

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
Appellee, :
-vs- : Case No. 2014-1035
WILLIE G. WILKS, JR., : ***Death Penalty Case***
Appellant :

*On Appeal from the Mahoning County
Court of Common Pleas
Mahoning County, Ohio, Case No. 2013CR00540*

MERIT BRIEF OF APPELLANT WILLIE G. WILKS, JR.

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STATEMENT OF THE CASE

On May 21, 2013 in Youngstown, Ohio a shooting took place which resulted in one death and another person seriously injured. A third named victim claimed to have been shot at but he did not suffer any physical injuries.

Willie Wilks, the appellant, was arrested the next day in Youngstown, Ohio and voluntarily gave a statement which was recorded in which he denied any involvement in the incident.

On May 23, 2013 the grand jury returned an indictment charging Wilks with nine separate felonies. Count one charged Wilks with Aggravated Murder of Ororo Wilkins including one “death” specification under RC § 2929.04(A)(5) (course of conduct specification). (R. Vol. I, Doc. 1)

Count two charged Wilks with Murder under RC § 2903.02(B) involving the same victim as count one. Count three charged Wilks with Attempted Aggravated Murder of Alexander Morales; Count four charged Attempted Aggravated Murder of William Wilkins Jr aka “Mister;” count five charged Felonious Assault on Morales and count six charged Felonious Assault on Wilkins aka “Mister;” count seven charged an improper discharge of a firearm into occupied structure in violation of RC § 2923.161 (A)(1). (Id.)

Counts Eight and Nine are weapons under disability charges under RC §2923.13 (A)(2)(B) which were severed for this trial and then dismissed post trial by the State. (id., Vol. III, Doc. 197)

The appellant was convicted on counts one through seven; he was sentenced to death on count one; plus a term of years on the remaining counts.

A timely notice of appeal was filed. The appellant has been declared indigent throughout these proceedings and counsel has been appointed throughout. The appellant's merit brief is now timely filed.

STATEMENT OF FACTS¹

A young woman named Ororo Wilkins was sitting on her front porch on May 21, 2013 at 725 Park Avenue, Youngstown, Ohio with other people when she was shot and killed in broad daylight. She was shot once in the head with an AK 47 rifle. Also on the small front porch was Alexander Morales Jr., who was also shot; Mr. Morales was fleeing from the porch into the house when he was shot in the back. William "Mister" Wilkins, Ororo's brother, was inside the house and was the state's key witness. He testified he saw the shooting from a second floor window which contained a box fan. During his testimony, Mister identified the appellant, Willie G. Wilks, Jr., as the shooter. (TR 3432, 3435, 3543)

According to Mister, he went upstairs to his room to get cigarettes. (TR 3518) He heard a car "skidding" and looked out the window. The car was stopped with two people in the front of the car and the appellant who was standing in front of the back seat door on the driver's side. (TR 3518-20) Mister further testified he looked out the window "you could see *somebody, the defendant, or whoever, walking towards ...* with a gun. As he goes to shoot me, his hood come off, and then that's when I scream." (TR 3541-42) Mister could not see the porch from his vantage point. (TR 3542) After Mister's scream, the shooter looked up, Mister ducked down, and the last shot was towards the window. (TR 3543)

¹ The facts set out here are taken from the transcript of the case, Appellant Wilks makes no concessions or admissions concerning his guilt in these offenses.

Mister then made his way downstairs where chaos was discovered; several people were laying in the kitchen including Alex Morales who had been shot. (TR 3523) Mister went to the porch where his sister Ororo was found with a fatal gunshot wound to her head. Mister was hysterical, screaming for help and he tried to stop the bleeding. (TR 3523-24)

Later, Mister went to the police station and identified through a photo array the other two occupants in the car carrying the shooter. (TR 3529; 3539) The police did no follow-up investigation concerning these two identified men; the men were never interviewed nor was any attempt made to contact them; neither was ever charged with any offense concerning this case.

Alfred Morales Jr. also testified for the State. (TR 3411) Mr. Morales was 25 years old and a friend of Mister's. They worked construction jobs together. (TR 3412)

Mr. Morales testified that he and Mister had been at the Park Avenue house for "no more than ten minutes" (TR 3430) when the shooting took place. Morales was on the porch with Ororo; Morales was on the banister with his back to his white truck. (TR 3429; TR 3432) Morales gave Ororo a cigarette he was smoking and she gave him the baby she was holding. (TR 3432)

Morales did not see or hear the shooter coming. (TR 3433) He saw a "look on Ororo's face" and he turned and saw someone raise an AK rifle and shoot. (TR 3433) Morales was shot in the back as he was turning. (TR 3434). He was running with the baby to the front door. (TR 3434) He fell a couple of times but got through the front door inside. (TR 3435) As Ororo tried to get the baby², the shooter shot her. (TR 3436) Morales described the rifle, the clothing the shooter was wearing, saw the shooter's face and recognized him. (TR 3434-35) In the courtroom, Morales identified the appellant as the shooter. (TR 3439)

² The baby was not injured in any way during this incident.

Morales testified he vaguely remembered talking to the police but he was drifting in and out of consciousness. (TR 3437). Initially, Morales told the police he did not know the identity of the shooter; but changed his story and said he knew him. (TR 3437; 3447)

Morales testified in court that the shooter came up the sidewalk with an AK 47 and insisted he told the police about the AK 47 but the police must have forgotten to put this information in their reports. (TR 3443-44) Morales insisted he never told the police he was shot with handgun even if that is what is in the police report. (TR 3445-46) Morales admitted that it is in none of the police reports that he saw Ororo get shot. (TR 3460) Three shots were fired in immediate succession. (TR 3462) Before shooting, the shooter asked where was Mister. (TR 3472)

Once the police had the name of the appellant from Mister and Morales, virtually no further investigation was done to identify the shooter. While there was a hole in the side of the house near where Mister said he was located, no attempt was made to retrieve the bullet from that hole or measure the hole to determine whether it was consistent with a bullet fire from an AK 47. No neighbors testified concerning the shooting in this urban neighborhood that took place in broad daylight.

Events earlier in day

The state attempted to provide a motive for the shooting. Mister and Alex Morales did not work on the day in question. Instead, they wanted to get a “loan” from Mister’s mother whose name is Mary. (TR 3412-13) Mary lived on Elm Street while Mister lived on Park. (TR 3500) Mary’s boyfriend for the previous year and a half was Willie Wilks. After picking Mary up and taking her to the place where they were to obtain the loan, it was learned that Mary needed her bank card and the Mr. Wilks had it. Mr. Wilks lived near Mary so they all went to his house. An argument ensued between Mister and Mr. Wilks. (TR 3507) Mister wanted to fight

Mr. Wilks. Mister even took off his shirt in preparation for the fight. (TR 3508) Mr. Wilks went back inside the house and came out with a small black handgun according to Mister. (TR 3508) Mr. Wilks refused to fight. (TR 3508) Mister ran away, up the street, and taunted Mr. Wilks by calling him names. (TR 3509) Morales and Mary witnessed this confrontation. (TR 3509)

Cooler heads prevailed and Alex and Morales walked to a basketball court several minutes away. While at the basketball court, according to Mister, Mister telephoned his mother Mary and gave her a hard time about being with Mr. Wilks; Mister was upset with his mother; according to Mister, during this conversation, Mr. Wilks took the phone from Mary and Mister called Wilks names and hung up. According to Mister, the appellant said he was going to kill him. (TR 3510-12) Mister also testified he told the police about the threat and he does not know why the threat *never* appears in any of the police reports. (TR 3535-36) No telephone records of any sort were sought by the police; no telephone records of any sort were introduced into evidence.

After this purported telephone conversation at the basketball court, Alex and Mister walked back to Mary's house and retrieved Alex's truck and went to the home on Park Avenue. (TR 3513)

Mister admitted in his testimony that Mr. Wilks did not know where Mister lived. (TR 3511)

Morales testified about the attempt to retrieve the bank card belonging to Mary and further testified that he was the peacemaker concerning the near fight between Mr. Wilks and Mister and explained they just wanted the bank card which the Mr. Wilks handed to Morales who then gave it to Mary. (TR 3419) Morales and Mr. Wilks even shook hands afterwards. (TR 3422) Morales left the area with Mister and Morales testified a friend drove them to the

basketball court, (TR 3423) and he left his truck at Mary's. Morales testified about the alleged phone call between Mister and Mary but said it was hard to hear what they were saying because they were about 10 yards apart but Mister seemed upset. (TR 3424-25). About an hour after arriving at basketball court, Morales and Mister were dropped off at Mary's house where Morales retrieved his truck and drove them back to Park Avenue. Approximately 10 minutes later, the shooting took place. (TR 3425-25)

Renae Jenkins

Ms. Jenkins is the mother of Mister's four children and 21 years old. She was at the house where the shooting took place but did not see the shooting as she was in the kitchen; she jumped off the back porch and ran; she called 911; she explained that Ororo had a BB gun in her purse because she was "beefing with people" and had been jumped two weeks earlier. (TR 3376-81) She further testified she did not hear screeching tires. (TR 3384)

Police Testimony

Patrolman Melvin Johnson was the first officer on the scene. (TR 3317) In general, he described the scene as he found it and testified most importantly that "Mister" and Morales said Wilks did this (TR 3327) and Mister complained that nobody was helping Ororo. Mister was described as "very distraught" (TR 3323) and "screaming." (TR 3325)

The police made a radio broadcast to be on the lookout for Wilks. (TR 3334) Officer Johnson testified, without detail or names given, that he was told by more than one person the shooter had dreadlocks and had walked down the street with a long gun. (TR 3346, 3347)

Officer Jessica Shields was the second officer to arrive; she described Mister as "losing his mind" and that he screamed "Willie did this." (TR 3389, 3392-93) Officer Shields saw Morales on the kitchen floor who was not talking or moving but was asked who did this and said Willie did this. (TR 3395-96) She further described how disruptive and uncooperative Mister

was to the point where he had to be handcuffed. (TR 3396- 99) Mister also described to the officer what he saw while looking out the upstairs window. (TR 3400)

Officer Martini arrived on the scene and called it “chaotic.” (TR 3484) Martini was ordered to keep the crowd under control and then to go to the nearby hospital where Morales had been taken. (TR 3485, 3487) The officer spoke to Morales for only two or three minutes and described him as slightly sedated, probably nervous; Morales gave the name of the shooter as Wilks, described what happened earlier in the day and also said Wilks had pulled out a handgun and shot him. (TR 3388, 3389, 3393)

Officer Crissman from the crime scene unit took numerous photographs. (TR 3586) He also took photos the next day when Mr. Wilks was arrested in his van. (TR 3609) He also searched the crime scene for more bullet casings and found none. (TR 3617) He also testified that the shell casing found was very large (.30 caliber) and could not be confused with 9mm and that no 9mm casings were found at the scene of the shooting. (TR 3620-23) Further, other than taking photos of the alleged bullet hole on the second floor, no effort was made to get a ladder and inspect it or attempt to retrieve the bullet or fragments.

Officer Marzullo from the crime scene unit testified on the day Wilks was arrested, he collected a gunshot residue kit and sent it to BCI. (TR 3638-39) He further testified that the blood on Wilk’s clothing was NOT the victim’s. (TR 3649) He further testified that shell casings can be tested for DNA but does not know if it was done in this case. He also testified that nobody at the Youngstown Police Department checks for the trajectory of bullets into buildings. (TR 3363, 3354)

Officers Geraci and Mullenex testified about how they observed Mr. Wilks' vehicle the next day, stopped him, he fled, and they arrested him after a short chase. A 9mm firearm was found in his vehicle. (TR 3688, 3704)

Det. Sgt. John Perdue (TR 3802), was the lead detective on the case and the only witness at the grand jury, also testified before the petit jury and summarized the case after sitting through the trial listening to the testimony. (TR 3824) He testified that based on Mister's identification on the photo array of the driver and shooter, the police looked for them but could not find them. (TR 3813) No testimony was given detailing their efforts. He also testified that the car allegedly used in the crime has never been found. (TR 3816) The black hoodie allegedly worn was never found. (TR 3818) No investigation was done in the case from 9 pm on the night of the shooting until 9 am the next day. (TR 3833) By 12:30 pm the day after the offense. Willie Wilks had been charged. (TR 3839) The next day the case would be presented to grand jury. (TR 3840) The detective testified they had information that shooter had dreds or dreadlocks and that Mr. Wilks did NOT have dreds or dreadlocks. (TR 3844) One source of the information about the shooter having dreds was a person that had been on the porch. (TR 3844) The Detective further testified that information he had was that the shooter got out of the back door of the car. The car the detective never found, but was attributed to Mr. Wilks was only a two door car. (TR 3848). The detective admitted that at least three descriptions of the car were obtained: blue, black, dark. (TR 3850) The detective admitted that Mister NEVER told him that Willie Wilks threatened to kill him over the phone as Mister testified. (TR 3859) The detective NEVER obtained any phone records. (TR 3861) The detective could not verify that the conversation even took place. (TR 3862) The detective had the names of the two men in the car according to Mister, Troy Cunningham and Scott Anderson, but did not send SWAT team or others to look for them. (TR

3863-64) Detective Perdue never showed Shantwone Jenkins a photo array. (TR 3871) Mister told the witness the gun was aimed at him but never fired. (TR 3874) The capital indictment was returned within two days of the crime even though nothing was investigated for 12 hours between 9 pm the night of the shooting until 9am the next day (TR 3833, 3881) The police never recovered the firearm used in the shooting. (TR 3906) Mister made it clear that Willie Wilks is bald. (TR 3911); Mister identified the driver and passenger within two hours of the shooting (TR 3912); the detective has NOTHING in his police reports about the efforts made to find these two named suspects. (TR 3913-15)

Lack of forensic/corroborating evidence

The only possible forensic evidence linking Willie Wilks to the crime scene was the gunshot residue results obtained the day after the shootings. Mr. Lewis, from BCI, testified that there are non-firearm sources of gunshot residue and that it can be transferred from one person to another through transference for example by being booked/processed at the police department.

Joshua Barr from BCI testified that the 9mm gun recovered was operable; (TR 3761) He further testified that AK/SKS rifles may be bought legally.

Dr. Ohr

The doctor testified that he is a forensic pathologist and the victim died instantly from her head wound. (TR 3721, 3749)

Defendant's recorded statement

After the defendant was arrested, he gave a lengthy videotaped statement; in the statement he denied being the shooter and otherwise cooperated in answering the questions posed. Neither the state nor the defense presented the statement to the jury; neither did they show a photograph of his appearance at the time of his arrest. A summary of the statement was contained in Def. Ex. D (paragraph marked: 2:10 p.m.).

Shantwone and Antwone Jenkins: The Second Account

As noted in the Mahoning County Prosecutor's Office Grand Jury Bindover Summary, Shantwone Jenkins was a witness with a known address and phone number; she was on the porch and gave an account of the shooting that the Grand Jury did not hear. Shantwone is the sister of Renae Jenkins who is the mother of Mister's four children. Shantwone has a twin brother named Antwone Jenkins. (TR 3362) Antwone also had known address and phone number. See Defendant's Ex. F.

Shantwone and Ororo were seated on the porch together. She gave the police an account of the shooting as follows: she "observed a male, black with dreads walk westbound on the sidewalk with a long gun. He started to approach the house and said "where is he at?" *** Jenkins started to run into the house and grabbed Mister Wilkins and moved him from the door. Jenkins heard several gunshots. *** Jenkins did not know or identify the shooter. Bindover Summary, page 2; def. Ex. F. There is no evidence that Wilks had dreadlocks; in addition, this testimony contradicts both Morales and Mister's testimony about Mister going upstairs to get cigarettes and even Mister's presence upstairs as he testified. Shantwone did NOT identify Wilks as the shooter and described someone completely different in appearance and failed to mention the involvement of a car let alone one "skidding" its tires. A description of the shooter given on scene in the rear of Car 111 described a black male with dreads, tan pants, maybe red shirt carrying a long gun. See Youngstown Police Department, Incident Report, Incident # 13-034831.1, page 3 of 4.

Antwone Jenkins told police he was in the dining room; after Shantwone yelled to "get down" he looked to see if anyone had been shot or "hit;" he saw a dark skin black male with dreads, and a blue possibly Chrysler vehicle and he heard two gunshots.

Neither Antwone nor Shantwone testified at trial nor was their account given to the Grand Jury.

The Penalty Phase

The defense presented only three lay witnesses and the appellant's unsworn statement.

Tikisha D'Altorio, the mother of appellant's three-year-old child, testified that Wilks had two jobs and was attentive to his son from the day he cut the child's umbilical cord. (See Ex. 1) Wilks saw his son every day and provided financial support. (TR 4226-28)

Wilks' half-brother, Tracy Lynell Wilks, testified that he has children, works full time and that the appellant worked full-time at the local newspaper and a restaurant; further, appellant lives with and loves his mother and helps her with her needs. (TR 4232-4234)

Patricia Wilks, appellant's mother testified. She was 61 years old and the appellant was 42 years old; she left Alabama when appellant was 9 months old and Wilks never saw his father afterwards. Mrs. Wilks had a drinking problem when her son was growing up; her brother, Wilks' uncle, has schizophrenia and she takes care of him and Wilks is attentive to her, his uncle and his son. (TR 4235-37) She identified Ex. 2 as a photo of Wilks with his son at a birthday party. Mrs. Wilks wants her son to live with all of her heart. (TR 4239).

Willie Wilks gave an undirected and unsworn statement maintaining his innocence, apologizing for an outburst when the guilty verdict was read in court and asking for leniency on his son's behalf. (TR 4245-4298)

The State moved to admit some exhibits and presented no testimony. (TR 4224)

ARGUMENT

PROPOSITION OF LAW NO. I

WHEN THE STATE FAILS TO INTRODUCE SUFFICIENT EVIDENCE OF PARTICULAR CHARGES, A RESULTING CONVICTION DEPRIVES A CAPITAL DEFENDANT OF SUBSTANTIVE AND PROCEDURAL DUE PROCESS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 5, 9, AND 16 OF THE OHIO CONSTITUTION.

