ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Appellee,	:	
-vs-	:	CASE NO. 2014-0273
CURTIS L. CLINTON,	:	**This is a capital case.**
Appellant.	:	

On Appeal From the Court of
Common Pleas of Erie County
Case No. 2012 CR 0383

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ABA Standards for Criminal Justice §13-2.1 (2 Ed.1980) 50
ABA Standards for Criminal Justice: *DNA Evidence*, 3d ed. 2007; Standard 3.4(c) 58, 167
Cho, *Capital Confusion: The Effect of Jury Instructions on the Decision To Impose Death*, 85 J. Crim. L. & Criminology 532 (1994) 203
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Statement of the Case and Facts

A. Introduction

This case, and the following pages of this brief, will demonstrate how a combination of ineffective assistance of counsel, misconduct by the prosecutor, a host of erroneous trial court rulings, as well as several violations of Curtis Clinton's rights to due process and to a fair trial, all combined to land Curtis Clinton on Ohio's death row. The groundwork for these violations was laid before trial, when the trial court ruled, over defense objection, that it would allow the erroneous joinder of two unrelated cases, and then also ruled, again over defense objection, that it would likewise allow the admission of prejudicial other acts evidence to be admitted at trial. Allowing the prosecution to put on display the facts and photographs related to the rape of E.S. and the 1997 homicide of Misty Keckler during the trial concerning the deaths of Heather Jackson and her children could do nothing but inflame the passions of the jury and guarantee an unfair verdict. In addition, the trial court's violations of Clinton's rights did not end there: the trial court erred when it failed to move the venue of the trial out of Erie County, when it conducted a one-sided voir dire that would leave Clinton with a biased jury, and when it allowed other irrelevant and prejudicial evidence to be admitted at trial.

Once these erroneous rulings were made, and this prejudicial evidence offered at trial, defense counsel then had the duty to confront the State's evidence. They failed in myriad ways. For example, they failed to object when one State's witness offered unqualified "expert" medical testimony, they failed to cross-examine the coroner as to anything that could have undercut the State's case, they failed to hire requisite experts to do the same, and they failed to effectively cross-examine all of the State's witnesses concerning Heather Jackson's drug activities and the fact that there was both opportunity and motive for one of Jackson's associates to have

committed these crimes. At the conclusion of the State's case, the defense once again failed by not offering any evidence in their case-in-chief to defend against the State's evidence. The defense rested, without presenting any effective defense for Clinton, to Clinton's prejudice.

What happened next, at a motion hearing held between trial phases, may have constituted the worst violation of Clinton's rights that occurred at trial. During this hearing, where Clinton's presence had been waived by defense counsel, the defense proceeded to waive Clinton's right to the presentation of mitigating evidence. What was even more egregious is the fact that the trial allowed this waiver absent even one question to Clinton, himself, whether or not this decision was being made both knowingly and voluntarily. Due to this "waiver," no mitigating evidence was placed before the triers of fact. What was presented was Clinton's unsworn statement, which solely rehashed the trial phase testimony and asked various questions of the State's witnesses that could have, and should have, been asked not during the mitigation phase, but during the trial phase, of this case. Clinton was then sentenced to death without the full picture of his background and history ever being presented to the jury.

What could have been presented during mitigation was a wealth of mitigating evidence that was worthy of consideration. Clinton grew-up in the midst of horrific abuse and neglect. Clinton's father wreaked havoc on the Clinton children, both sexually abusing the children, himself, as well as forcing the children to abuse each other. Clinton's step-mother was aware of the abuse and did nothing. She was too busy getting high in her bedroom. And, Clinton's mother was absent for most of his early years. When Clinton's mother did finally enter into Clinton's life, she was too overwhelmed, and an alcoholic, and could not care for her children properly. Children's Services records corroborate these facts.

As a teenager, Clinton ended up in the juvenile system where the abuse continued. Clinton never once had a stable home as a youth or a young man. All of this abuse and neglect resulted in the development of mental illnesses, including post-traumatic stress disorder, and depression. All of this could have, and should have, been presented to Clinton's jury. Had it been, at least one juror may have been swayed to vote for a sentence of less than death.

B. The investigation

Detectives began their investigation of the deaths of Heather Jackson and her family by interviewing known acquaintances of Jackson, particularly the many visitors to her house who had been seen there the night and morning before the bodies were discovered. Numerous suspects were investigated by Sandusky police in the initial hours of the investigation, based upon recurrent information that Jackson may have been involved with trafficking in drugs, and may have recently agreed to become a police informant after she was arrested and charged with possession of drugs.

However, the homicide investigation changed direction when the Sandusky police learned, through phone records and surveillance video from a nearby hospital, that Curtis Clinton was known to have visited the Jackson home between 3:10 and 4:21 a.m. on September 8, 2012. The Sandusky police did not know of anyone else who visited the Jackson home after Clinton left, and the presumption in play was that Clinton must have committed the homicides before departing. Because Clinton was already being investigated by the Sandusky Police Department regarding his possible involvement in a rape of an acquaintance that occurred the week prior to the homicides, the investigation turned exclusively towards Clinton. He soon was located in a local hospital, recovering from a suicide attempt, and was then taken to the Sandusky Police Station where he was questioned and arrested for the homicides of Heather Jackson and her

children. Yet, as illustrated throughout the trial, and by the testimony of the State's own witnesses, the fact remains that the homicides might well have occurred *after* Clinton is known to have left the Jackson home, and that others with the motivation to kill Heather Jackson might have entered the home via an open window, outside of the view of the hospital surveillance video, and committed the homicides during the 15 hours that elapsed before the bodies of Jackson and her children were discovered.

C. Clinton's indictment

Curtis Clinton was indicted by the Erie County grand jury on September 19, 2012. The grand jury charged Clinton with five counts of Aggravated Murder for the deaths of Heather Jackson, Celina Jackson, and Wayne Jackson, Jr. The five counts of Aggravated Murder carried with them three specifications: (1) felony murder (based on rape and/or aggravated burglary); (2) course of conduct; and, (3) sexual motivation. The Aggravated Murder charges related to Celina Jackson and Wayne Jackson, Jr. each carried the additional specification of causing the death of a child under thirteen. Clinton was also indicted on one count of Rape relating to Celina Jackson and one count of Aggravated Burglary. Additionally, in the same indictment, though based on a completely separate incident, Clinton was indicted on two counts of Rape relating to E.S. *See* Dkt. 9/19/12, Indictment. A Repeat Violent Offender specification was attached to all counts and a Sexually Violent Predator specification was attached to all counts except for Count Nine, Aggravated Burglary. Prior to trial, the State dismissed the sexually violent predator specification on October 17, 2013. *See* Dkt. 10/17/13, Motion to Dismiss Specification Pursuant to O.R.C. 2941.148 only filed.

D. Pre-trial publicity and change of venue request

Residents of Erie County were generally shocked and saddened when they learned, through extensive news and social media coverage, of the tragic murders of Heather Jackson and her children. The murders and the arrest of Clinton soon became a local media sensation, as the *Sandusky Register* provided live-streaming video coverage, via the internet, of all trial activities that ultimately led to Curtis Clinton's convictions. By an Entry filed with the clerk on September 26, 2012, the trial court had allowed the *Sandusky Register* coverage of "video and photographs of any and all proceedings." *See* Dkt. 9/26/12. Even the trial court was aware, early on, that Clinton's case would be highly publicized and it acted by prohibiting case participants from making any extrajudicial statements of any kind. Dkt. 9/25/12, J.E. filed. Order Regarding Pre-trial and Trial Publicity.

Numerous blogs, television broadcasts, radio shows, online chatrooms, and newspaper articles provided extensive coverage of Clinton's case. Erie County, Ohio became saturated with the facts underlying the murders and the investigation (and later, the media fully covered the trial, the convictions, and sentencing). Early on, media accounts portrayed Clinton as being guilty of the murders and other charges. This portrayal ultimately limited Clinton's ability to receive a fair trial before a jury composed of impartial persons who would learn the actual facts of the case only through the evidence properly admitted through trial.

Consequently, Clinton's defense counsel moved the trial court, pursuant to Ohio Crim. R. 18(B), for a change of venue, based upon the pervasive maelstrom of pre-trial publicity. *See* Dkt. 10/7/13, (D-28) Defendant's motion for a change of venue filed. The State failed to file any responsive pleading. Nevertheless, the trial court filed an Entry on October 21, 2013, denying the motion for change of venue, despite the potential impact of pre-trial publicity on Clinton's

right to a fair trial, and despite the torrent of local publicity surrounding the case, concluding that it had qualified 72 potential jurors.

Despite the trial court's confidence that a fair jury had been impaneled, subsequent voir dire proceedings revealed that seven of the jurors who decided Clinton's capital case admitted that they had been exposed to pre-trial publicity via the media, largely as published by the *Sandusky Register*. Juror 70's wife had read to him a *Register* story stating that Clinton "was just involved in a murder, as far as a mother and I think it was two children." Juror 96 had followed the Clinton investigation through the on-line version of the *Register* and its bloggers. During voir dire, Jurors 143 and 210 also admitted to following the events in the newspaper, with Juror 210 adding that he knew Clinton "was a suspect in these murders." Alternate Juror 397 had read newspaper accounts of the investigation just the night before appearing in court. And Alternate Juror 26 had not only read the newspaper accounts, but had done independent on-line research to learn all that she could about the Clinton investigation before arriving at the courthouse for questioning on voir dire. *See* Individual VD Vol. 1, pp. 62-64, 76-78; Vol. 4, pp. 537-38; Vol. 5 and 6, pp. 665-66, 775, 785; and Vol. 7 and 8, pp.1076-77, 1080, 1132.

E. Pre-trial evidentiary rulings

Defense counsel filed over twenty motions, and the trial court made just as many rulings, prior to trial. While the court granted various motions, there were many that were denied as well. Prior to trial, the court made the following erroneous rulings:

- J.E. filed. (D-10) Motion to preclude sentence of death specification is hereby denied as set forth. Dkt. 2/1/13
- J.E. filed. (D-11) Motion to transcribe the Grand Jury proceedings prior to trial is hereby denied as set forth. Dkt. 2/1/13
- J.E. filed. (D-13) Motion to release to defense counsel prior to trial a copy of the transcript of the Grand Jury Proceedings is hereby denied as set forth. Dkt. 2/1/13

- J.E. filed. (D-15) Motion to dismiss capital components of the case due to constitutional and international law violations is hereby denied as set forth. Dkt. 2/1/13

- J.E. filed. (D-17) Motion for order directing that a complete copy of the Prosecutor's file be made, reviewed in-camera by the court and sealed for appellate review is hereby denied as set forth. Dkt. 2/1/13

- J.E. filed. (D-18) Motion for the State to be required to preserve, and produce to the defendant, any notes taken by the City of Sandusky Police Dept., Agents from the Bureau of Criminal Identification and Investigation or any other State Agents or Investigators, of any interviews with persons who are, or may be, witnesses at trial is hereby denied as set forth. Dkt. 2/4/13

- J.E. filed. (D-20) Defendant's motion in limine to prohibit victim-impact evidence during the trial and if necessary the mitigation phase is hereby denied as set forth. Dkt. 2/4/13

- J.E. filed. (D-23) Defendant's motion to sever counts is hereby denied as set forth. Dkt 4/9/13

- J.E. filed. Defendant's motion to change venue is hereby denied as set forth. Dkt. 10/21/13

- J.E. filed. Defendant's motion to dismiss the capital specifications of the indictment due to the outrageous government conduct is hereby denied as set forth. Dkt 10/25/13

- J.E. filed. Defendant's motion to recognize mercy as a mitigating factor is hereby denied as set forth. Dkt. 11/12/13

- J.E. filed. Defendant's motion to instruct the jury that residual doubt may be considered as a factor under R.C. 2929.04(B)(7). After a thorough review of the pleading and relevant case law, said motion is not well taken and hereby denied as set forth. Dkt. 11/13/13

One of the more egregious rulings was the trial court's denial of defense counsel's motion to sever. In trial counsel's motion to sever, filed March 22, 2013, counsel pointed out the great dangers that would exist if the jury were to hear charges related to the alleged rape of E.S. along with Clinton's capital murder charges. These dangers include: (1) the jury would believe that because there are multiple charges, the defendant must have committed at least one of them; (2) that even if testimony in one case was relevant in the other, the value of said testimony was

substantially outweighed by its prejudicial nature; and, (3) that should the capital charges reach the penalty phase, there was a great danger that a carry-over effect would occur. The State responded on April 9, 2013, averring that counts 1 & 2 of the indictment were admissible under Evid. R. 404(B) and that, likewise, the State intended to introduce evidence of the defendant's conduct in the 1997 killing of Misty Keckler, which was "far more tragic and brutal" but was "relevant and probative to establish the identity of the killer in the present case." Dkt. 4/9/13, D-23 Response to Defendant's Motion to Sever Counts. The trial court denied the motion for severance the same day that the State filed its response. Dkt. 4/9/13, (D-23) J.E. filed. Defendant's motion to sever counts is hereby denied as set forth. In trial the court's journal entry denying Clinton's motion for severance, the trial court inexplicably stated that the joinder of the cases did not pose a significant risk of prejudice to the defendant.

F. Pre-trial motion hearings

Several motion hearings were held prior to Clinton's capital jury trial. One such hearing was the combined Motion to Show Cause and Daubert Hearing which was held on October 17, 2013, less than two weeks prior to Clinton's trial. The hearing began and ended with employees from Erie County Job and Family Services testifying as to what Children Services records they did and did not find involving the Clinton family. At the end of the hearing, the Director of Erie County Job and Family Services, Karen Balconi Ghezzi, appeared with a previously undiscovered microfilm that contained the relevant records involving the Clinton family. In between testimony from Erie County Job and Family Services employees, while the court waited on Karen Balconi Ghezzi to arrive, the court conducted a Daubert hearing.

During the Daubert portion of the hearing, the trial court heard from State's witness, and BCI forensic scientist, Hallie Garofalo, and determined that the evidence she presented "does

meet the Daubert test." Oct. 17, 2013 Mtn. Hear. Tr. 101. The next day the trial court filed an entry stating that "This Court finds said evidence is relevant, competent, material, and reliable, and admits said evidence at trial of this case as set forth." Dkt. 10/18/13. At Clinton's jury trial, defense counsel renewed their Daubert objection, stating "It was overruled, but I'm required to raise it before [Julie Cox] testifies, so we're renewing our objection." Tr. 864. The trial court simply stated, "Same ruling" without hearing any additional information. *Id.* at 865. The most troubling aspect of the court's ruling was the fact that statements made by the court during the Daubert hearing raise significant questions as to whether the court understood what a Daubert hearing entailed. The following discussion ensued:

> The Court: We're back on the record in State of Ohio versus Curtis Clinton. It appears that a witness pursuant to the hearing on the Motion to Show Cause, Karen Balconi Ghezzi, is available today and should be here in about 45 minutes. So we will proceed with a hearing on Defendant's motion to conduct a Daubert hearing, which, I guess, is akin to their Motion to Suppress on some issues.
>
> Mr. Doughten: It's like a 104 hearing; that we want to get the evidence out for the Court to determine whether it's fairly relevant for this case.
>
> The Court: Okay. The Court will hear it in that respect. And so, the Court has reviewed that Motion and the State's response, and I believe the State is ready to proceed.

Tr. 26-27.

The trial court's statements during the above discussion with defense counsel are concerning. What is even more concerning is the fact that the trial court denied defense counsel's Daubert motion, immediately after the testimony of State's witness Garofalo, without fully understanding the meaning of the motion in the first place.

G. Voir dire

During Clinton's voir dire, the trial court erroneously failed to remove eight biased jurors and two prospective biased jurors, denied a challenge for cause against a juror who tainted the entire jury pool, and failed to conduct voir dire on the issue of race. Additionally, trial counsel did not inquire further or, otherwise, attempt to correct many of these errors.

G.1 Biased jurors

During voir dire, Jurors 70, 96, and 225 all admitted to having connections to law enforcement officers. *See* juror questionnaires, filed under seal; Tr. 71-72, 158, 305. Jurors 143 and 371 informed the court that they were next door neighbors. Tr. 185-187. Jurors 341 and 63 went to high school together and remained friends on Facebook. Tr. 174-75. Juror 344 hired, and held a supervisory position over, State's witness Joshua Case. Tr. 289-293. Juror 344 also admitted to having a close friendship with an assistant prosecutor. Tr. 292. Despite the grave repercussions of allowing these jurors to remain seated on Clinton's jury, neither the trial court, nor defense counsel, did anything to try to have any of these jurors removed or, at the very least, questioned further as to their various connections. In fact, all of these jurors ultimately sat on Clinton's jury and sentenced him to death.

Defense counsel did object to the seating of two prospective jurors, but the trial court denied their challenges for cause, thus forcing defense counsel to use two peremptory challenges. Juror 73 was excused from the panel by defense counsel through the use of a peremptory challenge after the trial court failed to remove her for cause after she admitted to knowing the victim, the victim's family, and the defendant himself. Prospective Juror 22 was also removed by defense counsel through the use of a peremptory challenge after the trial court failed to remove

him for cause after he indicated clearly that he did not agree that the burden of proof should rest with the State.

G.2 Prospective Juror 363

During individual voir dire, prospective Juror 363, shortly after being seated, admitted to the court that he had read about the crime in various media reports, including a report that Clinton had admitted guilt. He also stated that he had formed opinions of Clinton's guilt as a result. Despite these statements, the trial court allowed the voir dire of prospective Juror 363 to continue. When asked by defense counsel whether he could refrain from discussing the case with other members on the panel, prospective Juror 363 admitted that he had already discussed the case with other prospective jurors, including one prospective juror who ultimately sat on Clinton's panel.

At the conclusion of the individual voir dire of prospective Juror 363, defense counsel challenged him for cause and stated two reasons for doing so. Ind. V.D. 59-61. First, the prospective juror demonstrated that he would not grant Clinton a presumption of innocence, and second, he would not be able to fairly consider mitigating evidence in the penalty phase. The trial court denied the defense challenge. Ind. V.D. 61.

Because the defense's challenge of prospective Juror 363 was denied at the end of individual voir dire, the juror was given yet another chance to taint the jury pool during general voir dire. Prospective Juror 363, in the presence of eventually empaneled jurors, explained: "I'm still sitting here – I have a question. Just from what I've heard from people say, I thought that he admitted guilty [sic], and so I don't know…" Tr. 152. Then, later, "If he's going to say he admitted to it already, then I can't – I have a hard time being open-minded to something that a person said they did." Tr. 155.

Only after prospective Juror 363 admitted to knowing the victim during general voir dire, and his continued insistence on Clinton's admission to the crime, did the trial court agree to excuse Juror 363 from service. Tr. 208-9. By this time, however, the damage had already been done. He had tainted the jury pool with his continuous mentioning about what he had read in the media and "heard" around town, and his belief in Clinton's guilt.

Trial counsel requested a cautionary instruction to the venire regarding Juror 363's comments. Tr. 180. Despite this request, and the court's agreement to provide such instruction, the instruction was never given. *Id.* The trial court further erred by not conducting additional voir dire of the venire that heard Juror 363's comments.

G.3 Race

The trial court erred, and defense counsel was ineffective, by failing to adequately address the issue of race at any point during Clinton's capital trial, where a black defendant stood trial for the deaths of three white victims. The issue of race was only brought up only one time, by defense counsel, during general voir dire. Defense counsel simply stated that race was "not necessarily something that anyone really likes to talk about a lot maybe," but that "sometimes that's a big issue in this country with some people, and sometimes it's no issue at all. And a lot of people have strong feelings one way or the other." Tr. 206. Counsel then asked the jurors whether race was an "issue" for any of them. *Id.* When none of the jurors spoke up, defense counsel simply accepted the lack of response as an indication that all of the jurors were perfectly fit for service. It was at this point, if not earlier, under the privacy of individual voir dire, that the trial court could, and should, have stepped in and elicited personal beliefs and feelings on race from the jurors to ensure that they were not simply refraining from answering defense counsel aloud because they did not wish to be singled out.

H. The trial

The trial began on October 28, 2012. The State, in opening argument to the jury, referred to the crimes as "horrific" and "unspeakable." *Id.* at 366-67. The State then detailed its version of events of September 7 and 8, 2012. *Id.* at 373.

The defense, during opening statements, argued that Clinton and Jackson had been friends and that Clinton admitted to being at Jackson's house on the morning that she was murdered. Tr. 383. Defense counsel argued that there was constant traffic in and out of Heather Jackson's house and that she didn't always lock her doors. Tr. 385. Trial counsel told the jury that the sex between E.S. and Clinton was consensual. Tr. 388. Finally, defense counsel closed by telling the jury that the DNA evidence indicated that Clinton could not be excluded, but that it was not a match. Tr. 391.

Throughout the trial, the State called seventeen witnesses. Danielle Sorrell was the first State's witness, and she advised the jury that she had been Heather Jackson's best friend for about 13 years. Tr. 344. She also advised the jurors that Heather Jackson's world, as it existed in September 2102, shortly before the murders, included a number of drug using male acquaintances, and that Sorrell had "lectured" Heather Jackson that these acquaintances were "a bad influence" on Jackson. Tr. 406, 408-09, 417. Sorrell never mentioned Curtis Clinton's name. In fact no evidence of record placed Curtis Clinton among Heather Jackson's "bad influences" or any of the drug abusers and/or drug traffickers with whom Jackson was acquainted. Indeed, no evidence of record indicated that Curtis Clinton abused or sold drugs of any sort.

On cross-examination, Clinton's trial counsel *began* to explore Heather Jackson's relationship with drugs and drug traffickers in the days preceding her murder, but never finished

this line of questioning. During cross-examination, Sorrell admitted that she was concerned for Jackson's safety after Jackson told police the source of the drugs that were found in Jackson's car during a traffic stop. Tr. 419. However, when defense counsel asked Sorrell if she knew who provided Jackson with drugs, the State immediately objected, and the trial court sustained the objection. Defense counsel failed to inquire further, and cross-examination of Sorrell abruptly ended. Tr. 419-420.

The State's next witness, Daniel Risner, testified that he and Thomas Hanson found Heather Jackson's body on September 8, 2012. Risner testified that Hanson had called him to go check on Jackson. Tr. 445. Risner agreed, even though he did not know Jackson and had never been to her house. Tr. 445-446. Risner testified that he went to the back door and noticed that there was a baby bottle and binkie and told Tom, "something ain't right." Tr. 446. At that point he and Hanson entered the house through the "unlocked" back door and discovered Heather Jackson's body. Tr. 447. Hanson and Risner exited the house and Risner called his wife, who told him to call 911. Tr. 448. Risner testified that he was not initially honest about the door being unlocked and, in a second interview with police, Risner disclosed that he had in fact broken into the residence by turning the handle "real hard and pushing." Tr. 451-452, 460. Later testimony would indicate that there were no signs of forced entry on this particular door. Tr. 490. During his testimony, Risner also stated that, while he was in the home, he wiped off the bathroom door handle to hide the fact that he had been there. Tr. 464. Finally, Risner testified that there were no signs of a struggle inside the house. Tr. 461.

The State then called Officer Eric Graybill from the Sandusky Police Department to testify. Officer Graybill testified that he was the officer in charge on the night in question. Tr. 477. Upon his arrival at the residence, he and Officer Heery entered the Jackson house through

the back door and did a quick search of the house to make sure that there were no victims or suspects inside. Tr. 479-481. The two officers then exited the house where other officers were securing the scene. Tr. 482. It was then determined that Officer Graybill and two firefighters would re-enter the house to check the vitals on Heather Jackson and look for her children. Tr. 482-483. As a result of this search, the bodies of Celina Jackson and Wayne Jackson, Jr. were discovered in a closet off of the living room. Tr. 483-484. During his testimony, Officer Graybill also offered the jury a picture of what the Jackson residence and surrounding property looked like. He stated that one side of the Jackson house faced towards an empty lot, and behind the house there was a small yard that butted up against a yard off of Fox Street. Tr. 457, 495.

Next, the State called Justin Kromer to testify. Tr. 498. Kromer stated that he was really good friends with Heather Jackson, and had known her for years as he had dated Jackson's sister, with whom he had a child. Tr. 509, 499. In describing his relationship with Heather Jackson, Kromer told the jury that he helped her financially, bought her a car, bought items for the children, helped her move, and was aware that she had a drug problem. Tr. 510-512. Kromer also testified that Heather Jackson's cell phone was in his name because she was on his plan. Tr. 505. Kromer told the jury that he had last seen Jackson at her house on Friday September 7, 2012, at around 6:00 p.m. Tr. 400. Jackson's mother, Jody Lynch, called Kromer on Saturday to say that she was concerned because no one had heard from Jackson all day. Tr. 508. At around 7:00 p.m., Jackson's brother, Nick Fee, called Kromer to tell him that Heather Jackson was dead. Tr. 508. Finally, Kromer told the jury that Jackson had told him that Tom Hanson "creeped" her out. Tr. 515.

The State's next witness was Joshua Case, another friend of Heather Jackson's. Tr. 519. Case testified that he last saw Jackson at her house, the night that she died. Tr. 521. Case was

there drinking and taking Percocets, for which he had no prescription. Tr. 524. Heather was also taking Percocets, and Case stated that the two had done drugs together prior to that night. Tr. 524, 534. While Case was at Jackson's house, Tom Hanson showed up. Tr. 534. Heather Jackson got in the car with Hanson for about ten minutes, and when she returned she had an Adderall and a Soma. Tr. 537-538. It appeared to Case that while Jackson was in the car there was an argument between her and Hanson. Tr. 543. Hanson left and then Case left to go to the 7-Eleven to buy some milk for Heather Jackson's children. Tr. 539. When Case returned, Hanson was in Jackson's kitchen. Tr. 539. Hanson stayed for about twenty minutes and then left again. Tr. 541. Case stayed there until about 1:00 a.m., when his friend Billy Crawford picked him up. Tr. 524-525. Case advised the jury that he and Heather Jackson had sex that night, Friday September 7, 2012. Tr. 526. After he left, Jackson called him around 3:05 a.m., but he was so intoxicated by that point that he did not remember the call until he was shown Jackson's phone records by Detective Wichman. Tr. 529-530. Case could not remember anything that was discussed during that phone call. Tr. 531.

The State then called Billy Crawford to testify. Tr. 544. Crawford testified that he was friends with Case and Heather Jackson, and that he had previously dated Jackson's sister. Tr. 545. Crawford stated that he was at Jackson's house three times the night that she was murdered. Tr. 547. He picked Case up and took him to the 7-Eleven, drove him back to Jackson's, and then picked him again around 12:30 or 1:00 a.m. to take him to Jeremy Griggs' house. Tr. 547-548.[1] While Crawford was in Jackson's house, he thought that Hanson was acting on edge. Tr. 557. Crawford further stated that Hanson seemed mad. Tr. 557.

[1] Crawford was in fact at the Jackson residence four times. The third time he was there to pick Case up, Case did not come out of the house and Crawford left and returned to the residence a fourth time to collect Case. Tr. 553-554.

The State's next witness was Thomas Hanson, who said that he had met Heather Jackson about two weeks prior to her death, when Jackson was selling her parents' car. Tr. 563. Jackson obtained Hanson's number and started calling and texting him. Tr. 564. Hanson testified that he had been at Jackson's house the night before she died, but that he had returned to his home around 10:00 p.m. that night. Tr. 571. The next day Hanson heard that people were looking for Heather Jackson, so he decided to stop by her house, with Daniel Risner, to check on her. Hanson told the jury that once he and Risner found Jackson's body they called 911 within the next ten to twenty minutes. Tr. 610. Tr. 572. The State elicited testimony from Hanson regarding his view of the crime: "I mean, that's, you know, some sick individual that would"—, to which the defense objected. Tr. 577-78. Then, Hanson emphasized that he had shown up to testify voluntarily, without being subpoenaed, at both the grand jury hearing and the trial. Tr. 583.

The next State's witness was Agent David Hammond from the Ohio Bureau of Criminal Investigation (BCI). Tr. 613. Hammond initially photographed the crime scene and gathered evidence. Through this evidence gathering, Hammond collected cigarette butts from the floor around the house. Specifically, cigarette butts were found on the floor inside of the locked utility closet where Celina Jackson and Wayne Jackson, Jr. were found, and on the floor immediately outside of Heather Jackson's bedroom, where Jackson's body was found. Tr. 631, 642-43, 659, 660. These cigarette butts were never tested. Tr. 705. Also, as found during his evidence collection, Hammond testified that the back door of the Jackson home had not been forced open. Tr. 623. He noted that the screen was out in the window of one of the bedrooms and that this window was unlocked. Tr. 625. Hammond tested the window from the outside and determined that it was possible to open the window from outside the house. Tr. 625. Despite this window

serving as a possible point of entry for the perpetrator, Hammond did not know whether fingerprints had been taken from the window. Tr. 636. Hammond also attended the autopsies of the Jacksons, where he noted that an abrasion on Wayne Jackson, Jr.'s neck was swabbed, and hairs were collected from Celina Jackson's abdomen, pubic region, and nose. Tr. 673-674, 681, 710. These hairs were never tested. Tr. 705. Hammond testified that the normal practice of BCI is to test items until the DNA of a suspect is found. Tr. 703.

The State's next witness was Detective Ken Nixon from the Sandusky Police Department. Detective Nixon testified that he had received a call on September 3, 2012, regarding the alleged rape of E.S. Tr. 735-36. Detective Nixon essentially testified in order to try to explain why the police department did not immediately arrest Clinton for E.S.'s alleged rape. Tr. 743-749. Other than speaking with E.S. and E.S.'s friend, Clinton's girlfriend, Mercedes Charlton, Nixon did little investigation in the case. Detective Nixon also testified that he was called to the Jackson residence on September 8, 2012. Tr. 749. Detective Nixon obtained cell phone records showing that Clinton was the last person to speak with Jackson, and Nixon then located Clinton at Bellevue Hospital, where Clinton was recovering from a suicide attempt. Tr. 755 & 758. Clinton agreed to voluntarily return to the station with Detective Nixon before he was discharged from the hospital. Tr. 766-767.

Detective Gary Wichman of the Sandusky Police Department testified next. Detective Wichman testified that he interviewed several people in reference to the Jackson case. Tr. 777. He advised the jury that there was a lot of "finger pointing" during his initial interviews. Tr. 778. A lot of people were pointing fingers at Joshua Case and Tom Hanson, and the suspect pool was quite large. Tr. 778. Phone records and video surveillance records from the hospital across the street from the Jackson home were used to eliminate suspects. Tr. 781. Detective Wichman

confirmed that Heather Jackson had been involved in a traffic stop and that drugs were found in her car. Tr. 855. Detective Wichman also testified that even though, during his homicide investigation, he received information that Jackson may have been in possession of a large amount of narcotics at her house, he failed to follow-up and find out whether Jackson was in fact acting as an informant. Tr. 855 & 858. Detective Wichman further testified about an interview that he conducted with Clinton, immediately upon being brought to the station by Officer Nixon, following a hospital stay for a suicide attempt via drug overdose. As can be seen in State's Exhibit 117 (the video of Clinton's interview with Detecetive Wichman), Clinton looks weak, he still has the tape from the IVs in his arm attached to his skin, and he can barely raise his hand to his mouth to drink a cup of water. *See* State's Exhibit 117.

The State then called Julie Cox, a forensic biologist from BCI. Tr. 864. She performed presumptive testing for DNA found on the bodies of Heather Jackson, Celina Jackson, and Wayne Jackson, Jr. Tr. 870. Cox testified that the tests performed on Heather Jackson were negative for semen. Tr. 878. Anal samples from Celina Jackson tested positive for seminal fluid. Tr. 879. Cox also located a solitary sperm cell in the underwear Celina was wearing. Tr. 884. She testified that the following samples were completely consumed by testing performed by BCI:

- swabs taken from Heather's wrists, ankles, back, shoulder, and fingernails; and
- swabs taken from Celina's rectum, fingernails, wrist, ankle, and ligature; and
- swabs taken from Wayne Jr.'s wrist, fingernails, and ligature.

Tr. 890.

A letter requesting consent to consume this DNA was sent to the prosecutor's office but was not sent to the defense. Tr. 889.

Next to testify was Hallie Garofalo, a forensic scientist in BCI's DNA unit. She testified that Clinton could not be excluded as a contributor of the DNA found on the ligatures taken from Celina and Wayne Jackson, or the samples taken from Celina's underwear and anal swab. Tr. 947-48.

The State then called retired Fostoria detective Michael Clark. Trial counsel for Clinton objected to any testimony whatsoever by Clark, who in his former police capacity had investigated the 1997 death of Misty Keckler. The basis of the objection was that Clark's testimony was inadmissible as "other acts evidence," and would be unduly prejudicial to Clinton's chance for a fair trial as to the Erie County charges. A motion for mistrial as to Clark's testimony was denied. Tr. 954, 957-958, 962-963, 967.

Retired detective Clark was the only witness offered by the State as to the circumstances of Misty Keckler's 1997 death, which led to a manslaughter conviction against Clinton. No forensic pathologist or other medical professional testified as to the cause of Keckler's death. The trial court allowed Detective Clark to tell the jurors in Clinton's capital trial that Clark believed ligatures had been attached to Keckler's hands and legs *after* she had died. In Detective Clark's opinion, Keckler "had passed away before the ligatures were put on her," and Clark further advised the jury that Keckler was "already dead" before her body was placed in a bathtub. Tr. 957-59. No forensic pathologist testified for either the State or the defense as to when or how Misty Keckler died in 1997. Indeed, Michael Clark was the *only* witness to offer any testimony whatsoever in Clinton's trial regarding the circumstances of the 1997 events. After Clark's testimony, defense counsel moved for a mistrial of Clinton's case based on all of their previous objections regarding the introduction of Evid. R. 404(B) material. Tr. 962-63. The motion was denied.

E.S. testified next in support of the rape accusation against Clinton. She told the jury that she was living with her mother when she met Clinton, and that she and her mother had been fighting about E.S. not staying at home more. Tr. 975, 979. In fact, E.S. was not even sure that she could go home and thought that she would probably have to go to a friend's house when she left Clinton's. Tr. 994. E.S. testified that she met Clinton through her friend Mercedes, and that she had been staying with her friend Mercedes at different places in the days prior. Tr. 976, 979. E.S. testified that she had Clinton pick her and Mercedes up down the street from her house on Friday August 31, 2012, because she did not want her mom to know where she was going. Tr. 981-982. Tr. 994. E.S., Mercedes, and Clinton went back to Clinton's apartment. Tr. 983. The three of them spent the weekend there. Tr. 983-87. E.S. initially told Clinton she was eighteen. Tr. 1045.

On Sunday night of that weekend, E.S. went to a bar with Clinton. Tr. 988. E.S. testified that she wore her "new outfit" that she got in Florida – "Coogie pants with this cute Coogie sweatshirt." Tr. 1048. Mercedes stayed at Clinton's apartment. *Id.* Clinton and E.S picked up two of Clinton's friends but she could not recall anything about them except that they were black males. Tr. 990. E.S. testified that she was drinking that evening. Tr. 1055. Clinton and E.S. returned to Clinton's house around three in the morning. Tr. 997. E.S. claimed that Clinton and Mercedes got in an argument, and both left Clinton's apartment. Tr. 1001-02. E.S. stated that only Clinton returned. She claimed she was lying on the couch and Clinton came in and sat beside her. Tr. 1003. E.S. testified that when she tried to get up, Clinton started choking her with his hands. *Id.* E.S. stated that she got off the couch and then Clinton put her in a headlock. *Id.* She stated that Clinton then took her to his bedroom, told her to take her clothes off and get on the bed, and that he then started licking her. Tr. 1005-06. E.S. testified that afterwards, they

talked, and Clinton told her to calm down because he wasn't going to hurt her anymore. Tr. 1006. E.S. testified that they then had sex, and it lasted "a lot of hours." Tr. 1006-07. She said that after they had intercourse, Clinton started choking her again and she passed out. *Id.* E.S. said that when she woke up Clinton was taking pictures of her. *Id.* She said she lost consciousness three more times, although Clinton did not choke her again. *Id.* She said they then had sex again. Tr. 1007-08. According to E.S., this time the sex lasted longer than the last time. Tr. 1008. E.S. stated that she asked Clinton to stop, but it continued for "a lot longer." *Id.* Then she asked him to stop again and he did. *Id.*

Clinton took her home afterwards. Tr. 1009. E.S. stated that she allowed Clinton to take her home because she did not have another ride. Tr. 1009. E.S. testified that she had him drop her off a street before her road. Tr. 1011. When E.S. got home, she told her mother what had happened, and they went to the hospital. Tr. 1013. E.S. told the doctor that her boyfriend had taken her home. Tr. 1014. E.S. testified that she never told Mercedes what had happened even though they were friends. Tr. 1033.

The sexual assault nurse examiner (SANE), Lisa Dettling, was the next witness. She performed the sexual assault exam on E.S. Tr. 1063. She testified that E.S. complained of some neck and low back pain. Tr. 1072. She stated that there was a hickey and some redness along E.S.'s neck. Tr. 1075. She testified that the redness was consistent with E.S. being choked. Tr. 1076. Despite the fact that E.S. never told Dettling that E.S. had been drinking, Dettling stated, when asked on cross-examination whether it is important to know whether they were drinking, "Yes. I imagine it probably would be." Tr. 1094.

The final State's witness was the Deputy Coroner, Dr. Scala-Barnett, who determined the cause of death of Heather Jackson and her children. Dr. Scala-Barnett described the autopsies to

the jurors. In describing to the jurors the ligature that was removed from Wayne Jackson, Jr.'s neck, Dr. Scala-Barnett referred to the ligature as Wayne's "froggy blanket." Tr. 1110-11. Dr. Scala-Barnett also speculated to the jury that Celina Jackson's underwear might have been removed and then Celina Jackson's body "redressed" at some point, because of the way that the elastic was rolled when Celina's body was reviewed at the autopsy. Tr. 1124-25.

Dr. Scala-Barnett presented to the jury a photograph of the rectum of an unidentified five year-old child that she supposedly had taken a picture of in 2001. That photograph, she said, would serve as a "point of reference" by which she could have the jury compare how Celina Jackson's rectum appeared after death and how this unidentified child's rectum appeared after his or her death. Tr. 1110-11, 1130-31, State's Exhibit 60. Despite the introduction of this photo into evidence, no foundation was ever laid as to the gender of the other child, how the child had died, whether the other child's rectum was diseased or injured, or the duration of time between the child's death and the taking of the photograph, etc.

Dr. Scala-Barnett never testified, on either direct or cross-examination, as to a crucial missing ingredient that no other police or other witness had discussed during the State's case—the time of death of the three Jackson family members. This gap in the evidence left open the possibility that someone, other than Clinton, had entered the open window in Celina Jackson's bedroom, out of view of the hospital surveillance camera, long after Clinton is known to have left the residence. The theory of the State's case, as developed through earlier witnesses, assumed that the victims died before roughly 4:00 a.m. on the day that the bodies were discovered. However, no testimony from the Deputy Coroner (or any forensic pathologist) ever established a time of death for any of the three homicide victims.

Trial counsel had copies of the Coroner's report and heard all of her testimony as Dr. Scala-Barnett testified on direct examination, but Clinton's trial counsel failed to object at any point or to cross-examine the Deputy Coroner. Tr. pp. 1095-1133. Thus, when the State concluded its questioning on direct examination, Clinton's trial counsel simply stated that they had "no questions," and the State then proceeded to rest its entire case-in-chief. Tr. 1133, 1136. At that point, defense counsel made a very generalized Rule 29 motion with discussion mainly focused on count of rape as to Celina Jackson. Tr. 1147-48.

Despite many promises made to the jury by defense counsel in their opening argument regarding what evidence would be provided, the defense did not call a single witness at the trial phase of Clinton's trial. Tr. 1158.

The State's closing argument contained a multitude of improper remarks. The prosecutor denigrated defense counsel, accusing them of trying to "dirty up the victim." Tr. 1212. The State repeatedly and persistently vouched for their witnesses' expertise and veracity. The State accused Clinton of raping Heather Jackson, despite the fact that the State hadn't charged him with any sexual assault of Heather Jackson, and the evidence did not support the allegation. Tr. 1211. The State also argued emotional victim impact evidence that was irrelevant to guilt.

The defense started their closing argument by giving accolades to the Judge and prosecutor and referring to the crime scene at the Jacksons' home as "carnage." Tr. 1215-18. Having failed to effectively cross-examine the State's witnesses or present any evidence, there was little more that they could have said.

The jury found Clinton guilty on all counts of the indictment. Tr. 1305.

I. The November 7, 2013, Motion Hearing.

The November 7, 2013, motion hearing, held between phases of the trial, would prove to be one of the most critical hearings in Clinton's case. This is the hearing where defense counsel would explain to the trial court that Clinton wanted to waived the presentation of mitigating evidence. This is also the hearing where the trial court would accept that waiver. All of this was done while Clinton was absent from court and could not object to this waiver, or explain his reasons for waiving, on the record. In the end, despite this Court's clear directive that a hearing must be held, and a determination must be made, that a defendant's waiver of the right to present mitigating evidence is both voluntary and knowing, the trial court never asked Clinton even one question on the record.

J. The penalty phase

During the penalty phase, defense counsel presented an unsworn statement by Clinton that lasted over an hour. It was made clear on the record that counsel did not guide or play any role in the unsworn statement by Clinton. Nothing else was presented to the jury by Clinton's defense team.

During deliberations, trial counsel proffered substantial mitigating evidence. Clinton's childhood was a documented disaster. He was brutally physically and sexually abused by his own father. Both his father and his stepmother were drug addicts. Clinton's biological mother, who he did not have consistent contact with until he was fourteen years old, was impoverished and an alcoholic. And, when Clinton found himself in trouble at an early age, he was sent to various juvenile facilities where the abuse continued and worsened.

At the conclusion of the penalty phase, the jury, having been presented with no mitigating evidence, recommended sentences of death for each count of aggravated murder. The trial court

imposed these death sentences and, additionally, sentenced Clinton to a term of life without parole plus a term of ten years. Dkt. 11/14/13, J.E. filed.

K. Conclusion

As stated above, the mixture of ineffective assistance of counsel, misconduct by the prosecutor, a host of erroneous trial court rulings, as well as several violations of Curtis Clinton's rights to due process and to a fair trial, all combined to land Clinton death row. Clinton now timely submits this brief in support of his assertions of law.

Proposition of Law No. I

A defendant's constitutional right to present mitigating evidence is violated when the trial court fails to ensure a waiver of this presentation was made both knowingly and voluntarily.

A. Introduction

Clinton's waiver of mitigation at his capital trial was not made knowingly and voluntarily. *See State v. Ashworth*, 85 Ohio St. 3d 56 (1999); *State v. Barton*, 108 Ohio St. 3d 402 (2005). This is structural error, and as such, it cannot be harmless. Clinton's rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 2, 5, 9, 10, 16, and 20 of the Ohio Constitution were violated.

B. Legal Authority

A capital defendant has a constitutional right to have the sentencing decision at his capital trial reflect a meaningful consideration of all relevant mitigating evidence. *See, e. g., Abdul-Kabir* v. *Quarterman,* 550 U.S. 233 (2007); *Skipper* v. *South Carolina,* 476 U.S. 1 (1986); *Lockett* v. *Ohio,* 438 U.S. 586 (1978).

Although a capital defendant generally has the right to control his defense (*see State v. Tyler*, 50 Ohio St. 3d 24, 28-29 (1990)), and a defendant is entitled to "great latitude" in deciding what mitigating evidence he wishes to present in the penalty phase (*see* R.C. 2929.04(C); *see also State v. Jenkins*, 15 Ohio St. 3d 164, 189 (1984)), there are protections put in place to ensure defendants only make decisions that are fully informed and free of coercion or inducements. As far back as *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938), the United States Supreme Court has held that courts must "'indulge every reasonable presumption against waiver' of fundamental constitutional rights." *Id.* Since that time, the Court has been unyielding in its insistence that "a

defendant's waiver of his trial rights cannot be given effect unless it is 'knowing' and 'intelligent.'" *Illinois* v. *Rodriguez,* 497 U.S. 177, 183 (1990) (*citing Zerbst,* 304 U. S. 458).

In line with the above precedent, this Court has specifically stated that in a capital case where a "defendant wishes to waive the presentation of all mitigating evidence, a trial court must conduct an inquiry of the defendant on the record to determine whether the waiver is knowing and voluntary." *Barton*, 108 Ohio St. 3d 402; *see also Ashworth*, 85 Ohio St. 3d at 62. *Ashworth* sets forth specific requirements for the colloquy:

> The trial court ***must*** inform the defendant of the right to present mitigating evidence and explain what mitigating evidence is. The court ***must*** then inquire of the defendant, and make a determination on the record, whether the defendant understands the importance of mitigating evidence, the use of such evidence to offset the aggravating circumstances, and the effect of failing to present that evidence. After being assured that the defendant understands these concepts, the court ***must*** inquire whether the defendant desires to waive the right to present mitigating evidence, and, finally, the court ***must*** make findings of fact as to the defendant's understanding and waiver of rights.

