

In the Supreme Court of Ohio

STATE OF OHIO,

Appellee

-vs-

DAVID MARTIN,

Appellant

}
} Case N° 2014-1922

}
} On Appeal from the Trumbull
} County Court of Common Pleas

}
} Case N° 2012 CR 00735

MERIT BRIEF OF APPELLANT DAVID MARTIN

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 Accurately the Effects of Pretrial Publicity, Denies Both Due Process
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 Errors of Trial Counsel, and the Cumulative Effect of Such Errors When
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STATEMENT OF THE CASE

A. Statement of the Facts:

This case actually began when David Martin was four years old. David Martin's mother was a drug addict who traded her body for drugs. She was murdered when Martin was four years old and her killer never found or prosecuted. David Martin was left with his brother and sister to be raised by their father, who was unable to function as a parent. By nine years old David Martin was living with his father and brother in the Morris Brown Projects, on the eastside of Cleveland. He had no parental supervision, no parental guidance and ran the streets all hours of the day and night. The Morris Brown Projects were filled with poverty, violence and crime, where major drug activity was routinely conducted, shootings and assaults occurred nightly. By ten years old, David Martin was on his own, in what can only be described as a war zone. He was stabbed when he was eleven (11) years old and rather than taking him to the hospital, his father left to go find who did the stabbing. Other adults in the projects would try to watch out for him. However, they too were criminals that ended up in prison, and were ill-equipped to provide any nurturing, care, or guidance in life.

On September 27, 2012, David Martin (hereinafter "Appellant") arrived at

Melissa Putnam's house to smoke marijuana with her. (T.p. Vol. VII, p. 1471.) When he arrived at Putnam's home, Putnam was there with a friend, Jeremy Cole. (T.p. Vol. VII, p. 1473). The three (3) of them sat down on the couch to roll a blunt. (T.p. Vol. VII, p. 1472). Appellant claimed Putnam and Cole went into a back room where he could hear them planning to harm him. (See, Docket No. 281, T.p. Transcript of Defendant's Statement.) (T.p. Vol. VIII, p. 1642; State's Exhibit 34.) Putnam, however, told the police that Appellant had gone into the kitchen and came back out with a gun, and pointed it at Jeremy Cole. (T.p. Vol. VII, p. 1474). Appellant directed both Cole and Putnam to get on the floor, and then directed Putnam to tie-up Cole with the phone cord. (T.p. Vol. VII, pp. 1477-1479). After making sure both Putnam and Cole were tied up, they were placed in separate rooms. (T.p. Vol. VII, p. 1495). While in a separate room, Putnam could hear noises from the adjoining bedroom and ultimately heard one (1) gunshot. (T.p. Vol. VII, pp. 1504-1505.) Putnam then looked up and saw Appellant in the room where she was located, she put her hands up as Appellant shot her and said "I'm sorry, Missy". (T.p. Vol. VII, p. 1506). After Appellant left the house, Putnam climbed out the window and ran to the neighbors where she called 911. (T.p. Vol. VII, pps. 1509-1510.)

Cole died as a result of one gunshot wound to the head. (T.p., Vol. VIII, p.

1671,) The coroner testified that Cole was shot from a distance of 3 to 8 inches from his head. (T.p. Vol. III, p. 1680.) Putnam was taken to the hospital with a gunshot wound to her hand, and the back of her head. (T.p. Vol. VII, p. 1517.) After four (4) days in the hospital, Putnam was released and was questioned by the Warren Police Department. (T.p. Vol. VII, pp. 1518, 1520.) Ultimately, Putnam was presented with three (3) photo arrays, one (1) on September 27, 2012, one on September 28, 2012, and one (1) on October 1, 2012. (T.p. Vol. VII, pp. 1521-1523.) On October 1, 2012, when presented with the photo array, Putnam identified Appellant as the individual who had come to her house and shot her, and shot and killed Jeremy Cole. (T.p. Vol. VII, p. 1523.) After Putnam's identification, the Warren Police Department issued an arrest warrant for Appellant. (T.p. Vol. VIII, p. 1638.)

On October 16, 2012, the United States Marshals located Appellant in an apartment in Summit County, Ohio. (T.p. Vol. VIII, p. 1557.) Appellant fully cooperated when arrested, executed a Rule 4 waiver of inter-county transfer and was transported from Summit County to Trumbull County, Ohio. (T.p. Vol. VIII, p. 1577.) While being transported to Trumbull County, Appellant began talking about his mom being murdered when he was a young boy. He told the Marshals that he wanted to talk to Warren detectives. (T.p. Vol. III, pp. 1578, 1583.) Not

only did Appellant show the Marshals where he had burned his clothes, but upon arriving at the Warren Police Department he gave a full confession. (T.p. Vol. VIII, pp. 1571, 1642.)

When Appellant was indicted, he had already provided a complete confession. His trial counsel conceded in voir dire and in opening statements that this was not a “who done it” case, but rather a case about what was the appropriate punishment.(T.p., Vol. VII, pp. 1461-1462.)

B. Procedural History

On October 24, 2012, Appellant was indicted via direct presentment to the Trumbull County Grand Jury, and was charged with two (2) counts of aggravated murder, pursuant to R.C. 2903.01(A) and (B), with death specifications appended to each count; one (1) count of attempted aggravated murder, pursuant to Ohio R.C. 2903.01(B), and R.C. 2923.02; two (2) counts of aggravated robbery, pursuant to R.C. 2911.01(A); two (2) counts of kidnapping, in violation of R.C. 2905.01(A); one (1) count of having weapons under disability, in violation of R.C. §2923.13(A)(B); one (1) count of receiving stolen property, in violation of R.C. §2913.51(A); and one (1) count of tampering with evidence, in violation of R.C.

§2921.12. (T.d. 1)¹ The next day, Appellant was arraigned and held without bond. (T.d. 18).

Appellant filed a number of standard pre-trial motions, and a series of motions specifically geared towards the death penalty aspect of the case. Appellant filed a motion for individual sequestered voir dire (T.d. 52), a motion to exclude venire persons who cannot fairly consider mitigation evidence (T.d. 57) a motion for comprehensive voir dire (T.d. 55), and a motion to prohibit the State's use of peremptory challenges to exclude venire persons with concerns about imposing the death penalty (T.d. 56.) While the trial court granted the motions for individual sequestered voir dire, (T.d. 129) the motion prohibiting the State from using peremptory challenges to exclude venire persons who express concerns about imposing the death penalty was denied. (T.d. 132.)

Many of the motions addressing the mitigation phase of the trial were held in abeyance and not ruled upon by the trial court, to include a motion *in limine* to prohibit the State from employing prejudicial arguments and themes in mitigation (T.d. 58), a motion to determine and limit the government's sentencing phase evidence (T.d. 60, 63, 65.) Appellant also filed a request for an instruction

¹ The State dismissed the receiving stolen property count and the weapons under disability count before trial. (T.p., Vol. Vi, p. 1270.)

that the jury may consider mercy in the sentencing phase (T.d. 68), which the trial court denied. (T.d. 147.)

Appellant filed a motion to suppress evidence, to include pretrial identification of Appellant, items found within the apartment where Appellant was arrested as no search warrant had been obtained, and suppression of statements Appellant made while in the custody of the United States Marshals and Warren police. (T.d. 164.) The trial court denied the motion to suppress. (T.d. 192.)

Approximately four (4) months before the trial started, there had been a hostage situation at the Trumbull County jail. Appellant was involved in the incident and had contacted the media. The media had played live stream reports of Appellant's conversations and concerns about his case and upcoming trial. Shortly before trial, Appellant filed a motion for change of venue, arguing that even though guilt was not an issue, Appellant was entitled to a jury which was free from the taint of the pervasive pre-trial publicity. (T.d. 209.) Attached to the Motion were numerous newspaper reports and 3 CDs of television coverage, including the news reports about the hostage situation and the news feed of Appellant speaking to the media during the hostage situation. The trial court found the motion to be premature and held ruling on it in abeyance. (T.d. 217.)

Thereafter, Appellant filed supplemental materials in support of the change of venue. (T.d. 219.)

The trial commenced on August 28, 2014. Although individual sequestered voir dire was granted, and although a motion for change of venue based upon pre-trial publicity had been filed, defense counsel conducted little, and in many instances no, inquiry into the pre-trial publicity and its impact on the jurors. No one, not the trial judge, not the prosecutor, and not the defense team, ever asked any of the jurors if they saw media coverage about the hostage situation.² While questions were asked about the jurors knowledge of the case, no questions were asked about prospective jurors knowledge of the hostage situation. Seated juror 6, Ms. Dennis's husband worked as a reserve deputy for Trumbull County Sheriff's Department. (T.p. Trial Vol. IV, p. 648.) When asked if she heard

² One juror, Ms. Steinbeck, was employed by the county and was on a break in front of the jail when the hostage situation arose. Although her mom worked in the kitchen at the jail, she was not on duty when the hostage situation arose. She volunteered her knowledge of the hostage situation and was ultimately excused because she would automatically vote for death if the defendant confessed. (T.p. Vol. IV pp. 565, 572, 580.) Another juror, Mrs. Dennis, who was Juror Number 6, was married to a reserve deputy sheriff. It stretches credulity to believe that her husband never spoke to any deputies about the hostage situation and that he never spoke to her upon learning that she was called for jury service. When asked if she had heard anything, she said not about "this case."

Q You haven't heard anything about this case?

A *Not this case, no.*

(T.p., Vol. V, p. 648.) (Emphasis added.)

anything about the case, she responded “Not *this* case, no.” (T.p. Trial Vol. IV, p. 648.) No one asked her any questions about the hostage situation at the jail run by the Trumbull County Sheriff’s Department. No one asked her any questions about whether or not she and her husband had ever discussed Appellant or the hostage situation or if her husband was working when the hostage situation occurred.

In fact, of the twelve (12) jurors that sat on the panel, five (5) had been exposed to pre-trial publicity; seated juror numbers 2, 4, 7, 8, 12. One (1) of those jurors, juror number 2, Ms. Ware, had actually lived in the same neighborhood where the murder had occurred, knew all about it, and had talked to her husband and neighbors about the murder. (T.p. Trial, Vol. IV, p. 498-501.) Juror No. 2, disclosed that after the murder had occurred, she had spoke to her husband about the murder. (T.p. Trial, Vol. IV, p. 499.) She further disclosed that she had heard about the case on the news and had talked to neighbors about it. (T.p. Trial, Vol. IV, p. 501.) Despite these concessions about her knowledge of the case, defense counsel did not ask her one question about the pre-trial publicity.

Juror number 9, Mr. Butler, later became the foreperson. He had worked with the victim, knew him and had lunch with him at work and spoke with him just hours before he was murdered. (T.p. , Vol. IV, pp. 598-600.)

Juror number 7, Ms. Crum had likewise read about the case in the newspaper. (T.p., Vol. IV, pp. 584-584.) She recalled thinking it was a bad murder. (T.p., Vol. IV, pp. 585.) While the State asked her if she could put that aside, the defense never asked her one question about what she had read or its impact upon her. (T.p., Vol. IV, pp. 594-597.) No one inquired as to what facts she recalled that led her to remember the case or the fact that it was a bad case.

Juror number 8, Ms. Hausen, also had recalled hearing about the case on the news. Again, defense counsel made no inquiry regarding pretrial publicity. (T.p., Vol. IV, pp. 701-705.)

Juror No. 3, Mr. Gore, was an alternate who during the trial replaced the original Juror No. 3. He had admitted that he had seen newspaper articles, but denied that he had formed any opinions. (T.p. Vol. V, pps. 827-828.) Despite this, defense counsel did not ask one question on pre-trial publicity.

Juror No. 10, despite having been advised to not watch the news or read anything about the case, came in for individual sequestered voir dire, and admitted that he had seen the news the night before, after the trial court had given the initial admonitions regarding no news or media. (T.p. Trial Vol. V, pps. 707-708.) Again, the defense did not ask one question with regard to the pre-trial publicity (T.p. Trial Vol. V, pps. 715-718). Finally, Juror No. 12, Mr. Mancini, had

admitted to being exposed to pre-trial publicity (T.p. Trial Vol. V, p. 751.) Again, there was no inquiry as to what he had been exposed to, what he had heard, or what impact the media would have had, by defense counsel. (T.p. Trial Vol. V, p. 756-757.)

Trial counsel had moved to excuse for cause four (4) jurors either because of their views on the death penalty or because of their knowledge of the case or contact with the victim, jurors number 4, 6, 8, and 9. (T.p., Vol. IV, pp. 539, 613, 651, 706.) Those four (4) jurors, along with the ones who knew about the case, knew the victim, or lived in the neighborhood where the victim was killed, all remained on the jury. After the individual sequestered voir dire, trial counsel waived general voir dire and exercised no peremptory challenges for the panel. (T.p., Vol. VII, pp. 414-1416.) Apparently, trial counsel and the prosecutor agreed to simply accept the first twelve (12) jurors as the panel for this case. No general voir dire was even conducted before that decision was made. Having agreed to seat the first twelve (12), the defense waived “the necessity” of having any general voir dire at all. (T.p., Vol. VII, p. 1416.) In a case where counsel conceded in individual voir dire, and in opening statements, that Appellant had committed this crime and this was a case about the appropriate punishment, Appellant was left with a jury panel where little meaningful voir dire had been conducted, and

where multiple jurors were pre-disposed to vote for the death penalty.

In opening statements, the defense conceded that Appellant conceded he committed the murder. The State presented the testimony of Melissa Putnam, the Marshals who had arrested Appellant, the detective who had questioned him, a ballistics expert and the County Coroner. The defense presented no evidence or testimony during the trial phase. After two and one-half (2½) hours of deliberating, the jury returned verdicts of guilty on all counts presented.

The penalty phase commenced on September 17, 2012. Prior to commencing the penalty phase Appellant made an oral motion *in limine* to preclude the State from arguing the facts and circumstances of the homicide as aggravating factors. (T.p., Vol. IX, p. 1830.) ruling on this was held in abeyance. (T.p., Vol. IX, p.1833.) The State dismissed count one, aggravated murder and the specifications attached to that count and proceeded to the sentencing phase solely on Count 2, aggravated murder with prior calculation and design and the specifications attached to that count only. (T.p., Vol. IX, p. 1835-1836.) In Count Two, the jury had convicted the Appellant of aggravated murder, finding beyond a reasonable doubt that Appellant was guilty of killing Jeremy Cole, with prior calculation and design. In addition, the jury had found Appellant guilty of the three (3) capital specifications appended to Count Two of the indictment. The first

specification, that the Appellant purposely killed or attempted to kill two (2) or more people, the second specification that Appellant committed the murder while kidnapping or attempting to kidnap Jeremy Cole, and that he was the principal offender in the commission of the murder, and the third specification, Appellant was the principal offender of the murder of Jeremy Cole, which was committed while he was committing or attempting to commit aggravated robbery. Also prior to commencement of the penalty phase, Appellant objected to the state's proposed exhibits contending the exhibits were irrelevant and prejudicial. (T.p., Vol. IX, p. 1828.) The trial court overruled the defense objections and permitted the State to introduce the gun, magazine, shell casings and cord used to tie up Cole in the penalty phase. (T.p., Vol. IX, pp. 1829-1830.) When the government argued and presented evidence regarding the nature and circumstances of the offense, the trial court overruled the object. (T.p., Vol. IX, p. 1852.) Despite the trial court advising the jury that the "underlying aggravated murder itself is not an aggravating circumstance" (T.p. Sentencing Phase, Vol. IX, p. 1837) the government argued and submitted evidence regarding the facts and circumstances of the murder as aggravating circumstances.

During opening statements of the penalty phase the prosecutor informed the jury:

So how do we proceed in Phase Two? We aren't gonna present our entire case again. We aren't gonna call Melissa Putnam. We aren't gonna put everyone in this case through that gain and put you through that. It would be repetitive and time consuming. So what we're gonna do is shortly after opening statements, we're gonna proffer , meaning to offer to the Court and the Jury, all of the evidence and testimony that you've heard in Phase One, Everything that you've heard and seen that relates to these aggravating circumstances, we're gonna proffer that. And, again, you've found that those exist beyond a reasonable doubt. So all the evidence that you've heard we're gonna incorporate into this second phase. And you're gonna have that evidence, that testimony and the exhibits that relate to these aggravating circumstances when you finally go back there to deliberate.

(T.p., Vol. IX, p. 1843.) Instead of outlining, delineating or otherwise specifying what testimony was relevant from the first phase, the State simply moved for admission of their exhibits (the gun, cartridge casings, magazine and cord) and proffered "the testimony that exists from the first phase relevant to those items."

(T.p., Vol. IX, p. 1852.) The State then rested, without specifying what of the submitted testimony was relevant for the jury to consider in any manner the portions of the testimony from the trial that were relevant to the penalty phase.

The defense presented three (3) witnesses, Appellant's first cousin, Legra Martin (T.p., Vol. IX, p. 1853.), Lucretia Norton (T.p., Vol. IX, p. 1866), and Landon Nicholson, an individual who had lived in the Morris Brown Projects when Appellant was a young boy. (T.p., Vol. IX, p. 1878.) Appellant also offered three (3) volumes of Children Service's records tracking the murder of Appellant's

mother, Appellant's life in the projects, abuse and neglect he endured and ultimate abandonment by his father and an index of the records.

Appellant presented an unsworn statement taking full responsibility for his actions, acknowledging how wrong his actions were, and apologizing to Putnam and the family of Jeremy Cole. (T.p. Penalty Phase, Vol., IX, pp. 1893-1894.)

At the conclusion of the penalty phase, the jury returned their recommendation of death. (T.p., Vol. IX, p. 1853.) The trial court entered findings of fact and conclusions of law which not only referenced the facts and circumstances of the murder, the trial court also took into consideration factors which were not aggravating circumstances permitted under Ohio law. (T.d. 264) The trial court repeatedly referenced the kidnapping of Melissa Putnam when conducting the weighing of aggravating circumstances against mitigating factor. Appellant was sentenced to death (T.d. 263.) This timely appeal followed.

ARGUMENT

PROPOSITION OF LAW NO. 1

When a Community in Which a Trial is to Be Conducted is Steeped in Pretrial Publicity, the Failure to Conduct Meaningful and Probing Voir Dire and the Failure to Develop a Record to Demonstrate Accurately the Effects of Pretrial Publicity, Denies Both Due Process and the Effective Assistance of Trial Counsel, in contravention of the Sixth and Fourteenth Amendments to the U.S. Constitution and Ohio Constitution, Article I, Sections 1, 2, 5, 10, and 16.

I

The media attention to this case was significant, in part because horrific circumstances of the murder of Jeremy Cole, in part because of Appellant's participation with two (2) other inmates in taking a corrections officer at the Trumbull County jail hostage just four (4) months before the trial. While these circumstances made selecting a jury free from the taint of the media coverage more difficult, the transcript of the voir dire confirms defense counsel did little to insure the jury was, in fact one that would decide what sentence was to be impose based solely upon the evidence presented at trial. Jurors may or may not have known about the hostage situation. Jurors may or may not have been able to put aside what they heard, and opinions they may have formed as a result of the media coverage, but there is simply no way to know because trial counsel failed to ask even one question about the media coverage of the hostage situation.

Moreover, trial counsel failed to inquire into the media coverage of the case with at least 8 of the jurors who were seated to decide the case.

In a case where the defense conceded in voir dire that Appellant murdered Jeremy Cole and shot Melissa Putnam so that the jury was only faced with the issue of the appropriate punishment, failure to conduct meaningful inquiry into the media coverage of the case and the hostage situation deprived Appellant of the effective assistance of counsel and due process of law. We know at least one juror, Ms. Dennis, juror number 6 tipped her hand that she may have in fact known more about Appellant when she was asked if she had heard anything about the case. Her response was “Not *this* case, no.” (T.p. Trial Vol. IV, p. 648.) Ms. Dennis’s husband worked as a reserve deputy for Trumbull County Sheriff’s Department. (T.p. Trial Vol. IV, p. 648.) No one asked her any questions about the hostage situation at the jail run by the Trumbull County Sheriff’s Department. No one asked her if her husband worked in the jail, was called in to help with the hostage situation or whether her husband had discussed anything about Appellant with her. Given the knowledge the Court and counsel had about the situation, it was incumbent upon them to ask her what case she did know about. Not one of the 12 jurors was asked any question about whether or not they knew about the hostage situation and, if they knew about it, would it impact their

ability to consider a punishment other than death.

II

In *State v. Williams*, 79 Ohio St.3d 1, 1997 Ohio 407, 679 N.E.2d 646, cert. denied, *Williams v. Ohio*, 522 U.S. 1053, 118 S.Ct. 703, 139 L.Ed.2d 646 (1998), the dissent argued that Williams, who had been convicted of killing 4 people execution-style, should have been awarded a new trial. The dissent wrote that a new trial for Williams was required:

acknowledging that the transcript in this case reveals a crime as heinous and calculated as any that come before us. This case represents a test for the criminal justice system because, if the right to an impartial jury is not protected for the worst among us, it is guaranteed to none of us.

79 Ohio St.3d, at 21 (MOYER, Ch.J., joined by PFEIFER, J., dissenting).

David Martin killed Jeremy Cole and he shot Melissa Putnam. That he is guilty does not mean, however, that a trial at which he was found guilty and sentenced to death was *ipso facto* a fair trial. The dissent in Willie Williams' case argued that his trial was unfair, regardless of factual guilt. It is the *process* that is important. If we cannot trust the process when Appellant is plainly guilty, we can have no confidence in the reliability of the outcome when factual guilt is questioned. For whether a man is guilty or not, the verdict and sentence are tainted if they are returned by a panel whose impartiality cannot be guaranteed.

With due respect, too many shortcuts have become ingrained in the law when there are cases involving substantial publicity. That is constitutionally unacceptable.³ We cannot forget that:

Protection of the integrity of the jury system requires our constant vigilance. Though perfect impartiality is neither a requirement nor an attainable goal, it must nevertheless remain the abiding objective of the justice system, and all reasonable measures must be taken by trial courts to protect the constitutional right of a criminal defendant to a fair and impartial jury.

Id. These ideas are easy to remember in a case where all who read the record doubt the guilt of the accused. This doubt, coupled with the specter of a tribunal organized to convict, or a tribunal organized to return a verdict of death, makes it easy to remember the importance of the extra steps we must travel to achieve an impartial jury. But these same safeguards are easy to forget when a man has confessed to a horrible crime.

III

Dating back to at least 12th Century England, juries began as a tool for the Crown, designed to discover and present facts in answer to questions addressed to them directly by the king. English juries moved from that initial role to the current role as the decider of facts. By the end of the 15th century, the jury system had

³ The American Bar Association Standards, quoted *post*, describe the proper methods that should be employed and the sincere caution that should be used in employing them.

transformed, and had come to be regarded as the most valuable feature of English common law. Courts began to permit objections to certain persons being seated on a jury, usually because of bias. In America, the right to trial by a jury of one's peers became a symbol of the overthrown power of the king. The right to trial by jury is meaningless if the presentation is to a stacked deck. Much law, which modern opinions have mooted to an unacceptable level, focuses on the ability to discover if the jurors are "indifferent." See, e.g., *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). Only the jury can strip a man of his liberty—or his life. The requirement, to borrow Lord Coke's phrase, is that every juror must be "indifferent as he stands unsworne" applies with equal force no matter the "heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." See, *Irvin v. Dowd*, 366 U.S., at 722.

We live in a free society, and the importance of a free press to report on the affairs of government is essential. There is in fact:

nothing that proscribes the press from reporting events that transpire in the courtroom. But where there 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.* * * *. If publicity during the proceedings *threatens the fairness* of the trial, a new trial should be ordered. But we must remember that *reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception.*

(Emphasis added.) *Sheppard v. Maxwell*, 384 U.S. 333, 362-363, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966).

IV

On the evening of February 16, 1961, police in Lake Charles, Louisiana, arrested Wilbert Rideau. Lake Charles was a medium-sized town with a city-suburban population of about 150,000 residents. Rideau was charged with murder and other offenses. The next morning, a motion picture with a sound track was made of an interview in the jail between Rideau and the Sheriff of Calcasieu Parish. The 20 minute interview contained admissions by Rideau that he had perpetrated a bank robbery, and was guilty of kidnaping and murder. Later the same day, the filmed interview was broadcast over a television station in Lake Charles, and where some 24,000 people saw the interview. The film was again shown on television the next day to an estimated audience of 53,000 people. The following day, the film was again broadcast by the same television station, and this time approximately 29,000 people saw and heard the interview.

Rideau's counsel filed for a change of venue. After a hearing, the motion for change of venue was denied. Rideau was convicted and sentenced to death on the murder charge in the Calcasieu Parish trial court. Three members of the jury that convicted him had stated during voir dire that they had seen and heard Rideau's

televised interview with the sheriff on at least one occasion. Two members of the jury were deputy sheriffs of Calcasieu Parish. Rideau had asked to have these jurors excused for cause, having exhausted all of his peremptory challenges.⁴ The challenges for cause were denied by the trial judge. Rideau's conviction was affirmed by the Supreme Court of Louisiana.

The United States Supreme Court vacated the conviction. See, *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963). The Court held "that it was a denial of due process of law to refuse the request for a change of venue, after the people of Calcasieu Parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged." 373 U.S., at 726. As Justice Potter Stewart put it in his opinion for the Court:

For anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense was Rideau's trial—at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.

⁴ It will not have escaped this Court's attention that Appellant's trial counsel exercised *no* peremptory challenges, leaving four (4) jurors on the panel which trial counsel had moved to excuse for cause. While this is troubling, to say the least, it does nothing to detract from the obligation of the trial judge to ensure that Appellant was tried by an impartial panel. On the other hand, it adds immeasurably to the claim that counsel was not functioning as counsel.

373 U.S., at 726. Like Wilbert Rideau, the jury in this case was not composed of 12 impartial decision makers; one juror knew and spoke with Jeremy Cole just hours before he was murdered, another juror lived in the same neighborhood and had talked to neighbors and her husband about the case and a third juror was married to a reserve deputy with the Trumbull County Sheriff's Department and none of the jurors were even asked if they had heard Appellant on the news during the hostage situation at the jail. Like Wilbert Rideau, who was factually guilty, David Martin's trial was, after the community was steeped in publicity, "a hollow formality."

V

There are more than a few parallels between this case and Rideau's.

On December 4, 2012, Melissa Putnam was removed from the Court during a pretrial proceeding. The news article portrayed the Appellant as guilty of the indicted offenses and cited unnamed attorneys who said that Appellant taunted Putnam. Pertinent portions of the article follow:

A 29-year-old Warren woman who was shot while her friend was murdered in a nearby room in her house in September lashed out at her accused attacker in court Tuesday.

Melissa Putnam was quickly removed from the courtroom of Trumbull County Common Pleas Judge Andrew Logan, who was hearing an initial pre-trial for David Martin, 28, of Cleveland, who could face the death penalty in the Sept. 27 murder of Jeremy Cole, Putnam's friend.

Cole, 21, was shot in the head, and Putnam, 29, was shot in the hand. The bullet traveled through her hand into her neck, and she spent several days in the hospital before recovering.

Attorneys in the courtroom about 11 a.m. said Martin antagonized Putnam by “mouthing” remarks to her—some of which could be considered incriminating.

One attorney claims Martin, who was in the jury box, said, “I should have shot you” to Putnam.

And Larry and Wanda Cole, parents of the murder victim, said Martin snapped at Putnam that she was the one who tied Cole up (before the murder). Putnam yelled back, “You made me tie him up!”

* * *

After a heated exchange, Putnam was removed from Logan’s courtroom, screaming obscenities while she was handcuffed and taken across the street to Trumbull County Jail.

* * *

A detective said Cole and Putnam knew Martin, but weren’t aware of his name. Putnam reportedly told detectives Martin had been in the house before. Another detective said Martin has a prior criminal record and had served prison time out of Cuyahoga County for robbery and felonious assault.

Then in March of 2014, the State filed a motion with the trial court that was widely publicized. It accused Appellant of making a comment to a deputy that when Appellant’s trial started, he was going to grab the nearest gun. Here’s how the March 5, 2014 edition of the Youngstown *Vindicator* reported the story to the community, a story that the paper headlined: “Defendant’s vow to grab gun leads to request for cuffs during trial.”

A prosecutor has asked a judge to require a Cleveland man charged with killing a Warren man and attempting to kill a Warren woman to be restrained with handcuffs during his trial scheduled to begin May 9.

Chris Becker, assistant Trumbull County prosecutor, filed a motion Tuesday with Judge Andrew Logan of Trumbull County Common Pleas Court seeking the unusual step because of a remark David Martin, 29, purportedly made to a corrections officer recently at the Trumbull County jail.

The officer said Martin told the officer after a hearing last month, "When I go to trial, I'm going to grab the first gun I can when I have a chance to. I'm not going to death row."

Martin could get the death penalty if convicted of aggravated murder and at least one of the death-penalty specifications.

In the filing, Becker said a criminal defendant is generally entitled to appear in court without shackles, "as the presumption of innocence may be undermined when the defendant is presented in restraints."

But he cited case law in which other courts have required a defendant to be shackled to prevent violence or escape.

"The defendant is on trial for a case in which he killed one person and tried to kill another," the motion says.

"The defendant has confessed to those crimes. The defendant has also been previously convicted of felony offenses of violence. During the course of this case, he was involved in a verbal barrage involving the surviving victim in the courtroom," the document said.

<http://www.vindy.com/news/2014/mar/05/motion-put-defendant-in-cuffs-at-trial/>.pdf

Appellant was so incensed about the falsity of the claim that it was the major point of his hostage takeover in the Trumbull County Jail the following month.

Three inmates took a correction officer hostage at an Ohio county jail for several hours Wednesday and one of the inmates called CBS affiliate WOIO in the middle of the incident.

"I don't want to be in the county jail. It's a matter of time before one of those guys snaps at [inaudible]. So I just took control and I want to control what I want to do," inmate David Martin told WOIO after dialing the station Wednesday afternoon.

Martin said he was upset about a newspaper article that he

claims made him look crazy. He told the station he was calling on corrections officer Joe Lynn's cell phone, while holding Lynn hostage in his jail cell.

"The C.O. who I got now, he's willing to take a polygraph test to tell the news media and to prove to the courts outside of my case that I never made that threat that they had me in the newspaper. Making me look bad in my case. It's bad enough I'm facing the death penalty," Martin said in the call.

<http://www.cbsnews.com/news/inmate-calls-reporter-while-holding-officer-hostage/>

Appellant's participation in the jail uprising was widely publicized. The exhibits show that at least one station cut into regular programming to announce the end of the hostage situation. Virtually every news story reported that Appellant had been charged and convicted in United States District Court on a charge of illegally possessing a weapon. Most stories reported that Appellant received a 22 year sentence from the federal court. As the exhibits offered by Appellant with his motion to change venue detailed, not only was there saturation coverage in the Youngstown Warren area, but stations from Cleveland and Columbus covered the hostage situation as well. Appellant's voice was played and his picture was shown over and over again as he called a Cleveland television station, talked about holding a shank to the hostage deputy sheriff, and recited his grievances.

Appellant submitted to the trial court 48 printed news stories from October 15, 2012 through July 12, 2014, as well as Internet searches and 12 news stories

about the hostage situation alone. The printed stories had such headlines as “Warren murder suspect nabbed by marshals,” “Man facing death penalty found guilty in unrelated,” “Man facing capital murder sentenced to 22 years,” “Judge to consider man’s comments to marshals” and “Defendant’s vow to grab gun leads to request.” In short, there was a steady stream of media coverage about the case and about the Appellant himself. Some jurors said that they knew about the case. Others, incredibly, were not even asked.

The number of televisions, citizens, adults, and viewers were detailed in the motion for change of venue. Yet, not one question was asked about the media coverage of the situation during voir dire.

VI

Every time, it seems, that there is a case involving pretrial publicity, we read that judges should try first to select a jury in the county in which the offenses are alleged to have been committed. This Court has held time and again that “a careful and searching voir dire provides the best test of whether prejudicial pretrial publicity has prevented obtaining a fair and impartial jury from the locality.” *State v. Trimble*, 122 Ohio St.3d 297, 306, 2009 Ohio 2961, 911 N.E.2d 242, ¶58, certiorari denied, __ U.S.__, 130 S.Ct. 752, 175 L.Ed.2d 526 (2009), citing *State v. Bayless*, 48 Ohio St.2d 73, 98, 357 N.E.2d 1035 (1976).

With due respect, that statement is a triumph of faith over experience. Particularly with the advent of the Internet, Google, Facebook and all the rest, as well as the ubiquitous smart phone that can access the Internet from almost anywhere, to believe that jurors do not attempt to investigate high profile cases to which they are summoned is a whistle in the dark. There is no doubt that a jury can be seated in any county: to do so, we simply need to overlook the requirement to obtain “indifferent” jurors as they stand “unsworne.” Asking the jurors to disregard what they have heard and read is described by the eminent jurist Learned Hand in a different context, and acknowledged by the United States Supreme Court in the seminal *Bruton* decision:

Judge Hand addressed the subject several times. The limiting instruction, he said, is a “recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody’s else,” *Nash v. United States*, 54 F.2d 1006, 1007; “Nobody can indeed fail to doubt whether the caution is effective, or whether usually the practical result is not to let in hearsay,” *United States v. Gottfried*, 165 F.2d 360, 367; “it is indeed very hard to believe that a jury will, or for that matter can, in practice observe the admonition,” *Delli Paoli v. United States*, 229 F.2d 319, 321. Judge Hand referred to the instruction as a “placebo,” medically defined as “a medicinal lie.”

Bruton v. United States, 391 U.S. 123, 132, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968),

n. 8.