“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.” *In re Winship*, 397 U.S. 358, 364 (1970), *Jackson v. Virginia*, 443 U.S. 307, 315 (1979).

The test for the sufficiency of evidence is whether any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found the elements of the crime beyond a reasonable doubt. *State v. Allen*, 73 Ohio St. 3d 626, 630 (1995) The sufficiency of the evidence standard requires evidence that would allow a rational juror to **“reach a subjective state of near certitude”** as to the existence of each and every element of the crime. *Jackson*, at 315 (defining the beyond-a-reasonable-doubt standard); *Piaskowski v. Bett*, 256 F.3d 687, 692 (7th Cir. 2001) (granting relief because of insufficient evidence in a murder case and noting: “[W]e are not convinced that [the State’s key witnesses’] respective stories implicate Piaskowski in Monfils’ murder to ‘a state of near certitude.’ A strong suspicion that someone is involved in criminal activity is no substitute for proof of guilt beyond a reasonable doubt.”); see also *McKenzie v. Smith*, 326 F.3d 721 (6th Cir. 2003)(relief granted for attempted murder); *Smith v. Mitchell*, 437 F.3d 884, 889 (9th Cir. 2006)(relief granted in assault on a child resulting in death); *Juan H. v. Allen*, 408 F.3d 1262, 1274-75 (9th Cir. 2005)(relief granted on first degree

murder conviction); *Evans-Smith v. Taylor*, 19 F.3d 899 (4th Cir. 1994)(relief granted in second degree murder case where two juries had previously convicted him); *Chein v. Shumsky*, 373 F.3d 978 (9th Cir. 2004)(perjury conviction); *Kelly v. Roberts*, 998 F.2d 802(10th Cir. 1993)(relief granted for aggravated robbery and felony murder).

The legal sufficiency of the evidence is a question of law, not a question of fact. *State v. McLeod*, 165 Ohio App. 3d 434, 436 (2006). Wilks raised his sufficiency claim at trial by properly and timely moving for a judgment of acquittal under Ohio Crim. Rule 29. (Tr. 3952, 3967). The defense further preserved the issue by filing a Renewed Motion for Judgment of Acquittal. (Vol. III, Doc. 185)

Among the essential elements the State must prove in order to convict Wilks of the aggravated murder and other criminal offenses is that Wilks is the actual perpetrator who committed the aggravated murder and other crimes. *State v. Chinn*, 85 Ohio St. 3d 548, 565 (1999); *State v. Minor*, 2013 Ohio 558, ¶ 9 (Ohio App. Feb. 20, 2013) (“[I]dentity is an element that must be proven by the state beyond a reasonable doubt.”).

In this case:

1. There is no reliable forensic or scientific evidence linking Wilks to the crime;
2. There is no substantial police investigation; indictment about 40 hours after the crime but no investigation from 9 pm May 21 to 9 am May 22; 13 pages of grand jury testimony from lead detective and prosecutor;
3. There is no DNA or ballistic evidence linked to Wilks;
4. No murder weapon found;
5. Two victims identify Wilks, but two people on scene identify someone else with dreadlocks (Antwone Jenkins and Shantwone Jenkins); a neighbor lady

(Ollie Smith) identifies an unknown third person walking down the street that could have been shooter; incident report YPD officer Bailey);

6. Only one shell casing found which is best evidence only one shot fired and not more; police on the scene immediately and did thorough search looking for shell casings; Injuries to Ororo and Morales support fact that one shot fired because of bullet passing through Ororo's head and fragments entering Morales in the back as he fled behind her towards house;
7. No phone records to support Mister's claim of phone conversation with Wilks that involved alleged threat by Wilks which he never told police about but only disclosed during trial for first time;
8. No testimony from Mister's mother concerning whether phone conversation took place;
9. Two men identified in car used by Wilks (allegedly) identified by name less than two hours after shooting were never interviewed by police or defense and never charged; detective testified that no police reports concerning police investigation of these two men which completely undermines Mister's identification of these two men and Wilks;
10. Morales at first said he did not know who shot him;
11. Morales said the shooter used a handgun;
12. Mister had poor vantage point from window with box fans obstructing his view;
13. Mister is only witness who heard "skidding" tires; others testified or gave statements no car involved; no car recovered linked to this case;

14. Transferred intent theory does not apply here;
15. The “bullet hole” near second floor window never sufficiently linked to this case where AK47 used as murder weapon; police did not attempt to retrieve the “bullet”; it likely would have penetrated the wall if an AK47 bullet; no penetration of wall in this case; trajectory of shot to Wilks alleged position on ground never testified to by an expert;
16. Gunshot residue linked to Wilks could have come from his handling of 9mm found in his vehicle the next day (and which is not the murder weapon or even the same type of firearm that is the murder weapon); in addition, the arresting officers had firearms and had been at the firing range the same day they arrested Wilks and the residue could have been inadvertently transferred to Wilks;
17. No confession from Wilks even though he gave recorded statement;
18. While state does not need to prove motive, the proffered motive in this case (an argument over a bank card belonging to Mister’s mother which Wilks gave to Morales before the shooting) is exceedingly weak; there is no reasonable explanation for Wilks to open fire on a house full of people including those on front porch especially when Mister not in view and potentially not there;
19. Ororo had recent beefs with other people and had identifications or cards in her purse belonging to others; she was the seeming target of the shooter as she was shot in the head; she had air pistol in her purse on the porch which

resembled a real firearm likely for protection or to scare off those who she felt threatened her; no testimony that Wilks had reason to harm her;

20. Clothes allegedly worn by Wilks during shooting never recovered;

21. No evidence police searched Wilks' residence, his girlfriends' residences or any other place with search warrant or otherwise for evidence linking Wilks to this case.

In addition, the only evidence tying Willie Wilks to this case was the testimony of two "eye witnesses." In recent times, more has been learned about eyewitness identification and the unreliability associated with it. A recent case from the Illinois Supreme Court illustrates the point. In *People v. Lerma*, ---N.E. 3d ---, 2016 IL 118496, 2016 WL 280709 (slip opinion), with facts that are eerily similar to the facts in this case, the court was addressing the use of expert testimony on eye witness identification. The opinion discusses the testimony of one potential expert witness:

The data and conclusions contained in Dr. [Geoffrey] Loftus's report largely tracked with the contents of Dr. Fulero's report, with two significant exceptions. First, Dr. Loftus's report stressed that he would not "issue judgments about whether a particular witness's memory and assertions * * * are correct or incorrect" and that "any testimony on [his] part which implies unreliability on the part of eyewitness(es) who identify a defendant should not, *ipso facto*, be taken to imply that the defendant is innocent—it implies only that the eyewitness evidence should be viewed with appropriate caution." Second, and more importantly, unlike Dr. Fulero's report, which was silent on the subject of acquaintance identifications, Dr. Loftus's report specifically stated that "[i]t would seem intuitive to a jury that if a witness identifies a suspect with whom he or she is acquainted, the witness's identification would likely be accurate. However, this is not necessarily true." Rather, the report explained, "if circumstances are poor for a witness's ability to perceive a person," and "the situation fosters a witness's expectations that he or she will see a particular acquaintance[,] * * * then the witness will tend to perceive the person as the expected acquaintance even if the person is in fact someone else." According to Dr. Loftus's report, such poor circumstances include low lighting; viewing longer distances in the dark; divided attention of the witness, including a focus on a weapon;

time duration, with less time leading to less available information, and a witness's tendency to overestimate time durations; cross-racial identification; stress; and a partially obscured face.

(Id., at ¶ 14)

Dr. Loftus' report opined that misidentification can occur even when the witnesses are acquainted with the person identified:

“In such circumstances, the witness's acquaintance with the expected—and hence perceived—person works against accurate identification for two reasons: First, it would be natural and easy for the witness to subsequently pick the acquaintance in an identification procedure * * * (because the witness already knows whom she is seeking in a lineup procedure, she could immediately rule out all the fillers, and zero in on the acquaintance/suspect). Second, the witness could use his or her prior knowledge of the acquaintance's appearance to reconstruct his or her memory of the original events—the crime—such that the in fact poor original memory of the actual criminal is replaced with a stronger and more confidence-evoking memory of the acquaintance * * *.”

(Id.)

Here, the jury should have heard from an expert on eye witness identification so as to inform the jury of the weakness of such evidence, the only evidence against Mr. Wilks.

For the above state reasons, and others found in the record, there was insufficient evidence to convict the appellant of all counts. His conviction violates the Fourteenth Amendment of the the United States Constitution, and must be reversed.

PROPOSITION OF LAW NO. II

WHEN THE CONVICTION OF A DEFENDANT IS AGAINST THE WEIGHT OF THE EVIDENCE AN APPELLATE COURT MUST REVERSE THAT CONVICTION, FAILURE TO DO SO DEPRIVES A CAPITAL DEFENDANT OF SUBSTANTIVE AND PROCEDURAL DUE PROCESS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 5, 9, AND 16 OF THE OHIO CONSTITUTION.

A weight of the evidence argument is part of the fundamental due process required by the Fourteenth Amendment. *Tibbs v. Florida*, 457 U.S. 31 (1982). The Ohio Constitution also gives appellate courts the “power to decide that [a] verdict is against the weight of the evidence.” Ohio Constitution, Article IV, Section 3(B)(3).

This inquiry is separate from the examination for sufficiency of the evidence. This review must be directed toward a determination of whether there is substantial evidence upon which a jury could reasonably conclude that all of the elements have been proved beyond a reasonable doubt. *State v. Eley*, 56 Ohio St.2d 169, 172, 383 N.E.2d 132, 134 (1978); *Glasser v. United States*, 315 U.S. 60, 80 (1942). Substantial evidence is more than a mere scintilla. *See United States v. Orrico*, 599 F.2d 113, 117 (6th Cir. 1979). It is evidence affording a substantial basis of fact from which the fact at issue can be reasonably inferred. *Id.*

A court considering a manifest-weight claim “review[s] the entire record, weighs the evidence and all reasonable inferences, [and] considers the credibility of witnesses.” *State v. Hancock*, 108 Ohio St. 3d 57, 63 (2006).

In this case, the following supports the position that the weight of evidence does not support the convictions:

1. There is no reliable forensic or scientific evidence linking Wilks to the crime;

2. No substantial police investigation; indictment about 40 hours after the crime but no investigation from 9 pm May 21 to 9 am May 22; 13 pages of grand jury testimony from lead detective and prosecutor;
3. No DNA or ballistic evidence link Wilks;
4. No murder weapon found;
5. Two victims identify Wilks but two people on scene identify someone else with dreadlocks (Antwone Jenkins and Shantwone Jenkins); a neighbor lady (Ollie Smith) identifies an unknown third person walking down the street that could have been shooter; incident report YPD officer Bailey)
6. Only one shell casing found which is best evidence only one shot fired and not more; police on the scene immediately and did thorough search looking for shell casings; Injuries to Ororo and Morales support fact that one shot fired because of bullet passing through Ororo's head and fragments entering Morales in the back as he fled behind her towards house;
7. No phone records to support Mister's claim of phone conversation with Wilks that involved alleged threat by Wilks which he never told police about but only disclosed during trial for first time;
8. No testimony from Mister's mother concerning whether phone conversation took place;
9. Two men identified in car used by Wilks (allegedly) identified by name less than two hours after shooting were never interviewed by police or defense and never charged; detective testified that no police reports concerning police

investigation of these two men which completely undermines Mister's identification of these two men and Wilks;

10. Morales at first said he did not know who shot him;
11. Morales said the shooter used a handgun;
12. Mister had poor vantage point from window with box fans obstructing his view;
13. Mister is only witness who heard "skidding" tires; others testified or gave statements no car involved; no car recovered linked to this case;
14. Transferred intent theory does not apply here;
15. "bullet hole" near second floor window never sufficiently linked to this case where AK47 used as murder weapon; police did not attempt to retrieve the "bullet"; it likely would have penetrated the wall if an AK47 bullet; no penetration of wall in this case; trajectory of shot to Wilks alleged position on ground never testified to by an expert;
16. Gunshot residue linked to Wilks could have come from his handling of 9mm found in his vehicle the next day (and which is not the murder weapon or even the same type of firearm that is the murder weapon); in addition, the arresting officers had firearms and had been at the firing range the same day they arrested Wilks and the residue could have been inadvertently transferred to Wilks;
17. No confession from Wilks even though he gave recorded statement;
18. While state does not need to prove motive, the proffered motive in this case (an argument over a bank card belonging to Mister's mother which Wilks

gave to Morales before the shooting) is exceedingly weak; there is no reasonable explanation for Wilks to open fire on a house full of people including those on front porch especially when Mister not in view and potentially not there;

19. Ororo had recent beefs with other people and had identifications or cards in her purse belonging to others; she was the seeming target of the shooter as she was shot in the head; she had air pistol in her purse on the porch which resembled a real firearm likely for protection or to scare off those who she felt threatened her; no testimony that Wilks had reason to harm her;
20. Clothes allegedly worn by Wilks during shooting never recovered;
21. No evidence police searched Wilks' residence, his girlfriends' residences or any other place with search warrant or otherwise for evidence linking Wilks to this case.

In addition, the only evidence tying Willie Wilks to this case was the testimony of two “eye witnesses.” In recent times, more has been learned about eyewitness identification and the unreliability associated with it. A recent case from the Illinois Supreme Court illustrates the point. In *People v. Lerma*, ---N.E. 3d ---, 2016 IL 118496, 2016 WL 280709 (slip opinion), with facts that are eerily similar to the facts in this case, the court was addressing the use of expert testimony on eye witness identification. The opinion discusses the testimony of one potential expert witness:

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(Id., at ¶ 14)

Dr. Loftus' report opined that misidentification can occur even when the witnesses are acquainted with the person identified:

“In such circumstances, the witness's acquaintance with the expected—and hence perceived—person works against accurate identification for two reasons: First, it would be natural and easy for the witness to subsequently pick the acquaintance in an identification procedure * * * (because the witness already knows whom she is seeking in a lineup procedure, she could immediately rule out all the fillers, and zero in on the acquaintance/suspect). Second, the witness could use his or her prior knowledge of the acquaintance's appearance to reconstruct his or her memory of the original events—the crime—such that the in fact poor original memory of the actual criminal is replaced with a stronger and more confidence-evoking memory of the acquaintance * * *.”

(Id.)

Here, the jury should have heard from an expert on eye witness identification so as to inform the jury of the weakness of such evidence, the only evidence against Mr. Wilks.

For the above stated reasons, and others found in the record, the weight of the evidence does not support the convictions in this case.

PROPOSITION OF LAW NO. III

AVAILABLE EXCULPATORY EVIDENCE CONCERNING THE IDENTITY OF THE PERPETRATOR IN A CAPITAL OFFENSE MUST BE PRESENTED TO THE GRAND JURY UNDER ART. I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION.

Article I, Section 10 of the Ohio Constitution and the Fifth Amendment of the federal constitution require capital cases to be instituted by grand jury proceedings.

The grand jury has served the dual function of determining if there is probable cause that a crime has been committed and of protecting citizens against unfounded criminal prosecutions. *Branzburg v. Hayes* 408 U.S. 665, 686-687 (1972); *Wood v. Georgia*, 370 U.S. 375, 390 (1962). The grand jury is to assess whether there is an adequate basis for bringing a criminal charge. *United States v. Williams*, 504 U.S. 36, 56 (1992); *United States v. Calandra*, 414 U.S. 338, 343 (1974).

A trial court may invoke its supervisory powers to prevent “fundamental unfairness.” *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256-57 (1988). Racial discrimination in the selection of a grand jury is unconstitutional. *Vasquez v. Hillary*, 474 U.S. 254, 264 (1986).

In a 5-4 decision, the U.S. Supreme Court held that federal trial courts have no authority to require the prosecutor to disclose exculpatory evidence. *Williams, supra*. However, the majority left open the proposal that Congress is free to require prosecutors to give grand juries exculpatory evidence. Indeed, the U.S. Attorney’s Manual requires federal prosecutors to present grand juries with available exculpatory evidence. See USDOJ, U.S. Attorneys’ Manual, p 9-11.233, p. 88 (1988) See *Williams, dissent at 69-70*.

Special protections must adhere to capital proceedings because death is different. Eighth Amendment, U.S. Constitution. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

States are likewise free to give heightened protection of individual rights under State Constitutions. The Ohio Constitution is a document of “independent force” in protecting individual rights. *Cleveland v. McCardle*, 2014 Ohio 2140 (dissenting opinion). The Court must take this opportunity to require the prosecutor to present to the grand jury exculpatory evidence of the perpetrator’s identity in a capital case. Otherwise, the grand jury cannot protect citizens against unfounded prosecutions. See *Branzburg, supra*.

By failing to provide contradictory and exculpatory evidence concerning the identity of the perpetrator in a capital case, the prosecutor fails to give due deference to its status as an independent legal body, improperly influences the grand jury, and fails to inform the grand jurors of the right to hear from available witnesses. See ABA, Prosecution Function, Criminal Justice Standard 3-3.5 Relations with Grand Jury and ABA, Prosecution Function, Criminal Justice Standard 3-3.6 Quality and Scope of Evidence Before Grand Jury. In fact, 3-3.6 (b) states that No prosecutor should knowingly fail to disclose to the grand jury evidence which tends to negate guilt or mitigate the offense.

Some courts have held that a prosecutor is not entitled to mislead or engage in unfair tactics before the grand jury and have specifically adopted the ABA language regarding substantial evidence negating guilt and the requirement to present it “at least where it might reasonably be expected to lead the jury not to indict.” *United States v. Ciambrone*, 601 F.2d 616, 623 (2nd. Cir, 1979); see *Mayes v. City of Columbus*, 105 Ohio App.3d 728, 740 (1995).