State v. Short, 129 Ohio St. 3d 360, 368-69 (2011) (emphasis added). The use of the term "must" in the above directive from this Court is clear; trial courts have to conduct this inquiry. There is no wiggle room. A failure not to hold this colloquy and make the requisite on-the-record determinations is reversible error. As this Court has further delineated, this *Ashworth* inquiry is necessary only upon a total waiver of mitigating evidence. *See State v. Monroe*, 105 Ohio St. 3d 384, 397-98 (2002).

C. Argument

Trial counsel informed the trial court at a hearing between the trial and mitigation phases that Clinton wished to waive the presentation of mitigating evidence. Nov. 7, 2013 Mtn. Hear. Tr. 4-7. In waiving this right on behalf of their client, trial counsel was very informal and cavalier about the process. *Id.* Counsel stated first that they had ensured that Clinton was

competent to proceed with this waiver, having had their own expert evaluate Clinton for competency. *Id.* Counsel then stated the following as the reason for this waiver: "He believes he will be much safer on death row than in general population." *Id.* at 6. Trial counsel then concluded by stating that they believed Clinton had given them a "voluntary waiver." *Id.* at 7. The trial court thanked counsel and then moved forward with ruling on pertinent defense motions. *Id.* Because Clinton's presence had been waived at this hearing[2], Clinton had no opportunity to confirm or deny what trial counsel was stating on the record, and the trial court could ask no questions of Clinton to ensure that this decision was being made knowingly and voluntarily.

At the commencement of the mitigation phase a few days later, counsel never revisited the waiver other than to say, "Nothing has changed. It's what we represented to the Court was going to happen today is going to happen." Mit. Tr. 9. The trial court asked no follow-up questions of Clinton or his counsel. That was the last mention of Clinton's waiver. Trial counsel then proceeded to waive both opening and closing statements during the mitigation phase. And the sole evidence adduced by the defense was that of Clinton's unsworn statement, which contained nothing constituting mitigating evidence. Trial counsel mentioned the waiver briefly at the close of the mitigation phase and then proffered the mitigation that they would have presented, but for Clinton's waiver. Mit. Tr. 124-28.

In the end, not one question was asked of Clinton on the record to ensure that his counsel had accurately conveyed his decision, his reasoning, and his understanding of the process to ensure that the waiver was made both "knowingly and voluntarily." Nov. 7, 2013 Mtn. Hear. 4-7. No *Ashworth* requirements were met: 1) the trial court did not inform the defendant of the right

[2] The fact that Clinton's presence had been waived at such a crucial proceeding is raised as constitutional error in Proposition of Law No. II.

to present mitigating evidence and explain what mitigating evidence is; 2) the trial court did not ensure the defendant understood the importance of mitigating evidence, the use of such evidence to offset the aggravating circumstances, and the effect of failing to present that evidence; 3) the trial court did not inquire whether the defendant desired to waive the right to present mitigating evidence; and 4) finally, the court did not make a finding of fact, based upon the above inquiry, as to the defendant's understanding and waiver of rights.[3] The record is silent on all four of these points. This was error pursuant to *Ashworth* and its progeny.[4]

It appears that trial counsel, and possibly the trial court (though the record is silent on this point), did not believe that this *Ashworth* inquiry was mandated since Clinton made an unsworn statement. *See* Mit. Tr. 123. However, although unsworn statements ***can*** constitute mitigating evidence, use of the word "can" indicates that they do not always. *See State v. Roberts*, 110 Ohio St. 3d 71, ¶143 (2006). Further, in *Roberts*, as this Court indicated, the trial court did, in fact, make an inquiry, in full compliance with *Ashworth*. *Id.* at ¶143.

Moreover, Clinton's unsworn statement here was not mitigating. In his unsworn statement, Clinton solely dealt with residual doubt[5], how he ***would*** get a new trial, and he challenged the jury on their previous findings as to the trial phase. Mit. Tr. 28-91. Clinton did not take responsibility for the crime, and he never once talked about his history or background as reason to mitigate the penalty here. *Id.* In fact, the trial court did not rely on, or even point to, anything mitigating in Clinton's unsworn statement in its R.C. § 2929.03(F) Sentencing Opinion.

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[3] The trial court did, in fact, make a finding that Clinton's waiver was knowing, voluntary, and intelligent, however this finding was made based only on trial counsel's statements, not upon an inquiry had with the defendant.

[4] Trial counsel's ineffectiveness to ensure that this process was followed and to request this hearing is also raised in Proposition of Law No. XVI.

[5] It is clear that residual doubt is not a mitigating factor in Ohio. *See State v. Mcguire*, 80 Ohio St. 3d 390 (1997).

See R.C. § 2929.03(F) Trial Court Opinion (no mention of ***any*** mitigating factors worthy of consideration). On the contrary, the trial court found that Clinton had waived the presentation of mitigating evidence. *See* Sent. Tr. 19-20 (the trial court found that Clinton made a full "waiver of the presentation of mitigating factors to the jury").

Clinton's case can also be distinguished from cases that this Court has seen in recent history. *See, e.g.*, *Short*, 129 Ohio St. 3d at 369-70 (offering some mitigation in the form of eliciting mitigating testimony concerning Short's emotional distress during the trial phase and arguing for a life sentence based upon that testimony); *Roberts*, 110 Ohio St. 3d at 89-90 (eliciting "some mitigation" in the form of an unsworn statement where Roberts asked for the death penalty because she agreed that it was the "right thing."); *Barton*, 108 Ohio St. 3d at 410 (offering mitigation through trial phase witnesses, including members of Barton's family, as well as offering an unsworn statement where Barton acknowledged the gravity of the crime and requested the death penalty); and *Monroe*, 105 Ohio St. 3d at 396-97 (presenting one witness and giving an unsworn statement in which Monroe described the hard life he had as a child). Unlike the above cases, Clinton's unsworn statement held no mitigating value.

Here, Clinton, as the trial court found, waived all mitigating evidence, triggering the need for an on-the-record colloquy pursuant to *State v. Ashworth*, 85 Ohio St. 3d 56 (1999). *See* Sent. Tr. 19-20 (the trial court found, absent asking Clinton any questions on the record, that Clinton made a full "waiver of the presentation of mitigating factors to the jury"). When the trial court failed to ask even one question of Clinton on the record, Clinton's constitutional rights were violated. Indeed, had the trial court undergone the required *Ashworth* colloquy, it may have cleared up any misconceptions that Clinton had and/or determined that Clinton actually did not

want to waive mitigation. *See Ashworth*, 85 Ohio St. 3d 56. Because the record is void of this inquiry, the end result remains unknown.

D. Conclusion

Clinton made an uninformed decision to waive mitigation and now faces execution. A trial court is to carefully guard against violations of a defendant's constitutional rights. Here, the trial court erred in that regard. Once trial counsel stated that Clinton wished to waive the presentation of mitigating evidence, and thus triggered the need for an on-the-record colloquy pursuant to *State v. Ashworth*, 85 Ohio St. 3d 56 (1999), the trial court at that point should have held a hearing to ensure that Clinton's constitutional rights were protected. That did not occur here. This Court should reverse and remand this case for a hearing pursuant to *Ashworth* where Clinton may decide, on-the-record, and with full knowledge of the rights that he is waiving, whether or not he wants to pursue the presentation of mitigating evidence to the jury.

Proposition of Law No. II

The accused has a right of presence at all critical stages of the trial under the Confrontation Clause and the Due Process Clause. The right of presence is personal to the accused and may only be waived by the accused. U.S. Const. amends. VI, XIV.

A. Introduction: Clinton was absent from critical trial proceedings.

Clinton was not present at all critical stages in the trial court proceedings against him. *See, e.g.*, Nov. 1, 2013 Mtn. Hear.; Nov. 7, 2013 Mtn. Hear. Importantly, Clinton was not present at a critical hearing held during the trial phase where counsel discussed the admission of the State's exhibits, as well as the jury instructions and verdict forms. Clinton was again absent at a crucial hearing held between the trial and mitigation phases where trial counsel informed the trial court that Clinton wished to waive the presentation of mitigation.[6] Defense counsel waived Clinton's presence in both instances; however, Clinton did not personally waive his right of presence at these proceedings. *Id.* This was constitutional error.

B. Clinton had an absolute right to presence that only he could waive.

The accused has a right of presence at every critical stage of the trial as guaranteed by the Confrontation Clause and the Due Process Clause. *United States v. Gagnon*, 470 U.S. 522, 526 (1985); *Kentucky v. Stincer*, 482 U.S. 730, 739-40 (1987); *Lewis v. United States*, 146 U.S. 370, 372 (1892).

The right of presence may be waived; however, the right is personal to the accused. The accused must make any waiver of this fundamental constitutional right knowingly, intelligently, and voluntarily. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Further, "[e]very reasonable presumption should be made against waiver, especially when it relates to a right or privilege

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[6] The fact that this waiver could be neither knowing nor voluntary is raised in Proposition of Law No. I.

deemed so valuable as to be secured by the constitution." *Simmons v. State*, 75 Ohio St. 346, 352 (1906). The waiver of a constitutional right is effective only if "*clearly determined* by the trial court . . . ." *Zerbst*, 364 U.S. at 465 (emphasis added). Moreover, in *Taylor v. Illinois*, 484 U.S. 400 (1988), the Court held that the accused's right to be present was so basic that counsel could not waive that right for the accused absent a "fully informed and publicly acknowledged consent" by the accused. *Id.* at 417.

Error resulted here because Clinton did not personally waive his presence on the record at these two critical proceedings. Instead, only counsel waived Clinton's presence The right of presence did not belong to counsel, and it was not theirs to forfeit. *Id.*

C. Damage resulted from Clinton's absence.

When constitutional error is established on the record on direct appeal, the State of Ohio must prove that the error is harmless beyond a reasonable doubt. *See Brecht v. Abrahamson*, 507 U.S. 619, 622 (1993) (citing *Chapman v. California*, 386 U.S. 18 (1967)). This Court cannot place the burden of persuasion on Clinton to show "affirmatively" that he was prejudiced due to his absence from these proceedings. *See State v. Fautenberry*, 72 Ohio St. 3d 435, 439 (1995). Instead, the State must persuade this Court, beyond a reasonable doubt, that this constitutional error is harmless. *See Brecht*, 507 U.S. at 622. In exercising its concurrent jurisdiction over this federal constitutional claim, this Court is bound to follow the standard of review established by the Supreme Court. U.S. Const. art. VI. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

Moreover, Clinton can establish that these constitutional errors were not harmless. In fact, the very danger posed by conducting crucial proceedings outside the accused's presence is demonstrated here. First, Clinton was not present at a hearing at the conclusion of the trial phase where counsel for the State and the defense went through all of the State's exhibits, and agreed to

the admission of most. Tr. 1139-46. Also discussed at this hearing were the jury instructions and verdict forms. *Id.* Determinations of what evidence shall be admitted against a defendant is a crucial proceeding. This is particularly true when prejudicial evidence, some of which was objected to and some of which was not, was being admitted against the defendant. Certainly Clinton's presence during this discussion would have been important. Clinton's absence was also not harmless error, as it would have alerted him to the ineffective assistance of counsel he was receiving as to the admission of irrelevant, cumulative, and prejudicial photographs (*see* Proposition of Law No. IX), which would have prompted him to raise the issue before the trial court.

Additionally, pursuant to § 16, Article I of the Ohio Constitution, Clinton is entitled to a "complete, full, and unabridged transcript of all proceedings against him so that he may prosecute an effective appeal." *State ex rel. Spirko v. Court of Appeals, Third Appellate Dist.*, 27 Ohio St. 3d 13, 18 (1986). The jury questionnaires and verdict forms were discussed off-record; and because Clinton was not present, he cannot help to recreate the record on appeal. Without a complete record for review, counsel cannot provide effective representation to Clinton on his first appeal as of right. *See State v. Buell*, 70 Ohio St. 3d 1211 (1994); *Evitts v. Lucey*, 469 U.S. 387 (1985). Thus, Clinton's improper exclusion from this hearing has also induced appellate ineffective assistance of counsel. *See United States v. Cronic*, 466 U.S. 648 (1984).

In addition to the above, Clinton was also absent from court during one of the most critical discussions, and, in turn, decisions made in this life or death trial. At the November 7, 2013, hearing where trial counsel waived Clinton's right to present mitigating evidence, Clinton was absent. Nov. 7, 2013 Mtn. Hear. 4-7. Clinton's absence cannot be harmless error, as Clinton had no opportunity to confirm or deny what trial counsel was stating on the record, and the trial

court could ask no questions of Clinton to ensure that this decision was being made knowingly and voluntarily.[7] Although there was mention of Clinton's waiver at the opening of the mitigation phase (in Clinton's presence), it was a mere after-thought. Mit. Tr. 9. At that hearing, trial counsel told the court, "Nothing has changed. It's what we represented to the Court was going to happen today is going to happen." No follow-up questions were asked. That was the last mention of Clinton's waiver.

Had Clinton been present at this critical Nov. 7, 2013, hearing, Clinton would have been aware of the ineffective assistance of counsel he was receiving as to his involuntary and unknowing waiver of the presentation of mitigating evidence (*see* Proposition of Law No. I), which would have, again, prompted him to raise the issue before the trial court. Clinton's presence at this hearing also could have resulted in a different outcome for this case. Had the trial court conducted a proper inquiry as to Clinton's waiver, the court may very well have found that Clinton's waiver was not voluntary and knowing and/or that Clinton, in fact, did not want to waive mitigation at all. And if that were proven true, there was a wealth of mitigation to present, which likely would have convinced at least one juror to vote for a sentence of less than death in this case. *See* Proffer of Defense Exhibits A-P; Mit. Tr. 123-125; Proposition of Law No. XIX. In any event, this hearing was a major event in Clinton's capital trial; therefore, regardless of what Clinton could have, or would have, stated, his presence was mandated. *United States v. Gagnon*, 470 U.S. 522, 526 (1985); *Kentucky v. Stincer*, 482 U.S. 730, 739-40 (1987) *Lewis v. United States*, 146 U.S. 370, 372 (1892).

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[7] This error is examined and explained in more detail in Proposition of Law No. I.

D. Conclusion

Clinton was denied his right to presence during two critical proceedings in the court below, depriving him of his due process rights. Clinton's convictions must be reversed and his case remanded for a new trial.

Proposition of Law No. III

The introduction and admission of prejudicial and improper character and other acts evidence and the failure of the trial court to limit the use of the other acts evidence denied Clinton his rights to a fair trial, due process, and a reliable determination of his guilt and sentence as guaranteed by U.S. Const. amends. V, VI, VIII and XIV; Ohio Const. art. I, §§ 10, 16. Ohio R. Evid. 403, 404.

The trial court erred in violation of Ohio Evidence Rules 403 and 404 and Clinton's rights to due process, a fair trial, and freedom from cruel and unusual punishment contained in the United States and Ohio Constitutions when it allowed highly prejudicial testimony of other acts with little to no probative value to be admitted at trial.

A. Relevant Law

The admissibility of other acts evidence is carefully limited because of the substantial danger that a jury will convict the defendant solely based on the assumption that the defendant has a propensity to commit criminal acts, or deserves punishment regardless of whether he or she committed the crime charged in the indictment. *State v. Curry*, 43 Ohio St. 2d 66, 68 (1975). "This danger is particularly high when the other acts are very similar to the charged offense, or of an inflammatory nature." *State v. Schaim*, 65 Ohio St. 3d 51, 59 (1992).

Evid. R. 403 requires a judge to exclude even relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice." Evidence Rule 403(A). "Usually, though not always, unfairly prejudicial evidence appeals to the jury's emotions rather than intellect." *Oberlin v. Akron Gen. Med. Ctr.*, 91 Ohio St. 3d 169, 172 (2001) (quoting Weisenberger's Ohio Evidence, pp. 85–87, Section 403.3 (2000)). Additionally, Evid. R. 404(A)(1) provides "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith." A trial court's decision to admit or exclude evidence is reviewed under an abuse of discretion standard. *Columbus v. Taylor*, 39

Ohio St. 3d 162, 164 (1988). Improper introduction of evidence of "bad acts and bad character" denies a defendant his "due process right to a fair trial." *State v. Johnson*, 71 Ohio St. 3d 332, 339, 341 (1994). On direct appeal, constitutional error is harmless only if the prosecution proves it to be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 26 (1967).

B. Background

Prior to trial, on June 13, 2013, the State filed a Notice of Intent to Use Other Acts Evidence including, among other things, evidence relating to Clinton's 1999 conviction for involuntary manslaughter relating to Misty Keckler. The State purported that this evidence clearly fell within the Evid. R. 404(B) exception, specifically as proof of identity and modus operandi. Defense counsel filed a motion to preclude other acts testimony on September 24, 2013.

The trial court granted the State's motion on October 24, 2013, with respect to admission of the prior conviction, stating:

> 1) Despite the temporal issues, the modus operandi in the Keckler conviction, death due to strangulation by ligature, is so strikingly similar to the three deaths in the indictment, as well as, the forcible rape of E.S., which alleges choking E.S. manually or by hand, is relevant;
>
> 2) Per agreement between the State and the defense substantial proof of the other acts was provided;
>
> 3) The State was offering the other acts evidence for the legitimate purpose of proving the identity of the killer, proving identity and modus operandi of Clinton when committing the sexual assault on E.S., and as evidence for the sexual motivation specification; and

4) That the probative value of the other acts evidence was not substantially outweighed by the danger of unfair prejudice because the modus operandi, strangulation by ligature, and the choking during a sexual assault are so strikingly similar and are highly probative.

Amended Opinion and Judgment Entry October 23, 2013, pp. 5-7.

Prior to the introduction of testimony of this other acts evidence, defense counsel renewed their objection. Tr. 950. Counsel again objected while the testimony was being offered. Tr. 954. Following the introduction of this testimony, defense counsel requested a mistrial. Tr. 962. Finally, defense counsel renewed their objection prior to closing arguments. Tr. 1160. As such, Clinton has timely objected to the introduction of this evidence and has preserved the issue for review by this Court.

C. Analysis

1. The State purported that the other acts evidence would show identity, modus operandi, and sexual motivation. Notice of Intent to Use Other Acts Evidence pp. 6-7.

a. The other acts evidence did not establish identity or modus operandi.

The State ended its opening statement by pointing out to the jury that Clinton had previously been convicted of strangling Keckler with a ligature. Tr. 381. The prosecutor stated in the next to the last paragraph of opening statement:

> Now strikingly similar to [the Jackson] case was a case that happened on April 3rd, 1997. A young, attractive female was strangled to death. Her name was Misty Keckler. She was found strangled to death by ligature at her residence[8], where she lived. It happened between the hours of 3:00 and 6:00 a.m. Investigators found her naked face down. Curtis Clinton.

Tr. 380-81.

[8] It is unclear whether Keckler was found at her residence. Tr. 1205.

The State, having just gone on at length about the DNA evidence against Clinton as establishing his identity as the killer of Heather Jackson, Celina Jackson, and Wayne, Jackson, Jr. made reference to some superficial similarities between the homicides of Heather Jackson and Keckler. Tr. 378-80.

The State introduced the purported other acts evidence through retired Detective Michael Clark. Detective Clark testified that he was involved in the investigation of the homicide of Keckler in 1997. Tr. 953. Keckler was found face down in a water-filled bathtub with her hands and legs tied behind her back. Tr. 955. According to Detective Clark, those ligatures were placed on her post-mortem. Tr. 957. She also had ligature marks on her neck. Tr. 956. Clinton had indicated to Detective Clark in 1997 that he had engaged in sexual contact with Keckler. Tr. 959. Clinton pled guilty to involuntary manslaughter. Tr. 960. Through Detective Clark the State also introduced five photos of Keckler's body, both from the scene and from the autopsy. Tr. 956-58.

In closing argument at Clinton's trial, the State perfunctorily told the jury that the purpose of the Keckler evidence was to "meet the burden of proof . . . to determine the identity of the killer of Heather Jackson and her children," "to show a modus operandi," and "to show some motive." Tr. 1204. The State then told the jury:

> Both young, blond, pretty girls. Both strangled with a ligature from behind. Both found dead. Both found naked. Both face down.
>
> In both cases, there was an attempt to degrade some degradation [sic] of the evidence. With Heather, she was wedged face down between a mattress and box spring, somehow trying to hide that. With Misty, she was found face down in a hot tub – a hot tub of water.
>
> Both occurred in the early morning hours. Both females were at the residence, were placed where they were living or staying, and both involved sexual conduct. Strikingly similar cases.

Tr. 1204-05.

Again, the State failed to emphasize or explain the distinct and identifiable similarities between the Keckler and Jackson cases versus any other crime involving strangulation by ligature. Instead, the State made vague, generalized statements that could be found in many homicides with no connection. The facts that the State pointed to in their closing argument do not show a "distinct, identifiable scheme, plan, or system." *Curry*, 43 Ohio St. 2d at 41.

Even more problematic was that the State's witness did not even testify to these similarities. Clark did not testify that Keckler was strangled with a ligature from behind. Nor did he testify that Keckler, in fact, died from ligature strangulation.[9] Clark testified that Keckler was found in a bathtub full of water but did not indicate that there was an attempt to degrade evidence. Tr. 955. From Clark's testimony, all that can be deduced is that Keckler did not die of natural causes, but she could have been strangled, hanged, or drowned. Clark did not testify as to whether Keckler was living at, staying in, or had any connection to the trailer in which her body was found. Tr. 959. Finally, while Clark testified that Clinton claimed there was sexual contact between himself and Keckler, there was no testimony or evidence admitted to the trier of fact that the involuntary manslaughter was a sexually motivated offense. Tr. 959.

In fact, Clark's testimony disclosed some differences between the homicides. Keckler was found in a bathtub full of water with her hands and legs tied behind her back. Tr. 955. Jackson was not bound or found in a bathtub. Keckler was not found with a ligature around her neck. State's Exhibit 125. Jackson was found with a ligature around her neck. Clinton pled to the *involuntary manslaughter* of Keckler, not murder. Tr. 961. Jackson's case involved multiple victims, burglary, and the rape of a child; Keckler's did not involve any of those additional offenses. This "other acts" evidence is not sufficiently related to the Jackson crimes, nor do they

[9] The autopsy does classify the cause of death as strangulation by ligature, however, this was not testified to by any witness at Clinton's trial.

share any significant common features that would have made them admissible under Evid. R. 404(B) in the Jackson case. A review of the photographic evidence admitted by the State, which depicted Keckler and the Jacksons, shows that they do not exhibit sufficient commonalities between them to be probative. Further, the introduction of this other acts evidence was completely unwarranted. Strangulation by ligature alone is not distinctive enough to show a behavioral fingerprint identifiable with Clinton. *See State v. Lowe,* 69 Ohio St. 3d 527, 532 (1994). A review of the closing argument in Clinton's case makes it clear that the State was actually relying on DNA evidence, and not the prior conviction, to prove identity. Tr. 1200-03. The evidence of Clinton's prior conviction was presented for the sole purpose of showing the jury Clinton's propensity for committing crimes and prejudicing the jury against him.

b. Other acts evidence was admitted to that show the offenses in the Jackson case were sexually motivated; yet no sexual motivation was shown through this evidence.

The State's argument that sexual motivation connected the murders was not supported by the evidence presented to the jury. Clinton was convicted of involuntary manslaughter in the Keckler case, a crime that does not require a sexual element. The State did not inquire whether Keckler was sexually assaulted but carefully phrased the question, "[W]as there a determination as to whether or not there was any sexual *conduct*?" Tr. 959, emphasis added. Clark answered, "Curtis Clinton advised that there was sexual *contact*." *Id.*, emphasis added. Clark did not testify or opine that a sexual assault took place against Keckler. Nor did Clark testify that the crime against Keckler was, or even appeared to be, sexually motivated. There was no testimony or evidence that indicated that any type of sexual assault took place, and Clark did not testify whether the sexual contact was contemporaneous with the homicide. This evidence could not have been offered by the State to support that the aggravated murders were committed with a

sexual motivation because Clark's testimony did not support that Keckler's homicide was sexually motivated. This evidence was again introduced by the State to show Clinton's propensity for bad acts and to prejudice the jury against Clinton. Any probative value of the evidence from the Keckler case was substantially outweighed by its prejudicial and inflammatory nature.

2. Other acts evidence from the Keckler case did not show identity or modus operandi in the E.S. case either.

Clinton deserved a fair trial not only in the Jackson aggravated murder case but also in the rape case involving E.S. The Keckler and E.S. cases have even less in common than the Keckler and Jackson cases. Clinton's defense as to E.S. was that the sex was consensual. Tr. 388 & 721.

E.S. was not blonde. *See* Exhibit 133. E.S. was not strangled by ligature. Tr. 1003. E.S. was at Clinton's residence. Tr. 998. She was not bound. She was not murdered. She was not found naked or on her back. E.S. had "suck marks" on her neck, and Keckler and Jackson did not. Tr. 1024. There was no effort to degrade any evidence. In fact, Clinton drove E.S. home following the alleged rape. Tr. 1009. There is nothing "strikingly similar" between Keckler's and E.S.'s cases.

There were no striking similarities between the two cases of sufficient probative value which could outweigh the highly prejudicial effect that this evidence unquestionably had on the jury. Any similarities between the two cases were tenuous at best and outweighed by the prejudicial nature of the evidence admitted.

3. The State used the other acts evidence improperly to argue bad character.

This evidence was admitted by the State to show Clinton's bad character and conduct. In closing argument, the State repeatedly argued Clinton's bad character and propensity for bad acts:

- "He's out hunting for sex." Tr. 1210.
- "He's out for sex that night." Tr. 1211.
- " [Why strangle Wayne Jackson?] Why not? I mean, from the evidence, this is what you do." Tr. 1213.

4. The photographic evidence was similarly prejudicial.

Finally, the admission of the five photographs of Keckler's body were of no probative value. There was no dispute by defense counsel concerning Clinton's prior conviction for involuntary manslaughter of Keckler or the circumstances surrounding it. There was no legitimate reason to admit these photographs to the jury. The photographs of Keckler's dead body were designed to appeal to the jurors' emotions rather than their intellect.

5. Conclusion

The trial court abused its discretion when it found that strangulation by ligature was a strikingly similar modus operandi, as opposed to a simple statement about how a crime was actually committed. The trial court further abused its discretion when it found that the probative value of this prior bad acts evidence was not outweighed by the danger of unfair prejudice. Here, the deaths of Keckler and Jackson were similar enough to have a highly prejudicial effect on the jury, but were not so strikingly similar as to be highly probative. Preventing the evidence from being introduced would not have unduly prejudiced the State because the State could have, and in fact did, rely on DNA evidence, to prove identity. Tr. 1200-03.

D. The admission of the other acts evidence was not harmless error.

The other acts evidence admitted against Clinton was blatantly prejudicial and should be assessed not as if this Court is the trier of fact, but rather as to whether it could have impacted the jury. *State v. Morris,* 2014 Ohio LEXIS 2999, 29 (2014) (quoting *State v. Rahman*, 23 Ohio St. 3d 146, 151 (1986)), quoting *State v. Ferguson*, 5 Ohio St. 3d 160, 166 n. 5 (1983)). The admission of the testimony of Clark coupled with the inflammatory and prejudicial photographs cannot be deemed harmless beyond a reasonable doubt.

Finally, assuming, arguendo, that this Court finds the evidence of guilt in the trial phase to be overwhelming, it must still consider the carry-over effect of the other acts evidence in the mitigation phase. The admission of evidence in the trial phase can affect the outcome of the mitigation phase. *State v. Thompson*, 33 Ohio St. 3d 1, 15 (1987) ("We would be naive not to recognize that those matters which occur in the guilt phase carry over and become part and parcel of the entire proceeding as the penalty phase is entered."); *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1098 (6th Cir. 1990) (improper admission of the defendant's statement was not harmless error in the penalty phase). There was no need to pile on this highly prejudicial and inflammatory evidence, especially in a capital case where it would be impossible for a jury not to carry the impact of this evidence into the penalty phase deliberations.

E. Conclusion

Simply put, the prosecution sought to introduce Clinton's prior conviction in the Keckler case to prove only that he was a "vicious and brutal killer." Trial Tr. 1164. It was far more prejudicial than probative for the jury to hear testimony about Clinton's prior conviction in the Keckler case and to see multiple graphic photographs of Keckler's body. The trial court, therefore, violated Clinton's right to due process and a fair trial when it permitted the

introduction of this evidence despite repeated and persistent objections made by Clinton pursuant to the Ohio Rules of Evidence. As such, this Court should vacate Clinton's convictions and remand his case for a new trial.

Proposition of Law No. IV

A trial court errs when it fails to grant a motion to sever rape charges from charges of aggravated murder and burglary in another unrelated case, in violation of a defendant's rights under the United States and Ohio Constitutions. U.S. Const. amends. VI, VIII, XIV; Ohio Const. art. I, §§ 9, 16, 20.

A. The Indictment

The indictment against Clinton was filed on September 19, 2012. It included nine counts, involving multiple victims and multiple counts of rape, and three counts of aggravated murder with death penalty specifications. Dkt. 9/19/12, Indictment.

The first two counts of the indictment charged Clinton with the rape of E.S. on September 2, 2012. The remaining counts charged Clinton with the aggravated murders of Heather Jackson, Celina Jackson, and Wayne Jackson, Jr., and related offenses.

On March 22, 2013, defense counsel filed a Motion to Sever Counts. Dkt. 3/22/13, Motion to sever counts filed. The purpose of the motion was to sever the counts of rape pertaining to E.S. from the other counts alleged in the indictment relating to the Jacksons.

B. Law

1. Improper Joinder Under R.C. § 2941.04

R.C. § 2941.04 regulates whether two charges may be included in the same indictment, and limits this occurrence to three instances: (1) when the charges are connected together in their commission; (2) when the charges are different statements of the same offense, or (3) when the charges are two or more different offenses of the same class of crimes or offenses. *See also* Ohio R. Crim. P. 8(A).

Clinton was charged with multiple counts against four different victims. Counts one and two of the indictment, relating to E.S., are completely unrelated to the remaining counts in the indictment relating to the Jacksons. Clinton was charged with two counts of rape against E.S. He

was charged with three counts of aggravated murder, rape, and aggravated burglary against the Jacksons. The offenses against E.S. were alleged to have occurred six days prior to the offenses committed against the Jacksons. The offenses against E.S. and the Jacksons were committed in separate dwellings, and E.S. and the Jacksons were unrelated and unknown to one another. The charges relating to E.S. and the Jacksons are not the same offenses. Therefore, the offenses of rape against E.S. and the remaining charges of aggravated murder, rape, and burglary against the Jacksons were not connected together in their commission and do not fall under the first instance in R.C. § 2941.04. Furthermore, rape, with regard to E.S., is not a different statement of the offense of aggravated murder, relating to the Jacksons. Finally, while certain offenses in the indictment may be different offenses of the same class of crimes or offenses, specifically, the rape charges, all of the charges taken together are not. The burglary and the aggravated murder charges against the Jacksons are separate and distinct from the first two counts of rape relating to E.S. in the indictment. The two rape charges against E.S. do not meet the third requirement in R.C. § 2941.04.

2. Improper Joinder Under Crim. R. 8(A) or 14

Ohio R. Crim. P. 8 provides in part:

> (A) Joinder of offenses. Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct.

Ohio R. Crim. P. 14 provides in part:

> If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires.

Under Crim. R. 8(A), joinder in this case was inappropriate. Generally, "joinder is liberally permitted to conserve judicial resources, reduce the chance of incongruous results in successive trials, and diminish inconvenience to witnesses." *State v. Schaim*, 65 Ohio St. 3d 51, 58 (1992) (citing *State v. Torres*, 66 Ohio St. 2d 340, 343 (1981)). But, "joinder of offenses solely because they are of the same or similar character creates a greater risk of prejudice to the defendant, while the benefits from consolidation are reduced because 'unrelated offenses normally involve different times, separate locations, and distinct sets of witnesses and victims.'" *Schaim* at 58, n. 6, quoting 2 ABA Standards for Criminal Justice (2 Ed.1980) 13.13, Section 13-2.1, Commentary, and 1 Wright, *Federal Practice and Procedure* (2 Ed.1982), Section 143.

A reviewing court is tasked with deciding, "(1) whether evidence of the other crimes would be admissible even if the counts were severed, and (2) if not, whether the evidence of each crime is simple and distinct." *Id.* quoting *State v. Hamblin*, 37 Ohio St. 3d 153, 158-159 (1988); *Drew v. United States*, 331 F.2d 85, 91 (D.C. Cir.1964). A defendant claiming error arising from the trial court's refusal to separate trials of multiple charges under Crim. R. 14 has the burden of proving that his rights were prejudiced. *State v. Torres*, 66 Ohio St. 2d 340, 343 (1981). He must demonstrate that the trial court abused its discretion in refusing to separate the charges for trial. *Id.* at 343 (citing *Opper v. United States*, 348 U.S. 84, 95 (1954)). The analysis of this issue turns on this Court's determination as to whether Clinton was prejudiced by the improper joinder. *State v. Schaim*, 65 Ohio St. 3d 51, 59 (1992).

a. The cases would not be admissible as other acts evidence in separate trials.

This Court must consider not only whether the other acts evidence from E.S.'s case should have been admitted in the Jackson case, but also whether the other acts evidence from the

Jackson case would have been admissible in E.S.'s case. The admissibility must go both ways. Had there been separate trials for the offenses against E.S. and the Jacksons, a request to admit the evidence would need to have survived both Evid. R. 404 and the rape shield statute. Evid. R. 404 states that "[e]vidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion" and that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of the person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Evid. R. 404 notes exceptions that apply pursuant to the rape statute. The exception language in the rape statute states:

> Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

R.C. § 2907.02(D)

Because the evidence was not being admitted to show the origin of semen, pregnancy, or disease, the evidence must be admissible pursuant to R.C. § 2945.59, which states:

> In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

Thus, there are only limited circumstances under which other acts evidence involving sexual activity would be admissible in a separate case. The State's purported purpose for admitting the other acts evidence from E.S.'s case in the Jackson case was to "establish the identity of the defendant as the person who murdered Heather Jackson and her two children as there was a similar modus operandi used in the crimes." Dkt. 4/9/13, Response to Defendant's Motion to Sever Counts, p. 4. The State's objective to show that Clinton committed the offenses with a similar method would fall under the "scheme, plan, or system" category of R.C. § 2945.59. Such pattern evidence is relevant in two scenarios:

The first is when "the 'other acts' form part of the immediate background of the alleged act which forms the foundation of the crime charged in the indictment. In such cases, it would be virtually impossible to prove that the accused committed the crime charged without also introducing evidence of the other acts. To be admissible pursuant to this sub-category of 'scheme, plan or system' evidence, the 'other acts' testimony must concern events that are inextricably related to the alleged criminal act." *State v. Curry*, 43 Ohio St. 2d 66, 73 (1975). When the acts against separate victims are "chronologically and factually separate occurrences, they are generally not inextricably related." *State v. Smith*, 84 Ohio App. 3d 647, 667 (2d Dist. 1992) (citing *State v. Eubank*, 60 Ohio St. 2d 183 (1979)). In Clinton's case, as noted *supra*, the alleged offenses against E.S. and the Jacksons occurred at different times, at different locations, and involved different victims who did not have any relationship or similarities between them. Evidence from any of the victims was not necessary for the background or explanation in either E.S.'s or the Jackson's, case and the evidence should not have been admitted under this scenario.

The second scenario exists in a case when the identity of the perpetrator of a crime is at issue. *See, e.g., State v Coley*, 93 Ohio St. 3d 253, 259-260 (2001); *State v. Williams*, 73 Ohio St.

3d 153, 157-159 (1995). Identity is at issue when the fact of the crime is open and evident but the perpetrator is unknown and the accused denies that he committed the crime. *State v. Smith*, 84 Ohio App. 3d 647, 666 (2d Dist. 1992). *See also Schaim*, 65 Ohio St. 3d at n. 11. In E.S.'s case, whether or not the crime actually occurred was at issue and, thus, was not open and evident. However, the identity of the offender was not disputed. Clinton's defense was that the sexual conduct with E.S. was consensual. Tr. 388. If the trier of fact believed E.S. was telling the truth, then Clinton was the perpetrator. If the jury believed Clinton, then no crime was committed. The case rested solely on the credibility of E.S. versus the credibility of Clinton because Clinton admitted to having sex with E.S. Witness credibility, not identity, was the material issue in the case, and the evidence from the Jackson case should not, and could not, have been admitted under this scenario to prove the identity of Clinton.

Under the second scenario, the evidence from E.S.'s case should not have been admitted in the Jackson case either. There is a complete lack of corresponding operative facts between the behavior toward E.S. and the murders of the Jacksons that would prove, through a "common scheme, plan, or system," that Clinton perpetrated both crimes. E.S. was a friend of Clinton's girlfriend. Tr. 976. Clinton and E.S. met for the first time the weekend of the alleged rape. Tr. 980. Clinton did not use a ligature to choke E.S. Tr. 1003. E.S. had "suck marks" on her neck. Tr. 1024. E.S. was not murdered. Clinton drove E.S. home following the sexual conduct. Tr. 1009. In contrast, Jackson was an adult and a friend of Clinton's with whom he had a prior sexual relationship. State's Exhibit 117. Jackson and her two children were all found dead with ligatures still around their necks in their home. Neither Jackson nor the children had any "suck marks" around their necks. The facts of the two cases do not show a scheme, plan, or system so

strikingly similar that the highly inflammatory and prejudicial nature of the E.S. evidence is outweighed by its probative value to the Jackson case, as required under R.C. § 2907.02(D).

b. The evidence of the crimes against E.S., and the crimes against the Jacksons was not simple and distinct.

The evidence against Clinton in the E.S. and Jackson cases was not simple and distinct. Evidence is simple and distinct when the evidence of each crime is so simple and distinct that the jury can segregate the evidence. *Schaim*, 65 Ohio St. 3d 51, 62 (citing *State v. Roberts*, 62 Ohio St. 2d 170 (1980)). However, if it appears that there is a possibility that the jury will become confused then the trial judge should order severance. *Id.* The issues were confused by the State in closing argument. The State argued that Clinton had raped "a number of people", that ". . . these three people were viciously and brutal [sic] murdered and raped," and even though Clinton was not charged with raping Heather Jackson, the State claimed, "the evidence [was] pretty loud that he raped her." Tr. 1164, 1241 & 1211. The State went on to say:

> So when the Defendant – from the evidence, when the Defendant arrives there, gets in the home he wants sex. Heather says no, but no's not in the cards that night. He sexually assaults Heather, as the coroner indicated, on or around the time that he strangled her to death.

Tr. 1212-13. The record thus shows that the jurors were likely confused to some extent regarding how many and which of the victims the State was alleging Clinton had raped. Tr. 1304.

c. Clinton's rights were prejudiced by joinder of the offenses.

Without doubt, evidence that a grown man sexually assaulted a seventeen year old girl and choked her to the point of unconsciousness is prejudicial. The State conceded that the evidence from E.S.'s case would be prejudicial. Dkt. 4/9/13, Response to Defendant's Motion to Sever Counts, p. 4. The State argued in their motion that they intended to introduce evidence of other acts from the Keckler case that were "far more tragic and brutal" than the conduct relating

to the offenses against E.S. *Id.* at p. 4. Essentially, the State agreed that the evidence from E.S.'s case was prejudicial, but not nearly as prejudicial as the other "other acts" they intended to introduce. Despite these concessions, the State argued that the evidence from E.S.'s case was probative and thus admissible under Evid. R. 404(B). *See* Proposition of Law III.

Despite the fact that both Clinton and the State agreed that the evidence would be prejudicial to Clinton, the trial court relied on *State v. Lott*, 51 Ohio St. 3d 160 (1990), to find that joinder of the offenses "d[id] not pose a significant risk of prejudice to [Clinton]." Dkt. 4/9/13, (D-23) J.E. filed. Defendant's motion to sever counts is hereby denied as set forth. The trial court did not offer further analysis. *Id.*

This case is not similar to *Lott*. In *Lott*, this Court found that joinder of the offenses of 1983 and 1986 offenses *against the same victim* were similar offenses under Crim. R. 8(A). *Lott*, 51 Ohio St. 3d at 164 (emphasis added). Such joinder was proper because Lott had burgled the same house, and the same victim, in 1983 and in 1986. The evidence of those offenses was simple and direct. *Id.* Further, this Court found it "beyond credibility that the panel of judges would be confused by the offenses or would improperly cumulate evidence of the various crimes." *Id.*

The joinder in Clinton's case did not involve the same victim nor the same offenses. Further, Clinton did not have the benefit of a three judge panel comprised of experienced jurists with the ability to guard against improperly cumulating the evidence of various crimes and victims, or allowing inflammatory evidence to affect their verdict in either the trial or mitigation phase of a capital trial.

C. Conclusion

The trial court abused its discretion when it denied Clinton's motion to sever the E.S. and Jackson cases. Clinton was prejudiced at both the trial and mitigation phases of his death penalty trial by the prejudicial joinder of the E.S. case with the Jackson case. Clinton was also prejudiced in E.S.'s case by the admission of the evidence relating to the Jacksons. As such, this Court should vacate Clinton's convictions and sentence and remand the case for new, separate trials.

Proposition of Law No. V

The consumption of DNA evidence, and the State's failure to notify defense counsel about the consumption of such evidence, violates a defendant's right to Due Process. U.S. Const. amends. V, VI, VIII, XIV; Ohio Const. art. I §§ 2, 5, 9, 10, 16, and 20.

A. Introduction

More due process, not less, is required in a death penalty case. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *State v. Griffin*, 138 Ohio St. 3d 108 (2013); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). *See also Evitts v. Lucey*, 469 U.S. 387, 401 (1985) ("When a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause.") The State violated Clinton's state and federal constitutional rights to due process when it consumed all DNA evidence, and failed to notify defense counsel prior to such consumption.

B. Argument

On September 13, 2012, Julie Cox, a BCI Forensic Scientist, sent a letter to the Erie County Prosecutor, Kevin Baxter. In this letter, Cox asked for Baxter's permission to fully consume the DNA samples from Heather Jackson, Celina Jackson, Wayne Jackson, and Curtis Clinton. Baxter agreed. Specifically, Cox requested to consume "swabs taken from the body of Heather Jackson, including swabs from her wrists, ankles, back, and shoulder, and the ligature; swabs from her right and left hand fingernails. Samples from Celina, including the anal swabs, the right hand fingernails, and left hand fingernails. Wrist, ankle, and ligature swabs from Celina. Samples from Wayne Jackson's body, including wrists and the ligature. And samples from Wayne's right and left hand fingernails." Tr. 890. Additionally, Cox "requested permission to

consume on samples taken from the right hand of Curtis Clinton, the left hand of Curtis Clinton, and the penile swab collected from Curtis Clinton." *Id.*

At trial, Cox admitted that she never sent a letter to the defense asking them for permission to consume. Tr. 889. She also stated that, "her job is to make the prosecutor aware of the potential for consumption. And then, after that, it's up to him or her to have that discussion." *Id.* at 889-90. This discussion never occurred.

Here, BCI only contacted the prosecutor for permission to consume DNA evidence related to Clinton's case. Not only did BCI never contact defense counsel, but no member of the prosecution team ever contacted defense counsel to inform them of the consumption, or to give them an opportunity to oppose. ABA Standards require that "[b]efore approving a test that entirely consumes DNA evidence or the extract from it, the prosecutor should provide any defendant against whom an accusatorial instrument has been filed, or any suspect who has requested prior notice, an opportunity to object and move for an appropriate court order." ABA Standards for Criminal Justice: *DNA Evidence*, 3d ed. 2007; Standard 3.4(c). Due to the fact that they were never notified, defense counsel did not find out about the consumption of DNA evidence until the evidence had already been consumed. This afforded Clinton zero opportunity to voice his objection and, zero opportunity to ever have the evidence tested, or re-tested, by an independent lab.

"As courts have long recognized, forensic expert testimony can play an important role in criminal trials. Juries may give special weight to testimony by forensic scientists; the Supreme Court has cautioned that 'expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it.'" Garrett & Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 9 (2009). It is also common knowledge that DNA, or

lack thereof, can ultimately lead to exonerations. "One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases." *Melendez-Diaz*, 557 U.S. 305, 319 (2009) (citing *Id.).* However, without the opportunity to test, or re-test, the DNA used to convict Clinton, neither Clinton nor his counsel had the ability to effectively challenge the testimony of BCI experts at trial. He also has no ability in the future to challenge this testimony on appeal. As such, Clinton was precluded from having a fair trial.

On direct appeal, constitutional error is harmless only if the prosecution proves it to be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 26 (1967). This error is of constitutional magnitude, as Clinton will never have the opportunity to test the DNA samples that were fully consumed, or to effectively challenge the testimony of the State's DNA experts. This error, therefore, was not harmless.

C. Conclusion

Clinton's due process rights were violated when the State consumed the DNA samples and failed to provide defense counsel with an opportunity to oppose the consumption of the entirety of the DNA samples. U.S. Const. amends. V, VI, VIII, XIV; Ohio Const. art. I §§ 2, 5, 9, 10, 16, and 20. As such, Clinton's convictions must be reversed and his case remanded for a new trial.

Proposition of Law No. VI

A capital defendant's rights to due process and a fair trial by an impartial jury are violated by the trial court's denial of a motion for change of venue where there is pervasive, prejudicial pre-trial publicity. U.S. Const. amends. V, VI, IX and XIV; Ohio Const. art. I §§ 5 and 16.