Too often, we ignore the pre-eminent cases on the subject. See, *Sheppard v. Maxwell*, supra; *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543

(1965); and, *Rideau v. Louisiana*, supra. If the cases are cited, there is no meaningful discussion of its holdings.

The Court's cure in *Sheppard* for conducting a criminal trial when there is widespread publicity is simple enough. Faced with the type of community publicity that by any objective view would threaten the fairness of a criminal trial, the trial judge should either change venue or order a continuance until the publicity abates or subsides.

But where there 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. In addition, sequestration of the jury was something the judge should have raised *sua sponte* with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. *But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.*

384 U.S., at 363. Accord, *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976).

Sheppard remains the seminal statement of how liberties under the Constitution's Sixth and Fourteenth Amendments should be protected *vis-à-vis* pretrial publicity. The case has not been overruled, and while the states are free to afford citizens charged with criminal offenses more liberties than the federal

Constitution promises, see, e.g., *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), the states are not free to ignore the requirements of the federal Constitution. The trial judge ignored the safeguards here. In doing so, he ignored the Fourteenth Amendment to the U.S. Constitution, which states are duty bound to apply. In fairness to the trial judge, Appellant's counsel did little to keep the issue of publicity in the judge's gun sights.

Courts, including the United States Supreme Court, have attempted to shy away from the holdings of *Rideau*, *Sheppard* and *Estes*. For example, it has been suggested that only in cases where the decorum of the court proceedings was overrun by media is there a presumption of prejudice. See, e.g., *Skilling v. United States*, 561 U.S. 358, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010). Justice Ruth Ginsberg's opinion for the majority in *Skilling*, however, shows that that case, where the Court would not presume prejudice, differs markedly from this case, where the Court should presume prejudice.

First, we have emphasized in prior decisions the size and characteristics of the community in which the crime occurred. In *Rideau*, for example, we noted that the murder was committed in a parish of only 150,000 residents. Houston, in contrast, is the fourth most populous city in the Nation: At the time of Skilling's trial, more than 4.5 million individuals eligible for jury duty resided in the Houston area. App. 627a. Given this large, diverse pool of potential jurors, the suggestion that 12 impartial individuals could not be empaneled is hard to sustain.

Skilling, supra, 561 U.S., at 382. Second, the Court observed that:

although news stories about Skilling were not kind, they contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight. Rideau's dramatically staged admission of guilt, for instance, was likely imprinted indelibly in the mind of anyone who watched it. Cf. *Parker v. Randolph*, 442 U.S. 62, 72, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979) (plurality opinion) ("[T]he defendant's own confession [is] probably the most probative and damaging evidence that can be admitted against him." (internal quotation marks omitted)). Pretrial publicity about Skilling was less memorable and prejudicial. No evidence of the smoking-gun variety invited prejudgment of his culpability. See *United States v. Chagra*, 669 F.2d 241, 251-252, n. 11 (CA5 1982) ("A jury may have difficulty in disbelieving or forgetting a defendant's opinion of his own guilt but have no difficulty in rejecting the opinions of others because they may not be well-founded.").

Third, unlike cases in which trial swiftly followed a widely reported crime, e.g., *Rideau*, 373 U.S., at 724, 83 S.Ct. 1417, 10 L. Ed. 2d 663, over four years elapsed between Enron's bankruptcy and Skilling's trial. Although reporters covered Enron-related news throughout this period, the decibel level of media attention diminished somewhat in the years following Enron's collapse. See App. 700a; id., at 785a; *Yount*, 467 U.S., at 1032, 1034, 104 S.Ct. 2885, 81 L. Ed. 2d 847.

Finally, and of prime significance, Skilling's jury acquitted him of nine insider-trading counts. Similarly, earlier instituted Enron-related prosecutions yielded no overwhelming victory for the Government. In *Rideau*, *Estes*, and *Sheppard*, in marked contrast, the jury's verdict did not undermine in any way the supposition of juror bias.

Skilling, supra, 561 U.S., at 382-383.

With due respect, Skilling's proposition that the Court need not examine the screening questionnaires or the voir dire before declaring his jury's verdict

void is easier to sustain if one looks to the behavioral sciences rather than looking to court opinions. What the broad constitutional guarantees of due process and a fair trial mean must be determined in the light of experience rather than the conclusions of appellate judges who operate in relative seclusion away from actual trials. The scientific evidence is both significant and helpful. Jeffrey Skilling asked the Court to presume prejudice, but the Court refused. The court reasoned that there were important differences between Skilling's prosecution and those in which the Court has presumed juror prejudice. These differences were outlined above.

Appellant's trial, however, was markedly different from Skilling's and was more like Rideau's trial. Appellant's case was tried in Trumbull County, not in Houston. The demographics were laid out in the motion for change of venue. Trumbull County had 144,913 registered voters and potential jurors, not over 4 million. Like *Skilling*, *Rideau*, *Sheppard*, and *Estes*, the news stories were not kind to Appellant. The stories repeatedly referred to his prior prison sentence, his federal conviction, his 22 year federal sentence, his hostage takeover in the jail, and his confession. As the *Skilling* majority noted, a confession is probably "the most probative and damaging evidence that can be admitted against him." Like Rideau, Martin's confession was a matter that was oft repeated. To believe

anything other than that the confession and all the rest of it “likely imprinted indelibly in the mind of anyone who watched it,” *Skilling*, 561 U.S., at 383, is “blinking reality.” See *Turner v. Louisiana*, 379 U.S. 466, 473, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965).

The pretrial publicity about *Skilling* was far “less memorable and prejudicial” than was the publicity about Appellant, and contained no “evidence of the smoking-gun variety [that] invited prejudgment of his culpability.” Not so here. The pretrial publicity was frequent and it was never favorable to Appellant. There was the prior conviction in federal court, the altercation in court between Putnam and Appellant, the claim that Martin was going to grab a deputy’s gun at trial and therefore should be handcuffed. There was the hostage situation with Martin talking to a reporter, admitting that he had a shank to the throat of the hostage deputy. And then of course, there was publicity about the confession. Any juror who might have entertained the thought that Appellant’s hostage takeover was the act of an innocent man, frustrated with an oppressive criminal justice system would have difficulty forgetting these lurid details. Any juror who might have entertained the thought that a life sentence without the possibility of parol may have been an appropriate punishment would have difficulty forgetting these lurid details. Those jurors just as certainly would have difficulty disbelieving or

forgetting a defendant's opinion of his own guilt and would most certainly dismiss out of hand any argument for any sentence less than death.

While Martin's trial was not as quick as Rideau's nor as drawn out as Skilling's, the interim between arraignment and trial was filled, once again, with lurid details. The crimes Martin was tried for occurred in late September of 2012. In October, Martin was arrested. In December, Martin and Putnam had their in-court confrontation. More than 40 news stories followed. In March of 2014, the State filed to have Martin handcuffed during trial. In April of 2014, Martin took a deputy hostage. In August of 2014, Martin's trial began. Many—most—of the news stories referred to Martin's federal felony weapons conviction and a 22 year sentence, Martin's confession to shooting Cole and Putnam, the claim that Martin told Putnam in Court "I should have shot you in the face," or some combination of these facts.

Finally, if we go to the last of the facts that Justice Ginsberg addressed in her Skilling opinion, a fact she labeled as of "prime significance," jurors here did not acquit Martin of anything. He was convicted on all counts and sentenced to death. Like *Rideau*, *Estes*, and *Sheppard*, and unlike *Skilling*, the jury's verdicts did nothing to "undermine in any way the supposition of juror bias." Bias here must be *presumed*. Against that presumption of bias against Martin, almost

nothing was done by the trial court or counsel to ferret out those whose latent impressions of Appellant told them the opposite of what the Constitution presumes.

VII

While there is scientific support that even thorough voir dire does not effectively weeding out jurors who were not “indifferent as they stand unsworne” in this case the voir dire was more than inadequate. But even if one accepts the premise that voir dire would have been effective, it was not pursued.

Iconic Judge Learned Hand of the Second Circuit was blunt about the efficacy of voir dire. In *United States v. Dennis*, 183 F.2d 201, 227 (2nd Cir. 1950), Judge Hand observed that “any examination on the voir dire is a clumsy and imperfect way of detecting suppressed emotional commitments to which all of us are to some extent subject, unconsciously or subconsciously.” See, also, Erickson, *Fair Trial and Free Press: The Practical Dilemma*, 29 STAN. L. REV. 485 (1977); J. Murray & J. Eckman, *A Follow-up Study of Jury Selection*, *Proceedings of the American Psychological Association Annual Meeting* (Sept. 1974). Suggestions by judges that voir dire may be entirely inadequate to lay bare the bias of a juror are not new. Justice Felix Frankfurter wrote in *Stroble v. California*, 343 U.S. 181, 72 S. Ct. 599, 96 L.Ed. 872 (1952):

Science with all its advances has not given us instruments for determining when the impact of such newspaper exploitation has spent itself or whether the powerful impression bound to be made by such inflaming articles as here preceded the trial can be dissipated in the mind of the average juror by the tame and often pedestrian proceedings in court.

Id., at 201 (FRANKFURTER, J., dissenting.)

As noted, the behavioral sciences give us little comfort that voir dire, even probing voir dire—and there was none of that here—would effectively ferret out the emotional and psychological conclusions drawn from extensive news coverage.

The relevant question is whether the jurors had such fixed opinions that they could not judge impartially the guilt of the defendant. See, *Patton v. Yount*, 467 U.S. 1025, 1035, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984). We do not know how effective voir dire is at uncovering bias, but it is all that we have. Far better to attempt to use the weapons we have to battle unfairness than to leave them in the scabbard. Unfortunately, it was the latter that was done here.

The behavioral studies inform us that pretrial publicity is consistently one-sided and almost always adverse to the accused. See, e.g., Saul Kassin and Lawrence Wrightsman, *The American Jury on Trial: Psychological Perspectives* 48 (1988); and, generally, Saul Kassin and Lawrence Wrightsman, *The Construction and Validation of a Juror Bias Scale*, 17 JR. RES. IN PERSONALITY, 423 (1983); and, Nancy M. Steblay, Jasmina Besirevic, Solomon M. Fulero, and

Belia Jimenez-Lorente, *The Effects of Pretrial Publicity on Juror Verdicts: a Meta-analytic Review*, 23 JR. L. HUM. BEHAVIOR, 219 (Apr 1999).

The purpose of the voir dire proceedings is not to simply go through the motions. Capital voir dire is a necessary evil to attempt to ensure, in a case where the most serious penalty known to mankind is at issue, that the jurors will be as impartial as man's imperfect knowledge permits and to ensure that the jury which tries a criminal defendant is not a tribunal organized to impose to death. *See, Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

With that said, there was precious little voir dire performed on pretrial publicity. This is constitutionally unacceptable in a case with this much pretrial publicity. For example, Juror Claudia Ware indicated that she was "aware of the facts of this case" a "little bit." (T.p. Vol. IV, p. 500.) The shootings occurred in her neighborhood, a couple streets over from where she lived. She wrote in her questionnaire that "[s]omeone got shot and someone got shot in a hand in a house two streets over." (T.p. Vol. IV, p. 501.) She talked with her husband about it. She denied that she had formed an opinion about Appellant's guilt or innocence or what happened. (Id.) She initially claimed that she got her information from the "[n]eighborhood grapevine," but when asked specifically what she had heard, she then acknowledged that "some of it was on the news." (Id., 501.) She claimed that

the fact that this happened a couple streets from where she lived and where she raised her 3 children would in no way impact her ability to be a juror. (Id., 502.)

The defense, with due respect, did not probe. Instead counsel's only question directed to potential bias was a leading question that "if a homicide occurred next door to your house and it was a friend of yours who died, that wouldn't be a very good case for you to sit on, would it? It would be too close to home?" (T.p. Vol. IV, p. 509.) The defense then passed the juror for cause without probing into the pretrial publicity she revealed she had been exposed to. (Id., 511.) She was seated on the panel.

Jurors may not be lying when they say things like, a highly publicized shooting that happened two streets from where I raise my kids has not caused me to form or express an opinion. Such jurors, to borrow the reasoning from *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992), "could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed." *Morgan*, supra, 504 U.S., at 735. And just as a belief that death should be imposed *ipso facto* upon conviction of a capital offense reflects directly on that individual's inability to follow the law, a belief that one exposed to publicity has not formed any opinion, can be fair, and can follow the dictates of the law is a

juror who cannot follow the dictates of law. As the Court noted in *Morgan*, “[i]t may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs” or impressions “would prevent him or her from doing so,”

Morgan held that a defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective jurors labor under the misconception that they can afford a defendant the presumption of innocence when what they have taken in with their senses and recorded in their brains flatly prohibits it. The risk that such jurors may have been empaneled in this case and infected the case with the effects of pretrial publicity is unacceptable “in light of the ease with which that risk could have been minimized.” *Morgan*, at 736, quoting *Turner v. Murray*, 476 U.S. 28, 36, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986). A latent but nonetheless dogmatic view about the death penalty is not analytically different for Fourteenth Amendment purposes from a latent view about guilt.

VIII

Juror Sharon Crum also heard about the case. She remembered reading about it in the newspaper. (T.p., Vol. IV, p. 584.) She “just thought it was bad.” (Id., 585.). The prosecutor tried to rehabilitate her by reminding her that she would have to decide the case from the evidence, not the news coverage. (Id.).

Though any examination on voir dire is a clumsy and imperfect way of detecting suppressed emotional commitments to which all of us are to some extent subject, unconsciously or subconsciously,” to quote Judge Hand, the defense did not even try. It asked *no questions* about publicity, and passed the juror for cause (Id., at 598.) She sat on the panel that imposed death.

Juror Eric Butler worked with the victim, Jeremy Cole. (T.p. Vol. IV, p. 599.) The inquiry from the trial court was as follows:

Q And you knew the victim or you spoke to him the day –

A Yeah.

Q -- of the event?

A Yeah.

Q Now, can you set all of that aside? *That's a big lift.*

A Yes.

Q Was he your friend?

A No. Just employee, coworker.

Q Just an employee with you?

A Coworker.

Q So you didn't interact with him on a regular basis. But you wouldn't consider him other than a fellow employee?

A Fellow employee.

Q The fact that he was killed, you wouldn't hold a greater offense to that –

A No.

Q -- than anyone else?

A No.

Q And you can sit back and weigh the evidence?

A Yes.

(T.p., Vol. IV, p. 600.) (Emphasis added.)

When asked how he could know the victim, perhaps been one of the last people to see him alive, know that the Appellant killed the victim, and sit impartially on the jury, Mr. Butler repeated the same mantra: “be fair.” Upon questioning from Appellant’s counsel, Mr. Butler said:

Q I'm torn. What would you do? What would you do?

A Be fair.

Q Even if it means taking some heat from Jeremy's family in the event you do not take this man's life?

A Yep. Be fair.

Q This man killed him. He confessed to that. We're not really gonna fight. We've got to go through the first part. It's gonna be about the second part. There's no self-defense.

A Okay.

Q Now, you'll get to that part.

A Uh-huh.

Q And you're in that room. And you get that form. And, you know, imagine yourself in the position where you know there's no real question how Jeremy Cole died. He died at the hand of murder. Will it matter to you if we can help bring to this courtroom information about what made David Martin the man he has grown to be in terms of his background and his family? Will you take that into consideration?

A Be fair.

Q Okay. Do those kinds of things, you think, count when it comes to choosing life in prison versus death? And by those kinds of things, I mean not what happened in the house where Jeremy died, but what happened in David Martin's life before Jeremy died.

A Have to be fair. Both sides.

Q Did you follow the publicity?

A No.

Q Because you knew?

A No.

(T.p. Vol. IV., pp. 611-612.) (Emphasis added.) In Fourteenth Amendment terms, "Be fair" is as much a constitutionally unacceptable mantra as "follow the law" was in *Morgan, supra*. The trial judge refused a challenge for cause, saying that Mr. Butler "answered every question correctly and indicated that he could be a fair juror under these circumstances." (Id., at 614.) But no one ever asked or

attempted to ascertain what being fair meant to Mr. Butler. Perhaps in Mr. Butler's mind, being fair meant insuring the man who killed his co-worker was put to death. The claim by Mr. Butler, with due respect, that he followed no publicity about the case of a man with whom he worked and was killed just hours after speaking with him, who was shot by another man who took a deputy hostage is "blinking reality." Mr. Butler sat on the jury and signed the death verdict. In fact, Mr. Butler was the foreman of the jury. (T.p. Vol. IX, p. 1819.)

Mr. Corman also heard about the case. While he denied having any preconceived opinion, he was asked no questions by the defense about publicity except that he was cooking dinner when he saw the coverage about the case. (T.p. Vol. V, pp. 715-716.)

Q Do you remember what channel you were watching on the news?

A 27.

Q Okay. And do you remember anything else other than you told Mr. Wildman about what you saw?

A No. Like I said, I just happened to see it. When I first saw it, I wasn't even sure it was the same case I'm sitting here for.

Q Okay.

A But then I did realize it was. And I just heard a little bit of it.

Q Were you cooking dinner?

A Yeah.

Q What did you have?

A Chicken.

Q I'm having chicken tonight too. * * * .

Mr. Corman remembered that he was having chicken for dinner the night that he saw the coverage but claims that he remembers little about the case. That curious answer would ordinarily cause more probing questioning, but here it did not. Mr. Corman was passed for cause and sat as a juror. He, too, signed the death verdict.

IX

Ohio Constitution, Article I, Section 10 provides in pertinent part: "In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; *** and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed ***." The Sixth Amendment to the United States Constitution provides in pertinent part: "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 * * *." R.C. 2901.12(K) provides: "Notwithstanding any other requirement for the

place of trial, venue may be changed, upon motion of the prosecution, the defense, or the court, to any court having jurisdiction of the subject matter outside the county in which trial otherwise would be held, when it appears that a fair and impartial trial cannot be held in the jurisdiction in which trial otherwise would be held, or when it appears that trial should be held in another jurisdiction for the convenience of the parties and in the interests of justice.” Crim. R. 18 provides in pertinent part:

(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.*

(Emphasis added.) Trial counsel did ask the trial court for a change of venue, which the trial court took under advisement. (T.d. 209.) Once that occurred, with due respect to counsel, counsel punted on the publicity issue. Mr. Gore, who was a juror in this case, was exposed to publicity. He was asked no questions about what he had seen, if he had talked to anyone, if he had spoken to other jurors in the courthouse about the case. It may be that his knowledge about the case was such that he might have passed for cause, but Appellant’s counsel left unprobed the concern. In a case where the facts warrant a finding of a presumption of

prejudice that is simply unacceptable.

Rather than a probing voir dire designed to determine whether the jurors had been tainted by pretrial publicity, the state's counsel engaged in an effort only toward "rehabilitation" so as to place as many of jurors on the panel as possible. That is to be expected. See, *State v. Williams*, supra, 79 Ohio St.3d, at 7. But Appellant's counsel was never cut off from attempting to question jurors about publicity. They simply did not probe nor *attempt* to probe. While this will be addressed in the proposition of law concerning ineffective assistance of counsel, the undeniable effect here is a denial of Due Process under the Fourteenth Amendment and a denial of the rights secured by Ohio Constitution, Article I, Sections 1, 2, 5, 10, and 16. Sections 5 and 10 promise trial by jury "inviolable." Section 16 promises a trial by due course of law. Section 1 promises the ability to defend life and liberty, and Section 2 promises those same rights to every citizen.

It is one thing if a juror may recall reading something in the paper about the defendant being arrested or indicted for a murder. Asking a juror if he or she could set that aside and decide the case based upon the evidence, and receiving an affirmative response, may be a realistic expectation. But it is quite another thing when the community has been saturated with information that jurors have heard that the Appellant had been in prison before; that the Appellant had been

convicted of a federal crime and receive a 22 year sentence, that Appellant had confessed to these crimes, and that Appellant had taken a deputy sheriff hostage. More than “do you think you can set aside what you have heard” was called for. The result of the default by both the trial court and Appellant’s counsel was a trial before a tribunal organized to return a verdict of death.

Even with the body of case law that has developed about attempting first to select a jury in the county in which the indictment was brought, when pretrial publicity is pervasive, a change of venue is proper; in fact, not only proper, but required. If, as the Ohio cases say, a careful and searching voir dire provides the best test of whether prejudicial pretrial publicity has prevented obtaining a fair and impartial jury from the locality, *State v. Davis*, 76 Ohio St.3d 107, 111, 1996 Ohio 414, 666 N.E.2d 1099, quoting *State v. Bayless*, 48 Ohio St.2d 73, 98, 357 N.E.2d 1035 (1976), then there should have been a careful and probing voir dire. In this case, there was a reasonable likelihood that pretrial publicity prevented a fair trial and a fair determination of the sentence. The nature and the extent of the publicity prevented Appellant from having a fair trial.

In *South Euclid v. Florian*, 95 Ohio Law Abs. 236, 192 N.E.2d 548 (Mun. South Euclid, 1963), the municipal court of South Euclid was faced with a defense motion for change of venue after the defendant had been previously convicted and

the conviction was publicized within the jurisdiction of the court. The court said that the issue is:

not what an appellate court would do if the judge in the exercise of his discretion overruled this motion, but rather, the issue is whether, this motion should be granted considering the publicity given the jury verdict, considering the general interest in the community (because of the unusual nature of the charge) and considering what transpired in the earlier trial of this case.

192 N.E.2d 560. *Florian* relied upon *State v. Williams*, 67 N.J. Super. 599, 171 A.2d 137 (1961). In *Williams*, the court was faced with a defense motion for change of venue after the defendant had entered a plea of *nonvult* (the equivalent of a plea of guilty). The *Williams* court held:

It is to the credit of our system of justice that a prospective juror candidly admitted at the prior trial that he knew of the plea of *nonvult* to second degree murder. If such knowledge were not revealed in a subsequent trial, the defendant would be grossly prejudiced. In the interest of justice, it is the duty of this court not to expose this defendant to the risk contingent upon a trial in this county.

171 A.2d, at 139-140.

The American Bar Association has published standards that should have guided both the trial court and Appellant's trial counsel. ABA STANDARDS FOR CRIMINAL JUSTICE: FAIR TRIAL AND FREE PRESS, 3rd ed., © 1992 American Bar Association.

Standard 8-3.3 Change of venue or continuance

The following standards govern the consideration and disposition of a motion in a criminal case for change of venue or

continuance based on a claim of threatened interference with the right to a fair trial:

(a) Except as federal or state constitutional or statutory provisions otherwise require, a change of venue or continuance may be granted on motion of either the prosecution or the defense.

(b) A motion for change of venue or continuance should be granted whenever it is determined that, because of the dissemination of potentially prejudicial material, there is a *substantial likelihood* that, in the absence of such relief, a fair trial by an impartial jury cannot be had. This determination may be based on such evidence as qualified public opinion surveys or opinion testimony offered by individuals, or on the court's own evaluation of the nature, frequency, and timing of the material involved. *A showing of actual prejudice shall not be required.*

(c) If a motion for change of venue or continuance is made prior to the impaneling of the jury, the court may defer ruling until the completion of voir dire. The fact that a jury satisfying prevailing standards of acceptability has been selected shall not be controlling if the record shows that the criterion for the granting of relief set forth in paragraph (b) has been met.

(d) It should not be a ground for denial of a change of venue that one such change has already been granted. The claim that the venue should have been changed or a continuance granted should not be considered to have been waived by the subsequent waiver of the right to trial by jury or by the failure to exercise all available peremptory challenges.

(Emphasis added.) Standard 8-3.5, entitled "Selecting the Jury," provides:

The following standards govern the selection of a jury in those criminal cases in which questions of possible prejudice are raised:

(a) If there is a substantial possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to exposure should take place outside the presence of other chosen and prospective jurors. An accurate record of this examination should be kept by a court reporter or tape recording whenever possible. The questioning should be conducted *for the purpose of determining what the prospective juror has read and heard about the case and how any exposure has affected that person's attitude toward the trial, not to convince the prospective juror that an inability to case aside any preconceptions would be a dereliction of duty.*

(b) Whenever prospective jurors have been exposed to potentially prejudicial material, the court should consider not only the

jurors' subjective self-evaluation of their ability to remain impartial but also the objective nature of the material and the degree of exposure. *The court should exercise extreme caution in qualifying a prospective juror who has either been exposed to highly prejudicial material or retained a recollection of any prejudicial material.*

(c) Whenever there is a substantial likelihood that, due to pretrial publicity, the regularly allotted number of peremptory challenges is inadequate, the court should permit additional challenges to the extent necessary for the impaneling of an impartial jury.

(d) Whenever it is determined that potentially prejudicial news coverage of a criminal matter has been intense and has been concentrated in a given locality in a state (or federal district), the court should, in jurisdictions where permissible, consider drawing jurors from other localities in that state (or district).

(Emphasis added.) Counsel failed to follow the standards and failed to object to the trial court's failure to follow the standards. Counsel were not functioning as counsel in this regard. This deprived the Appellant not only of the impartial jury he deserved, but the assistance of counsel to which he was entitled, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, and in violation of the Ohio Constitution, Article I, Sections 1, 2, 5, 10, and 16.

Hoping for a trial with 12 impartial, "disinterested" jurors, the type of jury promised by the Sixth and Fourteenth Amendments to the U.S. Constitution and by Ohio Constitution, Article I, Sections 1, 2, 5, 10, and 16, the Appellant was tried by jurors steeped in publicity.

Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any

accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution -- of whatever race, creed or persuasion.

Chambers v. Florida, 309 U.S. 227, 241, 60 S.Ct. 472, 84 L.Ed. 716 (1940). The trial court afforded Appellant no such haven here. Appellant's conviction and death sentence are in violation of the aforementioned constitutional principles and must be vacated.

Proposition of Law No. 2

Errors of Trial Counsel, and the Cumulative Effect of Such Errors When Fails to Fulfill a Litany of Duties and Were Not Functioning as Counsel Deprives a Capital Defendant of the Effective Assistance of Counsel Guaranteed by U.S. CONST., amend. VI and XIV and by OHIO CONST., art. I, §§1, 2, 10, and 16.

Appellant's trial counsel unfortunately failed in a number of essential duties to Appellant. The most telling and consequential were those relating to publicity and the death penalty. The standards by which counsel were to perform, or try to perform,⁵ are easily discernible. We begin with the duty of counsel in questioning capital jurors about their views on the death penalty.

Failure to Pursue Questioning of Death-Prone Jurors. As discussed elsewhere in this brief, *Witherspoon v. Illinois*, supra, held that jurors who have reservations about capital punishment may be excluded from a capital jury only if they state unequivocally that under no circumstances could they impose or consider a death sentence. *Witherspoon* dealt with jurors whose views on capital punishment might cause them *not* to vote for death even if the law and evidence warranted a death sentence.

⁵ Appellant recognizes that there are any number of decisions in this State that uphold limitations that trial judges place upon capital voir dire. If counsel attempts to follow performance standards but are hampered by rulings of the trial judge, then the claim on appeal is that the judge acted unreasonably and denied the Appellant a fair trial. But when counsel does not even attempt what the law says they should, then the denial of a fair trial is attributed not to the judge's actions, but to those of counsel.

The reverse of *Witherspoon* was the situation presented to the Supreme Court in *Morgan v. Illinois*, supra. Both *Witherspoon* and *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), set the table for *Morgan*. The *Witt* standard, the Court will recall, is that jurors whose view about the death penalty would “prevent or substantially impair” their ability to fairly consider capital punishment are excludable for cause. *Morgan* is dealt with a situation where jurors could not circumvent the *Witt* standard simply by making a promise to “follow the law.”

Morgan recognized that “follow the law” questions and answers are insufficient, and recognized the right of defense counsel to engage in a probing voir dire to lay bare the bias of veniremen whose views about the death penalty are such that he or she would, upon conviction, automatically vote for a sentence of death. Just as troubling, however, in terms of the Sixth Amendment requirement of a fair and impartial jury, and the Fourteenth Amendment’s promise of due process of law, is the juror who either acknowledges or whose answers clearly indicate that, upon conviction, he or she will vote for a sentence of death, unless the Defendant does something to convince the juror otherwise. Such a juror does not approach the second phase with all of the sentencing options equal in his or her mind, prepared to vote for death *only* if convinced

beyond all reasonable doubt that the aggravating circumstances outweigh the mitigation evidence; and, equally prepare to choose one of the life options if the juror has any reasonable doubt about that proof. For such jurors, many of whom once they find an intentional homicide, a death sentence is the default option.

As will be described below, several jurors were jurors who either grudgingly said that they would “listen” to the mitigation evidence, while others simply repeated the mantra of being “fair,” as did Mr. Butler, the jury foreman who worked with Jeremy Cole.

Morgan v. Illinois, gives the defense the right to probe these jurors, because they are, or may be, as unqualified to sit as a juror who will refuse in every instance to impose or consider death. See, *Witherspoon v. Illinois*, *supra*. *Morgan* emphasized the importance of voir dire and to that extent, runs contrary to a number of decisions of this Court finding, with due respect, unreasonable limitations on voir dire to be reasonable and within the discretion of the Trial Judge. See, e.g., *State v. Adams*, __Ohio St.3d __, __ N.E.3d __, 2015 Ohio 3954, 2015 Ohio LEXIS 2672 (slip opinion); *State v. Williams*, *supra*, 79 Ohio St.3d 1; *State v. Bedford*, 39 Ohio St.3d 122, 529 N.E.2d 913 (1988).

In this case, however, there was no complaint by Appellant that the trial judge unduly restricted voir dire. That does not mean, however, that Appellant

had a trial panel composed of impartial, “indifferent” jurors. The jurors were not asked detailed, probing questions about their views on capital punishment. While it was important with every juror, it was particularly important with two (2) jurors who on their face brought baggage to the jury selection process. One (1) juror lived just blocks away from the murder. The other worked with the deceased victim, Jeremy Cole.

These and other jurors said that they would “listen” to the mitigation evidence. Listening to evidence and being opened to being persuaded by the evidence are two entirely different things. With due respect to counsel, who are experienced and dedicated, they did not probe these jurors further. They did not, as they should have, asked if their views on the death penalty were such that, even if they found Appellant guilty of aggravated murder, and at least one (1) capital specification, they could nonetheless enter the penalty phase with all of the available penalties equal in their mind. One can understand counsel passing on the opportunity if counsel had planned to simply excuse these jurors peremptorily. As a matter of trial strategy, or even simply saving time and resources, a trial lawyer might decide not to spend much time on a juror, knowing that that juror was going to be removed by a peremptory challenge. Put another way, with regard to Mr. Butler, for example, who worked with Mr. Cole; counsel

had options. First, even if Mr. Butler said that he could be “fair” to both side, despite working with Mr. Cole, counsel could have and indeed should of, pressed Mr. Butler on his views about the death penalty, particularly his views about the death penalty for someone with whom he worked, who was killed in cold blood. Alternately, counsel could have said to themselves: “This man worked with the deceased. He may in fact have been one of the last persons to see the decedent alive. I don’t care how much I like him. I don’t care what his answers are. There is no way this guy is going to sit on a jury where he could vote to sentence my client to death. He is peremptory challenge No. 1.”

Unfortunately, counsel did not do either. Counsel did not probe, as *Morgan* not only entitles, but *requires* them to do, to make a record to demonstrate that the trial judge should have excused a juror for cause; and, if the Judge refused to do so, that it was clear error. Counsel’s challenge for cause was half-hearted, and the trial judge even inquired if there was a rule somewhere that just because the juror knew the victim, it demanded an excuse for cause. Counsel not only failed to peremptorily challenge Mr. Butler, they failed to peremptorily challenge *any* jurors. In fact, counsel failed to peremptorily challenge other jurors, like Mr. Butler, who they had earlier challenged for cause; as well as Ms. Autrey, Ms. Dennis, and Ms. Hausen.

Examples of not following up on voir dire are many. Alan Armstrong was asked one question about publicity. As to mitigation evidence, counsel did not follow up.

Q * * * . Mitigating factors could be a number of different things. Doesn't have to be anything presented to you, but it can be different things. It can be something to do with the person's background, the way they were raised, other things along those lines. Would you be open to considering those other factors?

A I would consider them.

Q And you'd weigh them?

A *Probably.*

Q Even knowing that someone has been killed?

A Yes.

Q Okay.

A *I'd have to.*

(Emphasis added.) (T.p. Vol. V, p. 806.)

Lora Dennis, who served on the jury as Juror Number 6 answered:

Q You haven't heard anything about this case?

A *Not this case, no.*

Q Your husband is a reserve deputy for Trumbull County?

A Right.

Q How often does he work?

A I think he's required to work 16 hours a month.

Q 16 hours. And he's active currently? I mean he does that now?

A Yes.

Q 16 hours? Okay. Do you read the paper or anything?

A Occasionally I'll read it online, but I don't have the access to the whole paper so I just read it online.

(T.p. Vol. V, p. 648.) (Emphasis added.) No questions about if she had spoken with her husband about the hostage situation, which was not "this case." No questions about whether her husband had contact with the Appellant.

Marion Gresko sat on Appellant's jury as Juror Number 5. Her desire to be "fair" is unquestioned. But as *Morgan* dictates, that definition of fair requires probing and further inquiry. In this case, those concerns were unprobed.

A Although I do, I do think people should be, should pay for what they've done. *Especially if they've, you know, killed somebody.*

* * *

Q Would you say you're on either of those extremes, or are you somewhere else?

A I'm somewhere else.

Q You're somewhere in the middle of that, I take it?

A Probably. Probably.

Q Okay.

A Like I say, *I do think people should pay. I can't imagine losing someone—*

Q Sure.

A -- that I loved or knew, *and I know I'd want them to pay.*

(T.p. Vol. IV, p. 546.) (Emphasis added.) She said of the death sentence:

A I would *feel an obligation* to probably, if it was, *if there was no doubt in my mind.*

(Emphasis added.) (T.p. Vol. IV, p. 548.) The defense asked:

Q * * *. If you got to that point where you're deciding whether or not the death penalty or one of the life options, would it be important to you to know about David's background and history in making that decision?