The Ohio Joint Task Force concerning the Administration of the Death Penalty (April 2014) recommended that prosecutors in capital cases be required to provide grand juries with available exculpatory evidence. See Recommendation 38.

In Ohio, the grand jury is essentially an arm of the court which gives the prosecutor access to it subject to the court's supervisory powers. The prosecutor may not abuse its access. See *State ex rel Shoup v. Mitrovich*, 4 Ohio St.3d 220, (1983). Prosecutorial misconduct in the grand jury may be a basis for dismissal of an indictment without prejudice. The grand jury serves as a protector of citizens against arbitrary and oppressive governmental action. *United States v. Calandra*, 414 U.S. 338, 343 (1974); the grand jury must be "independent" and "informed" *Wood v. Georgia*, 370 U.S. 375 (1962). Only one Ohio court decision has been found where it held that there is no "statutory" duty to present exculpatory evidence, it also cited to the practice of requiring to comply with the ABA Standards cited above "at least where it might reasonably be expected to lead the jury not to indict." *State v. Ball*, 72 Ohio App.3d 549 (1991). It must also be noted that this Court just created (January 2016) a Task Force to study improvements to the Ohio Grand Jury Process containing many judges and other members of the Ohio legal community.

In this case, the grand jury transcripts were made part of the record below, albeit under seal but unsealed for counsel's review, the appellant must raise the issue in his direct appeal. *State v. Dew*, 2013 Ohio 2549 paragraph 26.

In this case, the Grand Jury was deprived of the statements and testimony of two witnesses who described, in detail, the shooter as a person with dreadlocks who walked up to the house and opened fire with his gun rather than someone who approached the house rapidly emerging from the back seat of a car. Shantwone Jenkins statement calls into doubt all of Mister's testimony including the part where he was on the second floor looking out a window. See, Statement of Facts. Moreover, this information was part of the Grand Jury package possessed by the prosecutor. In addition, the prosecutor failed to give the grand jury the video

recorded statement of the appellant given shortly after his arrest in which he denied all involvement in this case. There was no evidentiary impediment in providing this important piece of information. See Ohio Evidence Rule 101(C)(2)(evidence rules not applicable to grand jury proceedings).

The critical issue in this case was the identity of the shooter. The state had independent witnesses (and the defendant's statement) that he was not the shooter but failed to provide this information to the Grand Jury. There was not overwhelming evidence of guilt; in fact, there is no strong scientific or forensic evidence corroborating evidence of guilt. Plus, there was no significant investigation by the State; the Grand Jury had the case less than 48 hours after the shooting. Simply put, the state had two witnesses who had had an argument with Mr. Wilks earlier in the day who said the appellant was the shooter; it presented only that to the grand jury; and withheld that two other independent witnesses at the scene who described someone very different than the appellant.

This case is really no different than a prosecutor questioning a witness outside the presence of a grand jury and then failing to inform the grand jury that the testimony was exculpatory. *United States v. Phillips Petroleum, Inc.* 435 F. Supp. 610, 615-17 (ND Oklahoma 1977). The prosecutor is required to be impartial and refrain from improper methods calculated to produce a wrongful conviction. See *Berger v. United States*, 295 U.S. 78, 88 (1935).

Mr. Wilks has been denied his constitutional right to fair grand jury proceedings. His conviction and death sentence must be vacated.

PROPOSITION OF LAW NO. IV

PROSECUTOR MISCONDUCT IN THE GRAND JURY PROCEEDINGS DENIED APPELLANT HIS RIGHTS UNDER ARTICLE I, SECTION OF THE OHIO CONSTITUTION AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION.

Appellant Wilks has raised an issue regarding presenting available exculpatory evidence concerning the identity of the shooter in the capital case to a grand jury. (See, Proposition of Law No. III) However, there is another issue regarding the grand jury in this case, and that is misconduct by the prosecuting attorney.

It is important to understand the basics. Only one witness testified before the grand jury and that was Detective Perdue. The testimony for this capital case consists of 13 pages which were sealed by the trial court for appellate review, if necessary. The shooting took place at about 5:00 p.m. on May 21st and the grand jury heard this case on May 23rd at 8:30 a.m. Only about 40 hours passed from the time of the shooting until grand jury presentation.

During this very short grand jury proceeding, the following instances of misconduct took place:

Page 3: the detective answers a question posed by the prosecutor concerning appellant's criminal history; the detective answers, but then the prosecutor interjects her "testimony" as follows:

Actually, he pled guilty to involuntary manslaughter and two counts of felonious assault, so back in 1990 he tried to kill at least a few people and killed one. So bringing us back up to date here. Wilks is the boyfriend of Aragon.

Page 7-8: the detective testifies that "everybody in the neighborhood was saying that that was Mary's boyfriend that actually did the shooting."

Page 8: Detective testifies that once they got to the scene that “We talked to William and talked to Tonya and all of them” and “they said it was Willie” that did the shooting.

Page 12: A grand juror inquired about the health of the baby at the crime scene; the detective answered that “the baby was fine.” Then, the prosecutor interjected her “testimony” that “She was hit in the head and she dropped the baby.”

Page 12-13: A grand juror inquired about the one shell casing previously testified about and was concerned about the distance from the position of the shooter “ten, fifteen yards from the porch” and asked “It flew that far?” the detective answered “yeah” but the prosecutor “testified” that “they can fly that far.” The detective then elaborated on the debris and efforts made using a metal detector to search the area.

Page 13: the prosecutor then “testified” as follows:

You can look at this that they could have been thrown anywhere. That’s the problem with casings. They fly, and a lot of times we can’t find them and we know that there’s at least three shots fired. One upstairs and two at the people, so....

The Witness: People said there was three to four shots they heard.

Prosecutor: Right. Right.

Page 14: A grand juror inquired about the identity of the other men in the car that allegedly was involved and carried the appellant to the crime scene; the witness answered about the “three guys” and their positions in the car. Then the prosecutor asked the witness “but we don’t know these other people are at this point?” A: No, we don’t know who they are. We have an idea, but we really—Q: Now that we have him, maybe we’ll get something. Okay? Grand Juror: Will they be chargeable? Prosecutor: Probably. Depending upon what their conduct was before and after. We just have to know who they are. Okay. Anything else?

The overall problem with the conduct described above is that the prosecutor took on the role of a fact witness, an expert witness (concerning the shell casings) and otherwise allowed

misleading and what some would say are false statements to go uncorrected before the grand jurors.

The classic opinion of *Berger, supra*, outlines some instances of prosecutorial misconduct which include overstepping the bounds which should characterize the conduct of an officer of the court by misstating the facts in cross examination of witnesses; of putting into the mouths of such witnesses things which they had not said; assuming prejudicial facts not in evidence. *Berger* at 84-85.

In general, prosecutors cannot allow the use of perjured testimony, *Mooney v. Holohan*, 294 U.S. 103 (1935), the suppression of evidence favorable to an accused, *Brady v. Maryland*, 373 U.S. 83 (1963) and misstatements of the law in argument to the jury, *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

In grand jury proceedings, prosecutors may not present perjured testimony, *United States v. Basurto*, 497 F.2d 781 (9th Cir 1974), question a witness outside the presence of the grand jury and then fail to inform the grand jury that the testimony was exculpatory, fail to inform the grand jury of its subpoena power, *United States v. Samango*, 607 F.2d 877 (CA 9 1979), misstate the law, *United States v. Roberts*, 482 F. Supp. 1385 (CD Cal 1980) and misstating the facts on cross examination, *United States v. Lawson*, 502 F. Supp. 158 (Md 1980).

As the *Berger* opinion made clear, the prosecutor is to govern impartially and is a servant of the law; he may strike hard blows but not foul ones and must refrain from improper methods calculated to produce a wrongful conviction. *Berger* at 88.

In this case, the grand jury was misled to believe that “everyone” was saying the appellant was the shooter when only “Mister” and Morales said so and at least two others, Shantwone and Antwone, describe someone else as the shooter but the grand jury never heard

that evidence; the prosecutor improperly became a “witness” repeatedly and misstated his prior convictions especially with respect to “he tried to kill a few people”; the prosecutor interjected her “expert” testimony about shell casings in response to a grand juror’s question; and then at the end, when a grand juror inquired about the identity of the other men in the car, she misled the grand jury and arguably perjured herself when she said they don’t know the identity of these men when in fact “Mister” identified the driver and passenger from a photo array the night of the crime which is on the video of his statement made part of the record; photo contained in folder 1 is the driver and photo in folder 9 is the passenger. Plus, the appellant had given his statement explaining he was not guilty and thus had not and could not identify the people in the car. The prosecutor’s misconduct throughout the grand jury proceedings, as brief as they were, prevented the grand jury from fairly doing its job which is in part to protect citizens from unfounded prosecutions. *Branzburg*, supra.

Mr. Wilks has been denied his constitutional right to fair grand jury proceedings. His conviction and death sentence must be vacated.

PROPOSITION OF LAW NO. V

THE FIRST, SIXTH, AND FOURTEENTH AMENDMENTS GUARANTEE THE RIGHT TO A PUBLIC TRIAL. THIS RIGHT IS VIOLATED WHEN THE TRIAL COURT HOLDS THE VOIR DIRE OF THE JURORS IN A BACKROOM AWAY FROM PUBLIC ACCESS AND CLOSES THE COURTROOM DURING THE JURY INSTRUCTIONS.

The United States Supreme Court’s rulings with respect to the public trial right rest upon two different provisions of the Bill of Rights, both applicable to the States via the Due Process Clause of the Fourteenth Amendment. The Sixth Amendment directs, in relevant part, that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial” The Court in *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 92 L.Ed. 682 (1948), made it clear that this right extends to the States.

The Court has further held that the public trial right extends beyond the accused and can be invoked under the First Amendment. *Press–Enterprise Co. v. Superior Court of Cal., Riverside Cty.*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (*Press–Enterprise I*). This requirement, too, is binding on the States. *Ibid.*

The Supreme Court has explained that “[t]he central aim of a criminal proceeding must be to try the accused fairly,” and the right to a public trial is “one created for the benefit of the defendant.” *Waller v. Georgia*, 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). However, “the right to an open trial may give way in certain cases to other rights or interests, such as the defendant’s right to a fair trial or the government’s interest in inhibiting disclosure of sensitive information.” *Id.* at 45, 104 S.Ct. 2210. Such circumstances are “rare” and “the balance of interests must be struck with special care.” *Id.*

A. FACTS

There were two separate times during the trial that the trial court denied Mr. Wilks a public trial.

The first instance occurred during voir dire. The trial court conducted individual voir dire of the jurors on the issues of pretrial publicity and the death penalty. This process began on March 17, 2014 and continued through April 3, 2014 and comprised 2808 pages of the 4322 pages of transcript.

At the end of the trial phase, the court put on the record that the individual voir dire was conducted in the jury room, “which is adjacent to the courtroom” rather than in open court. (Tr. 4166) The trial court stated that the “door was opened where anyone who wishes to be admitted was permitted.” But it was not clear as to how someone who wished to be admitted, actually got to the jury room. Were there signs indicating that the trial was being held there, rather than in the courtroom? Did a member of the public have to go through the courtroom to try and find the jury room? Was there any outside/hall access door that was also open, so that someone would feel welcome to walk in?

Evidently this procedure was done at the “behest of the defense.” (Tr. 4166) But it was clear that the defense attorneys did not want the public there. Defense counsel Yarwood made a point of saying that the procedure, “from our perspective, met the requirement of an open courtroom.” (Tr. 4167). Attorney Zena continued: “Quite frankly, we asked that you proceed in that fashion in the hope that certain people wouldn't come and observe and thus expose this case to yet more publicity. We accomplished that fact by the manner in which it was conducted without barring anybody from the room. That's all on us, and we asked you to do it that way.”

Defense counsel further states that “Mr. Wilks was very satisfied with that means and manner.” But the reality is that no one asked Mr. Wilks about it, no one informed him that it was his right to have a public trial and this right was being denied. This is confirmed by other areas

of the trial in which defense counsel, nonchalantly, moved forward without their client's presence, as if it was a bother to have him present.

On more than one occasion, during the individual voir dire, the participants assured the juror that the information they were providing was just for the people in the room, thereby also proving that no one else was in the room. For example, Tom Zena told a prospective juror: "So that's why we do people separately. That's why *nobody else is in the room*. That's why there's no other juror in the room, and that's why whatever you say stays here. (Tr. 1854, emphasis added.)

The second instance occurred in the penalty phase of the case, just prior to jury instructions. The court told the public the following:

Those in the rear of the courtroom, you're certainly welcomed to stay; however, when I begin this instruction, it will take about a half hour and we're going to close the door and lock it, and it will remain closed for the duration. So if you don't want to stay for the duration, you should leave, so you're welcomed to do that now.
Tr. 4271-4272

By the court's own words, he was closing the courtroom, and the door would be locked and the public would not be able to get in during the jury instructions. There is no notation in the record as to when the doors were once again open to the public.

B. PRESUMPTION AGAINST CLOSURE

In *Waller v. Georgia*, the Supreme Court established the test for determining whether a courtroom closure violates a criminal defendant's Sixth Amendment right to a public trial. The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered. *Id.* (quoting *Press-Enter. Co. v.*

Super. Ct. of Cal., Riverside Cnty., 464 U.S. 501, 510, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984)). In the same opinion, the Supreme Court articulated the test as a four-factor analysis:

(1) the party seeking to close a public hearing must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure.

Id. at 48, 104 S.Ct. 2210; *see also Johnson v. Sherry*, 586 F.3d 439, 443 (6th Cir.2009). Courts frequently call this the “*Waller* test.” As courts have explained in applying that test, “[b]ecause of the great, though intangible, societal loss that flows from closing courthouse doors, the denial of a right to a public trial is considered a structural error for which prejudice is presumed.” *Johnson*, 586 F.3d at 443 (internal quotation marks omitted). “Structural errors require automatic reversal, despite the effect of the error on the trial's outcome.” *United States v. Stewart*, 306 F.3d 295, 321 (6th Cir.2002); *see also United States v. Eisner*, 533 F.2d 987, 993 (6th. Cir 1976).

The *Press Enterprise* case is also applicable to this case. In that case the Court found that the guarantees of open public proceedings in criminal trials cover proceedings for the *voir dire* examination of potential jurors. Without explicitly saying so, it appeared to be the press that the attorneys were trying to keep out of the proceedings.

C. APPLICATION

1. Individual Voir Dire

What the trial court did here, was a de-facto closure of the courtroom for the individual *voir dire*. By holding it in the jury room, which in most courthouses is usually apart from the courtroom and away from the public so that the jury is not in direct contact with the public, the court kept the public away from the proceedings for four weeks during the *voir dire*, which comprised the vast majority of time that went into the trial.

In applying the *Waller* test to this closure, defense counsel failed to show any overriding reason other than “the hope that certain people wouldn't come and observe.” But that is the whole purpose of a public trial, that people can come and observe. It was clear that the defense did not want anyone at the proceedings and insured that by secreting away the proceedings. The trial court failed to make sure that the public had easy access to the voir dire proceedings.

Since there was no other interest articulated, other than keeping people from coming and observing, it is unclear under the second *Waller* factor what interest was being protected. If the court wanted to make a more comfortable environment, the proceedings could have been easily held around one of the counsel tables in the courtroom, rather than having a prospective juror sit in the jury box. Then the public could have easily come in and out of the courtroom to observe the proceedings. It does not appear in the record that the trial court considered an alternative such as this, as the third *Waller* factor required.

Finally, the trial court made no findings concerning this procedure, other than an after-the-fact attempt to explain the procedure for the record in the hopes of avoiding error. The trial court stated that it was done in the jury room rather than open court. (Tr. 4166).

There was also nothing to indicate that Mr. Wilks was willingly allowing the process or understood the right to a public trial. At other points during the proceeding when defense counsel indicated that he was stating his clients wishes, the court confirmed this fact with Mr. Wilks. For example, when defense counsel indicated that Mr. Wilks was going to waive his presence at the jury view, the court specifically asked Mr. Wilks if that was his choice. (Tr. 3226) Here, when the public was kept from the proceedings, no one asked Mr. Wilks if that was his wish. The right to a public trial under Section 10, Article I of the Ohio Constitution cannot

be waived by the defendant's silence. *State v. Hensley*, 75 Ohio St. 255, 266, 79 N.E. 462 (1906). See also *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, ¶81.

The defense counsel, in their attempt to explain their reasoning, emphasized that the door was open to the jury room, but never mentioned that one person had found their way back to attend the proceedings. (Tr. 4167-4168) Instead the emphasis was on keeping people out of the proceedings, and they stated “We accomplished that fact by the manner in which it was conducted without barring anybody from the courtroom.” (Id.)

In *Presley v. Georgia*, 558 U.S. 209 (2010) the Court found that the trial court denied the defendant his right to a public trial when it completely excluded the public from jury selection without considering alternative options for accommodating both the public and potential jurors in the courtroom. In *Presley*, the Court suggested that threats of improper communications with jurors or safety concerns could be “concrete enough to warrant closing voir dire” under some circumstances. To justify closure, the Court explained, “the particular interest, and threat to that interest, must ‘be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.’” The Court noted that there was “some merit” to the defendant’s complaint that the trial judge had identified no overriding interest likely to be prejudiced if the courtroom had been kept open. “The generic risk of jurors overhearing prejudicial remarks, unsubstantiated by any specific threat or incident, is inherent whenever members of the public are present during the selection of jurors. If broad concerns of this sort were sufficient to override a defendant’s constitutional right to a public trial, a court could exclude the public from jury selection almost as a matter of course.”

In *Press Enterprise*, the Court also addressed concerns that the privacy of the prospective jurors somehow trumped the defendant’s right to a public trial. The Court found that in those

limited circumstances where the prospective juror might need to disclose a sensitive area of their personal lives, a private screening could take place. *Press Enterprise*, 464 U.S. at 512. In this case, the entire conversations with the juror became a private discussion.