A. Facts

The community of Sandusky, and many if not most Erie County and northern Ohio residents, were shocked and saddened by the extensive news and social media accounts of the tragic murders of Heather Jackson and her children. Indeed, the case became a local media sensation, as the *Sandusky Register* provided live-streaming video coverage, via the internet, of all trial activities that ultimately led to Curtis Clinton's conviction. By an Entry filed with the clerk on September 26, 2012, the trial court had allowed the *Sandusky Register* coverage of "video and photographs of any and all proceedings." Dkt. 9/26/12, The Sandusky Register is granted permission to video or photograph any and all court proceedings pertaining to this case as set forth.

Numerous blogs, television broadcasts, radio shows, online chatrooms, and newspaper articles provided extensive coverage of Clinton's case. Erie County, Ohio became saturated with the facts underlying the murders, the investigation, the trial, and the convictions. Under these circumstances it was impossible for Clinton to receive a fair trial before a jury composed of impartial persons who should have learned of the case only through the evidence properly admitted through trial.

As a result, defense counsel moved the trial court pursuant to Ohio Crim. R. 18(B) for a change of venue based upon the pervasive maelstrom of pre-trial publicity. Dkt. 10/7/13, (D-28) Defendant's motion for a change of venue filed. The State failed to file any responsive pleading. Nevertheless, the trial court filed an Entry on October 21, 2013, denying the motion for change

of venue, despite the potential impact of pre-trial publicity on Clinton's right to a fair trial, and despite the torrent of local publicity surrounding the case, concluding that it had qualified 72 potential jurors. Dkt. 10/21/13, J.E. filed. Defendant's motion to change venue is hereby denied as set forth.

B. Law

Impartiality by an assigned jury is nowhere of greater importance than in a capital case, where a jury must choose between life imprisonment and death if they find the accused guilty of capital murder. *See Morgan v. Illinois*, 504 U.S. 719, 726-28 (1992) (jurors must be impartial with respect to culpability and punishment in a death penalty case). A biased juror is rendered unable to apply the facts to the law and deliberate under the constitutionally required burden of proof. *See In re Winship*, 397 U.S. 358 (1970).

In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), the Supreme Court recognized that pre-trial publicity may result in a denial of a defendant's right to due process of law. The Court held that where "[t]here is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity." *Id.* at 363. This Court has adopted the *Sheppard* standard and ruled that a showing of a "mere likelihood" of prejudice will support a venue change. *State v. Fairbanks*, 32 Ohio St. 2d 34, 37 (1972). Although this Court in *Fairbanks* pointed out that news reports that are factual and without distortion, or which are non-inflammatory in character, do not establish the impossibility of a fair and impartial trial where the jurors are uninformed or undecided, this Court also mandated that the rigid *Sheppard* standard of mere likelihood be applied. *Id.*

When a county has been subjected to such extensive publicity about the case that a likelihood of prejudice is evident, the trial court should transfer the case to another county. *See State ex rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St. 2d 457 (1976). The trial judge has a "duty to protect [the accused] from [this type of] inherently prejudicial publicity . . ." that renders the jury unfair in its deliberations. *Sheppard*, 384 U.S. at 363. Whether it is or is not likely that the defendant would be convicted in another venue is irrelevant. The right to a fair and impartial jury is fundamental. The denial of that right is a structural error that is never harmless. *Arizona v. Fulminante*, 499 U.S. 279, 290 (1991).

C. Argument

Clinton was denied a fair trial due to the extensive pre-trial publicity surrounding the murders of Heather Jackson and her children. With the emergence and pervasive employment of social media, Clinton's pre-trial exposure became far more pervasive and prejudicial than might first appear. Clinton became the subject of many daily blogs, online chat rooms, links and twitter feeds, above and beyond what more traditional media dispensed through the numerous local radio shows, television broadcasts, and newspaper articles. Additionally, the *Sandusky Register* went so far as to provide live streaming coverage of the trial to any interested viewers with access to the internet.

Under these circumstances, Clinton was denied a fair trial. Addressing a criminal defendant's constitutional right to be tried by a fair and impartial jury, the United States Court of Appeals for the Sixth Circuit emphasized:

> In essence, the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136. In the ultimate analysis, only the jury can strip a man of his liberty. In the language of Lord

> Coke, a juror must be as "indifferent as he stands unsworn." His verdict must be based upon the evidence developed at trial. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies *** "The theory of the law is that a juror who has formed an opinion cannot be impartial." *Reynolds v. United States*, 98 U.S. 145, 155.

Goins v. McKeen, 605 F.2d 947, 951 (6th Cir. 1979) (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)).

In *Irvin*, the Supreme Court held that the defendant's right to an impartial jury was denied by a presumption of prejudice arising from extensive pre-trial publicity. The Court found a presumption of prejudice despite the sincerity of the jurors who stated that they could be "fair and impartial" to the defendant. *Id.* at 728. In *Irvin*, the viewpoint of the community was revealed by the media's pre-trial coverage, which, as was the case here, painted the criminal defendant as a notoriously bad person. The Supreme Court found that the "force of this continued adverse publicity caused a sustained excitement and fostered a strong prejudice among the people of Gibson County." *Id.* at 726. *See also Rideau v. Louisiana*, 373 U.S. 723 (1963) (defendant denied due process without change of venue after confession was televised).

Even though many jurors indicated that they had read, heard, or discussed Clinton's case, the trial court maintained its position that Clinton could get a fair trial in Erie County because the jurors stated that they could, nonetheless, be fair and impartial. Questions requiring jurors' subjective evaluation of their ability to be fair and impartial, however, have consistently been held to be an inadequate basis upon which to assess jurors' qualification. *Murphy v. Florida*, 421 U.S. 794, 800 (1975); *Irvin*, 366 U.S. at 728. "[W]hether a juror can render a verdict solely on evidence adduced in the courtroom should not be adjudged on that jurors' own assessment of self-righteousness *without something more*." *Silverthorne v. United States*, 400 F.2d 627, 639 (9th Cir. 1968) (emphasis in original).

Similarly, in *United States v. Dellinger*, 472 F.2d 340, 367 (7th Cir. 1972), the court stated:

> The government's position . . . rest[s] upon an assumption that a general question to the group whether there is any reason they could not be fair and impartial can be relied on to produce a disclosure of any disqualifying state of mind. We do not believe that a prospective juror is so alert to his own prejudices.

As noted by the court in *Forsythe v. State*, 12 Ohio Misc. 99, 106 (1967), an assumption by the trial judge that a jury could disregard pre-trial publicity after being instructed to do so, was a "triumph of faith over experience." In *United States v. Aaron Burr*, 25 F. Case 30, Case No. 14 (1807), (1789-1880), Chief Justice Marshall stated:

> Why do personal prejudices constitute a just cause of challenge? Solely because the individual who is under their influence is presumed to have a bias on his mind which will prevent an impartial decision on the case according to the testimony. He made it clear that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him *** he will listen with more favor to that testimony which confirms, than to that which would change his opinion.

Clinton was denied a fair trial because of the extensive publicity surrounding the Jackson family murders. The trial court's reliance on the jurors' own self-assessments as to their individual abilities to be fair and impartial ignored the reality that these jurors could not set aside their opinions already formed from exposure to numerous and detailed media accounts of the Clinton case, including extensive on-line and traditional media reports leading up to, and throughout, Clinton's trial, even throughout the sentencing phase.

As in *Irvin* and *Sheppard*, prejudice from the weight of the adverse publicity must be presumed in this case. Erie County was saturated with stories concerning every aspect of the Clinton case from the times of the murders through the arrest of Clinton, prior to his capital trial,

throughout his capital trial, and through sentencing Further, social media carried open and continuous discussions of the case by bloggers and other contributors' various websites.

Further, seven of the jurors who decided Clinton's capital case admitted that they had been exposed to pre-trial publicity via the media, largely as published by the *Sandusky Register*. Juror 70's wife had read to him a *Register* story stating that Clinton "was just involved in a murder, as far as a mother and I think it was two children." Juror 96 had followed the Clinton investigation through the on-line version of the *Register* and its bloggers. Jurors 143 and 210 also admitted on voir dire following the events in the newspaper, with Juror 210 adding that he knew Clinton "was a suspect in these murders." Juror 397 had read newspaper accounts of the investigation just the night before appearing in court. And Juror 26 had not only read the newspaper accounts, but had done independent on-line research to learn all she could about the Clinton investigation before arriving at the courthouse for questioning on voir dire. *See* Individual VD Vol. 1, pp. 62-64, 76-78; Vol. 4, pp. 537-538; Vol. 5 and 6, pp. 665-666, 775, 785; and Vol. 7 and 8, pp.1076-1077, 1080, 1132.

Pre-trial publicity can be sufficient to create a "presumption of prejudice," even if the jurors state that they can be "fair and impartial" to the defendant. *Irvin v. Dowd*, 366 U.S. 717, 728 (1961). Due process is violated where there is a reasonable likelihood that prejudicial publicity prior to trial will prevent a fair trial. *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966). After Clinton was accused of the three deaths discovered at the Jackson home, he was regularly in the news, with voluminous coverage by the *Sandusky Register* and other local media in Erie

County – the *Sandusky Register* went so far as to run continuing coverage of the trial on its website.[10]

Clinton's constitutional guarantees under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 5 and 16 of the Ohio Constitution were violated.

D. Conclusion

Clinton's case became so infected by pre-trial publicity that he was unable to obtain a fair trial in Erie County. As a result, Clinton's constitutional guarantees under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 5, 16 of the Ohio Constitution were violated. Therefore, Clinton's convictions and sentences must be vacated and this case must be remanded for a new trial.

[10] In an age of media web searches, the Court can take judicial notice, after completing a brief web search, of the fact that Clinton's arrest, trial and sentencing were of consuming media interest in and around Erie County.

Proposition of Law No. VII

When the trial court fails to remove eight jurors who are biased, the capital defendant is deprived of his rights as guaranteed by U.S. Const. amends. V, VIII and XIV; Ohio Const. art. I, §§ 9 and 16.

A. Introduction

During Clinton's voir dire, trial counsel failed to properly question, and the trial court failed to remove, prospective jurors based upon their familiarity with, and their connections to members of the community, to other jurors, and to key witnesses. These failures resulted in inevitable bias against Clinton throughout his capital trial. Jurors 63, 70, 96, 225, 143, 371, 341, and 343 were impermissibly present on Clinton's capital jury.

The presence of these jurors on the jury that sentenced Clinton to death violated his rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and §§ 5 and 16, Article I of the Ohio Constitution.

B. Law

"Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). "Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Id.* at 188. It is also true that the "obligation to impanel an impartial jury lies in the first instance with the trial judge." *Id.* at 189 (emphasis added).

The United States Supreme Court has held that there is no Sixth Amendment right to have a jury verdict on the question of whether to impose capital punishment. *See Cabana v. Bullock*, 474 U.S. 376, 385 (1986); *Spaziano v. Florida*, 468 U.S. 447, 464 (1984). However, when a State acts—as Ohio has done—to include a jury's participation in capital sentencing, the

Due Process Clause requires that each juror must be fair and impartial "to the extent commanded by the Sixth Amendment." *Morgan v. Illinois*, 504 U.S. 719, 727 (1992) (citations omitted). A capital defendant in Ohio has a statutory right to a jury's participation in sentencing. R.C. § 2929.03(D)(2). Accordingly, the Due Process Clause guarantees a fair and impartial sentencing jury to an Ohio capital defendant. *See Morgan*, 504 U.S. at 727. A heightened degree of reliability is needed in the voir dire of a capital jury. *See id.* at 730 (citing *Turner v. Murray*, 476 U.S. 28, 26-37 (1986)).

C. Facts

Connections to Law Enforcement:

C.1 Juror 70

On the questionnaire distributed to prospective jurors, Juror 70 indicated that he had a friend employed as a law enforcement officer. *See* Juror 70 questionnaire, filed under seal. Following the prospective jurors' completion of these questionnaires, the trial court conducted individual voir dire in which each prospective juror was brought forth one at a time to be questioned by the court, the prosecution, and Clinton's trial counsel. Neither the trial court nor counsel for the State or the defense questioned Juror 70 regarding his friendship with a police officer. Thereby, the juror was eventually permitted to sit on the jury which sentenced Clinton to death without any assurances that his relationship with his police officer friend would not taint his perceptions during the trial. At a minimum, it was necessary for the trial court to ensure that this relationship would not cause Juror 70 to assign more weight to the testimony of members of law enforcement than to the testimony of other witnesses. The failure by the trial court to thoroughly examine Juror 70's indication that he was friends with a police officer was only

exacerbated by defense counsel when they, too, neglected to inquire whatsoever into the friendship and Juror 70's ability to remain impartial.

C.2 Juror 96

Juror 96 also indicated on his juror questionnaire that he had connections with law enforcement. He identified both his brother-in-law and a friend as police officers. *See* Juror 96 questionnaire, filed under seal. The prosecution did inquire into these relationships during general voir dire, asking Juror 96 if his friend, Ken Klamar, was the Perkins Township chief of police. Tr. 71. The prosecution then simply asked whether the relationship would "cause [Juror 96] not to be a fair and impartial juror in this particular case." *Id.* When Juror 96 responded "No," the prosecution ended the inquiry and began questioning Juror 96 concerning another connection to law enforcement with his brother-in-law, John Hartman, a Bellevue police officer. Tr. 71. Again, the prosecutor asked only one question about the relationship: simply whether it would "create an issue." Tr. 72.

Next, the State pointed out that Juror 96 was related to the Joy family and that they have "a few police officers in that family." Tr. 72. Neither the State nor Juror 96 elaborated as to whether the Joy family officers are members of the Sandusky police force, who were expected to testify at trial, and who investigated these crimes. No questions specific to this relationship were asked of Juror 96, nor was his ability to remain impartial inquired into, despite this family connection.

Following this cursory inquiry by the State, defense counsel asked Juror 96 even fewer questions of his law enforcement contacts. Trial counsel asked only, "[t]here will be police officers testifying. Are you going to – the bottom line question is, are you going to feel more accepting of their testimony or willing to accept their testimony than any other witness?" Tr.

158. Juror 96 referred only to his brother-in-law in response: "He doesn't – we don't talk about his job, so – we never have, so it's no different." Tr. 158. Trial counsel did not ask a single follow-up question regarding Juror 96's other connections with friends and family in law enforcement to ensure that neither of these would cloud his judgment, thereby prejudicing Clinton. The trial court, likewise, did nothing to step in after defense counsel failed to properly vet Juror 96 on his multiple police connections and relationships.

C.3 Juror 225

Juror 225 admitted, during general voir dire, that she knew Sandusky police officers, as she currently worked as a city employee. Juror 225 acknowledged, "I am a city employee, and I – I do know the officers. However, I do not work with them." Tr. 305.

Although the juror admitted that she knew all of the officers, the trial court did not conduct an adequate voir dire on the issue. In fact, the trial court asked only: " So you haven't formed an opinion on this case and you can be fair and impartial to both sides in this case?" *Id.* The court did nothing to determine whether Juror 225 knew any of the officers in charge of the investigation in this particular case or to make sure that she would not assign more weight or credibility to the testimony of the officers who she knew or was familiar with.

Defense counsel did not use a peremptory challenge against any of these jurors. Accordingly, three of the twelve jurors who joined the decision that Clinton should die sat on the panel despite close connections to law enforcement. It is apparent from their connections to law enforcement that they were jurors who could have been biased in favor of police officers, assigning more weight to their testimony, and less weight to evidence contradictory to the investigation by police. When defense counsel failed to pursue voir dire questioning of these biased jurors, the trial court should have acted. But it did not, to Clinton's prejudice.

Connections to Other Jurors

C.4 Jurors 143 and 371

During general voir dire, the trial court asked Juror 143 whether he knew any fellow jurors. Tr. 185. Juror 143 indicated that he knew the "young lady" sitting near him. Tr. 185. The other prospective juror, Juror 371, then chimed in explaining "We're neighbors." Tr. 185. When the trial court asked Juror 143 how well the two knew each other, he responded simply, "neighbors." Tr. 186. After giving a teacher-student analogy, the trial court asked both jurors simply, "Even though you know each other, you'll decide the case after – you'll decide the case on your own?" Tr. 187. After both jurors respond with "yes," the court neglected to explain further the effect knowing others on the jury may have on a juror – such as an inclination to agree, or a fear of disagreeing to avoid future conflict. This concern is heightened between neighbors, whose day-to-day lives could become awkward or unpleasant should conflict arise.

Neither the State nor defense counsel stepped in to properly ensure that there would be no effect on either of these jurors. Defense counsel did not inquire into whether the current relationship between the two was positive or negative, or whether a lack of trust or any other preconceived notions about one another already existed in the minds of either neighbor. Furthermore, perhaps even more importantly, defense counsel did not consider the danger in deliberating on a panel with a neighbor, with whom a disagreement could have lasting uncomfortable effects. This is evident because counsel did not use a peremptory challenge against either of these jurors. When the trial court, too, failed to adequately question or to disqualify either Juror 143 or 371, these jurors were permitted, to the prejudice of Clinton, to sit on the panel and ultimately deliberate together, knowing that they would have to remain neighbors, should any conflict arise.

C.5 Jurors 341 and 63

During general voir dire, Juror 341 requested to meet with the trial court and counsel for the State and the defense in chambers away from other prospective jurors. During a discussion in chambers, Juror 341 divulged that he knew another prospective juror, Juror 63, and that the two attended high school together and remained friends on Facebook. The trial court asked, "Would that still allow you to form an opinion on this case based upon your own belief of what the facts are and hold true to that no matter who the other jurors—" Tr. 174-75. Juror 341 stated simply "It would be all me." Tr. 175. After explaining that a student may be swayed by a teacher's presence on the same jury, the trial court ceased inquiring into the effect of Juror 341's familiarity with Juror 63. Neither the State nor Clinton's trial counsel engaged in any conversation with Juror 341 concerning just how familiar he was with Juror 63, whether any past relationship between the two was negative in any way, and whether Juror 341 had any preconceived notions of Juror 63's intelligence, trustworthiness, or character that would affect his ability to deliberate with him fairly. Nobody asked any questions of Juror 63. Defense counsel did not use a peremptory challenge against either juror. Both were permitted to sit with on the jury that sentenced Clinton to death.

When defense counsel failed to pursue any voir dire questioning of Juror 341 or of Juror 63, the trial court should have acted. It did not. The court did not engage in any inquiry whatsoever with Juror 63, concerning his connection to Juror 341. While the trial court may have been assured from their brief discussion with Juror 341 that he would not be affected by his familiarity with another juror on the panel, it did nothing to make sure that Juror 63 would not be affected, either. Whether Juror 63 was able to remain impartial in deliberating with Juror 341

cannot now be known, as the trial court and defense counsel allowed them to remain on the same panel, without a single question.

Connections to Witnesses

C.6 Juror 344

Juror 344 sat on the jury who sentenced Clinton to die despite having a working relationship with a witness for the prosecution. During general voir dire, Juror 344 admitted to recognizing a name on the State's witness list – Josh Case. Tr. 289. Josh Case testified for the State. Tr. 518. Case was a friend of the victim who admitted to having sexual intercourse with the victim at her home on the evening of her murder. Tr. 525.

After admitting to knowing State's witness Josh Case, Juror 344 admitted that he currently worked with Case, having seen him as recently as Friday. Tr. 289. The trial court then asked only one additional question: whether the two men had ever discussed the case. *Id.*

Next, Juror 344 admitted to the prosecutor that he personally hired Case at his current job as an operator, and that he held a supervisory position over Case: "He reports to a supervisor that reports to me." Tr. 291. The prosecutor asked Juror 344 whether he would assign more or less credibility to his employee's testimony given that he worked with and hired him. Tr. 290. Juror 344 indicated that he didn't "think so." *Id.*

Defense counsel then, very briefly, inquired whether Juror 344 would be impartial to Case's testimony at trial, asking only whether he would "view him as every other witness on the stand" and whether he had "any prejudgment one way or the other" Tr. 292-93. Defense counsel did not use a peremptory challenge on Juror 344.

Given the supervisor-supervisee relationship between Juror 344 and Case, an important witness for the State, the trial court should have disqualified the juror, or, at a minimum,

conducted further voir dire into the matter. The cursory inquisition that was performed was in no way sufficient to guarantee that Juror 344 would not assign more weight to this witness than to others. Juror 344 did not only work with the State's witness, but he knew him quite well. Given that he personally hired Case, it is very likely that he would have been charged with looking into his background and character. Knowing so much about a key witness outside the record put Juror 344 in a position of bias, ultimately to the prejudice of Clinton.

Connections to Prosecution

C.7 Juror 344

Juror 344's impermissible connections did not end with his working relationship with a witness for the prosecution. In fact, Juror 344 also admitted to the prosecutor, during general voir dire, to having a close friendship with an assistant prosecutor: "I do know Jason Hinners … We teach PSR in Huron together." Tr. 292. Upon learning of this connection, the prosecutor replied, "Good." *Id.* Rather than inquiring into whether this relationship would cause Juror 344 to be biased in favor of the prosecution, the trial court instead increased the likelihood of such by complementing the prosecutor friend of the juror: "He's done a wonderful job handling all those foreclosures that we're getting." *Id.* The prosecutor agreed, "He does do a great job." *Id.* After the prosecutor then asked whether Juror 344 could "follow the instructions of the Court," the trial court conducted no further voir dire regarding this relationship. Tr. 292. Defense counsel, likewise, asked no questions to ensure that Juror 344's relationship with an assistant prosecutor who, apparently, was in quite good graces with the trial court and with the prosecutor on the case, would in any way affect his ability to remain impartial.

D. Argument: Biased jurors violated Clinton's Due Process right to a fair and impartial sentencing jury.

There is an unacceptable risk that numerous jurors were biased against Clinton due to their connections with various players in the case. At a minimum, the trial court should have further inquired regarding these jurors' familiarity with, and connection to, members of the community, other jurors, and witnesses for the prosecution.

The service of a juror with connections to members of the community, such as police officers and prosecutors, creates a likelihood of bias in favor of testimony by like individuals that cannot be ignored. Connections to witnesses in the case create a similar reasonable probability that the juror will assign disproportionate weight to testimony by a familiar face. Finally, familiarity with other jurors on the same capital sentencing panel creates danger of unfairness in deliberations. Although the trial court did gain cursory assurances from many of these jurors that they could "follow the law," this generalized assertion is "wholly inadequate to protect a capital defendant" from the service of...a biased juror. *See Morgan v. Illinois*, 504 U.S. 719, 734-37 (1992). The trial court should have conducted a reasonable inquiry into these connections when defense counsel failed to do so.

In the alternative, Jurors 70, 96, 225, 143, 371, 341, 344, and Juror 341's former classmate, Juror 63, all with impermissible connections, should have been dismissed from service for cause. "A defendant may obtain a new trial if an impaneled juror's honest responses to questions on voir dire would have given rise to a valid challenge for cause." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984). Here, each of the aforementioned jurors admitted openly that they were related, or otherwise connected, to various police officers, prosecutors, peers on the jury, and witnesses. However, not one of these jurors was challenged

for cause. As a result, in total, 8 of the 12 jurors who signed Clinton's death verdict were impermissibly connected to players in the trial which, in any reasonable mind, could result in a concerning lack of impartiality.

E. Conclusion

The trial court's inaction during the voir dire of these jurors fails to satisfy the need for heightened reliability in a capital case. *See Beck v. Alabama*, 447 U.S. 625, 638 (1980) (need for heightened reliability in capital case before penalty phase required instruction on lesser offense); *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) (due process requires appointment of experts reasonably necessary to capital defendant); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (finality of death requires heightened degree of reliability in process of capital punishment); *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (capital defendant must be allowed as requirement of due process to rebut any information used to impose death); *Parker v. Dugger*, 498 U.S. 308, 322 (1991) (in scrutinizing State's death scheme, Court looks to see if scheme includes meaningful appellate review).

Jurors 63, 70, 96, 225, 143, 371, 341, and 344's responses during individual and general voir dire demonstrate their bias. Upon a conviction, their service on Clinton's jury violated the Due Process Clause. As such, Clinton's death sentence must be vacated. *See* R.C. § 2929.06(B).

Proposition of Law No. VIII

When the trial court fails to remove two jurors who are biased and denies a challenge for cause for a third juror who is biased, the capital defendant is deprived of his rights as guaranteed by U.S. Const. amends. V, VIII and XIV; Ohio Const. art. I, §§ 9 and 16.

A. Introduction

During Clinton's voir dire, the trial court failed to remove prospective biased jurors, resulting in inevitable bias against Clinton. The trial court failed to excuse Jurors 73 and 22 who, because of facial bias, should have been excused. As a result, defense counsel was forced to use peremptory challenges to remove these two biased jurors, leaving them without challenges left to remove other biased jurors from the panel. *See* Proposition of Law VII. Presence of these jurors on the jury that sentenced Clinton to death violated Clinton's rights as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and §§ 5 and 16, Article I of the Ohio Constitution.

The trial court additionally erred in denying a challenge for cause for potential Juror 363. His extreme views, garnered from media reports, of Clinton's guilt tainted the jury pool to Clinton's prejudice when he was able to express these views during voir dire after a challenge for cause was denied. The trial court's denial of counsel's challenge for cause for this juror was a denial of Clinton's rights as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and §§ 5 and 16, Article I of the Ohio Constitution.

B. Law

"Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). "Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate

the evidence cannot be fulfilled." *Id.* at 188. It is also true that the "obligation to impanel an impartial jury lies in the first instance with the trial judge." *Id.* at 189 (emphasis added).

The United States Supreme Court has held that there is no Sixth Amendment right to have a jury verdict on the question of whether to impose capital punishment. *See Cabana v. Bullock*, 474 U.S. 376, 385 (1986); *Spaziano v. Florida*, 468 U.S. 447, 464 (1984). However, when a State acts – as Ohio has done – to include a jury's participation in capital sentencing, the Due Process Clause requires that each juror must be fair and impartial "to the extent commanded by the Sixth Amendment." *Morgan v. Illinois*, 504 U.S. 719, 727 (1992) (citations omitted). A capital defendant in Ohio has a statutory right to a jury's participation in sentencing. R.C. § 2929.03(D)(2). Accordingly, the Due Process Clause guarantees a fair and impartial sentencing jury to an Ohio capital defendant. *See Morgan*, 504 U.S. at 727.

In a capital trial, "[a]t stake is [Petitioner's] right guaranteed by the Sixth Amendment to an impartial jury; the principal way this right is implemented is through the system of challenges exercised during the voir dire of prospective jurors." *Swain v. Alabama*, 380 U.S. 202 (1965). "A defendant may obtain a new trial if an impaneled juror's honest responses to questions on voir dire would have given rise to a valid challenge for cause." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984).

C. Facts

C.1 Prospective Juror 363

During individual voir dire, prospective Juror 363, shortly after being seated, admitted to the trial court that he had read about the crime in various media reports, including a report that Clinton had admitted to the crime. He also stated that he had formed opinions of Clinton's guilt as a result. The prospective juror explained "If he admitted to doing so, then I believe he would

be telling the truth, so I would think he would be guilty." Ind. V.D. 26. Nevertheless, the trial court, rather than fairly determining that this preconception against Clinton would render this person disqualified from his jury, allowed voir dire of prospective Juror 363 to continue.

The prosecutor, up next, asked the juror to explain whether he was leaning toward finding Clinton innocent or guilty – despite the presumption of innocence. Ind. V.D. 36. He replied, "I think I have a little pre-guilty, but I would absolutely listen to everything." *Id.*

Obviously concerned, still, that this individual may not be fit for jury service, defense counsel next questioned the prospective juror even further on his "little pre-guilty feeling". Ind. V.D. 50. The prospective juror explained that he felt "that the man did this to these people and, as far as I know at this point, that he admitted guilt. So –" *Id.*

The prospective juror next admitted that he had discussed the case with others and that he would unavoidably be affected by what he had read already:

> DEFENSE COUNSEL: So what did you say? What was the discussion?
>
> JUROR 363: Just shock. Just how could a person do such a thing?
>
> DEFENSE COUNSEL: So having said that, as you sit here now, do you think you can have – what you read in the paper have no effect on your deliberations whatsoever?
>
> JUROR 363: I don't think anybody could have no effect.

Ind. V.D. 52

In addition to having already formed an opinion as to Clinton's guilt, the prospective juror, when questioned by defense counsel on whether he could remain open to mitigating factors which could favor a sentence other than death should Clinton be found guilty, the prospective juror seemed to have difficulty grasping that anything could mitigate punishment

once guilt is established. Defense counsel used the analogy of a speeding ticket and whether an individual should be punished less given their reason for speeding. Ind. V.D. 57. The prospective juror replied: "You're still speeding. So I think, in the eyes of the law – what I've been brought up to, no ignorances [sic] and excuses in the eyes of the law." *Id.*

Finally, when asked by defense counsel whether he could refrain from discussing the case with other members on the panel, the prospective juror admitted that he had already discussed the case with other prospective jurors and that he had discussed "what we were doing here, and I read in the paper about the petition [by the victim's family]" with "the larger guy that I was sitting next to." Ind. V.D. 52.[11]

At the conclusion of the individual voir dire of prospective Juror 363, defense counsel challenged him for cause and stated two reasons for doing so. Ind. V.D. 59-61. First, the prospective juror demonstrated that he would not grant Clinton a presumption of innocence, and second, he would not be able to fairly consider mitigating evidence in the penalty phase. Despite obvious bias and an inability to deliberate fairly and impartially, the trial court denied the defense challenge. Ind. V.D. 61.

Because the defense's challenge of prospective Juror 363 was denied at the end of individual voir dire, the juror was given yet another chance to taint the jury pool during general voir dire. Prospective Juror 363, in the presence of eventually empaneled jurors, explained: "I'm still sitting here – I have a question. Just from what I've heard from people say, I thought that he admitted guilty [sic], and so I don't know…" Tr. 152. Then, later, "If he's going to say he admitted to it already, then I can't – I have a hard time being open-minded to something that a person said they did." Tr. 155. As the conversation with defense counsel continued, the

[11] Prospective Juror 363 was voir dired immediately prior to empaneled Juror 96 (*See* Proposition of Law VII), and was thereby seated directly next to him before and during voir dire.

prospective juror then indicated that because he was already sure that Clinton was guilty because of an admission to the crime, he was prepared already to consider only punishment: "And, of course, I believe he said he did it, and so then – so then we just decide punishment." Tr. 156. The trial court, then, stepped in to remind the prospective jurors of the presumption of innocence. The court asked prospective Juror 363 directly if he was having trouble with the presumption of innocence: "Can you follow that instruction? Are you having problems with that presumption of innocence based on what you brought to the courtroom?" Tr. 157. He replied, "I guess I am. I guess I am." *Id.*

Only after prospective Juror 363 admitted to knowing the victim during general voir dire, and his continued insistence on Clinton's admission to the crime, did the trial court agree to excuse Juror 363 from service. Tr. 208-09. By this time, however, the damage had already been done. He had tainted the jury pool with his continuous mentioning about what he had read in the media and "heard" around town. Given that he admitted himself to speaking with other jurors about the case and what he thought that he knew, it is evident that the very jurors who sentenced Clinton to death, particularly Juror 96, were exposed to prospective Juror 363's improper comments.

C.2. Prospective Jurors 73 and 22

Prospective Juror 73 was excused from the panel by defense counsel through use of a peremptory challenge after the trial court failed to remove her for cause after she admitted to knowing the victim, the victim's family, and the defendant himself. During individual voir dire, prospective Juror 73 explained to the trial court that she had a relationship with the victim's family and one of the victim's best friends. Ind. V.D. 641. She then admitted to the prosecutor that she was connected to the victim's family on social media, and had seen a petition headed by

the victim's brother on Facebook. Ind. V.D. 646. Although Juror 73 stated that she didn't hang out with the victim's family "on a daily basis," she did know them well enough to speak with them whenever she would run into them. *Id.* Her only guarantee to the prosecutor, then, was that she would "probably" follow what she heard in court over what she heard elsewhere through her connections to the victim. Ind. V.D. 647.

Then, prospective Juror 73 explained that she knew Clinton, too. She recalled seeing him at his former place of employment, the deli, where he worked with a close friend of hers. Ind. V.D. 645. She explained further that she had discussed Clinton with her friend, Christie, whom he would "hit on." Ind. V.D. 654. After Clinton's attempts to "hang out" and "date" Christie, Christie and prospective Juror 73 engaged in discussions about how "creepy" Clinton was. Ind. V.D. 656.

Upon learning that prospective Juror 73 shared friends with the victim and her family and that she personally knew Clinton and held a preconceived notion that he was "creepy," defense counsel determined that she was wholly unfit to serve on Clinton's capital jury. Defense counsel challenged her for cause after individual voir dire on the basis that she had pre-knowledge of the case and a negative opinion of Clinton. Ind. V.D. 663. The trial court denied the defense challenge, sure that despite her relationship with the victim's family and friends and her familiarity with Clinton, she would somehow still be able to remain impartial as a juror because she was "honest." Ind. V.D. 664. Thereafter, defense counsel, knowing that Juror 73's bias would cause her to deliberate unfairly, was forced to execute a peremptory challenge to remove her from the jury pool.

Prospective Juror 22 was also removed by defense counsel through the use of a peremptory challenge after the trial court failed to remove him for cause. During general voir

dire, the prospective juror indicated clearly that he did not agree that the burden of proof in this case should rest with the State. In fact, he explained, "[the defendant] needs to represent himself; prove that he's innocent." Tr. 301-02. The prosecutor, in response, attempted to remind the juror that, as stated by the judge, the burden rests on the State to prove the defendant's guilt beyond a reasonable doubt. When asked, then, why he believed the defendant must bear the burden instead, prospective Juror 22 explained, "Because the claims are trying to put him away, so he has to prove that he didn't do it." Tr. 302.

Despite this clear disagreement with the fundamentals of a criminal trial and an obvious inability to hold the prosecution to its burden of proof before a conviction, the trial court did not remove this juror from the pool of potential jurors for cause. Instead, defense counsel, again, was forced to resort to using a peremptory challenge to make sure that this juror would not end up on Clinton's jury despite his inability to follow the instructions of the court. To the prejudice of Clinton, defense counsel's forced use of a peremptory challenge here prevented them from using them on other biased jurors, who ultimately ended up on the jury. *See* Proposition of Law VII.

D. Argument

The trial court erred in denying a challenge for cause for prospective Juror 363. His insistence that Clinton was guilty based upon media reports and outside information that he had overheard tainted the jury pool when he was permitted to explain such, in depth, during general voir dire following the trial court's refusal to excuse him for cause. It is the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence. *Rosales-Lopez*, 451 U.S. at 188. Here, the trial court failed in this command.

By the time the juror was finally excused, the other members of the jury pool, including individuals who would ultimately determine Clinton's fate, had already been exposed to his improper comments. Time and again, he insisted not only that Clinton admitted to the crime, but that he was guilty. He went as far as suggesting that he should be punished without trial because of his obvious guilt. *See* Tr. 152-56. This contamination of the jury pool resulted in prejudice to Clinton.

Additionally, the trial court erred in failing to remove Jurors 73 and 22 for cause. Juror 73 had personal connections to the victim, the victim's family, and the victim's best friend. The same prospective juror personally knew the defendant himself. She knew Clinton well enough to have already formed an opinion of him as "creepy." Because of her relationships and preconceived notions, she demonstrated an inherent inability to remain fair during the trial and in deliberations. Despite this juror's bias, however, the trial court failed to remove her. Defense counsel, as a result, resorted to using a peremptory challenge to make sure that Juror 73 would not sit on Clinton's jury. The trial court erred similarly in failing to remove prospective Juror 22. Prospective Juror 22 claimed that the burden of proof should rest on the defendant, not on the State. Both of these jurors were facially biased.

In *White v. Mitchell*, 431 F.3d 517 (2005), the federal court of appeals found that the state trial court abused its discretion in denying the defense's challenge for cause of a facially biased juror. The court based its decision on the juror's responses to the questions posed to her during voir dire questioning. The court specifically pointed to the juror's contradictory statements regarding her ability to be a fair and impartial juror at the penalty phase; the vacillating nature of her responses; the ineffectual questions of the prosecutor as to the juror's ability to be fair and impartial; and, the juror's comments that she could follow the law and not let her personal

feelings interfere. *Id.* at 541-42. The court said that these statements were cursory and therefore not believable. *Id.* Based on these factors, the court concluded that the juror was unable to lay aside her opinion and render a verdict based on the evidence presented in court. *Id.* at 542. *See also Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

Jurors 73 and 22, like Juror 363, were unable to put aside their bias and follow the instructions of the court. All should have been immediately removed for cause. Defense counsel was unfairly forced to use a limited number of peremptory challenges to remove two of these jurors. Given the number of potentially biased jurors on the panel (*See* Proposition of Law VII), these peremptory challenges would have been useful in preventing prejudice to Clinton by removing these other jurors, instead.

E. Conclusion

The trial court's denial of counsel's challenge for cause of Juror 363 and refusal to remove Jurors 73 and 22 resulted in a denial of Clinton's rights as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and §§ 5 and 16, Article I of the Ohio Constitution. This Court must therefore vacate Clinton's death sentence.

Proposition of Law No. IX

The admission of irrelevant and prejudicial photographs into evidence at both phases violated Clinton's right to Due Process when the probative value of the photographs was outweighed by the danger of prejudice, and the photographs were cumulative.

A. Law

"Photographs are admissible into evidence as long as they are properly identified, are relevant and competent, and are accurate representations of the scene which they purport to portray." *State v. McFadden*, 7 Ohio App. 3d 215, 216 (12th Dist. 1982). In a non-death penalty case, assuming the above criteria are met, gruesome or deleterious photographic evidence will be admitted as evidence unless the opponent of the evidence can show that the probative value "is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Ohio R. Evid. 403(A). Additionally, photographs may be excluded pursuant to the Rules of Evidence if the opponent of the evidence persuades the court that the "probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence." Ohio R. Evid. 403(B).

In capital cases, however, the burden shifts to the proponent of the evidence to demonstrate that the probative value of "each photograph" outweighs the "danger of prejudice" to the defendant. *State v. Morales*, 32 Ohio St. 3d 252, 258 (1987). In addition to that burden, the proponent of the photographic evidence must also establish that the pictures are neither repetitive nor cumulative. *Id.* at 259. *See also State v. DePew*, 38 Ohio St. 3d 275, 281 (1988); *State v. Maurer*, 15 Ohio St. 3d 239, syllabus, para. 7 (1984). "Contrary to the Evid. R. 403 standard, where the probative value must be minimal and the prejudice great before the evidence may be excluded . . . if the probative value does not, in a simple balancing of the relative values, outweigh the danger of prejudice to the defendant, the evidence must be excluded." *Morales*, 32

Ohio St. 3d 252, 258. For instance, this Court has specifically found that admission of repetitive autopsy photos can be erroneous. *State v. Lundgren*, 73 Ohio St. 3d 474, 485-86 (1995).

As the standard in *Maurer* and *Morales* is designed to protect the capital defendant from the "***danger*** of prejudice," the defendant need not establish actual prejudice. *Morales*, 32 Ohio St. 3d at 258 (emphasis added). Thus, the *Maurer* and *Morales* standard is in concert with capital jurisprudence from the United States Supreme Court that strives to make the trial phase in a capital case as reliable as possible. *See Beck v. Alabama*, 447 U.S. 625, 630 (1980).

Nevertheless, the admission of prejudicial photographs may be harmless error at the trial phase when the evidence of guilt is overwhelming on each element of the offense. *See State v. Thompson*, 33 Ohio St. 3d 1, 15 (1987). *See also In re Winship*, 397 U.S. 358 (1970). On direct appeal, constitutional error is harmless only if the prosecution proves it to be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 26 (1967). Even when the admission of prejudicial photographs is harmless at trial, the use of improper photographs by the prosecution may have a prejudicial "carry over" effect on the trier of fact's penalty-phase deliberations. *Thompson*, 33 Ohio St. 3d at 15. This is especially so when the photographs are linked to inflammatory arguments by the prosecution at the penalty phase. *Id.* at 15. "Although gruesome photographs may be admissible in a capital case, the State may not use them 'to appeal to the jurors' emotions and to prejudice them against the defendant.'" *State v. Keenan*, 66 Ohio St. 3d 402, 407 (1993).

Last, the prosecution's use of "unduly prejudicial" evidence in a capital case violates the defendant's right to due process. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991).

B. Photographs admitted during the trial phase, and again at the mitigation phase, were inflammatory and cumulative, and, thus, prejudicial.

Photographs admitted at both phases of Clinton's trial were inflammatory, irrelevant, and duplicative to one another. Trial counsel failed to object to these prejudicial photographs admitted at the trial phase, however they did object to the re-admission of two irrelevant and prejudicial photographs of Celina Jackson and Wayne Jackson, Jr. at autopsy in the mitigation phase. The trial court is the gatekeeper in a trial and may only allow the admission of photographic evidence where there is no "danger of prejudice" to the defendant. *See Morales*, 32 Ohio St. 3d at 258. Further, because these photographs were, in fact, "unduly prejudicial" to Clinton, admission of this evidence, at both phases, violated Clinton's right to due process. *See Payne*, 501 U.S. at 825. The trial court failed in its duty here.

1. Introduction of gruesome, cumulative, and irrelevant photographs during the trial phase of Clinton's case constituted error.

The defense did not object to inflammatory, irrelevant, and cumulative photographs that depicted the crime scene and the victims' bodies during the trial phase of the case.[12] Thus, these issues must be reviewed for plain error.

During BCI Agent David Hammond's testimony concerning the evidence that he collected and photographed at the Jackson home, several especially graphic and repetitive photographs were admitted into evidence. Hammond first testified regarding photographs of the house and scene. In his testimony, he conceded that several of the admitted photographs were repetitive: as to State's Exhibit 14, Hammond testified that "It's a photograph of the same area. . .", and as to State's Exhibit 20, Hammond said this is "another photograph of the rear door." Tr. 622, 624. Hammond further testified that State's Exhibits 35-38 were photographs of the child's

[12] Counsel's failure to object is raised as ineffective assistance of counsel in Proposition of Law No. XVI.

bedroom, where there was undeniably nothing of evidentiary value recovered. Tr. 633-34. Next, Hammond testified that State's Exhibits 5 and 55-62 were all pictures of the master bedroom of the Jackson home; again, these photographs were repetitive and also highly prejudicial. Tr. 645-49. Specifically, Exhibits 5, 55, 56, and 60 were all of the bed (where Heather Jackson's body was depicted) as well as the master bedroom. Hammond testified that State's Exhibit 55 "is an additional photograph of the same area, depicting the same items." Tr. 646. And then, as to State's Exhibit 56, Hammond stated, "this is a photograph of the same area. . ." Tr. 647. Finally, as to State's Exhibit 60, he stated "it's an additional photograph of the bed. . ." Tr. 648. There are only so many angles of a crime scene that the trier of fact can look at until it becomes repetitious and overshadows the case.

As Hammond's testimony continued, he testified as to multiple photographs that he took of Heather Jackson's body, as she was discovered at the scene. State's Exhibits 63-69 all showed different angles of her body; admission of ***all*** of these photographs, particularly in the cumulative, was highly prejudicial. Tr. 650-55. Further, State's Exhibit 69 showed Heather Jackson's lower back and a tattoo (Tr. 655), which could have no evidentiary value, as there was no dispute that the victim here was Heather Jackson. These specific pictures were also presented right before a sidebar was held where defense counsel pointed out to the trial court that they had observed "maybe three people walking with tears in their eyes right underneath where the presentation is. . . So the jury is watching." Tr. 657. *See* Proposition of Law XV. The Judge, in recognizing the potential prejudice to the jury, then made it clear to the State's representatives that coming up "is probably the most demonstrative evidence of the children . . . if they're going to leave the room, they should leave the room before we proceed." Tr. 657. The presentation then continued with photographs from the scene of the dead children. Tr. 658-64.

Later in the State's presentation, the Lucas County Deputy Coroner, Dr. Diane Scala-Barnett, testified regarding the various photographs taken during the autopsy. Tr. 1102-32. During this testimony, a picture was introduced showing the rectum of Heather Jackson. *See* State's Exhibit 149. Dr. Scala-Barnett testified that although she could see no trauma, Jackson's rectum was "quite dilated." Tr. 1118. She then speculated that something was inserted into her rectum on or about the time of death to keep it open. Tr. 1119. Dr. Scala-Barnett testified to the same with Celina Jackson, however the photograph that was then published to the jury was not one of Celina Jackson's rectum, but of her vagina. State's Exhibit 159; Tr. 1129, 1133. Dr. Scala-Barnett explained that this photograph, in fact, did not depict Celina Jackson's rectum. But, because there was then no photograph available regarding the appearance of Celina Jackson's rectum for the jury's consideration, the jurors were told that "the dilation was similar to Heather's. . . it was more consistent with her mother's." Tr. 1130-31. The jurors were left to consider only a picture of Heather Jackson's rectum when they were charged with determining whether or not Celina Jackson was raped. Utilizing State's Exhibit 149 (a photograph of Heather Jackson's rectum) in place of State's Exhibit 159 (what should have been a photograph of Celina Jackson's rectum, but was instead a photograph of her vagina) was prejudicial.