A Yes.

Q It would be?

A Yes.

Q Why?

A Because I think -- *I think it might have a lot to do with why he did what he did.*

Q Okay. You've also mentioned, you said that people should have to pay for what they've done. I think a lot of people would feel that way. *Do you think life without parole, is that a stiff sentence in your mind?*

A Yes.

[Appellant's counsel]: It is. Okay. I think that's all I have, Judge.
Thanks.

(*Id.*, at 551-552.) (Emphasis added.) Counsel did not ask if she would consider the Appellant's background in her decision about the death penalty. Counsel did not ask if a life sentence, while a "stiff sentence," would be "stiff" enough if the juror found that the person had "killed somebody" and "if there was no doubt in [her] mind." These are precisely the types of answers that must be probed. We know that counsel should have pursued this. Justice White's opinion in *Morgan* said:

As to general questions of fairness and impartiality, such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed. More importantly, however, the belief that death should be imposed *ipso facto upon* conviction of a capital offense reflects directly on that individual's inability to follow the law. *See supra*, at 729. Any juror who would impose death regardless of the facts and circumstances of conviction cannot follow the dictates of law. *See Turner v. Murray*, 476 U.S. at 34-35 (plurality opinion). It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so.

Morgan, 504 U.S., at 735. *Morgan* affords the capital defendant the constitutional tools to ferret out such jurors who are incapable of following the law even if they are unaware of that fact.

A defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective jurors function under such misconception. The risk that such jurors may have been empaneled in this case and "infected petitioner's capital sentencing [is] unacceptable

in light of the ease with which that risk could have been minimized.” *Id.*, at 36 (footnote omitted). Petitioner was entitled, upon his request, to inquiry discerning those jurors who, even prior to the State’s case in chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty.

Morgan, 504 U.S., at 735-736. The tools were available, but counsel failed to use them. The *risk*, see, *Morgan*, *supra*, at 736, that Mrs. Gresko and others may harbor such views is “unacceptable in light of the ease with which that risk could have been minimized.” *Morgan*, *supra*, at 736.

Sharon Crum, who sat as Juror Number 7 on Appellant’s jury and sentenced him to death, said in her questionnaire that the death penalty is appropriate if Appellant was convicted without a doubt. (T.p. Vol. IV, p. 591.)⁶ Appellant’s counsel told her that there would not be a fight about guilt and that she would be sure Martin was guilty.

Q It’s not gonna be a big fight, part one. And I mention that to you because I want to take you kind of in your head and your heart and your gut, if you were a hundred percent, without any doubt, this man is convicted of this murder, is there any other information we can give you about his background that would be important for your life or death penalty decision?

A I guess I would have to go with his background.

Q Uh-huh. Would it –

⁶ She is the juror who had read about the case and “just thought it was bad.” (T.p. Vol. IV, p. 585.)

A How he was raised.

Q You willing to consider those factors in addition, even knowing the man did the murderous deed? Will you keep an open mind how he was raised, what shaped him, what brought him to that moment in time?

A I'd have to do that.

[Appellant's counsel]: Very good. Thank you very much.

(T.p. Vol. IV, pp. 597-598.)

This is not counsel functioning as counsel, no matter how fine you chop it, no matter how guilty the defendant. As noted elsewhere in this brief, as the jury system developed in England, some of the first reasons available to challenge jurors was for cause for bias. The peremptory challenge is an essential part of ensuring a fair and impartial jury, available to a party where the party is convinced that the juror is biased, but the trial judge refuses the challenge. Thus, in addition to failing to engage in the probing voir dire that is demanded of counsel, counsel, faced with seemingly biased jurors, counsel, though armed with peremptory challenges, failed to exercise a single one.

The law, of course, grants great latitude to the strategic decisions of counsel. Any trial lawyer knows that for any given strategy, if the strategy is successful "whether that is an acquittal, a conviction to a lesser offense, or a sentence less than death" will be labeled "brilliant" or "masterful." If the same

strategy fails, however, the list of epithets to describe the strategy is endless. The trial of a lawsuit is, after all, more art than science. Most trial lawyers and many appellate lawyers would agree with the law's decision to give trial strategy wide berth. On the other hand, just because the standards are liberal does not mean that there are no standards at all. No matter how much deference we grant the strategy of counsel, there is still some level below which performance may not dip, even in seemingly hopeless cases.

This was certainly a difficult case. David Martin shot Jeremy Cole at point blank range, after Mr. Cole was tied up. The government's evidence at trial was that Mr. Martin told the officers who arrested him that he did what he had to do; that he could accept the death penalty; and that they had the weapon. He showed officers where he had burned his clothes.⁷ Mr. Martin's statements to the police were not suppressed, claiming that there was reasonable doubt about his guilt would be a gargantuan task. The point is that this case was all about the second phase. To be weighed against the murder of Mr. Cole, which happened during the course of the kidnaping and a robbery, was the mitigation evidence. Was there something about the background and experiences of David Martin that the

⁷ As demonstrated elsewhere herein, burning the clothes certainly was not tampering with evidence because at trial, no evidentiary value to the clothes was demonstrated.

lawyers could use to at least cause the jury to have a reasonable doubt about whether the aggravating circumstances outweighed the mitigation evidence? The murder of his mother at a young age, and its traumatic impact; the rudderless wanderings in and out of housing projects, of learning disabled classes, of courts and correctional facilities; the post-traumatic stress and the need to always feel protected by having a gun; even the extremes of kidnaping and holding hostage a deputy sheriff because Appellant believed that the deputy had lied about Appellant claiming that he would grab the nearest gun at trial. All of these things meld together into a complex, certainly anti-social, personality. This might of worked, and it might not have worked. But the point of the discussion is that counsel knew that this was a case where all of the eggs had to be laid, as it were, into the basket of the second phase. To fail to probe into the death penalty views of jurors, when the death penalty was *everything* in this case, is not a trial strategy that backfired. It is no strategy at all.

Failure to Pursue or Renew Change of Venue. Counsel failed to perform as counsel in several other important respects as well. As shown in the statement of facts, no one—not the trial judge, not the prosecutor, and not the defense team—ever asked any of the jurors if they saw media coverage about the hostage situation. First, counsel failed to renew the motion for change of venue at the

close of voir dire.

Counsel also failed to follow-up on jurors who were exposed to pre-trial publicity. The defense lawyers filed a motion for change of venue. They attached over forty (40) news articles, and compact disks containing other news stories. This certainly wasn't a typical capital case in the sense that someone is accused of a horrible crime, and because the crime is so horrible, a lot of publicity is generated about the case. There was that, to be sure. But in addition, there were reports about Appellant's Federal weapons conviction and twenty-two (22) year sentence, and of course, there were multiple reports about Appellant's jail uprising, taking hostage a deputy sheriff, and even telephoning the news media in the middle of the uprising. Based upon all of this publicity, counsel appropriately filed a motion for change of venue. The trial court took the motion under advisement. Then, when faced with a juror admitted in his questionnaire that he had exposure to pre-trial publicity, Appellant's counsel asked absolutely no questions. A good example of this is juror Franko Mancini. He was asked no questions about publicity by the trial judge. The prosecutor, likewise, had little interest in making certain that Appellant was tried by an impartial jury. The prosecutor's limited questions to Mr. Mancini were leading in nature. "I know you had just a little bit of exposure to the media. You haven't formed an opinion about

this case, have you?” “And you feel you can, whatever you’ve read or heard, you can set aside?” “And decide the guilt or innocence of Mr. Martin based upon what you hear in this case?” (T.p., Vol. V, p. 751.) Appellant’s counsel asked exactly *zero* questions about publicity. (T.p., Vol. V, pp. 756-758.) This is not counsel performing as counsel in a highly publicized capital murder case, where counsel has moved for a change of venue. Having moved for a change of venue, counsel did almost nothing to try to substantiate the motion or demonstrate that it had merit.

Another juror, Alan Armstrong, said that he had “heard a few things on the news.” (T.p. Vol. V, 792.) He indicated that he does watch the news a lot. (*Id.*, 793.) Defense counsel asked one (1) question about pre-trial publicity. (*Id.*, 802.)

Failure to Fully Question Death-Scrupled Jurors. Counsel also failed to attempt to further questions jurors who had death scruples, who were excused, but who may or may not have been able to consider the penalty of death.

An example of this is juror Margaret Talbott. She wrote on her questionnaire that she could not for religious reasons impose the death penalty. (T.p. Vol. V, 736.) However, like many jurors, she was serious about doing her civic duty. She did not, when questioned under oath, say unequivocally that she could not impose or consider a death sentence. Her answer instead, was: “I don’t

know.” (*Id.*, at 737.) Later, after the Judge telling her that “this isn’t the case for everyone”, (*Id.*, at 739), she then said: “No, I couldn’t.”

But Ms. Talbott wasn’t finished. She went on to say that it’s a difficult decision, and she did understand her “religious rights.” (*Id.*, at 741.) She then asked questions about the possibility of sentences less than death, and the Judge, instead of placing the burden on the State to prove it beyond a reasonable doubt, told her that she could consider the life options “only if you find that the State failed in their burden.” (*Id.* at 743). The defense asked no questions. (*Id.* at 744.) When the State challenged for cause, the defense offered no argument, and Miss Talbott was excused for cause. (*Id.* at 745.)

As noted above, deferential standards are nonetheless standards. How do we know that counsel’s performance fell below acceptable levels, so that counsel was not functioning as counsel? The constitutional standards, fleshed out in capital cases by the American Bar Association’s Standards, provide substantial insight.

Standards of Effective Counsel. When the Supreme Court announced its decision in the highly publicized case of the “Scottsboro Boys, *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 177 L.Ed. 158 (1932), aside from what the case meant politically and socially, it marked the beginning of the doctrine of “incorporation”

in criminal justice. Justice George Sutherland wrote on behalf of the Court that Alabama had denied the Scottsboro boys the effective assistance of counsel *and* the due process of law that the Fourteenth Amendment to U.S. Constitution requires every state to protect and to enforce. *Powell* was a capital case, but the Supreme Court was not ready to announce that the guiding hand of counsel was needed in all cases, even all felony cases.

Thus, in *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942), the Court held that the assistance of counsel specified in the Sixth Amendment was *not* a basic component of the Fourteenth Amendment's Due Process Clause, and therefore the Court did not "incorporate" into state criminal prosecutions the assistance of counsel secured by the Sixth Amendment. The Court held that Smith Betts, a Maryland farmhand, had a fair trial even though he had no lawyer. Part of the opinion for the Court, written by Justice Owen Roberts, said that Betts had a fair trial because, *inter alia*, Betts was forty three years old, of average intelligence, and had once been in criminal court, where he had plead guilty to larceny. Thus, concluded Justice Roberts and the Court, Betts was not unfamiliar with criminal procedure.⁸

⁸ This holding has the same logical persuasiveness as a proposition that one who has had several surgeries is "not unfamiliar" with surgical procedures and therefore can
(continued...)

The *Betts* analysis was so constitutionally untenable that it had to be put to rest in *Gideon v. Wainwright*, 372 U.S. 335, 349, 83 S.Ct. 79, 29 L.Ed.2d 799 (1963). Later, the Court began to flesh out the “assistance of counsel,” and said that it means more than a person who happens to be a lawyer sitting with the defendant at the trial table. See, *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); see, also, *McFarland v. Scott*, 512 U.S. 1256, 1259, 114 S. Ct. 2785, 129 L. Ed. 2d 896 (1994). In *Powell*, the Court recognized that a layman defendant “requires the guiding hand of counsel at every step in the proceedings against him.” Much later, the Court stated:

An accused’s right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases “are necessities, not luxuries.” Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be “of little avail,” as this Court has recognized repeatedly. “Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.”

United States v. Cronin, 466 U.S. 648, 653-654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) (Footnotes omitted.) The Sixth Amendment right to counsel, together with the due process protections of the Fourteenth Amendment, establishes a right of effective assistance of counsel.

⁸ (...continued)
be a surgeon—competent enough at least to operate on himself.

The special value of the right to the assistance of counsel explains why “[it] has long been recognized that the right to counsel is the right to the effective assistance of counsel.” *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970). The text of the Sixth Amendment itself suggests as much. The Amendment requires not merely the provision of counsel to the accused, but “Assistance,” which is to be “for his defence.” Thus, “the core purpose of the counsel guarantee was to assure ‘Assistance’ at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor.” *United States v. Ash*, 413 U.S. 300, 309 (1973). If no actual “Assistance” “for” the accused’s “defence” is provided, then the constitutional guarantee has been violated. To hold otherwise “could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution’s requirement that an accused be given the assistance of counsel. The Constitution’s guarantee of assistance of counsel cannot be satisfied by mere formal appointment.” *Avery v. Alabama*, 308 U.S. 444, 446 (1940) (footnote omitted).

466 U.S., at 654-655. Of more recent vintage, the American Bar Association has adopted Standards for Performance. Many courts, including the United States Supreme Court, have looked to these Standards as polestars for what is proper performance.

Guideline 10.10.2, “Voir Dire and Jury Selection,” of the American Bar Association’s *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Revised Edition (Washington, D.C.: American Bar Association, copyright © February 2003), provides in relevant part:

* * *

B. Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding “death qualification” concerning any potential juror’s beliefs about the death penalty. Counsel should be familiar with

techniques: (1) for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the defendant is death-eligible, regardless of the individual circumstances of the case; (2) for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence; and (3) for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.

Guideline 10.8, “The Duty to Assert Legal Claims,” provides in pertinent part:

A. Counsel at every stage of the case, exercising professional judgment in accordance with these Guidelines, should:

1. consider all legal claims potentially available; and
2. thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted; and
3. evaluate each potential claim in light of:
 - a. the unique characteristics of death penalty law and practice; and
 - b. the near certainty that all available avenues of post-conviction relief will be pursued in the event of conviction and imposition of a death sentence; and
 - c. the importance of protecting the client’s rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited; and
 - d. any other professionally appropriate costs and benefits to the assertion of the claim.

B. *Counsel who decide to assert a particular legal claim should:*

1. *present the claim as forcefully as possible*, tailoring the presentation to the particular facts and circumstances in the client’s case and the applicable law in the particular jurisdiction; and
2. ensure that a full record is made of all legal proceedings in connection with the claim.

* * *

(Emphasis added.) These Guidelines are more than aspirational. They have been

given an imprimatur by the courts, including the United States Supreme Court. See, e.g., *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005): “[W]e long have referred [to the ABA Standards] as ‘guides to determining what is reasonable.’” *Wiggins v. Smith*, 539 U.S. 510, at 524, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

Against this backdrop, the record in this case discloses manifestly that Appellant was denied the effective assistance of trial counsel. In *Strickland*, the Supreme Court set forth the test for ineffective counsel.

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S., at 687. A claim for ineffective assistance of counsel must also, “identify the acts or omission of counsel” and show that the acts are not “the result of reasonable professional judgment.” 466 U.S., at 680. This has been done above. The accused 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. 466 U.S., at 694.⁹

Here, this case was about one thing: the appropriate sentence. How do we know that there is a reasonable probability of a different outcome? First, *Morgan* tells us that the risk of placing jurors with latent death penalty bias is too great to ignore. Second, there was mitigation in this case. There is a reasonable probability that, but for counsel's errors, detailed above, the result would have been different, i.e., a life sentence. But with a jury stacked with people who would listen to the mitigation, people who knew the decedent, people who knew the area of the crimes, people exposed to news coverage, and people who very likely knew

⁹ In the recent case of *State v. Adams*, __ Ohio St.3d __ __N.E.3d __, 2015 Ohio 3954, 2015 Ohio LEXIS 2672, the Court misstated the standard when it held that a "defendant establishes prejudice by showing that but for counsel's errors, the result of the trial *would have been different*." *Id.*, at ¶136 (emphasis added).

Of course, the *true* test is that "the defendant must prove that *there exists a reasonable probability that*, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), syl. 3. (Emphasis added.)

The correct standard is stated in *Strickland* as well:

When a defendant challenges a conviction, the question is whether there is a *reasonable probability* that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a *reasonable probability that*, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

(Emphasis added.) *Strickland*, 466 U.S., at 698.

of the hostage situation (about which no juror was asked), Appellant was tried by a tribunal organized to return a verdict of death.

These errors cannot be passed off as strategy or reasoned professional judgment. Absent a showing of a strategic reason, and there is none here, the failure to request the removal of a biased juror constitutes deficient performance. See, *Johnson v. Armontrout*, 961 F.2d 748, 755 (8th Cir. 1992). Moreover, the decision to seat a biased juror *cannot* be a discretionary or strategic decision. See, *Miller v. Webb*, 385 F.3d 666, 675-76 (6th Cir. 2004). Counsel's performance is deficient if he fails to pursue an answer from a prospective juror in which the prospective juror indicates that he cannot be fair. *Hughes v. United States*, 258 F.3d 453, 461 (6th Cir. 2001); and, *Virgil v. Dretke*, 446 F.3d 598, 609-10 (5th Cir. 2006). "Among those basic fair trial rights that can *never be treated as harmless* is a defendant's right to an impartial adjudicator, be it judge or jury." (Emphasis added.) See, *Gomez v. United States*, 490 U.S. 858, 876, 109 S. Ct. 2237, 104 L.Ed.2d 923 (1989).

Appellant was tried and sentenced by a panel from whom jurors should have been culled. There was no probing of the jurors, no effort to remove them for cause. Even those who were challenged by cause were later passed peremptorily. Appellant's convictions and death sentence stand as an affront to the right to

effective counsel, and must be vacated.

Proposition of Law No. 3

When the State is permitted to proffer all evidence from the trial phase at the sentencing phase, and is permitted to argue improper aggravating circumstances, any resulting death sentence is in violation of the Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 9 and 16, of the Ohio Constitution.

This was a case where guilt was conceded during voir dire, and the defense repeatedly emphasized that the only issue was about the appropriate sentence to be imposed. Thus, the mitigation phase of the trial was for all intents and purposes the only true trial for Appellant. Despite this, and over the objection of Appellant, the Trial Court permitted the State to proffer all testimony from the trial at the mitigation phase. In addition, again over objection of Appellant, the Trial Court permitted the State to re-admit in the mitigation phase, the gun, the fired cartridges, the magazine and the cord used to tie up the victims, as exhibits in the mitigation phase. The jury was given no guidance or directive as to exactly *what* evidence from the first phase of the trial they were to consider.

Prior to commencement of the sentencing phase, Appellant objected to the state's proposed exhibits contending the exhibits were irrelevant and prejudicial. (T.p. Vol. IX, p. 1828.) The trial court overruled the defense objections. (T.p. Vol. IX, p. 1829-1830.) Appellant made a motion *in limine* prior to the sentencing phase to preclude the government from submitting or arguing the nature and circumstances of the underlying offenses. (T.p. Vol. IX, p. 1833-1834.) When the government argued and presented evidence regarding the nature and

circumstances of the offense, the trial court overruled the object. (T.p. Vol. IX, p. 1852.) Despite the trial court advising the jury that the “underlying aggravated murder itself is not an aggravating circumstance” (T.p. Vol. IX, p. 1837) the government argued and submitted evidence regarding the facts and circumstances of the murder as aggravating circumstances.

During opening statements of the sentencing phase the prosecutor informed the jury:

So how do we proceed in Phase Two? We aren't gonna present our entire case again. We aren't gonna call Melissa Putnam. We aren't gonna put everyone in this case through that gain and put you through that. It would be repetitive and time consuming. So what we're gonna do is shortly after opening statements, we're gonna proffer , meaning to offer to the Court and the Jury, all of the evidence and testimony that you've heard in Phase One, Everything that you've heard and seen that relates to these aggravating circumstances, we're gonna proffer that. And, again, you've found that those exist beyond a reasonable doubt. So all the evidence that you've heard we're gonna incorporate into this second phase. And you're gonna have that evidence, that testimony and the exhibits that relate to these aggravating circumstances when you finally go back there to deliberate.

(T.p. Vol. IX, p. 1843.) Instead of outlining, delineating or otherwise specifying what was relevant from the first phase, the state simply moved for admission of their exhibits (the gun, cartridge casings, magazine and cord) and proffered “the testimony that exists from the first phase relevant to those items.” (T.p. Vol. IX, p. 1852.) That was the entire submission for the sentencing phase from the government. The jury was never instructed to disregard the evidence and

testimony that did not bear upon the aggravating circumstances relating to Count Two of their verdict. As a result, the jury was presented with testimony and evidence in mitigation that was clearly beyond that which is permitted under Ohio law.

In Count Two, the jury had convicted the Defendant of aggravated murder, finding beyond a reasonable doubt that Appellant was guilty of killing Jeremy Cole, with prior calculation and design. In addition, the jury had found Appellant guilty for the three (3) capital specifications appended to Count Two of the indictment. The first specification, that the Appellant purposely killed or attempted to kill two (2) or more people, the second specification that Appellant committed the murder while kidnapping or attempting to kidnap Jeremy Cole, and that he was the principal offender in the commission of the murder, and the third specification, Appellant was the principal offender of the murder of Jeremy Cole, which was committed while he was committing or attempting to commit aggravated robbery. As a result of the State's proffer of all testimony and evidence from the first phase of the trial, the jury was left to consider the evidence and testimony presented from Melissa Putnam, who was also shot on the morning of September 27, 2012, Officer John Messaro, who first responded to the scene, and provided testimony as to the crime scene, what was found, the blood all over Miss Putnam, the description of Jeremy Cole, and how he was found, as well as the EMS transport of Cole and Putnam, and securing the crime scene. (T.p. VII, pp.

1535-1539.) The State also presented testimony of United States Marshal's Bolden and Murphy. These two (2) witnesses provided testimony with regard to the arrest of Appellant in Summit County, and his transport to Trumbull County. They provided testimony with regard to the burn pile where Appellant's clothes had been burned, and other statements that Appellant had made during the transport. The State also proffered at the sentencing phase, the testimony of Nikeisha Pruitt, Appellant's girlfriend, who provided testimony regarding Appellant's activities on the morning and afternoon of September 27, 2012. (T.p. pp. 1589-1593.) Also proffered in the mitigation phase was the testimony of Detective Stabile, who was responsible for securing the crime scene and photographing and videotaping the scene. He presented evidence and testimony with regard to submission of items to BCI. (T.p. VIII, pp. 1595-1624.) Detective Mackey also testified for the State during the first phase of the trial. He provided information with regard to processing the crime scene, the description he received from the surviving victim, Melissa Putnam, his interviews of neighbors and friends, and preparation of photo line-ups leading to Miss Putnam identifying the Appellant. The State's final two (2) witnesses in the first phase of the trial, were the County Coroner, Dr. Germaniuk, and an Ohio Bureau of Criminal Investigation and Identification technician, Michael Roberts. Not only did Dr. Germaniuk testify about Jeremy Cole's injuries, he testified at length about the autopsy process, the examinations conducted, toxicology reports, and the six (6)

major findings he opined upon based upon his examination. (T.p. VIII, pp. 1647-1698.) Michael Roberts testified with regard to the ballistics examinations of the gun, magazine and cartridge cases recovered during the investigation. (T.p. VIII, pp. 1704-1718.) Indeed, while some of this testimony may have been necessary for purposes of chain of custody, and establishing other facts with regard to the first phase of the trial, much of it was wholly irrelevant and improper in the sentencing phase. The jury was never advise what testimony the government was admitting for purposes of their duty to weight he aggravating circumstances against the mitigating factors. Did they consider the gruesome video of the crime scene depicting Jeremy Cole bound and shot? Did they consider the testimony from the U.S. Marshals about the warrant they received and locating Appellant in the apartment in Akron? Did the jury consider the testimony of Melissa Putnam about how she was taken into a back room and ties up? These would have been improper consideration, but the jury was not told what testimony was offered regarding the aggravating circumstances.

In ruling capital punishment unconstitutional for juveniles under the age of 18, the United States Supreme Court emphasized that rules have been implemented to ensure that the death penalty is reserved for “a narrow category of crimes and offenders.” *Roper v. Simmons*, 543 U.S. 551, 569, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). One such rule that helps ensure that the death penalty is reserved for a narrow category of offenders is that the state is limited to

presenting “the death-eligible statutory aggravating circumstances set forth in R.C. 2929.04(A)(1) through (8).” *State v. Wogenstahl*, 75 Ohio St.3d 344, 662 N.E.2d 311 (1996) syl. 1. R.C. 2929.04(B) limits the evidence which may be presented by the government at the mitigation phase, to the aggravating circumstances which have been proven beyond a reasonable doubt. That was not done in this case. This Court has previously made clear that it is “completely improper for the prosecutors in the penalty phase of a capital murder trial to make any comment before a jury, that the nature and circumstances of the offense are “aggravating circumstances.” *State v. Wogenstahl*, 75 Ohio St.3d, at 352. In this case by submitting all evidence and testimony from the first phase, without any clarification for the jury, the nature and circumstances of the offense became factors to be considered by the jury. More recently, in *State v. Mammone* this Court attempted to clarify the boundaries of appropriate arguments for the state to present during a death penalty sentencing phase. *State v. Mammone*, 139 Ohio St.3d 467, 2014 Ohio 1942, 13 N.E.3d 1051. This Court emphasized that “prosecutor’s argument during the mitigation phase is restricted to issues germane to the jury’s weighing process. The prosecutor may comment on any testimony or evidence relevant to the nature and circumstances of the aggravating circumstances specified in the indictment of which the defendant was found guilty.” *State v. Gumm*, 73 Ohio St.3d 413, 1995 Ohio 24, 653 N.E.2d 253 (1995), syllabus. However, because the jury is not at liberty to consider

nonstatutory aggravating circumstances, the prosecutor cannot argue the existence of nonstatutory aggravating circumstances. See *Wogenstahl* at 355; *State v. Mammone*, 139 Ohio St.3d, at 496-497. The circular nature of the guidance provided by the decisions in *Gumm*, *Wogenstal* and *Mammone* renders any limitation upon the government's evidence and arguments during the sentencing phase hollow at best and in reality, non-existent. Permitting the government to argue the facts and circumstances of the aggravated murder tells the jury they are permitted to consider the facts and circumstances of the aggravated murder in the weighing process. This is hardly an effort to limit the narrow class of murders and offenders eligible for the death penalty.

This lack of limitation upon what the jury in this case was directed to consider and the lack of guidance for the jury was compounded by the government's closing arguments in the sentencing phase. The government submitted to the jury evidence which was not relevant to any aggravating circumstance. In closing arguments, the government told the jury that they should "keep in mind a piece of evidence that's gonna go back to you. Nineteen days after committing all three of these aggravating circumstances, this defendant said he could accept the needle." (T.p. Vol. IX, p. 1901.) In addition, the Prosecution argued facts and circumstances of the offenses for the jury to consider when weighing the aggravating circumstances and specifically, facts and circumstances of the aggravated murder. Multiple times the Prosecutor

emphasized that Jeremy Cole was shot three (3) to six (6) inches away from his head. (T.p. Vol. IX, pp. 1899, 1900.) This Court made clear the facts and circumstances of the offense, can only be considered as mitigating factors. In this case, the exact opposite occurred. By presenting all of the evidence from the first phase, the purpose and intent of Ohio's death penalty statutory structure was violated. The purpose of having two (2) trials is to limit what the jury can consider when deciding whether to impose the death penalty. Here there was no limit as to what evidence the jury could consider. By proffering all evidence and testimony in the mitigation phase, the government failed to limit the jury's consideration to the aggravating factors delineated in R.C. 2929.04.

Proposition of Law No. 4

A trial court may not consider the nature and circumstances of the offense, or the circumstances of other offenses which are not aggravating factors in the weighing process, and to do so voids any resulting death sentence. Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 9 and 16 of the Ohio Constitution.

David Martin should not be on Death Row. The trial court issued a separate opinion weighing the aggravating circumstances against the mitigating factors which contained circumstances as aggravating factors not permitted under Ohio law. (T.d. 264.) The trial court found that the aggravating circumstance outweighed the mitigating factors beyond any reasonable doubt. However, the trial court improperly weighed the *facts* of the aggravated murder, rather than simply weighing the aggravating factors of the purposely killing or attempting to kill two (2) or more people, murder committed during the course of a kidnaping where Appellant was the principal offender of the murder and murder committed during the course of an aggravated robbery where Appellant was the principal offender of the murder. The trial court referred to the fact that Appellant “held Putnam and Cole at gun point; robbed *them*; restrained *them* with electrical cords and shot *them* both from close range. The hands and feet of Jeremy Cole were both bound, rendering him completely helpless. Despite the fact that Cole was not a threat to Martin, he shot him in such a cold and calculated manner- right between the eyes from three to eight inches away.” (T.d. 264) (Emphasis added.)

These facts of the offenses are not the statutory aggravating circumstance specified in the statute. See, R.C. 2929.04(A)(7). Consideration of the circumstances regarding the robbery and kidnapping of Putnam are not statutory aggravating circumstances, See, R. C. 2929.04. As Ohio is a weighing state, the trial court erroneously placed additional weight onto the aggravation side of the death equation by considering the circumstances of the offenses and by considering the circumstances of separate offenses involving a separate victim. Any consideration of Putnam was limited to the first specification to Count two (2), purposely killing or attempt to kill two or more people.

That the trial court improperly considered the Putnam kidnapping and robbery, which were not aggravating circumstances or facts and circumstances of the aggravating circumstances for count two is abundantly clear from the judgment entry. By repeatedly referencing the kidnapping and robbery of Putnam, the Court skewed the weighing process in favor of death. On page two of the findings of fact and conclusions of law the trial court found “Defendant Martin was the principal offender in this Aggravated Murder and he kidnapped both Jeremy Cole and Melissa Putnam and fled immediately after committing this kidnapping and aggravated murder.” (T.d. 264.) After recounting the facts and circumstances of the offenses, the trial court again, on page three (3) found “Defendant Martin kidnapped both Jeremy Cole and Melissa Putnam and fled immediately after...” (T.d. 264). The robbery and kidnapping of Putnam were *not*

an aggravating circumstance for the aggravated murder in Count 2.

There were three (3) aggravating circumstances for Count 2: 1) purposely killing or attempting to kill two (2) or more people, 2) murder of Cole which was committed while committing, attempting to commit, or fleeing immediately after committing kidnapping, 3) murder of Cole was committed while committing, attempting to commit, or fleeing immediately after committing aggravated robbery. The kidnapping of Putnam was a separate offense set forth in Count Seven (7) of the indictment. The aggravated robbery of Putnam was a separate offense contained with Count 5 of the indictment. The trial court improperly considered the kidnapping and robbery of Putnam when weighing the aggravating circumstances against the mitigating factors.

While this Court has time and time again reiterated that it is improper for prosecutors to make any comment to the jury during the penalty phase that the nature and circumstances of the murder are “aggravating circumstances” *State v. Wogenstahl*, supra, syl. 2; and, *State v. LaMar*, 95 Ohio St.3d 181, 2002 Ohio 2128, 767 N.E.2d 166, at ¶92, such admonitions have little impact as long as the trial courts continue to reference the nature and circumstances of the murder to justify why the aggravating circumstances outweigh the mitigating evidence. The trial court listed the facts and circumstances of the offense to conclude the aggravating circumstances outweighed mitigating factors. Only semantics can permit a contrary conclusion.

In addition, the trial court clearly considered and factored in to the decision to impose death the fact that Appellant shot Cole “in such a cold and calculated manner- right between the eyes from three to eight inches away.” This is not an aggravating factor and the Supreme Court specifically rejected a Florida death penalty sentencing factor which took into account the heinous nature of the offense. *Sochor v. Florida*, 504 U.S. 527, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992). Even though the statute permitted the jury and judge to consider the heinous nature of the murder, the Court held that an “Eighth Amendment error occurred when the trial judge weighed the coldness factor.” Despite instructing the jury that the facts and circumstances of the aggravated murder were not aggravating factors, the trial court in this case then considered the facts and circumstances of the aggravating murder when imposing death.

In a weighing State like Florida, there is Eighth Amendment error when the sentencer weighs an “invalid” aggravating circumstance in reaching the ultimate decision to impose a death sentence. See *Clemons v. Mississippi*, 494 U.S. 738, 752, 108 L. Ed. 2d 725, 110 S. Ct. 1441 (1990). Employing an invalid aggravating factor in the weighing process “creates the possibility . . . of randomness,” *Stringer v. Black*, 503 U.S. 222, 236, 117 L. Ed. 2d 367, 112 S. Ct. 1130 (1992), by placing a “thumb [on] death’s side of the scale,” *id.*, at 232, thus “creating the risk [of] treating the defendant as more deserving of the death penalty,” *id.*, at 235.

Id. at 532.

In *State v. Davis*, 38 Ohio St.3d 361, 372, 528 N.E.2d 925 (1988), this Court found that when a trial court “improperly weighs aggravating circumstances which it finds the appellant guilty of committing against the mitigating factors”

independent review cannot be used to cure the action. *Id.* In *Davis* the trial court, like the court in the present case, weighed invalid aggravating circumstances against valid mitigating evidence. The reason that independent review in *Davis* was prohibited was because this Court could not know if the result of the weighing process would have been different had the impermissible aggravating circumstances not been present. *Id.* See also, *State v. Green*, 90 Ohio St. 3d 352, 364, 738 N.E.2d 1208, 1224 (2000) (“deficiency in the case too severe to correct by simply reevaluating the evidence”). In the present case, the trial court improperly considered facts and circumstances of the aggravated murder and facts from an offense not one of the aggravating circumstances. As a result, the weight of the aggravating circumstances was improperly inflated and the sentencing determination is unreliable.