2. Jury Instructions

During the penalty phase of the case the trial court closed the courtroom while he read the jury instructions. Tr. 4271-4272. This procedure was not followed during the trial phase jury instructions. (Tr. 4049) There is nothing on the record to indicate that the closure had been discussed with the parties. Nor was the *Waller* criteria even addressed. The court just indicated that the doors would be locked without any reasoning or justification.

The Court's determination to close the courtroom is even more concerning because the trial court did not close the courtroom in the penalty phase. The court offered no justification as to why the doors needed to be locked during the jury instructions.

The trial court's "locking of the doors" violated Mr. Wilks right to a public trial.

D. Conclusion

The closure of the courtroom for these two different parts of the trial violated Mr. Wilks right to a public trial, as guaranteed by the First, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sec. 10 and 11 of the Ohio Constitution. The only way to rectify this error is reverse the conviction and sentence and to grant Mr. Wilks a new "public" trial.

PROPOSITION OF LAW NO. VI

A CRIMINAL DEFENDANT HAS A FUNDAMENTAL RIGHT TO A FAIR CROSS SECTION OF THE COMMUNITY THAT IS GOING TO TRY HIM AND DETERMINE WHETHER HE SHOULD BE SENTENCED TO DEATH. THE EXCUSAL FOR CAUSE OF A SPANISH-SPEAKING PROSPECTIVE JUROR DENIED HIM HIS RIGHT TO A FAIR CROSS SECTION AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION. IT FURTHER DENIED THE PROSPECTIVE JUROR’S RIGHT TO ACCESS THE COURT AND EQUAL PROTECTION.

The prospective jury in this case were required to fill out a jury questionnaire and then were subjected to individual voir dire concerning pre-trial publicity and the death penalty. Prospective Juror No. 481 was Alfonso Guzman. Mr. Guzman filled out the vast majority of the questionnaire, although he left some answers blank. Other jurors did the same thing. (See, for example, prospective questionnaires of Jurors No. **441**, 451, **576**, **610**, 710³) The answers were in English and the writing did not indicate any difficulty. When he answered the question concerning “why do you think we have the death penalty in this country?”, he responded “if is nesenary [sic] its ok”. Jury Questionnaire, p. 13. Other questionnaires also indicated misspellings. (See for example, prospective questionnaires of Jurors No. 710, 716, 741)

Later in Mr. Guzman’s questionnaire on page 16, Question 75 asked “If you are selected as a juror in this case, the Court will order you not to discuss this case with **anyone** unless and until permitted to do so by this Court. Will you have any difficulty in following this order?” (emphasis in original). There was a line for yes and a line for no and he checked the yes line. He added “Because I don’t speak well inglish(sic).” The last question of the questionnaire asked if there was any reason he felt he could not serve as a juror in this case, and he answered “no.”

³ The numbers in bold indicate jurors who sat on the jury in this case.

When Mr. Guzman was brought into the jury room for questioning, the Court greeted him and indicated he would ask him some questions. The prosecuting attorney spoke up and said “Page 16, Judge.” (Tr. 672) She was indicating to the court the page number in which Mr. Guzman wrote he did not speak English well. The following exchange took place:

THE COURT: Thank you.

We looked at this questionnaire you filled out. We appreciate you did that. One of the things that we want to be sure about is one of the answers you gave to one of the questions about that you don't speak English too well.

Not too well.

Q. Excuse me. Do you understand English well?

A. Not much. I've been a waiter for so many years in different Mexican restaurants, but I just know about my work. And, you know, for things like this, it's kind of hard for me.

Q. When you filled out the questionnaire, did you understand all the words in there?

A. Not all.

Q. Okay.

MR. ZENA: We're okay, Judge.

MS. DOHERTY: Agree, Your Honor.

THE COURT: We appreciate you coming, and I think on some other jury you might be fine. This has got a lot of legal stuff in it, a lot of words that even the lawyers have trouble with, and I don't want you to miss anything. So with all that said, I'm going to excuse you for jury duty in this case.

Okay?

PROS. JUROR GUZMAN: Okay. Thank you.

THE COURT: So you're excused, and appreciate it. Thank you.

PROS. JUROR GUZMAN: Thank you.

THE BAILIFF: You could follow me, Alfonso.

PROS. JUROR GUZMAN: Thank you. Sorry about that.

MS. DOHERTY: No, it's okay.

THE COURT: You did great. Nice seeing you.

PROS. JUROR GUZMAN: Good seeing you.

(Tr. 672-674)

There is no reason that this juror should have been excused for cause without a further examination. He obviously read, and spoke English. He understood the trial court's questioning

and he answers did not indicate any hesitation. His treatment as a Hispanic-American was much different than others in the jury pool. There were others that had problems understanding the concepts that are involved in a death penalty case. In fact, the judge often said to the prospective jurors that each field has its own language and that is why we are going over these concepts with you. (For example, Tr. 2603, 2640, 2784, 2955) The Court did not even give Mr. Guzman a chance to determine if he could sit on the jury by going over the questions he asked the other prospective jurors.

The erroneous excusal of Mr. Guzman for cause implicates two different constitutional concepts. First, it denies Mr. Wilks a fair cross section of the community. Second, it denied Mr. Guzman the right to free access to the courts, and equal protection, the right to serve as a juror.

Erroneous Removal for Cause

The Sixth Amendment guarantees a defendant the right to a jury pool comprised of a fair cross-section of the community. In this case, the jury pool included African-Americans, Caucasians, Hispanic-Americans and a Native American. The problem is not with the pool of jurors, the problem was caused by the trial court and counsel, deciding rather than determining if the juror was qualified, to excuse the juror outright.

Crim. R. 24 (B)(13) provides that a person may be challenged for cause when "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." In *State v. Getsy*, 84 Ohio St.3d 180, 192 (1998) the Court addressed a similar issue, but the facts of that case indicated a juror who did not understand English to the extent that Mr. Guzman did. In the *Getsy* case, the juror had asked another juror to explain the written instructions to him. In addition, the *Getsy* juror raised his hand when asked if there was any reason that they could not be a good juror and cited the language issue. In

Mr. Wilks case, when that same question was asked on the questionnaire, Mr. Guzman answered “no” he did not know a reason he could not be a good juror. In addition, it was clear that he could understand the questionnaire, as he filled it out without any help and he understood and answered the trial court’s questions. He should not have been excused for cause.

Defense counsel began almost every voir dire session by telling the jurors that it was important that Mr. Wilks had a cross section of the community on his jury. People from all walks of life and experiences, unfortunately he failed to make sure that happened.

Denial of Access to Court and Equal Protection

The duty of jury service falls on all citizens, and, therefore, it is vitally important that the legal system open its doors to each person who desires to serve on a jury. In *State v. Speer*, 124 Ohio St.3d 564, 2010-Ohio-649, the Court expounded on the efforts to ensure that all persons, have access to the courts and the opportunity to serve on juries. *Id.*, at ¶20. The court mentioned the Interpreter Services Program as one of the initiatives promulgated that has demonstrated the Court’s commitment to ensure that no individuals are excluded from the courts on the basis of disability, whether as parties, witnesses, or jurors. *Id.*, at ¶ 22.

The *Speer* case involved a hearing-impaired juror. The Court acknowledged that when facing accommodations for jurors, the trial court must ensure that all jurors will be able to afford the accused a fair trial. Here, the trial court did not even attempt to see if the juror was qualified to serve as a juror. There were no questions about how long the juror had been in he country. The juror understood the questions asked of him during the limited questioning by the court. There was no attempt to go through the process with the juror and see if he could understand it.

The erroneous exclusion of prospective juror Guzman implicates the right of the prospective juror to the equal protection of the law, under the Equal Protection clause of the

Fourteenth Amendment to the United States Constitution, not just the rights of Mr. Wilks.⁴ The Equal Protection clause is implicated whenever state action is predicated upon race, alienage, *or national origin*. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). That is because: “These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others.” *Id.*

Ohio recognizes that: “The opportunity for jury service should not be denied or limited on the basis of race, *national origin*, gender, age, religious belief, income, occupation, disability, or any other factor that discriminates against a cognizable group in the jurisdiction.” Rules of Superintendence, Appendix B, Trial Court Jury Use and Management Standards 1(A) (emphasis added), quoted approvingly in *State v. Speer*, 124 Ohio St.3d 564, 2010–Ohio–649, 925 N.E.2d 584, ¶ 20. Ohio has enacted rules to guide the court when faced with a deaf juror to enable that juror to participate in the proceedings. (Sup. R. 88(B)). If the trial court had continued with his examination of the juror, he could have determined if an interpreter was necessary. Other states have made accommodations when a juror cannot speak English. In New Mexico, the New Mexico Supreme Court found the trial court’s excusal of a Spanish-speaking prospective juror who had difficulty understanding the English language violated the juror’s state constitutional right to perform jury service. *State v. Samora*, 307 P.3d 328, 2013 NMSC 038.

In this case, Mr. Guzman was chosen to be in the jury pool that would determine Mr. Wilks fate. However, the trial court and the attorneys involved failed to give him a chance to

⁴ Pursuant to *Powers v. Ohio*, 499 U.S. 400 (1991) a criminal defendant has standing to vindicate the right of the prospective juror not to be discriminated against.

serve. As soon as he honestly admitted he had trouble with the English language, they excused him. The jury questionnaire and the colloquy with the juror failed to indicate that the juror could not understand the proceedings that were about to take place. The trial court's comment that "on some other jury he might be fine" belied their reasoning to excuse him. In all cases tried in our judicial system there are legal terms as well as terms of art relating to the case being tried. Nothing would indicate that other case would somehow be a better vehicle for jury service than the Mr. Wilks case.

Conclusion

The actions of the trial court and the attorneys indicated a lack of concern and an adherence to the idea that everyone called to serve on a jury should be given an equal opportunity to do so. The trial court found it easier to just excuse Mr. Guzman than to take the time and determine if he really could understand the concepts involved in the case. He took the time with other jurors and spent a great deal of time making sure that they understood the concepts. Here, he just excused Mr. Guzman.

Neither Mr. Wilks, nor Mr. Guzman were served by the actions of the trial court. In the process, the Constitution was violated. Mr. Wilks was denied his right to a fair cross section of people and Mr. Guzman his opportunity to serve on a jury. These constitutional violations are embodied in the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 5 of the Ohio Constitution.

PROPOSITION OF LAW NO. VII

A CRIMINAL DEFENDANT IS DENIED A RIGHT TO A FAIR TRIAL, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION WHEN THE TRIAL COURT ALLOWS THE INTRODUCTION OF VICTIM CHARACTER EVIDENCE AND EMOTIONALLY LADEN GRAPHIC TESTIMONY DURING THE TRIAL PHASE OF A CAPITAL TRIAL.

A. Introduction

When evidence is “so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.” *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). Moreover, when an individual’s life is at stake, the Supreme Court has repeatedly insisted upon higher standards of reliability and fairness. *See e.g., Beck v. Alabama*, 447 U.S. 625 (1980) (need for heightened reliability); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (the penalty of death is qualitatively different from any other sentence and requires a heightened degree of reliability).

This was not a case in which there was “overwhelming evidence of guilt.” Instead, the sole evidence tying Mr. Wilks to this case was the eyewitness testimony of two men who had an argument with Wilks earlier in the day. Eyewitness testimony is very unreliable. Therefore, the introduction of prejudicial evidence, in the form of victim character evidence and emotionally laden and graphic testimony cannot be deemed to be harmless.

B. The Emotionally Charged Evidence

1. Victim Character Evidence

The very first witness called by the state was Traniece Wilkins. It is not clear why the State called Ms. Wilkins as a witness. She set forth the relationship between her, her brother “Mister” who was alleged to be one of the victims and her sister Ororo, who was killed in the

porch shooting. After the State set out the relationship, the Prosecuting Attorney asked the witness to “tell the jury a little bit about her.” (Tr. 3306). In response the witness told the jury:

Well, she had a beautiful heart, and she was smart, caring, funny. She loved to make people laugh. And whenever she was anywhere, like she commanded attention. When she was present, you knew she was in the room. It's just like she just had this personality where like people just gravitated to her like.

Q And you have nieces and nephews?

A Yes. And she thinks they're the best thing since sliced bread.
(Id)

After this exchange, the witness went on to describe how close the brothers and sisters were, that she, the witness, was involved in raising Ororo, and then the witness identified a photo of Ororo when she was alive. After the identification, the witness talked about how she found out her sister killed. Finally, the state asked her if she knew Willie Wilks, but she did not identify him, did not know how long they were dating, and only met him one time. If the state's intent was to have her identify the victim in the case, that could have been accomplished by showing her the photograph and having her identify it, the vast majority of her testimony was irrelevant and should have been excluded, particularly her description of Ororo set out above.

2. Jessica Shields and Coroner Testimony

The State called Officer Jessica Shields as a witness. Officer Shields was the second officer to arrive on the scene. When the Prosecutor asked the witness to describe the scene, she responded:

It was the most gruesome scene I have ever seen up until that date and since then. As soon as I stepped out of the car, I heard Willie screaming. I ran up to the front porch, at which time he was wearing white shorts. He didn't have a shirt on.

Q Let me stop you there. When you say Willie, is it Mister?

A Yes, it's Mister.

...

He was sitting on the front porch with his legs sprawled out. He was wearing white shorts that were covered in blood,

completely saturated in blood and brain matter. He was holding on to his sister's head like so, like this. Brains were all over the place. He was trying to hold the sides of her head. He was screaming at me personally because Melvin had already walked away to tend to the other victim. Why don't you help me pick her up? Please help me carry her to the hospital.
(Tr. 3391-3392)

After she set out more facts, Officer Shields indicated that she tried to handcuff “Mister” Wilkins but indicated “I don't have any gloves on or anything on because it happened so fast. I got brains all over my hands and blood all over my uniform.” (Tr. 3397)

Once the witness completed her testimony, defense counsel requested a sidebar discussion.

Another matter I want to address is it seems like a majority of the state's case here is to bring in a lot of sympathy and talk about things that are not evidence. An officer blurting out this is the most gruesome scene I have ever experienced without being inquired on is completely improper, and the state is responsible for the witnesses that they want to call, especially a trained police officer should know better. So the nature of the evidence that they have as proof that somebody did something, nobody is debating that. And any more of it I think is misconduct.
(Tr. 3405)

In response the Prosecutor argued that she was very emotional on the stand and she is human. (Tr. 3406) The prosecutor then asked for a curative instruction.

Defense counsel, rightly so wondered if that was going to be the whole state's case, to rely on sympathy. “But the other issue is, you know, we filed a motion that victim impact is improper in a trial phase, and they have been using a lot of victim impact, which doesn't really bring how this occurred. It's not proper.” (Tr. 3408, see also Vol. II, Doc. 97)

The trial court said that it would be excluded from the trial portion of the case, but it had already occurred and the damage was done.

The trial court then gave a curative instruction indicating that he did not want the the evidence to “cloud your ability to objectively and independently view the evidence minus the emotion.” Saying this, did not make it so.

Later in the trial, Dr. Joseph Ohr, the Coroner was testifying concerning the autopsy done in the case. The coroner was talking about the wound to Ororo’s head and opining on the distance the gun was from the victim’s head when the shot was fired. As he described the lack of soot, he indicated that beyond three or four feet, his diagnosis is indeterminate range because he cannot tell where the gun was fired from. The prosecutor then asked the following question:

Q That's fine. And had the firearm been fired at that close a range that you talked about where soot and stippling may have been left, what would be the difference in the damage to Ororo Wilkins' head?

A Oh, wow. Well, Counselor, frankly, the gunshot wound would have -- would have taken her head.

Q Off?

A. Yes.

Q. Okay. If it had been closer?

A. Yes.

(Tr. 3745)

The State had no reason to ask a question like that given the doctor’s testimony. The shock value of that statement is obvious.

C. Law

Evidence Rule 401 provides: “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” The admissibility of relevant evidence rests within the sound discretion of the trial court. *State v. Drummond*, 111 Ohio St. 3d 14, 28, 854 N.E.2d 1038, 1059 (2006).

Evidence Rule 403(A) provides that evidence is not admissible “if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. The determination of whether a piece of evidence is inadmissible under this standard is left to the sound discretion of the trial court. *State v. Crotts*, 104 Ohio St. 3d 432, 437, 820 N.E.2d 302, 308 (2004). All evidence that tends to prove the State’s version of the facts necessarily is prejudicial to the defendant. *Id.* Thus, the Rules of Evidence do not bar all prejudicial evidence, only unfairly prejudicial evidence is excludable. *Id.*

Evidence is unfairly prejudicial when it may result in an improper basis for the jury’s decision. *Id.* If the evidence “arouses the jury’s emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish, the evidence may be unfairly prejudicial.” *Id.* In other words, if the evidence appeals to the jury’s emotions rather than its intellect, it is usually prejudicial. *Id.*

Further, a Rule 403 objection requires heightened scrutiny in capital cases. *State v. Morales*, 32 Ohio St. 3d 252, 257-58, 513 N.E.2d 267, 273 (1987). Whereas exclusion under 403 generally requires that the probative value of the evidence be minimal and the prejudice great, in capital cases, the probative value of each piece of evidence must outweigh any potential danger of prejudice to the defendant. *Id.* at 258, 513 N.E.2d at 274. If the probative worth of the evidence does not outweigh the danger of prejudice to the defendant, it must be excluded. *Id.*

On direct appeal, constitutional error is harmless only if *the prosecution* proves it to be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 26 (1967). When the record on direct appeal establishes constitutional error, the burden is on the State to prove that the error is harmless beyond a reasonable doubt. *Id.* “The harmless error standard is even more stringent when applied to errors committed at the penalty phase of a capital trial. ‘The question . . . is not whether the legally admitted evidence was sufficient to support the death sentence, which

we assume it was, but rather, whether the State has proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *State v. Fears*, 86 Ohio St. 3d 329, 354, 715 N.E.2d 136, 158 (1999) (Moyer, C.J., dissenting) (quoting *Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988)).