What made this scenario more troubling was the admission of the next State's Exhibit, State's Exhibit 160, a picture from an autopsy that Dr. Scala-Barnett conducted in 2001 of "a five-year-old rectum [sic] who died." Tr. 1130. No other detail was given, nor asked for. Admission of this photograph alone was highly prejudicial, as the photo was completely irrelevant to this case and could lead to confusion of the issues in front of the jury. Even more prejudicial though is that the jury was to compare this photograph against the previously discussed Exhibits 149 and 159. However, as previously noted, due to the prosecutor's error, all

the jurors had to compare against this photograph of an unknown child's rectum was that of a sexually active, adult woman's rectum. *Compare* State's Exhibits 149 and 160. The trial court should not have allowed admission of these exhibits, or, at the very least, should not have admitted State's Exhibits 159 and 160, as they were irrelevant to the case and the "danger of prejudice" associated with both was too great. *See Morales*, 32 Ohio St. 3d at 258. In addition, because these photographs were "unduly prejudicial," admission of these photographs violated Clinton's right to due process.

2. Re-introduction of prejudicial photographic evidence at the mitigation phase was also error.

The trial court similarly violated Clinton's constitutional rights when it allowed the re-admission of gruesome and irrelevant photos of Celina Jackson and Wayne Jackson, Jr. to be re-introduced at the mitigation phase of Clinton's trial. Defense counsel objected to the reintroduction of these photographs. Mit. Tr. 7. Thus, this issue is not waived and may be considered under the *Morales/Maurer* standard. The photographs at issue are of Celina Jackson and Wayne Jackson, Jr. at autopsy. State's Exhibits 135 and 152. As to State's Exhibit 135, the State's purported reason for readmission of this photo was as follows: "135 is a photo that shows Wayne at autopsy. One of the elements that the jury is to consider is the specification that he was a child under the age of 13, and the photograph is demonstrative of that." Mit. Tr. 8. As to State's Exhibit 152, the State claimed that this photograph of Celina Jackson, showing her underwear, at autopsy went to proving "the child under 13 specification, as well as the rape specification." *Id.* These stated reasons were not valid. Also admitted along with these photographs were the autopsy reports, which conclusively proved that both of these children were under 13, as their ages were printed directly on the reports. *See* State's Exhibits 142, 150.

And a photograph depicting Celina Jackson in her underwear does nothing to prove rape. If anything, the fact that she was wearing underwear could imply the opposite.

The photographs of the two dead children did not shed light on the aggravating circumstances charged in this case. On the contrary, admission of these two photographs was solely "to appeal to the jurors' emotions." *Keenan*, 66 Ohio St. 3d at 407. There was no legitimate reason to admit the photographs at the mitigation phase of Clinton's trial. Admission of these unduly prejudicial photographs violated Clinton's right to due process

C. Conclusion

The admission of the objectionable photographs at both phases of the trial violated Clinton's right to due process. U.S. Const. amend. XIV; Ohio Const. art. I, § 16. The trial court abused its discretion in allowing the inflammatory photographs to be admitted and made part of the record. Clinton is therefore entitled to a new trial. Alternatively, his death sentence must be vacated under R.C. § 2929.06(B).

Proposition of Law No. X

When an involuntary statement is admitted as evidence against a defendant, that defendant's constitutional rights to due process and a fair trial are violated. U.S. Const. amends V, VI, VIII, and XIV.

A. Introduction

Clinton's interview with, and resulting statements to, Detective Wichman were involuntary under the totality of the circumstances. As such, the trial court erred when it allowed a portion of this interview to be played, and ultimately, used as evidence against Clinton, during the trial phase of Clinton's capital trial. This error cannot be harmless, as Clinton can demonstrate prejudice. Clinton's rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 2, 5, 9, 10, 16, and 20 of the Ohio Constitution were violated.

B. Law

"The basic test for voluntariness is whether the [statement] is the product of a rational intellect and a free will." *Mincey v. Arizona*, 437 U.S. 385, 398 (1978). "In assessing voluntariness, courts seek to determine whether a defendant's will was overborne at the time . . . by examining the 'totality of the surrounding circumstances[.]'" *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (internal citations omitted). "'[B]oth the characteristics of the accused and the details of the interrogation[,]' are pertinent to the voluntariness analysis and specific factors for consideration include the age, education, and intelligence of the defendant, ***the defendant's physical and mental state***, whether the defendant has been informed of his *Miranda* rights, the length of questioning, the repeated and prolonged nature of the questioning, and the use of physical punishment, such as deprivation of food or sleep." *Spencer v. Scutt*, 2013 U.S. Dist. LEXIS 15782, 36 (E.D. Mich. Feb. 6, 2013) (emphasis added), citing *Id.*; *see also Withrow v.*

Williams, 507 U.S. 680, 693-94 (1993). "The burden rests with the State to prove voluntariness by a preponderance of the evidence." *Abela v. Martin*, 380 F.3d 915, 928 (6th Cir. 2004).

Error resulted here when Clinton's interview with, and resulting statements to, Detective Wichman were played for the jury as evidence of Clinton's guilt in this case. Clinton's statements were involuntarily made, and thus, should not have been admissible at trial.

C. Clinton's statement to Detective Wichman was involuntary under the totality of the circumstances.

Detective Wichman interviewed and interrogated Curtis Clinton, immediately following a day-long hospitalization for an attempted suicide by medication overdose. *See* May 28, 2013 Supp. Hear. Tr. 6. Detective Wichman testified first at a pre-trial suppression hearing and then again at Clinton's trial. During his testimony, Detective Wichman explained how Clinton was removed from his hospital room, still wearing his hospital gown, and transported directly to the station for questioning. Tr. 845; *see also* May 28 2013 Supp. Hear. Tr. 65, 68. Detective Wichman described that Clinton had a bandage on his arm, and that he "assume[d] an IV or something was in his arm." *Id.* at 68. Detective Wichman noted that Clinton, at the time of his interview, had a "defeated posture about himself." May 28, 2013, Supp. Hear. Tr. 66. As can be seen in State's Exhibit 117 (the video of Clinton's statement), Clinton looks weak, he still has the tape from the IVs in his arm attached to his skin, and he can barely raise his hand to his mouth to drink a cup of water. *See* State's Exhibit 117.

Detective Wichman further explained that he was aware that Clinton had overdosed on some type of medication, although he was unclear at the time of trial what medication it was. *Id.* at 63. Detective Wichman then offered that he was not concerned during the interview about the after-effects of the medication that Clinton had ingested. *Id.* at 65. Yet, he then conceded almost immediately thereafter that he failed to check with medical personnel to ensure that Clinton was

no longer suffering the effects of the overdose. *Id.* He similarly admitted that he had not checked with medical personnel concerning any medications that they may have given to Clinton. *Id.* As a result, Detective Wichman was unaware of what, if anything, Clinton still had in his system at the time of the interview. Detective Wichman did nothing to ensure that Clinton, in fact, was clear-headed and able to comprehend, and voluntarily and intelligently participate in, a multi-hour interrogation at that time.

Clinton's statements to Detective Wichman during the interview further assist in proving that Clinton was not in an appropriate mental state to be making a statement. Throughout the interview, Clinton made comments such as: "I don't even know what today is," "I cannot remember," "My days is so mixed up right now," "You're trying to confuse me," "I just have my days mixed up because I thought yesterday was Saturday and today was Sunday," "I can't say something that I can't remember," "Ain't nothing written all over my face, but I'm tired," "I don't want to say something and then lie. Do you want me to say something and then lie?," "You're trying to tell me I did something that I know I didn't do," "You're trying to manipulate me," "I don't know what you're talking about," "Send me to jail," and, "I can't remember shit, man. You're confusing me, too." *See* State's Supp. Hear. Ex. 2,; May 28, 2013 Supp. Hear. Tr. 9-59; *see also* State's Trial Ex. 117. It is clear through these statements, and through the circumstances as detailed above, that Clinton's mental state was obviously affected at the time of this interview.

Allowing Clinton's police interview that was obtained under these circumstances to be played as evidence in the State's case-in-chief was error. Clinton's interview with, and statements to, Detective Wichman were involuntary under U.S. Supreme Court precedent. *See Mincey v. Arizona*, 437 U.S. 385, 401-02 (1978). In *Mincey*, the Supreme Court held Mincey's

statement to be involuntary when he "was weakened by pain and shock, isolated from family, friends, and legal counsel, and barely conscious." *Id.* The Court concluded that "[Mincey's] will was simply overborne." *Id.*

Clinton, similarly, was not thinking clearly, as evidenced by his statements above. He was physically and mentally weak from the attempted suicide, he was isolated from family and friends, and he was, possibly, still feeling the after-effects of one or more medications. In the end, it seems that Clinton just wanted the interview to stop. As he stated during the interview, "if y'all going to arrest me go ahead." May 28, 2013 Supp. Hear. Tr. 53. A statement made under these conditions cannot be voluntary under the totality of the circumstances. *See Mincey*, 437 U.S. at 401-02.

D. Admission of Clinton's statement was not harmless.

Here, the State introduced Clinton's statements during the testimony of Detective Wichman. As such, the State bears the burden of showing, on appeal, that any error that resulted was harmless. *See Chapman v. California*, 386 U.S. 18 (1967) (whoever "insists on the introduction of certain evidence at trial . . . has the burden to show its harmlessness on appeal."). This error is of constitutional magnitude, as Clinton's statement was accorded lofty weight during the trial. The prosecutor used Clinton's own words against him in order to call him a liar, arguing in closing that this statement tended to prove Clinton's guilt, and argued, also, that it demonstrated the "cool, calm, collected, cold way" Clinton answered questions so as to avoid the truth. Tr. 1197-98. Furthermore, the jury specifically asked to hear this statement again during deliberations, indicating that this was, indeed, a crucial piece of evidence in their minds. Tr. 1303. As such, admitting this statement was not harmless.

E. Conclusion

A trial court is to carefully guard against violations of a defendant's constitutional rights. Here, the trial court erred in that regard when it allowed the admission as evidence of Clinton's involuntary statement. As such, Clinton's convictions must be reversed and his case remanded for a new trial.

Proposition of Law No. XI

The trial court erred when it allowed unqualified "expert" witness testimony under Ohio Rule of Evidence 702 and the Fourteenth Amendment of the United States Constitution as well as Article I, §§ 10 and 16 of the Ohio Constitution.

A. Introduction and Legal Authority

This Court addressed what qualifications are necessary to accord a witness expert status in *State v. Baston*, 85 Ohio St. 3d 418 (1999). According to its interpretation of Ohio R. Evid. 702, "a witness may qualify as an expert by reason of her knowledge, experience, skill, training, or education. Neither special education nor certification is necessary to confer expert status. The individual offered as an expert need not have complete knowledge of the field in question, as long as the knowledge she possesses will aid the trier-of-fact in performing its fact-finding function." *Id.* at 423.

No witness in a capital trial should be granted free reign to testify to anything he, she, or counsel desires. Foundational expertise limits the proper scope of any witness' testimony. While any witness testifying based on his or her professional expertise may be qualified to testify on one subject, he or she may not be similarly qualified to testify as an expert on a related subject. *Campbell v. The Daimler Group, Inc.*, 115 Ohio App. 3d 783, 793 (10th Dist. 1996) (citation omitted). Thus, a professional witness may only give an opinion as to matters residing within his or her realm of expertise. *Shilling v. Mobile Analytical*, 65 Ohio St. 3d 252, 255 (1992). During Clinton's trial, an unqualified witness – retired Wood County detective Michael Clark – provided testimony that was well beyond his realm of knowledge or expertise, when he was allowed to testify regarding the cause of death of Misty Keckler in April, 1997. Trial counsel for Clinton objected to the testimony by State's witness Michael Clark, who in his police capacity had investigated the 1997 death of Misty Keckler, but the basis of the objection was that

Clark's testimony was inadmissible as "other acts evidence," and would be unduly prejudicial to Clinton's chance for a fair trial as to the Erie County charges.[13] A motion for mistrial as to Clark's testimony was denied. Tr. 954, 957-58, 962-63, 967. Once Clark strayed into areas of testimony going beyond his limited realm of expertise, the trial court erred in not limiting and/or striking Clark's unqualified testimony regarding Keckler's cause of death.

B. Michael Clark was not qualified to give testimony regarding Misty Keckler's cause of death in April 1997, and the trial court erred in allowing this testimony.

Retired detective Michael Clark was the only witness offered by the State as to the circumstances of Misty Keckler's death. No forensic pathologist or other medical professional testified as to the cause of death, and Detective Clark obviously was unqualified to make or offer conclusions about how Keckler died. Yet the trial court allowed Detective Clark to tell the jurors in this capital trial that he believed ligatures had been attached to Keckler's hands and legs *after* she had died, and that in his opinion, Keckler "had passed away before the ligatures were put on her." Detective Clark was also not qualified to opine to Clinton's jury that Keckler was "already dead" before her body was placed in a bathtub. Tr. 957-59.

No forensic pathologist testified for either the State or the defense as to when or how Misty Keckler died in 1997. Indeed, Michael Clark was the *only* witness to offer any testimony whatsoever in Clinton's trial regarding the circumstances of the 1997 events. Though Detective Clark arguably, given the trial court's ruling on "other acts," could have testified as to the steps he took to investigate the Keckler case, Clark plainly was unqualified to offer his opinions to a capital jury as to when or how, as a matter of forensic science, Keckler might have died in 1997.

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[13] Trial counsel's ineffectiveness for failing to challenge Clark's testimony on the specific basis that he was unqualified to testify as to Misty Keckler's cause and/or time of death, due to his lack of expertise in forensic pathology, is raised separately. *See* Proposition of Law No. XVI.

This trial court error was not harmless. *See Chapman v. California*, 386 U.S. 18 (1967). *Chapman* requires that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24. Here, the jury was fed scientific information from a non-scientifically qualified witness, and the jury was therefore likely confused. Michael Clark lacked the knowledge to testify as to the time and cause of death issues under Evidence Rule 702. As such, the trial court erred in allowing Detective Clark's testimony. The trial judge, as the "gatekeeper", must ensure that only reliable evidence from qualified witnesses reaches the jury. *See Kumho Tire Co*, 526 U.S. 137, 141 (1999) ("*Daubert's* general holding – setting forth the trial judge's general "gatekeeping" obligation – applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge.").

The trial court should have determined whether retired detective Clark had the qualifications necessary to assist the jury through offering his opinion testimony, but entirely failed to act as a gatekeeper here by allowing Detective Clark to opine on forensic pathology science. *See State v. Hipkins*, 69 Ohio St. 2d 80 (1982). *See also State v. Morris*, 8 Ohio App. 3d 12 (8th Dist. 1982) (witness not allowed to testify as an "expert" in construction where that witness had no specialized knowledge, training, or experience about the causes of concrete cracks).

Here, the State introduced and solicited Detective Clark's testimony, and the State bears the burden of showing, on appeal, that any error that resulted was harmless. *See Chapman*, 386 U.S. at 18 (whoever "insists on the introduction of certain evidence at trial . . . has the burden to show its harmlessness on appeal."). This error is of constitutional magnitude. The State used Detective Clark's opinions as the foundation to try to convince the capital jury that the deaths of

Misty Keckler and Heather Jackson were "signature crimes" by Clinton. Yet Detective Clark was *never* qualified to share his opinions regarding forensic pathology science with Clinton's jury. The trial court erred in allowing Detective Clark to testify as to when or how Misty Keckler died in 1997, since he was not qualified to offer those opinions under Ohio R. Evid. 702.

C. Conclusion

Excluding Michael Clark's testimony would have "prevent[ed] the jury from considering information that would not assist in rendering a verdict founded on reliable expert evidence." *Valentine v. Conrad*, 110 Ohio St. 3d 42, 45 (2006). The trial court erred in allowing Clark's testimony on issues controlling law commands should be offered as opinions by a qualified forensic pathologist or other qualified scientist, as opposed to a former police detective. Therefore, Clinton's conviction and sentence must be reversed and his case remanded for a new trial.

Proposition of Law No. XII

The accused's due process right to a fair trial is violated when the trial court fails to take curative action when the trial is disrupted. U.S. Const. amends. VI, XIV; Ohio Const. art. I, § 10.

A. Introduction

Throughout the trial, the emotionally charged and intimidating behaviors of the brother of Heather Jackson, Nick Fee, disrupted Clinton's capital trial. Given the pervasiveness of Fee's intimidation of the defendant, Clinton's jury was undoubtedly prejudiced against him. Confronted with this situation, the trial court failed to take curative action. The pervasive behaviors, coupled with the trial court's failure to act, deprived Clinton of a fair trial and an impartial jury. U.S. Const. amends. VI, XIV.

B. Facts

During individual voir dire the following events were discussed outside the presence of the jurors:

> DEFENSE COUNSEL: I would ask the Court to ask Mr. Fee, when jurors are present, not to glare in the direction of the Defendant, because it is something that can be picked up. It has happened in the past.
>
> We have a concern of, they figure out who he is and they see – you know, it's understandable, his disdain for the accused, but, obviously, that's not something we want the jurors to pick up.
>
> TRIAL COURT: I certainly understand that, and I've asked Mr. Fee to off the record.

Ind. V.D. 726.

Following this disruption, the trial court took no curative action with any of the prospective jurors who had witnessed Fee glaring at Clinton and wearing a shirt with pictures of the victims on it. Juror 70 was questioned during the morning session prior to Fee leaving the

courtroom and was part of the jury that decided Clinton's fate. Ind. V.D. 665. The trial court further addressed Fee's behavior:

> TRIAL COURT: This morning's session of jury selection . . . during that, one of the victim's – the brother of the alleged victim carried on a little bit with his standard come to court and stare at the defendant.
>
> I personally asked him to discontinue that. He didn't seem favorable to the idea.
>
> And then apparently, they had on – some shirts that are – basically, represented the victims.
>
> I asked them not to wear those and turn their shirts inside-out. So they left.
>
> There's some sort of threat through the victims' advocate, I understand, that they plan to come back to court tomorrow with a group of folks, which is – as long as they're not disruptive and violate any other order of the Court, is fine with me. But if they do disrupt the court, they'll be removed.
>
> * * *
>
> DEFENSE COUNSEL: . . . Mr. Fee was staring at [Clinton] and glaring at him, and Mr. Clinton indicated, "I don't want to be in here. I don't want to be subjected to this."
>
> It's been going on the whole time. And he was worried that prospective jurors would see that, would pick up on that.

Ind. V.D. 810-12. The trial court also noted that Fee didn't want to comply with court orders and continued to violate gag orders. Ind. V.D. 815.

However, it is clear from the record that Fee did not abide by the trial court's admonishments. Clinton went on to waive mitigation in his case partially because he knew he would be safer on death row than in general population. Nov. 7, 2013 Mtn. Hear. Tr. 6. During sentencing Fee threatened Clinton telling him, "they saved your life by putting your worthless ass on death row . . . Be glad you're on death row and my buddies can't find you . . . I wish they

gave you life in prison. I begged for it. Begged to save your worthless life so my friends could get you." Sent. Tr. 35. Clearly, Fee was very active with his provocations throughout the case.

C. Law

"The starting point for discussion of trial court treatment of extraneous contact with a jury is *Remmer v. United States*, 347 U.S. 227 (1954)." *White v. Smith*, 984 F.2d 163, 165 (6th Cir. 1993). Once inappropriate contact with a juror occurs, the trial court must conduct an evidentiary hearing to determine if the actions violate the defendant's rights to a fair trial by an impartial jury, a reliable sentencing determination, and due process of law. *Remmer*, 347 U.S. at 229-30. All interested parties must be permitted to participate. *Id.* If the incident complained of was harmful, a new trial should be granted. *Id.* at 230. *See also State v. Jenkins*, 15 Ohio St. 3d 164, 237 (1984) (pre-verdict irregularities more suspect under *Remmer*).

Remmer was limited to the question of whether third party contact with a deliberating juror violated the Sixth Amendment right to a fair trial by an impartial jury. However, the courts have extended the hearing requirement to any allegation of inappropriate jury contact sufficient to call into question the integrity of the process. *See United States v. Rouse*, 111 F.3d 561, 572-73 (8th Cir. 1997) (allegations of juror racial bias sufficient to warrant hearing); *United States v. Webster*, 960 F.2d 1301, 1304 (5th Cir. 1992) (allegation that juror was hearing-impaired sufficient to warrant hearing); *United States v. Skelton*, 893 F.2d 40, 42 (3rd Cir. 1990) (allegation that juror knew witnesses sufficient to warrant hearing).

Although it is "advisable" that the court hold a hearing after a third party has contact with the jury, not every communication with jury members requires a *Remmer* hearing. *White*, 984 F.2d at 166. Absent that hearing, the trial court must determine "whether the jury was disturbed, alarmed, shocked or moved by the demonstration or whether the incident was of such

a nature that it necessarily influenced the ultimate verdict of conviction." *State v. Bradley*, 3 Ohio St. 2d 38, 40 (1965). Thus, the trial court determines "whether the demonstration deprived the defendant of a fair trial by improperly influencing the jury." *State v. Morales*, 32 Ohio St. 3d 252, 255 (1987).

D. Argument

Fee was causing a disruption of sufficient magnitude for the trial court and defense counsel to address the issue during Clinton's trial. Yet, the trial court did not question the jurors to ensure that the public displays from Fee would not impact their ability to be fair and impartial. The trial court did not admonish the jury that it should disregard this disruption. The trial court took no action to ensure that the displays from Fee would not infringe on Clinton's rights to a fair trial and an impartial jury. U.S. Const. amends. VI, XIV.

"The constitutional safeguards relating to the integrity of the criminal process attend every stage of the criminal proceedings, starting with arrest and culminating with a trial 'in a courtroom presided over by a judge.'" *Cox v. Louisiana*, 379 U.S. 559, 562 (1965) (citing *Rideau v. Louisiana*, 373 U.S. 723, 727 (1963)). The Due Process Clause requires protection from "the intrusion of factors into the trial process that tend to subvert its purpose." *Woods v. Dugger*, 923 F.2d 1454, 1456 (11th Cir. 1991) (citing *Estes v. Texas*, 381 U.S. 532, 561 (1965) (Warren, C.J., concurring)). The behavior of Fee that occurred during Clinton's trial was one of those factors designed to subvert the trial's purpose. *See id.* Because it is the trial court that bears the "ultimate responsibility" for protecting the defendant's due process rights and for ensuring a fair trial rests with the trial court, *see Lakeside v. Oregon*, 435 U.S. 333, 341-42 (1978), when Fee's demonstrations of hatred for Clinton were taking place in the courtroom, it

was the trial court's obligation to protect Clinton's right to a fair trial. *See id. See also State v. Johnson*, 24 Ohio St. 3d 87, 91 (1986) (citing *Powell v. Alabama*, 287 U.S. 45 (1932)).

The trial court should have acted. Indeed, the court had many available remedies to address these displays. First, and foremost, the trial court should have conducted a *Remmer* hearing. *See White*, 984 F.2d at 165. This disruption occurred in court during voir dire. It was of sufficient magnitude that it was addressed on the record during voir dire and ended up with Clinton feeling like he could not attend his own trial. Ind. V.D. Tr. 812 & Nov. 7, 2013 Mtn. Hear. Tr. 6. The trial court needed to know if the jurors' exposure to this extraneous contact would impact their decision in Clinton's case.

If the trial court did not deem the disruption to be of sufficient magnitude to warrant a hearing, the trial court still had an obligation to act to ensure that Clinton suffered no prejudice from Fee's behavior. What sets Clinton's case apart from other cases involving public disruptions and displays is the trial court's complete failure to take any curative action with respect to the jurors. The trial court did not question the jurors to ensure that the prejudicial behavior of Fee would not affect their ability to be fair and impartial. *See Messer v. Kemp*, 760 F.2d 1080, 1087 (11th Cir. 1985). Moreover, the trial court did not admonish the jury that it would be inappropriate to allow the disruption to invade its considerations of guilt, and later, sentencing. *See White*, 984 F.2d at 166; *Messer*, 760 F.2d at 1087; *Bashor v. Risley*, 730 F.2d 1228, 1237 (9th Cir. 1984); *United States v. Rocha*, 916 F.2d 219, 230 (5th Cir. 1990). While failure to conduct a hearing might be excusable if the trial court questions or admonishes the jury, *see White*, 984 F.2d at 166, absent such action prejudice to Clinton is probable.

Because the trial court failed to act, there is no fact-finding to which this Court must defer. The court did not place on the record its opinion regarding the potential impact of the

disruption on the jurors. Thus, any evidentiary insufficiency is the product of the trial court's failure to address this disruption on the record. The trial court abdicated its duty to ensure Clinton received a fair trial by failing to address Fee's behavior.

The pre-trial publicity surrounding Clinton's case compounds the court's failure to act. *See* Proposition of Law No. VI. The highly charged and emotional atmosphere surrounding Clinton's trial is demonstrated further by the second public disruption of Clinton's trial, which occurred post-sentence. The culmination of the pre-trial publicity, along with the public disruptions by Nick Fee at Clinton's trial, deprived Clinton of a fair trial and a verdict rendered by an impartial and unbiased jury. U.S. Const. amends. VI, XIV.

E. Conclusion

The public disruptions at Clinton's trial deprived Clinton of a fair trial and an impartial jury. U.S. Const. amends. VI, XIV. Coupled with the extensive and inflammatory pre-trial publicity and the inappropriate character evidence presented, these events created an atmosphere where it was impossible for Clinton to receive a fair trial. *Cf. Woods*, 923 F.2d at 1459 ("[T]he pre-trial publicity combined with the large number of uniformed spectators rose to the level of inherent prejudice[.]") This Court must vacate Clinton's convictions and remand for a new trial.

Proposition of Law No. XIII

The broadcasting of attorney-client discussions over a closed-circuit video feed violates a defendant's right to Due Process. U.S. Const. amends. V, VI, VIII, IX, and XIV; Section 10, Article 1 of the Ohio Const., §§ 1, 2, 5, 9, 10, 16, and 20.

A. Introduction

More due process, not less, is required in a death penalty case. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *State v. Griffin*, 138 Ohio St. 3d 108 (2013); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). *See also Evitts v. Lucey*, 469 U.S. 387, 401 (1985) ("When a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause.") Clinton's state and federal constitutional rights to due process were violated when his discussions with counsel were broadcast over a closed-circuit video feed into another courtroom.

B. Argument

During Clinton's jury trial, there was a live closed-circuit video feed set up that ran from the courtroom in which the jury trial took place to an empty courtroom where overflow spectators could watch the proceedings. Tr. 19, 176. On October 28, 2013, the first day of Clinton's jury trial, it came to the trial court's attention that there was an issue with the courtroom's closed-circuit feed transmitting privileged attorney-client discussions to another courtroom. Outside the hearing of the jury, the court stated: "There's been a problem about the closed-circuit feed that runs to another courtroom down the hall picking up the comments of counsel at their table as they work with their client in defense of this case. And the Court has to weigh the right of the public coming into the courtroom today against prejudicing the defense in their efforts in trying this case on behalf of their client." Tr. 176. Clinton's defense counsel stated

that the issue with closed-circuit feed was "infringing in our ability to discuss at the table who to exercise peremptory challenges and what questions to ask jurors, which we think is absolutely essential." *Id.* at 177. The trial court further explained that "there's a monitor set up right near defense counsel's table. We did, quote, the whisper test, end quote, and persons in our courtroom on the other end of the live feed could hear that." *Id.* at 178.

Ultimately, the trial court decided to terminate the live feed. Prosecutor Barylski tried to reassure defense counsel that nobody in the other room had heard anything that defense counsel had said. *Id.* at 179-80. Despite these reassurances, the court stated that: "The Court is a little nervous about who's hearing what at bench conferences or otherwise – or, counsel table." *Id.* at 180. Additionally, despite the State's reassurances, it is impossible to tell who heard what. There is no indication of who may have been in the other courtroom, or what they may have heard regarding privileged attorney-client information and defense strategy.

The attorney-client privilege is one of the most fundamental aspects of the attorney-client relationship. "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law...its purpose is to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (internal citations omitted). "'The privilege protects against any dissemination of information obtained in the confidential relationship.'" *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St. 3d 261 (2005), citing *Am. Motors Corp. v. Huffstutler*, 61 Ohio St. 3d 343, 348 (1991). The mere possibility of the disclosure of private, confidential discussions between attorney and client, or between attorneys strategizing about the client's defense, is horrific. The broadcasting of these discussions to another courtroom where no one can be sure what was

heard, or by whom, is a plain violation of Clinton's ability to confidentially communicate with his counsel and, ultimately, his right to a fair trial.

On direct appeal, constitutional error is harmless only if the prosecution proves it to be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 26 (1967). This error is of constitutional magnitude, as anyone could have overheard Clinton or his counsel discussing trial strategy or other privileged material relevant to Clinton's defense. This error, therefore, was not harmless.

C. Conclusion

Clinton's due process rights were violated when attorney-client discussions were broadcasted over a closed-circuit feed. U.S. Const. amends. V, VI, VIII, IX, and XIV; Section 10, Article 1 of the Ohio Const., §§ 1, 2, 5, 9, 10, 16, and 20. As such, Clinton's convictions must be reversed and his case remanded for a new trial.

Proposition of Law No. XIV

The defendant's rights to due process, equal protection, and freedom from cruel and unusual punishment are violated when the State excludes an African-American juror without providing a satisfactory race-neutral reason. U.S. Const. amends. V, VI, VIII, XIV; Ohio Const. art. I §§ 2, 5, 9, 10, 16, and 20.

The State violated Clinton's rights to due process, equal protection, and freedom from cruel and unusual punishment as guaranteed by the United States and Ohio Constitutions when it excluded an African-American juror without being able to provide a satisfactory race-neutral reason. *See Batson v. Kentucky*, 476 U.S. 79, 97 (1986).

A. Relevant law

The *Batson* Court held that the State violates the Equal Protection clause of the Fourteenth Amendment when it challenges "potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* at 89. The Court delineated a three-step procedure to evaluate a *Batson* challenge. *Id.* at 93-98. First, the Defendant must make a prima facie showing of discrimination. *Id.* at 93-97. Next, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Id.* at 97. Finally, the trial court determines "if the defendant has established purposeful discrimination." *Id.* at 98.

Sometimes, as in Clinton's case, the trial court will gloss over the prima facie showing and simply require the prosecutor to provide a race-neutral reason. *See, e.g.*, *Hernandez v. New York*, 500 U.S. 352, 359 (1991); *Braxton v. Gansheimer*, 561 F.3d 453, 461 (6th Cir. 2009). When the trial court immediately requires the State to provide a race-neutral reason, "the preliminary issue of whether the defendant has made a prima facie showing becomes moot." *Hernandez*, 500 U.S. at 359.

A prosecutor's race neutral reason "need not rise to the level of justifying exercise of challenge for cause." *Batson*, 476 U.S. at 97. However, a prosecutor cannot meet his burden by simply denying a discriminatory motive or asserting his good faith. *Id.*

B. Analysis

In Clinton's case, the prosecutor exercised his second peremptory challenge regarding Juror 255, an African-American woman. Tr. 266. Prior to exercising this peremptory challenge, the prosecutor asked to approach the bench where he immediately told the judge that "for the record, there's another prospective juror on the jury that's an African-American female. The basis – the nondiscriminatory basis under *Batson* that we would cite is the fact that her family members...were both prosecuted by the State, by Erie County prosecutors, and convicted of felonies...and then, also, presently, we have a pending case against her brother..." Tr. 267-68. Defense counsel made no challenge, and, instead agreed with the prosecutor, stating "[w]e would agree that's a race neutral reason for it. We didn't think it was a reason for cause, but we believe it's a proper use of a peremptory challenge because of that background." Tr. 268. The court's only input was that "[t]he Court's definitely in agreement with that and passes the *Batson* test." *Id.*

The trial court, here, shirked its duty to evaluate the prosecutors' demeanor and credibility to determine whether the race-neutral reason the State offered was pretextual. *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003). After all, "the critical question in determining whether a prisoner has proved purposeful discrimination is the persuasiveness of the prosecutor's justification for his peremptory strike." *Id.* at 338-39. Here, the trial court asked no questions and simply stated that the court agreed with the prosecutor's reasoning and that it passed the *Batson* test. Tr. 268. Additionally, trial counsel was ineffective for failing to question the prosecutor's

reasoning, and instead, simply agreeing with the stated reason. *See Strickland v. Washington*, 466 U.S. 668 (1984).

Reviewing Juror 255's answers during voir dire reveals how flimsy the basis behind the prosecutor's reasoning truly was. During general voir dire, Juror 255 stated that she thought that she could be fair and impartial in this case. Tr. 221. She stated that she was not prejudiced against the State of Ohio. *Id.* The prosecutor asked questions of Juror 255 regarding her brother's and cousin's involvement in the criminal justice system. *Id.* In response to that line of questioning, Juror 255 once again stated that as far as the State of Ohio is concerned, she could be fair and impartial. *Id.* at 223. In fact, despite the prosecutor's reliance on the fact that several members of her family have been prosecuted by the Erie County Prosecutor's office, Juror 255 stated that she doesn't even see her cousin at all. *Id.* at 224. Juror 255 was then asked a third time whether or not she could be fair and impartial in this particular case, to which she again, for the third time, stated that she could. *Id.* Despite stating, three times, that she could be impartial, the prosecutor attempted to challenge this juror for cause because he did not believe that she could be a fair and impartial juror based on all of the State's involvement with her family. *Id.* at 229. The court denied this challenge for cause. *Id.* at 231.

Once the prosecutor requested use of a peremptory challenge to remove Juror 255, defense counsel immediately stated that they agreed with that reasoning. *Id.* at 268. There was no request for more information, there was no challenge based on the fact that Juror 255 had stated numerous times that she could be fair and impartial, and there was no challenge based on the fact that only one other prospective juror was African-American in a case where the defendant was African-American and all three victims were white. Despite these same facts, the trial court,

without any questioning, immediately concurred with the prosecutor's reasoning and determined that the *Batson* test was met. *Id.*

The court's acceptance of a proposed justification, on its face, violated Clinton's rights under the Ohio and United States constitution because the court failed to engage in the analysis required by *Batson*. *Coombs v. Diguglielmo*, 616 F.3d 255, 262 (3rd Cir. 2010) ("Trial courts fail to engage in the required analysis when they 'fail[ ] to examine all of the evidence to determine whether the State's proffered race-neutral explanations [a]re pretextual.'") (quoting *Riley v. Taylor*, 277 F.3d 261, 286 (3rd Cir. 2001)).

C. Conclusion

Clinton's rights to due process, equal protection, and freedom from cruel and unusual punishment as guaranteed by the United States and Ohio Constitutions were violated by the impermissible exclusion of an African-American juror. As such, this Court should reverse and remand for a new trial. *See Ford v. Norris*, 67 F.3d 162, 170 (8th Cir. 1995) ("[C]onstitutional error involving racial discrimination in jury selection is not subject to harmless error analysis.")

Proposition of Law No. XV

A trial court violates a capital defendant's constitutional rights to a fair trial and due process when it allows misleading and prejudicial evidence and testimony, improperly overrules defense motions and objections, and does not adequately conduct voir dire. U.S. Const. amends. V, VI, VIII, IX, and XIV; Section 10, Article 1 of the Ohio Const., §§ 1, 2, 5, 9, 10, 16, and 20.

Curtis Clinton's rights to due process and a fair trial were violated by the trial court's errors and omissions. "The right to a fair trial is a fundamental liberty[.]" *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (citing *Drope v. Missouri*, 420 U.S. 162 (1975)). "To implement the presumption [of innocence], courts must be alert to factors that may undermine the fairness of the factfinding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Id.* (citing *In re Winship*, 397 U.S. 358, 364 (1970)). "It is the judge...who has the ultimate responsibility for the conduct of a fair and lawful trial." *Lakeside v. Oregon*, 435 U.S. 333, 341-42 (1978). Here, Clinton's rights to due process and a fair trial were violated by the trial court.

A. The trial court erred when it allowed improper questioning, testimony, and evidence to be introduced during Clinton's capital trial.

"Within limits, the judge may control the scope of rebuttal testimony, may refuse to allow cumulative, repetitive, or irrelevant testimony, and may control the scope of examination of witnesses." *Geders v. United States*, 425 U.S. 80, 86-87 (1976) (internal citations omitted).

"If truth and fairness are not to be sacrificed, the judge must exert substantial control over the proceedings." *Id.* By permitting the prosecution's errors, the trial court failed to protect Clinton's rights to due process and a fair trial. *See* Proposition of Law XVII.

A.1 The trial court erred when it allowed the deputy coroner to make prejudicial and biased comments during her testimony.

During her testimony, Dr. Scala-Barnett, the Lucas County Deputy Coroner, exhibited unscientific bias as she described the autopsies of the Jackson family to the jurors. In describing to the jurors the ligature that was removed from Wayne Jackson, Jr.'s neck, Dr. Scala-Barnett referred to it as his "froggy blanket." Tr. 1110-11. She also referred to Wayne Jackson, Jr.'s clothes as "jammies." Tr. 1103. Additionally, Dr. Scala-Barnett speculated, without any scientific foundation for that speculation, that Celina Jackson's underwear might have been removed, indicating she may have been "redressed" at some point before she died, because of the way the elastic was rolled-in when Celina's body was reviewed at the autopsy. Tr. 1124-35.

Perhaps worst of all, Dr. Scala-Barnett also presented to the jury, without foundation, a photograph of the rectum of an unidentified five-year old child that she had photographed in 2001. *See also* Proposition of Law IX. That photograph purportedly was to serve as a "point of reference" by which she could have the jury compare how Celina Jackson's rectum appeared after death to how this unidentified child's rectum appeared after his or her death. Tr. 1110-11, 1130-31, State's Exhibit 60. No foundation was laid as to the gender of the other child, how the child had died, whether the other child's rectum was diseased or injured, or the duration of time between the child's death and the taking of the photograph, etc., before Dr. Scala-Barnett offered her conclusions that Celina Jackson's rectum should have looked similar. It should also be noted that there was never a picture of Celina Jackson's rectum shown to the jury. The only comparison photo that was shown to the jury was that of Heather Jackson's rectum. Dr. Scala-Barnett testified that Celina Jackson's rectum looked similar to that of Heather Jackson, however this fact was never proven. Tr. 1130-31.

Despite the coroner's use of prejudicial evidence and improper comments, all of which lacked foundation, the trial court made no attempt to reign in Dr. Scala-Barnett's testimony. Rather, the trial court allowed the jury to see and hear all of these prejudicial, biased, and arguably inappropriate, comments and evidence.

A.2 The trial court erred when it allowed victim impact testimony to be introduced by the prosecutor.

Victim impact evidence is inadmissible during the culpability phase of a capital trial because it is immaterial to the issue of guilt. *See State v. Fautenberry*, 72 Ohio St. 3d 435, 440 (1995); *State v. Tyler*, 50 Ohio St. 3d 24, 35 (1990); *State v. White*, 15 Ohio St. 2d 146, 151 (1968). The trial court erred in allowing the following improper and irrelevant victim impact testimony from witnesses Thomas Hanson, Detective Gary Wichman, Detective Ken Nixon, and E.S. *See also* Proposition of Law XVII.

- Upon questioning by the prosecutor, and over objection by defense counsel, Thomas Hanson referred to the perpetrator of the crimes as "some sick individual." Tr. 577-78.

- Upon questioning by the prosecutor, and over objection of defense counsel, Detective Wichman stated that his police interview with Clinton was "an extremely difficult interview. Probably the worst interview I ever did, situation-wise." Tr. 826-27.

- The prosecutor asked Detective Nixon whether victims under the age of 18 were reluctant to immediately file charges to which Nixon replied: "Victims are afraid. They don't want to go forward. They're afraid of what's going to happen if they do, if they tell on the person." Tr. 743.

- Upon further questioning along these lines by the prosecutor, Detective Nixon stated, "[E.S.] was kind of afraid that, you know, the suspect, Clinton wouldn't – He would get out of jail and come after her. She was hesitant because she felt that he wouldn't be in jail forever and he would get out." Tr. 747.

- Over objection from the defense, the prosecutor elicited testimony from E.S. that she was involved in counseling. Tr. 1032.

Despite the introduction of the above victim impact testimony elicited from the prosecutor, and over the objection by defense counsel to most of it, the trial court did nothing to stop the jury from hearing these prejudicial comments.

A.3 The trial court erred when it overruled the following objections made by defense counsel.

The trial court erred by overruling defense counsel's objections. The testimony in question, when defense counsel objected, had no legitimate evidentiary value. A trial court should exclude irrelevant evidence. Ohio R. Evid. 402. Evidence is relevant if it has "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." Ohio R. Evid. 401.

Even if any of the below testimony is found to be relevant, Evidence Rule 403 requires a judge to exclude even relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice." Ohio R. Evid. 403(A). "Usually, though not always, unfairly prejudicial evidence appeals to the jury's emotions rather than intellect." *Oberlin v. Akron Gen. Med. Ctr.*, 91 Ohio St. 3d 169, 172 (2001) (quoting Weisenberger's Ohio Evidence, pp. 85-87, Section 403.3 (2000)).

The trial court incorrectly overruled the following objections made by defense counsel:

- During voir dire, defense counsel objected to the prosecutor asking potential jurors if it is fair to say that victims can do all kinds of things after the incident as far as reporting or not reporting. Tr. 116.

- During Clinton's jury trial, when Thomas Hanson was asked to describe his second interview with Detective Wichman, Hanson stated "I'm like, 'Dude, if I knew that happened, I would tell you.' You know what I mean? Because what happened – you know, that's different. You know, what happened to Heather, that's – for them little kids, you know, for somebody to do that." Tr. 577. Defense counsel objected and the trial court sustained the objection. Immediately afterwards, the prosecutor asked Hanson if that is what he told the police and Hanson stated "oh, yeah." *Id.* The court then allowed Hanson to continue, which prompted Hanson to immediately say, "Yeah. I told them. I said, 'I mean, that's, you know, some sick individual that would' –." *Id.* at 577-78. Defense

counsel again objected and the court overruled that objection. At a sidebar, defense counsel argued that Hanson could not "testify what he said in the prior statement." *Id.* at 579. Additionally, defense counsel argued that Hanson's statements were not relevant and that there was a relevancy issue on probative value. *Id.* at 581. Defense counsel further stated that "He gave his opinion to the officer. It doesn't make it not an opinion because he's repeating the opinion that he told previously." *Id.* Ultimately, the court overruled the objection. *Id.* at 582.

- Once again during Hanson's testimony, defense counsel objected when the prosecutor asked Hanson, "How long did it take you to regain your composure [after finding the body of Heather Jackson]?" and Hanson responded, "I don't even know if I still have. I mean, I fall asleep at night and I see that stuff. You know? Her. I mean, it's –." Tr. 610. The trial court immediately overruled this objection. *Id.*

- During the testimony of Detective Nixon, the trial court overruled two objections by defense counsel. First, defense counsel objected when Detective Nixon was asked who the suspect was that he had in mind after his interview and conversations with E.S. Tr. 744. The trial court immediately overruled this objection. *Id.*

- Next, when testifying as to why E.S. was initially hesitant to press charges, Detective Nixon stated, "At that time, she was kind of – she didn't want to go forward. She was kind of afraid that, you know, the suspect, Clinton, wouldn't –." Tr. 747. Defense counsel objected, to which the court immediately overruled. Nixon then continued with, "He would get out of jail and come after her. She was hesitant because she felt that he wouldn't be in jail for forever and he would get out." *Id.*

- During the testimony of Detective Wichman, the trial court overruled two objections by defense counsel. The prosecution asked Detective Wichman, "You also told him that you don't believe he's a violent person; that – that you don't think this is Curtis Clinton. Why did you say that?" Tr. 826. Detective Wichman responded, "You know, to help him along to admit what he did" to which defense counsel promptly objected and the trial court overruled. *Id.* at 826-27. Detective Wichman continued, "It was an extremely difficult interview. Probably the worst interview I ever did, situation-wise." *Id.* at 827. Defense counsel objected to this statement, and the trial court, again, overruled the objection. *Id.*

- Prior to the testimony of the State's DNA experts, defense counsel renewed their objection from the Daubert hearing. Tr. 864. The trial court overruled this objection. *Id.* at 865.

- Prior to Michael Clark, the former Fostoria police detective who investigated the Misty Keckler homicide, taking the stand, defense counsel objected to his testimony based on their other acts motion. Tr. 950. Defense counsel also objected to graphic photos that would be presented as exhibits during Clark's testimony. *Id.* The trial court maintained their previous ruling, overruling defense counsel's objections. *Id.* During Clark's testimony, defense counsel objected to the entire line of questioning. Tr. 954. Defense

counsel also objected to Clark's statements that the injuries on Misty Keckler's neck were "from ligature marks" and that "we know that Misty had – was – had passed away before the ligatures were put on her. There's no bruising on the – excuse me. There's no bruising on the hands and/or feet area. That means –." *Id.* at 956-57. Despite the fact that he was not qualified to offer this testimony, the trial court overruled the defense objections and noted defense counsel's continuing objection to Clark's testimony. *Id.* at 956-58. *See also* Proposition of Law XI.