Here, the mitigating factors overwhelmingly supported the conclusion that the trial court rightly acknowledged; Appellant’s experiences as a little boy left him with an “ingrained nature to survive at all costs.” (T.d. 264) The mitigating factors overwhelming supported the conclusion that Appellant was not in the narrow class of offenders, the worst of the worst, upon whom death should be imposed.

The nature and circumstances of the offense can be, if the defendant chooses, a mitigating circumstance—not an aggravating one. R.C. 2929.04(B) says, and has always said, “[i]f 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, ... 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:" (Emphasis added.)

The circumstance to be weighed against the Appellant's mitigation evidence is that the aggravated murder was committed during the course of a felony; kidnaping and aggravated robbery and Appellant purposely killed or attempted to kill two (2) or more people. Under the trial court's reasoning, every aggravated murder would be one that results in the imposition of a death sentence, the Appellant's mitigation—however compelling or insubstantial—notwithstanding. But it has long been the rule that the Eighth Amendment prohibits such a result. *See, Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

Based upon the trial court's consideration of improper factors when weighing the aggravating circumstances against the mitigating factors Appellant's death sentence must be vacated.

Proposition of Law No. 5

Due process and the ability to remain free from cruel and unusual punishment requires a “mercy” instruction when requested. See, the Eighth and Fourteenth Amendment to the U.S. Constitution; Ohio Constitution, Article I, Sections 2, 9, and 16.

As part of the charge in the penalty, or sentencing, phase, Appellant requested a “mercy” instruction. The trial court refused this and specifically instructed the jury that they could not be “influenced by any consideration of sympathy.” Three times the trial court instructed the jury that they could not consider sympathy. (T.p. Sentencing, Vol. IX, p. 1809, 1946.) The trial court’s refusal to give a mercy instruction coupled with the instruction that the jury could not consider sympathy was error for the reasons which follow.

The cases have distinguished between two different aspects of the capital sentencing process, the eligibility phase and the selection phase. See, *Tuilaepa v. California* (1994), 512 U.S. 967, 971, 129 L.Ed.2d 750, 114 S.Ct. 2630 (1994). In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances. *Id.*, at 971. In the sentencing phase, the jury determines whether to impose a death sentence on an eligible defendant. *Id.*, at 972. To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment. *Coker v. Georgia*, 433 U.S. 584, 53 L.Ed.2d 982, 97 S.Ct. 2861 (1977). To render a defendant death eligible, the trier of fact must convict the defendant of murder and find at least one aggravating circumstance

(or its equivalent) at either the guilt or penalty phase. *See, e.g., Lowenfield v. Phelps*, 484 U.S. 231, 244-246, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988); *Zant v. Stephens*, 462 U.S. 862, 878, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). The aggravating circumstance may be contained in the definition of the crime, in a separate sentencing factor, or in both. An aggravating circumstance must meet two requirements. First, it may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. *See, Arave v. Creech*, 507 U.S. 463, 474, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993) (“If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm.”) Second, the aggravating circumstance may not be unconstitutionally vague. *See, Godfrey v. Georgia*, 446 U.S. 420, 428, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980).

As to mitigation, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence. *See, Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct.1669, 90 L.Ed.2d 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L. Ed.2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978) (plurality opinion).

There are not many things which are unwavering in the law today, especially in capital litigation. One thing that is unwavering, however, is a virtually unbroken line of cases that say that the Constitution does not permit

limitations on mitigation. Ohio learned this lesson the hard way in its post-*Gregg* statutory scheme, see, *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), a scheme that was struck down by the Court in *Lockett v. Ohio*, *supra*. The infirmity with the law was that it listed only three statutory mitigators. If the defendant was found guilty of capital murder and at least one aggravator, but did not satisfy one of the three statutory mitigating circumstances, then the death penalty was the result. The Court struck that down, holding that the Constitution does not permit such limitations on mitigation. *Lockett* said that, given that the imposition of death by a public authority is so profoundly different from all other penalties, an *individualized* decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases, where a variety of flexible techniques, such as probation, parole, and furloughs may be available to modify an initial sentence of confinement. *Lockett* said that the nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

The epitome of this principle is the Court's decision in *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). In that case, Hitchcock's lawyer referred to various considerations, some of which were the subject of factual dispute, that would make a death sentence inappropriate. Hitchcock's

youth (20 at the time of the murder), his lack of significant prior criminal activity or violent behavior, the difficult circumstances of his upbringing, his potential for rehabilitation, and his voluntary surrender to authorities. Although counsel stressed the first two considerations, which related to mitigating circumstances specifically enumerated in the statute, he told the jury that in reaching its sentencing decision, it was to “look at the overall picture ... consider everything together ... consider the whole picture, the whole ball of wax.” In contrast, the prosecutor told the jury that it was “to consider the mitigating circumstances and consider those by number,” and then went down the statutory list, item by item, arguing that only one (Hitchcock’s youth) was applicable. The trial judge instructed the jurors “on the factors in aggravation and mitigation that you may consider under our law.” He then instructed them that “the mitigating circumstances which you may consider shall be the following” and then the judge listed only the *statutory* mitigating circumstances.

A unanimous Supreme Court reversed the limitations placed by the trial judge, and the Court’s opinion, written by Justice Antonin Scalia held that Hitchcock’s right to relief under the Constitution “could not be clearer.”

We think it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of *Skipper v. South Carolina*, 476 U.S. 1 (1986), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion). Respondent has made no attempt to argue that this, or that it had no effect on the jury or the

sentencing judge. In the absence of a showing that the error was harmless, the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid.

Hitchcock v. Dugger, 481 U.S., at 398-399.

The law has a history of jurors having an option to find the defendant guilty of capital murder, but nonetheless recommending mercy. In fact, Ohio's pre-*Furman* statute provided that the penalty is death unless the jury recommends "mercy" or "life imprisonment" in which case the punishment shall be life imprisonment. The statute had been construed as providing for alternative punishment in the discretion of the jury. See, *Howell v. State*, 102 Ohio St. 411, 131 N.E. 706 (1921). The United States Supreme Court has consistently recognized the obligation to have a sentencing jury consider all factors relevant to mitigation in order to guarantee individualized consideration of the death penalty. Moreover, the Court has held that State's cannot limit the jury's ability to consider all information that "mitigates against the death penalty" for the jury is to give a "reasoned moral response to the defendant's background, character, and crime:"

Furman held that "in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant." *Gregg v. Georgia*, 428 U.S. 153, 199 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). But as we made clear in *Gregg*, so long as the class of murderers subject to capital punishment is narrowed, there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence introduced by

a defendant. *Id.*, at 197-199, 203. As Justice White wrote in *Gregg*:

“The Georgia legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute, and I cannot accept the naked assertion that the effort is bound to fail. As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is particularly appropriate as they are in Georgia by reason of the aggravating-circumstance requirement, it becomes reasonable to expect that juries -- even given discretion not to impose the death penalty -- will impose the death penalty in a substantial portion of the cases so defined. If they do, it can no longer be said that the penalty is being imposed wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device.” *Id.*, at 222 (opinion concurring in judgment).

“In contrast to the carefully defined standards that must narrow a sentencer’s discretion to impose the death sentence, the Constitution limits a State’s ability to narrow a sentencer’s discretion to consider relevant evidence that might cause it to decline to impose the death sentence.” *McCleskey v. Kemp*, 481 U.S. 279, 304 (1987) (emphasis in original). Indeed, it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant’s character or record or the circumstances of the offense. Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a “reasoned moral response to the defendant’s background, character, and crime.” *Franklin*, 487 U.S., at 184 (O’Connor, J., concurring in judgment) (quoting *California v. Brown*, 479 U.S., at 545 (O’Connor, J., concurring)). In order to ensure “reliability in the determination that death is the appropriate punishment in a specific case,” *Woodson*, 428 U.S., at 305, the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant’s background and character or the circumstances of the crime.

Penry v. Lynaugh, 492 U.S. 302, 326-328, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

The trial court’s failure to give a mercy instruction, coupled with the

instruction that the jury could not consider sympathy eliminated the jury's ability to consider "reasoned moral response to the defendant's background, character, and crime."

This Court's decision in *State v. Lorraine*, 66 Ohio St.3d 414, 613 N.E.2d 212 (1993), virtually ended mercy instructions because mercy is not one of the mitigating factors set forth in R.C. 2929.04(B). Prior to *Lorraine*, this Court paid lip service to the mercy option by holding that an Ohio jury is *not precluded* from extending mercy to a defendant. See, *State v. Zuern*, 32 Ohio St.3d 56, 512 N.E.2d 585 (1987), certiorari denied, *Zuern v. Ohio*, 484 U.S. 1047, 108 S.Ct. 786, 98 L.Ed.2d 872 (1988). How can a jury consider something that are not told they can consider. This jury was not in fact told of the ability to opt for mercy regardless of whether the aggravating factors outweigh the mitigating circumstances beyond a reasonable doubt. However, by specifically instructing the jury that they may not consider sympathy, the trial court eliminated any option for individualized sentencing based upon Appellant's life and history. *Lorraine* and its progeny held that a mercy instruction is not to be permitted because mercy is not one of the mitigating factors set forth in R.C. §2929.04(B)—as if the Constitution permits such a finite list. *Lorraine* conflicts with a number of federal decisions, including *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); *Gregg v. Georgia*, *supra*; *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972); *Eddings v. Oklahoma*, *supra*; *Lockett v. Ohio*, *supra*; and *Skipper v. South*

Carolina, supra.

The similarity is striking between the this Court's opinion in *State v. Lorraine* and the Florida Supreme Court's opinion in *Cooper v. State*, 336 So.2d 1133, 1139 (Fla. 1976), which has since been rejected. Both cases held that only statutory mitigation evidence could be considered. In *Cooper*, the court said that the "sole issue in a sentencing hearing under Section 921.252, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have [sic] no place in that proceeding . . ." In *Lorraine*, this Court said: "Permitting a jury to consider mercy, which is not a mitigating factor and thus irrelevant to sentencing, would violate the well-established principle that the death penalty must not be administered in an arbitrary, capricious, or unpredictable manner. . . The arbitrary result which may occur from a jury's consideration of mercy is the exact reason the General Assembly established the procedure now used in Ohio." 66 Ohio St.3d, at 417 citing *California v. Brown, Gregg, and Furman*. The *Lorraine* decision did not mention *Hitchcock, Skipper, Eddings, or Lockett*. The conclusion that a mercy instruction results in arbitrary or capricious imposition of the death penalty in contrary to the United States Supreme Court rational for not limiting any mitigation, including mercy.

In upholding the Kansas statutory death penalty sentencing scheme, the Supreme Court noted that the mercy instruction forecloses the possibility of

“Furman-type error as it ‘eliminate[s] the risk that a death sentence will be imposed in spite of facts calling for a lesser penalty.’” *Kansas v. Marsh*, 548 U.S. 163, 176, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006) n. 3. With all due respect, *Lorraine* is not sound constitutional reasoning based upon an expansive reading of personal liberty and limited governmental authority: it is instead crafting an opinion around a preordained result. A mercy instruction does not result in arbitrary imposition of the death penalty, it insure individualized consideration of the death penalty constitutionally mandated.

In *State v. Garner*, 74 Ohio St.3d 49, 57, 1995 Ohio 168, 656 N.E.2d 623, the trial judge instructed the jury that it might consider the mitigating factors to be those circumstances which “in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability,” virtually the same instruction as Appellant sought here. (See, T.d. 174.) “Such a charge constitutes adequate instruction concerning the extension of mercy to a capital defendant,” said the Court in *Garner*.

If capital sentencing is to be truly individualized as required by the state and federal constitutions, a mercy option is required under all circumstances. Individualized sentencing requires that the sentencing body have the ability to choose mercy and to determine that death is not the appropriate penalty in the particular situation. In *Barclay v. Florida*, supra, the United States Supreme Court held that the jury must be and is free to determine whether death is the

appropriate punishment.” 463 U.S.,at 950, citing *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983).

The trial court here eliminated that option. Without the mercy, Appellant faced a death verdict logically indistinguishable from a type that was voided in *Lockett*. In *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987), the Supreme Court reaffirmed the Eighth Amendment’s requirement that there be reliability in the determination that death is the appropriate punishment in a specific case. But the trial court’s refusal to give the limited mercy instruction blocked such a determination and suggested to the jury, as did the voir dire questioning, that a death sentence is mandated if the jury determines that aggravating circumstances outweigh mitigating factors, regardless of whether the death penalty is appropriate in a particular case. This hazard was compounded by the trial court’s instruction in the sentencing phase that the jury could not consider sympathy. Whether one calls it mercy, or sympathy or as trial counsel argued for Appellant “Am I asking you to feel sorry? Yeah. Does the evidence give you reason? I hope it will” (T.p. Sentencing Vo. IX, p. 1850-1851) instructing the jury that they their decision consider not be based upon sympathy negates the purpose of mitigation evidence, consider they defendant individually when deciding whether or not to impose death.

This Court approved an instruction virtually identical to the one sought here in *Garner*, a case decided after *Lorraine*. Without the “fairness and mercy”

instruction sought here, there can be no confidence from this record that Appellant's death sentence was the product of individualized sentencing as opposed to a sheer mechanical weighing of evidence. The Eighth Amendment and Ohio Constitution, Article I, Sections 1, 9, and 16 demand more, and Appellant's death sentence must be vacated.

Proposition of Law No. 6

Failure to Employ R.C. 2945.25(C) in the Qualification of Capital Veniremen Violates Principles of Federalism and Separation of Powers.

I

Appellant filed a motion with the trial court, asking the court to determine the proper standard of excusal for prospective jurors concerning their views about the death penalty. (T.d. 54.) The trial court, perhaps in reliance on the number of decisions of this Court, applied the standard announced by the United States Supreme Court in 1985, in *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). See, *State v. Rogers*, 17 Ohio St.3d 174, 177-178, 478 N.E.2d 984 (1985).

II

A

The Sixth Amendment to the United States Constitution provides:

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

(Emphasis added.) Its provisions apply to state court criminal prosecutions

through the Fourteenth Amendment's Due Process Clause. See, *Parker v. Gladden*, 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966).

In *Witherspoon v. Illinois*, supra, the Supreme Court announced what then became the standard for excusing jurors in capital cases under the federal Constitution. *Witherspoon* held that jurors should be excused in capital cases if they would either automatically vote against the imposition of capital punishment without regard to any evidence which might be developed at the trial; or, if their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. *Id.*, 522, fn. 21. The constitutional basis for the holding was the Sixth Amendment's guarantee of a trial by an impartial jury, made applicable to the states through the Due Process Clause of the Fourteenth Amendment.

The Supreme Court modified the *Witherspoon* federal standard and announced a new *federal* constitutional standard in *Wainwright v. Witt*, supra. The Court held that a juror may not be "challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." 469 U.S., at 420. *Witt* "softened" the *Witherspoon* standard, and made it easier for the government to exclude jurors who expressed reservations

(but not a flat refusal) about imposing death.

Witherspoon focused on what lawyers and judges call death qualification, the process of selecting a jury whose members will at least fairly consider the imposition of the death sentence if the evidence and the law so warrant. Later, the Supreme Court dealt with the other end of the spectrum, what many call life qualification. As the name suggests, it is the process of insuring that those selected as jurors on a capital case will fairly consider the imposition of a life sentence upon conviction. In *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988), the Court held that it was constitutional error not to exclude for cause jurors who would automatically vote for the death penalty upon conviction. The Court in *Ross* thus recognized the need to “life qualify” as well as to “death qualify” prospective jurors.¹⁰

Morgan v. Illinois, *supra*, recognized that a juror who will automatically vote for a death sentence will in good faith fail to consider a proper weighing of aggravating factors and mitigating circumstances and thus will deprive the

¹⁰ *Ross* said, however, that a capital defendant was required to exhaust all peremptory challenges in order to preserve such a claim for review, an idea that could not possibly have been drafted by anyone who has ever tried a death penalty case, or even a jury case for that matter. The *Ross* rule has since been modified by *United States v. Martinez-Salazar*, 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000). That case refused to find a constitutional violation when a defendant was forced to use a peremptory challenge to exclude a juror who concededly should have been removed for cause.

defendant of a trial by an impartial jury guaranteed by the federal Constitution.

The *Morgan* Court emphasized the need for probing voir dire; and, while it used

Wainwright phraseology, the Court relied upon *Witherspoon*:

Witherspoon and its succeeding cases would be in large measure superfluous were this Court convinced that such general inquiry could detect those jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath. But such jurors—whether they be unalterably in favor of or opposed to the death penalty in every case—by definition are ones who cannot perform their duties in accordance with law, their protestations to the contrary notwithstanding.

As to general questions of fairness and impartiality, such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed.... Any juror who would impose death regardless of the facts and circumstances of conviction cannot follow the dictates of the law.

Id., at 734-735.

B

The federal Constitution establishes a minimum level of protection of personal liberty, a floor, as it were, beneath which no government may prod when defining constitutional rights. *See, Oregon v. Hass*, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975); *Arkansas v. Sullivan*, 532 U.S. 769, 121 S.Ct. 1876, 149 L.Ed.2d 994 (2001). States interpreting their own constitutions are free to declare that their citizens enjoy *greater* liberties and protections than those afforded by the federal Constitution. *See, Cooper v. California*, 386 U.S. 58, 87 S.Ct. 788, 17

L.Ed.2d 730 (1967); *Michigan v. Long*, supra.

This Court has held that the Ohio Constitution is a document of independent force, and presumably, therefore, not a vestigial organ of democracy.

See, *Arnold v. Cleveland*, 67 Ohio St.3d 35, 41-42, 616 N.E.2d 163 (1993):

The United States Supreme Court has repeatedly reminded state courts that they are free to construe their state constitutions as providing different or even broader individual liberties than those provided under the federal Constitution. See, e.g., *City of Mesquite v. Aladdin's Castle, Inc.* (1982), 455 U.S. 283, 293, ... (“...[A] state court is entirely free to read its own State’s constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee.”); and *California v. Greenwood* (1988), 486 U.S. 35, 43, ... (“Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution.”). See, also, *Pruneyard Shopping Ctr. v. Robins* (1980), 447 U.S. 74, 81, Further, in *Michigan v. Long* (1983), 463 U.S. 1032, 1041, ...the Supreme Court reinforced its comments in this area by declaring that the state courts’ interpretations of state constitutions are to be accepted as final, as long as the state court plainly states that its decision is based on independent and adequate state grounds.

A noticeable trend has recently emerged among state courts. [Footnote omitted.] It appears that more state courts are increasingly relying on their constitutions when examining personal rights and liberties. See *Davenport v. Garcia* (Tex.1992), 834 S.W.2d 4, 12, fn. 21. See, also, *State v. Johnson* (1975), 68 N.J. 349, 353, 346 A.2d 66, 67. A common thread found in the state court decisions which have relied exclusively on the state’s constitution is that states may not deny individuals or groups the minimum level of protections mandated by the federal Constitution. However, there is no prohibition against granting individuals or groups greater or broader protections.

The recent movement by state courts to rely on their constitutions, rather than on the federal Constitution, has been labeled

“state constitutionalism” or “new federalism.” This movement has met with considerable approval. *Davenport, supra*, 834 S.W.2d at 12, fn. 22. See, also, Brennan, *State Constitutions and the Protection of Individual Rights* (1977), 90 HARV.L.REV. 489, and Comment, *Interpretation and Authority in State Constitutionalism* (1993), 106 HARV.L.REV. 1147. One court has pointedly stated that “[w]hen a state court interprets the constitution of its state merely as a restatement of the Federal Constitution, it both insults the dignity of the state charter and denies citizens the fullest protection of their rights.” *Davenport, supra*, 834 S.W.2d at 12.

In joining the growing trend in other states, we believe that the Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.

III

The issue of the standard of excusal is one that has constitutional dimensions in three planes. There is, first, of course, the due process standard announced in *Witherspoon*, and refined in *Morgan*. If there is one phrase that distinguishes the American rule of law from the rest of the world, it is the phrase “due process of law.” The second constitutional plane is the concept of federalism, a principle that is an integral fabric of our constitutional government. The concept of federalism has been at the core of legal discussions starting with the adoption and ratification of the Constitution itself (and the jettisoning of the Articles of

Confederation), through the *Civil Rights Cases, sub nom United States v. Stanley*, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835 (1883), through the school desegregation cases, see, e.g., *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), through *Gideon v. Wainwright*, supra, all the way through the federal statute that revamped federal habeas corpus in the name of federalism: the Anti-terrorism and Effective Death Penalty Act of 1996. The third constitutional plane is the separation of powers. All three go to the heart of our democracy.

To understand how due process is implicated, one need simply look to the opinions and comprehend that case and controversy between the parties involved application of the Sixth Amendment guarantee, secured in state prosecutions by the Fourteenth Amendment's Due Process Clause. Justice Stewart and the Supreme Court informed us in *Witherspoon*, that the Constitution does not permit, in state court capital cases, a trial before a jury which is in reality a tribunal organized to return a verdict of death. *Witherspoon*, 391 U.S., at 521. *Morgan v. Illinois*, was in essence the mirror image of *Witherspoon*. *Witherspoon* excluded jurors who would never return a verdict of death. *Morgan* held that jurors whose answers clearly indicated that they would always return a verdict of death, their protestations to the contrary notwithstanding, likewise, had to be

excluded from capital juries under the Fourteenth Amendment's due process clause.

The United States Supreme Court, of course, softened the *Witherspoon* standard in favor of the state in *Wainwright v. Witt, supra*. Rather than excluding jurors who said that they would *never* impose a death sentence, *Witt* held that jurors whose beliefs would prevent or substantially impair their service as jurors could be excluded under the due process clause.

The next intersection between these three constitutional planes is the due process clause and the concept of federalism. *Wainwright v. Witt*, changed the *federal* standard. Before that case, jurors could be excluded under the Due Process Clause only if they unequivocally stated that under no circumstances could they consider a death sentence or impose a death sentence. *Witt's* standard allowed the government to exclude a wider array of jurors with anti-death penalty tendencies, and to do so consistent with the due process clause. Nothing in *Witt*, however, barred the States from imposing a different standard. The United States Supreme Court, of course, has a long history of permitting States, under their own Constitutions, from adopting different standards. Many states have accepted this invitation. See, e.g., *Michigan Department of State Police, v. Sitz*, 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990), and *Sitz v. Department of State*

Police, 443 Mich. 744, 506 N.W.2d 209, 1993 Mich. LEXIS 2218 (1993); *Ohio v. Robinette*, 519 U.S. 33, 117 S. Ct. 417, 136 L. Ed. 2d 347 (1996), and *State v. Robinette*, 80 Ohio St. 3d 234, 1997 Ohio 343, 685 N.E.2d 762; and, *State v. Storch*, 66 Ohio St. 3d 280, 1993 Ohio 38, 612 N.E.2d 305. Indeed, some of the Justices of the Supreme Court openly invited the States to adopt this approach, and scholars have even given a name to the movement: “New Federalism.” See, e.g., William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Shirley S. Abrahamson, *State Constitutional Law, New Judicial Federalism, and the Rehnquist Court*, 51 CLEVE. ST. L. REV. 339 (2004).

After *Witherspoon* and before *Witt*, the Ohio General Assembly codified *Witherspoon* in R.C. 2945.25(C), and thus set forth the appropriate standard for capital juror excusal in *Ohio*. Despite the fact that Ohio, prior to *Witt*, had in-place a *specific* statute that dealt, not with jurors in general, but only with jurors in death penalty cases. It would be difficult for the legislature, or anyone else, to make a statute more specific. That statute, R.C. 2945.25(C), codified the *Witherspoon* standard.

With due respect, after *Witt* was decided, this Court dropped the federalism ball so loudly, and so awkwardly, as to defy explanation. What the Court should

have done after *Witt* was to recognize the new federal standard, but point out that Ohio had its own statutory standard, one not inconsistent with Ohio's own Constitution. See, Ohio Constitution, Article I, Sections 1, 2, 5, 10, and 16. What this Court did instead was to repeal a part of the statute, *viz.*, R.C. 2945.25(C). Beginning with *State v. Rogers*, *supra*, the Court simply read out of existence R.C. 2945.25(C), announcing, without reasoning or analysis, that the standard for excusal in capital cases was now R.C. 2945.25(O). Incredibly, the Court cited *Wainwright v. Witt*, for that proposition. This, again with due respect, is an abject failure to abide by the principles of federalism. Ohio's specific statute, R.C. 2945.25(C), does not violate due process. The judiciary owes "fidelity to the separation-of-powers doctrine" and "must respect that the people of Ohio conferred the authority to legislate solely on the General Assembly." See, *State v. South*, __ Ohio St.3d __, __ N.E.2d __, 2015 Ohio 3930, 2015 Ohio LEXIS 2558, ¶28 (O'CONNOR, J., concurring.)¹¹

Those principles of federalism intersect with the third constitutional plane,

¹¹ There, the Chief Justice wrote:

I write separately solely for the purpose of emphasizing that our role, as members of the judiciary, requires fidelity to the separation-of-powers doctrine. Accordingly, we must respect that the people of Ohio conferred the authority to legislate solely on the General Assembly. *Sandusky City Bank v. Wilbor*, 7 Ohio St. 481, 487-488 (1857); Article II, Section 1, Ohio Constitution.

the doctrine of separation of powers. This Court's decisions, beginning with *Rogers, supra*, demonstrated a lack of respect for the enactment of the General Assembly. This Court has many times extolled the doctrine of separation of powers, and rightly so. See, e.g., *State v. Bodyke*, 126 Ohio St.3d 266, 2010 Ohio 2424, ¶¶39-42, 933 N.E.2d 753:

The first, and defining, principle of a free constitutional government is the separation of powers. *Evans v. State* (Del. 2005), 872 A.2d 539, 543. In *Kilbourn v. Thompson* (1880), 103 U.S. 168, 190-191, 26 L.Ed. 377, the United States Supreme Court stated:

"It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other."

As this court has observed with regard to our own state system of government:

"While Ohio, unlike other jurisdictions, does not have a constitutional provision specifying the concept of separation of powers, this doctrine is implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government." *S. Euclid v. Jemison* (1986), 28 Ohio St.3d 157, 158-159, 28 OBR 250, 503 N.E.2d 136. It "represents the constitutional diffusion of power within our tripartite government. The doctrine was a deliberate design

to secure liberty by simultaneously fostering autonomy and comity, as well as interdependence and independence, among the three branches.” *Norwood v. Horney*, 110 Ohio St.3d 353, 2006 Ohio 3799, 853 N.E.2d 1115, ¶114.

In these days where the media coins phrases like “gridlock” and reports on prospective government shutdowns, almost everyone, it seems, has forgotten that our government was *designed* to be inefficient. It was designed at times to be unwise. Aside from their own experiences with the Crown, the Framers did something that almost no one does these days: they read history. Governments with plenary powers are efficient, to be sure. Unfortunately, such governments are also oppressive. One would not know it to cast a gaze across America today, but the Framers of our government designed a limited government, one with three branches, and none of those branches having an excessive amount of power.

Under the grand design of the Framers, it is up to the legislature to enact statutes. Presumably, the members of the legislature represent the public and carry into enactment the public’s desired, or at least the desires of a majority of the public. The executive enforces those legislative enactments to the extent it is necessary to do so. Depending upon the nature of the legislative enactment, the executive may be accorded discretion in how he or she carries out the legislative enactment, or the executive may be accorded little or no discretion in how the laws are to be carried out.

The judiciary, of course, upon proper challenge and when a proper case or controversy is presented to it, decides whether if in enacting the statute, the legislature exceeded its constitutional authority. In so ruling, the courts do not decide policy. The courts do not decide if the statute is a good idea or a bad idea, the most or least efficient way to achieve the stated goal.

For better or worse, the Ohio General Assembly decided to codify the *Witherspoon* standard. The violation of the separation of powers doctrine by this Court is that since *Wainwright v. Witt* was decided, the Court has simply jettisoned the R.C. 294525(C) as a bad idea or bad policy. The legislature obviously has not thought so. If open ignorance of a validly enacted statute is adherence to the separation of powers doctrine that is “implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government,”¹² it is difficult for the objective observer to see that clearly.

In *State v. Buell*, 22 Ohio St.3d 124, 138-139, 489 N.E.2d 795 (1986), this Court relied upon *State v. Jenkins*, 15 Ohio St.3d 164, 473 N.E.2d 264 (1984), *State v. Rogers*, 17 Ohio St.3d 174, 478 N.E.2d 984 (1985), and the federal cases to leap to the conclusion that death qualification challenges for cause suddenly

¹² See, *State v. Bodyke*, supra.

were to be governed by R.C. 2945.25(O) and not the more specific R.C. 2945.25(C). The *federal* cases obviously would fail to account for the specific *Ohio* statute. The two Ohio cases just mentioned blindly rely upon the federal *Witt* standard but fail to account for Ohio's independent exercise of power through a validly enacted statute.¹³

The statute remains on the books, though ignored today because of the decisions of this Court. This Court has not declared Division (C) unconstitutional. Indeed, so far as Appellant is aware, no one has asked the Court to do that. But there is nothing in *Wainwright v. Witt*, or the jurisprudence of the United States Supreme Court regarding "new Federalism" that requires, or even permits, this Court to do what it has done: to read out of existence Division (C).

¹³ The following is the extent of the analysis in *Buell*:

[A]ppellant urges that R.C. 2945.25(C) denies an impartial jury by failing to provide an alternative challenge for cause for any juror irrevocably committed to the death penalty even where there is evidence that mitigation outweighs aggravation.

Relying upon *Witherspoon v. Illinois* (1968), 391 U.S. 510, ...this court originally addressed the converse of appellant's claim in *Jenkins, supra*, In *State v. Rogers*, (1985), 17 Ohio St.3d 174, at 177, ...this court, again, addressed this issue by applying the modified standard of *Witherspoon* as set forth by the United States Supreme Court in *Wainwright v. Witt*

Although R.C. 2945.25(C) does not provide an alternative challenge for cause for such a juror, R.C. 2945.25(O) would allow, if found appropriate, a challenge for cause in such a case in light of *Wainwright*. Accordingly, we find appellant's argument without merit.

It has been a long time since *Rogers* was decided. The Court has on any number of occasions been asked to reconsider this matter, but it has failed to explicitly to do so. The result is that trial judges understandably follow the lead of this Court. While the Court has been asked on any number of occasions to reconsider the holding in *Rogers*, this Appellant asks the Court once again to do so, in the name of intellectual and constitutional integrity.

Whether the Court does so or not, the trial judge was nonetheless incorrect. Despite the holding in *Rogers, supra*, and other decisions of this Court since *Rogers*, some trial judges in this State continue to follow the statute. Appellant has not seen a case where a trial judge has followed the statute, and been reversed. Thus, while Appellant, again with due respect, says that this Court has led the trial court's of this State down the wrong path when it comes to the standard of excusal, there is nothing to excuse. The trial judge, from reading the statute for himself and applying it. He did not do so, and this is clear error.

Proposition of Law No. 7

Ohio's Death Penalty Violates the Ohio and United States Constitutions, and Violates International Law.

Ohio's death penalty scheme, embodied principally in R.C. 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05, violates the liberties secured by U.S. Constitution, Amendments Six, Eight, and Fourteen, as well as the immunities specified in Ohio Constitution, Article I, Sections 1, 2, 5, 9, 10, and 16. This is not an abolitionist essay decrying the moral depravity of the death penalty or a voice crying out in the desert that *any* death penalty is *per se* unconstitutional. The Framers of the United States Constitution contemplated the infliction of capital punishment when the Bill of Rights was adopted for the Fifth Amendment speaks to persons being held to "answer for a capital, or otherwise infamous crime . . ." But to say that the death penalty is always constitutional is as foolish as to say that it always is unconstitutional. Obviously, not *any* death penalty statutory scheme comports with the Constitution. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

Our Constitution was written in broad oracle-like phrases such as “due process of law,” the “assistance of counsel,” and “cruel and unusual punishment.” The law does not remain mired in the attitudes and traditions of the seventeenth or eighteenth centuries. The United States Supreme Court has said that the machinery of criminal justice and capital punishment “must advance also to keep pace with the times.” See, *Trop v. Dulles*, 356 U.S. 86, 100-101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958), where the Court held that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”

The United States Supreme Court has held that the Eighth Amendment does not *per se* prohibit the government from imposing death as a sentence for certain offenses. See, *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). At the same time, however, the government’s authority to impose death as a punishment is not *carte blanche*. The ability to impose death is limited by, e.g., the Equal Protection and Due Process Clauses, see, e.g., *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 54 L.Ed.2d 973 (1978); *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992); *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); by the Sixth Amendment, see, e.g., *Ring v.*

Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002); or by the Cruel and Unusual Punishments Clause itself, *see, e.g., Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). There is no presumption that because the government acted under its “police” powers, that its actions automatically are valid. The “time-honored presumption” that enacted legislation is “constitutional exercise of legislative power” *see, Reno v. Condon*, 528 U.S. 141, 120 S.Ct. 666; 145 L.Ed.2d 587 (2000), has been mutated into an animal that is no “presumption” at all, for the presumption has become well-nigh irrefutable.

Due Process of Law, Equal Protection of the Law, and Cruel and Unusual Punishment.

The enjoyment of life is an “inalienable,” natural one, secured against government encroachment by the Ohio Constitution. *See, Ohio Constitution, Article I, Section 1.* The right is one which exists in natural law, and the Ohio Constitution is a document which specifies that every citizen is immune from government encroachment upon such natural rights. *See, e.g., Pollack, Natural Rights: Conflict and Consequence*, 27 OHIO ST.L.J. 559 (Fall 1966); Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L.REV. 1147 (1992); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L.REV. 489 (1977). Before the government can take a life by legislative

mandate, the government must demonstrate that such a drastic action is the least restrictive means to further a legitimate objective of a limited government. *Gregg v. Georgia, supra; Commonwealth v. O'Neal*, 367 Mass. 440, 327 N.E.2d 662 (1975). The societal interests most commonly espoused as justifications for capital punishment are: (1) deterrence of capital crimes; (2) retribution; and (3) incapacitation of and elimination of dangerous criminals, thereby preventing them from committing further crimes.