D. Application

These three pieces of evidence should not have been admitted in Mr. Wilks trial. What is even more egregious is the prosecuting attorney was complicit in the admission of the evidence.

During the testimony of Traniece Wilkins, the prosecutor’s questioning elicited the inadmissible victim character evidence. During the later discussion after Officer Jessica Shields testimony, the prosecuting attorney tried to step away from any responsibility for eliciting the testimony. (Tr. 3406-3407) But the trial court held the prosecutor responsible stating that when interviewing witnesses before trial, the witness should be admonished from doing so during the trial. (Id.)

When discussing the victim impact information, the prosecutor’s response indicated that it was prohibited from the mitigation phase, but refused to acknowledge it was not admissible in the trial phase. (Tr. 3408) The prosecuting attorney then stated: “The witnesses talking about her being dead is different than victim impact saying how it affected them. They haven't said how it affected them.” (Tr. 3409) This again fails to acknowledge or recognize that the line of cases dealing with victim impact evidence, also dealt with victim character evidence.

This Court, as far back as *State v. Tyler*, 50 Ohio St.3d 24, 35 (1990) recognized that victim impact evidence is not permitted in the trial phase. The Court has had many opportunities to examine this kind of evidence in the last fifteen years.

In *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 98, the Court found that testimony relating to the facts of the offense is admissible, even if characterized as victim impact evidence. But in that case, the evidence that the victim was friendly and outgoing and trusting was admissible to show that in all likelihood the victim had given the defendant a ride in her car. In *State v. Maxwell*, 139 Ohio St.3d 12, 43, 2014-Ohio-1019 the Court found questionable relevance in the admission of graphic descriptions of the victim's medical condition.

Here, the fact that the victim had a beautiful heart, and that she loved her nieces and nephews was not relevant to anything in the case.

In *Maxwell* the Court also addressed a similar situation regarding graphic testimony. In that case the coroner testified about the pain the victim must have suffered from one of the gunshot wounds, defense counsel objected and the jury was instructed to disregard. In *State v. Heinich*, 50 Ohio St.3d 231, 241, 553 N.E.2d 1026 (1990) the Court found that “[w]here a jury is cautioned and a correction is given to the jury, the effect of improper evidence *may* be cured”. (emphasis added)

In this case the Court gave a generalized cautionary instruction about emotional testimony after Traniece Wilkins and Jessica Shields testified, but no instruction after the coroner's testimony. However, whatever arguable effect the curative instruction “may” have had, that was erased during the Prosecuting Attorney's closing argument.

Jessica Shields, she was the female officer who was second on the scene. You got a curative instruction after she testified. But what I want to tell you is she's human. She is human. Cops are not like they are on TV; okay? Just because she had some emotion you don't have to consider that, and we ask you not to consider that. We - - actually the Judge instructed you not to consider her emotion. But that's the reality. This is not a sterile situation where police officers go out and they see random people who they - -

who they aren't affected by. So understand that when she was testifying and getting somewhat animated, she was reliving that also. She was reliving what she saw. She was reliving the fact that when she gets up there to that porch, Mister is trying to hold his sister's head together and begging for someone to help her.
(Tr. 3996-3997)

These remarks from the prosecuting attorney not only reminded and emphasized the testimony, but also told the jurors that the testimony was what she saw and experienced and was reality.

Pursuant to the rules of evidence, and the case law, this evidence should not have been admitted. It was prejudicial and not relevant. It left the jurors with a picture of this woman who was a wonderful woman during the one witnesses testimony and then during the next the witness is talking about her brains being on her uniform and her brother holding her head together and a few witnesses later the coroner says if the gun had been closer her entire head would have been blown off.

As mentioned above, this was not a case with "overwhelming evidence of guilt", so the admission cannot be considered harmless. The Court should find that the admission of this prejudicial evidence violated the Sixth and Fourteenth Amendments of the United States Constitution and Article I, section 16 of the Ohio Constitution. Mr. Wilks convictions and sentences should be vacated and a new trial granted.

PROPOSITION OF LAW NO. VIII

IT IS PREJUDICIAL ERROR TO ADMIT EVIDENCE OF A FIREARM NOT USED IN THE HOMICIDE AND THAT IS NOT RELEVANT TO THE CHARGES BEING DECIDED BY THE JURY IN VIOLATION OF ART. I SECTION 10 OF THE OHIO CONSTITUTION AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION.

Counts Eight and Nine of the indictment (Vol. I, Doc. 1) charged the appellant with Having a Weapon while under a Disability. Count 8 concerned a “loaded black handgun” on the day of the homicide and count 9 concerned the same day but a “loaded firearm.”

The appellant moved to sever counts 8 and 9 from the jury’s consideration. (Vol. I, Doc. 56) The trial court granted the motion to sever in a journal entry filed March 10, 2014. (Vol. II, Doc. 69) Nonetheless, the state introduced testimony in support of each charge including the seizure of a black 9 mm firearm seized from the appellant’s vehicle and also introduced expert testimony that it was operable. (Tr. 3759-3762) Both “Mister” and Morales testified concerning the incident earlier in the day and the appellant’s possession of a black firearm at his home. (Tr. 3508, 3418-19, 3422)

It was beyond dispute that the firearm used in the homicide was an AK 47 style long gun since a shell near the homicide victim was found that was consistent with an AK 47 and completely inconsistent with the 9mm recovered from the appellant the next day. (Tr. 3766-68)

It was improper for the State to solicit testimony concerning the 9mm handgun since it was not used in the homicide or related shootings. *State v. Neyland*, 139 Ohio St.3d 353, 2014 Ohio 1914; *State v. Trimble*, 122 Ohio St.3d 297, 2009 Ohio 2961.

The error here is especially egregious because the trial court granted a motion to sever counts 8 and 9; then interestingly, the prosecutor DISMISSED counts 8 and 9 once the case was completed. See journal entry May 7, 2014. (Vol. III, Doc. 197) The bell cannot be unrung; the

appellant was prejudiced by the improper admission of testimony and physical evidence related to counts 8 and 9. A new trial must be ordered.

PROPOSITION OF LAW NO. IX

DEFECTIVE JURY INSTRUCTIONS DEPRIVED THE APPELLANT OF DUE PROCESS AND FUNDAMENTAL FAIRNESS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The court instructed the jury that if the State failed to prove beyond a reasonable doubt “...all the essential elements of aggravated murder in Count 1, then your verdict must be not guilty of that offense; and in that event, you will continue your deliberations ...” to determine whether the State proved all of the elements of the lesser included offense of Murder. (T. 4066)

The above instruction is fundamentally incorrect. It is boilerplate law that if the State fails to prove **any one element** of a charge then the defendant must be found not guilty. Here, the Court required the State to fail to prove **all** of the elements before a not guilty verdict could be returned. It would appear that the court tried to short cut the instruction, as seen in a comparison with the instruction regarding the capital specification.

In instructing on the capital specification the court stated:

If you find that the state proved beyond a reasonable doubt all of the essential elements of the Specification 1 to Count 1, your verdict must be guilty. If you find the **state failed to prove** beyond a reasonable doubt **any of the essential elements** of Specification 1 to Count 1, your verdict must be not guilty.

(Tr. 4064)(emphasis added)

So in the case, the correction instruction relating to the aggravated murder counts should have read:

If you find that the state proved beyond a reasonable doubt all of the essential elements of the aggravated murder in Count 1, your verdict must be guilty. If you find the **state failed to prove** beyond a reasonable doubt **any of the essential elements** of aggravated murder in Count 1, your verdict must be not guilty.

The error in relation to the aggravated murder instruction stands in stark contrast to the proper instruction the court then gave concerning the lesser included offense of murder where the court properly instructed

If you find that the state proved beyond a reasonable doubt all the essential elements of the offense of murder of Ororo Wilkins, your verdict must be guilty of murder. If you find the state failed to prove beyond a reasonable doubt anyone of the essential elements of the offense of murder, your verdict must be not guilty.

(Tr. 4067)

The problem in this case is similar to that of *Miller v. State* a recent Kansas Supreme Court case. *Miller v. State*, 318 P.3d 155 (Kan. 2014). The incorrect jury instruction in *Miller* read “If you have a reasonable doubt as to the truth of each of the claims required to be proved by the State, you must find the defendant not guilty.”

The State in *Miller* conceded that the instruction was wrong but argued the error was harmless. Nonetheless, the Kansas Supreme Court held that U.S. Supreme Court precedent mandated that harmless error analysis did not apply. *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993).

The above fundamental errors were structural error and plain error under Crim. R. 52. If the court finds that counsel failed to object sufficiently, then counsel was ineffective under *Strickland* to the prejudice of the appellant in that the errors were easily correctable if brought to the attention of the court. See *Miller v. State, supra*, finding counsel to be ineffective and structural error; *Rivera v. Illinois*, 556 U.S. 148, 160 (2009); *Washington v. Recuenco*, 548 U.S. 212, 218-19 (2006). A new trial is in order.

PROPOSITION OF LAW NO. X

ERRORS IN THE TRIAL PHASE JURY INSTRUCTIONS DEPRIVED APPELLANT WILKS OF DUE PROCESS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Jury instructions guide a jury in making its determination or whether a person is guilty, or not guilty. In a capital case, the jury instructions also guide a jury in determining whether the defendant will live, or die. Therefore, errors in the instructions can have an injurious effect on the outcome of either the trial or penalty phase of the case.

At the end of the trial phase of the case, defense counsel made a Crim. R. 29 motion. (Tr. 3953-3954) One of the arguments that the defense submitted, was that transferred intent cannot be applied to the R.C. § 2929.04 (A)(5) capital specification which states in pertinent part: “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.”

It was the State’s theory of the case that there was only one person who was the intended to be killed and that was William “Mister” Wilkins.⁵ This is the person that had had the argument with Mr. Wilks and the allegedly heated exchange on the phone prior to the shooting. Mr. Wilks had a cordial conversation with Mr. Morales at Mr. Wilks house in the front yard. There was no evidence that there was any animosity between Ororo Wilkins and Mr. Wilks.

During the trial phase instructions, the court instructed on “transfer of purpose.” The instruction provided:

Purpose to cause the death: If you find that the defendant did have a purpose to cause the death of a particular, of a particular person, and the shot

⁵ Defense counsel argued that he was not conceding the identity of the shooter at the house. The same holds true for appellate counsel in this appeal. The identity of the shooter is not conceded, but for the purpose of the argument only.

accidentally caused the death of another, then the defendant would be just as guilty as if the shot had taken effect upon the person intended.

The purpose required is to cause the death of another, not any specific person. If the shot missed the person intended but caused the death of another, the element of purpose remains and the offense is as complete as though the person for whom the shot was intended had died.

Tr. 4060-4061

Just moment later, the trial court instructed on the course of conduct specification:

In Specification 1 to Count 1 you must decide whether the state proved beyond a reasonable doubt that the aggravated murder was part of a course of conduct involving a purposeful killing of or attempt to kill two or more persons by the defendant.

Tr. 4063

Trial counsel objected to the transfer of purpose instruction. (Tr. 3978)

The plain language of the capital specification requires that there must be a purposeful killing or attempt to kill two or more people. The use of transferred intent to “fill in the gap” would defeat the intent of the statute. Just because transferred intent can be used for aggravated murder, See *State v. Solomon*, 66 Ohio St. 2d 214 (1981), paragraph one of the syllabus, it does not automatically follow that transferred intent can be used for a capital specification. The constitution requires additional safeguard when dealing with capital specification.

This principal is illustrated with the Court’s cases concerning evidence that someone is a principal offender. In *State v. Taylor*, 66 Ohio St.3d 295, syllabus (1993), the Court held that the fact that, pursuant to R.C. § 2923.03(F), a defendant who aids and abets another in committing an offense “shall be prosecuted and punished as if he were a principal offender” and so may be convicted of aggravated murder under R.C. § 2903.01 (B) does not make the defendant “the principal offender” for purposes of imposing the death penalty under R.C. § 2929.04(A)(7). Such a defendant will only be eligible for the death penalty if they acted with prior calculation and design. *Id.*, at 307-08.

Likewise, just because transferred intent can be used to convict the offender of aggravated murder, that does not mean that transferred intent can also be used for the capital specification. More is demanded when it is used to make a person death eligible. *Zant v. Stephens*, 462 U.S. 862, 877 (1983). Here, the instruction allowed the jury to use transferred intent to defeat the narrowing function required by the Eighth Amendment.

“In examining errors in a jury instruction, a reviewing court must consider the jury charge as a whole and ‘must determine whether the jury charge probably misled the jury in a matter materially affecting the complaining party’s substantial rights.’ ” *Kokitka v. Ford Motor Co.*, 73 Ohio St.3d 89, 93, 652 N.E.2d 671 (1995), quoting *Becker v. Lake Cty. Mem. Hosp. W.*, 53 Ohio St.3d 202, 208, 560 N.E.2d 165 (1990). Whether the jury instructions correctly state the law is a question that is reviewed de novo. See *State v. Bradford*, 4th Dist. Adams No. 11CA928, 2013-Ohio-480, ¶ 22; *State v. Cook*, 9th Dist. Summit No. 26360, 2012- Ohio-4250, ¶ 6.

The trial court error in denying defense counsel’s objection to the jury instructions, violated Mr. Wilks rights as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The death penalty should be vacated and the case remanded for a life sentence.

PROPOSITION OF LAW NO. XI

WHEN THE ONLY FACTUAL ISSUE IS THE IDENTITY OF THE SHOOTER, THEN THE TRIAL COURT MAY NOT INSTRUCT A JURY ON LESSER INCLUDED OFFENSES.

In this case, the trial court instructed the jury on lesser included offenses of Aggravated Murder when the only factual issue for the jury was the identity of the shooter. Such instructions were in violation of *State v. Wine*, 140 Ohio St.3d 409 (2014). Further, the jury was confused by the additional offenses it had to consider and the appellant was prejudiced in this capital case by the jury believing he had committed additional offenses for which the jury never should have been charged by the court. Under the concepts of Due Process and fundamental fairness found in the Sixth, Eighth and Fourteenth Amendments of the Federal Constitution, at the very least a new penalty phase is in order if not a new trial.

As the Court held in *Wine*, regardless of who reaps the benefit, a jury charge on a lesser included offense is required when the facts warrant it and *improper* when the facts do not warrant it. *Wine* at paragraph 20.

In this case, the factual issue for the jury to decide was the identity of the shooter. If the jury believed the State had proven the appellant beyond a reasonable doubt was the shooter, then it had no choice but to return guilty verdicts on Aggravated Murder with specifications. In other words, if the jury believed beyond a reasonable doubt that the appellant was the shooter, then he could not be guilty of the lesser included offenses.

In this case, the appellant, if he were the shooter, could not be guilty of Aggravated Murder in count 1 (which contains the death specification) and guilty of count 2 of the lesser included Murder. (See Tr 4114-4116; verdict forms) Likewise, one cannot be guilty, under this factual scenario, of Attempted Aggravated Murder, Counts 3 and 4, and also guilty of Felonious Assault Counts 5 and 6. (TR 4116-4118)

The error described above is compounded by the jury's duty to determine punishment; the error is plain under Crim. R 52 and not harmless. Death is different and special protections apply when the ultimate penalty is concerned. A new trial or at least a new penalty phase hearing is necessary.

While under *Wine* a defendant may not prevent the court from instructing on lesser included offenses if the facts warrant it, a trial court cannot instruct on lesser included offenses in a case such as this when the only factual issue is the identity of the shooter.

As the defendant said when the first guilty verdict was announced "I didn't do this." (TR 4114)

PROPOSITION OF LAW NO. XII

A CRIMINAL DEFENDANT SHOULD NOT BE MADE TO APPEAR IN COURT WITH SHACKLES, UNLESS THE TRIAL COURT HOLDS A HEARING AT WHICH THE PROSECUTION DEMONSTRATES THE NEED FOR THE RESTRAINT.

Appellant Wilks appeared during the trial phase in civilian clothing and without restraints. After the verdict was read in the trial phase, Mr. Wilks “had a slight outburst.” (Tr 4146) The outburst was not evident from the record of the case, only Mr. Wilks stating “I did not do this” (Tr 4113) However, at the status hearing before the penalty phase, the trial court made the following statement on the record:

The second issue is that at the conclusion of the trial phase of the case, Mr. Wilks, who I would expect any ordinary human being to be under great stress and emotional -- emotionally charged, and upon hearing the verdict where a Jury found you guilty beyond a reasonable doubt of aggravated murder with the death specification, which puts in play, of course, an option for a jury to impose the death penalty, Mr. Wilks, I don't believe, acted unlike any other human being would react. He had a *slight outburst* and then had to be subdued. He kicked a hole in the wall. No one was injured. And although I don't -- *I'm not so concerned about his conduct, because he's been exemplary throughout the trial and conducted himself appropriately*, and upon consultation with his lawyers I think they were able to explain to him that that can't occur. But because of the safety of my courtroom and the people in it, and *not necessarily the conduct of the defendant*, I think that could act as a fuse to ignite other types of outbursts and, therefore, create an unstable circumstance in my courtroom, I have determined that what I'm going to do is I'm going to permit the defendant to appear in street civilian clothes, but we are going to have him restrained so that it doesn't -- we don't draw attention to that. . . . So that takes care of that issue.

(Tr 4146-4148)(emphasis added)

The next day of trial, before the penalty phase was to begin, Defense counsel entered an objection:

MR. YARWOOD: As the Court is aware, the Court has indicated he will be handcuffed and shackled with one of those belly handcuffed locks. The Court would indicate he is wearing a suit. I would agree that it is a device he's put his arms through; however, the case law is pretty clear that it's a Constitutional violation to shackle a Defendant during the penalty phase.