- After Clark's testimony was completed, defense counsel moved for a mistrial and the judge denied their motion. Tr. 962-63, 967. Defense counsel objected, stating "Out of paranoia, Your Honor, because of a finding wavered level [sic], part of the calculation, if you will, on relevance is, is this is a capital case, and the Ohio Supreme Court has recognized, in State versus Thompson, that you can't decide these other acts in another case. There is a carry-over effect. It's – the prior homicide is not an aggravating factor, not a statutory aggravating factor. In this instance, to ask the jury not to consider a prior homicide conviction in their weighing process in determining what the appropriate penalty would be is impossible. I don't think there's a single person that could ignore a homicide of a young woman, having seen those pictures, in particular. That's the added weight that – it's different about another act in a capital case than in another case and that's, I guess, as much or more of the basis of our objection." *Id.* at 968-69.

- During the testimony of E.S., the prosecutor asked if she had gotten involved with counseling. Tr. 1029. Defense counsel objected "to the victim impact" stating, "The relevancy of counseling and what was said or what she had to do for counseling is irrelevant to whether the offense occurred or not. Obviously it's going to evoke sympathy unrelated to the offense itself. The issue here is whether a rape occurred or not, and not to have to go through what she had to go through at counseling and how her life went downhill after this whole occurrence." *Id.* at 1029-30. The State argued that the fact that E.S. went to counseling was consistent and relevant. *Id.* at 1030. Defense counsel continued to object based on relevancy, and the trial court overruled. *Id.*

- During the testimony of nurse Lisa Dettling, who examined E.S., Dettling was asked by the prosecutor to tell the jury about the conversation that she had with E.S. "in an effort to gain some type of history as to the complaint that she was there for." Tr. 1064-65. Defense counsel objected to the possibility of Dettling "going into all of the stuff afterwards and details that are unrelated" and "if she's going to talk about who it is, who did it." *Id.* at 1065. Defense counsel stated that "who did it doesn't matter. It's what happened that caused her to get medical attention. It's not, 'This person did it and this person said that.'" Defense counsel further stated, "My understanding of the law is, what comes in is her statements that are necessary to let the doctor know what needs to be addressed medically, not all the extraneous information afterward." *Id.* at 1066. The prosecutor argued that that's a very "twisted way of looking at the medical exception." *Id.* The trial court overruled the objection, stating "The Court would overrule the objection; would ask counsel – the State to not go over, you know, verbatim – the medical is important. The Court will allow that." *Id.* at 1070.

- Shortly thereafter, defense counsel objected to the prosecutor asking Dettling to "read to the members of the jury the narrative statement you took from [E.S.]." Tr. 1087. Despite the trial court's previous statement, asking the State to not go over Dettling's conversation with E.S. "verbatim," the court overruled this motion. *Id.*

- Finally, defense counsel objected to the admission of all exhibits related to Misty Keckler, which was consistent with their prior objection. Tr. 1140-41. This objection is based on the relevancy of the photographs, because defense counsel did not believe they should have been admitted in the first place. *Id.* The trial court overruled this objection.

Through the above questioning, the prosecutor wanted the jurors to consider the emotional aspects of the case. The trial court's error in overruling these objections allowed the prosecutor to appeal to the jurors' emotions. Such an appeal is improper. *State v. Keenan*, 66 Ohio St. 3d 402, 407-08 (1993). Victim impact evidence is inadmissible during the culpability phase of a capital trial because it is immaterial to the issue of guilt. *See State v. Fautenberry*, 72 Ohio St. 3d 435, 440 (1995); *State v. Tyler*, 50 Ohio St. 3d 24, 35 (1990); *State v. White*, 15 Ohio St. 2d 146, 151 (1968). The same reasoning applies to inflammatory testimony from a witness who is not related to the victim.

Additionally, many of the above statements elicited by the State, despite defense objections, are irrelevant, prejudicial, and basic hearsay. *See* Ohio R. Evid. 802, "Hearsay is not admissible except as otherwise provided..." At trial, during Thomas Hanson's testimony, defense counsel based their objection on hearsay, stating: "It's still hearsay, even though he says it's what he said at a previous time. It's still hearsay. Not only that, but it still goes to victim impact, because he's talking about how outraged he was. But this is still hearsay. You can't come in with a prior consistent statement no one challenged." Tr. 578. During the testimony of Lisa Dettling, defense counsel again argued hearsay based on prior consistent statements. Tr. 1065-68. Despite these arguments, the trial court overruled the above objections.

Thus, the trial court abused its discretion when it overruled defense counsel's objections for the reasons stated at trial. As such, the trial court violated Clinton's Sixth and Fourteenth Amendment rights to a fair trial.

A.4 The trial court erred by allowing the telephone call between Clinton and his mother, recorded by the Erie County Jail, to be played at trial.

The day after Clinton was arrested he made a phone call to his mother from the Erie County Jail. This phone call was recorded and introduced at trial as State's Exhibit 119. The trial court erred by allowing this phone call to be played to the jury. The conversation between Clinton and his mother had no legitimate evidentiary value. A trial court should exclude irrelevant evidence. Ohio R. Evid. 402. Evidence is relevant if it has "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." Ohio R. Evid. 401.

Even if any of the conversation between Clinton and his mother is found to be relevant, Evidence Rule 403 requires a judge to exclude even relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice." Ohio R. Evid. 403(A). "Usually, though not always, unfairly prejudicial evidence appeals to the jury's emotions rather than intellect." *Oberlin v. Akron Gen. Med. Ctr.*, 91 Ohio St. 3d 169, 172 (2001) (quoting Weisenberger's Ohio Evidence, pp. 85-87, Section 403.3 (2000)).

During the telephone conversation with his mother, Clinton made the following statements:

- "I'm just trying to figure out what to say mom because I'm just confused." State's Exhibit 119
- "You should know that it would happen again though." *Id.*
- "Now it's even worse than before." *Id.*

- "I was just doing good." *Id.*
- "It was all behind me." *Id.*
- "It's something in me. I don't know what it is though. I swear I just don't know. I don't know what the fuck it is. It's just, I just lose it, and then I just don't even – I don't know what it is." *Id.*
- "Losing jobs, and it's just fucking overwhelming, and just, I don't know." *Id.*
- "I should have given you (inaudible) on what was the matter with me, what I figure was the matter with me and why they didn't help me, or who – I should have just been honest. I just didn't think that, you know, nothing would happen like that again because I was doing good." *Id.*
- "I just didn't think it would happen." *Id.*
- "I thought I was just over it, I don't know. I thought after 13 years I would be over that, and I just wouldn't believe that shit would happen no more." *Id.*

Throughout the entire conversation with his mother, Clinton's statements are vague and at no point does Clinton admit guilt of any sort. Instead, he exhibits confusion and is clearly upset about being back in jail and about losing all of his jobs. Not only did this conversation occur one day after Clinton was arrested, but it also occurred one day after Clinton was released from the hospital for a suicide attempt by alcohol consumption and medication overdose. The statements made by Clinton during the conversation with his mother have no evidentiary value and cannot be shown to be relevant to the case at hand. Even if relevancy was not an issue, the prejudicial value of such statements being played at Clinton's capital murder trial would require that the judge exclude the statements from being heard by the jury. Allowing such statements to be played for the jury allowed for confusion of the issues, and for jurors to make assumptions that they should not be making. The trial court erred by allowing this conversation between Clinton and his mother to be played at trial.

A.5 The court erred by allowing the video of Clinton's police interview, accompanied by inaccurate captions, to be played to the jury.

During Detective Wichman's testimony, the prosecutor introduced Clinton's police interview, State's Exhibit 117, to be played for the jury. Prior to the video actually being shown, defense counsel requested a sidebar where the following discussion ensued:

Mr. Dixon: Well, words have been added to captions, rather. We think there's some inaccuracies, which I'm going to have co-counsel explain.

Ms. Kendall: Well, just in reviewing the first half, inaccuracies with the timing, inaccuracies with the words, doesn't match up with the transcripts. There's times when what they caption is the action, which is not timed properly. It doesn't contain the words. You can sometimes read what Curtis Clinton says, but sometimes you can't because it goes too quickly. And so, because, you know, we don't have an issue of accessibility, there's no reason the jurors can't determine for themselves what they're hearing with a printed transcript not being provided.

...

Ms. Kendall: There are phone numbers, like it has the Human Services hotline phone number mixed in in part of it. It's not in the transcript.

Mr. Doughten: It's not in the transcript.

Mr. Baxter: I never saw that.

Ms. Kendall: I can break it down and get the iPad and tell you exactly what time that occurs in the video. There's a phone number, when you start the video, halfway through the dialog, there's the Human Services –

The Court: Well, how does –

Ms. Kendall: It distracts from hearing the video, and there are parts that I think are substantively inaccurate from what he says.

Mr. Baxter: Well, it detracts – what it does is it allows the jury to understand exactly what's being said sometimes.

The Court:	I'm not – I'm – I don't have any problem with that. I'm having problems with the claim that there's inaccuracies.
Ms. Kendall:	There are times when there's not audible speaking off camera and there's captions for it.
Mr. Doughten:	There's one major discrepancy. There's one major inaccuracy that's down that's different.
The Court:	Don't hold back. Let me know what it is.
Mr. Doughten:	Okay. It was the "was" versus "was not." You can hear it. We can tell you exactly the location. Now, we can do it, I suppose, by going back and trying to find the exact location and –

...

Mr. Baxter:	I guess we don't want the jury to know what he exactly said.
Ms. Kendall:	Did you watch this?
Mr. Baxter:	I watched it.
Ms. Kendall:	There's parts you can't even read it. It's so fast, you can't even follow it. It doesn't aid in that way.

Tr. 829-36.

Ultimately, the trial court agreed to read an advisory instruction to the jury "to rely on what you hear over what you read." Tr. 838-39. Despite such an advisory instruction, nothing was done to address the substantive inaccuracies that trial counsel brought to the trial court's attention. The trial court did nothing to further inquire as to what substantive inaccuracies existed, nor did it do anything to prevent the jury from hearing and/or seeing such inaccurate statements. Additionally, a review of State's Exhibit 117 shows that the video of Clinton's police interview is accompanied by large, bright yellow text that moves across the screen very quickly in a distracting manner. While there appears to be no issue with understanding the audio portion

on its own, the addition of the quick-moving text across the screen makes it difficult to listen and read at the same time. Such difficulty may cause the viewer to focus only on one or the other, either the text or the audio, making it even more prejudicial that the text is not accurate. At the very least, the advisory instruction provided by the trial court is not adequate to prevent the harm from the substantively inaccurate text on the screen. As such, the trial court erred, to Clinton's prejudice, by not doing more to prevent the police interview with incorrect captions from being played to the jury.

B. The trial court erred when it overruled defense motions prior to, and during, Clinton's capital trial.

The trial court erred when it improperly overruled various defense motions prior to, and during, Clinton's capital trial. The trial court filed the following journal entries overruling motions filed by defense counsel:

- J.E. filed. (D-10) Motion to preclude sentence of death specification is hereby denied as set forth. Dkt. 2/1/13
- J.E. filed. (D-11) Motion to transcribe the Grand Jury proceedings prior to trial is hereby denied as set forth. Dkt. 2/1/13
- J.E. filed. (D-13) Motion to release to defense counsel prior to trial a copy of the transcript of the Grand Jury Proceedings is hereby denied as set forth. Dkt. 2/1/13
- J.E. filed. (D-15) Motion to dismiss capital components of the case due to constitutional and international law violations is hereby denied as set forth. Dkt. 2/1/13
- J.E. filed. (D-17) Motion for order directing that a complete copy of the Prosecutor's file be made, reviewed in-camera by the court and sealed for appellate review is hereby denied as set forth. Dkt. 2/1/13
- J.E. filed. (D-18) Motion for the State to be required to preserve, and produce to the defendant, any notes taken by the City of Sandusky Police Dept., Agents from the Bureau of Criminal Identification and Investigation or any other State Agents or Investigators, of any interviews with persons who are, or may be, witnesses at trial is hereby denied as set forth. Dkt. 2/4/13

- J.E. filed. (D-20) Defendant's motion in limine to prohibit victim-impact evidence during the trial and if necessary the mitigation phase is hereby denied as set forth. Dkt. 2/4/13 (*See also supra,* Proposition of Law XVII.)

- J.E. filed. (D-23) Defendant's motion to sever counts is hereby denied as set forth. Dkt 4/9/13 (*See also* Proposition of Law IV.)

- J.E. filed. Defendant's motion to change venue is hereby denied as set forth. Dkt. 10/21/13 (*See also* Proposition of Law VI.)

- J.E. filed. Defendant's motion to dismiss the capital specifications of the indictment due to the outrageous government conduct is hereby denied as set forth. Dkt 10/25/13

- J.E. filed. Defendant's motion to recognize mercy as a mitigating factor is hereby denied as set forth. Dkt. 11/12/13

- J.E. filed. Defendant's motion to instruct the jury that residual doubt may be considered as a factor under R.C. 2929.04(B)(7). After a thorough review of the pleading and relevant case law, said motion is not well taken and hereby denied as set forth. Dkt. 11/13/13

The trial court also improperly denied the motions, described in the sections below, that defense counsel made during Clinton's capital trial.

B.1 Daubert Hearing

At Clinton's Motion to Show Cause and Daubert Hearing, the trial court heard from State's witness, and BCI forensic scientist, Hallie Garofalo, and determined that the evidence she presented "does meet the Daubert test." Oct. 17, 2013 Mtn. Hear. Tr. 101. The next day the trial court filed an entry stating that: "This Court finds said evidence is relevant, competent, material, and reliable, and admits said evidence at trial of this case as set forth." Dkt. 10/18/13. At Clinton's jury trial, defense counsel renewed their Daubert objection, stating: "It was overruled, but I'm required to raise it before [Julie Cox] testifies, so we're renewing our objection." Tr. 864. The trial court simply stated: "Same ruling," without hearing any additional information. *Id.* at 865. The most troubling aspect of the trial court's ruling was the fact that statements made by

the court during the Daubert hearing raise significant questions as to whether the court understood what a Daubert hearing entailed. The following discussion ensued:

The Court:	We're back on the record in State of Ohio versus Curtis Clinton. It appears that a witness pursuant to the hearing on the Motion to Show Cause, Karen Balconi Ghezzi, is available today and should be here in about 45 minutes. So we will proceed with a hearing on Defendant's motion to conduct a Daubert hearing, which, I guess, is akin to their Motion to Suppress on some issues.
Mr. Doughten:	It's like a 104 hearing; that we want to get the evidence out for the Court to determine whether it's fairly relevant for this case.
The Court:	Okay. The Court will hear it in that respect. And so, the Court has reviewed that Motion and the State's response, and I believe the State is ready to proceed.

Tr. 26-27.

The court's statements during the above discussion with defense counsel are concerning. What is even more concerning is the fact that the court denied defense counsel's Daubert motion, immediately after the testimony of State's witness Garofalo, without fully understanding the meaning of the motion in the first place.

In total, the court acted unreasonably and to Clinton's prejudice when it failed to grant defense motions for the reasons set forth above and within said motions.

B.2 Motion for Mistrial

After former Detective Mike Clark's testimony was completed, regarding the death of Misty Keckler, defense counsel moved for a mistrial of Clinton's case based on all of their previous objections regarding the introduction of Evid. R. 404(B) material. Tr. 962-63. After hearing from both sides, the trial court stated: "The Court would deny the motion for a mistrial; does stand by its prior written decision, based on your prior motions. It's been well briefed and

well researched on the issue of prior acts of the Defendant to show intent, and the Court finds that the prejudicial effect does not – does not outweigh the probative value and, obviously has allowed the evidence; would deny your motion for mistrial." *Id.* at 967.

The trial court erred by denying this motion after the unduly prejudicial, and arguably irrelevant, testimony provided by former Detective Clark. *See supra, see also* Proposition of Law III. In addition to the prejudicial and irrelevant nature of his testimony, former Detective Clark was also not qualified to testify about the cause and nature of Misty Keckler's death, as he is neither a coroner nor forensic pathologist. *See* Proposition of Law XI. As such, the trial court erred by denying defense counsel's motion for a mistrial based on this testimony.

B.3 Rule 29 Motion

At the end of the State's case, defense counsel made a Rule 29 motion, stating "We have a general motion for the counts, but the specific count is the count of rape against Celina. And the basis for that is, the coroner did not testify to a medical certainty that the intrusion into her anal cavity occurred premortem. What she said was perimortem; that it was around, could have been before, could have been at the same time, could have been after death. Obviously, if it's postmortem, it's not a rape. It's abuse of a corpse. So we would move for the rape count against Celina and the corresponding rape specifications be dismissed." Tr. 1147-48. The trial court stated, "The Court – having considered the argument, the Court would deny the Defendant's motion for acquittal pursuant to Criminal Rule 29; indicate – and would find that the State has presented sufficient evidence to sustain a conviction as to all of the counts…" *Id* at 1149. The trial court erred by denying this motion for the reasons presented by defense counsel and for the fact that there was insufficient evidence to convict Clinton, particularly of the rape of Celina Jackson. *See* Proposition of Law XX.

C. The trial court erred by allowing multiple people to walk out of the courtroom in tears while passing right beneath the presentation of crime scene photos, that were being shown to the jury, without providing a curative instruction.

During the testimony of BCI agent David Hammond, the prosecutor showed State's exhibits, including photographs of the crime scene and victims, on a projection screen in the courtroom. After several people walked out of the courtroom in tears, after passing right beneath the screen where the presentation was being shown, defense counsel asked to approach the bench, where they stated:

> For the record, if we can do something about it, during the presentation, there's been at least two, maybe three people walking with tears in their eyes right underneath where the presentation is. So the jury is watching. One is Danielle Sorrell, who testified earlier, another one walked out and was visibly upset, which is understandable, but they're walking right smack underneath where Paul's doing his presentation. There's going to be some very nasty photos coming up. I wonder if there's some way that we cannot have people walking in front of the presentation in the presence of the jury, you know, seeing them upset, because there's been two so far at least. There might have been three. And I don't know if the victim --

Tr. 656-57.

The trial court responded by instructing the prosecutor to "advise the victim's advocate, this is going to be probably the most demonstrative evidence of the children, and if they're going to leave the room, they should leave the room before we proceed." *Id.* at 657. Despite this instruction, the court had previously done nothing to stop, or prevent, two to three people from walking out of the courtroom in tears and passing directly under the presentation of the photographs that the jurors were viewing. Such a display was extremely prejudicial to Clinton's case. Immediately after the sidebar where the trial court took steps to prevent such events from recurring, by having others leave the courtroom, the presentation continued. There was no curative instruction given to the jury to ignore what they had witnessed. *See State v. DeMastry*, 155 Ohio App. 3d 110, 127 (5th Dist. 2003), citing *State v. Franklin*, 62 Ohio St. 3d 118, 127

(1991) ("Juries are presumed to follow and obey the limiting instructions given them by the trial court."). Rather, the jurors were left with the powerful images of the victims' friends and family walking and crying directly beneath the photos of the crime scene. The trial court erred by failing to adequately address this situation.

D. The trial court erred during voir dire when it failed to: give a cautionary instruction to the venire concerning remarks made by Juror 363, conduct additional voir dire of seated jurors following Juror 363's comments, and conduct voir dire on the issue of race.

D.1 The trial court erred when it failed to give a cautionary instruction to the venire concerning the remarks made by Juror 363 during general voir dire.

The trial court erred when it failed to provide the venire in this case with a requested, and agreed to, cautionary instruction. Tr. 180. This cautionary instruction was to serve to rectify any prejudice to Clinton when Juror 363 stated in open court, no less than four separate times, that he thought Clinton "admitted guilty [sic]." Tr. 152-55. Although the juror that made these statements was ultimately excused, the rest of the venire was tainted by these statements made in open court. These remarks were especially prejudicial considering the fact that Clinton's arguably inculpatory statements made during his interview with Detective Wichman, which this juror was obviously referencing, were suppressed by the court due to a violation of *Miranda v. Arizona*, 384 U.S. 436 (1966).

Following these remarks, a bench conference was had, where trial counsel requested that the trial court give a cautionary instruction to the venire. Tr. 180. The trial court agreed to give this instruction (Tr. 182), however, this instruction was never given. *See DeMastry*, 155 Ohio App. 3d at 127, citing *Franklin*, 62 Ohio St. 3d at 127 ("Juries are presumed to follow and obey the limiting instructions given them by the trial court."). The parties had clearly agreed that these

statements were prejudicial, and, in turn, that the jury was in need of a cautionary instruction. Thus, the trial court erred by failing to give this cautionary instruction.

D.2 The trial court erred when it failed to conduct additional voir dire of seated jurors following Juror 363's comments during general voir dire.

"The obligation to impanel an impartial jury lies in the first instance with the trial judge." *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981). Despite the fact that Juror 363 stated, no less than four times on the record, that he thought Clinton had "admitted guilty [sic]," the trial court never required further voir dire of the jurors who heard these statements. Tr. 152-55. It is impossible to unring this bell once heard. "Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Rosales-Lopez*, 451 U.S. at 188. In fact, even if the trial court had given the above curative instruction, *see supra*, it would not have been enough. "'[There] are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure too vital to the defendant that the practical and human limitations of the jury cannot be ignored...'" *Parker v. Randolph*, 42 U.S. 62, 88 (1979), citing *Bruton v. United States*, 391 U.S. 123, 135-36 (1968). As such, the trial court erred in failing to conduct additional voir dire to ensure all jurors remained impartial.

D.3 The trial court erred when it failed to voir dire prospective jurors on the issue of race.

The entire purpose of voir dire is to ferret out those potential jurors who would not be fair and impartial. "If conducted properly, voir dire can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise. Voir dire provides a means of discovering actual or implied bias and a

firmer basis upon which the parties may exercise their peremptory challenges intelligently." *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 143-44 (1994).

"Questions on voir dire must be sufficient to identify prospective jurors who hold views that would prevent or substantially impair them from performing the duties required of jurors." *State v. Jackson*, 107 Ohio St. 3d 53, 64 (2005) (citing *Morgan v. Illinois*, 504 U.S. 719, 734-35 (1992)). And as this Court further stated, "the fact that defendant bears the burden of establishing juror partiality makes it all the more imperative that a defendant be entitled to meaningful examination at voir dire in order to elicit potential biases held by prospective jurors." *Id.* (internal citations omitted).

"Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). The Supreme Court has found that "particularly in capital cases...certain inquiries must be made to effectuate constitutional protections." *Morgan*, 504 U.S. at 730 (citing *to Turner v. Murray*, 476 U.S. 28, 36 (1986) and *Ham v. South Carolina*, 409 U.S. 524, 526-27 (1973)). "Without an adequate voir dire, the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Id.* at 188. It is also true that the "obligation to impanel an impartial jury lies in the first instance with the trial judge." *Id.* at 189.

The trial court failed to ensure Clinton's constitutional protections when it failed to question potential jurors on the issue of race during the voir dire of Clinton's capital trial, where a black defendant stood trial for the deaths of three white victims.

The issue of race was only brought up one time, by defense counsel, during general voir dire. Defense counsel simply stated that race was "not necessarily something that anyone really

likes to talk about a lot maybe," but that "sometimes that's a big issue in this country with some people, and sometimes it's no issue at all. And a lot of people have strong feelings one way or the other." Tr. 206. Counsel then asked the jurors whether race was an "issue" for any of them. *Id.* When none of the jurors spoke up, defense counsel simply accepted the lack of response as an indication that all of the jurors were perfectly fit for service. It was at this point, if not earlier, under the privacy of individual voir dire, that the trial court could, and should, have stepped in and elicited personal beliefs and feelings on race from the jurors to ensure that they were not simply refraining from answering defense counsel aloud because they did not wish to be singled out. The court did no such thing.

As such, the trial court acted unreasonably, and to Clinton's prejudice, when it failed to individually voir dire the jurors to uncover any racial biases.

E. The Defendant was prejudiced by these errors.

"The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But [the Supreme Court of the United States] has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny." *Estelle v. Williams*, 425 U.S. 501, 504 (1976). The State's use of "unduly prejudicial" evidence in a capital case violates the defendant's right to due process. *See Payne v. Tennessee*, 501 U.S. 808, 825 (1991).

The Equal Protection Clause of the Fourteenth Amendment protects against state action that impinges on fundamental rights. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). This protection extends to the right to a fair trial, which is a fundamental right guaranteed to all criminal defendants. *See Estelle*, 425 U.S. at 503 (citing *Drope v. Missouri*, 420 U.S. 162 (1975)).

It is beyond question that the trial court is a state actor. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991). In fact, the trial court is one of two state actors who participate in a criminal trial, the other being the prosecution. Despite both being representatives of the State, the trial court's and the prosecution's roles in a trial are markedly different. The trial court is not the capital defendant's adversary. Nor is the trial court an advocate for a particular penalty. Instead, it is the neutral arbiter. *Lakeside v. Oregon*, 435 U.S. 333, 341-42 (1978). "[T]he judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law." *Quercia v. United States*, 289 U.S. 466, 469 (1933).

For the reasons stated above, the trial court erred, to Clinton's prejudice, when it allowed misleading and prejudicial evidence and testimony, improperly overruled defense motions and objections, and conducted an inadequate voir dire. These errors resulted in biased jurors hearing evidence that they should not have been allowed to consider, and ultimately, Clinton's constitutional rights to a fair trial and due process were violated.

F. Conclusion

The trial court's errors and omissions mandate reversal of Clinton's convictions and sentence. The trial court failed to ensure that Clinton received a fair trial and reliable sentence. On direct appeal, constitutional error is harmless only if the prosecution proves it to be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 26 (1967). None of the above errors are harmless, particularly, when considered cumulatively. As such, the trial court's errors and omissions mandate reversal of Clinton's conviction and sentence.

Proposition of Law No. XVI

The cumulative errors of trial counsel in failing to fulfill a litany of duties and not functioning as counsel denies a criminal defendant the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution and Ohio Constitution, Article I, Sections 1, 2, 10 and 16.

Clinton's trial counsel provided ineffective assistance in myriad ways during his capital trial. As such, his rights as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution were violated.

A. Standard of review for ineffective assistance of counsel claims

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685–86 (1984). Where the procedure for sentencing in a capital case is similar to a trial, like Ohio's, "counsel's role in the proceeding is comparable to counsel's role at trial - to ensure that the adversarial testing process works to produce a just result under the standards governing decision." *Id.* at 687.

An ineffective assistance of counsel claim has two components: deficient performance and prejudice. *Id.* Regarding deficient performance, "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688. Courts consistently recognize that the prevailing professional norms of representation in death penalty cases are outlined in the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. *See Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 522 (2003); *Hamblin v. Mitchell*, 354 F.3d 482, 486 (6th Cir. 2003); *State v. Herring*, 2014 Ohio LEXIS 3074, ¶¶81-83 (2014).

To demonstrate prejudice, a defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The reasonable probability standard is lower than but-for causation or a showing that it's more-likely-than-not that counsel's error affected the outcome of the trial. *Id.* at 693 ("[W]e believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case.") The prejudice prong is satisfied if "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537.

Capital defendants also enjoy an Eighth and Fourteenth Amendment protection against incomplete mitigation investigation. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982), 110 (holding that the jury must be able to consider all mitigating evidence under the Eighth and Fourteenth Amendments). The Court's recent decision in *State v. Herring*, 2014 Ohio LEXIS 3074 ¶111 (2014), has made clear that: "Trial counsel's responsibility to ensure that an investigation was completed cannot be excused." *See also Porter v. McCollum*, 558 U.S. 30 (2009).

In addition to finding prejudice from individual deficiencies, the cumulative impact of counsel's errors and omissions must be assessed as well. *See State v. DeMarco*, 31 Ohio St. 3d 191 (1987); *Harris By & Through Ramseyer v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995).

B. Allegations of Ineffective Assistance of Counsel:

B.1 Failure to present a complete defense on Clinton's behalf through effective cross-examination of, and eliciting information from, State's witnesses

Counsel completely failed to put on evidence to support their case, by not pursuing record evidence that Heather Jackson and her children very possibly were murdered by drug traffickers who learned that she had recently entered into a confidential informant or "snitch" arrangement with the Sandusky Police Department. Instead, they abandoned the argument at the

first objection made by the State to cross-examination designed to advise the jurors of the details of the "snitch" arrangement. Tr. 419-20. With this theory of defense abandoned by his counsel, Clinton was deprived of the opportunity to argue that alternative suspects committed the murders, to his obvious prejudice. "[T]he adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." *United States v. Cronic*, 466 U.S. 648, 656 (1984).

Danielle Sorrell was the first State's witness in the capital trial accusing Curtis Clinton of three murders. Sorrell advised the jury that she had been Heather Jackson's best friend for about 13 years. Tr. 344. She also advised the jurors that Heather Jackson's world as it existed in September 2102, shortly before the murders, included a number of drug using male acquaintances, and that Sorrell had "lectured" Heather Jackson that these acquaintances were "a bad influence" on Heather Jackson. Tr. 406, 408-09, 417. Sorrell never mentioned Curtis Clinton's name. Indeed, no evidence of record placed Curtis Clinton among Heather Jackson's "bad influences" as to her association with drug abusers and/or drug traffickers. In fact, no evidence of record indicated that Curtis Clinton abused or sold drugs of any sort.

On cross-examination, Clinton's trial defense counsel *began* to explore Heather Jackson's relationship with drugs and drug traffickers in the days preceding her murder, but never finished this line of questioning. During cross-examination, Sorrell admitted that she was concerned for Jackson's safety after Jackson told police the source of the drugs that were found in Jackson's car during a traffic stop. Tr. 419. However, defense counsel then asked a question drawing an immediate State's objection that was sustained by the Court, via the following exchange:

Q. Okay. Now, did you – do you recall indicating to the police, when you talked to them, that you were – you had become very concerned recently about Heather?

A. (by Danielle Sorrell) Yes.

Q. Why was that?

A. Because she got pulled over.

Q. And –

A. Said some stuff to the cops.

Q. What do you mean?

A. Where she got the stuff that was in the car. Drugs.

Q. What stuff in the car?

A. Drugs.

MR. BAXTER: Objection.

THE COURT: Overruled.

BY MR. DIXON:

Q. It was your understanding – that's why you were concerned, right?

A. Yes.

Q. Because she had gotten stopped in the car, there was drugs found [*sic*], and your understanding is that she told the police the source of that?

A. Yes.

Q. Okay. Do you know who that was to be?

MR. BAXTER: Objection.

MS. BARYLSKI: Objection.

THE COURT: Sustained.

MR. DIXON: Just a moment, Your Honor.

THE COURT: Thank you.

MR. DIXON: *Nothing further, Your Honor.*

Tr. 419-420 (emphasis added). Rather than pursue questioning of Sorrell as to her knowledge about this crucial evidence pointing to the existence of alternate suspects, who would have had an obvious motivation to murder Heather Jackson and her children in revenge for her becoming a police informant, defense counsel simply abandoned this alternative theory of defense at this early point in the capital trial.

As seen in the trial court exchange above, the State failed to state any basis for its objections. The Court never stated a basis for sustaining the objection. And Clinton's trial counsel never asked that any basis for the Court's ruling should be stated for the record. Thus the testimony of Heather Jackson's best friend ended with Sorrell never advising the jury or the judge who she believed might have been motivated to commit these murders in revenge for Heather Jackson's recent decision to "snitch" on her drug suppliers.

The alternative suspect defense in play here did not depend on an answer as to who supplied Jackson with drugs before she and her children were murdered. The following lines of inquiry for *any* of the State's witnesses might have pointed to an alternative suspect's motivation to kill Heather Jackson and her children as revenge for the knowledge that she was serving as a "snitch" to the Sandusky Police Department.

- What type of drugs did Heather Jackson use in the days and weeks preceding her death?
- Did Heather Jackson ever advise Danielle Sorrell or other friends or family of death threats made against her after she entered a confidential informant relationship with the Sandusky Police Department? If so, what were the threats? Who made them?
- Had Heather Jackson told any friends or family that she regretted entering into the confidential informant arrangement, and/or why?

- Did the Sandusky Police Department disclose to BCI, as part of the murder investigation, that Heather Jackson was offered a confidential informant arrangement shortly before she was murdered? Did the BCI agent (Agent Hammond) who testified for the State know of this arrangement?

- Did Heather Jackson's family and friends fear for her life due to her association with drugs and drug traffickers?

- Did the Sandusky Police Department and/or BCI continue to investigate alternative suspects who may have committed the murders after they had arrested Curtis Clinton? And if so, did that investigation yield any results?

Thus, the jury needed to hear more from Danielle Sorrell and other State's witnesses, through unasked inquiries that could have been elicited by Clinton's defense counsel, to understand how Heather Jackson's world was inhabited by drugs and drug traffickers, and how her willingness to serve as a "snitch" may have resulted in the death of her and her children.

Counsel abandoned the alternative suspect theory that the first State's witness (and possibly every witness thereafter) could have developed further, to the obvious prejudice of Clinton. Thus, Clinton's counsel ineffectively abandoned an entire avenue of defense that could have a reasonably probability that at least one of the jurors in Clinton's case would have struck a different balance and acquitted Clinton of the murders. Counsel's failure to fully pursue this line of defense failed Clinton. "If no actual 'Assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated." *Cronic*, 466 U.S. at 654.

B.2 Failure to ensure that Clinton's waiver of the presentation of mitigating evidence was knowing and voluntary

As discussed in Proposition of Law No. I, the trial court failed to conduct an on-the-record inquiry of Clinton before allowing him to waive the presentation of mitigation during his capital trial. As a result, Clinton made an unknowing and involuntary waiver of the presentation of mitigating evidence. Like the trial court, trial counsel similarly failed Clinton. Trial counsel

performed ineffectively in myriad ways when they failed: 1) to ensure that their client understood, and could explain on the record, the ramifications of waiving the presentation of mitigation; 2) to ask the trial court to conduct the necessary inquiry pursuant to *State v. Ashworth*, 85 Ohio St. 3d 56 (1999); 3) to ensure that their client understood the appellate process; and, 4) to ensure that their client was making a voluntary and knowing waiver, not a waiver based upon fear and intimidation.

It is clear that Clinton was never asked one question on the record to ensure that his waiver of the presentation of mitigation was knowing and voluntary. It is similarly clear that counsel never asked the trial court to conduct this necessary on-the-record inquiry of Clinton before his right to present mitigation was waived. Counsel's failures to either ensure, on the record, that their client's waiver was knowing and voluntary themselves, or to ask the trial court to conduct an inquiry of Clinton, were clearly prejudicial. *See* Proposition of Law No. I for further detail and for a showing of prejudice.

Likewise, trial counsel failed Clinton when they did not ensure that Clinton understood the appellate process and the fact that there is slim likelihood of success on appeal. Knowledge of the appellate scheme, as well as the slim likelihood of success, was essential to a voluntary and ***knowing*** waiver. Clinton made several remarks in his unsworn statement indicative of his confusion and/or lack of understanding of the process. *See* Tr. 83 ("I'm going to be okay. I still have options. It's not over for me. . . He'll [the Judge will] see me again. I get an appeal." and Tr. 91 ("Whatever decision you make today is not definite. It's not. . .Coming back. I am."). These statements signify that Clinton was absolutely ***sure*** that he would get back into court and see the trial judge again. He repeated that he was "coming back" multiple times. *Id.* Trial

counsel were ineffective for failing to ensure that Clinton understood how appeals are designed, and, in addition, that the chances of success on appeal are slim.

Trial counsel again failed their client when they allowed Nick Fee's presence in the courtroom to intimidate the jurors as well as their client. *See* Ind. V.D. Tr. 726; *see also* section B.17, on this Proposition of Law, *infra*. This intimidation, and the fear it invoked in Clinton, was particularly relevant when it came to Clinton making a voluntary waiver of the presentation of mitigation. Counsel indicated on the record, during a hearing between phases, that part of the reason that Clinton was waiving mitigation was due to the fact that he knew that he knew that he would be safer on death row. Nov. 7, 2013 Mtn. Hear. Tr. 6. In fact, Clinton knew that he would be safer on death row because Nick Fee and "his buddies" could not get to him there. As this all played out in sentencing, Fee threatened Clinton stating, "They saved your life by putting your worthless ass on death row . . . Be glad you're on death row and my buddies can't find you. . ." Sent. Tr. 35-36. Clinton was fearful for his life; his trial counsel stated as much on the record. *See* Nov. 7, 2013 Mtn. Hear. Tr. 6. A waiver made based on fear and intimidation cannot be voluntary. It was ineffective of trial counsel when they failed to ensure that Clinton's waiver was not made based upon fear and coercion, but instead, made voluntarily.

Instead of the above, trial counsel, rather flippantly, "waived" the right to present mitigation for their client at a hearing held between phases, when Clinton was absent. *See* Nov. 7, 2013 Mtn. Hear. Trial counsel, without delving into much concerning the conversations that they had had with Clinton, explained to the court that they believed that Clinton had given them a "voluntary waiver." *Id.* 4-7. Because Clinton was not present at this hearing, Clinton had no opportunity to confirm or deny what trial counsel was stating on the record, and the trial court could ask no questions of Clinton to ensure that this decision was being made knowingly and

voluntarily. The trial court could not explain the appellate process nor ask Clinton whether or not Fee's intimidation affected his reasoning to waive. In the end, not one question was asked of Clinton on the record to ensure that his counsel accurately conveyed his decision, his reasoning, and his understanding of the rights that he was waiving to ensure that the waiver was made both "knowingly and voluntarily."

Clinton's counsel failed him. They failed to ask the trial court to conduct an on-the-record inquiry, and they failed to ensure that Clinton understood the process of trial and appeals and the importance of presenting mitigation. *See* ABA Guideline 1.1 (B). Prejudice should be presumed. In the alternative, Clinton can prove prejudice, as there was a wealth of mitigating evidence available for presentation. *See* Proffered Defense Exs. A-P. *See also* Proposition of Law Nos. I and XIX for a further discussion of prejudice, and for an explanation of what evidence, in fact, was available for presentation had counsel not waived the right to present mitigation for their client.

B.3 Failure to ensure Clinton's presence at all critical proceedings

In Proposition of law No. II, Clinton's constitutional right to be present at all critical proceedings against him was raised. Trial counsel were ineffective to Clinton's prejudice when they failed to ensure Clinton's presence at these hearings. For the same reasons as stated in Section B.2 of this Proposition of Law, Clinton was prejudiced due to his counsel's waiver of his presence at the November 7, 2013, hearing held between phases. In addition, for brevity, Clinton incorporates Proposition of Law No. II here for cites to the record and to argue prejudice.

B.4 Failure to object to unqualified "expert" witness testimony

Counsel for Clinton failed to adequately challenge the State's case and allowed an unqualified State's witness to testify to matters outside of his realm of knowledge and expertise.

See State v. Jackson, 92 Ohio St. 3d 436, 448 (2001). *See Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 589 (1993); *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 147 (1999).

Although defense counsel objected to the entirety of retired Wood County Detective Michael Clark's testimony on the basis that his testimony constituted inadmissible "other acts" testimony, they failed to object to portions of his testimony on the basis that he was unqualified to render a medical opinion as to Misty Keckler's cause of death or whether or not ligatures were applied before or after death. The details of this error are further outlined in Proposition of Law No. XI, and are incorporated herein.

Detective Clark's testimony began as that of a detective at a crime scene. However, Detective Clark then strayed into areas requiring medical expertise, yet no forensic pathologist had testified to these facts, and he was not a forensic pathologist by trade. For instance, Detective Clark went on to tell the jurors that he believed ligatures had been attached to Keckler's hands and legs *after* she had died, and that in his opinion, Keckler "had passed away before the ligatures were put on her." Tr. 957. Detective Clark further opined to Clinton's jury that Keckler was "already dead" before her body was placed in a bathtub. Tr. 957-59.

Clinton's attorneys were unreasonable in their failure to challenge the unreliable and prejudicial "expert" testimony of a witness who was not qualified as an expert. "Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009). Once Detective Clark strayed into areas going beyond his limited realm of knowledge, trial counsel erred in not objecting and/or requesting to strike Clark's unqualified testimony regarding Keckler's cause of death

Clinton was further prejudiced by Detective Clark's testimony, as shown by the State's reliance on the testimony at trial and in closing arguments. The State used Detective Clark's opinions as the foundation to try to convince the capital jury that the deaths of Misty Keckler and Heather Jackson were "signature crimes" by Clinton. Yet Detective Clark was *never* qualified to share his opinions regarding forensic pathology science with Clinton's jury.

Clinton's attorneys were unable to challenge the use by the prosecutor of the facts and circumstances surrounding the death of Misty Keckler and its application to this case. Both the Rules of Evidence and case law require that an expert witness be qualified, and his testimony must be relevant, reliable, and "to a reasonable degree of scientific or medical certainty." *Jackson*, 92 Ohio St. 3d at 448. *See also* Ohio R. Evid. 702; *Daubert,* 509 U.S. at 589. Clinton was prejudiced by his counsel's failure to adequately challenge the State's case and this unqualified "expert" witness.

B.5 Failure to challenge seated jurors, who demonstrated bias

As argued in Proposition of Law No. VII, "Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). It is also true that the "obligation to impanel an impartial jury lies in the first instance with the trial judge." *Id.* at 189. At Clinton's capital trial, however, the trial court played a limited role in the voir dire questioning of prospective jurors. Instead, the trial court allowed counsel for the prosecution and the defense to subject the venire to questions in both group and individual voir dire. Additionally, the potential jurors completed a juror questionnaire, which counsel was to utilize in probing the juror's beliefs, backgrounds, and connections.

During voir dire, counsel allowed eight biased jurors with impermissible connections to police, prosecutors, witnesses, and other jurors to be seated on Clinton's jury when counsel failed to challenge these jurors for cause. *See* Proposition of Law No. VII. The presence of these jurors on Clinton's sentencing jury ensured a death verdict. *See Quintero v. Bell*, 368 F.3d 892 (6th Cir. 2004); *State v. Treesh*, 90 Ohio St. 3d 460 (2001). Three jurors were friends with, or closely related to, law enforcement officers, creating a likelihood that they would assign undeserving weight to police evidence and testimony. *See* Proposition of Law No. VII. Two jurors were neighbors, creating the risk that they would be unable to deliberate openly, without fear of the lingering effects of conflict in their day-to-day lives. *Id.* Two jurors were former classmates and Facebook friends, creating the risk that they, too, would be unable to deliberate without allowing preconceived notions of one another affect their judgment. *Id.* Another juror admitted not only to a working supervisor-supervisee relationship to a witness, but also a friendship with an assistant prosecutor well-liked by the court and the prosecutor at Clinton's trial. *Id.* These relationships created the risk that this juror would impermissibly assign more or less weight to the testimony of the familiar witness and to the prosecution in general.

Despite the strong possibility of inevitable bias in each of these scenarios, defense counsel only barely inquired into these connections to various trial players during voir dire. Because of this inadequate voir dire performance, and because defense counsel failed to use peremptory challenges to remove any of these jurors from service, or to challenge them for cause, these biased jurors were each permitted to sit on Clinton's jury and ultimately to sentence him to death.

Trial counsel's ineffective performance throughout individual and general voir dire resulted in an overwhelmingly biased jury. Counsel could have, and should have, acted to

determine whether these jurors' relationships warranted a challenge for cause or a peremptory strike. Counsel's failures prejudiced Clinton by creating a reasonable likelihood that at least one juror might not have fairly considered testimony and evidence presented and may have deliberated unfairly.

B.6 Failure to effectively voir dire on race

Clinton is a black man who was on trial for killing a white woman and two white children. As such, his attorneys were obligated to uncover any racial biases in the potential jurors.

As discussed in Proposition of Law No. XV, Section D.3, the trial court failed to ensure that Clinton's capital jury was comprised of persons free of racial biases. Clinton's counsel, likewise, unreasonably failed to adequately voir dire the jurors on race, despite the fact that the Supreme Court has found that "particularly in capital cases ... certain inquiries must be made to effectuate constitutional protections." *Morgan v. Illinois*, 504 U.S. 719, 730 (1992) (citing *Turner v. Murray*, 476 U.S. 28, 36 (1986) and *Ham v. South Carolina*, 409 U.S. 524, 526-527 (1973)). Counsel clearly recognized the possibility of racial biases and the problems that would cause, because, after neglecting to voir dire whatsoever during individual voir dire, they asked the jurors collectively, during general voir dire, whether race was "any kind of issue for anyone." Tr. 206. None of the jurors responded in the affirmative or negative. *Id.* Despite this, defense counsel in no way specifically questioned the jurors regarding their personal feelings on race.

The entire purpose of voir dire is to ferret out those potential jurors who would not be fair and impartial. "If conducted properly, voir dire can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise. Voir dire provides a means of discovering actual or implied bias and a

firmer basis upon which the parties may exercise their peremptory challenges intelligently." *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 143-44 (1994).

"Questions on voir dire must be sufficient to identify prospective jurors who hold views that would prevent or substantially impair them from performing the duties required of jurors." *State v. Jackson*, 107 Ohio St. 3d 53, 64 (2005) (citing *Morgan*, 504 U.S. at 734-35). And as this Court further stated, "the fact that defendant bears the burden of establishing juror partiality makes it all the more imperative that a defendant be entitled to meaningful examination at voir dire in order to elicit potential biases held by prospective jurors." *Id.* (internal citations omitted).