A. Deterrence and Incapacitation.

1. Deterrence

Despite considerable research, there is no substantial evidence that the death penalty is a deterrent superior in effect to any other form of lesser punishment. Studies reveal that executions have no discernible negative effect on homicide rates. See, Cochran, Chanmlin and Seth, *Deterrence or Brutalization? An Impact Assessment of Oklahoma's Return to Capital Punishment*, 32 CRIMINOLOGY 107 (1994); Tabak and Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOYOLA L.REV. 59, 114-125 (1989); see also, Bailey and Peterson, *Murder, Capital Punishment and Deterrence: A Review of the Evidence and an Examination of*

Police Killings, 50 JOURNAL OF SOCIAL ISSUES 53, 57 (1994). In many cases, the “threat of death has little or no deterrent effect.” *Gregg v. Georgia*, 428 U.S., at 185; and Bailey, *The Deterrent Effect of the Death Penalty for Murder in Ohio: A Time-series Analysis*, 28 CLEVE. ST.L.REV. 51 (1979). If the death penalty were a deterrent to capital crimes, Texas, Virginia, and Florida should not have any capital crimes being committed.

John Sorenson, Robert Wrinkle, Victoria Brewer, and James Marquart examined executions in Texas between the years 1984 and 1997. The authors hypothesized that if a deterrent effect were to exist, it would be found in Texas because of the high number of death sentences and executions there. Considering factors such as patterns in executions across the study period, and the relatively steady rate of murders in Texas, the authors found no evidence of a deterrent effect. They also found that the number of executions was unrelated to murder rates in general. *See*, 45 *Crime and Delinquency* 481-93 (1999).

There is no evidence to establish any correlation between the availability of the death penalty and a decrease in crime. *See*, Michael D. Hintze, *Attacking the Death Penalty: Toward a Renewed Strategy Twenty Years After Furman*, 24 COLUM. HUM. RTS. L. REV. 395, 406 (1992- 93). A comparison of the homicide

rates in states which have the death penalty and states which do not demonstrates that capital punishment is not a deterrent. These statistics obviously suggest that factors other than the availability of the death penalty contribute to crime levels. Many such comparisons have been done by scholars. They consistently show that the death penalty has no effect on deterring capital homicides.¹⁴

The “cold calculus that precedes the decision” of a capital murder, *see, Gregg v. Georgia*, 428 U.S. 153, 186, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), is seen more often in a TV movie than in a real live capital case. Many capital defendants lack the intelligence to think their way out of a game of checkers, let alone determine in advance which murders are capital and which are not. Others have deep-seated and oft undiagnosed and untreated mental or emotional problems. These people are not Frank Morris and the Anglin brothers, planning and executing a brilliant escape from Alcatraz. Though there are exceptions, capital defendants generally do not contemplate the crime, then weigh against

¹⁴ Aside from the statistical analysis, one must consider that most citizens do not even know what constitutes a capital homicide. If that is the case, one can hardly imagine the would-be murderer giving pause before committing the crime to analyze, in Ohio, the aggravating circumstances in R.C. 2929.04(A), and then deciding whether or not to commit the offense.

it the risk of apprehension or the death penalty. Many courts in reviewing these cases are understandably shocked at the conduct of the defendant. That reaction, while understandable, has no place in dispassionate constitutional analysis. To say that capital punishment acts as a deterrent because of its effect on “cold calculus that precedes the decision” is out of touch with reality. Because the death penalty has no deterrent effect, it does not promote the general welfare or the public safety any more than does a term of imprisonment. The deterrence of crime is factually inadequate to overcome the presumption in favor of life and against death as a punishment.

Gregg v. Georgia, supra, 428 U.S. at 153, identified “retribution and deterrence of capital crimes by prospective offenders” as the social purposes served by the death penalty. Unless the imposition of the death penalty “measurably contributes to one or both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment.” In his concurrence in *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008), Justice Stevens said of deterrence:

The legitimacy of deterrence as an acceptable justification for the death penalty is also questionable, at best. Despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders. In the absence of such evidence, deterrence cannot serve as a sufficient

penological justification for this uniquely severe and irrevocable punishment.

553 U.S., at 79 (STEVENS, J., concurring.) The Justice cited the literature, noting the recent surge in scholarship asserting the deterrent effect of the death penalty. *See, e.g.*, Mocan & Gittings, *Getting off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J. LAW & ECON. 453 (2003); Adler & Summers, “Capital Punishment Works,” *Wall Street Journal*, Nov. 2, 2007, p. A13. But, as Justice Stevens pointed out, there has been “an equal, if not greater, amount of scholarship criticizing the methodologies of those studies and questioning the results.” *See, e.g.*, Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO ST. J. CRIM. L. 255 (2006); Donohue & Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005).

2. Incapacitation of Offenders

The death penalty is not the least restrictive means for incapacitation and elimination of offenders. Ohio has recognized as much by adopting, effective July 1, 1996, a provision for life imprisonment without parole. *See*, R.C. 2929.03(D). Incapacitation can be achieved by incarceration, which is certainly a less destructive, less restrictive, less final, and more humane method of punishment

and the expression of societal outrage than is execution. There is no need for the government to kill people, particularly when shocking and compelling evidence has demonstrated that government does not always get it right. The history of Illinois' death row is evidence enough that the death penalty should yield to life imprisonment. Ohio, too, has its black eyes, none more poignant than Joseph D'Ambrosio's case. See, e.g., *State v. D'Ambrosio*, 73 Ohio St. 3d 141, 1995 Ohio 129, 652 N.E.2d 710; *D'Ambrosio v. Bagley*, 688 F. Supp. 2d 709 (N.D. Ohio 2010), affirmed, *D'Ambrosio v. Bagley*, 656 F.3d 379 (6th Cir. 2011), certiorari denied, *Bobby v. D'Ambrosio*, __ U.S., __, 132 S.Ct. 1150, 181 L.Ed.2d 1031 (2012).

Retribution. The “interest in seeing that the offender gets his ‘just deserts’—the severity of the appropriate punishment necessarily depends on the culpability of the offender” is described in *Atkins v. Virginia*, supra. The Court said:

Since *Gregg*, our jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes. For example, in *Godfrey v. Georgia*, 446 U.S. 420 (1980), we set aside a death sentence because the petitioner's crimes did not reflect “a consciousness materially more ‘depraved’ than that of any person guilty of murder.” *Id.*, at 433. If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.

536 U.S., at 319. The language of *Gregg* notwithstanding, it is questionable whether retribution was ever a “compelling state interest” to justify capital punishment.

The government has never produced compelling evidence that a penalty less severe than execution would not equally satisfy the public’s desire for punishment. The recent trend towards imposing LWOP rather than death shows that such compelling evidence, if it ever existed, has vanished. The life without parole option makes clear that there are less restrictive, equally effective methods of satisfying the need for punishment. Because the death penalty is “more severe than is necessary to serve the legitimate interest of the State” it violates the Cruel and Unusual Punishment Clause. *See, Furman v. Georgia*, supra, 408 U.S., at 359-360, fn. 141 (MARSHALL, J., concurring).

C. Discrimination

The death penalty is so fraught with discrimination its imposition violates the equal protection provisions of both the state and federal constitutions. *See*, U.S. Constitution, Amendment Five and Fourteen; Ohio Constitution, Article I, Section 2. The Ohio law is patterned after the laws of other jurisdictions which have been studied. The studies prove that capital punishment has been applied in a racially discriminatory manner as to both the race of the victim and the

defendant. See, Bowers and Pierce, *Arbitrariness and Discrimination: Post-Furman Capital Statutes*, CRIME AND DELINQUENCY (October 1980), 563, 594-95; Greenberg, *Capital Punishment as a System* (1982), 91 YALE L.J. 908; and Baldus, Pulaski, & Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J.CRIM.L. & C. 661 [the famous Baldus study examined but rejected in *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987)]. Such arbitrariness and discrimination persists under the Ohio framework which gives even greater discretion in sentencing to the trier of fact.

D. *Unbridled Charging Discretion*

No doubt part of the systemic discrimination begins with the charging function. In order for the death penalty to be constitutional, sentencing discretion “must be suitably directed and limited as to minimize the risk of wholly arbitrary and capricious action.” *Gregg v. Georgia*, *supra*, at 189. Yet, in Ohio, there is no control of the prosecutor’s unbridled discretion in charging. Capital indictments are arbitrarily issued, and Ohio law provides no independent review of the propriety of the charging decision to ensure that indictments are not arbitrarily issued. No judicial or reviewing body determines the appropriateness of a charge or oversees the unbridled discretion of the prosecutor in seeking a capital

specification. Because death-qualified juries are more conviction-prone than juries which are not death-qualified, the prosecutor, simply by exercising his charging function, can undermine the constitutional liberties of a fair and an impartial jury. While it is the grand jury which issues the indictment, as a practical matter, the grand jury, composed of laymen, will follow the prosecutor's recommendation as to whether to issue a death specification. By allowing the prosecutor to circumvent procedural safeguards mandated by decisions of the United States Supreme Court, the Ohio law allows arbitrary charging decisions.

The death penalty must be imposed rationally and predictably or not at all. That quite simply is not what is taking place, the death penalty quite clearly violates the Cruel and Unusual punishments provisions and the unconstitutional Due Process provisions of the United States Constitution. In his concurring opinion in *Furman, supra*, the late Justice Potter Stewart said that the death penalty was cruel and unusual in the same way that being struck by lightning was cruel and unusual. The strike of lightning is in fact what is occurring when the death penalty is imposed in Ohio.

The assurance of effective appellate review has reduced any queasiness on the part of the United States Supreme Court in capital cases. *See, e.g., Gregg v. Georgia, supra; Zant v. Stephens, supra; Godfrey v. Georgia*, 446 U.S. 420, 100

S.Ct. 1759, 64 L.Ed. 2d 398 (1980). The lack of any review by this Court over the Prosecutor's charging function renders the unbridled charging discretion an Eighth Amendment violation and a violation of Ohio Constitution, Article I, Sections 2, 9, and 16.

E. *Cruel and Unusual Punishment*

Ohio had two forms of execution: electrocution, the statutorily preferred method, and lethal injection. Death by either electrocution or lethal injection constitutes cruel and unusual punishment and denies due process under the state and federal constitutions. Inflicting death as a punishment also violates internationally held principles of human rights.

U.S. Constitution, Amendments Eight and Fourteen and Ohio Constitution, Article I, §9 and 16 bar the imposition of penalties which are grossly disproportionate to the crime; or, are excessive because they do not make a measurable contribution to an acceptable punishment goal; or, are "nothing more than the purposeful and needless imposition of pain and suffering". *Coker v. Georgia, supra*, 433 U.S., at 592; *Solem v. Helm*, 463 U.S. 277, 288, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).

In *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463, 67 S.Ct. 374, 91 L.Ed. 422 (1947), four (4) Justices interpreted the Cruel and Unusual

Punishment Clause to prohibit the “infliction of unnecessary pain”. Botched executions have shown that unnecessary pain results from the use of the death penalty electrocution. In barring executions by cyanide gas, the United States Court of Appeals for the Ninth Circuit looked to the severity of pain, the possibility of the execution process lasting several minutes, and the unnecessary cruelty presented by this method of punishment. *See, Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996).

Punishment by electrocution was upheld over a hundred years ago in *In Re Kemmler* 136 U.S. 436, 105 S.Ct. 930, 34 L.Ed. 519 (1890). Since that time, there has developed a substantial body of evidence that death by electrocution inflicts “unnecessary pain,” “physical violence,” and “mutilation,” rather than the “mere extinguishment of life” referred to in *Kemmler*. Aside from the applicability of the Eighth Amendment to the States, Ohio has its own constitutional provision. Ohio Constitution Article I, §9 provides in pertinent part that “Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.” Many states, including Ohio, have outlawed electrocution. Public opinion, which plays a significant role in determination of whether a punishment is cruel and unusual, led the Ohio legislature to add lethal injection as an alternate means of punishment in 1994. While disclaiming that such action

constituted a belief that punishment by electrocution is cruel and unusual, *see*, R.C. 2949.22(H), the Ohio legislature was responding to public opinion in this state which questioned electrocution as a penalty.

While intended to diminish pain, lethal injection nonetheless risks cruel and unusual punishment. No other nations make use of this means of punishment. Like electrocution, lethal injection should be barred.

F. *Ohio Constitutional Provisions*

Neither *State v. Jenkins*, 15 Ohio St.3d 164, 473 N.E.2d 264 (1984), *cert. denied*, *Jenkins v. Ohio*, 472 U.S. 1032, 105 S.Ct. 3514, 87 L.Ed.2d 643 (1985), nor *State v. Maurer*, 15 Ohio St.3d 239, 473 N.E.2d 768 (1984), *cert. denied*, *Maurer v. Ohio*, 472 U.S. 1012, 105 S.Ct. 2714, 86 L.Ed.2d 728 (1985), contain any analysis of applicable Ohio constitutional provisions. Later cases simply refer back to *Jenkins* and *Maurer*. The Court has ignored the fact that it has never passed on the constitutionality of the Ohio death penalty law *vis-a-vis* the Ohio Constitution. *Jenkins*, at 167-179; *Maurer*, at 241-243. The provisions are *mentioned*, but there is absolutely no analysis of them. Only federal cases are cited and discussed, and those cases of course deal only with U.S. Constitution, Amendments Eight and Fourteen. *See, also, State v. Carter, supra.*

If the Ohio Constitution means the same thing as the federal constitution,

one wonders why someone went to so much trouble to write it and revise it. In any event, the provisions of Ohio Constitution, Article I, §1 seem to negate any claim that the Ohio and United States Constitutions mean exactly the same thing, particularly as the United States Constitution is often presently construed. The Ohio courts have not addressed these claims under the Ohio Constitution, and this Court should now do so, and declare that capital punishment violates the Ohio Constitution.

V

Structural Trial Deficiencies

A. Effective Assistance of Counsel

Ohio's capital law provides for a sentencing recommendation by the very same jury which found the defendant guilty at the first phase and found the existence of one or more death specifications. This procedure violates the constitutional provisions which guarantee the effective assistance of counsel and a fair trial before an impartial jury. *See*, U.S. Constitution, Amendments VI and Fourteen; Ohio Constitution, Article I, Sections 5, 10, and 16. The two-phase capital trial in Ohio denies the Defendant the effective assistance of counsel, because if the Defendant is convicted, the conviction inherently destroys the credibility of his counsel and diminishes counsel's effectiveness at the second

phase. See, *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763, fn. 14 (1970); *State v. Hester*, 45 Ohio St.2d 71, 341 N.E.2d 304 (1976). If defense counsel argues strenuously for his client's innocence at the first phase and the jury votes for conviction, counsel starts the second phase at a disadvantage. Counsel desperately needs credibility to successfully argue for a life sentence instead of the death penalty. A provision for two separate juries would easily eliminate this handicap; and, at least in this regard, restore the ability to have the effective assistance of counsel. The two-stage proceeding, with the same jury at both stages is an action by the government which prevents defense counsel from effectively assisting a defendant during what has been held to be a "critical stage" of the proceeding, the sentencing phase. See, e.g., *United States v. Cronin*, 466 U.S. 468, 469, 104 S.Ct. 2039, 80 L.Ed.2d 657, fn. 25 (1984).

The Ohio law also impairs the effective assistance of counsel because death qualification is necessary before the jurors have heard any evidence that a defendant may be guilty. Requiring a defendant to question the prospective jurors about the death penalty places counsel in the undesirable position of appearing to have no confidence in the facts of the case or in the defendant's innocence. In *Grigsby v. Mabry*, 569 F.Supp. 1273 (E.D. Ark. 1983), the court found that "death qualification" of prospective jurors creates juries which are conviction prone,

thereby denying the defendant his right to a trial by a jury representative of a cross-section of the community. *Grigsby* was affirmed by the Court of Appeals for the Eighth Circuit, 758 F.2d 226 (8th Circ. 1985), but was reversed by the United States Supreme Court *sub nom. Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137, 54 USLW 4449 (1986). The Supreme Court did not deny that “death qualification” of jurors results in a jury more likely to convict. The Court assumed that the studies done were correct and that “death qualification” does indeed produce juries more conviction prone than non-death qualified juries. Nonetheless, the Court held that the federal constitution does not prohibit the states from “death qualifying” juries in capital cases. Ohio courts have cited and have relied on *Lockhart v. McCree*, but have engaged in no analysis of the Ohio Constitution’s assurances of trial by impartial jury, a remedy in the courts by due course of law, or the promise that justice shall be administered without denial. *See*, Ohio Constitution, Article I, Sections 5, 10, and 16.

Ohio Constitution, Article. I, §10 secures against encroachment by the government a trial other than one before an impartial jury. *See also*, Ohio Constitution, Article I, §5, which preserves inviolate the right to trial by jury. Ohio Constitution, Article I, §16 prohibits the government from administering justice without denial, and Ohio Constitution, Article I, §1 provides that the ability to

defend “life and liberty” shall be “inalienable.” These provisions mean that the government, whether acting through prosecutor, the court, or the legislature, may not act in any way as to deny trial by an impartial jury. Given the constitutional presumption of innocence, justice is denied when the jury deciding the case is not impartial, but is instead inclined to convict. Can the Framers of the Ohio Constitution have intended that a jury which begins the case inclined to convict is the administration of justice without denial? Can the Framers have meant that such a conviction-prone jury satisfies the obligation that every citizen—even one charged with heinous offenses—be afforded a remedy in the courts by “due course of law”; or that trial by such a jury retains “inviolable” the right to jury trial; or that a citizen who tries his case before a conviction-prone jury can effectively defend his life and liberty? Wasn’t one of the reasons why trial by jury was implemented so that citizens would not be “railroaded” by government officers inclined to convict? These provisions are found in OHIO CONST. art. I, Sections 1, 5, 10, and 16. It appears that the courts have ignored them, but the Appellant asks this Court to once again breathe life into those provisions.

R.C. 2929.03(D)(1) is unconstitutional because it, too, denies a defendant the effective assistance of counsel. Under that statute, once a defendant requests a mental examination for mitigation purposes, the defendant and counsel have no

control over the distribution of the results of that examination to the jury, whether the report appears to be mitigatory or aggravating. The law forces defense counsel to play a guessing game, running the risk that something in the report may save a defendant's life, when in fact something in the report may cause the jury to vote for death. It is no answer to say that the jury instructions will prevent the jury from misusing the report. instructions do not clearly explain what the jury is to do and what the jury is to consider. The instructions of that kind are very close to "an instruction to unring a bell." See, *United States v. Murray*, 784 F.2d 188 (6th Cir. 1986). The Ohio death penalty law must be declared unconstitutional because it deprives the Defendant of the effective assistance of counsel.

B. Denial of Impartial Jury.

The Defendant cannot be deprived an impartial jury under the state and federal constitutions. See, U.S. CONST. amend. Six and Fourteen; Ohio Const., art. I, Sections 5 and 10; *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966).

First phase. The effects of "death qualification" were discussed above. The requirement that an unbiased jury represent a fair cross-section of the community is mandated by the equal protection provisions of the Constitution.

See, U. S. Constitution, Amendment Fourteen; *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). See, also, Ohio Constitution, Article I, §2. See, also, generally, Jane Byrne, *Lockhart v. McCree: Conviction-Proneness and the Constitutionality of Death-Qualified Juries*, 36 CATH. U. L. REV. 287 (1986). The Supreme Court has said that when certain cognizable groups are removed from the jury pool, the “qualities of human nature” and “perspective[s] on human events that may have unsuspected importance” are absent from the group’s deliberations. See, *Peters v. Kiff*, 407 U.S. 493, 503-04, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972). The requirement of a community cross-section in U.S. CONST. amend. Fourteen has also been extended to cases addressing the constitutionality of death-qualified juries. In *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), the government exercised unlimited peremptory challenges to exclude all venire persons who expressed reservations about imposing capital punishment. The United States Supreme Court held that a death sentence is unconstitutional if it is recommended by a jury from which all venire persons having doubts about capital punishment are removed.

This constitutional scenario presents courts with either striking the death penalty as unconstitutional in this form or bending the Constitution by saying that *Witherspoon* and *Witt* excludables, and the resulting conviction-prone jury,

are necessary evils if we as a society are going to put people to death. We must, the reasoning goes, bend the Constitution to exclude a cognizable portion of the community so that we can still sentence people to death. The danger for the first phase is that such juries are *not* fair and impartial, and are not wedded to the precept of the presumption of innocence. “The decision of the *McCree* majority not to extend cross section requirements to scrupled guilt phase jurors is inconsistent with the basic premise that has established *Witherspoon* as a universally accepted constitutional measure.” Byrne, *Lockhart v. McCree: Conviction-Proneness and the Constitutionality of Death-Qualified Juries, supra*, at 313.

Second phase. A sentencing hearing is a part of the prosecution. See, *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967); *State v. Smith*, 29 Ohio App.2d 241, 281 N.E.2d 17 (1972). A sentencing hearing indeed is a “critical stage” of the prosecution. A defendant cannot be denied an impartial jury at his sentencing hearing, but the Ohio procedure, which uses the same jury for both the first and second phases, precludes an impartial jury at the sentencing hearing. If the jury finds a defendant guilty of aggravated murder at the first phase, there is a very high probability that jury bias, perhaps even animosity, toward the defendant will exist at the second phase, when a defendant most needs an impartial jury. That bias or animosity would in normal

circumstances be a statutory challenge for cause during voir dire of any single-phase trial. *See*, R.C. 2945.25. The Ohio law therefore creates an unacceptable risk that the defendant's life will be put into the hands of a biased or hostile jury. There is no procedure to remove—or even question for that matter—jurors who, as a result of something that occurred at the first phase, become biased towards a defendant at the second phase.

The United States Supreme Court has recognized that capital punishment is in part an expression of society's outrage at particularly offensive conduct. *Gregg v. Georgia*, 428 U.S. at 183. The risk of an emotional response creates uncertainty in the reliability of the determination and undermines confidence in the outcome. Juror bias should never be tolerated in any case, but it cannot be tolerated in a capital case. *See, Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). The Ohio law must therefore be declared an unconstitutional violation of the Defendant's right to trial and sentencing by an impartial jury.

C. Jury Trial and the Privilege Against Self-incrimination.

The Ohio death penalty law impermissibly encourages guilty pleas. The law therefore violates U.S. Constitution, Amendment Fourteen and Ohio Constitution, Article I, Sections 1, 5 and 10. In *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), the United States Supreme Court

declared unconstitutional a statute which unnecessarily encouraged guilty pleas. The statute provided that a capitally-indicted defendant could be sentenced to death by a jury, but only to a mandatory life sentence by a judge if the defendant pleaded guilty to the charge. The Court struck down the statute, holding that it encouraged the defendant to waive his right to a trial by jury and his privilege against self-incrimination by inducing him to plead guilty in order to escape the risk of death. The Ohio law is similar in many respects. A guilty plea greatly increases a defendant's chance to demonstrate mitigating facts, thereby avoiding the imposition of a death sentence. This Court did not fully or analytically address the distinction between the laws in *State v. Buell*, 22 Ohio St.3d 124, 489 N.E.2d 795 (1986), *cert. denied*, *Buell v. Ohio*, 479 U.S. 871, 107 S.Ct. 240, 93 L.E.d2d 165 (1986), when it overruled this argument on *federal* constitutional grounds.

Ohio's framework still encourages guilty pleas and thereby induces a capital defendant to waive his constitutional rights. Crim.R. 11(C)(3) provides that, with respect to an aggravated murder committed on or after January 1, 1974, if the indictment contains one or more specifications, and if a plea is accepted, the court "may dismiss the specifications and impose sentence accordingly, in the interest of justice." The Ohio law does not adequately address the concerns expressed by Justice Blackmun in his concurring opinion in *Lockett*

v. *Ohio*, 438 U.S., at 619. Ohio's law compels the sentencer to consider aggravating circumstances, and to balance them against mitigating factors. Therefore, if a defendant has doubtful mitigating circumstances or even no mitigating circumstances, he is strongly encouraged by the Ohio law to plead guilty and to waive all of his constitutional rights at trial with the *hope* of evading the death penalty.

D. *Failure to Provide Adequate Guidelines for Deliberation.* The Ohio law, which requires that aggravating factors "outweigh the mitigating factors" violates U.S. CONST. amend. Eight and Fourteen, and also violates OHIO CONST., art. I, Sections 9 and 16. The use of the term "outweigh" encourages a jury to use a preponderance of the evidence standard, while the state and federal constitutions demand proof beyond a reasonable doubt. The statute only requires that the sentencing body be convinced beyond a reasonable doubt that the aggravating factors are *marginally* greater than the mitigating circumstances. Any perceived marginal difference in weight between the aggravating circumstances and the mitigating factors would result in imposition of the death penalty. The sentencing scheme creates an unconstitutional and unacceptable risk of arbitrary or capricious sentencing. The Ohio statutes do not explicitly provide for merciful discretion on the part of the trier of fact even though such mercy was first

introduced into Ohio capital law back in 1898. The death penalty is *mandatory* if the State proves that the aggravating circumstances outweigh the mitigating factors. The result is a sentencing scheme where the scales of justice are weighted more heavily toward the imposition of the death penalty.

The law fails to give the jury the appropriate guidance, and a pattern of arbitrary and capricious sentencing occurs. Therefore, the unbridled sentencing discretion found unconstitutional in *Furman v. Georgia* persists. Without such objective standards, there can be no confidence that the verdict at the second phase is not infected with caprice. Moreover, it is impossible to explain to a jury composed of laymen that the aggravating circumstances, which it already found to exist beyond a reasonable doubt, must now be weighed against mitigating factors which it has not heard before the second phase. For the jury to do so, it might well think that it has to recant its first phase verdict as to the capital specification. There are lawyers who do not understand how the weighing process works in a capital case. To expect laymen to understand it is to engage in a legal and psychological fantasy in order to allow defendants to be executed. The guidelines do not guide: they misguide and they confuse. The Ohio law violates the state and federal constitutions because it provides no guided discretion to juries.

E. Lack of Inquiry Regarding Arbitrariness, Passion, or Prejudice.

U.S. CONST. amend. Eight mandates that, in appellate review of a death sentence, it must be determined whether the sentence is imposed under the influence of passion, prejudice, or any other arbitrary factor. This review is to serve as a check against the “random and arbitrary imposition of the death penalty”. *Gregg v. Georgia, supra*. The Ohio law does not require inquiry or findings about the possible influence of passion, prejudice, or any other arbitrary factor, although the same is demanded by the state and federal constitutions. U.S. Constitution, Amendments Eight and Fourteen; Ohio Constitution, Article I, Sections 9 and 16. If the review is not required explicitly by the statute, and if it is not deemed required by implication in every case through a construction of the statute, R.C. 1.47, then Ohio’s capital law is constitutionally deficient.

F. Requirement that Death Be Imposed in Certain Circumstances.

The Ohio law violates the state and federal constitutions, *see*, U.S. Constitution, Amendments V, Eight, and Fourteen and Ohio Constitution, Article I, Sections 9 and 16, because it precludes a mercy option in two circumstances: (1) in the absence of mitigation; or (2) when aggravating circumstances outweigh mitigating factors. In those situations, the law *requires* the imposition of the death penalty. The law emasculates the requirement of individualized sentencing

and impermissibly limits the sentencer from returning a decision of life imprisonment. At least two federal circuits, the Fifth and Eleventh Circuits, have remanded cases, finding error in the jury instructions when the trial court failed to clearly instruct the jury that it, the jury, had the option to return a life sentence *even if* aggravating factors outweighed mitigating factors. *See, Chenault v. Stynchcomber*, 581 F.2d 444 (5th Cir. 1978); *Westbrooke v. Zant*, 704 F.2d 1487 (11th Cir. 1983).

If capital sentencing is to be truly individualized as required by the state and federal constitutions, a mercy option is required under all circumstances. Individualized sentencing requires that the sentencing body have the ability to choose mercy and to determine that death is not the appropriate penalty in the particular situation. In *Barclay v. Florida*, *supra*, the United States Supreme Court held that the jury must be and is free to “determine whether death is the appropriate punishment.” 463 U.S. at 950. Ohio’s law eliminates that option. Without the mercy option in all circumstances, the defendant faces a death verdict resulting from a type of statute as in *Lockett v. Ohio*, *supra*. That statute mandated a death verdict in the absence of one of three specific mitigating factors.

The United States Supreme Court has repeatedly spoken on this subject,

but nowhere did it speak more authoritatively than in *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). The Court in *Hitchcock* vacated the death sentence. It said that the jury and the trial judge may not refuse to consider, nor may they be precluded from considering, *any* relevant mitigating evidence. See, 481 U.S., at 398-399. Hitchcock argued that certain evidence which was not specifically mentioned in the Florida statute was kept from the jury and not considered by the judge, and that still other evidence was not offered by his lawyer, on the reasonable belief that Florida law precluded him from doing so. The similarity between this Court's opinion in *State v. Lorraine* and the Florida Supreme Court's opinion, since rejected, is striking. Both held that only statutory mitigation evidence could be considered. In *Cooper v. State*, 336 So.2d 1133, 1139 (Fla. 1976), the court said that the "sole issue in a sentencing hearing under Section 921.252, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have [*sic*] no place in that proceeding" In *Lorraine*, the Ohio Supreme Court said: "Permitting a jury to consider mercy, which is not a mitigating factor and thus irrelevant to sentencing, would violate the well-established principle that the death penalty must not be administered in an arbitrary, capricious, or unpredictable manner... . The arbitrary result which may occur from a jury's

consideration of mercy is the exact reason the General Assembly established the procedure now used in Ohio.” 66 Ohio St.3d at 417.

G. Failure to Require Decision About Appropriateness.

Under R.C. 2929.05, Ohio appellate courts, when reviewing a death sentence, must determine that death is the only “appropriate” penalty. Yet, the trial court is not required to make such a determination. The omission violates U.S. Constitution, Amendments Eight and Fourteen and Ohio Constitution, Article I, Sections 9 and 16. A finding of appropriateness of the death penalty is constitutionally required. *See, Coker v. Georgia, supra.* The death penalty is unconstitutional if it is not the only penalty that will appropriately serve the government’s punishment goals in a particular case. The death penalty is unconstitutional if the government cannot reliably establish that death is the appropriate punishment in a particular case. *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

It is not impossible, and it is certainly within the realm of reason that a jury could conclude that aggravating circumstances outweigh mitigating factors and still conclude that death is *not* the appropriate punishment in a specific case. *See, Smith v. North Carolina*, 459 U.S. 1056, 103 S.Ct. 474, 74 L.Ed.2d 622

(1982), (STEVENS, J., dissenting from denial of certiorari). The jury must have the opportunity to find the death penalty inappropriate even when statutory aggravating circumstances outweigh mitigating circumstances, yet the aggravating circumstances are not weighty enough to support the ultimate penalty of death. *Barclay v. Florida, supra*, 463 U.S., at 964. However, if the original sentencing body does not make a finding that the penalty is appropriate in a particular case, then reviewing courts can do little more than speculate whether the sentencing body dealt with the issue. Arbitrary decisions are the natural by-product where such a finding is made for the first time on appeal due to forced speculation by the appellate court. The present Ohio law permits imposition of the death penalty in spite of factors in mitigation. The law is defective because it does not require the jury or the trial judge to decide the appropriateness of the death penalty.

VI

Structural Appellate Defects

A. Lack of Meaningful Proportionality Review.

The culmination of the *de facto* moratorium on death sentences came in 1972 when the Supreme Court of the United States struck down virtually every capital sentencing scheme then in existence. See, *Furman v. Georgia*, 408 U.S.

238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). When, four years later, the Court found a number of state capital statutory schemes acceptable under the Eighth Amendment, the Court made clear that effective appellate review is an indispensable component of the legal machinery which imposes death as a punishment. In 2000, a study commissioned by the United States Congress to review the death penalty nationwide was released. See, James Liebman, Jeffrey Fagan, and Valerie West, *Broken System: Error Rates in Capital Cases, 1973-1995* (2000). Liebman and his colleagues studied 5,760 capital sentences and 4,578 appeals. They found that:

serious error—error substantially undermining the *reliability* of capital verdicts—has reached epidemic proportions throughout our death penalty system. More than two out of every three capital judgments reviewed by the courts during the 23-year study period were found to be seriously flawed.

Id., 2. Of those flawed cases, some forty percent (40%) were ferreted out through state appellate review. Ohio was not part of the original Liebman study.

However, in 2002 Liebman released *Broken System Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It*. As the titles suggests, *Broken System II* was a continuation of the first study with emphasis on finding both the causes and the potential solutions for the serious error rates in capital cases. This time, Ohio *was* included in parts of the analysis. Perhaps

most compelling from *Broken System Part II* was the conclusion that not only are there significant error rates in capital cases, but that “reviewing courts do not effectively keep serious errors from occurring or keep unreliable death verdicts from being carried out.” See, *Broken System Part II*, Part IX Conclusion.

Ohio has an unacceptably low percentages of cases. One of two things is occurring in Ohio: either Ohio’s system for imposing the death penalty is so flawless as to be well-nigh perfect, which would make it unique among jurisdictions that have the death penalty; or, Ohio appellate review of capital cases is so deficient that it virtually does not exist. The evidence shows that the latter is the case, and the steady stream of federal habeas relief in cases that are often too old to retry, shows that Ohio does not have effective appellate review. It sweeps its errors under the rug. The case of Joseph D’Ambrosio of Cleveland was reviewed by Ohio courts. D’Ambrosio received habeas relief more than 20 years after his trial. How does he get that time back? How does the system hold itself out as being just? Were his case a rare one or the sole one, it would be one thing. But names like Jerome Henderson, John Glenn, Ronald Combs, Rayshawn Johnson, and Kenneth Richey are but a few.