The Court, under some circumstances, can make some findings that would allow that under different circumstances. Our position is the fact that he had a little bit of an outburst in the courtroom in which he maintained his innocence, and after he was escorted out, doesn't rise to the level that would deem it appropriate for this type of restrictive measure in light of the prejudicial effect it may have upon the jury.

(Tr 4184)

The Court responded:

The Court spoke to that issue on Friday. I have, over the weekend, reviewed the cases that pertain to that issue. And I delivered a judgment entry which I believe lays out the foundation for the need for the safety and security of the courtroom. The record should reflect the Defendant is in a suit and a sports jacket and tie, and it appears the least restrictive -- the least appearance of the restraint, and the Court is going to maintain its position regarding the -- the manner in which the Defendant will appear.

Let's go on.

(Tr 4185)

The measures put into place by the trial court was an over reaction to a situation that he himself acknowledged that any ordinary human being, who had maintained his innocence throughout the proceedings would react to, the jury finding him guilty. The court further indicated that he was not concerned about his conduct, because he had conducted himself in an exemplary fashion throughout the proceedings. In spite of that, the trial court forced Mr. Wilks to go before the jury in restraints, at the moment in which the jury were to make the decision as to whether he would live or die.

Restraints are only to be used as a last resort, absent highly unusual circumstances. *Holbrook vs. Flynn*, 475 U.S. 560, 567 (1986); *Illinois vs. Allen*, 397 U.S. 337, 344 (1970); *State vs. Richey*, 64 Ohio St.3d 353, 358 (1992). The United States Supreme Court has given close scrutiny to the potentially prejudicial practice of stationing additional security personnel in the vicinity of a criminal defendant during trial. *Holbrook*, 475 U.S. at 569. The

trial court did not conduct an “evidentiary hearing” on the need for restraints and instead simply summarily ordered that Mr. Wilks wear the restraints. The prosecution had the burden of proof by "a clear necessity" to show the need for restraints. *Kennedy vs. Cardwell*, 487 F.2d 101, 107 (6th Cir., 1973). Here the prosecution was silent concerning the need for any restraints, deferring to the trial court, who had made up its mind.

An appellate court normally applies an abuse of discretion standard in reviewing a trial court's decision to require the use of restraints. *State vs. Franklin*, 97 Ohio St.3d 1, 19 (2002); *State vs. Cassano*, 96 Ohio St.3d 94 (2002). Since the trial court did not conduct the necessary hearing, it did not exercise its discretion and therefore that deferential standard of review is inapplicable.

This Court addressed the use of stun belts in *State vs. Adams*, 103 Ohio St.508, 2004-Ohio-5845. The rationale for the use of a stun belt or restraints is the same. Although with the use of the stun belts it is less likely that there will be any outward manifestation of the device. In this case Wilks was forced to wear a belly device that attached the handcuffs to a belly belt. With this option, the defendant is not able to put his hands on the table or write notes to his counsel, thereby interfering with his representation.

In *Adams*, the court held a hearing prior to ordering the defendant to wear a stun belt, at which it "heard arguments of counsel and statements from security personnel before authorizing the use of a security device". *Id.* at ¶ 103-110. The trial court in *Adams* subsequently explained its decision to authorize the "Band-it device in an entry". [*Id.*].

The trial court also failed to discuss any other devices that might have been used, or a limitation on the use of the restraints, for example the restraints could have been used only when the verdict was read at the end of the jury deliberations. Since, according to the trial court, Mr.

Wilks displayed exemplary conduct during the course of the trial phase, until the reading of the verdict, there was no reason to assume that he would not act appropriately during the penalty phase.

In addition, in its entry, the court left the “proper restraints” up to the Mahoning County Courthouse Security Detail of the Mahoning County Sheriff’s Department. (Record, Vol. III, Doc #186) But this should have been the trial court’s decision, not the decision of the Sheriff’s Department. The trial court must exercise its own discretion and not leave the issue up to security personnel. See, e.g., *Woodards v. Cardwell* (C.A.6, 1970), 430 F.2d 978, 981-982. Accord *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81, ¶ 54.

In *State v. Neyland*, 139 Ohio St. 3d 353, 2014-Ohio-1914, ¶ 105, the court examined the use of leg restraints on the defendant. The Court found that the trial court should have considered whether there were lesser alternatives to provide courtroom security. Leg irons or shackles always present a risk that jurors will inadvertently discover the restraints and possibly be influenced in deliberations. See, e.g., *Illinois v. Allen*, 397 U.S. 337, 344 (1970). Because the trial court in Wilks failed to have a hearing, no lesser options were discussed or offered.

In ruling against the defendant in *Neyland*, the Court found that “[n]othing in the record indicates that Neyland’s leg restraints inhibited his communication with counsel with respect to his defense. Both of Neyland’s hands were free throughout the trial.” *Id.*, at ¶107. As mentioned above, the handcuffs, attached to the belly device did not lend itself to communication with his counsel. This would have been visible to the jury who would certainly have noticed a difference between Mr. Wilks actions in the trial phase versus the penalty phase.

The trial court seemed unconcerned that Mr. Wilks was now going to be on trial for his life. The trial court stated: “It is obvious that someone who has been convicted of this nature of a crime, there would be nothing unusual about having him handcuffed.” (Tr. 4147) The reality is that the jury had to decide if Mr. Wilks was going to live or die, and placing Mr. Wilks in hand cuffs sent a message that he was dangerous and should not be given a life sentence.

The trial court’s failure to conduct a hearing and to place Mr. Wilks in restraints violated his right to a fair trial and his right to counsel as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sec. 16 of the Ohio Constitution. Since this error affected only the penalty determination in this case, the death sentence should be vacated and a new sentencing hearing conducted.

PROPOSITION OF LAW NO. XIII

IT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND OHIO CONSTITUTION, ARTICLE I, SECTIONS 1, 2, 9, AND 16 TO UPHOLD A SENTENCE OF DEATH WHEN AN INDEPENDENT WEIGHING OF THE AGGRAVATING CIRCUMSTANCE VERSUS THE MITIGATING FACTORS DEMONSTRATES THAT THE AGGRAVATING CIRCUMSTANCE DOES NOT OUTWEIGH THE MITIGATING FACTORS BEYOND ANY REASONABLE DOUBT, AND THAT DEATH IS NOT THE APPROPRIATE SENTENCE

R.C. § 2929.05 charges this Court with the obligation to "review upon appeal the sentence of death at the same time that they review the other issues in the case." The 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 supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They also shall review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors. The . . . 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.

While this is a procedure that the Court is required to do in every capital case (and the Court has reviewed over 220 of them) it should never become rote, because it is an individualized determination.

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, the Court noted, that helps ensure that the death penalty is reserved for a narrow category of offenders is that the defendant be given "wide latitude to raise as a mitigating factor `any aspect of [his or her] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' *Lockett v. Ohio*, 438 U.S. 586, 604, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978), *Simmons*, 543 U.S., at 568.

The Death Sentence is Not Appropriate

In this case there was one aggravating circumstance, 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. R.C. § 2929.04 (A)(5). While this factor is serious, it should be considered less weighty in this case since it involved a single victim that died. The second victim, was shot in the back, but has recovered and the third "victim" was not even hit by a bullet. The weight given this factor should not be the same as in a case in which three persons were killed.

But the prosecuting attorney tried to influence the jury to impose a death sentence. In closing argument, the prosecuting attorney told the jury that the legislature has made this (case) a potential death penalty case.

The law specifically allows for this circumstance to be considered by you, because people should be free to sit on their porch and smoke a cigarette and hold a baby in broad daylight and not be shot. That's why these laws are enacted, for you to make this decision. This cannot happen. We live in a civilized society. (Tr. 4253, 4270-4271)

The was quite the exaggeration as to how this aggravating circumstance came to be.

Against this single aggravating circumstance, the jury weighed the mitigating evidence. The defense presented evidence of mitigating factors during the course of the penalty phase of the case.

Willie Wilks, Jr. was removed from his birth state of Alabama when he was 9 months old. After this move, Willie never saw his birth father again. His father was not a part of his life growing up. (Tr. 4236) His mother eventually remarried and had another son, Tracy Wilks. During his childhood years, his mother, Patricia Wilks, had a drinking problem. (Tr. 4236) Tracy Wilks father, did not live with the family, but was sometimes present in the boys lives. See, *State v. Mammone*, 139 Ohio St.3d. 467, 2014-Ohio-1942, ¶ 237.

Willie Wilks, obviously feeling the void in his life left by his own father, was a very attentive father to his 3-year-old son. While he did not live with the birth mother, he saw his son every day and had two separate jobs to provide financial support to his son and the mother of his child. (Tr. 4227, 4228, 4233, 4237) His employment is entitled to weight in mitigation. See, *State v. Mammone*, 139 Ohio St.3d. 467, 2014-Ohio-1942, ¶ 239.

In addition, Willie lived with his mother and provided support to her, financially and otherwise in the case of his uncle, he suffered from schizophrenia. (Tr. 4238) See, *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, at ¶ 160. The devotion and care of family members should be given weight. *State v. Lawrence*, 44 Ohio St.3d 24, 33 (1989).

Willie Wilks has maintained his innocence from the time of his arrest. He continued to maintain his innocence during the penalty phase and mentioned this in his statement to the jury. (Tr. 4247). A proclamation of innocence is factor relevant to issue of whether sentence of death should be imposed, and as such, can be asserted by a defendant in mitigation. *State v. Buell*, 22 Ohio St.3d 124, 142 (1986). He also discussed the effect that this will have on his son and hoped

that the jury would grant him leniency so he could continue his relationship with his son. (Tr. 4247). See, *State v. Fox*, 69 Ohio St. 3d 183, 194 (1994).

Something not mentioned during the penalty phase but present in the facts of the case is the presence of the other two people in the car that was allegedly involved in the offense. Neither of them were found nor faced any charges.

From the start of the penalty phase the jury was told that they have to “consider” the mitigating evidence, “but you assign whatever weight you believe appropriate to each of those mitigating factors. You assign that weight.” (Pros. Opening Statement, Tr. 4219.) They were told that they would listen to the witnesses and determine “whether or not if it is significant enough to reach the level of that mitigating factor that you weigh, it’s totally up to you.” (Id., Tr. 4220). The prosecutor gave them a roadmap as to how to “follow the law” but still impose a death sentence.

It is the same road map that is often followed on appeal. What Appellant asks this Court to do, is actually engage in a weighing of the aggravating circumstance against the mitigating factors, without minimizing the mitigation to justify imposition of the death penalty. Ohio courts have a habit, when "independently" re-weighing the aggravating circumstance and mitigating factors, of approaching the situation as the trial court did here⁶; mitigation evidence is entitled to modest weight, little weight, or no weight at all. See, e.g., *State v. Hanna*, 95 Ohio St.3d 285, 2002 Ohio 2221, 767 N.E.2d 678, at 1171: (“In summary, appellant's collective mitigation is weak. His family background, psychological disorders, and his unsworn statement are entitled to modest weight in mitigation. Overall, the mitigating factors are of minimal significance, and the

⁶ “The Court finds that the mitigating factors pale and are dwarfed in comparison to the aggravating circumstance.” (Trial Court opinion, p. 4)

aggravating circumstances substantially outweigh them.") See, also, e.g., *State v. Green*, 66 Ohio St.3d 141, 154, 1993 Ohio 26, 609 N.E.2d 1253 ("In weighing the aggravating circumstance against mitigating factors, we find that the aggravating circumstance does not outweigh the mitigating factors beyond a reasonable doubt. Collectively, Green's lack of intelligence, family upbringing, and alcohol and drug addiction 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 the 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.") *State v. Johnson*, 112 Ohio St.3d 210, 253, 2006 Ohio 6404, 858 N.E.2d 1144, at 1308, certiorari denied, *Johnson v. Ohio*, 552 U.S. 836, 128 S.Ct. 74, 169 L.Ed.2d 55 (2007),("Johnson's employment record, his history as an abused and neglected child, and his redeeming traits of spirituality, politeness, and helpfulness have little weight ")

This Court has also engaged in a mitigation comparison analysis. Most recently in *State v. Dean*, Slip Opinion No. 2015-Ohio-4347, ¶ 321, the Court, in its independent review states "[m]oreover, as the state points out, there is no evidence that Dean suffered from sexual abuse, intellectual deficits, or psychological impairment, which are often factors in many death penalty cases." In an independent review, what factors are present in other cases should not be determinative of what happens in the case before the Court. There certainly have been an extremely large number of cases to come before the Court with defendant that have suffered from sexual abuse, intellectual deficits, or psychological impairment whose cases have also been affirmed by the Court, leading one to believe that if a defendant received the penalty of death, it must be appropriate.

The prosecuting attorney certainly did everything she could to minimize the mitigating evidence in the case.

The fact that he has a son, absolutely, that is something to consider, but does it lessen the appropriateness of the death penalty weighed against what he did? Ororo was somebody's daughter. Think about that when you're making this decision.

Tr 4257-4258

The fact of the matter is that in every aggravated murder, the victim's life is taken all too early. If these were the standards, then 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 just that result. See, *Woodson v. North Carolina*, supra. In his concurring opinion in *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008), Justice John Paul Stevens, with customary insight, summarized Eighth Amendment jurisprudence, and reminded us that the Eighth Amendment prohibits a punishment that serves no societal goals and is a needlessly inflicted punishment. That is certainly the case here, where a life sentence would serve the goals of incapacitation of the offender (for the remainder of his life.) The death sentence serves no deterrent purpose here.

The prosecuting attorney also tried to put a "spin" on the evidence that it never should have been given.

He was raised with a church background. He had opportunities, just like probably many of you had. What it comes down to is choices. He even had a good role model, the father of Tracy Wilks. She kind of backed down from that, but you heard her, "Yeah, he was around." How many people have that kind of background? A strong mom who raised you in the church, made sure you had food on the table, you were clothed, you were taken care of. Does that lessen the appropriateness of the death penalty? No.

Tr 4255

The fact is that Willie Wilkins did not have the same opportunities that the jurors had. He did not live in the nice parts of county, he did not have a college education, there were not two wage earners in the family, he did not have a strong male role model in his life, and he had an alcoholic mother. The fact that he “sometimes” in his 42 years of life went to church does not mean he was raised with a church background. There was no evidence that there was food on the table or clean clothes to wear.

The Death Sentence is Not Proportional

In addition to appropriateness, this Court also exams case to determine if the death penalty is proportional. Next to Professor Amsterdam's "death is different" concept, perhaps the next most famous phrase in death penalty litigation is Justice Potter Stewart's "strike of lightning." Stewart voted with the majority in 1972 in *Furman v. Georgia*, 408 U.S. 238 (1972) to strike down death penalty laws, having carefully studied them and concluded that the implementation of the death penalty in America at that time resulted in a system where death sentences were handed out in such a way that receiving the death penalty was cruel and unusual in the same manner that being struck by lightning was cruel and unusual.

The Eighth Amendment requires some procedural safeguard against disparity in jury death sentences. *Furman v. Georgia*, 408 U.S. 238 (1972). There must be some meaningful appellate review of cases where a jury imposes death. *Pulley v. Harris*, 465 U.S. 37 (1984); *Sochor v. Florida*, 504 U.S. 527 (1992); *Parker v. Dugger*, 498 U.S. 308 (1991); *Jurek v. Texas*, 428 U.S. 262 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

Unfortunately, Ohio fails to provide any meaningful safeguard. The cursory review provided by this court and its unwillingness to review cases where life was imposed even though the defendant was eligible for death renders its review short of what is required. The lack of

oversight by this Court has been highlighted recently in two separate studies: *Ending the Death Lottery: A Case Study of Ohio's Broken Proportionality Review*, 76 Ohio St. L.J. 67 (2015) by William W. Berry III (40% of Ohio's capital sentences from 1996-2011 were comparatively disproportionate to cases in which Ohio juries sentenced capital murderers); *The Impact of Race, Gender, and Geography on Ohio Executions*, published January 28, 2016, Frank R. Baumgartner, University of North Carolina at Chapel Hill. (Detailing the substantial disparities by race and gender of the victim of the crime and by geography the use of Ohio's death penalty; vast inequities characterize the implementation of capital punishment in Ohio)

This case was tried in Mahoning County. The defense raised three relevant cases from Mahoning County, to illustrate the point that death in this case is not appropriate and not proportional to other cases from the same county; the defense argued Davis, Barnett and Chris Jones received life sentences and Davis involved six dead people including four children; Barnett two victims executed and burned; Curtis Young (previously said Jones) three dead including two children. (TR 4301-02)

In addition, at the request of the trial court, defense counsel filed a Memorandum detailing the cases in which the R.C. § 2929.04(A)(5) capital specification was in play. (Vol. III, Doc. No. 192, p. 5) In many of the cases, the State failed to even seek a capital specification although the circumstances of the case would have supported it.

Appropriateness and Proportionality.

Those two facts, taken together, impel the immutable conclusion that there is no principled way to distinguish this case, in which the death penalty was imposed, from the many in which it was not, and indeed, given Ohio's unbridled charging discretion, from the many in which the jurors did not even have the opportunity to consider the imposition of the death

penalty. Given the foregoing, it cannot be said with any confidence that the death penalty is appropriate in this case and it certainly cannot be said that the death penalty is generally being imposed for this type of conduct. The death sentence in this case is inappropriate. There is no showing of proportionality, nor can there be. Additionally, the sole aggravating circumstance does not outweigh the Appellant's mitigation beyond any reasonable doubt.

Therefore, if the Court does nothing else in this case, it must vacate Appellant's death sentence. To leave the sentence in place would violate the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

PROPOSITION OF LAW NO. XIV

IT VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION TO NOT INSTRUCT THE JURY THAT MERCY CAN BE CONSIDERED DURING ITS PENALTY PHASE DELIBERATIONS.

Prior to the start of the penalty phase, the defense filed a motion requesting the jury be instructed to consider mercy in its deliberations. (Record, Vol. II, Doc # 151) The trial court denied Wilks' requested jury instruction that the . (Record, Vol. III, Doc. # 171).