Clinton's trial counsel acted unreasonably and to his prejudice when they made a single comment regarding race during general voir dire to which no single juror responded specifically. From this single cursory statement about the importance of race during trials, the defense did not garner any sentiments from the jurors who would ultimately decide Clinton's fate. Defense counsel should have, in the first instance, questioned jurors about race during this individual voir dire, when the jurors would have been more likely to give candid responses, outside of the presence and intimidation of other jurors. While they apparently were aware of the danger of race and its impact upon criminal trials, they neglected to do so.

Because of the multiple failures of defense counsel here, Clinton was prejudiced. The jurors who sat upon Clinton's jury and ultimately sentenced him to death were never personally questioned regarding their feelings on racism and race in general. The possibility that racial bias thereby crept into the panel and their deliberations cannot be ignored. As a result, Clinton must be granted a new trial in which the precautions of fairness are properly taken.

B.7 Failure to follow-up on the trial court's failure to give a cautionary instruction to the venire concerning the remarks made by Juror 363 during general voir dire

As outlined in Proposition of Law No. XV, Section D.1, the trial court erred when it failed to provide the venire in this case with a requested, and agreed to, cautionary instruction. Tr. 180. This cautionary instruction was to serve to rectify any prejudice to Clinton when Juror 363 stated in open court, no less than four separate times, that he thought Clinton "admitted guilty [sic]." Tr. 152-55. Although the juror that made these statements was ultimately excused, the rest of the venire was tainted by these statements made in open court. Especially considering the fact that Clinton's arguably inculpatory statements made during his interview with Detective Wichman, which this juror was obviously referencing, were suppressed by the court due to a violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), these remarks indicating that Clinton had admitted guilt (four separate times) were even more prejudicial. *See* Tr. 152-55.

Following these remarks, a bench conference was had, where trial counsel requested that the trial court give a cautionary instruction to the venire. Tr. 180. The trial court and prosecution agreed to this instruction, however, this instruction was never provided to the venire, or to the jurors who eventual sat in judgment of Clinton. Failing to follow-up to ensure that this instruction was actually provided to the venire was ineffective.

This failure was also prejudicial; all parties, including the prosecution had agreed to this cautionary instruction, indicating that all parties deemed these statements made in open court to have been problematic, and, in turn, prejudicial to Clinton. Yet, no cautionary instruction was given. Thus, the prejudice to Clinton was never rectified; that prejudice lingered through trial and in the minds of the jurors that ultimately sentenced Clinton to death.

B.8 Failure to request additional voir dire of seated jurors following Juror 363's comments during general voir dire

Although the duty to ensure that an impartial jury is empaneled lies first with the trial judge (*Rosales-Lopez v. U.S.*, 451 U.S. 182, 189 (1981)), as stated above, defense counsel cannot just sit back and do nothing to assist in effectuating their client's right to a fair trial in front of an impartial, unbiased tribunal. Counsel performed deficiently to Clinton's prejudice when they failed to request additional voir dire of the seated jurors to ensure that no prejudice had ensued when Juror 363 stated no less than four times on the record that he thought Clinton had "admitted guilty [sic]." Tr. 152-55.

Instead of requesting additional voir dire, trial counsel requested a cautionary instruction that was never provided. *See* Section B.7 of this Proposition of Law. However, even if this cautionary instruction had been given, the requested instruction was inadequate to cure the prejudice to Clinton. It is impossible to unring this bell once heard. Once the entire venire had been tainted when they were made aware that Clinton potentially had "admitted guilty [sic]", Clinton's counsel had the duty to request adequate voir dire of each of the seated jurors because, "[w]ithout an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Rosales-Lopez*, 451 U.S. at 188.

In addition, this failure prejudiced Clinton. *See* Section B.7 of this Proposition of Law for arguments as to prejudice. *See also* Proposition of Law XV, Section D.2.

Failure to request additional voir dire after the "admitted guilt" of their client had been announced in front of the ***entire*** panel of jurors was clearly ineffective assistance.

B.9 Failure to effectively argue for a change of venue

As outlined in Proposition of Law No. VI, the trial court should have granted counsel's motion for change of venue due to pervasive pre-trial publicity. To the extent that counsel's failure to attach articles and other examples of the pervasive pre-trial publicity and/or to reargue the motion after voir dire potentially waived error, they performed deficiently to Clinton's prejudice. For brevity, Clinton incorporates Proposition of Law No. VI here for cites to the record and to argue prejudice.

B.10 Failure to hire a forensic pathologist and/or a DNA expert

Clinton's counsel did not present any expert testimony refuting the State's case. Clinton's case, however, contained unusual physical evidence, i.e., the presence of unknown DNA on each of the three victims, various hairs, cigarette butts and other materials that were collected, yet remain untested, as well as latent fingerprint lifts taken from the unlocked window sill of the Jackson home. In addition, the coroner made biased and speculative statements, and additionally, left open at trial when the time of death of the Jackson family occurred. All of these areas could have been pointed out and contradicted had trial counsel utilized expert testimony at Clinton's trial. Further, it is clear that several jurors had questions concerning the time of death (annotated "TOD" in the juror notes) and wanted to know more. *See* Proffered Juror Notes, Filed under Seal.

Counsel has an established duty to "to conduct a thorough and independent investigation relating to the issues of both guilt and penalty." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7(A). Trial counsel also has a duty to subject the State's case to "meaningful adversarial testing." *United States v. Cronic* 466 U.S. 648, 656 (1984).

Expert assistance was both available and required to comport with this established duty. Capital defendants are entitled to the assistance of experts where necessary to prepare an effective defense. *State v. Mason*, 82 Ohio St. 3d 144, 149 (1998) (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985)). This Court recognized in *Mason* that the Due Process Clause might require the appointment of other experts beyond psychologists. *Id.* *Mason* requires that the defendant make a "particularized showing of two factors." *Id.* at 150. First, the defendant must show that the expert would aid his defense. *Id.* Second, the defendant must show that the denial of the expert would result in an unfair trial. *Id.*

A DNA expert coupled with a forensic pathologist could have testified as to the unknown DNA, the untested evidence, the time of death, and possibly, other factors. Considering that Clinton's primary defense was that he did not commit these homicides, establishing that someone else could have committed these murders was absolutely critical. Without expert assistance, counsel was unable to establish these important facts and unable to render effective assistance of counsel.

B.11 Failure to object to prejudicial, irrelevant, and cumulative photos

Clinton's trial counsel performed ineffectively when they failed to object to prejudicial, irrelevant, and cumulative photographs being entered into evidence. As outlined in Proposition of Law No. IX, the admission of such photographs was error. To the extent trial counsel failed to preserve said error and by silence, assented to the admission of prejudicial evidence, they were ineffective. Further, to the extent trial counsel affirmatively consented to the admission of these prejudicial photographs, they were clearly ineffective to Clinton's prejudice.

B.12 Failure to assist Clinton in the preparation of his unsworn statement

It is clear on the record that Clinton's trial counsel did not assist Clinton in preparing his unsworn statement. *See* Nov. 7, 2013 Mtn. Hear. Tr. 12. Trial counsel as well as the court joked about the fact that Clinton's unsworn statement would be a "surprise" to both of them. *Id.* Trial counsel then related that his best guess was that Clinton would talk about residual doubt, but admitted that he did not really know. *Id.* The court had no duty to Clinton to assist him in preparing his unsworn statement, however trial counsel did. Trial counsel should have been well aware of the topics that Clinton wanted to cover, and should have assisted Clinton in preparing a succinct, poignant statement. Failing to do so was ineffective.

Clinton was further prejudiced by this failure. The topics of conversation that Clinton raised were not appropriate for the mitigation phase. *See* Mit. Tr. 28-91. Clinton did not take responsibility for the crime, and he never once talked about his history or background as reason to mitigate the penalty here. *Id.* Those topics would have been relevant to the jury's consideration of penalty, yet none were discussed. *See* R.C. § 2929.04(B). In fact, the vast majority of Clinton's unsworn testimony was spent rehashing the first phase and arguing with the jurors about their first phase verdict; this clearly would not, and did not, curry much sympathy for him as to penalty. The trial court agreed that nothing of relevance to mitigation was discussed by Clinton when the court did not rely on, or even point to, anything mitigating in Clinton's unsworn statement in its R.C. § 2929.03(F) Sentencing Opinion. *See* R.C. § 2929.03(F) Trial Court Opinion (no mention of ***any*** mitigating factors worthy of consideration).

Had Clinton wanted to speak to the jurors about any doubts[14] they should have, and challenge the jury on the evidence, as presented in the trial phase, he should have testified in the

[14] It is clear that residual doubt is not a mitigating factor in Ohio. *See State v. Mcguire*, 80 Ohio St. 3d 390 (1997).

defense case-in-chief, not through unsworn testimony during the mitigation phase. *See also* Section B. 13 of this Proposition of Law. Failing to present anything of mitigating value during the mitigation phase prejudiced Clinton. Had his counsel assisted in preparing this statement, Clinton could have spoken to the jurors about topics appropriate for consideration in the mitigation phase.

B.13 Failure to present Clinton's testimony in the defense case-in-chief

Clinton had an absolute right to testify on his own behalf. *State v. Bey*, 85 Ohio St. 3d 487, 499 (1999) ("Generally, the defendant's right to testify is regarded both as a fundamental and a personal right that is waivable only by an accused."). Here, Clinton's counsel was ineffective when they failed to present Clinton's testimony in the defense case-in-chief. As discussed in Section B.12 of this Proposition of Law, the basis of, and facts raised in, Clinton's unsworn statement would have been more appropriately presented during the first phase, as what Clinton argued dealt solely with rehashing the evidence, as presented during the first phase of the trial.

In addition, Clinton's primary defense was that he did not commit this crime. Defense counsel attempted to lay the groundwork that reasonable doubt existed as to his guilt, although they did not, as discussed above in Section B.1 of this Proposition of Law, present a complete defense. A part of that failure included failing to present testimony from Clinton, himself. Testimony from Clinton indicating that he did not, in fact, kill Heather Jackson and her children, would have gone a long way to assist in that defense. Failing to have Clinton testify, in essence, deprived Clinton of his due process "right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

Clinton's counsel's failure to present his testimony completely deprived Clinton of any realistic opportunity to defend against the State's accusations and as such, their performance was ineffective.

B.14 Failure to object to the admission of Clinton's involuntary statement

A portion of Clinton's interview with Detective Wichman was suppressed due to a violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). However, a large portion of this interview was still played for the jury, and entered as evidence against Clinton at his capital trial. Trial counsel should have objected to the admission of this statement because it was involuntary under the totality of circumstances. For brevity, Clinton incorporates Proposition of Law No. X here for cites to the record and to argue prejudice.

B.15 Failure to object to the admission of Clinton's phone call with his mother

As discussed in Proposition of Law No. XV, Section A.4, Clinton's phone call with his mother was overly vague and prejudicial, and thus, should not have been admissible evidence against him pursuant to Ohio R. Evid. 403. As such, it was ineffective to Clinton's prejudice when trial counsel failed to challenge the admission of this phone call for use by the prosecution at Clinton's capital trial. For brevity, Clinton incorporates Proposition of Law No. XV, Section A.4 here for cites to the record and to argue prejudice.

B.16 Failure to request voir dire of the spectators who could have overheard attorney-client conversations through the closed circuit video feed that was streaming during the first day of Clinton's trial

The attorney-client privilege is one of the most fundamental aspects of the attorney-client relationship. "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law...its purpose is to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interests

in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (internal citations omitted).

As argued in Proposition of Law No. XIII, the trial court erred in failing to ensure that no violation of the attorney-client privilege occurred when the closed-circuit video feed was broadcasting the conversations between defense counsel and their client to another courtroom where overflow spectators could watch the proceedings. Tr. 19, 176. When brought to the court's attention, the feed was terminated. *Id.* at 179-80. Prosecutor Barylski assured defense counsel that nobody in the other room had heard anything that defense counsel had said, however despite those assurances, it is impossible to know who heard what absent a further inquiry by the trial court. Defense counsel failed their client when they did not request that the trial court inquire further of these spectators. Due to the strong possibility that at least a portion of their attorney-client communications had been overheard by spectators in the other courtroom, defense counsel was ineffective when they failed to protect their client as well as the attorney-client privilege.

B.17. Failure to object to the continuing intimidating presence of Nick Fee when it was prejudicial to jurors

As discussed in Proposition of Law No. XII, Nick Fee, Heather Jackson's brother, was reprimanded during voir dire regarding the fact that he was glaring at the defendant. Defense counsel stated, "We have a concern of, they figure out who he is and they see – you know, it's understandable, his disdain for the accused, but, obviously, that's not something we want the jurors to pick up." Ind. V.D. 726. Later, counsel again explained to the court that "Mr. Fee was staring at [Clinton] and glaring at him. It's been going on the whole time. And he was worried that prospective jurors would see that, would pick up on that." Ind. V.D. 810-12. Counsel were

clearly aware of Fee's prejudicial presence in the courtroom, yet this was the last they spoke of it on the record.

As things unraveled in the courtroom, it is apparent that Fee's presence, and the prejudice to Clinton's jury, did not end during voir dire. During a hearing between phases, defense counsel indicated on the record that part of the reason that Clinton decided to waive mitigation was due to the fact that he knew that he would be safer on death row. Nov. 7, 2013 Mtn. Hear. Tr. 6. In fact, Clinton knew that he would be safer on death row because Nick Fee and "his buddies" could not get to him there. At the sentencing hearing, Fee threatened Clinton stating, "They saved your life by putting your worthless ass on death row . . . Be glad you're on death row and my buddies can't find you . . ." Sent. Tr. 35-36. Defense counsel should not have acquiesced and allowed Fee's presence to taint Clinton's trial. Fee's constant glaring and the impact it would have on the jurors cannot be understated. Defense counsel had the affirmative duty to bring to the court's attention the ongoing prejudicial impact that Fee's presence could have on Clinton's jurors. Failure to do so was ineffective to Clinton's prejudice.

B.18 Failure to make a sufficient argument that the trial court should have dismissed the rape count and specification regarding Celina Jackson pursuant to Criminal Rule 29

As argued in Proposition of Law No. XV, B.3, the trial court erred when it overruled defense counsel's motion pursuant to Criminal Rule 29. Tr. 1149. Regardless of the fact that the trial court should have granted this motion based upon the on-the-record evidence submitted at trial, defense counsel had a duty to make a sufficient argument to the Court so that the court could make the requisite determination. Here, defense counsel could have, and should have, presented the argument now presented in Proposition of Law No. XX to effectively challenge Clinton's conviction of rape as to Celina Jackson, and attendant specifications related to that

rape. Clinton was prejudiced by his counsel's failures, as there is a reasonable probability that the trial court may have, in fact, rendered a different decision had this motion been articulately prepared and delivered.

B.19 Failure to, in the alternative, put on mitigating evidence during the mitigation portion of Clinton's trial

Because Clinton did not actually waive the presentation of mitigating evidence in this case (*see* Proposition of Law No. I), Clinton's trial counsel were ineffective when they failed to present the available and compelling evidence that they were apparently ready to present. *See* Proffered Defense Exhibits A-P. Tr. 123-25. *See also* Proposition of Law No. XIX for a summary of that evidence that was available.

There was a wealth of mitigating evidence available to present. Clinton's childhood was brutal and horrific. He suffered the worst abuse at the hands of his own father. Proffered Defense Exhibits A, C, D, & N. For years, Clinton and his siblings were sexually and physically abused by their father and neglected by their stepmother. *Id.* For instance, Clinton's sister, Doris Baccus, would have testified concerning Clinton's upbringing. Doris would have reported that their father began physically, emotionally, and sexually abusing her, Clinton, and their other siblings as soon as they moved in with him and his new wife Andria. Proffered Defense Exhibit C. Doris believed their father forced himself on the boys as well. *Id.* As Doris could have testified, Clinton's father would routinely force Clinton to have sex with his step-sister Tonya. *Id.* Doris said that Curtis always got the worst beatings as well, "he got the worst of everything." *Id.* Often these beatings occurred for no apparent reason. *Id.* Clinton's father would whip him with anything available. *Id.*

Clinton's brother, mother, aunt, as well as other extended family and friends would have corroborated this testimony and would have exposed the "monster" who raised Curtis Clinton to

the jury, and would have revealed the horrific background Clinton survived. *See* Proffered Defense Exhibits A-P. Children Services records would have further corroborated the abuse that was taking pace in the Clinton home. Exhibit N. Moreover use of experts, such as a psychologist and/or neuropsychologist, would have assisted the defense in explaining how Clinton's history and mental status factored in to the person that he had become. Information from experts would have been of critical importance in the mitigation phase of Clinton's trial.

Had information like the above been presented at the mitigation phase of Clinton's trial, a reasonable likelihood exists that at least one juror would have voted for a life sentence. *State v. Brooks*, 75 Ohio St. 3d 148, 162 (1996). *See also State v. Herring*, 2014 Ohio LEXIS 3074 (2014).

B.20 Failure to know the mitigation theory (or lack of one) prior to voir dire

As has been made clear by the Court's recent decision in *State v. Herring*, 2014 Ohio LEXIS 3074 (2014), trial counsel has the affirmative duty to ensure a complete investigation is conducted before making any type of strategic decision as to what should, or should not, be presented. Further, the ABA Guidelines, which are "well-defined norms" of the profession, require that all investigation, and strategic decision making, be conducted prior to voir dire so that trial counsel can choos[e] a jury most favorable to the theories of mitigation that will be presented." *See id.*; *see also* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Commentary to Guideline 10.10.2 (2003)

Here, counsel for the defense indicated to potential jurors during voir dire that mitigating evidence would indeed be presented. Counsel asked various questions of the venire concerning what types of evidence they would want to hear, what they would consider, and what would weigh heavily in their minds. *See generally* Ind. V.D. In the end, though, counsel waived the

right to the presentation of mitigating evidence for Clinton. *See* Nov. 7, 2013, Mtn. Hear. *See, also*, Propositions of Law I and II. Either trial counsel was aware that Clinton wished to waive the presentation of mitigation prior to voir dire, and still voir dired the jury based upon the thought that Clinton's mitigation would be presented, or, in the alternative, trial counsel was unaware ahead of the trial phase that Clinton apparently wanted to waive mitigating evidence. In either event, trial counsel were ineffective. If counsel was aware of Clinton's apparent desire to waive the presentation of mitigation, then voir dire should have been structured differently. Indeed, counsel could have asked questions indicative of the lack of mitigation and the effect that would have on the potential jurors. If counsel was not aware of Clinton's apparent feelings regarding this waiver, then they failed in their duty to Clinton to vet these issues with Clinton before the trial phase had begun.

Further, these failures, alone, or together, prejudiced Clinton, as there was a wealth of mitigating evidence to present. *See* Section B.18 of this Proposition of Law as well as Proposition of Law XIX for more details on the specific mitigation that was available for presentation. Had compelling information, such as what was available to be presented at the mitigation phase of Clinton's trial, been presented, a reasonable likelihood exists that at least one juror would have voted for a life sentence. *State v. Brooks*, 75 Ohio St. 3d 148, 162 (1996). *See also State v. Herring*, 2014 Ohio LEXIS 3074 (2014).

B.21 Failure to challenge the prosecutor's use of a peremptory challenge on one of two African-Americans in Clinton's jury pool

As explained in Proposition of Law XIV, the trial court violated Clinton's rights under the Ohio and United States Constitutions when the court failed to engage in the analysis required by *Batson*. *Coombs v. Diguglielmo*, 616 F.3d 255, 262 (3rd Cir. 2010). For the same reasons stated in that proposition of law, Clinton's trial counsel were likewise deficient when they failed

to challenge the prosecutor's alleged race-neutral reason for challenging Juror 255. Juror 255 stated numerous times that she could be fair to the State of Ohio. Tr. 221-24. Yet, instead of requiring that the prosecution defend their reason offered to exclude Juror 255 from jury service, defense counsel immediately agreed with their reasoning. Tr. 229. This was deficient to Clinton's prejudice.

B.22 Failure to challenge the inaccurate captions attached to the video of Clinton's interview with Detective Wichman

In Proposition of Law XV, it is argued that the trial court erred when it failed to ensure the accuracy of the captions that were viewable while Clinton's police interview was played to the jury. Defense counsel raised this issue to the trial court, and the court, in turn, agreed to give a cautionary instruction that the jurors were to "rely on what you hear over what you read." Tr. 838-39. However, because this cautionary instruction did nothing to rectify the "substantive" inaccuracies (*see* Tr. 829-36), trial counsel was ineffective for acquiescing and accepting this "remedy" that did nothing to actually remedy the problem with the captions. For brevity, Clinton incorporates Proposition of Law No. XV, Section A.5 here for cites to the record and to argue prejudice.

B.23 Failure to object to speculative, biased, and prejudicial testimony of the coroner, Dr. Scala-Barnett

As outlined in Proposition of Law No. IX and XVII, it was error for the trial court to permit, and the prosecutor to present, prejudicial photographs of the dead children, a close-up photo of Celina Jackson's vagina, a photo of a child's anus that was completely unrelated to the case, and repetitive pictures of the deceased, all of which constituted inflammatory victim impact evidence, and all of which is improper at the trial phase. Defense counsel failed to object to the

admission of all of these pieces of evidence, to Clinton's prejudice. For brevity, see the fore-mentioned propositions of law for cites to the record and to argue prejudice.

The coroner also made prejudicial, biased comments during her testimony. *See* Proposition of Law No. XV, Section A.1. The coroner referred to Wayne Jackson, Jr.'s "froggy blanket" and "jammies" and speculated on the fact that she assumed Celina Jackson had been sexually assaulted, in part, due to the way her underwear was positioned when she was found. Tr. 1110-11, 1124-35. These comments and conclusions showed bias and were speculative and unfounded. Trial counsel should have objected to this prejudicial and biased testimony.

In general, defense counsel gave the coroner, and thus, the State, a pass in this case when they failed to object to the above and when the failed to ask even one question of the coroner on cross-examination. One such inquiry that could have been made would have been to ask Dr. Scala-Barnett about the time of death of the three victims, as no time of death was established during direct exam. Any drug trafficker, or other interested person, seeking revenge could have entered the residence through the window on the west side of the house, just as easily as Danielle Sorrell testified she might have done, had she so chosen. Tr. 400, 404, 414, 415, and 625. That window was not within view of the Firelands Hospital security camera. *See* State's Exhibit 62.

Defense counsel's failure to object here failed to subject the State's case to meaningful adversarial testing and was thus ineffective.

B.24 Failure to object to irrelevant and improper victim impact testimony

As discussed in Proposition of Laws XVII and XV, the prosecution introduced victim impact evidence through several State's witnesses. Only some of these instances were admitted over defense objections. Specifically, victim impact evidence admitted through Detective Ken Nixon concerning E.S. was admitted absent such an objection. As victim impact evidence is not

allowed and has the very real possibility to taint a capital trial (*see State v. Fautenberry*, 72 Ohio St. 3d 435, 440 (1995); *State v. Allard*, 75 Ohio St. 3d 482, 499 (1996)), defense counsel were ineffective to Clinton's prejudice when they failed to object to the admission of this testimony. *See* Proposition of Law XVII.

B.25 Failure to argue that the trial court should have dismissed the rape counts regarding E.S. pursuant to Criminal Rule 29

When trial counsel made their Motion pursuant to Criminal Rule 29, they solely raised error as to the rape of Celina Jackson; this was denied. Tr. 1149. However, defense counsel could have, and should have, also presented the argument now presented in Proposition of Law No. XX to effectively challenge Clinton's two conviction of rapes as to E.S. Clinton was prejudiced by his counsel's failures, as there is a reasonable probability that the trial court may have, in fact, rendered a different decision had this motion been articulately prepared and delivered. For brevity, Clinton incorporates Proposition of law No. XX here for cites to the record and to argue prejudice.

B.26 Failure to object to the State's improper closing argument

As outlined in Proposition of Law No. XVII, the prosecutor's closing argument was improper. Counsel's failure to object to the many instances where the prosecution toed, and stepped over, the line, was ineffective. For instance, several of the statements made by the prosecutor during closing argument were wholly improper and violated Clinton's rights to due process and a fair trial. The prosecutor improperly denigrated the defense, expressed his opinion as to witness credibility and repeatedly vouched for State's witnesses, and argued evidence of character or bad acts to have the jury draw negative inferences about Clinton. For brevity, Clinton incorporates Proposition of Law No. XVII here for cites to the record and to argue prejudice.

B.27 Failure to object to court costs

Clinton is indigent. While this Court has held that it is appropriate to assess costs to an indigent defendant, because Clinton is unable to pay, trial counsel should have objected and asked that costs not be imposed nor collected. For brevity, Clinton incorporates Proposition of Law No. XVIII here for cites to the record and to argue prejudice.

B.28 Cumulative ineffective assistance

Assuming for the sake of argument that none of the myriad failures outlined above individually constitutes ineffective assistance of counsel, the accumulation of errors over the course of trial and sentencing deprived Clinton of his right to counsel, freedom from cruel and unusual punishment, a fair trial, and due process.

Errors that might not be so prejudicial as to amount to a constitutional violation when considered alone, may cumulatively produce a trial setting that is fundamentally unfair thereby violating the defendant's constitutional rights. *Walker v. Engle*, 703 F.2d 959, 963 (6th Cir. 1983) (the "cumulative effect" of misconduct committed by state in prosecuting case against petitioner constituted denial of fundamental fairness). *Cooper v. Sowders*, 837 F.2d 284 (6th Cir. 1988) (various trial errors, considered cumulatively, produced a trial setting that was fundamentally unfair). It has been held that such cumulative effect analysis applies to ineffective assistance of counsel claims. *Rodriguez v. Hoke*, 928 F.2d 534, 538 (2d Cir. 1991).

Here, if the above claims of ineffective assistance of counsel are not deemed to merit relief when considered individually, then considered cumulatively the effect of the errors or omissions of counsel establish that Clinton's constitutional rights were violated under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Proposition of Law No. XVII

A capital defendant is denied his substantive and procedural due process rights to a fair trial and reliable sentencing as guaranteed by U.S. Const. amends. VIII and XIV; Ohio Const. art. I, §§ 9 and 16 when a prosecutor commits acts of misconduct during his capital trial.

The prosecutor committed acts of misconduct that deprived Clinton of a fair trial. These acts resulted in a violation of Clinton's rights as guaranteed under the Eighth and Fourteenth Amendments to the United States Constitution as well as Article I, §§ 9 and 16 of the Ohio Constitution. Thus, Clinton's convictions and sentence must be reversed.

A. Law

To succeed on a claim of prosecutorial misconduct, Clinton must meet one of two standards. Clinton must demonstrate either that the prosecutor's misconduct prejudiced a substantive right, *see Donnelly v. DeChristoforo*, 416 U.S. 637, 644 (1974) (citing *Griffin v. California*, 380 U.S. 609 (1965)) (footnote omitted); *United States v. Carter*, 236 F.3d 777, 785 (6th Cir. 2001), or that the prosecutor's misconduct rendered the trial fundamentally unfair. *See Berger v. United States*, 295 U.S. 78 (1935); *Gravley v. Mills*, 87 F.3d 779, 786 (6th Cir. 1996).

The reviewing court should not give inordinate weight to the strength of the evidence. In *Boyle v. Million*, 201 F.3d 711, 717-18 (6th Cir. 2000), the Sixth Circuit Court of Appeals reversed a habeas petitioner's conviction based on a finding of prosecutorial misconduct even though the evidence of guilt was quite strong. *See also Carter*, 236 F.3d at 791 (granting habeas relief on grounds of prosecutorial misconduct despite sufficiency of evidence).

B. The prosecution violated ABA Standards when it allowed DNA evidence to be completely consumed without notifying the defense.

The State violated Clinton's state and federal constitutional rights to due process when it consumed all DNA evidence, and failed to notify defense counsel prior to such consumption.

ABA Standards require that "[b]efore approving a test that entirely consumes DNA evidence or the extract from it, the prosecutor should provide any defendant against whom an accusatorial instrument has been filed, or any suspect who has requested prior notice, an opportunity to object and move for an appropriate court order." ABA Standards for Criminal Justice: *DNA Evidence*, 3d ed. 2007; Standard 3.4(c). The prosecutor failed to notify Clinton prior to consumption of the sample. *See* Proposition of Law V.

C. The prosecution offered irrelevant and prejudicial evidence with no probative value.

> "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.

Ohio R. Evid. 401. Ohio R. Evid. 402 provides in part: "Evidence that is not relevant is not admissible."

> (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.

Ohio R. Evid. 403.

Where the prosecutor deliberately attempts to gain a conviction through inflaming the passions of the jury, this Court has found reversible error. *State v. Keenan*, 66 Ohio St.3d 402 (1993).

C.1 The prosecutor introduced gruesome and repetitive photographs at both the trial and mitigation phases. *See* Proposition of Law IX.

Autopsy photos of dead children, a close-up photo of a child's vagina, a photo of a child's anus that was not related to the case, repetitive pictures of the deceased, photos from the prior involuntary manslaughter conviction and autopsy photos from that same conviction all

constituted inflammatory victim impact evidence, which is improper at the trial phase.[15] *State v. Tyler*, 50 Ohio St. 3d 24, 35 (1990). None of this evidence was relevant to any fact that was of consequence to the determination of whether the State had proven beyond a reasonable doubt that Clinton had committed the crimes. *See State v. Fautenberry*, 72 Ohio St. 3d 435, 440 (1995). Indeed, the jury knew from the outset that Clinton was not contesting much of the State's case except whether he was the killer. Tr. 382-83.

Without objection, the trial court allowed the State to admit seventeen photos of Heather Jackson's body. *See* State's Exhibits 5, 55-56, 63-69, 143-149; Tr. 645-55. The State's own witness testified that some of the photographs were cumulative. Tr. 646. The photographs were so inflammatory that during the State's presentation defense counsel requested a sidebar to discuss the fact that at least two or three people were walking out of the courtroom with tears in their eyes right in front of where the jury was being directed to look at the photographs. Tr. 656. One of the people who walked out was Danielle Sorrell, who had testified earlier in the trial about her friendship with Heather and her kids. Tr. 656.

The prosecution went on to introduce twenty-three photographs of Celina Jackson and Wayne Jackson, Jr.'s bodies, including a photograph of Celina Jackson's vagina, which served no probative purpose, and also introduced a photo of an unrelated child's rectum. State's Exhibits 7, 72-76, 78, 80, 83, 135-137, 151-60. The admission of any of these photographs did not tend 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." Ohio R. Evid. 401. The defense was not contesting the age of the children or the manner of death of the

[15] To the extent that Clinton's counsel did not object to the introduction of irrelevant and inflammatory evidence, Clinton was denied effective assistance of counsel. *See* Proposition of Law No. XVI.

victims. Because the evidence was not probative, it was not relevant, and, therefore, it was not admissible. The danger of unfair prejudice arising from the introduction of this irrelevant yet highly inflammatory evidence substantially outweighed the minimally probative value any of these items may have had to the issues in this case. The only purpose these pictures served was to inflame the passion of the jury against Clinton. This is even more problematic because jurors expressed having difficulty with children as victims in the case. Ind. V.D. 569.

In capital cases, this Court has imposed a stricter test for the admissibility of gruesome photographs, requiring that the probative value be outweighed by the danger of material prejudice. *State v. Maurer*, 15 Ohio St. 3d 239 (1984), par. 7 syllabus. Under this stricter standard, courts must limit the photographs so that they are not cumulative or repetitive and so that they only demonstrate the actual injuries sustained by the victim in order to minimize the risk of material prejudice at either the trial or the penalty phase. *State v. Morales*, 32 Ohio St. 3d 252, 257-59 (1987); *State v. Clinton*, 33 Ohio St. 3d 1, 9 (1987); *State v. Davie*, 80 Ohio St. 3d 311, 318 (1997).

The same test must be applied in this situation where the State improperly introduced highly inflammatory evidence. The multiple photographs of the dead bodies of the children, autopsy photos of the children, children's toys, and children's clothing had absolutely no probative value to the questions at issue in the trial, i.e., whether the State had proven beyond a reasonable doubt that Clinton committed these crimes.

C.2 The prosecutor introduced victim impact evidence. *See State v. Fautenberry*, 72 Ohio St. 3d 435, 440 (1995); *State v. Allard*, 75 Ohio St. 3d 482, 499 (1996).

The prosecution solicited improper and irrelevant victim impact testimony from witnesses Thomas Hanson, Detective Gary Wichman, Detective Ken Nixon, and E.S.

- Upon questioning by the prosecutor and over objection of defense counsel, Hanson referred to the perpetrator of the crimes as "some sick individual." Tr. 577-578.

- Upon questioning by the prosecutor and over objection of defense counsel, Wichman stated that this was "Probably the worst interview I ever did, situation-wise." Tr. 826-27.

- The prosecutor asked Nixon whether victims under the age of 18 were reluctant to immediately file charges to which Nixon replied: "Victims are afraid. They don't want to go forward. They're afraid of what's going to happen if they do, if they tell on the person." Tr. 743.

- Upon further questioning along these lines by the prosecutor, Nixon stated, "[E.S.] was kind of afraid that, you know, the suspect, Clinton wouldn't – He would get out of jail and come after her. She was hesitant because she felt that he wouldn't be in jail forever and he would get out." Tr. 747.

- Over objection from the defense, the prosecutor elicited testimony from E.S. that she was involved in counseling. Tr. 1032.

C.3 The prosecutor introduced other acts evidence. *See* Propositions of Law III & IV.

The prosecution admitted other acts evidence through testimony and exhibits admitted through the following witnesses:

- E.S. (see also Proposition of Law III).

- Michael Clark (see Proposition of Law IV).

Permitting the introduction of this evidence had no legitimate evidentiary purpose and merely inflamed the jury and unnecessarily reminded the jury that Clinton had previously been convicted of involuntary manslaughter and was being tried simultaneously for an unrelated rape. All of these were improper considerations for the jury at the trial phase. *State v. Thompson,* 33 Ohio St. 3d 1, 15 (1987). The improper evidence also had a carryover effect to the penalty phase. As such, the improper introduction of this evidence denied Clinton a fair trial and due process.

D. The prosecution made inflammatory and improper remarks during closing argument in the trial phase.

Several of the statements made by the prosecutor during closing argument were wholly improper and violated Clinton's rights to due process and a fair trial. "The test regarding prosecutorial misconduct in closing arguments is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant." *State v. Elmore*, 111 Ohio St. 3d 515, 525-26 (2006).

D.1 The prosecutor improperly denigrated the defense (*see State v. Keenan*, 66 Ohio St. 3d 402, 405-06 (1993); *State v. Getsy*, 84 Ohio St. 3d 180, 194 (1998)):

- "Now implicit in the cross-examination is, you know, they – you know, and it's natural, trying to, as I say, kind of dirty up the victim." Tr. 1211-12.
- "Implicit in the cross-examination is to question Heather Jackson's lifestyle." Tr. 1212.
- "Now implicit in the questions that were asked here is, 'Well, we found a body here. Oh, we have some cigarette butts.' Those are sometimes known as red herring." Tr. 1182.
- "Again, we talked about untested items, the red herring, the imaginary doubt." Tr. 1202.

D.2 The prosecutor expressed his opinion as to witness credibility and repeatedly vouched for State's witnesses (*see State v. Clemons*, 82 Ohio St. 3d 438, 452 (1998); *State v. Watson*, 61 Ohio St. 3d 1, 10 (1991); *State v. Jackson*, 107 Ohio St. 3d 53, 77 (2005) (argument that witness "lacked motive to lie" not improper *if* in response to defense counsel's attack on witness' credibility)):

- "I think, on the stand, you can tell Josh [Case] was extremely credible. He was truthful. . . Extremely credible and, I believe, truthful witness in Josh Case that night. Tr. 1174.
- "[Tom Hanson] was very cooperative . . . he actually came here came here voluntarily. As he testified, 'I didn't get a subpoena.'" Tr. 1177.
- "It's extremely, extremely credible." (In reference to E.S.'s testimony.) Tr. 1208.

- " . . . a testament to [E.S.'s] credibility is . . . prior to coming in here, she made a correction. . . " Tr. 1209.

- "Nurse Dettling, independent of [E.S.], made that same correction . . . Again, extremely credible." Tr. 1209.

- "Dr. Barnett finished the State's case . . . Extremely credible witness." Tr. 1209.

- "So, obviously, Wichman, like a good detective, calls [Hanson] back in . . . kind of pressing it." Tr. 1193.

- "[Wichman] knew, based upon his experience and training as a seasoned detective, that this man's DNA, his profile, would be on certain items." Tr. 1198.

- "[Hallie Garofalo] kind of sounded like a real bright – these ladies [Julie Cox and Hallie Garofalo] are, obviously, extremely intelligent." Tr. 1200.

D.3 The prosecution argued evidence of character or bad acts to have the jury draw negative inferences about Clinton (*see State v. Treesh*, 90 Ohio St. 3d 460, 483 (2001) (citing *State v. Lytle*, 48 Ohio St. 2d 391, para. 3 of syllabus (1976)):

- "Defendant's out drinking. Doesn't find anybody at the bar. He's out hunting for sex." Tr. 1210.

- "He's out for sex that night. He obviously isn't satisfied with Mercedes Charlton. We know that from the weekend before." Tr. 1211.

- "So when the Defendant – from the evidence, when the Defendant arrives there, gets in the home, he wants sex. Heather says no, but no's not in the cards that night. He sexually assaults Heather, as the coroner indicated, on or around the time that he strangled her to death." Tr. 1212-13.

These statements during closing argument also reveal that the State's true purpose in admitting the other acts evidence relating to Keckler was to paint Clinton as a sex fiend. *See* Proposition of Law III. The above statements were highly prejudicial to Clinton's rights to due process and a fair trial.

D.4 The prosecutor improperly argued victim impact evidence to the jury in the trial phase that was not related to "facts attendant to the offense" (*see State v. Fautenberry*, 72 Ohio St. 3d 435, 440 (1995); *State v. Allard*, 75 Ohio St. 3d 482, 499 (1996)):

- But through [Danielle Sorrell's] testimony, you could see that, while Heather may have been somewhat troubled, maybe not made the best of choices at times, like all of us, that Heather, you know, was a beautiful girl and also a beautiful person; a person, I think that Danielle had attributed certainly some value to. She valued her as a person and a friend. Tr. 1165-66.

- "Then [Joshua Case] got somewhat emotional because he's one of the last people that saw these people. Especially, Celina. We talked about Celina coming to him and him holding Celina and comforting her, but, of course, now we know, just hours before the Defendant brutally murdered her." Tr. 1176.

- "One of the things in this case, too, you learn, it's not easy being a victim. It really isn't." Tr. 1187-88.

- "[E.S.] is a victim for sure, but she's also a survivor . . . Courageous young lady." Tr. 1205.

- "You know, I can only imagine that probably [E.S.'s] mother probably sometimes thinks, What could I have done differently?" Tr. 1206.

- "[E.S] was in fear, and also this very egregious process that we go through here." Tr. 1206.

- "It's tough being a victim. It really is." Tr. 1207.

- ". . . like a three hour procedure. A very invasive intrusive rape or sexual assault kit that she had to go through." Tr. 1207.

- "It's not easy being a victim." Tr. 1208.

- "You know, you can see the burden through the testimony that someone – that a sexual assault victim carries." Tr. 1241.

D.5 The prosecutor argued facts that were not in evidence (*see State v. Smith*, 14 Ohio St. 3d 13, 14 (1984) (It is a prosecutor's duty in closing arguments to avoid efforts to obtain a conviction by going beyond the evidence which is before the jury):

- "We now know . . . to rape probably two of them." Tr. 1211.

- "Now, there's no rape with Heather, but the evidence is pretty loud that he raped her." Tr. 1211.

- "So when the Defendant – from the evidence, when the Defendant arrives there, gets in the home he wants sex. Heather says no, but no's not in the cards that night." Tr. 1212-13.

Although the prosecution is entitled to a degree of latitude in closing argument, it is improper for prosecutors to incite the jurors' emotions through insinuations and assertions that are not supported by the evidence and are therefore "calculated to mislead the jury." *State v. Smith*, 14 Ohio St. 3d 13, 14 (1984).

D.6 The prosecutor made overly emotional arguments to the jury that denied Clinton due process (*see Keenan*, 66 Ohio St. 3d at 409):

- ". . . even this experienced, trained, seasoned special agent from BCI obviously got somewhat emotional as he began to relay to us in his testimony how he removed these little people from the utility room." Tr. 1181-82.

- "And then Hanson was, 'Hey, this is a – this is a sick thing that occurred here.'" Tr. 1183.

E. Cumulative effect of misconduct

This Court has recognized the necessity of considering the cumulative effect of prosecutorial misconduct. *See State v. Fears*, 86 Ohio St. 3d 329, (1999) (Moyer, C.J., dissenting) (citing *State v. Keenan*, 66 Ohio St. 3d 402 (1993); *State v. Liberatore*, 69 Ohio St. 2d 583 (1982)). Each individual act of misconduct, or type of misconduct, is not separated out for consideration. Under such circumstances, it would be nearly impossible to succeed on a claim of misconduct. Rather, the alleged misconduct in its entirety should be reviewed to determine whether it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *See Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (citing *Donnelly*, 416 U.S. 637) (internal quotations omitted); *see also United States v. Francis*, 170 F.3d 546, 556 (1999).

F. Conclusion

The prosecutor committed pervasive and prejudicial misconduct during Clinton's trial. *See State v. Thompson,* 33 Ohio St. 3d 1, 15 (1987). These errors "cannot be ignored or overlooked." *Id.* at 14. The State's misconduct during the trial phase deprived Clinton of a reliable sentence as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution, as well as Article I, §§ 9, 16 and 20 of the Ohio Constitution, and it surely had a prejudicial "carry over" effect to Clinton's penalty phase deliberations. *Thompson*, 33 Ohio St. 3d at 15. Clinton's conviction and sentence must be vacated and this case remanded.

Proposition of Law No. XVIII

Imposition of costs on an indigent defendant violates the spirit of the Eighth Amendment. U.S. Const. amends. VIII and XIV; Ohio Const. art. I. §§ 10 and 16.

A. Clinton is indigent – he cannot afford to pay court costs.

The trial court determined that Clinton was indigent. This is demonstrated by the trial court's appointment of both trial counsel and appellate counsel. Despite the trial court's recognition of Clinton's impoverished status, court costs were imposed on Clinton. Additionally, trial counsel did not object to the imposition of costs, an issue raised separately as ineffective assistance of counsel in Proposition of Law No. XVI.

B. Ohio law should not allow imposition and collection of costs from an indigent defendant.

In *State v. White*, 103 Ohio St. 3d 580 (2004), this Court held that R.C. § 2947.23 requires assessment of costs against convicted defendants. However, this Court noted that payment could be waived for indigent defendants. *State v. Threatt*, 108 Ohio St. 3d 277, 278 (2006) (internal citation omitted). But a clerk of courts may "attempt to collect costs from indigent defendants." *Id.* This Court held in *White* that "costs must be assessed against and may be collected from indigent defendants." *Id.* at 279.

Clinton respectfully requests that this Court reconsider its rulings in *White* and *Threatt*. Collection of costs from an incarcerated and indigent defendant violates the spirit of access to the courts. At the federal level, the in forma pauperis statute was "intended to guarantee that no citizen shall be denied an opportunity to commence, prosecute, or defend an action, civil or criminal, in any court of the United States, solely because...poverty makes it impossible...to pay or secure the costs of litigation." *Denton v. Hernandez*, 504 U.S. 25, 31 (1992) (citing *Adkins v. E. I. Du Pont de Nemours & Co.*, 335 U.S. 331, 342 (1948)) (internal quotation marks omitted).

By analogy, the collection of costs against an indigent defendant imposes a cost to defend against an action brought by the State, a fact that may dissuade defendants from requesting aid or even proceeding to trial. The result – a chilling effect on the defendant's right to trial by jury.

Additionally, the Eighth Amendment is aimed at limiting the State's power to punish. *See Austin v. United States*, 509 U.S. 602, 610 (1993) (internal citation omitted). The Eighth Amendment precludes excessive bail and fines. *Id.* It also precludes cruel and unusual punishments. The purpose of the Eighth Amendment, putting the Bail Clause to one side, was to limit the government's power to punish. *Id.* (internal citation omitted).

Collection of costs from an indigent defendant is an additional punishment, one that is particularly cruel to those who are incarcerated and who have no hope of meeting the obligation. Inmates have no source of income, save low paying institutional jobs. Some receive support from outside the institution, but not all. Moreover, inmates use their inmate accounts to obtain items many would deem to be necessities, including food and toiletries. While it may be proper to impose costs on an indigent criminal defendant, the practice imposes an unnecessarily high cost to collect those fees while an indigent defendant is incarcerated. The better practice would be to impose costs, yet stay collection until the inmate is ever released or paroled from prison.

C. Conclusion

The spirit of the Eighth Amendment is violated when costs are collected from an indigent, incarcerated defendant. This Court should reconsider its holdings in *White* and *Threatt*. This Court should modify those rulings to ensure collection is not attempted on indigent, incarcerated inmates. So doing, this Court should stay the collection of costs against Clinton.

Proposition of Law No. XIX

The sentence of death imposed on Clinton was unreliable and inappropriate. U.S. Const. amends. VIII and XIV; Ohio Const. art. I, §§ 9 and 16 and R.C. § 2929.05.