Appellate review of capital cases in Ohio, with due respect, is not appellate

review. It is ignoring errors simply because the inmate has been found guilty of doing horrendous things. The American Bar Association has studied Ohio's capital punishment system preliminarily, and found that Ohio's appellate review is so flawed that there should be a moratorium on the death penalty until Ohio's "broken system" is fixed. The ABA Ohio Death Penalty Assessment Team's Report "Evaluating Fairness and Accuracy in State Death Penalty Systems: The Ohio Death Penalty Assessment Report," was released September 24, 2007. In its review, the Ohio Death Penalty Assessment Team found a number of problems in the state's death penalty system, all of which undermine the fairness and accuracy of the system. Some of the problems include:

1. Inadequate procedures to protect innocent defendants
2. Inadequate access to experts and investigators
3. Inadequate legal representation
4. Inadequate appellate review of claims of error
5. Lack of meaningful proportionality review of death sentences
6. Virtually nonexistent discovery provisions in state post-conviction
7. Racial and geographic disparities in Ohio's capital sentencing, and,
8. Death sentences imposed or carried out on people with severe mental disabilities.

Ohio fails to provide a meaningful basis for distinguishing between life and death sentences. R.C. 2929.03 does not explicitly require the jury, when recommending life imprisonment, to specify the mitigating factors found, or to otherwise identify its reasons for the sentence. This Court is required to determine whether a particular death sentence is excessive or disproportionate to that imposed in similar cases. The United States Supreme Court recognizes that a proportionality review serves as a check against arbitrary imposition of the death penalty. *Gregg v. Georgia*, *supra*. Despite that holding, the Court has refused to require a proportionality review in all cases from every state as a matter of federal constitutional law. *See, e.g., Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). However, when such a review is done, as is mandated by the Ohio statute, it must be a *true* proportionality review. *Pulley* describes what such a review is: the sentences imposed in *similar* cases. This means the sentences imposed (not just death) in factually and legally similar cases, not just cases where the death penalty has been imposed.

Ohio has no means to accurately compare a case in which a binding recommendation of life was imposed by the jury to a case in which death was imposed.

In *Eddings v. Oklahoma*, *supra*, the United States Supreme Court held

that the Constitution mandates measured and consistent application of the death penalty as well as fairness to the defendant. The Court has said that capital punishment must be imposed fairly and with reasonable consistency or not at all. It is impossible under the Ohio system to have such a consistent application. Although a jury's binding recommendation of a life sentence favors the particular capital defendant receiving that sentence, that finding, masked by jury secrecy, deprives other capital defendants of the constitutional protections, spelled out in *Eddings*, that the government will not capriciously impose a death sentence.

The ABA Study had this to say:

In death penalty cases, the Ohio Supreme Court is required to "consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases."

While the Ohio Supreme Court has reviewed over 250 death-imposed cases since the law requiring proportionality review went into effect, it has never vacated a death sentence on this ground. In conducting its review, reviewing courts do not need to consider or compare cases where a life sentence was imposed or where death could have been, but was not, sought.

The Court has held that "proportionality review is satisfied by a review of those cases already decided by the reviewing court in which the death penalty has been imposed." The present approach that looks only to other death-imposed cases (and on occasional a life sentence imposed on an accomplice) ultimately deprives the judicial system of an ability to ensure that sentences are being consistently and fairly meted out.

The Ohio Supreme Court's refusal to consider the life sentence imposed in similar cases has sometimes led to a refusal to consider a co-defendant's sentence, even in the case of a co-defendant who admitted killing the victim and was sentenced to life imprisonment. In one leading case, the Court simply stated that the life sentence imposed on the co-defendant was irrelevant as it was the product of a

separate trial.

On occasion, the Court will address the sentences of accomplices and co-defendants in the case under review, sometimes in its reweighing of aggravating and mitigating circumstances, and instances, even when the codefendants were brothers and committed the same offense.

...
In addition to the erratic consideration of co-defendants, the Ohio Supreme Court's review of relevant cases in its proportionality review is at best spotty, and often consists of a recitation that the Court has compared a number of cases. This recitation usually includes a citation or series of citations, but not always, and often there is no explanation or analysis to support the conclusion how or why the case where death was imposed was "similar." If an explanation or statement is offered beyond a string of citations, it often is a statement that the Court has previously affirmed the death sentence when the defendant's aggravating factor was present. While that reaffirms death eligibility, however, it does not address whether death is commonly imposed in the presence of this aggravating factor and does not address, let alone examine, the frequency of imposition of death in the presence of the defendant's mitigating factors.

ABA STUDY, 240-242.

B. Lack of Adequate Appellate Analysis.

R.C. 2929.021, 2929.03, and 2929.05 require that minimal information be reported to the Supreme Court of Ohio. The statute is a toothless tiger, however, because additional data is necessary if there is to be a constitutionally adequate comparison in death penalty cases. The law does not require any compilation, collation, or analysis of the data for use in any comparison. There is no statutory requirement that the reviewing courts identify the types of cases considered or the particular cases considered. There is no requirement that courts submit written

findings comparing the cases.

While Ohio's capital laws require collection of certain data relating to capital cases to facilitate this review, *i.e.*, the entire records of cases in which the death penalty is imposed, R.C. 2929.03(G); and information as to each capital indictment including name of defendant, court, date of capital indictment, disposition (by plea, dismissal, or trial) and sentence imposed, R.C. 2929.021, there is a fundamental omission in the collection scheme. This flaw arises from the failure to require, when recommending life imprisonment, identification of the mitigating factors found to exist, and why the aggravating circumstances do not outweigh the mitigating factors beyond any reasonable doubt. Information as to cases in which life imprisonment was imposed after a capital sentencing hearing is essential for the reviewing courts to carry out their responsibility of assuring that excessive, disproportionate sentences of death are not imposed. *See*, Baldus, Pulaski, Woodworth and Kyle, *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 STAN.L.REV. 1, 7, fn. 15 (1980); *Woodson v. North Carolina*, 428 U.S. 280, 316, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), *supra*, (REHNQUIST, J., dissenting); *McCaskill v. State*, 344 So.2d 1276, 1280 (Fla. 1977). The majority of states follow the practice of comparing cases in which life sentences were imposed. *See*, Van Duizend, *Comparative Proportionality Review*

in Death Sentence Cases. What Why?, STATE COURT JOURNAL (1984), Vol. 8, No. 3, at fn. 26 (pub. draft).

However, as the jury's recommendation of life is binding, and no opinion is required to be prepared by the jurors setting forth the mitigating factors found and the reasons why one outweighed the other, there is no means in Ohio to accurately compare a case in which a binding jury's life recommendation was made to that in which a death sentence was imposed.

For a death sentence to be constitutional, there must be adequate or meaningful appellate review, and death sentences must be reversed when there is a significant risk of arbitrary sentencing. *See, Gregg v. Georgia, supra; Godfrey v. Georgia, supra*. The standard for review is obviously one of careful scrutiny, and the review must be based on a comparison of similar cases. The review must ultimately focus on the character of the defendant and the circumstances of the crime or crimes and a consideration of the aggravating circumstances and mitigating factors. *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983).

The Ohio statutes are unclear as to whether the sparse information gathered will indeed be used by the courts. A review of appellate death penalty decisions in Ohio seems to indicate that the information goes unnoticed. The

statutes are equally unclear as to how the comparative evaluation is to be carried out and what documentation there is to be of the evaluation once it is performed.

A sentencing body that recommends a life sentence is not required to identify mitigating circumstances or factors, nor is the body required to indicate why mitigating circumstances outweigh aggravating factors. Without this type of information, no comparison of cases, except on the most superficial level, is possible. Effective and meaningful appellate review demands an in-depth analysis, not a cursory review based upon sparse and incomplete information. Nor is a meaningful review possible without some standardized method of comparison. The Ohio law is the antithesis of a meaningful comparison and review. The procedure authorizes accelerated review, minimal information included in written findings at sentencing, and inadequate data. With no certainty of a meaningful appellate review, there can be no guarantee that death sentences are not arbitrary. *Zant v. Stephens, supra*.

This Court does not consider or compare death sentences with life sentences handed down in capital murder indictment cases. Nor does it consider life sentences imposed on co-defendants in separate jury trials. Moreover, in *State v. Rogers*, 17 Ohio St.3d 174, 478 N.E.2d 984 (1985), the Court held that appellate courts need only consider death verdicts within their own district or

geographical boundaries. In *State v. Maurer*, supra, the Court undertook no comparison of cases at all and conducted no meaningful proportionality review. In obvious violation of the principle that a criminal statute is to be strictly construed in favor of the defendant, it allowed the appellate court to provide the rationale for the death sentence, something the trial court was required to do so, but failed to do. See, R.C. 2929.05.¹⁵

The arbitrariness in appellate review in Ohio comes in a number of forms.

Mercy. The United States Supreme Court made clear in *Gregg* that the federal constitution does not act as a bar to a jury granting mercy in a given case, the statutorily defined aggravating factors and mitigating circumstances notwithstanding. The Court held:

The petitioner next argues that the requirements of *Furman* are

¹⁵ In *State v. Martin*, 19 Ohio St.3d 122, 483 N.E.2d 1157 (1985), the Court expedited the procedure for the proportionality review by holding that, in a case where there is no mitigation, the death sentence is *automatically* proportionate because death sentences have been affirmed in cases *with* mitigation. That analysis quite simply fails to consider the significance of the aggravating circumstances or whether or not they are serious enough to warrant a death sentence. The analysis also fails to take into consideration the mandate that death not be imposed when juries do not generally impose death for such offenses, regardless of the mitigation or lack thereof. See, *Gregg v. Georgia*, quoted *supra*. The decisions demonstrate that the Court's analysis and review of the death penalty is cursory at best and not the in-depth analysis demanded by the state and federal constitutions. See, e.g., *State v. Zuern*, supra; *State v. Steffen*, 31 Ohio St.3d 111, 509 N.E.2d 383 (1987); and *State v. Morales*, 32 Ohio St. 3d 252, 513 N.E.2d 267 (1987).

not met here because the jury has the power to decline to impose the death penalty even if it finds that one or more statutory aggravating circumstances are present in the case. This contention misinterprets *Furman*. See *ante*, at 198-199. Moreover, it ignores the role of the Supreme Court of Georgia which reviews each death sentence to determine whether it is proportional to other sentences imposed for similar crimes. Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the penalty, the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice.

The proportionality requirement, the Court made clear, is to prevent capricious *infliction* of the death penalty, not the converse. See, *State v. Lorraine, ante*.

This Court has said that an Ohio jury *is not precluded* from extending mercy to a defendant. In Ohio, a jury *is effectively* precluded from extending mercy, of course, if it has no idea that it may extend mercy. We have jury instructions for a reason. Ohio capital jurisprudence constantly saddles capital defendants with the errors of their trial counsel. The courts find in all but the rarest of cases that a failure to object was a waiver and that there was no plain error; and, that all but the most egregious errors are litigation strategy.¹⁶

¹⁶ See, e.g., *State v. Allen, supra*, 73 Ohio St.3d, at 639:

In his twelfth proposition of law Allen alleges several instances of prosecutorial misconduct. Allen raised no objection to many of the comments he challenges and therefore these alleged improprieties are waived, absent plain error. *State v. Williams, supra.*; *State v. Greer* (1988),

(continued...)

Lorraine and cases after it make clear that, while a defendant may *argue* for mercy, the trial courts of this state are not to *instruct* the jury that they may extend mercy to a capital defendant. Juries get their marching orders on how to weigh the evidence from judges, not from the lawyers. Ohio juries are, or can be, under the impression that they cannot extend mercy because the trial judge has not told them that they may do so.

Weighing. The weighing of aggravating circumstances against mitigating factors provides no assurance that the death penalty in Ohio is administered evenhandedly. Before looking at some specific cases, it is alarming to note that even the Ohio Supreme Court does not always set forth the proper standard, thus begging the question of the standard actually applied by the Court. In *State v. DePew*, 38 Ohio St.3d 275, 292, 528 N.E. 2d 542 (1988), the Court *reversed* the standard and placed the burden on the defendant:

In short, we find, beyond a reasonable doubt, that the unusual number of aggravating circumstances in this case *is not outweighed* by the relatively meager mitigating factors offered by appellant. Thus, the sentence of death imposed upon appellant must stand.

(Emphasis added.)

¹⁶ (...continued)

39 Ohio St.3d 236, 530 N.E.2d 382. We have reviewed these prosecutorial comments and find no plain error. We do not even get to know what the misconduct was that Allen claimed denied him a fair trial.

In *State v. Green*, 66 Ohio St.3d 141, 153-154, 609 N.E.2d 1253 (1993), the Court set out the mitigating factors, including Green's IQ of 66, youthful age of 24, remorse, poor upbringing, alcohol and drug addiction, the disparate treatment accorded to the co-defendant, and the fact that the victim "arguably 'induced or facilitated the offense.'" Despite this plethora of mitigation the Court rejected the mitigation, with only this analysis:

In weighing the aggravating circumstance against mitigating factors, we find that the aggravating circumstance does outweigh the mitigating factors beyond a reasonable doubt. Collectively, Green's lack of intelligence, family upbringing, and alcohol and drug addition are entitled to modest weight. In contrast, Green planned and carried out a calculated robbery and murder of a frail, elderly man in his own home. The number and manner of stab wounds convincingly demonstrate an intention to commit murder. The manner of death and the prior calculation and design tend to negate Green's later claims of remorse.

That the victim was frail and elderly is tragic indeed, but it is not an aggravating circumstance. That the murder was committed purposely, as evidenced by the number and type of wounds, is also not an aggravating circumstance. In fact, if the government had anything less than "convincingly demonstrate[d] an intention to commit murder," Green's conviction and death sentence would have to be vacated virtually without further analysis—for the government would not have met its burden of proof beyond a reasonable doubt.

Every aggravated murder conviction in this State must have as its foundation a convincing demonstration that the defendant intended to commit murder. To use such proof as the basis for a death sentence is preposterous. The language of the Court's opinion leaves one with the impression that 24 year old people with extremely low IQs who purposely kill someone cannot earnestly express remorse. It appears clear from the opinion that there was substantial mitigation in Green's case, but that the Court fumbled with how to vacate the death sentence.

In *State v. Evans*, 63 Ohio St.3d 231, 586 N.E.2d 1042 (1992), the Court affirmed the death sentence of a defendant with an IQ of less than 70. In dissent, Justice Herbert Brown wrote:

I must respectfully dissent from the opinion of the majority. I believe this record reflects errors that individually might be considered non-prejudicial but which, when considered cumulatively, taint the conviction for aggravated murder and appellant's sentence of death.

What I find most disturbing is the trial court's failure to instruct the jury properly regarding the testimony of an accomplice... . . *The majority, while conceding that the instruction is improper, concludes that the result would have been the same if the jury had been properly instructed. This is speculation . . .* I believe it is dangerously speculative to conclude that the jury would have reached the same conclusion if it had accorded this testimony the weight permitted by the proper instruction.

In my opinion the trial court also erred in failing to instruct the jury on the lesser included offense of murder. The majority finds that there is no error because the evidence does not reasonably support an acquittal on aggravated murder as well as a conviction upon the lesser

included offense. Again, I cannot agree. Originally the appellant was convicted of aggravated burglary and aggravated robbery. These convictions form the basis for his conviction of aggravated murder. The appeals court, however, concluded that appellant could not be convicted of both aggravated burglary and aggravated robbery because they were allied crimes of similar import ... [and the] appeals court vacated appellant's aggravated burglary conviction. It also vacated the conviction on the gun specification Then, however, the court of appeals held that the trial court did not err in denying appellant's motion pursuant to Crim.R. 29 for acquittal on the aggravated robbery charge, because "reasonable minds could reach different conclusions as to whether each material element of aggravated robbery had been proven beyond a reasonable doubt." The trial court, however, instructed the jury that they could not find appellant guilty of aggravated murder unless they found him guilty of aggravated robbery and/or aggravated burglary—in other words, that either aggravated robbery or aggravated burglary was an element of aggravated murder. If reasonable minds could differ as to whether an aggravated robbery took place, they could differ as to whether each material element of aggravated murder had been proven beyond a reasonable doubt because a finding of aggravated murder (in this case) is predicated upon the finding of aggravated robbery... .

Appellant's low IQ also bothers me. Despite the line of cases beginning with *State v. Jenkins* (1984), 15 Ohio St.3d 164, ... in which this court has held that lack of intelligence is not a sufficiently mitigating "mental disease or defect" pursuant to R.C. 2929.04(B)(3), I believe that a level of intelligence as low as the one here should be given considerable weight before a death penalty is imposed.

Last, I find prosecutorial misconduct here. Though standing alone it is not enough to compel reversal, it adds to the concern about the fairness of the capital sentence when it is combined with the other errors... .

Id., 63 Ohio St.3d, at 255-256. (Brown, J., dissenting.) (Emphasis added.) The Court's majority overlooked a series of errors toward one apparent end: affirming

of the death penalty. Forcing square pegs into round holes, which is not effective and meaningful appellate review.

Another anomaly of the appellate review of death sentences in Ohio is the consideration by the courts of non-statutory aggravating circumstances. *State v. Richey*, 64 Ohio St. 3d 353, 1992 Ohio 44, 595 N.E.2d 915, highlights that shortcoming. The Court found that Richey deserved the death penalty because “[i]n torching an apartment building at night, he jeopardized the lives of others in addition to killing an innocent two-year-old child.” *Id.*, at 372. One need not excuse Mr. Richey’s atrocious conduct¹⁷ and yet may properly conclude that it is *not* a statutory aggravating circumstance. The shocking actions of the defendant produce the type of emotional reaction that might well cause jurors to ignore a careful balancing of aggravating and mitigating evidence that the Eighth Amendment demands. The Court, which sits to insure that those types of things do not occur, compounded the error—then admitted, even if unwittingly, to the error in the Court’s opinion.

Proportionality. The Court has consistently held that its proportionality review is constitutionally sufficient. The proportionality review that is required

¹⁷ Or maybe not so atrocious conduct, as Richey was later released.

of appellate courts in Ohio need only be confined to the appellate district. Moreover, and perhaps most incredibly, the proportionality review is limited to a review of decisions where the death penalty was actually imposed. *See, e.g., State v. Richey*, supra.

The proportionality review performed in Ohio is a far cry from the proportionality review approved by the United States Supreme Court in *Gregg v. Georgia*, ante. In discussing the Georgia appellate review procedure, the Supreme Court noted that the review procedure is a statewide one and noted that cases in which the death penalty is not imposed are included in the comparison and review. As to the statewide review of cases, the Supreme Court quoted the Georgia Supreme Court in *Moore v. State*, 233 Ga. 861, 864, 213 S.E.2d 829 (1975), where the state court held: “we view it to be our duty under the similarity standard to assure that no death sentence is affirmed unless in similar cases throughout the state the death has been imposed generally” As to the obligation to include cases where the death penalty was *not* imposed, *see, Gregg*, ante, at 204, fn. 56: “The Georgia court has the authority to consider [non-appealed capital convictions where a life sentence is imposed and cases involving homicides or a capital conviction is not obtained], *see Ross v. State*, 233 Ga. 361, 365-366, 211 S.E.2d 356, 359 (1974), and it does consider appealed murder cases

where a life sentence has been imposed... .”

Another reason that the Supreme Court approved the Georgia procedure in *Gregg* is that the state court was at least giving the appearance of actually performing a proportionality review. The Supreme Court said:

It is apparent that the Supreme Court of Georgia has taken its review responsibilities seriously. In *Coley v. State* (1974), 231 Ga. 829, 204 S.E.2d 612], it held that “[t]he prior cases indicate that the past practice among juries faced with similar factual situations and like aggravating circumstances has been to impose only the sentence of life imprisonment for the offense of rape, rather than death.” 231 Ga., at 835, 204 S.E.2d, at 617. It thereupon reduced *Coley*’s sentence from death to life imprisonment. Similarly, although armed robbery is a capital offense under Georgia law, §26-1902 (1972), the Georgia court concluded that the death sentences imposed in this case for that crime were “unusual” in that they are rarely imposed for [armed robbery]. Thus, under the test provided by statute, ... they must be considered to be excessive or disproportionate to the penalties imposed in similar cases. 233 Ga., at 127, 210 S.E.2d, at 667. The court therefore vacated *Gregg*’s death sentences for armed robbery and has followed a similar course in every other armed robbery death penalty case to come before it. [Citations to Georgia cases omitted.]

The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedure assure that no defendant convicted under such circumstances will suffer a sentence of death.

Id., at 205-206. The last sentence of the opinion quoted above clearly indicates

that a proportionality review can only be a true proportionality review when it includes cases in which the death penalty was *not* imposed. Ohio refuses to recognize this basic point.

The death penalty is no less capriciously imposed if the caprice is in appellate review as opposed to the trial. The death penalty no more satisfies the constitutions if it is appellate judges who act with whim and caprice while pretending not to than if a jury does the same thing.

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, this Court must declare the death penalty in Ohio unconstitutional and vacate Appellant's death sentence.

"International law is a part of our law[.]" *The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 44 L. Ed. 320 (1900). A treaty made by the United States is the supreme law of the land. Article Six, 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, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968). In fact, international law creates remediable rights for United States citizens. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980); *Forti v. Suarez-Mason*, 672

F.Supp. 1531 (N.D. Cal. 1987).

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.

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.

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.

Ohio's statutory scheme also violates the ICERD's protections against race discrimination.

Appellant's counsel asked the trial court to dismiss the capital specifications, but the trial court refused to do so. This was clear constitutional error. Appellant's sentence of death must be vacated.

Proposition of Law No. 8

A Conviction Upon Insufficient Evidence of Tampering with Evidence Violates Due Process and the Liberties Secured by the United States Constitution and Ohio Const. Art. I, §§ 1, 2, 10 and 16.

R.C. 2921.12(A)(1) provides the essential elements of tampering with evidence as follows:

No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall * * * [a]lter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation.

This Court recently construed the elements necessary to prove a charge of tampering with evidence in *State v. Straley*, 139 Ohio St.3d 339, 342, 2014 Ohio 2139, 11 N.E.3d 1175, and held that three elements of the offense are as follows:

(1) the knowledge of an official proceeding or investigation in progress or likely to be instituted, (2) the alteration, destruction, concealment, or removal of the potential evidence, (3) the purpose of impairing the potential evidence's availability or value in such proceeding or investigation.

This Court then held that the evidence tampered with must have relevance to an ongoing or likely investigation:

the evidence tampered with must have some relevance to an ongoing or likely investigation to support a tampering charge. R.C. 2921.12(A)(1) requires the state to prove that an offender, with knowledge of an ongoing (or likely) investigation or proceeding, tampered with (altered, destroyed, concealed, or removed) a record, document, or thing "with purpose to impair its value or availability as

evidence in such proceeding or investigation.” (Emphasis added.) The word “such” is an adjective commonly used to avoid repetition. It means “having a quality already or just specified.” *Webster’s Third New International Dictionary* 2283 (1986). In this instance, “such” investigation refers back to the investigation just specified, *i.e.*, the one that the defendant knows is ongoing or is likely to be instituted. Therefore, the evidence must relate to that investigation; otherwise, the word “such” loses all meaning. The state’s argument that all evidence recovered in an investigation should be included in the ambit of the tampering statute would require us to change the language from “such” proceeding or investigation to “any” proceeding or investigation.

Id., at 344. Drawing a parallel to the Court’s analysis of the tampering with witness statute in *State v. Malone*, 121 Ohio St.3d 244, 2009 Ohio 310, 903 N.E.2d 614, the Court in *Straley* held that the tampering statute applies “only when a person intends to impair availability or value of evidence in an ongoing investigation or proceeding.”

In this case, while there was testimony that Appellant burned his clothes and his watch, the State failed to produce *any* evidence that Appellant did so with the purpose to impair the value or availability of the clothing as evidence, or that the clothes and the watch held any evidentiary value. In fact, when asked why he burned his clothes, Appellant stated, “Why not?” The State presented no evidence regarding an on-going investigation when the clothing was burned, and no evidence was elicited from any witness as to what could have been obtained from

the clothing or from the watch. Notably, the weapon which the State claims was the murder weapon was *not* destroyed by Appellant, a fact reflecting heavily against the State on the “purpose” element.

To establish a violation of the tampering statute, the state must show that the defendant, with knowledge of a proceeding or investigation that is in progress or likely to be instituted, altered, destroyed, concealed, or removed any “record, document, or thing” with the purpose to impair its value or availability as evidence in that proceeding or investigation. There is no need to expand the reach of the statute beyond its plain meaning.

Straley, at 345.

Due process requires the State prove every element of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty.

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

Id., at 364.

In *State v. Thompkins*, 78 Ohio St.3d 380, 1997 Ohio 52, 678 N.E.2d 541, this Court delineated the standards for a sufficiency of the evidence challenge, noting that sufficiency of the evidence is “a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law.” *Id.*, at 386. When determining whether the evidence is sufficient to support the verdict the reviewing court must determine whether, “after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), ¶2 of the syl. Based upon the evidence presented, the jury could not legitimately find all essential elements to support a conviction for tampering with evidence beyond a reasonable doubt. Appellant’s tampering conviction must be vacated.

Proposition of Law No. 9

Police Armed Only with an Arrest Warrant May Not Enter the Home of a Third Person to Effect the Arrest Without Consent, and Fruits of Such Illegal Actions May Not Be Used as Evidence in a Criminal Trial. Fourth and Fourteenth Amendments, United States Constitution, and Ohio Constitution, Article I, Sections 14 and 16.

Appellant was arrested by United States Marshals on October 16, 2012 at 1525 Britain Road in Tallmadge, Ohio. (T.p., Vol. II, p. 97; T.p., Vol. VIII, p. 1557.)

It is undisputed that officers had no search warrant to permit them to enter or search the residence. (T.p., Vol. II, p. 125.) When officers knocked on the apartment door, Appellant's friend opened the door. Once the door was opened, officers claimed that they saw Appellant inside. They immediately pushed the homeowner aside, entered the residence and cuffed Appellant. (T.p., Vol. II, pp.100-101, 125-126.) Only after entering the apartment did officers see a handgun on the floor next to Appellant. (T.p., Vol. II, p. 127.) When they saw the gun, they had no legal right to be inside.

Appellant filed a pretrial motion to suppress all items seized pursuant to the unlawful entry and any evidence and testimony related to the unlawful search. (T.d.164) The police seized the items, which included the gun and magazine. The gun was tested and introduced at trial as the murder weapon. The government filed a reply to the Motion to Suppress claiming a lawful search

incident to arrest and exigent circumstances justified the failure to obtain a warrant before entering the apartment. (T.d.188). The exception is for a search incident to a lawful arrest. The arrest was not lawful, as officers had no legal right to enter the apartment to effect the arrest. Neither exception to the Fourth Amendment's warrant requirement are applicable. The trial court should have granted Appellant's Motion to Suppress.

As the Supreme Court recently recognized, when analyzing whether a search has occurred within the Fourth Amendment requirements "there is no precedent for the proposition that whether a search has occurred depends on the nature of the crime being investigated." *United States v. Jones*, __ U.S.__, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012). The Fourth Amendment was designed to protect the citizenry from overreaching actions by the government to search private places and to seize things—whether those things be tangible items, intangible items, or live human bodies. *See*, the Fourth Amendment of the U.S. Constitution. The Ohio Constitution guarantees essentially the same liberties. *See*, Ohio Constitution, Article I, Section 14. The "right of a man to retreat into his own home and there be free from unreasonable governmental intrusion" stands "[a]t the very core' of the Fourth Amendment," *Kyllo v. United States*, 533 U.S. 27, 31, 150 L.Ed.2d 94, 121 S.Ct. 2038 (2001), quoting *Silverman v. United States*,

365 U.S. 505, 511, 5 L.Ed.2d 734, 81 S.Ct. 679 (1961). The basic rule of the Fourth Amendment is that searches and seizures inside a home without a warrant are “presumptively unreasonable.” See, *Payton v. New York*, 445 U.S. 573, 586, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980).

Though often criticized, the principal method of enforcing these guarantees is through the employment of the exclusionary rule.¹⁸ It is an essential rule that, in seizing goods and articles, law enforcement officers must secure and use search warrants wherever reasonably practicable. The rule is premised upon the desirability of having magistrates, rather than police officers, determine when searches and seizures are permissible and what limitations should be placed thereon. To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the Framers of the Fourth Amendment required adherence to judicial processes wherever possible.

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a

¹⁸ In 1961, the exclusionary rule was applied to state proceedings, through the Due Process Clause of Fourteenth Amendment to the United States Constitution. See, *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

Johnson v. United States, 333 U.S. 10, 13-14, 68 S.Ct. 367, 92 L.Ed. 436 (1948)

(Footnote omitted.) Because the "physical entry of the home is the chief evil against which . . . the Fourth Amendment is directed" officers have limited authority to enter a residence to effectuate the arrest pursuant to an arrest warrant. *Payton v. New York*, 445 U.S. 573, 603, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). While they have authority to enter the house of the person named in the arrest warrant, without a search warrant or consent, they may not enter the home of a third party to complete an arrest. Officers had neither a search warrant nor consent.

Officers arrived at the Britain Road apartment to look for Appellant. When the door was opened. They claimed to see Appellant. No effort was made to identify themselves, to ask if Appellant was present, or to ask Appellant to come outside. The door was opened, the officer saw a man he believed to be Appellant

and the officer entered. Under such circumstances, entry without a warrant was improper.

A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited power that grows out of the inherent necessities of the situation at the time of the arrest. “But there must be something more in the way of necessity than merely a lawful arrest.” *Trupiano v. United States*, 334 U.S. 699, 705, 708, 68 S.Ct. 1229, 92 L.Ed. 1663 (1948). Here, there was no lawful arrest.

Under *Chimel* [v. California (1969), 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685, police may search incident to arrest only the space within an arrestee’s “immediate control,” meaning “the area from within which he might gain possession of a weapon or destructible evidence.” 395 U.S., at 763, 89 S.Ct. 2034, 23 L.Ed.2d 685]. The safety and evidentiary justifications underlying *Chimel*’s reaching-distance rule determine *Belton*’s scope. Accordingly, we hold that *Belton* does not authorize a vehicle search incident to a recent occupant’s arrest after the arrestee has been secured and cannot access the interior of the vehicle. Consistent with the holding in *Thornton v. United States*, 541 U.S. 615, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004), and following the suggestion in Justice Scalia’s opinion concurring in the judgment in that case, *id.*, at 632, 124 S.Ct. 2127, 158 L.Ed.2d 905, we also conclude that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.

See, Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 1714, 173 L.Ed.2d 485 (2009).

The reasonableness of a warrantless search is analyzed with the premise in mind that “searches conducted outside the judicial process, without prior approval by

judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)(footnote omitted). This was an unauthorized warrantless search.

The government claimed the search was incident to a lawful arrest. *See, Weeks v. United States*, 232 U.S. 383, 392, 34 S.Ct. 341, 58 L.Ed. 652 (1914). The exception derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations. *See, United States v. Robinson*, 414 U.S. 218, 230-234, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). *Chimel v. California*, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), held that a search incident to arrest may only include the arrestee’s person and the area within his immediate control, *i.e.*, the area from within which he might gain possession of a weapon or destructible evidence. That spatial limitation ensures that the scope of a search incident to arrest is commensurate with the twin purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. *See ibid.* (noting that searches incident to arrest are reasonable “in order to remove any weapons [the arrestee] might seek to use” and “in order to prevent [the] concealment or destruction” of evidence (emphasis added)). If there is no possibility that an arrestee could reach into the

area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply. *E.g.*, *Preston v. United States*, 376 U.S. 364, 367-368, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964). Of course, to take advantage of such an exception, officers had no more right to be in that apartment to execute the arrest warrant than they had to execute it in Chicago, Phoenix, Paris or London. The entry was illegal, and so, therefore, so was the arrest.

Pursuant to their authority to conduct a search incident to arrest, police are authorized to conduct a full search of the arrestee's person and the area within his immediate control, that is, the area from which he might be able to reach or grab a weapon or evidence. *See, State v. Myers*, 119 Ohio App.3d 376, 380, 695 N.E.2d 327 (1997), citing *Chimel, supra*. Once an arrestee is neutralized by police, such as by handcuffing, as immediately occurred here the extent of police authority to search the area in which the person was arrested diminishes because the arrestee no longer has an ability to reach or grab a weapon or some other item from that area. *See, Centerville v. Smith*, 43 Ohio App.2d 3, 332 N.E.2d 69 (2nd Dist. 1973). There officers located Smith in the bathroom of the house and took him to the living room. A later search of the bedroom adjacent to the bathroom yielded a bag of amphetamines. The court held that the motion to

suppress the amphetamines should have been granted by the trial court since the search did not constitute a valid search incident to an arrest.

Time and again, the Supreme Court has held that searches *and seizures* conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment, subject only to a few *specifically established and well delineated* exceptions. *Thompson v. Louisiana*, 469 U.S. 17, 19-20, 83 L.Ed.2d 246, 105 S.Ct. 409 (1984). There was no such exception here.

The Court in *Steagald v. United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981), held that entry into the home of a third person without a search warrant when there was an arrest warrant for someone other than the homeowner or resident is unlawful. Justice Marshall described the issue as a narrow one: “whether an arrest warrant—as opposed to a search warrant—is adequate to protect the Fourth Amendment interests of persons not named in the warrant, when their homes are searched without their consent and in the absence of exigent circumstances.” 451 U.S., at 212. Arrest warrants and search warrants require different analysis the issuing judge or magistrate. A search warrant reflects a magistrate’s determination that there is probable cause to believe that the evidence sought will aid in apprehension or conviction, and describes the

particular place to be searched and things to be seized. An arrest warrant, on the other hand, indicates nothing more than that an “officer has probable cause to believe the suspect committed a crime; it affords no basis to believe that the suspect is in some stranger’s home.” See, *Fisher v. Volz*, 496 F.2d 333, 341 (3rd Cir. 1974).