In *State v. Rogers*, 28 Ohio St. 3d 427, 434, 504 N.E.2d 52, 58 (1986), this Court said "defense counsel certainly has the right to plead for mercy and, indeed, has the very duty to cause the jury to 'confront both the gravity and the responsibility of calling for another's death" (emphasis added; citation omitted). In *State v. Zuern*, 32 Ohio St. 3d 56, 63-64, 512 N.E.2d 585, 593 (1987), the Court rejected the argument that "the imposition process does not permit the extension of mercy," saying "a jury is not precluded from extending mercy to defendant."

The Court then went a different direction in *State v. Lorraine*, 66 Ohio St.3d 414, 417 (1993), finding that a capital defendant is not entitled to an instruction that mercy is a mitigating factor. It is time to re-examine that ruling in light of more recent United States Supreme Court cases, or to at least limit its application.

The rationale in *Kansas v. Marsh*, 548 U.S. 163, 126 S. Ct. 2516 (2006), supported the motion for a jury instruction. Justice Thomas writing for the majority in a decision about whether the Constitution permits Kansas to allow a death sentence when aggravating and mitigating factors are in equipoise, quoted with approval the Kansas jury instruction on mercy:

The appropriateness of the exercise of mercy can itself be a mitigating factor you may consider in determining whether the State has proved beyond a reasonable doubt that the death penalty is warranted."

In footnote 3, Justice Thomas explained that mercy as a mitigating factor is important “because it ‘alone 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.”

Marsh held that a "mercy" instruction saved Kansas's statute from a constitutional challenge. Addressing the dissenters' concern that the "equipose" rule allowed unconstitutional weighing of evidence in favor of death, the majority said: "The 'mercy' jury instruction alone 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.' *Marsh*, at 4 (Souter, J., dissenting)." *Id.* at footnote 3. The Court once again endorsed the concept of a capital jury's consideration of mercy just this term in *Kansas v. Carr*, 577 U.S. ---, 136 S.Ct. 633 (2016).

Ohio, like Kansas, is a "weighing" state, therefore a mercy instruction is required to foreclose constitutional error. *Marsh* also requires a ruling that forbids the State in this case to argue that "mercy" cannot be considered by Defendant's jurors during mitigation phase deliberations.

This Court's consideration of a jury instruction regarding mercy in *State v. Jackson*, 141 Ohio St. 3d 171, 2014-Ohio-3707, ¶ 238-240 is distinguishable. There, the defendant was asking that the jury be instructed that mercy is a mitigating factor. The Court found no requirement that the jury be instructed mercy is a mitigating factor. Here the request was that the jury be instructed that they could consider mercy in their deliberations. That instruction should have been allowed.

The United States Supreme Court's opinion in *Lockett v. Ohio*, 438 U.S. 586 (1978), established a defendant's right to permit the sentencer to use any factors it sees fit in deciding whether a defendant merits leniency. This principle permits the jury to consider sympathy or

mercy in its sentencing decision. In *Gregg v. Georgia*, 428 U.S. 153, 190 (1976), the Supreme Court endorsed the propriety of permitting the jury to consider mercy for the defendant. An individualized sentencing decision requires that the jury be given a vehicle for expressing the view that the Defendant "does not deserve to be sentenced to death," that "he was not sufficiently culpable to deserve the death penalty." *Penry v. Lynaugh*, 492 U.S. 302 (1989). In *Penry*, the Court approved a procedure that allowed the jury to recommend mercy based on the mitigating evidence introduced by a defendant. The jury must be free to determine what punishment is appropriate and to give a "reasoned moral response to [the] mitigating evidence." *Id.* at 323.

The failure to allow the instruction that the jury could consider mercy requires a new sentencing phase be conducted.

PROPOSITION OF LAW NO. XV

THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION ARE VIOLATED IF ONE IS NOT ALLOWED TO ARGUE “RESIDUAL DOUBT” AND HAVE THE JURY INSTRUCTED CONCERNING “RESIDUAL DOUBT” IN A CAPITAL CASE SENTENCING HEARING.

The defense filed a written motion to instruct the jury that it may consider residual doubt as a mitigating factor and that the defense be allowed to argue it. (Motion No. 36; filed 4-21-14) The State filed a written opposition the next day. The trial court denied the motion. (TR 4152)

In this case, residual doubt is especially important given the *underwhelming* evidence of guilt which is based on eyewitness identification. Eyewitness identification evidence is notoriously unreliable. See *Illinois v. Lerma*, 2016 IL 118496, Opinion filed January 22, 2016; paragraph 24 (single greatest source of wrongful convictions) Further, the police did practically no investigation and simply relied on the identification provided by “Mister” and Morales and discounted the identifications made by the Jenkins twins that someone else committed the offenses.

This Court needs to reconsider its opinion in *State v. McGuire*, 80 Ohio St.3d 390 (1997); we know now some 20 years after *McGuire* was decided about the fallibility of eyewitness identification and how many inmates have been completely exonerated by advances in scientific knowledge in cases that were seemingly airtight at the time of the trial or witnesses who recanted previous testimony. This case is far from airtight. Wilks should have been able to argue that the “residual doubt” in his case, i.e. lack of investigation by the police, lack of scientific evidence against him, lack of confession and a recorded statement denying his guilt, entitled the jury to give whatever weight each juror deemed appropriate in favor of a life sentence. In short, this was

not a “death worthy” investigation by the State and he should not have to suffer the ultimate penalty at the hands of the State.

A close reading of *Oregon v. Guzek*, 546 U.S. 517 (2006) further supports Wilks. He is not seeking to add new evidence but to argue and instruct the jury that each juror should weigh on the side of mitigation the items mentioned above. *State v. Wogenstahl*, 75 Ohio St.3d 344 (1996) in combination with *Guzek* supports Wilks’ position.

Under the Eighth Amendment, death is different. *Woodson v. North Carolina*, 428 U.S. 280 (1976) Whether death is appropriate in this case requires the jury to consider residual doubt. The circumstances of this offense were such that the State had to rely only on eyewitness identification to obtain a conviction. Such evidence is notoriously unreliable and perhaps the most common reason inmates are later exonerated.

For the above stated reasons, and those offered in Motion 36 filed in the trial court, Mr. Wilks seeks a new sentencing hearing.

PROPOSITION OF LAW NO. XVI

PROSECUTORIAL MISCONDUCT DEPRIVED THE APPELLANT OF A FAIR TRIAL UNDER FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

A criminal defendant is entitled to a determination of his guilt in a trial free from prosecutorial misconduct which renders the proceeding fundamentally unfair. *Donneley v. DeChristoforo*, 416 U.S. 637 (1974). As the government's representative, the prosecutor has a special duty "whose obligation to govern impartially is as compelling as its obligation to govern at all." *Berger v. United States*, 295 U.S. 78, 88 (1935).

The test for prosecutorial misconduct is whether the challenged conduct and/or remarks were improper and, if so, whether they prejudicially affected the accused's substantial rights so as to deny him a fair trial. *State v. Lott*, 51 Ohio St. 3d 160, 165 (1990); *State v. Apanovitch* 33 Ohio St. 3d 19, 24 (1987). The touchstone of this analysis "is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982).

As this Court has said: "While we realize the importance of an attorney's zealously advocating his or her position, we cannot emphasize enough that prosecutors of this state must take their roles as officers of the court seriously. As such, prosecutors must be diligent in their efforts to stay within the boundaries of acceptable argument and must refrain from the desire to make outlandish remarks, misstate evidence, or confuse legal concepts." *State v. Fears*, 86 Ohio St. 3d 329, 332 (1999). *State v. Smith*, 14 Ohio St. 3d 13, 13-15 (1984) (conviction reversed because of prosecutorial misconduct); *State v. Vanek*, 2003 Ohio 6957 (Ohio App. 2003) (same); *State v. Thornton*, 2002 Ohio 6824 (Ohio App. 2002) (same)

MISCONDUCT IN THE GRAND JURY PROCEEDINGS AND VOIR DIRE

In this case, prosecutorial misconduct started in the presentation of the case to the Grand Jury. (See, Proposition of Law No. III and IV, incorporated by reference).

The misconduct there was not an isolated incident but pervasive. During voir dire, the prosecutor repeatedly stated that mitigation was fact based. “It’s a legal decision, not—and it’s a evidence-based decision, not something—we don’t just put the jurors in a room and say, hey battle out your feelings about the death penalty. Okay?” (Tr. 281, see also 610, 708, 777, 828, 907, 1140, 1207, 1548, 2114⁷). However, such a statement is a misstatement of the law since “mercy” is can be factored in during the deliberation process and mercy “simply is not a factual determination” according to a recent 8-1 decision from the U.S. Supreme Court. The Court emphasizes that jurors will accord mercy if they deem it appropriate, which “is what our case law is designed to achieve.” *Kansas v. Carr*, 577 U.S. _____, 136 S.Ct. 633, ___ (2016).

TRIAL PHASE MISCONDUCT

The very first witness called by the state was Traniece Wilkins. It is not clear why the State called Ms. Wilkins as a witness. She set forth the relationship between her, her brother “Mister” who was alleged to be one of the victims and her sister Ororo, who was killed in the porch shooting. After the State set out the relationship, the Prosecuting Attorney asked the witness to “tell the jury a little bit about her.” (Tr. 3306). In response the witness told the jury:

Well, she had a beautiful heart, and she was smart, caring, funny. She loved to make people laugh. And whenever she was anywhere, like she commanded attention. When she was present, you knew she was in the room. It's just like she just had this personality where like people just gravitated to her like.

Q And you have nieces and nephews?

⁷ While Prosecutor Doherty used this “explanation” with almost all prospective jurors, these citations listed are the juror who actually determined the penalty in the case.

A Yes. And she thinks they're the best thing since sliced bread.

(Id)

After this exchange, the witness went on to describe how close the brothers and sisters were, that she, the witness, was involved in raising Ororo, and then the witness identified a photo of Ororo when she was alive. After the identification, the witness talked about how she found out her sister killed. The prosecuting attorney elicited this evidence for the sole purpose of prejudicing the jury. (See, Proposition of Law No. VII, incorporated herein)

Just a couple witnesses later, the Prosecuting attorney again raised prejudicial evidence through the testimony of Officer Jessica Shields. When the Prosecutor asked the witness to describe the scene, she responded:

It was the most gruesome scene I have ever seen up until that date and since then. As soon as I stepped out of the car, I heard Willie screaming. I ran up to the front porch, at which time he was wearing white shorts. He didn't have a shirt on.

Q Let me stop you there. When you say Willie, is it Mister?

A Yes, it's Mister.

...

He was sitting on the front porch with his legs sprawled out. He was wearing white shorts that were covered in blood, completely saturated in blood and brain matter. He was holding on to his sister's head like so, like this. Brains were all over the place. He was trying to hold the sides of her head. He was screaming at me personally because Melvin had already walked away to tend to the other victim. Why don't you help me pick her up? Please help me carry her to the hospital.

(Tr. 3391-3392)

After she set out more facts, Officer Shields indicated that she tried to handcuff "Mister" Wilkins but indicated "I don't have any gloves on or anything on because it happened so fast. I got brains all over my hands and blood all over my uniform." (Tr. 3397)

Once the witness completed her testimony, defense counsel requested a sidebar discussion.

Another matter I want to address is it seems like a majority of the state's case here is to bring in a lot of sympathy and talk about things that are not evidence. An officer blurting out this is the most gruesome scene I have ever experienced without being inquired on is completely improper, and the state is responsible for the witnesses that they want to call, especially a trained police officer should know better. So the nature of the evidence that they have as proof that somebody did something, nobody is debating that. And any more of it I think is misconduct.

(Tr. 3405)

In response the Prosecutor argued that she was very emotional on the stand and she is human. (Tr. 3406) The prosecutor then asked for a curative instruction.

Defense counsel, rightly so wondered if that was going to be the whole state's case, to rely on sympathy. "But the other issue is, you know, we filed a motion that victim impact is improper in a trial phase, and they have been using a lot of victim impact, which doesn't really bring how this occurred. It's not proper." (Tr. 3408) The prosecuting attorney believed that the admission of this evidence was allowed. (Tr. 3408) The prosecuting attorney then stated: "The witnesses talking about her being dead is different than victim impact saying how it affected them. They haven't said how it affected them." (Tr. 3409) This again fails to acknowledge or recognize that the line of cases dealing with victim impact evidence, also dealt with victim character evidence. (See, Proposition of Law No VII, incorporated herein)

The trial court gave a cautionary instruction, but the Prosecuting Attorney diminished any effect of the instruction in her closing argument:

Jessica Shields, she was the female officer who was second on the scene. You got a curative instruction after she testified. But what I want to tell you is she's human. She is human. Cops are not like they are on TV; okay? Just because she had some emotion you don't have to consider that, and we ask you not to consider that. We - - actually the Judge instructed you not to

consider her emotion. But that's the reality. This is not a sterile situation where police officers go out and they see random people who they - - who they aren't affected by. So understand that when she was testifying and getting somewhat animated, she was reliving that also. She was reliving what she saw. She was reliving the fact that when she gets up there to that porch, Mister is trying to hold his sister's head together and begging for someone to help her.

(Tr. 3996-3997)

These remarks from the prosecuting attorney not only reminded and emphasized the testimony, but also told the jurors that the testimony was what she saw and experienced and was reality. This was misconduct.

The prosecuting attorney knew that there were two witnesses that did not identify Willie Wilks as the shooter in this case. Neither of these witnesses were called during the state's case. The defense attempted to point out the holes in the State's case for not calling these witnesses. During closing argument, the State told the jury that the defense could have called Shantwone Jenkins (TR 4007) and commented that the defendant's right to call any witness (TR 4047). The prosecuting attorney then went further and argued "you heard nothing to the contrary that the person who committed these crimes is Wilks (TR 4048)" All of these comments implicate the defendant's right to remain silent and an attempt to shift the burden of proof to the defense. It is especially egregious given state's knowledge that at least two and arguably three witnesses describe someone other than Wilks but state withheld witnesses from jury.

PENALTY PHASE MISCONDUCT

In the penalty phase, the prosecuting attorney returned to here theme that the determination of life or death was "evidence-based" only. (TR 4217, 4251-54, 4268, 4271) These misstatements of the law prevented the jury from considering "mercy" which is not factual based. *Kansas v. Carr*, supra.

In the penalty phase, the burden of proof and in particular the burden of persuasion remains with the State throughout. Any jury instruction or argument or suggestion by the prosecutor that the burden shifts to the appellant in an incorrect statement of the law. The United States Supreme Court has made clear that improper burden shifting is constitutional error. See *Sandstrom v. Montana*, 442 U.S. 510 (1979) There is no presumption of death in the penalty phase; in fact there is a presumption of life just as there is a presumption of innocence in the first phase. Thus, it is improper for the prosecutor to state or argue that the mitigating factors must diminish the appropriateness of the death penalty; actually, the converse is true; the aggravating circumstance (here the course of conduct specification only) outweighs beyond a reasonable doubt the mitigation (including mercy). See TR 4220, 4255, 4257. See also Verdict Form D filed April 29, 2014.

Prosecutorial misconduct throughout the case deprived Wilks of a fair trial under the Fifth, Sixth, Eighth and Fourteenth Amendments.

PROPOSITION OF LAW NO. XVII

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

Willie Wilks Sixth Amendment right to effective counsel was violated by the cumulative effect of errors and omissions by his trial counsel.⁸

1. Standards for Ineffective Assistance of Counsel Claim.

The standard for assessing attorney performance found in *Strickland v. Washington*, 466 U.S. 668 (1984) applies to this claim. Under *Strickland*, this Court must determine if counsel’s performance was deficient in view of “prevailing professional norms.” 466 U.S. at 687, 689.

Counsel’s actions are presumed reasonable. But *Strickland* also establishes that a reasonable investigation of both law and facts is required before a choice by counsel may be deemed strategic or tactical. *Id.* at 691. “[S]trategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation. ... A decision not to investigate thus must be directly assessed for reasonableness in all the circumstances.” *Wiggins v. Smith*, 539 U.S. 510, 533 (2003) (citations and internal quotation marks omitted).

When assessing the performance prong in a capital case, this Court is informed or guided by the American Bar Association Guidelines for the Appointment of Counsel in Death Penalty

⁸ While Appellant Wilks believes that counsel’s ineffective assistance is present in the record of this case, if this Court were to determine that this issue cannot be decided without information **that is not in the record of the case**, the Court should defer any ruling on the issue and allow it to be addressed in post-conviction proceedings. *State v. Madrigal*, 87 Ohio St.3d 378, 390-391 (2000).

Cases (ABA Guidelines). *See Wiggins*, 539 U.S. at 524. “The ABA Guidelines provide that investigations into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence ...” *Id.* (citation and internal quotation marks omitted with emphasis in original). If counsel’s performance is deficient, this Court must determine whether Wilks suffered prejudice resulting from counsel’s error. *Strickland*, 466 U.S. at 687. Prejudice results when this Court’s confidence in the result of Wilks’s trial is undermined by counsel’s error. *Id.* at 694. Wilks has no requirement to demonstrate that counsel’s error was outcome determinative under the *Strickland* prejudice prong. *Id.* at 693.

2. Ineffectiveness of Counsel at Voir Dire.

a. Counsel Failed to Ensure a Public Trial.

The trial court conducted individual voir dire of the jurors on the issues of pretrial publicity and the death penalty. This process began on March 14, 2014 and continued through April 9, 2014 and comprised 2808 pages of the 4322 pages of transcript.

At the end of the trial phase, the court put on the record that the individual voir dire was conducted in the jury room, “which is adjacent to the courtroom” rather than in open court. (Tr. 4166) The trial court stated that the “door was opened where anyone who wishes to be admitted was permitted.” But it was not clear as to how someone who wished to be admitted, actually got to the jury room. Were there signs indicating that the trial was being held there, rather than in the courtroom? Did a member of the public have to go through the courtroom to try and find the jury room? Was there any outside/hall access door that was also open, so that someone would feel welcome to walk in?