A. Introduction

Curtis Clinton was convicted of six counts of aggravated murder involving the deaths of Heather Jackson, Celina Jackson, and Wayne Jackson, Jr. Each count of aggravated murder carried three capital specifications. Clinton was sentenced to death for each victim.

Ohio Revised Code § 2929.05(A) requires this Court to determine the appropriateness of the death penalty in each capital case it reviews. The statute directs the appellate courts to "affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case." *Id.* The statute requires this Court to make an independent review of the record and decide for itself, without any deference given to the determination below, whether it believes that this defendant should be sentenced to death. *State v. Jenkins*, 15 Ohio St. 3d 164 (1984); *State v. Maurer*, 15 Ohio St. 3d 239 (1984). The record in this case merits the independent conclusion by this Court that the death sentences are not appropriate for Curtis Clinton.

B. A wealth of mitigating evidence existed in this case.

This Court has frequently described a mitigating factor as one that "lessens the moral culpability of the offender or diminishes the appropriateness of death as the penalty." *State v. DePew*, 38 Ohio St. 3d 275, 292 (1988) (quoting *State v. Steffen*, 31 Ohio St. 3d 111 (1987)). Although these were shocking and tragic crimes, there are factors that mitigate against the death sentences imposed in this case. Trial counsel proffered this evidence to the trial court prior to sentencing. Tr. 123-25.

1. Clinton's history and background are substantial mitigating factors (R.C. § 2929.04(B)).

Clinton's childhood was brutal and horrific. He suffered the worst abuse at the hands of his own father. Proffered Defense Exhibits A, C, D, & N. For years, Clinton and his siblings were sexually and physically abused by their father and neglected by their stepmother. *Id.* As a result of the abuse, Clinton suffers from Post-traumatic Stress Disorder and depression. Proffered Defense Exhibit O.

Astella Cole, Clinton's biological mother, reported that Clinton's father, Willie Clinton, severely physically abused her. Proffered Defense Exhibit E. Willie Clinton was a crack cocaine user. Proffered Defense Exhibit J. She reported that Clinton's father took the children away from her in 1973. Proffered Defense Exhibit E. She did not know where he took them but was told that since he was their father there was nothing she could do about it. *Id.* Clinton was two years old. She did not have contact with her children once again until 1977. *Id.* Then, in 1978, Astella was chased off the porch of Will Clinton's house with a shotgun, and Astella did not have any contact with her children again until 1983. *Id.* At that time, Erie County Children's Services contacted her due to reports of sexual abuse. *Id.* James and Willie, Clinton's older brothers, were removed from their father's home and placed with their mother. Inexplicably, Clinton remained with his father where the abuse continued. *Id.*

Doris Baccus, Clinton's older sister, reports that their father began physically, emotionally, and sexually abusing her, Clinton, and their other siblings as soon as they moved in with him and his new wife Andria. Proffered Defense Exhibit C. Doris said that her brother, Willie, told her their father "forced himself on the boys as well." *Id.* Clinton's father would routinely force Clinton and his brothers to have sex with his step-sister Tonya. *Id.* Doris also said that Clinton always got the worst beatings, "he got the worst of everything." *Id.* Often these

beatings occurred for no apparent reason. *Id.* Clinton's father would whip him with anything available. *Id.*

Willie Cole, Clinton's second eldest brother, remembers seeing his father beat his mother for the first time when he was three years old. Proffered Exhibit D. He said he and his siblings stayed with their mother when she and their father separated when he was six years old. *Id.* He described the situation at his mother's home as being without rules and highly impoverished. *Id.* Willie Cole believes that their mother was an alcoholic and too young to care for him and his three siblings. *Id.* When his father took him and his siblings away from their mother, the first night they moved in with their father and stepmother, their father came in the kids' room and had sex with their step-sister, Tonya. *Id.* Willie Cole also reported that he and his siblings were beaten with anything their father could find – belts, sticks, electrical cords, etc. *Id.* He also recalled his father kicked him in the face one time for receiving a "C-" on a report card. *Id.*

Children Services' records document the abuse that was taking place in the Clinton home. Proffered Defense Exhibit N. In 1985 and 1986, Willie Clinton's children and step-children reported that he was sexually abusing them. *Id.* at 54. It was also reported that their stepmother, Andria, was a drug user. *Id.* Willie and Andria Clinton provided little emotional support for the children. *Id.* at 55.

Clinton also has a history of mental health issues relating to the trauma he suffered in childhood. Proffered Defense Exhibit O. The abuse had long-lasting and significant effects on Clinton. Even as an adult Clinton continued to suffer from disturbing dreams of the abuse he was subjected to at the hands of his father and step-mother. *Id.* Clinton was diagnosed with Post-traumatic Stress Disorder ("PTSD") secondary to the abuse he suffered as a child. *Id.* Clinton also has a history of depression and suicide attempts. *Id.*

Even in cases involving multiple homicides, failure to present similar background information about a capital defendant has been found to be prejudicial. *See State v. Herring*, 2014 Ohio LEXIS 3074 (2014).

2. Other factors relevant to sentencing (R.C. § 2929.04(B)(7)

a. Clinton can adjust to life in prison.

During Clinton's prior incarceration he engaged in mental health counseling for PTSD and depression. Proffered Defense Exhibit O. He also obtained his GED. Proffered Defense Exhibit M.

b. Clinton has shown redeeming traits.

Clinton's mother reported that Clinton is a giving person. Proffered Defense Exhibit E. He would often raid her food supplies to give to those in need. *Id.* When he was released from prison, Clinton lived with her for a short time and enrolled in community college and obtained three jobs. *Id.* He was eager to establish a relationship with his children and made them a priority. *Id.* Many people expressed that Clinton went out of his way to help others. Proffered Defense Exhibits H, F, & J.

Crystal Miller, a friend and ex-girlfriend of Clinton's, reported that when he was released from prison he re-established contact with their son, Christopher. Proffered Defense Exhibit F. Crystal stated that even though Christopher was eighteen years old, Clinton voluntarily paid child support to her upon his release from prison. *Id.*

Reyna Miller, another one of Clinton's friends, reported that after his release from prison Clinton became a father figure to her children. Proffered Defense Exhibit H. He would even fill-in for her at school meetings concerning her children. *Id.* Her daughter lived with Clinton for a while because of problems she was having with her daughter. *Id.* She reported that Clinton was a

giving person and also stated that he worked three jobs following his release from prison. *Id.* Clinton also has a positive employment history. Proffered Defense Exhibits E, J, & O.

C. Weighing aggravating circumstances against mitigating factors

This Court must independently examine the mitigating factors and decide for itself whether the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. R.C. § 2929.05. This Court must confine its consideration of the arguments in favor of death to proven aggravating circumstances for each count of aggravated murder. Furthermore, when, as in the present case, the defendant is convicted of more than one count of aggravated murder, only the aggravating circumstances related to a given count may be considered in assessing the penalty for that count. *State v. Cooey*, 46 Ohio St. 3d 20 (1989). Here, the aggravating circumstances do not outweigh the mitigating factors beyond a reasonable doubt. Clinton's horrific background in combination with his mental illness and redeeming traits are strong mitigation worthy of consideration. *See, e.g., Herring*, 2014 Ohio LEXIS 3074, ¶¶81-83.

D. Conclusion

Our law requires "a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). This is true even when the capital defendant is convicted of horrific crimes. This Court should vacate Clinton's death sentence because it is unreliable and inappropriate.

Proposition of Law No. XX

When the State fails to introduce sufficient evidence of particular charges and there is not substantial evidence upon which a jury can conclude that all elements have been proven beyond a reasonable doubt, a resulting conviction deprives a capital defendant of substantive and procedural due process. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 9, 16.

A. Aggravated murder charges

Curtis Clinton was charged with the aggravated murders of Heather Jackson, Celina Jackson, and Wayne Jackson, Jr. Dkt. 9/19/12, Indictment; R.C. § 2903.01. This required the State to prove that Clinton caused the deaths of each individual. R.C. § 2903.01. Clinton was also charged with the rapes of Celina Jackson and E.S. Dkt. 9/19/12, Indictment; R.C. § 2907.02(A)(2). This required the State to prove that Clinton engaged in sexual conduct with both victims and that Clinton purposely compelled the victims to submit by force or the threat of force. R.C. § 2907.02(A)(2). Finally, Clinton was charged with aggravated burglary. Dkt. 9/19/12, Indictment; R.C. § 2911.11(A)(1). This required the State to prove that Clinton did, by force, stealth, or deception, trespass in Heather Jackson's house with the purpose to commit a criminal offense. R.C. § 2911.11(A)(1).

B. Sufficiency of the evidence

The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). *See also State v. Adams*, 62 Ohio St. 2d 151 (1980); *State v. Miclau*, 167 Ohio St. 38 (1957); R.C. § 2901.05(A). The test for determining whether the trial evidence was sufficient to establish guilt beyond a reasonable doubt is whether there was "substantial evidence upon which a jury could have reasonably concluded that all of the elements of an offense have been proven beyond a reasonable doubt." *State v. Eley*, 56 Ohio St. 2d 169, syl. (1978). In examining claims based upon insufficient

evidence, a reviewing court must ask whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all of the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). *See also Adams*, 62 Ohio St. 2d at 153 (1980); *Miclau*, 167 Ohio St. at 41 (1957). A conviction based upon insufficient evidence violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Jackson*, 443 U.S. at 316.

C. Manifest weight of the evidence

In assessing the manifest weight of the evidence, this Court must examine the entire record and determine whether the evidence produced attains the high degree of probative force and certainty required for a criminal conviction.

This inquiry is separate from the examination for sufficiency of the evidence. This review must be directed toward a determination of whether there is substantial evidence upon which a jury could reasonably conclude that all of the elements have been proven beyond a reasonable doubt. *Eley*, 56 Ohio St. 2d at 172; *Glasser v. United States*, 315 U.S. 60, 80 (1942). Substantial evidence is more than a mere scintilla. *See United States v. Orrico*, 599 F.2d 113, 117 (6th Cir. 1979). It is evidence establishing a substantial basis of fact from which the fact at issue can be reasonably inferred. *Id.*

A claim that a jury verdict is against the manifest weight of the evidence requires the reviewing court to review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether in resolving conflicts in the evidence, the jury lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Scott*, 101 Ohio St. 3d 31, 36

(2004); *see State v. Thompkins*, 78 Ohio St. 3d 380, 387 (1997) (quoting *State v. Martin*, 20 Ohio App. 3d 172, 175 (1st Dist. 1983)).

D. Argument

1. Aggravated Murder Charges

a. It was essential for the State to prove that Clinton caused the deaths of Heather Jackson, Celina Jackson, and Wayne Jackson, Jr.

In order to convict Clinton of the deaths of the Jacksons, the State was required to prove that Clinton actually caused their deaths. The trial court instructed the jury on the essential element of cause: "Cause is an essential element of the offense of aggravated murder. Cause is an act which directly produces the death of another and without which it would not have occurred." Tr. 1256.

b. Insufficient evidence to prove that Clinton caused the deaths of Heather Jackson, Celina Jackson, and Wayne Jackson, Jr.

The State presented very little evidence in Clinton's case that actually pointed to Clinton as the perpetrator of the deaths of the Jackson family. The State introduced evidence that Clinton called Heather Jackson around 3:12 a.m. on September 8, 2012, which was the last phone call that she answered, and that Clinton was at Jackson's house from 3:12 a.m. until around 4:20 a.m. Tr. 787-93. Clinton never denied either of these facts. No other State's witness even mentioned Clinton as a possible suspect in the Jackson murders. Rather, the State's witnesses actually painted a picture of a potential drug motive behind the Jackson murders. Tr. 405-20. Additionally, several State's witnesses were themselves considered suspects prior to Clinton's arrest. Tr. 778-81. The State presented virtually no evidence that Clinton actually killed the Jackson family.

After assessing that Clinton was the last person that Jackson answered the phone for, the entire police investigation focused on Clinton. The police located him at Bellevue Hospital where he was recovering from a suicide attempt. Tr. 825-28. Clinton was immediately taken to the police station where he was questioned for nearly three hours while still wearing a hospital gown. *Id. See also* State's Exhibit 117. It is clear from State's Exhibit 117, the video of Clinton's police interview, that he is incredibly weak and confused. *See* Proposition of Law X. Despite his confusion, Detective Wichman attempted to use Clinton's statements against him.

In addition to all other suspects being ignored once the police learned of Clinton's connection to Heather Jackson, other evidence was disregarded as well:

- A window on the west-side of the Jackson home, which was not visible from the nearby hospital surveillance camera, was open and could have been entered without anyone being seen. Tr. 400, 625. In fact, BCI Agent Hammond testified that he did not remember if he was able to obtain any lifts from this open window. Tr. 636.

- Thomas Hanson and Daniel Risner, the two men who found Heather Jackson's body, admitted to breaking into Jackson's home and wiping off doorknobs prior to the police arriving. Tr. 472-73.

- Although Clinton's DNA was found in the Jackson home, a place where he admitted to being, there was also unknown male DNA found on the victims. Tr. 910, *See also* Mtn. Hear. 10/17/13.

- A number of items were never tested for DNA or fingerprints, including cigarettes butts, one of which was found inside the locked closet where the Jackson children were located, and hairs found on the body of Celina Jackson. Tr. 700-04.

This combination of evidence that was ignored, with the testimony that was presented regarding Clinton's guilt at trial, was insufficient to establish that Clinton committed the murders of Heather Jackson, Celina Jackson, and Wayne Jackson, Jr.

c. Clinton's convictions were against the manifest weight of the evidence.

In assessing the manifest weight of the evidence, this Court must examine the entire record and determine whether the evidence produced attains the high degree of probative force

and certainty required for a criminal conviction. This Court must review the credibility of the evidence submitted to support Clinton's convictions when reaching this determination.

"Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of the proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief.*'" *Thompkins*, 78 Ohio St. 3d at 387. When reviewing for manifest weight, the reviewing court can consider the credibility of witnesses. *Id.*

The credibility of the State's witnesses, particularly that of Thomas Hanson and Daniel Risner, along with the plethora of evidence that was not tested or presented to the jury, is questionable. The jury clearly lost its way when it found Clinton guilty of the aggravated murders of Heather, Celina, and Wayne Jackson, Jr. This was caused in part by the jury being overwhelmed with inadmissible evidence and prejudicial testimony. As such, the evidence used to prove that Clinton caused these murders was insufficient.

2. Rape as to Celina Jackson and E.S.

The trial court instructed the jury on the essential elements of rape, stating:

> Sexual conduct means vaginal intercourse between a male and female, anal intercourse or cunnilingus between persons, regardless of sex, without privilege to do so, or the insertion, however slight, of any part of the body into the vaginal or anal opening of another.
>
> Penetration, however slight is sufficient to complete vaginal or anal intercourse. Vaginal intercourse means penetration of the penis into the vagina. Anal intercourse means penetration of the penis into the anal opening of a man or woman. Cunnilingus

> means the sexual act committed with the mouth and the female sex organ.
>
> A person acts purposely when it is his specific intention to cause a certain result or when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby. It is his specific intention to engage in conduct of that nature.
>
> Force means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.
>
> Threat means – threat includes a direct and indirect threat.

Tr. 1253-54.

a. It was essential for the State to prove that Clinton engaged in sexual conduct with Celina Jackson and E.S. by force or threat of force.

In order to convict Clinton of the rape of Celina Jackson, the State was required to prove that Clinton engaged in sexual conduct with Celina Jackson by force or threat of force. The trial court instructed the jury on the essential elements of rape, quoted above, and stated: "Before you can find the Defendant guilty, you must find beyond a reasonable doubt that, on or about the 8th day of September, 2012, and in Erie County, Ohio, the Defendant engaged in sexual conduct with Celina Jackson, date of birth, March 10, 2009, not the spouse of the Defendant, and the Defendant purposely compelled Celina Jackson to submit by force." Tr. 1268-69.

In order to convict Clinton of the rape of E.S., the State was required to prove that Clinton engaged in sexual conduct with E.S. by force or threat of force. The trial court instructed the jury on the essential elements of rape, quoted above, and stated: "Before you can find the Defendant guilty, you must find beyond a reasonable doubt that on or about the 2nd day of September, 2012, and in Erie County, Ohio, the Defendant engaged in sexual conduct with E.S. and Defendant purposely compelled the other person to submit by force or the threat of force." Tr. 1252.

b. Insufficient evidence to prove that Clinton committed the rape of Celina Jackson.

The State presented testimony from the Lucas County Deputy Coroner, Dr. Scala-Barnett, and BCI forensic scientists, Julie Cox and Hallie Garofalo, in an effort to prove that Clinton was responsible for the rape of Celina Jackson.

Dr. Scala-Barnett testified that Celina Jackson's rectum was dilated, similar to her mother's.[16] Tr. 1129. When the State attempted to show the jury a photo of Celina Jackson's rectum, it produced a photo of her vagina instead. *Id.* State's Exhibit 159. As such, the jury never saw a photo of Celina Jackson's rectum, and instead were left with only a photo of Heather Jackson's rectum for comparison. *Id.* Despite the rectal dilation, Dr. Scala-Barnett testified that "There were no -- injuries, per se. There were no -- there was no tearing. There was no bruising." *Id.* at 1130. Dr. Scala-Barnett then showed the jury a photo of an unrelated child's anus, from a five-year old child who she performed an autopsy on in 2001, to document what a child's anus should look like. *Id.* at 1130-31. No foundation was laid as to the unrelated child's gender, how the child had died, whether the child's rectum was diseased or injured, or the duration of time between the child's death and the taking of the photograph, etc. Despite the lack of noticeable injury to Celina Jackson's rectal area, Dr. Scala-Barnett concluded that the dilation occurred "perimortem" or "on or about the time of death." *Id.* at 1133. Despite this assertion, Dr. Scala-Barnett offered no real foundation to explain her conclusion.

The State also presented testimony from BCI forensic scientists Julie Cox and Hallie Garofalo regarding the testing of Celina Jackson's underwear, anal swabs, and various DNA found on the Jackson family's bodies. Despite the reliance on this testimony, "[t]he advent of

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[16] It should be noted that, despite this alleged similarity, rape charges were never brought against Clinton in relation to Heather Jackson.

DNA technology has not solved the problem of invalid forensic testimony." Garrett & Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 4 (2009). "Nor is DNA analysis immune from inaccurate presentation of results." *Id.* "One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases." *Melendez-Diaz*, 557 U.S. at 319 (citing *Id.)* In fact, currently, there are "no national or widely accepted set of standards for forensic science written reports or testimony." *Id.* Additionally, Cox, herself, admitted that she had requested permission from the prosecutor to completely consume DNA swabs but never asked defense counsel. Tr. 889-90, *See* Proposition of Law V. Because these swabs were consumed, Clinton will never have the opportunity to re-rest or challenge this testimony on appeal.

This combination of evidence that was presented without foundation, with the testimony that can never be challenged, was insufficient to establish that Clinton engaged in sexual conduct with Celina Jackson by force or threat of force. At the very least, the above testimony and evidence presented cannot establish, beyond a reasonable doubt, that Clinton engaged in sexual conduct with Celina Jackson prior to Celina Jackson's death.

c. Insufficient evidence to prove that Clinton committed the rape of E.S.

The State presented testimony from E.S., Detective Nixon, and nurse Lisa Dettling in an effort to prove that Clinton was responsible for the rape of E.S. During E.S.'s and Detective Nixon's testimony, the trial court allowed improper victim impact testimony to be introduced to the jury. *See* Proposition of Law XV. The trial court also allowed Dettling's testimony over the objections of trial counsel. *Id.*

E.S. testified that Clinton raped her. Clinton's defense, however, was that the sexual conduct with E.S. was consensual. Tr. 388; *see also* Proposition of Law IV. The question, then, became one of credibility. If the trier of fact believed E.S. was telling the truth, then Clinton was the perpetrator. If the jury believed Clinton, and not E.S., then no crime was committed. The case rested solely on the credibility of E.S.

E.S. testified that she had been fighting with her mother, and that she had Clinton pick up her and his girlfriend, Mercedes, down the street from E.S.'s house because she did not want her mom to know where she was going. Tr. 979, 981-82. The three went back to Clinton's apartment and spent the weekend there. Tr. 983-87. E.S. initially told Clinton she was eighteen years old. Tr. 1045.

On Sunday night of that weekend, E.S. went to a bar with Clinton. Tr. 988. E.S. testified she wore her "new outfit" she got in Florida – "Coogie pants with this cute Coogie sweatshirt." Tr. 1048. Mercedes stayed at Clinton's apartment. *Id.* Clinton and E.S picked up two of Clinton's friends but she could not recall anything about them except they were black males. Tr. 990. She was drinking that evening. Tr. 1055. Clinton and E.S. returned to Clinton's house around three in the morning. Tr. 997. E.S. claimed that Clinton and Mercedes got in an argument and both left Clinton's apartment. Tr. 1001-02. She stated that only Clinton returned. She claimed she was lying on the couch and Clinton came in and sat beside her. Tr. 1003. When she tried to get up, Clinton started choking her with his hands. *Id.* E.S. stated she got off the couch and then Clinton put her in a headlock. *Id.* She stated Clinton then took her to his bedroom, told her to take her clothes off, get on the bed, and he then started licking her. Tr. 1005-06. E.S. testified that afterwards, they talked, and Clinton told her to calm down because he wasn't going to hurt her anymore. Tr. 1006. E.S. testified that they then had sex, and it lasted "a lot of hours." Tr. 1006-

07. She said that after they had intercourse, Clinton started choking her again and she passed out. *Id.* E.S. said when she woke up Clinton was taking pictures of her. *Id.* She said she lost consciousness three more times, although Clinton did not choke her again. *Id.* She said they then had sex again. Tr. 1007-08. According to E.S., this time lasted longer than the last time. Tr. 1008. E.S. stated that she asked Clinton to stop and it continued for "a lot longer." *Id.* Then she asked him to stop again and he did. *Id.*

Clinton took E.S. home afterwards. Tr. 1009. E.S. stated she allowed him to take her home because she did not have another ride. Tr. 1009. E.S. testified that she had him drop her off a street before her road. Tr. 1011. When E.S. got home, she told her mother what had happened and they went to the hospital. Tr. 1013. E.S. told the doctor that her boyfriend had taken her home. Tr. 1014. E.S. testified that she never told Mercedes what had happened, even though they were friends. Tr. 1033.

The sexual assault nurse examiner (SANE), Lisa Dettling, was the next witness. She performed the sexual assault exam on E.S. Tr. 1063. She testified E.S. complained of some neck and low back pain. Tr. 1072. She stated that there was a hickey and some redness along E.S.'s neck. Tr. 1075. She testified that the redness was consistent with E.S. being choked. Tr. 1076. Despite the fact that E.S. never told Dettling that E.S. had been drinking, Dettling stated, when asked on cross-examination whether it is important to know whether they were drinking: "Yes. I imagine it probably would be." Tr. 1094.

E.S.'s testimony called into question her credibility. She did not tell her mother where she was going, and she purposely had Clinton pick her up down the street from her home so that her mother would not know. She told Clinton that she was eighteen and asked to go to the bar with him and his friends, when she knew that her friend, Clinton's girlfriend, Mercedes, would

not be in attendance. She did not question why Clinton and Mercedes left her alone in Clinton's apartment. She did not tell the SANE nurse the truth about who took her home, or that she had been drinking. At no point was any definitive proof offered that Clinton's defense, that the sexual conduct between him and E.S. was consensual, was inaccurate.

As such, the evidence and testimony introduced at trial, was insufficient to establish that Clinton engaged in sexual conduct with E.S. by force or threat of force. Additionally, evidence regarding the alleged rapes of E.S. should not have been introduced during Clinton's capital trial. *See* Proposition of Law IV.

d. Clinton's convictions were against the manifest weight of the evidence.

In assessing the manifest weight of the evidence, this Court must examine the entire record and determine whether the evidence produced attains the high degree of probative force and certainty required for a criminal conviction. This Court must review the credibility of the evidence submitted to support Clinton's convictions when reaching this determination.

"Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of the proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief.*'" *Thompkins*, 78 Ohio St. 3d at 387. When reviewing for manifest weight, the reviewing court can consider the credibility of witnesses. *Id.*

The credibility of the State's witnesses, particularly that of E.S. and Dr. Scala-Barnett, is questionable. The jury clearly lost its way when it found Clinton guilty of the rapes of Celina

Jackson and E.S. This was caused in part by the jury being overwhelmed with inadmissible evidence and prejudicial testimony. As such, the evidence used to prove that Clinton caused these rapes was insufficient.

3. Aggravated Burglary

a. It was essential for the State to prove that Clinton committed aggravated burglary.

In order to convict Clinton of aggravated burglary, the State was required to prove that Clinton, "with purpose to commit the offense of rape, trespass by force, stealth, or deception in an occupied structure when another person was present in that structure…inflicted, attempted to inflict, or threatened to inflict physical harm on that…person." Tr. 1257-58. The trial court instructed the jury on the essential elements of aggravated burglary, stating:

> Purpose has already been defined for you.
>
> The purpose to commit a criminal offense is necessary in the actual commission thereof. Purpose to commit an offense can be formed at any point during the trespass.
>
> Trespass is committed when a defendant, without privilege to do so, knowingly entered and remained on the premises of Heather Jackson.
>
> Privilege means an immunity, license, or right conferred by law, bestowed by, expressed, or implied grant, or rising out of status, position, or leadership.
>
> A person acts knowingly regardless of his purpose when he is aware that his conduct will probably cause a certain result or he is aware that his conduct will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.
>
> Force has already been defined for you.
>
> Stealth means any secret or sly act to avoid discovery and to gain entrance into or to remain within a structure of another without permission.

> 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 the state of mind or other objective or subjective fact.
>
> Occupied structure means any house or any portion thereof to which the following applies: That, at the time it is occupied as the permanent or temporary habitation of any person, whether or not any person is actually present.
>
> Physical harm to persons means any injury, illness, or other psychological impairment regardless of its gravity.

Tr. 1258-60.

b. Insufficient evidence to prove that Clinton committed aggravated burglary.

The State presented very little evidence in Clinton's case that actually showed that Clinton entered the Jackson residence in any way other than by Jackson's invitation. In other words, the State did very little to show that Clinton entered Jackson's residence without privilege or permission to do so. In fact, there were no signs that anyone had gained forced entry into the Jackson home.

Heather Jackson's phone records indicate that Clinton called Jackson and she spoke to him shortly before Clinton's arrival at her home. Tr. 787-88, State's Exhibit 9. Surveillance videos show that Clinton was parked in Heather Jackson's driveway, hardly somewhere one would want to park prior to entering a home they did not have permission to enter. Tr. 792-93, State's Exhibits 113 and 114. There is no indication that Clinton entered Jackson's home via any means other than Jackson opening a door for him. In fact, BCI agent David Hammond testified that the back door of Heather's home had not appeared to be forced open. Tr. 623.

None of the evidence introduced at trial points to Clinton as someone who entered Jackson's residence via force, stealth, or deception. As such, the evidence and testimony introduced at trial is insufficient to establish that Clinton committed aggravated burglary.

c. Clinton's conviction was against the manifest weight of the evidence.

In assessing the manifest weight of the evidence, this Court must examine the entire record and determine whether the evidence produced attains the high degree of probative force and certainty required for a criminal conviction. This Court must review the credibility of the evidence submitted to support Clinton's conviction when reaching this determination.

"Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of the proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*.'" *Thompkins*, 78 Ohio St. 3d at 387.

The jury clearly lost its way when it found Clinton guilty of aggravated burglary. The credibility of the evidence presented was questionable, as demonstrated by the lack of information actually presented to the jury. As such, the evidence used to prove that Clinton committed aggravated burglary was insufficient.

E. Conclusion

There was insufficient evidence that Clinton caused the deaths of the Jackson family, committed the rapes of Celina Jackson or E.S, or committed aggravated burglary. Moreover, a review of the entire record demonstrates that Clinton's convictions were against the manifest weight of the evidence. Clinton's convictions therefore violate the Due Process Clause of the

Fourteenth Amendment to the United States Constitution. *Jackson*, 443 U.S. at 316. His convictions on the aggravated murder charge, rape charges, and aggravated burglary charge, and his death sentence must be vacated.

Proposition of Law No. XXI

> A trial court's failure to follow Ohio's sentencing laws violates a defendant's right to Due Process. U.S. Const. amends. V, VI, VIII, XIV; Ohio Const. art. I §§ 2, 5, 9, 10, 16, and 20.

A. Introduction

More due process, not less, is required in a death penalty case. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *State v. Griffin*, 138 Ohio St. 3d 108 (2013); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). *See also Evitts v. Lucey*, 469 U.S. 387, 401 (1985) ("When a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause.") The trial court's failure to apply R.C. § 2929.11 to Clinton's sentencing proceedings violated Clinton's constitutional right to Due Process.

B. Argument

In May 2011, the 129th Ohio General Assembly passed Am. Sub. H.B 86. The bill took effect on September 30, 2011, well before Clinton's arraignment and sentencing hearing. Among the many criminal sentencing reforms were changes to R.C. § 2929.11, which included a description of the purposes of felony sentencing. Using the Ohio Legislative Services Commission drafting conventions, R.C. § 2929.11 was amended as follows:

> (A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender **using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources**. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both....

R.C. § 2929.11 (emphasis added).

This amendment was a deliberate policy statement by the General Assembly that places affirmative duties on trial courts in *all* felony sentencing cases. The General Assembly's intent is stated by the use of the "shall be guided," "shall consider," and "shall be reasonably calculated" language. *Id.* At least one appellate court has reversed a maximum sentence based on R.C. § 2929.11, because "[t]he sentence would thus place an undue burden on the state's resources." *See State v. Bonness*, 2012 Ohio App. LEXIS 401 ¶29 (8th Dist. Feb. 9, 2012).

Here, the trial court violated Clinton's constitutional right to due process of law when it failed to follow Ohio statutory law. This was an abuse of discretion because the purposes of felony sentencing were neither mentioned nor cited in either the trial court's sentencing transcript or in the R.C. § 2929.03(F) sentencing opinion. The trial court never assessed whether a sentence less than death would have achieved the mandates listed in R.C. § 2929.11, such as incapacitating Clinton, deterring him and others from future crime, and providing a chance for rehabilitation in prison. The trial court also did not assess whether a life sentence would have been the "minimum sanctions" needed to achieve the purposes of felony sentencing "without imposing an unnecessary burden on state or local government resources." R.C. § 2929.11. By failing to make these required determinations, the trial court violated Clinton's constitutional rights as guaranteed by both the United States and Ohio Constitutions.

C. Conclusion

The trial court violated Clinton's constitutional right to due process of law when it failed to follow Ohio statutory law. Clinton is entitled to a new sentencing hearing where the dictates of R.C. § 2929.11 are followed by the trial court.

Proposition of Law No. XXII

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 Clinton. 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.[17]

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 ways described below.

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. *Id.* Any arbitrary use of the death penalty also offends the Eighth Amendment. *Id.*

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

[17] In *State v. Jenkins*, 15 Ohio St. 3d 164 (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 (1988).

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*, 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 are 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. *See generally Gregg,* 428 U.S. 153 ; *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 (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 will not be factored into the sentencer's decision. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982) (youth or childhood abuse); *Penry v. Lynaugh*, 492 U.S. 302 (1989) *rev'd on other grounds Penry v. Johnson*, 532 U.S. 782 (2001); *Enmund v. Florida*, 458 U.S. 782 (1982) (level of involvement in the crime); and *Delo v. Lashley*, 507 U.S. 272 (1993) (lack of criminal history). 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). *See also 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* 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 R. Crim. P. 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 identified this discrepancy as 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; the Ohio 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 listed within R.C. § 2929.04(A)(1)-(8) are both eligibility and selection factors.

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 (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 R.C. § 2929.05(A). *State v. Steffen*, 31 Ohio St. 3d 111 (1987). However, this prevents a fair proportionality review. No meaningful manner exists by which 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 Clinton'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, Clinton'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* at 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 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 African-Americans 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. *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. *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. *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. *Id.*

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

H. Conclusion

The death penalty process as employed in Ohio fails to protect against arbitrary and discriminatory imposition of the death penalty in individual circumstances. 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. As such, Clinton's death sentence must be vacated.

Proposition of Law No. XXIII

The cumulative effect of trial error renders a capital defendant's trial unfair and his sentence arbitrary and unreliable. U.S. Const. amends. VI, XIV; Ohio Const. art. 1, §§ 5 and 16.

Curtis Clinton raised numerous errors worthy of this Court granting relief both from his convictions and his death sentence. Each error, standing alone, is sufficient to warrant a reversal. However, by viewing the many errors together, it is apparent that their cumulative impact rendered Clinton's trial fundamentally unfair. *See Walker v. Engle*, 703 F.2d 959, 963 (6th Cir. 1983). As such, this Court must reverse Clinton's convictions and sentence.

From beginning to end, Clinton's capital trial was replete with prejudicial error. *See* Propositions of Law Nos. I-XXII. Assuming, *arguendo*, that none of the errors Clinton raised alone warrant reversal of his convictions and sentence, the cumulative effect of the errors is so prejudicial that this Court must order a new trial.

The adequacy of the legally admitted evidence is only one factor for this Court to consider in determining the influence that an error has on a jury. The Supreme Court made clear in *Satterwhite v. Texas*, 486 U.S. 249 (1988), that it "is not whether the legally admitted evidence was sufficient to support" the verdict, but rather "whether the [prosecution] has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* at 258-59. Review must also determine whether the cumulative effect of the errors rendered the trial fundamentally unfair. *See Walker*, 703 F.2d at 963. "We must reverse any conviction obtained in a proceeding in which the cumulative impact of irregularities is so prejudicial to a defendant that he is deprived of his fundamental right to a fair trial. Fourteenth Amendment, United States Constitution." *State v. Wilson*, 787 P.2d 821, 821 (N.M. 1990); *United States v. Wallace*, 848 F.2d 1464, 1475 (9th Cir. 1988); *State v. DeMarco*, 31 Ohio St. 3d 191 (1987).

Perhaps the most telling example of the prejudice resulting from the cumulative impact of the errors at Clinton's trial are the erroneous trial court evidentiary rulings, ineffective assistance of counsel, and misconduct that combined to deprive Clinton of the opportunity to fully and fairly present an adequate defense to the charges at issue. *See Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). In general, trial counsel failed to fully investigate in order to present a complete and competent defense. For example, they failed to effectively cross-examine State's witnesses, they failed to make relevant objections, they failed to hire pertinent experts, and, significantly, they failed to ensure that Clinton both voluntarily and knowingly waived his right to present mitigating evidence in this case. In combination with prejudicial evidence, which was offered and admitted against Clinton, as well as errors during jury selection and the State's misconduct during the trial and closing argument, Clinton was destined to receive the penalty of death.

The result of cumulative error entitles Clinton to a new trial. His convictions based upon cumulative error denied him a fair trial and his right to due process. U.S. Const. amends. VI, XIV; Ohio Const. Art. I, § 5, 16. Additionally, these same errors render Clinton's death sentence unreliable and arbitrary. U.S. Const. amends. VIII, XIV; Ohio Const. art. I, §§ 9, 16.

Conclusion

For the foregoing reasons, Curtis L. Clinton's convictions and sentence must be reversed and his case remanded for a new trial and/or sentencing phase.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true copy of the foregoing Merit Brief of Appellant Curtis L. Clinton and Appendix to Merit Brief was sent by first-class mail to Kevin J. Baxter, Erie County Prosecutor, Erie County Office Building, 247 Columbus Avenue, Suite 319, Sandusky, Ohio 44870 and to Thomas E. Madden, Senior Assistant Attorney General – Special Prosecutor, Ohio Attorney General's Office, 150 East Gay Street, 16th floor, Columbus, Ohio 43215 on this 15th day of December, 2014.

By: _____
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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Appellee,	:	
-vs-	:	CASE NO. 2014-0237
CURTIS L. CLINTON,	:	**This is a capital case.**
Appellant.	:	

On Appeal From the Court of
Common Pleas of Erie County
Case No. 2012 CR 0383

APPENDIX TO MERIT BRIEF OF APPELLANT CURTIS L. CLINTON

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ORIGINAL

In the Supreme Court of Ohio

STATE OF OHIO,	:	
Appellee,	:	Case No. 14-0273
-v-	:	
CURTIS L. CLINTON,	:	
Appellant.	:	**This Is A Capital Case.**

On Appeal From the Court Of
Common Pleas of Erie County
Case No. 2012 CR 0383

Notice Of Appeal of Appellant Curtis L. Clinton

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FEB 21 2014
CLERK OF COURT
SUPREME COURT OF OHIO

In the Supreme Court of Ohio

STATE OF OHIO,	:	
Appellee,	:	Case No.
-v-	:	
CURTIS L. CLINTON,	:	
Appellant.	:	**This Is A Capital Case.**

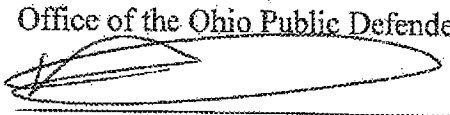
On Appeal From the Court Of
Common Pleas of Erie County
Case No. 2012 CR 0383

Notice Of Appeal of Appellant Curtis L. Clinton

Appellant Curtis L. Clinton hereby gives his notice of appeal to the Supreme Court of Ohio from the judgment entry (Nunc Pro Tunc) and the Sentencing Opinion of the Erie County Court of Common Pleas, entered on November 19, 2013 and January 8, 2014, respectively. *See* Exhibit A and B. This is a capital case and the date of the capital offense are subsequent to January 1, 1995. *See* S.Ct.Prac.R. 11.01(B)(1).

Respectfully submitted,

Office of the Ohio Public Defender



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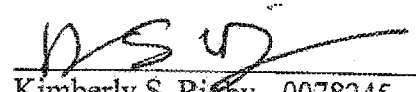

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I hereby certify that a true copy of the foregoing NOTICE OF APPEAL OF APPELLANT CURTIS L. CLINTON was sent by first-class mail to Kevin J. Baxter, Erie County Prosecutor, and Mary Ann Barylski, Chief Assistant, Criminal Division, Erie County Office Building, 247 Columbus Avenue, Suite 319, Sandusky, Ohio 44870 on this 21st day of February, 2014.

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FILED
COMMON PLEAS COURT
ERIE COUNTY, OHIO
2014 JAN -8 PM 12:12
LUVADA S. WILSON
CLERK OF COURTS

IN THE COMMON PLEAS COURT OF ERIE COUNTY, OHIO

STATE OF OHIO	:	
	:	CASE NO. 2012-CR-383
-vs-	:	**SENTENCING OPINION**
CURTIS L. CLINTON	:	
DEFENDANT	:	

******

This opinion is rendered pursuant to Ohio Revised Code Section 2929.03(F).

On September 19, 2012, the Erie County Grand Jury returned an indictment charging the Defendant with five counts of Aggravated Murder, three counts of Rape, one count of Aggravated Burglary, and multiple specifications, including multiple capital specifications.

After having appointing Rule 20 certified counsel, Robert A. Dixon and David L. Doughten, the Defendant entered pleas of not guilty at his arraignment held on September 27, 2012.

After multiple pretrial conferences, motion hearings, suppression hearing, jury excuse hearings, and individual voir dire, the case proceeded to trial beginning October 28, 2013.

On November 4, 2013, the jury returned verdicts finding the Defendant, Curtis L. Clinton, guilty of all counts of the indictment as well as all specifications, which included

EXHIBIT
A
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capital specifications as well as non-capital specifications (the repeat violent offender specification was not presented to the jury and will be addressed later in this opinion.)

Therefore, the Defendant was found guilty of the following:

Count I: Rape of Elizabeth Sebetto, a felony of the first degree in violation of R.C. Section 2907.02(A)(2).

Count II: Rape of Elizabeth Sebetto, a felony of the first degree in violation of 2907.02(A)(2).

Count III: Aggravated Murder of Heather Jackson, an unclassified felony in violation of R.C. Section 2903.01(B) as well as the following specifications as to Count III:

(a) Two felony Murder Specifications (Rape/Aggravated Burglary) in violation of R.C. Section 2929.04(A)(7);

(b) Multiple Murder Specification in violation of R.C. Section 2929.04(A)(5);

(c) Sexual Motivation Specification in violation of R.C. Section 2941.147.

Count IV: Aggravated Murder of Celina Jackson (DOB: 3-10-09), an unclassified felony in violation of R.C. Section 2903.01(B) as well as the following specifications:

(a) Felony Murder Specification in violation of R.C. Section 2929.04(A)(7);

(b) Multiple Murder Specification in violation of R.C. Section 2929.04(A)(5);

(c) Under Age 13 Specification in violation of R.C. Section 2929.04(A)(9);

(d) Sexual Motivation Specification in violation of R.C. Section 2941.147.

Count V: Aggravated Murder of Celina Jackson, an unclassified felony in violation of R.C. Section 2903.01(C) as well as the following specifications:

(a) Two Felony Murder Specifications (Rape/Aggravated Burglary) in violation of R.C. Section 2929.04(A)(7);

(b) Multiple Murder Specification in violation of R.C. Section 2929.04(A)(5);

(c) Under Age 13 Specification in violation of R.C. Section 2929.04(A)(9);

(d) Sexual Motivation Specification in violation of R.C. Section 2941.147.

Count VI: Rape of Celina Jackson, a felony of the first degree in violation of R.C. Section 2907.02(A)(1) as well as the following specification as to Count VI:

(a) The victim was under the age of 10 at the time the rape was committed.

Count VII: Aggravated Murder of Wayne Jackson Jr. (DOB: 1-4-11), an unclassified felony in violation of R.C. Section 2903.01(B) as well as the following specifications:

(a) Two Felony Murder Specifications (Rape/Aggravated Burglary) in violation of R.C. Section 2929.04(A)(7);

(b) Multiple Murder Specification in violation of R.C. Section 2929.04(A)(5);

(c) Under Age 13 Specification in violation of R.C. Section 2929.04(A)(9);

(d) Sexual Motivation Specification in violation of R.C. Section 2941.147

Count VIII: Aggravated Murder of Wayne Jackson Jr., an unclassified felony in violation of R.C. Section 2903.01(C) as well as the following specifications as to Count VIII:

(a) Two Felony Murder Specifications in violation of R.C. 2929.04(A)(7) (Rape/Aggravated Burglary);

(b) Multiple Murder Specification in violation of R.C. 2929.04(A)(5);

(c) Under Age 13 Specification in violation of R.C. 2929.04(A)(9);

(d) Sexual Motivation Specification in violation of R.C. 2941.147

Count IX: Aggravated Burglary (723 John Street – home of Heather Jackson), a felony of the first degree in violation of R.C. Section 2911.11(A)(1).

Applying the law of merger, the State elected to proceed to the sentencing phase of the trial with Count 3: The purposeful killing of Heather Jackson while in commission of Aggravated Burglary; Count 5: The purposeful killing of Celina Jackson who was under thirteen (13) years of age at the time of the commission of the offense; and Count 8: The purposeful killing of Wayne Jackson Jr., who was under thirteen (13) years of age at the time of the commission of the offense.

Prior to the sentencing phase, the Court specifically considered the requirement of merger of the specifications and/or circumstances. [See State v. Jenkins (1984), 15 Ohio St. 3d 164; State v. Robb (2000), 88 Ohio St. 3d 59]

Based upon those considerations, the Court instructed the jury at the sentencing phase that the aggravated circumstances they were to consider were: As to Count 3, the Aggravated Murder of Heather Jackson, (1) that the offense was part of a course of conduct involving the purposeful killing or attempt to kill two or more persons by the Defendant [2929.04(A)(9)]; and/or (2) that the offense was committed while the Defendant was committing, attempting to commit or fleeing immediately after committing, attempting to commit the offense of rape and the Defendant was the

principal offender in the commission of the Aggravated Murder [2929.04(A)(7)]. As to Count 5, the Aggravated Murder of Celina Jackson, (1) that the offense was part of a course of conduct involving the purposeful killing, or attempt to kill, two or more persons by the Defendant [2929.04(A)(5)]; (2) that the offense was committed while the Defendant was committing, attempting to commit, or fleeing immediately after committing, attempting to commit the offense of rape, and the Defendant was the principal offender in the commission of the Aggravated Murder [(2929.04(A)(7)]; and/or (3) the Defendant, in commission of the offense, purposely caused the death of another who was under thirteen (13) years of age at the time of the commission of the offense and the Defendant was the principal offender in the commission of the offenses [2929.04(A)(5)]. As to Count 8, the Aggravated Murder of Wayne Jackson Jr., (1) that the offense was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the Defendant [2929.04(A)(5)]; (2) that the offense was committed while the Defendant was committing, attempting to commit, or fleeing immediately after committing, attempting to commit the offense of rape, and the Defendant was the principal offender in the commission of the Aggravated Murder [2929.04(A)(7)]; and/or (3) that the Defendant, in the commission of the offense, purposefully caused the death of another who was under thirteen (13) years of age at the time of the commission of the offense, and the Defendant was the principal offender in the commission of the offense [2929.04(A)(9)].

The jury was instructed that the penalty for each separate count must be determined separately and that only the aggravated circumstances, separately, relating to a given count may be considered and weighed against any and all mitigating factors.