It was error for the trial court to overrule the motion to suppress and to allow the weapon and magazine into evidence. Appellant’s statements to the police are also, of course, “fruits” of the illegal arrest. See, *Wong Sun v. United States*. This Court must find that it was error not to suppress the items found, and order the matter remanded for a new trial with that evidence, testimony about it, and the fruits thereof excluded from the government’s case.

Proposition of Law No.10

The Fifth and Fourteenth Amendments to the United States Constitution, and Ohio Constitution, Article I, Sections 1, 2, 10, and 16 require rights be read to an individual pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), as soon as practicable when an individual is in custody and questioned.

I

Appellant filed a motion to suppress statements given to the United States Marshals that arrested him and statements made pursuant to questioning by the Warren Police. (T.d. 164) Appellant was arrested by United States Marshals in Tallmadge, Ohio. When officers entered the apartment, Appellant immediately put his hands up and surrendered. (T.p. Vol. II, p. 101.) No *Miranda* warnings were given at the time of arrest. (T.p., Vol. II, p. 102, 131.) Appellant was immediately hand cuffed and placed in the Marshal's vehicle and transported to the Summit County jail. (T.p., Vol. II, p. 104-106.) Deputy Marshal Boldin testified:

A. I then entered the apartment and moved up to where he was laying. With other officers behind me providing cover, I placed handcuffs on Mr. Martin.

Q. And he was under arrest pursuant to that warrant at that point; is that correct?

A. That is correct.

Q. You did not Mirandize him at that point; is that correct?

A. No, at that—I did not Mirandize him at that point. At that point, the scene was still not secure.

(T.p. Vol. II, pp. 101-102.)

Two (2) Marshals were in the vehicle that transported Appellant to the Summit County jail, Deputy Marshals William Boldin, and Anne Murphy. Boldin denied administering *Miranda* warnings to Appellant until after arriving at the Summit County jail. (T.p., Vol. II, p. 133.) Murphy however claimed Boldin read *Miranda* warnings on the way to the Summit County jail. (T.p. Suppression, Vol. II, p. 153.) Once at the Summit County jail, the Marshals obtained a Rule 4 waiver form, and Appellant waived his rights to an inter-County transfer hearing, while sitting in the parking lot of the jail. (T.p. , Vol. II, p. 155.) No effort was made to obtain a *Miranda* waiver form, and Appellant never executed a written *Miranda* waiver, until he arrived at the Warren police station. The Marshals denied questioning Appellant during the ride to Summit County jail, and later back to Trumbull County. However, by the time they arrived in Trumbull County the Marshals had obtained supposedly volunteered information about the murder of Jeremy Cole, tying up of Melissa Putnam, and the location of the burn pile, as well as information regarding the murder of Appellant's mother. The government

claims Appellant was not asked one question while driving to the Summit County jail and not one question while driving to Trumbull County. Upon arrival at the Warren Police Department, Appellant was *Mirandized*. However, by that time the government had obtained incriminating admissions from Appellant.

The government must establish a waiver rather than Appellant establishing an invocation of his rights. Put another way, there is no presumption of a waiver of rights. In addition, the mere failure of a suspect to request the assistance of counsel does not constitute a waiver of the right to counsel. *North Carolina v. Butler*, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979). Curiously, the government claims that Appellant made fatal admission after fatal admission, and no one stopped to at least warn Appellant.

II.

The burden to prove that a defendant committed a crime is always the government's. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). This requirement is a natural corollary of, and is logically compelled by, a citizen's privilege not to incriminate himself. Undeniably, this is the hallmark of our accusatory system of criminal justice. A suspect in custody may offer a statement in response to interrogation, but only if it is shown that he understood what rights he is claimed to have relinquished or abandoned when he agreed to give the

statement. The government must demonstrate that the privilege against self-incrimination was, in the classic locution, knowingly, voluntarily, and intelligently waived. Waiver “is ordinarily an intentional relinquishment of a known right or privilege.” *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

The burden was, therefore, upon the government to establish that the Appellant knew or understood his constitutional rights; that relinquishment of the same was intentional; and that he acted knowingly, intelligently and voluntarily when doing so. It is absurd to presume that a waiver of constitutional rights done outside of a courtroom may be done with any less assurance of the voluntary character of the relinquishment than judges explore during the course of a plea hearing. There is no reason to presume comprehension and waiver of constitutional rights in one setting but not another. Relinquishment of a right generally has the same effect whether done in a courthouse or a police station. The government did not establish a valid waiver in this case. Any statements made by the Appellant to law enforcement officers should have been suppressed, but were not.

Our “accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own

independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.” *Chambers v. Florida*, 309 U.S. 227, 235, 60 S.Ct. 472, 84 L.Ed. 716 (1940). The privilege against self-incrimination is honored only when the citizen is guaranteed the ability “to remain silent unless he chooses to speak in the unfettered exercise of his own will.” *See, Malloy v. Hogan*, 378 U.S. 1, 8, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

III

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), recognized that the atmosphere of compulsion bred by *incommunicado* custodial interrogation, coupled with modern police tactics which shy away from the rubber hose and bright light, and focus instead upon psychological compulsion, can overbear the will of a suspect to resist questioning and assert his rights.

To admit Appellant’s statements and still satisfy the requirements of the United States and Ohio Constitutions, the government was required to show that the Appellant’s statements were a choice “to speak in the unfettered exercise of his own will.” *Malloy v. Hogan*, 378 U.S., at 8. The warnings exist so that Appellant might determine if he wished to speak as an exercise of free will. The government was required to prove that the Appellant’s statements were obtained in such a fashion as not to violate his right to the assistance of counsel. *See, Fifth,*

Sixth, and Fourteenth Amendments to United States Constitution; Ohio Constitution Article I, Sections 1 and 10. Though the marshals obtained a Rule 4 waiver at the Summit County jail, apparently no effort was made to obtain or secure a *Miranda* waiver form.

There can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings. The privilege serves to protect persons in any setting in which their freedom of action is curtailed in any significant way from being compelled to speak to government agents, whether to incriminate themselves or exculpate themselves.¹⁹ *Miranda* warnings are necessary to guard against the inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. *Miranda v. Arizona, supra*. Under *Malloy v. Hogan*, the privilege is fully assertable in state criminal proceedings such as these. And of

¹⁹ See, *Miranda*, 384 U.S. at 476-477:

Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely "exculpatory." If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.

course Ohio has separate constitutional provisions which apply to the circumstances here, even if those provisions are not fully explained by the courts of this State. Ohio Constitution, Article I, Sections 1, 2, 10, and 16, are all reproduced in the Appendix. The voluntariness doctrine in State cases, as *Malloy* indicates, encompasses *all* interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free and rational choice.

A defendant's constitutional rights are violated if his conviction is based, in whole or in part, upon an involuntary statement, regardless of its truth or falsity. *Rogers v. Richmond*, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961). This is true even if there is sufficient evidence aside from the improperly admitted confession to support the conviction. *See, e.g., Bram v. United States*, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897).

The State appeared to believe that it was incumbent upon Appellant to show that he asserted his rights by some affirmative act. This is precisely backward. It is incumbent upon the *government* to establish waiver. Appellant was not required to assert his rights, and if the government could not demonstrate a valid waiver, there was no waiver. All the claims about not asserting rights do not substitute for a showing of waiver.

The burden to prove that the waivers purportedly obtained and any statement made were done voluntarily is clearly upon the government. In *Tague v. Louisiana*, 444 U.S. 469, 100 S.Ct. 652, 62 L.Ed.2d 622 (1980), United States Supreme Court granted certiorari and then reversed the case without even the necessity of oral argument. At the suppression hearing in the trial court, the arresting officer:

testified that he read Petitioner his *Miranda* rights from a card, that he could not presently remember what those rights were, that he could not recall whether he asked petitioner whether he understood the rights as read to him, and that he “couldn’t say yes or no” whether he rendered any tests to determine whether petitioner was literate or otherwise capable of understanding his rights.

Id., 444 U.S. at 469. The Louisiana Supreme Court held that the officer was not compelled to give an intelligence test to a person who has been advised of his rights to determine if he understands them. But one justice of the Louisiana Court wrote in dissent that the Court was reversing the *Miranda* standard, and creating a “presumption that the defendant understood his constitutional rights,” thereby placing “the burden of proof upon the defendant, instead of the state, to demonstrate whether the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.” *Id.*, 444 U.S. at 470; *State v. Tague*, 372 So.2d 555, 558 (La. 1978).

Concerning the point made by the State court dissenting judge, the United

States Supreme Court, *per curiam*, said: “We agree. The [Louisiana Supreme Court] majority’s error is readily apparent * * *. In this case, no evidence at all was introduced to prove that petitioner knowingly and intelligently waived his rights before making the inculpatory statement. The statement was therefore inadmissible.” 444 U.S. at 470. *Tague* is no revelation. There isn’t a common pleas court in this State that would permit a plea to a felony offense without a sufficient colloquy. No court would rely on the notion that since a defendant did not say that he did not understand his rights, and was pleading guilty, he *must* have understood them. Are the constitutional rights purportedly given up in a police confession any less sacrosanct? The answer is obvious.

This Court solidified the issue that statements made after *Miranda* warnings were given which merely confirmed pre-*Miranda* statements were inadmissible. *State v. Farris*, 109 Ohio St.3d 519, 2006 Ohio 3255, 849 N.E.2d 985. *Farris* made clear that the constitutional mandates of *Miranda* are not satisfied with mere “talismanic incantation” of the warnings, but must be given in a manner that “effectuates its purpose of reasonably informing a defendant of his rights.” The only evidence that Appellant was advised of and waived his *Miranda* rights was the waiver form executed at the Warren police station, after Appellant had already disclosed many of the details of the murder.

The statements made to Marshals Boldin and Murphy should have been excluded under *Miranda*. Accordingly, Appellant's conviction and death sentence should be vacated, and the case remanded for retrial without use of the statements.

CONCLUSION

The processes and procedures employed in capital cases must be vigilantly monitored to guard against relaxed standards because we think, or in this case know that the defendant is guilty. The fact that Appellant admitted his guilt does not lessen the requirements for ensuring that a verdict of death penalty was arrived at through Constitutionally sound procedures. Here, the death penalty was recommended by a jury composed of the individuals where little effective probing voir dire was conducted regarding extensive pretrial publicity and jurors ability to not just listen to mitigation, but truly consider the mitigation offered in the weighing of the aggravating circumstances and mitigating factor. As a result, the recommendation for death came from a jury composed of individuals who knew the victim, who lived close to where the murder occurred and who had been exposed to extensive pretrial publicity. As if that wasn't enough to tip the scales in favor death, the prosecutor did not limit the information presented to the jury in the sentencing phase to the statutorily mandated aggravating circumstances. Instead, the jury was presented all the evidence and testimony offered in the trial phase, relating to the gun, shell casings, magazine and electrical cord. The jury was given no guidance as to what that supposedly included. And so, the jury was told by the prosecutor to consider "all that evidence" along with the fact that the

victim was shot between the eyes from 3-8 inches away in deciding whether to impose death for a defendant who said he could take the needle. Under such circumstances, there was no narrowing of the class of offenders for whom death is appropriate. As several jurors acknowledged, they wanted to hear about Appellant's childhood and upbringing. There was no assurance that the jury would actually weigh the mitigating factors against the aggravating circumstances found in the first phase. The trial judge himself could not limit his consideration to the aggravating circumstances. The trial judge himself, as prompted by the prosecutor, considered the facts of the aggravated murder when deciding to impose death.

The facts and circumstances of this case were put into play when David Martin was 4 years old. Had the jury been properly voir dired, had trial counsel functioned as counsel and asked probing questions during voir dire about pretrial publicity and the death penalty, had trial counsel exercised peremptory challenges for those jurors the trial court refused to remove for cause but who truly had no business being on this jury, had the prosecutor limited the State's evidence in mitigation to that which was relevant to the aggravating circumstances and had the judge appropriately considered only the statutory aggravating circumstances we would then have confidence that the verdict of death was reliably imposed. It

was not. Appellant's sentence must be vacated.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent by regular U.S. mail on the 10 day of October, 2015 to: Mr. Dennis Watkins, Esq., Trumbull County Prosecuting Attorney, and Ms. Luwayne Annos, Esq., 160 High Street, NW, Warren, Ohio 44481-1005.



JOHN B. JUHASZ
COUNSEL FOR APPELLANT

APPENDIX

State v. Martin, N° 2014-1922

Notice of Appeal App 2

Constitutional Provisions, Statutes, Rules App 30

In the Supreme Court of Ohio

STATE OF OHIO,

Appellee

-vs-

DAVID MARTIN,

Appellant

} Case N^o _____

} On Appeal from the Trumbull
} County Court of Common Pleas

} Case N^o 2012 CR 00735

NOTICE OF APPEAL OF APPELLANT DAVID MARTIN

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In the Supreme Court of Ohio

STATE OF OHIO,

Appellee

-vs-

DAVID MARTIN,

Appellant

} Case N^o _____

} On Appeal from the Trumbull
} County Court of Common Pleas

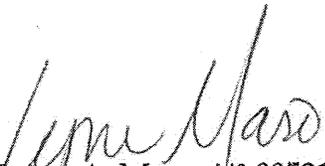
} Case N^o 2012 CR 735

NOTICE OF APPEAL OF APPELLANT DAVID MARTIN

APPELLANT, DAVID MARTIN, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Trumbull County Court of Common Pleas entered on September 24, and amended on October 8, 2014 *nunc pro tunc*. This case involves imposition of the death penalty for an offense committed on or after January 1, 1995, and is an appeal of right as set forth in S.Ct.Prac. 5.01(A)(4). The sentencing entries and trial court's opinion are attached.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent by regular U.S. mail on the 5th day of November, 2014 to: Mr. Dennis Watkins, Esq., 160 High Street NW, Warren, Ohio 44481-1005.


JOHN B. JUHASZ
COUNSEL FOR APPELLANT

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**IN THE COURT OF COMMON PLEAS
GENERAL DIVISION
TRUMBULL COUNTY, OHIO**

State of Ohio)	Case No. 2012CR00735
)	
Plaintiff,	)	Judge Andrew D. Logan
)	
vs.	)	OPINION OF THE COURT
)	
David Martin	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
Defendant.	)	REGARDING IMPOSITION
	)	OF DEATH PENALTY

On September 11, 2014, the Defendant, David Martin, was found guilty following a trial before a petit jury and after due deliberation by said jury of the following: Count One: Aggravated Murder with specifications of Aggravating Circumstances and Firearm Specification in violation of R.C. 2903.01(B)&(F); 2941.14(C); 2929.04(A)(5); 2929.04(A)(7); and 2941.145; Count Two: Aggravated Murder with specifications of Aggravating Circumstances and Firearm Specification in violation of R.C. 2903.01(A)&(F); 2941.14(C); 2929.04(A)(5); 2929.04(A)(7); and 2941.145; Count Three: Attempted Aggravated Murder with Firearm Specification in violation of R.C. 2923.02(A)&(E)(1); 2903.01(B)&(F); and 2941.145; Counts Four and Five: Aggravated Robbery with Firearm Specifications in violation of R.C. 2911.01(A)(1)&(3)&(C); and 2941.145; Counts Six and Seven: Kidnapping with Firearm Specifications in violation of R.C. 2905.01(A)(2)&(C)(1); and 2941.145; Count Eight: Tampering with Evidence in violation of R.C. 2921.12(A)(1)&(B).

On September 17, 2014, the State elected to proceed to the second phase as to Count Two only. On the same day, after due deliberations following the second phase of this trial, the duly empaneled petit jury returned a recommendation of death as the appropriate sentence for Defendant Martin on Count Two. The aggravating circumstances for Count Two were set forth in the indictment as follows from R.C. 2929.04(A)(5) and (A)(7):

1. that the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons;

2. that the offense was committed while Defendant Martin was committing, attempting to commit, or fleeing immediately after or attempting to commit Kidnapping, and that Defendant Martin was the principal offender in the commission of the Aggravated Murder;

3. that the offense was committed while Defendant Martin was committing, attempting to commit, or fleeing immediately after or attempting to commit Aggravated Robbery, and that Defendant Martin was the principal offender in the commission of the Aggravated Murder.

The Court finds these Aggravating Circumstances were proven beyond a reasonable doubt. Defendant Martin killed Jeremy Cole with purpose and attempted to kill Melissa Putnam. Defendant Martin was the principal offender in this Aggravated Murder and he kidnapped both Jeremy Cole and Melissa Putnam and fled immediately after committing this kidnapping and the aggravated murder. Defendant Martin was the principal offender in the Aggravated Murder and committed aggravated robbery of Jeremy Cole and fled immediately after committing such acts.

The evidence established beyond a reasonable doubt that Defendant Martin killed Jeremy Cole with purpose and attempted to kill Melissa Putnam. Defendant Martin restrained Jeremy Cole and provided no opportunity for him to defend himself.

Then, Defendant Martin purposefully shot Jeremy Cole between the eyes from a distance of three to eight inches away. Defendant Martin then attempted to kill Melissa Putnam. Somehow, Melissa Putnam was able to protect herself and shield her head with her hand. The projectile passed through Melissa's hand and lodged in her head. The evidence showed beyond a reasonable doubt that Defendant Martin intended to kill Melissa Putnam; just as he killed Jeremy Cole.

Defendant Martin was the principal offender in the Aggravated Murder of Jeremy Cole. In addition, Defendant Martin kidnapped both Jeremy Cole and Melissa Putnam and fled immediately after committing this kidnapping and the aggravated murder. Defendant Martin forced Melissa Putnam to tie up Jeremy Cole at gunpoint. Then, Defendant Martin forced Melissa Putnam to secure herself by tying an extension cord around her wrists. Defendant Martin moved Jeremy Cole to the master bedroom and separated Melissa Putnam by removing her to the other bedroom. He performed all of these acts while brandishing a gun. There were no accomplices in this endeavor. Defendant Martin was the sole offender. Defendant Martin fled immediately after killing Jeremy Cole.

Not only did the evidence establish beyond a reasonable doubt that Defendant Martin kidnapped, fled and committed the aggravated murder of Jeremy Cole and attempted murder of Melissa Putnam, the evidence also clearly established beyond a reasonable doubt that Defendant Martin committed the offense of Aggravated Robbery against his murder victim, Jeremy Cole. Defendant Martin took the cell phone of Jeremy Cole while he was threatening him with the gun that eventually was used in

his murder. Defendant Martin fled the scene after he robbed, kidnapped and killed Jeremy Cole.

Having found the aggravating circumstances listed above were proven beyond a reasonable doubt, the Court now must weigh those aggravating circumstances against the nature and circumstances of the offense, the history, character, and background of the offender, plus the additional statutory factors set forth in R.C. 2929.04(B) as mitigating factors.

MITIGATING FACTORS

Pursuant to R.C. 2929.03(F), the Court makes the following findings regarding the factors listed in R.C. 2929.04(B):

1. *"Whether the victim of the offense induced or facilitated it; ***"*

The Court finds there is absolutely no evidence before this Court to suggest Jeremy Cole, the victim in this case, in any way induced or facilitated this crime. There is no evidence of wrongdoing on behalf of Jeremy Cole. He was visiting his friend. He had just returned from driving her to various business locations in an effort to aid in her employment search. In laymen's terms, Jeremy Cole was minding his own business.

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; ***"*

The Court finds there is no evidence before the Court that Martin was under any duress, coercion or strong provocation to commit the crime.

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; ***"*

The Court finds there is no evidence to suggest Martin lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the rules of law. In fact, quite the opposite is true. Martin knew immediately why the United States Marshalls were knocking on his friend's door in Tallmadge, Ohio. He admitted his guilt to the deputies on the return trip to Warren. There is no evidence of any mental disease or defect.

4. *"The youth of the offender; ***"*

The Court finds the age of Martin is not a factor for consideration.

5. *"The offender's lack of a significant history of prior criminal convictions and delinquency adjudications; ***"*

The Court finds Martin has a significant criminal record and therefore this factor does not weigh in his favor.

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; ***"*

The Court finds Martin was the sole offender in each of the acts for which he now stands convicted in this case.

7. *"Any other factors that are relevant to the issue of whether the offender should be sentenced to death."*

The Court finds there were several mitigating elements presented in the second phase of Martin's trial. The following mitigating factors were identified:

1. "David Martin's mother was murdered when he was four-years old. By the time she was murdered, his mother had become a drug addict and a prostitute who traded her body for drugs;
2. After his mother was murdered, his father moved his sons into the Morris Black subsidized apartment complex in an impoverished and crime-ridden ghetto;
3. His father felt helpless and hopeless when it came to trying to raise his sons David and Ben Jr. in a violent environment;
4. After he was diagnosed HIV positive when David was eleven-years old, David's father attempted suicide and was hospitalized for psychiatric problems;
5. David Martin was often left to his own on the streets of a crime-ridden, violent and dangerous ghetto environment;
6. When David Martin was a child, an adolescent and a teenager, his father never followed through to get him counselling that was offered by Children Services;
7. When he was arrested, David Martin confessed, led law enforcement to evidence that helped prove his guilt, and accepted responsibility for the crimes that led to this trial;

8. During this trial, Defendant Martin admitted his guilt, accepted responsibility and apologized for his crimes."

First, the Court notes with empathy that Martin experienced significant struggles from an extremely young age. Martin's mother was murdered when he was just four-years old. Even prior to her death, Martin's mother was not an ideal role model. She was a drug addict and a prostitute.

Following this tragic event, Martin moved with his brother into their father's home in the Morris Black housing projects of East Cleveland. To describe this neighborhood as rough seems to undermine its violent and tumultuous character where a shooting was a daily occurrence according to a neighbor who testified in phase two of this trial on Martin's behalf. Landon Nicholson testified on behalf of Martin during this mitigation phase and explained he tried to influence Martin as much as he could in this impoverished and violent neighborhood. Martin was routinely left on his own; skipped school daily and survived on the streets of his neighborhood.

During this time, Martin's father was struggling with his own personal traumas. Martin's father was also a drug addict and suffered from severe mental and physical health issues, even to the point of psychiatric hospitalization for long periods of time. Children's services for Cuyahoga County received countless referrals during Martin's childhood. Despite these referrals, there was no resolution, follow-through or aid provided which helped the family. Martin's father could not handle his own affairs and he could not provide for or care for his children.

Martin gave an unsworn statement wherein he apologized directly to Jeremy Cole's mother and took responsibility for his actions. Martin showed little to no

emotion during his monologue. This could be attributed to the fact that Martin still feels he "did what he had to do" or the lack of emotion could be the result of his ingrained nature to survive at all costs. Either reason is unfortunate and evidence of a lack of true remorse.

The Court finds Martin's cooperation with law enforcement officials immediately following his arrest is a mitigation factor that weighs in his favor. Although Martin fled after the crime, when confronted and arrested by law enforcement, he cooperated. Martin seemed to accept responsibility immediately through his general conversations with the law enforcement officers escorting him to Trumbull County. Martin even alleviated some of the evidentiary burden by offering to show and, in fact, leading law enforcement to the burn pile where he burned his belongings after the murder.

The violence, despair, tragic, tumultuous, emotionally and financially impoverished nature of Martin's childhood clearly shaped him into the man he is today. However, the Court must also balance this upbringing and his cooperation following his arrest with the aggravating circumstances of the crime. In doing so, the Court finds the aggravating circumstances grossly outweigh the limited mitigation factors on Martin's behalf.

Martin held Putnam and Cole at gunpoint; robbed them; restrained them with electrical cords and shot them both from close range. The hands and feet of Jeremy Cole were both bound, rendering him completely helpless. Despite the fact that Cole was not a threat to Martin, he shot him in such a cold and calculated manner – right between his eyes from three to eight inches away. Then, Martin continued on his murderous track and fired another bullet at Putnam, who survived only through her

own self-preservation efforts. The mitigation factors that do weigh on Martin's behalf are negligible compared to the aggravating circumstances of the aggravated murder.

Therefore, the Court has granted little weight to the mitigating factors on Martin's behalf. The presence of mitigating factors does not preclude the imposition of a sentence of death. Rather, those mitigating factors are to then be weighed against the aggravating circumstances of the crime. In conducting this comparison, the Court overwhelmingly finds the aggravating circumstances outweigh the mitigating factors.

CONCLUSIONS OF LAW

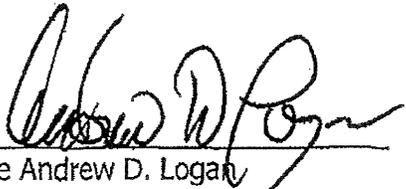
The mitigating factors given little weight by this Court do not outweigh the aggravating circumstances present in this matter. Martin's tumultuous childhood draws empathy; it does not outweigh the aggravating circumstances of his crime. In addition, Martin's cooperation is likewise superseded by the aggravating circumstances.

The Court has made a careful and independent review of the entire record. Upon this review, the Court finds the aggravating circumstances outweigh the mitigating factors by proof beyond a reasonable doubt.

Therefore, the Court hereby finds the sentence of death is an appropriate penalty for the Defendant DAVID MARTIN in this matter.

Date:

September 24, 2014


Judge Andrew D. Logan

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COURT OF COMMON PLEAS

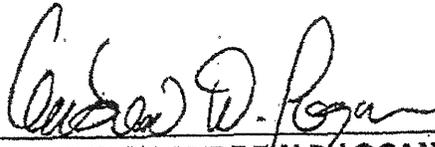
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TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

App 13

**TO THE CLERK OF COURTS: You Are Ordered to Serve Copies of this
Judgment on all Counsel of Record or Upon the Parties who are
Unrepresented Forthwith by Ordinary Mail.**



JUDGE ANDREW D. LOGAN

FILED
COURT OF COMMON PLEAS

SEP 24 2014

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

**IN THE COURT OF COMMON PLEAS
GENERAL DIVISION
TRUMBULL COUNTY, OHIO**

State of Ohio	)	Case No. 2012CR00735
)	
Plaintiff,	)	Judge Andrew D. Logan
)	
vs.	)	JUDGMENT ENTRY
	)	ENTRY ON SENTENCE
David Martin)	
)	
Defendant.)	
)	

On September 24, 2014, the Defendant, David Martin, was brought before this Court for the purposes of sentencing pursuant to R.C. 2929.19. The Defendant was present in Court and was represented by Atty. Greg Meyers, Atty. Matthew Pentz and Atty. David Rouzzo. The State of Ohio was represented by Atty. Christopher D. Becker and Atty. Gabriel Wildman. The Defendant was afforded all rights pursuant to Crim.R. 32.

The Court has considered the record, oral statements and the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors of R.C. 2929.12.

On September 11, 2014, the Defendant was found guilty following a trial before a petit jury and after due deliberation by said jury of the following: Count One: Aggravated Murder with specifications of Aggravating Circumstances and Firearm Specification in violation of R.C. 2903.01(B)&(F); 2941.14(C); 2929.04(A)(5); 2929.04(A)(7); and 2941.145; Count Two: Aggravated Murder with specifications of Aggravating Circumstances and Firearm Specification in violation of R.C. 2903.01(A)&(F); 2941.14(C); 2929.04(A)(5); 2929.04(A)(7); and 2941.145; Count

Three: Attempted Aggravated Murder with Firearm Specification in violation of R.C. 2923.02(A)&(E)(1); 2903.01(B)&(F); and 2941.145; Counts Four and Five: Aggravated Robbery with Firearm Specifications In violation of R.C. 2911.01(A)(1)&(3)&(C); and 2941.145; Counts Six and Seven: Kidnapping with Firearm Specifications In violation of R.C. 2905.01(A)(2)&(C)(1); and 2941.145; Count Eight: Tampering with Evidence in violation of R.C. 2921.12(A)(1)&(B).

The State nollied Count Nine: Receiving Stolen Property In violation of R.C. 2913.51(A)&(C). In addition, the State nollied Count Eight (as it was originally named in the Indictment but which was severed prior to trial by order of the Court), Having Weapons While Under Disability with firearm specification in violation of R.C. 2923.13(A)(2)(3)&(B) and 2941.145. The State also nollied the repeat violent offender specifications relative to Counts Three, Four, Five, Six and Seven. In addition, the State elected to proceed on Count Two for the penalty phase.

The Court has previously set forth in a separate opinion findings of fact and conclusions of law finding that the aggravating circumstances as to Count Two: Aggravated Murder, outweigh the mitigating factors by proof beyond a reasonable doubt. The Court inquired of the Defendant at this hearing as to whether he had anything to say why judgment should not be pronounced against him. The Defendant elected not to allocate and answered affirmatively on the record this was his choice and election not to exercise this opportunity. Alternatively, the Defendant's counsel requested the Court consider the prior unsworn statement provided during the mitigation phase of the trial. The Court considered the statements of counsel at the sentencing hearing and also considered Martin's prior unsworn statement.

The Court has considered the factors pursuant to R.C. 2929.14 and makes the following findings: (1) the shortest prison term will demean the seriousness of the Defendant's conduct; (2) the longest prison term is appropriate because the Defendant committed the worst form of the offense; (3) multiple prison terms are necessary to protect the public from future crime and to punish the offender; (4) consecutive prison sentences are not disproportionate to the seriousness of the Defendant's conduct and to the danger the offender poses to the public; (5) the harm caused by multiple offenses was so great that no single prison term for any of the offenses committed as part of a single course of conduct adequately reflects the seriousness of the Defendant's conduct; and (6) the Defendant's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the Defendant.

It is therefore ORDERED, ADJUDGED AND DECREED that:

1. The Defendant is hereby sentenced to Death for Count Two;
2. The Defendant shall serve an imprisonment term of Eleven (11) Years on Count Three plus Three (3) Years on the firearm specification;
3. The Defendant shall serve an imprisonment term of Eleven (11) Years on Count Four plus Three (3) Years on the firearm specification;
4. The Defendant shall serve an imprisonment term of Eleven (11) Years on Count Five plus Three (3) Years on the firearm specification;
5. The Defendant shall serve an imprisonment term of Eleven (11) Years on Count Six plus Three (3) Years on the firearm specification;

6. The Defendant shall serve an imprisonment term of Eleven (11) Years on Count Seven plus Three (3) Years on the firearm specification;
7. The Court hereby merges the imprisonment terms for the firearm specifications for Count Three, Count Four, Count Five, Count Six and Count Seven and orders the Three (3) Year imprisonment term on the merged firearm specification shall be served prior to and consecutive to the Imprisonment terms for the underlying offenses;
8. The Defendant shall serve an imprisonment term of Thirty-Six (36) Months on Count Eight;
9. The Imprisonment terms for Counts Three, Four, Five, Six, Seven, and Eight shall be served consecutive to one another for a total Imprisonment term of Fifty-Eight (58) Years plus the firearm specification term of imprisonment of Three (3) Years to be served prior to and consecutive with the Fifty-Eight (58) Years for a total of Sixty-One (61) Years;
10. The Defendant is ordered to submit to DNA testing;
11. The Defendant shall pay the cost of prosecution taxed in the amount of \$_____ costs for which execution is awarded.

The Court has further notified the Defendant that post-release control is mandatory in this case if he is ever released from prison as to Count Two and the maximum post-release control period on Count Two is equal to the duration of a life term. A violation of any parole rule or condition may result in: (1) a more restrictive sanction while released; (2) an increased duration of post-release supervision, up to the maximum set forth above; and/or (3) re-imprisonment for a period of time equal

to the life sentence imposed. If the Defendant commits another felony while subject to this period of post-release control, or if by some other means, violates the conditions of post-release control, he may be sent back to prison to serve out the remainder of the life term.

The Court has further notified the Defendant that post-release control is mandatory in this case for five (5) years as to Counts Three, Four, Five, Six, and Seven, as well as the consequences for violating conditions of post-release control imposed by the Parole Board under R.C. 2967.28. The Court has further notified the Defendant that post-release control is optional in this case as to Count Eight only for a period of three years, as well as the consequences for violating conditions of post-release control imposed by the Parole Board under R.C. 2967.28. The Defendant is ordered to serve as part of this sentence any term of post-release control imposed by the Parole Board, and any prison term for violation of that post-release control.

A violation of any parole rule or condition may result in: (1) a more restrictive sanction while released; (2) an increased duration of post-release supervision, up to the maximum set forth above; and/or (3) additional prison terms imposed in increments of up to nine months but not exceeding one-half the initial term and if a felony is committed while under a period of post-release control, the Defendant subjects himself to an additional prison term which consists of the maximum amount of time remaining on post-release control or twelve months, whichever is greater.

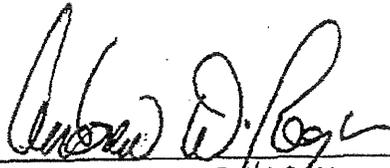
The Court has notified the Defendant that he may be eligible to earn one or five days of credit for each completed month during which he productively participates in an educational program, vocational training, employment in prison

Industries, treatment for substance abuse, or any other constructive program developed by the Ohio Department of Corrections. However, these credits are not automatically awarded but must be earned. Some inmates, including those convicted of serious felonies or homicides are not eligible to earn those days of credit.

It is further ORDERED that Lorain Correctional Facility shall take note that the Defendant herein has been granted credit for time incarcerated in the Trumbull County Jail/Mahoning County Jail pursuant to these charges from: October 16, 2012 to present.

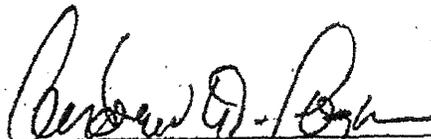
Date:

September 24, 2014



JUDGE ANDREW D. LOGAN

TO THE CLERK OF COURTS: You Are Ordered to Serve Copies of this Judgment on all Counsel of Record or Upon the Parties who are Unrepresented Forthwith by Ordinary Mail.



JUDGE ANDREW D. LOGAN

FILED
COURT OF COMMON PLEAS

SEP 24 2014

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

IN THE COURT OF COMMON PLEAS
GENERAL DIVISION
TRUMBULL COUNTY, OHIO

State of Ohio	)	Case No. 2012CR00735
)	
Plaintiff,	)	Judge Andrew D. Logan
)	
vs.)	
)	
David Martin	)	JUDGMENT ENTRY
	)	WRIT OF EXECUTION
Defendant.)	

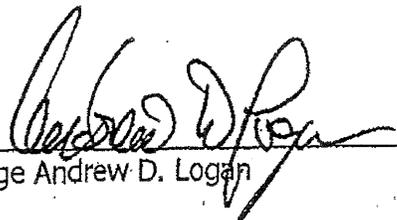
This Writ of Execution is directed to Thomas Altieri, Sheriff of Trumbull County, Ohio, to convey DAVID MARTIN to the Lorain Correctional Facility or other facility as instructed by the director for the Ohio Department of Rehabilitation and Correction where he shall be held until the execution of the death sentence against DAVID MARTIN.

IT IS SO ORDERED.

Date:

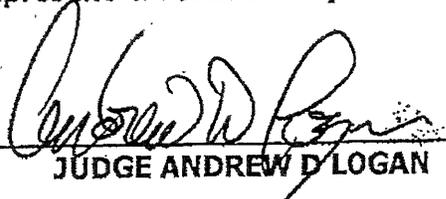
September 24, 2014

Judge Andrew D. Logan



TO THE CLERK OF COURTS: You Are Ordered to Serve Copies of this Judgment on all Counsel of Record or Upon the Parties who are Unrepresented Forthwith by Ordinary Mail.

JUDGE ANDREW D LOGAN



FILED
COURT OF COMMON PLEAS

SEP 24 2014

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

CASE NUMBER: 2012 CR 00735

STATE OF OHIO
PLAINTIFF

JUDGE ANDREW D. LOGAN

VS.

POST RELEASE CONTROL NOTIFICATION
(PRISON IMPOSED)

DAVID MARTIN
DEFENDANT

The Court hereby notifies the Defendant that post-release control is mandatory in this case if you are ever released from prison as to Count Two (Count Two - Aggravated Murder with Specifications of Aggravating Circumstances and Firearm Specification in violation of R.C. 2903.01(A)&(F); 2941.14(C); 2929.04(A)(5); 2929.04(A)(7); and 2941.145) and the maximum post-release control period on Count Two is equal to the duration of a life term. A violation of any parole rule or condition may result in: (1) a more restrictive sanction while released; (2) an increased duration of post-release supervision, up to the maximum set forth above; and/or (3) re-imprisonment for a period of time equal to the life sentence imposed. If you commit another felony while subject to this period of post-release control, or if by some other means, violates the conditions of post-release control, you may be sent back to prison to serve out the remainder of the life term.

The Court also notifies the Defendant that should you ever be released from prison, you **WILL** have a mandatory period of post-release control for **5** years on the following:

Count Three - Attempted Aggravated Murder with Firearm Specification in violation of R.C. 2923.02(A)&(E)(1); 2903.01(B)&(F); and 2941.145.

Counts Four & Five - Aggravated Robbery with Firearm Specification in violation of R.C. 2911.01(A)(1)&(3)&(C); and 2941.145.

Counts Six & Seven - Kidnapping with Firearm Specification in violation of R.C. 2905.01(A)(2)&(C)(1); and 2941.145.

You **MAY** have an optional period of post-release control for **3** years on the following:

Count Eight - Tampering with Evidence in violation of R.C. 2921.12(A)(1)&(B).

If you violate a post-release control sanction imposed upon you, any one or more of the following may result:

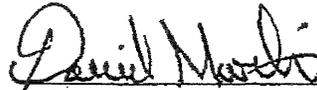
- 1) The Parole Board may impose a more restrictive post-release control sanction upon you.
- 2) The Parole Board may increase the duration of the post-release control subject to a specified maximum.

The Parole Board may impose re-imprisonment even though you have served the entire state prison sentence imposed upon me by this Court for all offenses set out above. Re-imprisonment can be imposed in segments of up to nine (9) months but cannot exceed a maximum of one-half (1/2) of the

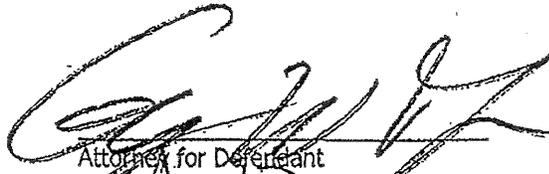
equal term imposed for all of the offenses set out above. If you commit another felony while subject to this period of control or supervision, you may be subject to an additional prison term consisting of the maximum period of unserved time remaining on post-release control as set out above or twelve (12) months whichever is greater. This prison term must be served consecutively to any term imposed for the new felony you are convicted of committing.

I hereby certify that the Court read to me, and gave me in writing, the notice set forth herein.

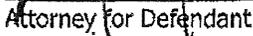
September 24, 2014
Date-


Defendant - David Martin

As the attorneys for the Defendant, I hereby certify that the Judge read to the Defendant, and gave the Defendant in writing, this notice set forth within.


Attorney for Defendant


Attorney for Defendant


Attorney for Defendant

**FILED
COURT OF COMMON PLEAS**

SEP 24 2014

**TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK**

IN THE COURT OF COMMON PLEAS
GENERAL DIVISION
TRUMBULL COUNTY, OHIO

State of Ohio	)	Case No. 2012CR00735
)	
Plaintiff,	)	Judge Andrew D. Logan
)	
vs.	)	<i>NUNC PRO TUNC</i>
	)	JUDGMENT ENTRY
	)	ENTRY ON SENTENCE
David Martin)	
)	
Defendant.)	
)	

This Nunc.Pro Tunc Judgment Entry is entered solely for the purpose of correcting a clerical omission of the felony levels of each count on which Defendant Martin was sentenced. The remainder of the Judgment Entry remains the same.

On September 24, 2014, the Defendant, David Martin, was brought before this Court for the purposes of sentencing pursuant to R.C. 2929.19. The Defendant was present in Court and was represented by Atty. Greg Meyers, Atty. Matthew Pentz and Atty. David Rouzzo. The State of Ohio was represented by Atty. Christopher D. Becker and Atty. Gabriel Wildman. The Defendant was afforded all rights pursuant to Crim.R. 32.

The Court has considered the record, oral statements and the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors of R.C. 2929.12.

On September 11, 2014, the Defendant was found guilty following a trial before a petit jury and after due deliberation by said jury of the following: Count One: Aggravated Murder (F) with specifications of Aggravating Circumstances and

Firearm Specification in violation of R.C. 2903.01(B)&(F); 2941.14(C); 2929.04(A)(5); 2929.04(A)(7); and 2941.145; Count Two: Aggravated Murder (F) with specifications of Aggravating Circumstances and Firearm Specification in violation of R.C. 2903.01(A)&(F); 2941.14(C); 2929.04(A)(5); 2929.04(A)(7); and 2941.145; Count Three: Attempted Aggravated Murder (F1) with Firearm Specification in violation of R.C. 2923.02(A)&(E)(1); 2903.01(B)&(F); and 2941.145; Counts Four and Five: Aggravated Robbery (F1) with Firearm Specifications in violation of R.C. 2911.01(A)(1)&(3)&(C); and 2941.145; Counts Six and Seven: Kidnapping (F1) with Firearm Specifications in violation of R.C. 2905.01(A)(2)&(C)(1); and 2941.145; Count Eight: Tampering with Evidence (F3) in violation of R.C. 2921.12(A)(1)&(B).

The State nollied Count Nine: Receiving Stolen Property (F4) in violation of R.C. 2913.51(A)&(C). In addition, the State nollied Count Eight (as it was originally named in the Indictment but which was severed prior to trial by order of the Court), Having Weapons While Under Disability (F3) with firearm specification in violation of R.C. 2923.13(A)(2)(3)&(B) and 2941.145. The State also nollied the repeat violent offender specifications relative to Counts Three, Four, Five, Six and Seven. In addition, the State elected to proceed on Count Two for the penalty phase.

The Court has previously set forth in a separate opinion findings of fact and conclusions of law finding that the aggravating circumstances as to Count Two: Aggravated Murder, outweigh the mitigating factors by proof beyond a reasonable doubt. The Court inquired of the Defendant at this hearing as to whether he had anything to say why judgment should not be pronounced against him. The Defendant elected not to allocate and answered affirmatively on the record this was

his choice and election not to exercise this opportunity. Alternatively, the Defendant's counsel requested the Court consider the prior unsworn statement provided during the mitigation phase of the trial. The Court considered the statements of counsel at the sentencing hearing and also considered Martin's prior unsworn statement.

The Court has considered the factors pursuant to R.C. 2929.14 and makes the following findings: (1) the shortest prison term will demean the seriousness of the Defendant's conduct; (2) the longest prison term is appropriate because the Defendant committed the worst form of the offense; (3) multiple prison terms are necessary to protect the public from future crime and to punish the offender; (4) consecutive prison sentences are not disproportionate to the seriousness of the Defendant's conduct and to the danger the offender poses to the public; (5) the harm caused by multiple offenses was so great that no single prison term for any of the offenses committed as part of a single course of conduct adequately reflects the seriousness of the Defendant's conduct; and (6) the Defendant's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the Defendant.

It is therefore ORDERED, ADJUDGED AND DECREED that:

1. The Defendant is hereby sentenced to Death for Count Two;
2. The Defendant shall serve an Imprisonment term of Eleven (11) Years on Count Three plus Three (3) Years on the firearm specification;
3. The Defendant shall serve an Imprisonment term of Eleven (11) Years on Count Four plus Three (3) Years on the firearm specification;

4. The Defendant shall serve an imprisonment term of Eleven (11) Years on Count Five plus Three (3) Years on the firearm specification;
5. The Defendant shall serve an imprisonment term of Eleven (11) Years on Count Six plus Three (3) Years on the firearm specification;
6. The Defendant shall serve an Imprisonment term of Eleven (11) Years on Count Seven plus Three (3) Years on the firearm specification;
7. The Court hereby merges the Imprisonment terms for the firearm specifications for Count Three, Count Four, Count Five, Count Six and Count Seven and orders the Three (3) Year imprisonment term on the merged firearm specification shall be served prior to and consecutive to the imprisonment terms for the underlying offenses;
8. The Defendant shall serve an Imprisonment term of Thirty-Six (36) Months on Count Eight;
9. The Imprisonment terms for Counts Three, Four, Five, Six, Seven, and Eight shall be served consecutive to one another for a total imprisonment term of Fifty-Eight (58) Years plus the firearm specification term of Imprisonment of Three (3) Years to be served prior to and consecutive with the Fifty-Eight (58) Years for a total of Sixty-One (61) Years;
10. The Defendant is ordered to submit to DNA testing;
11. The Defendant shall pay the cost of prosecution taxed in the amount of \$ _____ costs for which execution is awarded.

The Court has further notified the Defendant that post-release control is

mandatory in this case if he is ever released from prison as to Count Two and the maximum post-release control period on Count Two is equal to the duration of a life term. A violation of any parole rule or condition may result in: (1) a more restrictive sanction while released; (2) an increased duration of post-release supervision, up to the maximum set forth above; and/or (3) re-imprisonment for a period of time equal to the life sentence imposed. If the Defendant commits another felony while subject to this period of post-release control, or if by some other means, violates the conditions of post-release control, he may be sent back to prison to serve out the remainder of the life term.

The Court has further notified the Defendant that post-release control is mandatory in this case for five (5) years as to Counts Three, Four, Five, Six, and Seven, as well as the consequences for violating conditions of post-release control imposed by the Parole Board under R.C. 2967.28. The Court has further notified the Defendant that post-release control is optional in this case as to Count Eight only for a period of three years, as well as the consequences for violating conditions of post-release control imposed by the Parole Board under R.C. 2967.28. The Defendant is ordered to serve as part of this sentence any term of post-release control imposed by the Parole Board, and any prison term for violation of that post-release control.

A violation of any parole rule or condition may result in: (1) a more restrictive sanction while released; (2) an increased duration of post-release supervision, up to the maximum set forth above; and/or (3) additional prison terms imposed in increments of up to nine months but not exceeding one-half the initial term and if a felony is committed while under a period of post-release control, the Defendant

subjects himself to an additional prison term which consists of the maximum amount of time remaining on post-release control or twelve months, whichever is greater.

The Court has notified the Defendant that he may be eligible to earn one or five days of credit for each completed month during which he productively participates in an educational program, vocational training, employment in prison industries, treatment for substance abuse, or any other constructive program developed by the Ohio Department of Corrections. However, these credits are not automatically awarded but must be earned. Some inmates, including those convicted of serious felonies or homicides are not eligible to earn those days of credit.

It is further ORDERED that Lorain Correctional Facility shall take note that the Defendant herein has been granted credit for time incarcerated in the Trumbull County Jail/Mahoning County Jail pursuant to these charges from: October 16, 2012 to present.

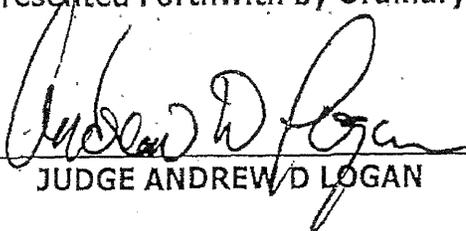
Date:

October 8, 2014



JUDGE ANDREW D. LOGAN

TO THE CLERK OF COURTS: You Are Ordered to Serve Copies of this Judgment on all Counsel of Record or Upon the Parties who are Unrepresented Forthwith by Ordinary Mail.



JUDGE ANDREW D. LOGAN

FILED
COURT OF COMMON PLEAS

OCT 08 2014

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

United States Constitution

Article I, Section 1: Legislative Power Vested in Congress

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Amendment V

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

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

Amendment VIII

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

Amendment XIV

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.

Ohio Constitution

ART. I, SECTION 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.

ART. I, SECTION 2 EQUAL PROTECTION AND BENEFIT

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.

ART. I, SECTION 5 RIGHT OF TRIAL BY JURY

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.

ART. I, SECTION 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.

ART. I, SECTION 10 RIGHTS OF CRIMINAL DEFENDANTS

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

ART. I, SECTION 16 REDRESS FOR INJURY; DUE PROCESS

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

ART. I, SECTION 20 POWERS NOT ENUMERATED RETAINED BY 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.

Article IV, Section 5

(A) (1) In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court.

(2) The supreme court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas or a division thereof temporarily to sit or hold court on any other court of common pleas or division thereof or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas or division thereof and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.

(B) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

(C) The chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or division thereof. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

Statutes

R.C. . §2903.01

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

(E) No person shall be convicted of aggravated murder unless the person is specifically found to have intended to cause the death of another or, if the case involves an alleged violation of division (A) or (B) of this section, the unlawful termination of another's pregnancy. In no case shall a jury in an aggravated murder case be instructed in such a manner that it may believe that a person who commits or attempts to commit any offense listed in division (B) of this section is to be conclusively inferred, because the person engaged in a common design with others to commit the offense by force and violence or because the offense and the manner of its commission would be likely to produce death or the unlawful termination of another's pregnancy, to have intended to cause the death of any person who is killed or the unlawful termination of another's pregnancy during the commission of, attempt to commit, or flight from the commission of or attempt to commit, the offense. If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be inferred, because the offender engaged in a common design with others to commit the offense by force or violence or because the offense and the manner of its commission would be likely to produce death or the unlawful termination of another's pregnancy, to have intended to cause the death of any person who is killed or the unlawful termination of another's pregnancy during the commission of, attempt to commit, or flight from the commission of or attempt to commit the offense, the jury also shall be instructed that the inference is nonconclusive, that the inference may be considered in determining intent, that it is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate the person's lack of intent in determining whether the person specifically intended to cause the death of the person killed or the unlawful termination of another's pregnancy, and that the prosecution must prove the specific intent of the person to have caused the death or the unlawful termination of another's pregnancy by proof beyond a reasonable doubt.

R.C. 2929.021

(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 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 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.

R.C. 2929.03

(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 a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

R.C. 2929.04

(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.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

R.C. 2929.05

(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 upon appeal review 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 shall also 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 Appellate Rules.

(C) Whenever 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, upon motion of the offender and after conducting a hearing on the motion, vacate the sentence if all of the following apply:

(1) The offender alleges in the motion and presents evidence at the hearing 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;

(2) The offender did not present evidence at trial pursuant to section 2929.023 of the Revised Code 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;

(3) The motion was filed at any time after the sentence was imposed in the case and prior to execution of the sentence;

(4) At the hearing conducted on the motion, the prosecution does not prove beyond a reasonable doubt that the offender was eighteen years of age or older at the time of the commission of the aggravated murder for which the offender was sentenced.

R.C. 2929.06

(A) If the sentence of death that is imposed upon an offender is vacated upon appeal 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 vacated upon appeal 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, or is vacated pursuant to division (C) of section 2929.05 of the Revised Code, the trial court that sentenced the offender shall conduct a hearing to resentence the offender. At the resentencing hearing, the court shall impose one of the following sentences upon the offender:

(1) Except as provided in division (A)(2) of this section, 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;

(2) If the sentence of death was imposed for an aggravated murder committed on or after January 1, 1997, and if the offender also was convicted of or pleaded 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 aggravated murder, life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(B) If the sentence of death that is imposed upon an offender is vacated upon appeal 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 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, 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.

(C) If the sentence of life imprisonment without parole that is imposed upon an offender pursuant to section 2929.021 or 2929.03 of the Revised Code is vacated upon appeal 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.

R.C. 2945.21 PEREMPTORY CHALLENGES IN CAPITAL CASES

(A)(1) In criminal cases in which there is only one defendant, each party, in addition to the challenges for cause authorized by law, may peremptorily challenge three of the jurors in misdemeanor cases and four of the jurors in felony cases other than capital cases. If there is more than one defendant, each defendant may peremptorily challenge the same number of jurors as if he were the sole defendant.

(2) Notwithstanding Criminal Rule 24, in capital cases in which there is only one defendant, each party, in addition to the challenges for cause authorized by law, may peremptorily challenge twelve of the jurors. If there is more than one defendant, each defendant may peremptorily challenge the same number of jurors as if he were the sole defendant.

(3) In any case in which there are multiple defendants, the prosecuting attorney may peremptorily challenge a number of jurors equal to the total number of peremptory challenges allowed to all of the defendants.

(B) If any indictments, informations, or complaints are consolidated for trial, the consolidated cases shall be considered, for purposes of exercising peremptory challenges, as though the defendants or offenses had been joined in the same indictment, information, or complaint.

(C) The exercise of peremptory challenges authorized by this section shall be in accordance with the procedures of Criminal Rule 24.

R.C. 2945.25

A person called as a juror in a criminal case may be challenged for the following causes:

(A) That he was a member of the grand jury that found the indictment in the case;

(B) That he is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial;

(C) In the trial of a capital offense, that he unequivocally states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a particular case. A prospective juror's conscientious or religious opposition to the death penalty in and of itself is not grounds for a challenge for cause. All parties shall be given wide latitude in voir dire questioning in this regard.

(D) That he is related by consanguinity or affinity within the fifth degree to the person alleged to be injured or attempted to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted, or to the defendant;

(E) That he served on a petit jury drawn in the same cause against the same defendant, and that jury was discharged after hearing the evidence or rendering a verdict on the evidence that was set aside;

(F) That he served as a juror in a civil case brought against the defendant for the same act;

- (G) That he has been subpoenaed in good faith as a witness in the case;
 - (H) That he is a chronic alcoholic, or drug dependent person;
 - (I) That he has been convicted of a crime that by law disqualifies him from serving on a jury;
 - (J) That he has an action pending between him and the state or the defendant;
 - (K) That he or his spouse is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against him;
 - (L) That he is the person alleged to be injured or attempted to be injured by the offense charged, or is the person on whose complaint the prosecution was instituted, or the defendant;
 - (M) That he is the employer or employee, or the spouse, parent, son, or daughter of the employer or employee, or the counselor, agent, or attorney of any person included in division (L) of this section;
 - (N) That English is not his native language, and his knowledge of English is insufficient to permit him to understand the facts and law in the case;
 - (O) That he otherwise is unsuitable for any other cause to serve as a juror.
- The validity of each challenge listed in this section shall be determined by the court.

R.C. 2949.22 EXECUTION OF DEATH SENTENCE

(A) Except as provided in division (B)(1) of this section, a death sentence shall be executed by causing a current of electricity, of sufficient intensity to cause death, to pass through the body of the person upon whom the sentence was imposed. The application of the current shall be continued until the person upon whom the sentence was imposed is dead. The warden of the correctional institution in which the sentence is to be executed or another person selected by the director of rehabilitation and correction shall ensure that the death sentence is executed.

(B)(1) Any person sentenced to death may elect to be executed by lethal injection instead of by electrocution as described in division (A) of this section. The election shall be made no later than one week prior to the scheduled date of execution of the person by filing a written notice of the election with the department of rehabilitation and correction. If a person sentenced to death timely files with the department a written notice of an election to be executed by lethal injection, the person's death sentence shall be executed by causing the application to the person of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death instead of by electrocution as described in division (A) of this section. The application of the drug or combination of drugs shall be continued until the person is dead. The warden of the correctional institution in which the sentence is to be executed or another person selected by the director of rehabilitation and correction shall ensure that the death sentence is executed.

If a person sentenced to death does not timely file with the department a written notice of election to be executed by lethal injection, his death sentence shall be executed by electrocution in accordance with division (A) of this section.

(2) Neither a person's timely filing of a written notice of election under division (B)(1) of this section nor a person's failure to file or timely file a written notice of election under that division shall affect or waive any right of appeal or postconviction relief that may be available under the laws of this state or the United States relative to the conviction for which the sentence of death was imposed upon the person or relative to the imposition or execution of that sentence of death.

(C) A death sentence shall be executed within the walls of the state correctional institution designated by the director of rehabilitation and correction as the location for executions, within an enclosure to be prepared for that purpose, under the direction of the warden of the institution or, in his absence, a deputy warden, and on the day designated by the judge passing sentence or otherwise designated by a court in the course of any appellate or postconviction proceedings. The enclosure shall exclude public view.

(D) If a death sentence is required to be executed by lethal injection because the person sentenced to death elected to be executed by lethal injection pursuant to division (B)(1) of this section and if the execution of a death sentence by lethal injection is determined to be unconstitutional, the death sentence shall be executed by causing a current of electricity, of sufficient intensity to cause death, to pass through the body of the person upon whom the sentence was imposed. The application of the current shall be continued until the person is dead. The warden of the state correctional institution in which the sentence is to be executed or another person selected by the director of rehabilitation and correction shall ensure that the death sentence is executed.

(E) No change in the law made by this amendment constitutes a declaration by or belief of the general assembly that execution of a death sentence by electrocution is a cruel and unusual punishment proscribed by the Ohio Constitution or the United States Constitution.

RULES

OHIO CRIM.R. 11

(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 his 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 such 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 shall, except as provided in subsections (C)(3) and (4), proceed with sentencing under Rule 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 has the right to be represented by retained counsel, or pursuant to Rule 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 such plea without first addressing the defendant personally and:

(a) Determining that he is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved, and, if applicable, that he is not eligible for probation.

(b) Informing him of and determining that he understands the effect of his plea of guilty or no contest, and that the court upon acceptance of the plea may proceed with judgment and sentence.

(c) Informing him and determining that he understands that by his plea he is waiving his rights to jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to require the state to prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself.

(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 such plea the court shall so advise the defendant and determine that he understands the consequences of such 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 which 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 him of the effect of the pleas of guilty, no contest, and not guilty and determining that he 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 has the right to be

represented by retained counsel, or pursuant to Rule 44 by appointed counsel, waives this right.

(E) Misdemeanor cases involving petty offenses

In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such pleas without first informing the defendant of the effect of the plea of guilty, no contest, and not guilty.

The counsel provisions of Rule 44(B) and (C) apply to this subdivision.

(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.

OHIO CRIM. R. 12

(A) Pleadings and motions. Pleadings in criminal proceedings shall be the complaint, and the indictment or information, and the pleas of not guilty, not guilty by reason of insanity, guilty, and no contest. All other pleas, demurrers, and motions to quash, are abolished. Defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(B) Pretrial motions. Prior to trial, any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue. The following must be raised before trial:

(1) Defenses and objections based on defects in the institution of the prosecution;

(2) Defenses and objections based on defects in the indictment, information, or complaint (other than failure to show jurisdiction in the court or to charge an offense, which objections shall be noticed by the court at any time during the pendency of the proceeding);

(3) Motions to suppress evidence, including but not limited to statements and identification testimony, on the ground that it was illegally obtained. Such motions shall be filed in the trial court only.

(4) Requests for discovery under Crim. R. 16;

(5) Requests for severance of charges or defendants under Crim. R. 14.

(C) Motion date. All pretrial motions except as provided in Rule 7(E) and Rule 16(F) shall be made within thirty-five days after arraignment or seven days before trial, whichever is earlier. The court in the interest of justice may extend the time for making pretrial motions.

(D) Notice by the prosecuting attorney of the intention to use evidence

(1) At the discretion of the prosecuting attorney. At the arraignment or as soon thereafter as is practicable, the prosecuting attorney may give notice to the defendant of the prosecuting attorney's intention to use specified evidence at trial, in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under division (B)(3) of this rule.

(2) At the request of the defendant. At the arraignment or as soon thereafter as is practicable, the defendant, in order to raise objections prior to trial under division (B)(3) of this rule, may request notice of the prosecuting attorney's intention to use evidence in chief at trial, which evidence the defendant is entitled to discover under Crim. R. 16.

(E) Ruling on motion. The court may adjudicate a motion based upon briefs, affidavits, the proffer of testimony and exhibits, a hearing, or other appropriate means.

A motion made pursuant to divisions (B)(1) to (B)(5) of this rule shall be determined before trial. Any other motion made pursuant to division (B) of this rule shall be determined before trial whenever possible. Where the court defers ruling on any motion made by the prosecuting attorney before trial and makes a ruling adverse to the prosecuting attorney after the commencement of trial, and the ruling is appealed pursuant to law with the certification required by division (J) of this rule, the court shall stay the proceedings without discharging the jury or dismissing the charges.

Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

(F) Return of tangible evidence. Where a motion to suppress tangible evidence is granted, the court upon request of the defendant shall order the property returned to the defendant if the defendant is entitled to possession of the property. The order shall be stayed pending appeal by the state pursuant to division (J) of this rule.

(G) Effect of failure to raise defenses or objections. Failure by the defendant to raise defenses or objections or to make requests that must be made prior to trial, at the time set by the court pursuant to division (C) of this rule, or prior to any extension of time made by the court, shall constitute waiver of the defenses or objections, but the court for good cause shown may grant relief from the waiver.

(H) Effect of plea of no contest. The plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence.

(I) Effect of determination. If the court grants a motion to dismiss based on a defect in the institution of the prosecution or in the indictment, information, or complaint, it may also order that the defendant be held in custody or that the defendant's bail be continued for a specified time not exceeding fourteen days, pending

the filing of a new indictment, information, or complaint. Nothing in this rule shall affect any statute relating to periods of limitations. Nothing in this rule shall affect the state's right to appeal an adverse ruling on a motion under divisions (B)(1) or (2) of this rule, when the motion raises issues that were formerly raised pursuant to a motion to quash, a plea in abatement, a demurrer, or a motion in arrest of judgment.

(J) Appeal by state. When the state takes an appeal as provided by law from an order suppressing or excluding evidence, the prosecuting attorney shall certify that: (1) the appeal is not taken for the purpose of delay; and (2) the ruling on the motion or motions has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed.

The appeal from an order suppressing or excluding evidence shall not be allowed unless the notice of appeal and the certification by the prosecuting attorney are filed with the clerk of the trial court within seven days after the date of the entry of the judgment or order granting the motion. Any appeal taken under this rule shall be prosecuted diligently.

If the defendant previously has not been released, the defendant shall, except in capital cases, be released from custody on his or her own recognizance pending appeal when the prosecuting attorney files the notice of appeal and certification.

This appeal shall take precedence over all other appeals.

If an appeal pursuant to this division results in an affirmance of the trial court, the state shall be barred from prosecuting the defendant for the same offense or offenses except upon a showing of newly discovered evidence that the state could not, with reasonable diligence, have discovered before filing of the notice of appeal.

OHIO CRIM.R. 18

(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 CRIM.R. 24

(A) Examination of jurors

Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to his qualifications. The court may permit the attorney for the defendant, or the defendant if appearing pro se, and the attorney for the state to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the state and defense to supplement the examination by further inquiry.

(B) Challenge for cause

A person called as a juror may be challenged for the following causes:

(1) That he has been convicted of a crime which by law renders him disqualified to serve on a jury.

(2) That he is a chronic alcoholic, or drug dependent person.

(3) That he was a member of the grand jury which found the indictment in the case.

(4) That he served on a petit jury drawn in the same cause against the same defendant, and such jury was discharged after hearing the evidence or rendering a verdict thereon which was set aside.

(5) That he served as a juror in a civil case brought against the defendant for the same act.

(6) That he has an action pending between him and the State of Ohio or the defendant.

(7) That he or his spouse is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against him.

(8) That he has been subpoenaed in good faith as a witness in the case.

(9) That he is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial.

(10) That he is related by consanguinity or affinity within the fifth degree to the person alleged to be injured or attempted to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted; or to the defendant.

(11) That he is the person alleged to be injured or attempted to be injured by the offense charged, or the person on whose complaint the prosecution was instituted, or the defendant.

(12) That he is the employer or employee, or the spouse, parent, son, or daughter of the employer or employee, or the counsellor, agent, or attorney, of any person included in subsection (B)(11).

(13) That English is not his native language, and his knowledge of English is insufficient to permit him to understand the facts and the law in the case.

(14) That he is otherwise unsuitable for any other cause to serve as a juror.

The validity of each challenge listed in this subdivision shall be determined by the court.

(C) Peremptory challenges

In addition to challenges provided in subdivision (B), if there is one defendant, each party peremptorily may challenge three jurors in misdemeanor cases, four jurors in felony cases other than capital cases, and six jurors in capital cases. If there is more than one defendant, each defendant peremptorily may challenge the same number of jurors as if he were the sole defendant.

In any case where there are multiple defendants, the prosecuting attorney peremptorily may challenge a number of jurors equal to the total peremptory challenges allowed all defendants. In case of the consolidation of any indictments, informations or complaints for trial, such consolidated cases shall be considered, for purposes of exercising peremptory challenges, as though the defendants or offenses had been joined in the same indictment, information or complaint.

(D) Manner of exercising peremptory challenges

Peremptory challenges may be exercised after the minimum number of jurors allowed by the rules has been passed for cause and seated on the panel. Peremptory challenges shall be exercised alternately, with the first challenge exercised by the state. The failure of a party to exercise a peremptory challenge constitutes a waiver of that challenge. If all parties, alternately and in sequence, fail to exercise a peremptory challenge, the joint failure constitutes a waiver of all peremptory challenges.

A prospective juror peremptorily challenged by either party shall be excused and another juror shall be called who shall take the place of the juror excused and be sworn and examined as other jurors. The other party, if he has peremptory challenges remaining, shall be entitled to challenge any juror then seated on the panel.

(E) Challenge to array

The prosecuting attorney or the attorney for the defendant may challenge the array of petit jurors on the ground that it was not selected, drawn or summoned in accordance with law. A challenge to the array shall be made before the examination of the jurors pursuant to subdivision (A) and shall be tried by the court.

No array of petit jurors shall be set aside, nor shall any verdict in any case be set aside because the jury commissioners have returned such jury or any juror in any informal or irregular manner, if in the opinion of the court the irregularity is unimportant and insufficient to vitiate the return.

(F) Alternate jurors

The court may direct that not more than six jurors in addition to the regular jury be called and empaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same oath, and have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each party is entitled to one peremptory challenge in addition to those otherwise allowed if one or two alternate jurors are to be empaneled, two peremptory challenges if three or four alternate jurors are to be empaneled, and three peremptory challenges if five or six alternate jurors are to be empaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by this rule may not be used against an alternate juror.

(G) Control of juries

(1) Before submission of case to jury. Before submission of a case to the jury, the court, upon its own motion or the motion of a party, may restrict the separation of jurors or may sequester the jury.

(2) After submission of case to jury. (a) Misdemeanor cases. After submission of a misdemeanor case to the jury, the court, after giving cautionary instructions, may permit the separation of jurors.

(b) Non-capital felony cases. After submission of a non-capital felony case to the jury, the court, after giving cautionary instructions, may permit the separation of jurors during any period of court adjournment or may require the jury to remain under the supervision of an officer of the court.

(c) Capital cases. After submission of a capital case to the jury, the jury shall remain under the supervision of an officer of the court until a verdict is rendered or the jury is discharged by the court.

(3) Separation in emergency. Where the jury is sequestered or after a capital case is submitted to the jury, the court may, in an emergency and upon giving cautionary instructions, allow temporary separation of jurors.

(4) Duties of supervising officer. Where jurors are required to remain under the supervision of an officer of the court, the court shall make arrangements for their care, maintenance and comfort.

When the jury is in the care of an officer of the court and until the jury is discharged by the court, the officer may inquire whether the jury has reached a verdict, but shall not:

(a) Communicate any matter concerning jury conduct to anyone except the judge or;

(b) Communicate with the jurors or permit communications with jurors, except as allowed by court order.