The jury was further instructed that the sentence for each of Counts 3, 5, and 8 must be decided separately and independently of all other counts and circumstances and to only consider the aggravating circumstances which the Court outlined during the sentencing phase instructions. The jury was further instructed that the aggravated circumstances which they were to consider did not include the aggravated murder charges.

Prior to the start of the sentencing phase, the Court reviewed with the Defendant and his counsel that the Defendant was advised of his right to a presentence investigation and report prepared by the Court, his right to a mental/psychological exam, and his right to make a sworn or unsworn statement. Defense counsel has advised this Court that they have met with their client extensively on these issues, that they have worked with their own investigators, psychologists and mitigation experts, and although the Defendant was advised through this Court and his counsel that great leeway would be given in the presentation of any and all mitigating factors, the Defendant made a knowing, intelligent and voluntary waiver of the presentation of mitigating factors to the jury. Counsel for the Defendant stood ready, willing and able to present said mitigation testimony and exhibits to the jury, but that right was waived and said evidence was proffered to the Court outside the hearing of the jury and made part of the record, under seal.

On November 12, 2013, the sentencing phase of the trial began and ended. The State first moved for the admission of certain exhibits from the trial phase, which was granted. The defense waived presentation of mitigating evidence based on the Defendant's wishes; however, the Defendant did take the stand to make a lengthy unsworn statement, after which both sides rested and proceeded to closing arguments.

On November 12, 2013, the jury in the above captioned matter, upon due deliberation, returned to open Court with their unanimous finding that the penalty of death was the appropriate sentence for each separate Aggravated Murder conviction contained in Counts 3, 5 and 8. The matter was then set for sentencing this 14th day of November, 2013.

At this sentencing hearing, the Defendant, Curtis L. Clinton, has been afforded all of his rights pursuant to Criminal Rule 32. Counsel for the Defendant were allowed to speak in mitigation prior to this Court rendering its sentence. The Defendant was allowed to exercise his right of allocution. The Court has considered the statement made by the Defendant at allocution.

Pursuant to R.C. Section 2929.04(A), imposition of the death penalty for a conviction of Aggravated Murder is precluded unless one or more of the listed specifications is specified in the indictment or count in the indictment pursuant to 2941.14 of the Ohio Revised Code, and proven beyond a reasonable doubt.

The following aggravated circumstances were listed properly in the indictment as specifications, were proven beyond a reasonable doubt, and subsequently the Defendant has been found guilty by a jury of committing the following aggravating circumstances, as to Count 3: 2929.04(A)(5) that the offense at bar was part of a course of conduct involving the purposeful killing of two or more persons and 2929.04(A(7) the offense was committed while the offender was committing rape and was the principal offender in the commission of aggravated murder; Count 5: 2929.04(A)(5) that the offense at bar was part of a course of conduct involving the purposeful killing of two or more persons and 2929.04(A)(7) the offense was committed while the offender was

committing rape and was the principal offender in the commission of the aggravated murder, and 2929.04(A)(9) that the victim was under thirteen years of age at the time of the offense and the Defendant was the principal offender. Count 8: 2929.04(A)(5) that the offense at bar was a course of conduct involving the purposeful killing of two or more persons, 2929.04(A)(7) the offense was committed while the offender was committing rape and was the principal offender in the commission of aggravated murder, and 2929.04(A)(9) that the victim was under thirteen years of age at the time of the offense and the Defendant was the principal offender.

The Court has considered separately and only the aggravating circumstances as to each individual and specific charge of aggravated murder of which the Defendant has been found guilty.

For purposes of sentencing, the Court has reviewed all of the evidence, including the unsworn statement of the Defendant in search of mitigating factors. The Court has further spent a significant amount of time reviewing its notes to be sure to consider any and all mitigating factors it might find.

As to the Aggravated Murder convictions, the Court has separately and specifically considered each of the four sentencing options allowable in this case:

(a) Life imprisonment with parole eligibility after serving twenty-five full years;

(b) Life imprisonment with parole eligibility after serving thirty full years;

(c) Life imprisonment without the possibility of parole; and ,

(d) Death.

The Court has considered the fact that, if given a life sentence, Curtis Clinton would not be eligible for parole or release until the stated time is served day-for-day.

The Court did not in any way consider any cumulative effect of the Defendant having been convicted of multiple counts of aggravated murder or having been convicted of multiple capital specifications. Each count was considered separately and each aggravating circumstance connected to that count, and that count only, was considered separately and independently of all other counts and circumstances.

For the purposes of the Court's consideration of mitigation and sentencing, victim impact statements were not considered in any way against the Defendant.

The Court has considered any and all mitigating factors that it could find from the thorough and exhaustive review of the record in this case. The Court further considered that any mitigating factors standing alone would be sufficient to support a life sentence and that the cumulative effect of the mitigating factors could also support a sentence of life imprisonment. The Court did not limit its consideration to specific mitigating factors, but also considered any other mitigating factors that weighed in favor of a sentence other than death. In so doing, the Court finds, as the jury found, that the aggravating circumstances outweigh the mitigating factors.

The Court is required to state the reasons why the aggravating circumstances the offender has been found guilty of committing are sufficient to outweigh the mitigating factors. Quite simply put, the aggravating circumstances of brutally killing an entire family, including a mother and her two little children by strangulation, the little boy by his own blanket while raping the little daughter, grossly outweighs any mitigating factor the Court could point to in this case.

In consideration of all that has been articulated by this Court, the Court cannot see any reason to set aside the recommendation by the jury for the sentence of death, by way of mitigating evidence, legal authority or otherwise.

Therefore the Court concurs with the jury's sentence and:

As to Count 3 – hereby sentences Curtis L. Clinton to death for the Aggravated Murder of Heather Jackson in violation of 2903.01(B), 2929.04(A)(5) and 2929.04(A)(7).

As to Count 5 – hereby sentences Curtis L. Clinton to death for the Aggravated Murder of Celina Jackson in violation of 2903.01(C), 2929.04(A)(5), 2929.04(A)(7) and 2929.04(A)(9).

As to Count 8 – hereby sentences Curtis L. Clinton to death for the Aggravated Murder of Wayne Jackson Jr., in violation of 2903.01(C), 2929.04(A)(5), 2929.04(A)(7) and 2929.04(A)(9).

The sentences in Counts 3, 5 and 8 are to run consecutively as there are three separate victims in this series of crimes.

On behalf of the victims, family members addressed the Court, after which the Court continued with the sentencing as to all non-capital counts:

As to Count 6, the Rape of Celina Jackson in violation of 2907.02(A)(1)(b), the victim being under 10 years of age, the Court imposes a life sentence without the possibility of parole.

As to Counts 1 and 2, the Rapes of Elizabeth Sebetto in violation of 2907.02(A)(2), the Court finding that these two counts are not allied offenses of similar import, that they have separate anima and do not merge for the purpose of sentencing, the Court imposes a 10 year sentence on each count.

As to Count 9, the Aggravated Burglary in violation of 2911.11(A)(1), the Court imposes a 10 year sentence.

As stated, Counts 3, 5 and 8 are to run consecutively. The sentences imposed in Counts 1 and 2 shall run concurrent. The sentences in Counts 6 and 9 shall run concurrent. The sentences imposed in Counts 3, 5 and 8 shall be served consecutively to the sentences imposed in Counts 1 and 2. The sentences imposed in Counts 1, 2, 3, 5 and 8 shall run concurrent with the sentences imposed in Counts 6 and 9 for a total of three Death sentences, one term of Life without parole eligibility in addition to 10 years.

The Court finds that consecutive sentences are necessary to protect the public and not disproportionate to the seriousness of the Defendant's conduct and the danger the Defendant poses to the public.

The Court will not make the requisite guilty finding on the repeat violent offender specification and therefore declines to sentence on that specification.

The Court further dismisses the sexual motivation specification.

Notification of Appellant's rights have previously been given and the Court appoints Rule 20 certified counsel from the State Public Defender's office.

The Court further orders that the Erie County Clerk of Courts shall forthwith deliver a copy of the entire case file to the Ohio Supreme Court pursuant to law.

Further, the Defendant is ordered to submit to any DNA sample requests as requested by any law enforcement agency; and ordered to pay the Court costs.

The Defendant is hereby remanded back into the custody of the Erie County Sheriff to be committed to the Ohio Department of Rehabilitation and Correction pursuant to the above sentence, forthwith, for immediate transport to the Chillicothe

Correctional Institution at Chillicothe, Ohio, and that he be safely kept until such day as the Department of Rehabilitation and Correction designates a new Correctional Facility for purposes of administration of the lethal injection. At such time, Defendant shall be transported to the new Correctional Facility and shall be safely kept, within an enclosure, inside the walls of said Correctional Facility, prepared for lethal injection, according to law. Defendant, Curtis L. Clinton, shall be administered a lethal injection by the Warden of said Correctional Facility; that the Warden or his duly authorized deputy, shall administer a lethal injection until Defendant, Curtis L. Clinton, is DEAD.

1/8/14
DATE

JUDGE TYGH M. TONE

as previously filed in Supreme Court of Ohio

cc: Supreme Court of Ohio
Kevin Baxter
Mary Ann Barylski
Paul Scarsella
David Doughten
Robert Dixon

K1 Bud Atty.

FILED
COMMON PLEAS COURT
ERIE COUNTY, OHIO
2013 NOV 19 PM 12:27
LUVADA S. WILSON
CLERK OF COURTS

IN THE COMMON PLEAS COURT OF ERIE COUNTY, OHIO

State of Ohio	:	Case No. 2012-CR-383
-vs-	:	Judge Tygh M. Tone
Curtis L. Clinton	:	**JUDGMENT ENTRY NUNC PRO TUNC**
Defendant	:	
	:	

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This case shall be amended NUNC PRO TUNC to correct a typographical error in the Judgment Entry filed on November 14, 2013, in that on page 8 the offense of Aggravated Burglary is "as to Count 9". The Judgment Entry shall read as follows:

On the 14th day of November, 2013, defendant's sentencing hearing was held pursuant to Ohio Revised Code §2929.19; present were Prosecuting Attorney Kevin J. Baxter and Special Assistant Prosecutor Paul Scarsella on behalf of the State of Ohio, the defendant in person and represented by counsel, Robert Dixon and David Doughten; and defendant was afforded all his rights pursuant to Crim.R. 32.

The Court finds that on November 4, 2013, a jury found the defendant

GUILTY beyond a reasonable doubt of Rape by force [F-1; O.R.C. §2907.02(A)(2)] as contained in Count 1 of the indictment [victim E.S. 09/17/94] subject to a penalty of 3, 4, 5, 6, 7, 8, 9, 10 or 11 years;

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11-21-13

EXHIBIT
B

GUILTY beyond a reasonable doubt of Rape by force [F-1; O.R.C. §2907.02(A)(2)] as contained in Count 2 of the indictment [victim E.S. 09/17/94] subject to a penalty of 3, 4, 5, 6, 7, 8, 9, 10 or 11 years;

GUILTY beyond a reasonable doubt of AGGRAVATED MURDER [O.R.C. §2903.01(B)] as contained in Count 3 of the indictment [victim Heather Jackson];

GUILTY beyond a reasonable doubt of the AGGRAVATING CIRCUMSTANCE SPECIFICATION COUNT 3, committed while in the commission of committing, attempting to commit or fleeing immediately after committing, attempting to commit the offense of rape and defendant was the principal offender in the commission of the aggravated murder;

GUILTY beyond a reasonable doubt of the AGGRAVATING CIRCUMSTANCE SPECIFICATION COUNT 3, committed while in the commission of committing, attempting to commit or fleeing immediately after committing, attempting to commit the offense of aggravated burglary and defendant was the principal offender in the commission of the aggravated murder;

GUILTY beyond a reasonable doubt of the AGGRAVATING CIRCUMSTANCE SPECIFICATION COUNT 3, committed the offense of aggravated murder with a sexual motivation;

GUILTY beyond a reasonable doubt of AGGRAVATED MURDER [O.R.C. §2903.01(B)] as contained in Count 4 of the indictment [victim Celina Jackson];

GUILTY beyond a reasonable doubt of the AGGRAVATING CIRCUMSTANCE SPECIFICATION COUNT 4, committed while in the commission of committing, attempting to commit or fleeing immediately after committing, attempting to commit the offense of rape and defendant was the principal offender in the commission of the aggravated murder;

GUILTY beyond a reasonable doubt of the AGGRAVATING CIRCUMSTANCE SPECIFICATION COUNT 4, committed the offense of aggravated murder with a sexual motivation;

GUILTY beyond a reasonable doubt of the AGGRAVATING CIRCUMSTANCE SPECIFICATION COUNT 4, committed while in the commission of aggravated murder, purposely caused the death of Celina Jackson, who was under thirteen years of age at the time of the commission of the offense of aggravated murder, and was the principal offender in the commission of aggravated murder;

GUILTY beyond a reasonable doubt of AGGRAVATED MURDER [O.R.C. §2903.01(C)] as contained in Count 5 of the indictment [victim Celina Jackson];

GUILTY beyond a reasonable doubt of the AGGRAVATING CIRCUMSTANCE SPECIFICATION COUNT 5, committed while in the commission of committing, attempting to commit or fleeing immediately after committing, attempting to commit the offense of rape and defendant was the principal offender in the commission of the aggravated murder;

GUILTY beyond a reasonable doubt of the AGGRAVATING CIRCUMSTANCE SPECIFICATION COUNT 5, committed while in the commission of committing, attempting to commit or fleeing immediately after committing, attempting to commit the offense of aggravated burglary and defendant was the principal offender in the commission of the aggravated murder;

GUILTY beyond a reasonable doubt of the AGGRAVATING CIRCUMSTANCE SPECIFICATION COUNT 5, committed the offense of aggravated murder with a sexual motivation;

GUILTY beyond a reasonable doubt of the AGGRAVATING CIRCUMSTANCE SPECIFICATION COUNT 5, committed while in the commission of aggravated murder,

purposely caused the death of Celina Jackson, who was under thirteen years of age at the time of the commission of the offense of aggravated murder, and was the principal offender in the commission of aggravated murder;

GUILTY beyond a reasonable doubt of Rape by force [F-1; O.R.C. §2907.02(A)(1)(b)] as contained in Count 6 of the indictment [victim Celina Jackson] subject to a penalty of 3, 4, 5, 6, 7, 8, 9, 10 or 11 years;

GUILTY beyond a reasonable doubt of the AGGRAVATING CIRCUMSTANCE SPECIFICATION COUNT 6, Celina Jackson was under the age of ten (10) years of age;

GUILTY beyond a reasonable doubt of AGGRAVATED MURDER [O.R.C. §2903.01(B)] as contained in Count 7 of the indictment [victim Wayne Jackson Jr.];

GUILTY beyond a reasonable doubt of the AGGRAVATING CIRCUMSTANCE SPECIFICATION COUNT 7, committed while in the commission of committing, attempting to commit or fleeing immediately after committing, attempting to commit the offense of rape and defendant was the principal offender in the commission of the aggravated murder;

GUILTY beyond a reasonable doubt of the AGGRAVATING CIRCUMSTANCE SPECIFICATION COUNT 7, committed while in the commission of committing, attempting to commit or fleeing immediately after committing, attempting to commit the offense of aggravated burglary and defendant was the principal offender in the commission of the aggravated murder;

GUILTY beyond a reasonable doubt of the AGGRAVATING CIRCUMSTANCE SPECIFICATION COUNT 7, committed the offense of aggravated murder with a sexual motivation;

GUILTY beyond a reasonable doubt of the AGGRAVATING CIRCUMSTANCE SPECIFICATION COUNT 8, committed while in the commission of aggravated murder,

purposely caused the death of Wayne Jackson Jr., who was under thirteen years of age at the time of the commission of the offense of aggravated murder, and was the principal offender in the commission of aggravated murder;

GUILTY beyond a reasonable doubt of AGGRAVATED MURDER [O.R.C. §2903.01(C)] as contained in Count 8 of the indictment [victim Wayne Jackson Jr.];

GUILTY beyond a reasonable doubt of the AGGRAVATING CIRCUMSTANCE SPECIFICATION COUNT 8, committed while in the commission of committing, attempting to commit or fleeing immediately after committing, attempting to commit the offense of rape and defendant was the principal offender in the commission of the aggravated murder;

GUILTY beyond a reasonable doubt of the AGGRAVATING CIRCUMSTANCE SPECIFICATION COUNT 8, committed while in the commission of committing, attempting to commit or fleeing immediately after committing, attempting to commit the offense of aggravated burglary and defendant was the principal offender in the commission of the aggravated murder;

GUILTY beyond a reasonable doubt of the AGGRAVATING CIRCUMSTANCE SPECIFICATION COUNT 8, committed the offense of aggravated murder with a sexual motivation;

GUILTY beyond a reasonable doubt of the AGGRAVATING CIRCUMSTANCE SPECIFICATION COUNT 8, committed while in the commission of aggravated murder, purposely caused the death of Wayne Jackson Jr., who was under thirteen years of age at the time of the commission of the offense of aggravated murder, and was the principal offender in the commission of aggravated murder;

GUILTY beyond a reasonable doubt of AGGRAVATED BURGLARY [O.R.C. §2911.11(A)(1)] as contained in Count 9 of the indictment;

GUILTY beyond a reasonable doubt of the AGGRAVATING CIRCUMSTANCE SPECIFICATION AS TO COUNTS 3, 4, 5, 7 AND 8, committed as part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons;

The Court finds defendant guilty of the same.

Prior to the penalty phase, the Court merged Counts 4 and 5, including all Aggravating Circumstance Specifications, into Count 5; and merged Counts 7 and 8, including all Aggravating Circumstance Specifications, into Count 8.

This matter proceeded to the sentencing phase. On November 12, 2013, the jury unanimously found beyond a reasonable doubt a) that the aggravated circumstances the defendant was guilty of committing *did* outweigh the mitigating factors as to the charge of Aggravated Murder, as to the death of Heather Jackson, as contained in Count 3 of the indictment with DEATH SPECIFICATIONS; b) that the aggravated circumstances the defendant was guilty of committing *did* outweigh the mitigating factors as to the charge of Aggravated Murder, as to the death of Celina Jackson, as contained in Count 5 of the indictment with DEATH SPECIFICATIONS; and c) that the aggravated circumstances the defendant was guilty of committing *did* outweigh the mitigating factors as to the charge of Aggravated Murder, as to the death of Wayne Jackson Jr., as contained in Count 8 of the indictment with DEATH SPECIFICATIONS.

Based on the above findings, the jury recommended *death* for the defendant on Count 3 of the indictment; the jury recommended *death* for the defendant on Count 5 of the indictment; and the jury recommended *death* for the defendant on Count 8 of the indictment.

Thereupon the Court inquired of the defendant if he had anything to say why judgment should not be pronounced against him and the defendant made a statement and showed no good and sufficient cause why judgment should not be pronounced:

The Court hereby finds beyond a reasonable doubt that the aggravating circumstances do outweigh the mitigating factors and that the death penalty shall be imposed on Counts 3, 5 and 8.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that defendant having been found guilty as to **Count No. 3**, for the offense of **AGGRAVATED MURDER**, a special felony in violation of §2903.01(B) of the Ohio Revised Code, the sentence is DEATH; defendant having been found guilty as to **Count No. 5**, for the offense of **AGGRAVATED MURDER,** a special felony in violation of §2903.01(C) of the Ohio Revised Code, the sentence is DEATH; defendant having been found guilty as to **Count No. 8**, for the offense of **AGGRAVATED MURDER,** a special felony in violation of §2903.01(C) of the Ohio Revised Code, the sentence is DEATH.

When imposing a sentence in this case for the non-capital counts, the defendant was afforded all rights pursuant to Crim.R. 32. Defendant was advised at the time of this hearing of his right to appeal within thirty (30) days of the sentence.

In so far as defendant was found guilty of two (2) counts of rape in violation of O.R.C. §2907.02(A)(2) and rape in violation of O.R.C. §2907.02(A)(1)(b) and, pursuant to O.R.C. §2950 et.seq., this Court finds that defendant is a Tier III sexual offender. Defendant waived reading of the conditions on the record and signed notification forms as to be determined a Tier III sexual offender.

The Court has considered the record, oral statements of counsel, defendant's statement, any victim impact statements, as well as the principles and purposes of sentencing under Ohio

Revised Code §2929.11, and has balanced the seriousness and recidivism factors of Ohio Revised Code §2929.12 with regard to non-capital offenses.

The Court finds that pursuant to H.B. 86, and due to the seriousness of the offenses and potential recidivism, that the imposition of consecutive prison sentences is appropriate.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, by the Court that defendant having been found guilty as to **Count No. 1**, for the offense of **RAPE BY FORCE**, a first degree felony in violation of §2907.02(A)(2) of the Ohio Revised Code, shall be sentenced to the Department of Rehabilitation and Correction and conveyed to the Lorain Correctional Institution at Grafton, Ohio to be imprisoned and confined for a definite sentence for the term of ten (10) years - which are mandatory in that defendant is not eligible for community control sanctions, judicial release or any form of early release pursuant to O.R.C. §2929.13(F)(6); defendant having been found guilty as to **Count No. 2**, for the offense of **RAPE BY FORCE**, a first degree felony in violation of §2907.02(A)(2) of the Ohio Revised Code, shall be sentenced to the Department of Rehabilitation and Correction and conveyed to the Lorain Correctional Institution at Grafton, Ohio to be imprisoned and confined for a definite sentence for the term of ten (10) years - which are mandatory in that defendant is not eligible for community control sanctions, judicial release or any form of early release pursuant to O.R.C. §2929.13(F)(6); defendant having been found guilty as to **Count No. 6**, for the offense of **RAPE BY FORCE**, a first degree felony in violation of §2907.02(A)(1)(b) of the Ohio Revised Code, shall be sentenced to the Department of Rehabilitation and Correction and conveyed to the Lorain Correctional Institution at Grafton, Ohio to be imprisoned and confined for a definite sentence for the term of LIFE without eligibility for parole; defendant having been found guilty as to **Count No. 9**, for the offense of **AGGRAVATED BURGLARY**, a first degree felony in

violation of §2911.11(A)(1) of the Ohio Revised Code, shall be sentenced to the Department of Rehabilitation and Correction and conveyed to the Lorain Correctional Institution at Grafton, Ohio to be imprisoned and confined for a definite sentence for the term of ten (10) years - which are mandatory in that defendant is not eligible for community control sanctions, judicial release or any form of early release pursuant to O.R.C. §2929.13(F)(6).

The sentences imposed in Counts 3, 5 and 8 shall be served consecutively. The sentences imposed in Counts 1 and 2 shall run concurrent. The sentences imposed in Count 6 and 9 shall run concurrent.

The sentences imposed in Counts 3, 5 and 8 shall be served consecutively to the sentences imposed in Counts 1 and 2. The sentences imposed in Counts 1, 2, 3, 5 and 8 shall run concurrent with the sentences imposed in Counts 6 and 9 for a total of three DEATH sentences, a term of LIFE without eligibility for parole in addition to ten (10) years.

Defendant shall receive 431 days credit for time served as of November 14, 2013; and defendant shall pay the costs of this prosecution for which execution is awarded and the recognizance heretofore given is hereby canceled and sureties thereon are discharged.

As part of the sentence in this case, regarding non-capital offenses, the defendant ***shall*** be supervised after leaving prison for a mandatory period of 5 years of post release control on Counts 1, 2, 6 and 9 to run concurrent. After prison release, if post-release control is imposed, for violating post-release control conditions, the Adult Parole Authority or Parole Board may impose a more restrictive or longer control sanction, return defendant to prison for up to nine months for each violation, up to a maximum of 50% of the stated terms. If the violation is a new felony, defendant may receive a new prison term of the greater of one year or the time remaining on post-release control.

Defendant is hereby notified that, under Federal law, persons convicted of felonies can never lawfully possess a firearm. Defendant was further notified that if he is ever found with a firearm, even one belonging to someone else, he could be subject to prosecution by federal authorities and subject to imprisonment for several years. This restriction applies even if his Civil Rights have successfully been restored.

IT IS FURTHER ORDERED that the institution shall credit defendant for time served from the date of sentencing until reception at said facility.

IT IS FURTHER ORDERED that the Erie County Sheriff's Office shall transport defendant to the appropriate institution for service of prison sentence.

IT IS FURTHER ORDERED that the defendant shall submit to the collection of DNA specimen as required by law.

IT IS FURTHER ORDERED that the Erie County Clerk of Courts shall enter, without delay, this Judgment Entry on its journal pursuant to Crim.R. 32(C).

IT IS FURTHER ORDERED that the Erie County Sheriff's Office shall withdraw/remove any Temporary Restraining Order [TPO] which may have been placed in LEADS and/or NCIC. The victim is E.S. [09/17/84].

IT IS FURTHER ORDERED that the Erie County Sheriff's Office shall withdraw any Holders/Warrants which have been placed in LEADS and/or NCIC as to this matter.

IT IS FURTHER ORDERED that the defendant shall pay all court costs in this matter.

Thereupon, the Court, pursuant to O.R.C. §2941.25(A), declined to receive any evidence and to make the requisite finding on the repeat violent offender specification due to the imposition of the death penalty. Further, the Court dismissed the sexual motivation specification due to the imposition of the death penalty.

The Court informed the defendant of his right to appeal pursuant to Rule 32(A)(2) Criminal Rules of Procedure, Ohio Supreme Court. The defendant indicated to the Court that he will appeal. The Court will appoint Sup.R. 20 certified defense counsel for purposes of appeal.

IT IS THEREFORE ORDERED AND ADJUDGED by this Court that the defendant, Curtis L. Clinton, shall be committed to the Ohio Department of Rehabilitation and Correction pursuant to the above sentence; that the Defendant is to be conveyed by the Sheriff of Erie County, Ohio, within five (5) days to Lorain Correctional Institution, for the immediate transport to Chillicothe Correctional Institution at Chillicothe, Ohio, and that he be there safely kept until such day as the Department of Rehabilitation and Correction designates a new Correctional Facility for purposes of the administration of the lethal injection.

At such time, defendant shall be transported to the new Correctional Facility and shall be safely kept, within an enclosure, inside the walls of said Correctional Facility, prepared for lethal injection, according to law. Defendant, Curtis L. Clinton, shall be administered a lethal injection by the Warden of said Correctional Facility; that the Warden or his duly authorized deputy, shall administer a lethal injection until defendant, Curtis L. Clinton, is DEAD.

JUDGE TYGH M. TONE

11/18/13

SECTION 1, ARTICLE I, OHIO CONSTITUTION

§ 1 Inalienable rights

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

SECTION 2, ARTICLE I, OHIO CONSTITUTION

§ 2. Right to alter, reform, or abolish government, and repeal special privileges

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.

SECTION 5, ARTICLE I, OHIO CONSTITUTION

§ 5. Trial by jury; reform in civil jury system

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.

SECTION 9, ARTICLE I, OHIO CONSTITUTION

§ 9. Bail; cruel and unusual punishments

All persons shall be bailable 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.

SECTION 10, ARTICLE I, OHIO CONSTITUTION

§ 10. Trial of accused persons and their rights; depositions by state and comment on failure of accused to testify in criminal cases

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 made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

SECTION 16, ARTICLE I, OHIO CONSTITUTION

§ 16. Redress in courts

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 against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

SECTION 20, ARTICLE I, OHIO CONSTITUTION

§ 20. Powers reserved to the people

This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers, not herein delegated, remain with the people.

AMENDMENT V, UNITED STATES CONSTITUTION

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.

AMENDMENT VI, UNITED STATES CONSTITUTION

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 defense.

AMENDMENT VIII, UNITED STATES CONSTITUTION

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

AMENDMENT IX, UNITED STATES CONSTITUTION

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT XIV, UNITED STATES CONSTITUTION

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.

ARTICLE II, UNITED STATES CONSTITUTION

Section 2.

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

ARTICLE VI, UNITED STATES CONSTITUTION

Cl 2. Supreme law.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

ORC Ann. 2901.05 (2014)

§ 2901.05. Burden and degree of proof; presumption concerning self-defense or defense of another; jury instructions concerning reasonable doubt

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

(B) (1) Subject to division (B)(2) of this section, a person is presumed to have acted in self defense or defense of another when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used is in the process of unlawfully and without privilege to do so entering, or has unlawfully and without privilege to do so entered, the residence or vehicle occupied by the person using the defensive force.

(2) (a) The presumption set forth in division (B)(1) of this section does not apply if the person against whom the defensive force is used has a right to be in, or is a lawful resident of, the residence or vehicle.

(b) The presumption set forth in division (B)(1) of this section does not apply if the person who uses the defensive force uses it while in a residence or vehicle and the person is unlawfully, and without privilege to be, in that residence or vehicle.

(3) The presumption set forth in division (B)(1) of this section is a rebuttable presumption and may be rebutted by a preponderance of the evidence.

(C) As part of its charge to the jury in a criminal case, the court shall read the definitions of "reasonable doubt" and "proof beyond a reasonable doubt," contained in division (D) of this section.

(D) As used in this section:

(1) An "affirmative defense" is either of the following:

(a) A defense expressly designated as affirmative;

(b) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which the accused can fairly be required to adduce supporting evidence.

(2) "Dwelling" means a building or conveyance of any kind that has a roof over it and that is designed to be occupied by people lodging in the building or conveyance at night, regardless of whether the building or conveyance is temporary or permanent or is mobile or immobile. As used in this division, a building or conveyance includes, but is not limited to, an attached porch, and a building or conveyance with a roof over it includes, but is not limited to, a tent.

(3) "Residence" means a dwelling in which a person resides either temporarily or permanently or is visiting as a guest.

(4) "Vehicle" means a conveyance of any kind, whether or not motorized, that is designed to transport people or property.

(E) "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.

ORC Ann. 2903.01 (2014)

§ 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*.

§ 2907.02. Rape

(A) (1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

(a) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.

(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

(c) The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.

(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

(B) Whoever violates this section is guilty of rape, a felony of the first degree. If the offender under division (A)(1)(a) of this section substantially impairs the other person's judgment or control by administering any controlled substance described in *section 3719.41 of the Revised Code* to the other person surreptitiously or by force, threat of force, or deception, the prison term imposed upon the offender shall be one of the prison terms prescribed for a felony of the first degree in *section 2929.14 of the Revised Code* that is not less than five years. Except as otherwise provided in this division, notwithstanding *sections 2929.11* to *2929.14 of the Revised Code*, an offender under division (A)(1)(b) of this section shall be sentenced to a prison term or term of life imprisonment pursuant to *section 2971.03 of the Revised Code*. If an offender is convicted of or pleads guilty to a violation of division (A)(1)(b) of this section, if the offender was less than sixteen years of age at the time the offender committed the violation of that division, and if the offender during or immediately after the commission of the offense did not cause serious physical harm to the victim, the victim was ten years of age or older at the time of the commission of the violation, and the offender has not previously been convicted of or pleaded guilty to a violation of this section or a substantially similar existing or former law of this state, another state, or the United States, the court shall not sentence the offender to a prison term or term of life imprisonment pursuant to *section 2971.03 of the Revised Code*, and instead the court shall sentence the offender as otherwise provided in this division. If an offender under division (A)(1)(b) of this section previously has been convicted of or pleaded guilty to violating division (A)(1)(b) of this section or to violating an existing or former law of this state, another state, or the United States that is substantially similar to division (A)(1)(b) of this section, if the offender during or immediately after the commission of the offense caused serious physical harm to the victim, or if the victim under division (A)(1)(b) of this section is less than ten years of age, in lieu of sentencing the offender to a prison term or term of life imprisonment pursuant to *section 2971.03 of the Revised Code*, the court may impose upon the offender a term of life without parole. If the court imposes a term of life without parole pursuant to this division, division (F) of

section 2971.03 of the Revised Code applies, and the offender automatically is classified a tier III sex offender/child-victim offender, as described in that division.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under *section 2945.59 of the Revised Code*, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise is unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.

(G) It is not a defense to a charge under division (A)(2) of this section that the offender and the victim were married or were cohabiting at the time of the commission of the offense.

ORC Ann. 2911.11 (2014)

§ 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.*

ORC Ann. 2929.02 (2014)

§ 2929.02. Penalties for aggravated murder or murder

(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 [2929.02.2]*, *2929.03*, and *2929.04 of the Revised Code*, except that no person who raises the matter of age pursuant to *section 2929.023 [2929.02.3] 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*.

ORC Ann. 2929.021 (2014)

§ 2929.021. Notice to supreme court of indictment charging aggravated murder; plea

(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.

ORC Ann. 2929.022 (2014)

§ 2929.022. Determination of aggravating circumstances of prior conviction

(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 [2929.02.3] 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.

ORC Ann. 2929.023 (2014)

§ 2929.023. Defendant may raise matter of age

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.

§ 2929.03. Imposing 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 [2929.02.3] 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 [2929.02.3] 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 [2929.02.3] 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 [2929.02.3] 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.

ORC Ann. 2929.04 (2014)

§ 2929.04. Criteria for imposing death or imprisonment for a capital offense

(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 [2929.02.3] 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.

§ 2929.05. Appellate review of death sentence

(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.

ORC Ann. 2929.06 (2014)

§ 2929.06. Resentencing after sentence of death or life imprisonment without parole is set aside, nullified, or vacated

(A) If a sentence of death imposed upon an offender is set aside, nullified, or vacated because 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, in cases in which the supreme court reviews the sentence upon appeal, could not affirm the sentence of death under the standards imposed by *section 2929.05 of the Revised Code*, is set aside, nullified, or vacated for the sole reason that the statutory procedure for imposing the sentence of death that is set forth in *sections 2929.03* and *2929.04 of the Revised Code* is unconstitutional, is set aside, nullified, or vacated pursuant to division (C) of *section 2929.05 of the Revised Code*, or is set aside, nullified, or vacated because a court has determined that the offender is mentally retarded under standards set forth in decisions of the supreme court of this state or the United States supreme court, the trial court that sentenced the offender shall conduct a hearing to resentence the offender. At the resentencing hearing, the court shall impose upon the offender a sentence of life imprisonment or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that is determined as specified in this division. If division (D) of *section 2929.03 of the Revised Code*, at the time the offender committed the aggravated murder for which the sentence of death was imposed, required the imposition when a sentence of death was not imposed of a sentence of life imprisonment without parole or a sentence of an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (A) or (B)(3) of *section 2971.03 of the Revised Code* and served pursuant to that section, the court shall impose the sentence so required. In all other cases, the sentences of life imprisonment that are available at the hearing, and from which the court shall impose sentence, shall be the same sentences of life imprisonment that were available under division (D) of section 2929.03 or under *section 2909.24 of the Revised Code* at the time the offender committed the offense for which the sentence of death was imposed. Nothing in this division regarding the resentencing of an offender shall affect the operation of *section 2971.03 of the Revised Code*.

(B) Whenever any court of this state or any federal court sets aside, nullifies, or vacates a sentence of death imposed upon an offender because of error that occurred in the sentencing phase of the trial and if division (A) of this section does not apply, the trial court that sentenced the offender shall conduct a new hearing to resentence the offender. If the offender was tried by a jury, the trial court shall impanel a new jury for the hearing. If the offender was tried by a panel of three judges, that panel or, if necessary, a new panel of three judges shall conduct the hearing. At the hearing, the court or panel shall follow the procedure set forth in division (D) of *section 2929.03 of the Revised Code* in determining whether to impose upon the offender a sentence of death, a sentence of life imprisonment, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment. If, pursuant to that procedure, the court or panel determines that it will impose a sentence other than a sentence of death, the court or panel shall impose upon the offender one of the sentences of life imprisonment that could have been imposed at the time the offender committed the offense for which the sentence of death was imposed, determined as specified in this division, or an indefinite term consisting of a minimum term of thirty years and a maximum term of

life imprisonment that is determined as specified in this division. If division (D) of *section 2929.03 of the Revised Code*, at the time the offender committed the aggravated murder for which the sentence of death was imposed, required the imposition when a sentence of death was not imposed of a sentence of life imprisonment without parole or a sentence of an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (A) or (B)(3) of *section 2971.03 of the Revised Code* and served pursuant to that section, the court or panel shall impose the sentence so required. In all other cases, the sentences of life imprisonment that are available at the hearing, and from which the court or panel shall impose sentence, shall be the same sentences of life imprisonment that were available under division (D) of section 2929.03 or under *section 2909.24 of the Revised Code* at the time the offender committed the offense for which the sentence of death was imposed.

(C) If a sentence of life imprisonment without parole imposed upon an offender pursuant to *section 2929.021* or *2929.03 of the Revised Code* is set aside, nullified, or vacated for the sole reason that the statutory procedure for imposing the sentence of life imprisonment without parole that is set forth in *sections 2929.03* and *2929.04 of the Revised Code* is unconstitutional, the trial court that sentenced the offender shall conduct a hearing to resentence the offender to life imprisonment with parole eligibility after serving twenty-five full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(D) Nothing in this section limits or restricts the rights of the state to appeal any order setting aside, nullifying, or vacating a conviction or sentence of death, when an appeal of that nature otherwise would be available.

(E) This section, as amended by H.B. 184 of the 125th general assembly, shall apply to all offenders who have been sentenced to death for an aggravated murder that was committed on or after October 19, 1981, or for terrorism that was committed on or after May 15, 2002. This section, as amended by H.B. 184 of the 125th general assembly, shall apply equally to all such offenders sentenced to death prior to, on, or after March 23, 2005, including offenders who, on March 23, 2005, are challenging their sentence of death and offenders whose sentence of death has been set aside, nullified, or vacated by any court of this state or any federal court but who, as of March 23, 2005, have not yet been resentenced.

§ 2929.11. Purposes of felony sentencing; discrimination prohibited

(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

(C) A court that imposes a sentence upon an offender for a felony shall not base the sentence upon the race, ethnic background, gender, or religion of the offender.

§ 2941.04. Two or more offenses in one indictment

An indictment or information may charge two or more different offenses connected together in their commission, or different statements of the same offense, or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated.

The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant may be convicted of any number of the offenses charged, and each offense upon which the defendant is convicted must be stated in the verdict. The court in the interest of justice and for good cause shown, may order different offenses or counts set forth in the indictment or information tried separately or divided into two or more groups and each of said groups tried separately. A verdict of acquittal of one or more counts is not an acquittal of any other count.

ORC Ann. 2945.59 (2014)

§ 2945.59. Proof of defendant's motive

In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

§ 2947.23. Judgment for costs and jury fees [Effective until September 19, 2014]

(A) (1) (a) In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution, including any costs under *section 2947.231 of the Revised Code*, and render a judgment against the defendant for such costs. If the judge or magistrate imposes a community control sanction or other nonresidential sanction, the judge or magistrate, when imposing the sanction, shall notify the defendant of both of the following:

(i) If the defendant fails to pay that judgment or fails to timely make payments towards that judgment under a payment schedule approved by the court, the court may order the defendant to perform community service in an amount of not more than forty hours per month until the judgment is paid or until the court is satisfied that the defendant is in compliance with the approved payment schedule.

(ii) If the court orders the defendant to perform the community service, the defendant will receive credit upon the judgment at the specified hourly credit rate per hour of community service performed, and each hour of community service performed will reduce the judgment by that amount.

(b) The failure of a judge or magistrate to notify the defendant pursuant to division (A)(1)(a) of this section does not negate or limit the authority of the court to order the defendant to perform community service if the defendant fails to pay the judgment described in that division or to timely make payments toward that judgment under an approved payment plan.

(2) The following shall apply in all criminal cases:

(a) If a jury has been sworn at the trial of a case, the fees of the jurors shall be included in the costs, which shall be paid to the public treasury from which the jurors were paid.

(b) If a jury has not been sworn at the trial of a case because of a defendant's failure to appear without good cause or because the defendant entered a plea of guilty or no contest less than twenty-four hours before the scheduled commencement of the trial, the costs incurred in summoning jurors for that particular trial may be included in the costs of prosecution. If the costs incurred in summoning jurors are assessed against the defendant, those costs shall be paid to the public treasury from which the jurors were paid.

(B) If a judge or magistrate has reason to believe that a defendant has failed to pay the judgment described in division (A) of this section or has failed to timely make payments towards that judgment under a payment schedule approved by the judge or magistrate, the judge or magistrate shall hold a hearing to determine whether to order the offender to perform community service for that failure. The judge or magistrate shall notify both the defendant and the prosecuting attorney of the place, time, and date of the hearing and shall give each an opportunity to present evidence. If, after the hearing, the judge or magistrate determines that the defendant has failed to pay the judgment or to timely make payments under the payment schedule and that imposition of community service for

the failure is appropriate, the judge or magistrate may order the offender to perform community service in an amount of not more than forty hours per month until the judgment is paid or until the judge or magistrate is satisfied that the offender is in compliance with the approved payment schedule. If the judge or magistrate orders the defendant to perform community service under this division, the defendant shall receive credit upon the judgment at the specified hourly credit rate per hour of community service performed, and each hour of community service performed shall reduce the judgment by that amount. Except for the credit and reduction provided in this division, ordering an offender to perform community service under this division does not lessen the amount of the judgment and does not preclude the state from taking any other action to execute the judgment.

(C) The court retains jurisdiction to waive, suspend, or modify the payment of the costs of prosecution, including any costs under *section 2947.231 of the Revised Code*, at the time of sentencing or at any time thereafter.

(D) As used in this section:

(1) "Case" means a prosecution of all of the charges that result from the same act, transaction, or series of acts or transactions and that are given the same case type designator and case number under Rule 43 of the Rules of Superintendence for the Courts of Ohio or any successor to that rule.

(2) "Specified hourly credit rate" means the wage rate that is specified in *26 U.S.C.A. 206*(a)(1) under the federal Fair Labor Standards Act of 1938, that then is in effect, and that an employer subject to that provision must pay per hour to each of the employer's employees who is subject to that provision.

Review Court Orders which may amend this Rule.

Rule 8. Joinder of offenses and defendants

(A) Joinder of offenses.

Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct.

(B) Joinder of defendants.

Two or more defendants may be charged in the same indictment, information or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses, or in the same course of criminal conduct. Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count.

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 plea without first informing the defendant of the effect of the pleas 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.

Review Court Orders which may amend this Rule.

Rule 14. Relief from prejudicial joinder

If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires. In ruling on a motion by a defendant for severance, the court shall order the prosecuting attorney to deliver to the court for inspection pursuant to Rule 16(B)(1) any statements or confessions made by the defendants which the state intends to introduce in evidence at the trial.

When two or more persons are jointly indicted for a capital offense, each of such persons shall be tried separately, unless the court orders the defendants to be tried jointly, upon application by the prosecuting attorney or one or more of the defendants, and for good cause shown.

Rule 18. Venue and change of venue

(A) General venue provision.

The venue of a criminal case shall be as provided by law.

(B) Change of venue; Procedure upon change of venue.

Upon the motion of any party or upon its own motion the court may transfer an action to any court having jurisdiction of the subject matter outside the county in which trial would otherwise be held, when it appears that a fair and impartial trial cannot be held in the court in which the action is pending.

(1) Time of motion.

A motion under this rule shall be made within thirty-five days after arraignment or seven days before trial, whichever is earlier, or at such reasonable time later as the court may permit.

(2) Clerk's obligations upon change of venue.

Where a change of venue is ordered the clerk of the court in which the cause is pending shall make copies of all of the papers in the action which, with the original complaint, indictment, or information, he shall transmit to the clerk of the court to which the action is sent for trial, and the trial and all subsequent proceedings shall be conducted as if the action had originated in the latter court.

(3) Additional counsel for prosecuting attorney.

The prosecuting attorney of the political subdivision in which the action originated shall take charge of and try the case. The court to which the action is sent may on application appoint one or more attorneys to assist the prosecuting attorney in the trial, and allow the appointed attorneys reasonable compensation.

(4) Appearance of defendant, witnesses.

Where a change of venue is ordered and the defendant is in custody, a warrant shall be issued by the clerk of the court in which the action originated, directed to the person having custody of the defendant commanding him to bring the defendant to the jail of the county to which the action is transferred, there to be kept until discharged. If the defendant on the date of the order changing venue is not in custody, the court in the order changing venue shall continue the conditions of release and direct the defendant to appear in the court to which the venue is changed. The court shall recognize the witnesses to appear before the court in which the accused is to be tried.

(5) Expenses.

The reasonable expenses of the prosecuting attorney incurred in consequence of a change of venue, compensation of counsel appointed pursuant to Rule 44, the fees of the clerk of the court to which the venue is changed, the sheriff or bailiff, and of the jury shall be allowed and paid out of the treasury of the political subdivision in which the action originated.

Ohio Evid. R. 401 **(2014)**

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.

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.

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.

Review Court Orders which may amend this Rule.

Rule 404. Character evidence not admissible to prove conduct; Exceptions; Other crimes

(A) Character evidence generally.

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, subject to the following exceptions:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable.

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable.

(3) Character of witness. Evidence of the character of a witness on the issue of credibility is admissible as provided in Rules 607, 608, and 609.

(B) Other crimes, wrongs or acts.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this rule shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Review Court Orders which may amend this Rule.

Rule 702. Testimony by experts

A witness may testify as an expert if all of the following apply:

(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

(2) The design of the procedure, test, or experiment reliably implements the theory;

(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

Review Court Orders which may amend this Rule.

Rule 802. Hearsay rule

Hearsay is not 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.