Evidently this procedure was done at the “behest of the defense.” (Tr. 4166) It was clear that the defense attorneys did not want the public there. Defense counsel Yarwood made a point

of saying that the procedure, “from our perspective, met the requirement of an open courtroom.” (Tr. 4167). Attorney Zena continued: “Quite frankly, we asked that you proceed in that fashion in the hope that certain people wouldn't come and observe and thus expose this case to yet more publicity. We accomplished that fact by the manner in which it was conducted without barring anybody from the room. That's all on us, and we asked you to do it that way.”

Defense counsel further states that “Mr. Wilks was very satisfied with that means and manner.” But the reality is that no one asked Mr. Wilks about it, no one informed him that it was his right to have a public trial and this right was being denied.

Defense counsel's failure to make sure that his client received the public trial that he was entitled to denied him of his Sixth Amendment right to a public trial. (Proposition of Law No. V is incorporated herein).

Defense counsel is the guardian of the defendant's rights and the responsibility falls on counsel to make sure that he obtains all the right he is entitled to receive. The fact that it may be “easier” to conduct voir dire one way does not satisfy counsel's responsibilities.

Counsel's actions fell below the standards of care. Counsel has a duty to assert all legal claims available. See, ABA Guidelines 10.8. When the public is barred from the viewing of the proceedings, the right to a public trial is meaningless.

b. Counsel Failed to Remove Biased Juror.

Counsel failed to challenge for cause a juror that could not consider a defendant's background as a mitigating factor. Juror Linda Diver, Juror No. 508 had many troubling answers during individual voir dire. This juror was actually seated on the panel that decided Willie Wilks fate. She was troubled by why someone who gets the death penalty gets to sit in prison for 20 years. (Tr. 810) At first she thought that every case should get the death penalty where there

was a murder, but after the court explained it further she said the death penalty is okay in the appropriate case. However, most troubling was her comments on mitigation.

During the prosecutor's voir dire, she was giving the juror ideas of mitigation such as the defendant's background. (Tr. 826) But the juror did not think that should be used as an excuse. (Id.) The prosecutor then told the juror that she "could put whatever weight you want to put on any mitigating information they give you. You may think it's all a bunch of crap, and that's okay too. That is up to you, as long as you listen to it and deliberate and talk about it." (Tr. 827) It was clear that the juror would give no weight to background evidence, which was the bulk of the evidence that defense counsel would put on in the penalty phase. She again indicated "But like you said before, I wouldn't put a lot of emphasis of the upbringing and stuff." (Tr. 829).

Defense counsel failed to object to the prosecuting attorney's characterization a mitigation as "a bunch of crap." When the end of voir dire came, the defense knew that this juror would not be giving any weigh to the evidence that they planned to present, yet they failed to ask that she be removed for cause and also failed to use a peremptory challenge on the juror. This juror sat on the jury panel in this case.

The Sixth and Fourteenth Amendments of the United States Constitution guarantee a capital defendant the right to a fair trial before a panel of impartial and indifferent jurors. *Morgan v. Illinois*, 504 U.S. 719, 728 (1992); *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988); *Duncan v. Louisiana*, 391 U.S. 145, 147-158 (1968); *Turner v. Louisiana*, 379 U.S. 466, 471-473 (1965); *Irwin v. Dowd*, 366 U.S. 717, 722-723 (1961).

In *Morgan v. Illinois*, the Supreme Court confirmed, as it had previously suggested in *Ross v. Oklahoma*, that, in order to protect a capital defendant's right to a fair trial, a juror is properly removed for cause (life qualified) if it becomes clear that the juror's views in favor of

the death penalty would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” *Id.* at 728-729 (quoting *Wainwright v. Witt*, 469 U.S. 412, 424 (1985); *Adams v. Texas*, 448 U.S. 38, 45 (1980)). In *Morgan*, the Court “reiterate[d]” that a juror, for example, who would “automatically” impose a death sentence following conviction for murder is properly excluded under this standard. *Morgan*, 504 U.S. at 729, 736. Such “automatic death penalty” (ADP) jurors are properly excused because they “obviously deem mitigating evidence to be irrelevant to their decision to impose the death penalty; they not only refuse to give such evidence any weight but are also plainly saying that mitigating evidence is not worth their consideration and that they will not consider it.” *Id.* at 736.

The *Morgan* mandate of life qualification, however, encompasses more than the class of ADP jurors who would “automatically” impose death for any defendant convicted of murder. Pursuant to *Morgan*, “[a]ny juror to whom mitigating factors are . . . irrelevant should be disqualified for cause, for [they have] formed an opinion concerning the merits of the case without basis in the evidence developed at trial.” *Morgan*, 504 U.S. at 738-39. *Morgan* teaches therefore, that any juror whose ability to follow the trial court’s instruction to consider the defendant’s mitigating evidence is substantially impaired must be excused for cause. *Id.* In other words, if a juror is “mitigation impaired” – meaning he or she cannot or will not meaningfully consider and give effect to any mitigation evidence relevant to the defendant’s case, that juror is not qualified.

Trial counsel’s ineffective questioning of this “mitigation impaired,” juror was both unreasonable and prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984). One of counsel’s “most essential responsibilities” was to protect Wilks “constitutional right to a fair and impartial

jury by using voir dire to identify and ferret out jurors who are biased against the defense.” *Miller v. Francis*, 269 F.3d 609, 615 (6th Cir. 2001). Counsel failed in this endeavor by failing to move for cause to excuse Juror Diver or using a peremptory challenge to do so. Mr. Wilks was prejudiced by this performance.

c. Prosecutor’s Questioning in Voir Dire

The misconduct there was not an isolated incident but pervasive. During voir dire, the prosecutor repeatedly stated that mitigation was fact based. “It’s a legal decision, not—and it’s a evidence-based decision, not something—we don’t just put the jurors in a room and say, hey battle out your feelings about the death penalty. Okay?” (Tr. 281, see also 610, 708, 777, 828, 907, 1140, 1207, 1548, 2114⁹). However, such a statement is a misstatement of the law since “mercy” is can be factored in during the deliberation process and mercy “simply is not a factual determination” according to a recent 8-1 decision from the U.S. Supreme Court. The Court emphasizes that jurors will accord mercy if they deem it appropriate, which “is what our case law is designed to achieve.” *Kansas v. Carr*, 577 U.S. _____, 136 S.Ct. 633, ___ (2016). Trial counsel should have objected to this characterization of the weighing process.

d. Acquiesced in the Removal of Prospective Juror Alfonso Guzman

The prospective jury in this case were required to fill out a jury questionnaire and then were subjected to individual voir dire concerning pre-trial publicity and the death penalty. Prospective Juror No. 481 was Alfonso Guzman. Mr. Guzman indicated in the questionnaire that he did not speak English well. (Proposition of Law No. VI is incorporated herein.)

⁹ While Prosecutor Doherty used this “explanation” with almost all prospective jurors, these citations listed are the juror who actually determined the penalty in the case.

When Mr. Guzman was brought into the jury room for questioning, the Court greeted him and indicated he would ask him some questions. The prosecuting attorney spoke up and said “Page 16, Judge.” (Tr. 672) She was indicating to the court the page number in which Mr. Guzman wrote he did not speak English well. The following exchange took place:

THE COURT: Thank you.

We looked at this questionnaire you filled out. We appreciate you did that. One of the things that we want to be sure about is one of the answers you gave to one of the questions about that you don't speak English too well.

A. Not too well.

Q. Excuse me. Do you understand English well?

A. Not much. I've been a waiter for so many years in different Mexican restaurants, but I just know about my work. And, you know, for things like this, it's kind of hard for me.

Q. When you filled out the questionnaire, did you understand all the words in there?

A. Not all.

Q. Okay.

MR. ZENA: We're okay, Judge.

(Tr. 672-674)

The juror was excused. It seemed that defense counsel thought it might be easier to excuse this juror than to determine whether there was really a language issue that would be detrimental to their client's right to a fair trial. There was nothing in the questionnaire that indicated the juror should be excused.

Defense counsel had a duty to assert all legal claims in the case. ABA Guideline 10.8. Instead, counsel could not even be bothered with questioning this prospective juror.

3. Counsel Ineffectiveness at Trial.

Counsel failed in several ways to provide a basic defense for Wilks. Counsel breached their duty to Wilks with the following errors and omissions. *See* ABA Guidelines 10.7, 10.10.1.

a. *Should Have Objected to the Admission of the 9mm Gun*

Counts Eight and Nine of the indictment (Vol. I, Doc. 1) charged the appellant with Having a Weapon while under a Disability. Count 8 concerned a “loaded black handgun” on the day of the homicide and count 9 concerned the same day but a “loaded firearm.”

The appellant moved to sever counts 8 and 9 from the jury’s consideration. (Vol. I, Doc. 56) The trial court granted the motion to sever in a journal entry filed March 10, 2014. (Vol. II, Doc. 69) Nonetheless, the state introduced testimony in support of each charge including the seizure of a black 9 mm firearm seized from the appellant’s vehicle and also introduced expert testimony that it was operable. (Tr. 3759-3762) Both “Mister” and Morales testified concerning the incident earlier in the day and the appellant’s possession of a black firearm at his home. (Tr. 3508, 3418-19, 3422)

It was improper for the State to solicit testimony concerning the 9mm handgun since it was not used in the homicide or related shootings. *State v. Neyland*, 139 Ohio St.3d 353, 2014 Ohio 1914; *State v. Trimble*, 122 Ohio St.3d 297, 2009 Ohio 2961.

Defense counsel should have objected to the admission of the 9mm gun, failure to do so was ineffective assistance of counsel.

b. *Prosecutorial Misconduct*

Trial counsel failed to object to misconduct by the prosecuting attorney.

While counsel did object to the admission of victim character evidence (See, Proposition of Law No. VII), counsel failed to object to the prosecutor’s dismissal of the curative instruction:

Jessica Shields, she was the female officer wo was second on the scene. You got a curative instruction after she testified. But what I want to tell you is she’s human. She is human. Cops are not like they are on TV; okay? Just because she had some emotion you don’t have to consider that, and we ask you not to consider

that. We - - actually the Judge instructed you not to consider her emotion. But that's the reality. This is not a sterile situation where police officers go out and they see random people who they - - who they aren't affected by. So understand that when she was testifying and getting somewhat animated, she was reliving that also. She was reliving what she saw. She was reliving the fact that when she gets up there to that porch, Mister is trying to hold his sister's head together and begging for someone to help her.

(Tr. 3996-3997)

These remarks from the prosecuting attorney not only reminded and emphasized the testimony, but also told the jurors that the testimony was what she saw and experienced and was reality. Trial counsel should have objected to these comments.

The prosecuting attorney knew that there were two witnesses that did not identify Willie Wilks as the shooter in this case. Neither of these witnesses were called during the state's case. The defense attempted to point out the holes in the State's case for not calling these witnesses. During closing argument, the State told the jury that the defense could have called Shantwone Jenkins (TR 4007) and commented that the defendant's right to call any witness (TR 4047). The prosecuting attorney then went further and argued "you heard nothing to the contrary that the person who committed these crimes is Wilks (TR 4048)" All of these comments implicate the defendant's right to remain silent and an attempt to shift the burden of proof to the defense. It is especially egregious given state's knowledge that at least two and arguably three witnesses describe someone other than Wilks but state withheld witnesses from jury. Again, defense counsel should have objected to these comments.

c. Should Have Obtained an Expert on Eye-Witness Identification

In addition, the only evidence tying Willie Wilks to this case was the testimony of two "eye witnesses." In recent times, more has been learned about eyewitness identification and the unreliability associated with it. A recent case from the Illinois Supreme Court illustrates the

point. In *People v. Lerma*, ---N.E. 3d ---, 2016 IL 118496, 2016 WL 280709 (slip opinion), with facts that are eerily similar to the facts in this case, the court was addressing the use of expert testimony on eye witness identification. The opinion discusses the testimony of one potential expert witness:

The data and conclusions contained in Dr. [Geoffrey] Loftus's report largely tracked with the contents of Dr. Fulero's report, with two significant exceptions. First, Dr. Loftus's report stressed that he would not “issue judgments about whether a particular witness's memory and assertions * * * are correct or incorrect” and that “any testimony on [his] part which implies unreliability on the part of eyewitness(es) who identify a defendant should not, *ipso facto*, be taken to imply that the defendant is innocent—it implies only that the eyewitness evidence should be viewed with appropriate caution.” Second, and more importantly, unlike Dr. Fulero's report, which was silent on the subject of acquaintance identifications, Dr. Loftus's report specifically stated that “[i]t would seem intuitive to a jury that if a witness identifies a suspect with whom he or she is acquainted, the witness's identification would likely be accurate. However, this is not necessarily true.” Rather, the report explained, “if circumstances are poor for a witness's ability to perceive a person,” and “the situation fosters a witness's expectations that he or she will see a particular acquaintance[,] * * * then the witness will tend to perceive the person as the expected acquaintance even if the person is in fact someone else.” According to Dr. Loftus's report, such poor circumstances include low lighting; viewing longer distances in the dark; divided attention of the witness, including a focus on a weapon; time duration, with less time leading to less available information, and a witness's tendency to overestimate time durations; cross-racial identification; stress; and a partially obscured face.

(*Id.*, at ¶ 14)

Dr. Loftus' report opined that misidentification can occur even when the witnesses are acquainted with the person identified:

“In such circumstances, the witness's acquaintance with the expected—and hence perceived—person works against accurate identification for two reasons: First, it would be natural and easy for the witness to subsequently pick the acquaintance in an identification procedure * * * (because the witness already knows whom she is seeking in a lineup procedure, she could immediately rule out all the fillers, and zero in on the acquaintance/suspect). Second, the witness could use his or her prior knowledge of the acquaintance's appearance to reconstruct his or her memory of the original events—the crime—such that the in fact poor original memory of the actual

criminal is replaced with a stronger and more confidence-evoking memory of the acquaintance * * *.”

(Id.)

Here, the jury should have heard from an expert on eye witness identification so as to inform the jury of the weakness of such evidence, the only evidence against Mr. Wilks.

Defense counsel fell below the standard of care in failing to obtain an eye-witness identification expert, and Mr. Wilks was prejudiced.

d. Should Have Objected to the Erroneous Jury Instructions

The court instructed the jury that if the State failed to prove beyond a reasonable doubt “...all the essential elements of aggravated murder in Count 1, then your verdict must be not guilty of that offense; and in that event, you will continue your deliberations ...” to determine whether the State proved all of the elements of the lesser included offense of Murder. (T. 4066)

The above instruction is fundamentally incorrect. It is boilerplate law that if the State fails to prove **any one element** of a charge then the defendant must be found not guilty. Here, the Court required the State to fail to prove **all** of the elements before a not guilty verdict could be returned. It would appear that the court tried to short cut the instruction, as seen in a comparison with the instruction regarding the capital specification. (Proposition of Law No. IX incorporated herein)

The jury instruction was not correct or complete, counsel was ineffective for failing to make the appropriate objection.

4. Counsel Ineffectiveness in Penalty Phase.

a. Mitigation Presentation

Willie Wilks was 42 years old at the time of his trial. However, the defense presented only three witnesses, the mother of his child, his half-brother and his mother. (Tr. 4226, 4232,

4235) Defense counsel failed to develop the testimony of each witness, instead they just asked very stilted questions, such as “was he attentive?”

It is clear from the paper record that defense counsel should have developed the testimony of each witness. He could have questioned Takisha concerning the interaction of Willie and his child, did they play together, did he take him to zoo, was he there for holidays, did he come when the child was sick? Likewise with Tracy Wilks, he could have asked him to describe their time together. He said Willie was attentive to his own children. How? Did he spend time with them, what did they do together, how often did they see each other? Did they ever talk about their fathers, and how much time did Tracy’s father spend with them? Did Tracy’s father treat Willie as if he was his own?

And certainly Willie’s mother’s testimony could have been developed a lot more. Why did she leave Alabama? What was life like there? Was there a problem with Willie’s father? Did Willie’s father not want any contact with him? Did Willie’s father know she was leaving the state with his child? How did she end up in Youngstown? What did she do there? Did she let Willie’s father know where he was? She indicated she had a drinking problem. How did it affect the children? Did she make dinner every night? Did she have any problems taking care of the children as a result of the drinking? Was it difficult living in the area of town they lived? Was there crime in the area?

These were questions that begged to be asked. Instead, the defense counsel focused on very superficial subjects.

The defense needed to provide the jury with a reason to spare their client’s life. They went into the penalty phase knowing that all they had was background information, but failed to develop it to the point that the jurors who indicated they would not give background any weight,

would want to give it some weight. *See Wiggins*, 539 U.S. at 524. “The ABA Guidelines provide that investigations into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence ...” *Id.* (citation and internal quotation marks omitted with emphasis in original). If counsel’s performance is deficient, this Court must determine whether Wilks suffered prejudice resulting from counsel’s error. *Strickland*, 466 U.S. at 687. Prejudice results when this Court’s confidence in the result of Wilks’s trial is undermined by counsel’s error. *Id.* at 694.

b. Prosecuting Attorney Closing Argument

In the penalty phase, the prosecuting attorney returned to here theme that the determination of life or death was “evidence-based” only. (TR 4217, 4251-54, 4268, 4271) These misstatements of the law prevented the jury from considering “mercy” which is not factual based. *Kansas v. Carr*, supra.

In the penalty phase, the burden of proof and in particular the burden of persuasion remains with the State throughout. Any jury instruction or argument or suggestion by the prosecutor that the burden shifts to the appellant in an incorrect statement of the law. The United States Supreme Court has made clear that improper burden shifting is constitutional error. See *Sandstrom v. Montana*, 442 U.S. 510 (1979) There is no presumption of death in the penalty phase; in fact there is a presumption of life just as there is a presumption of innocence in the first phase. Thus, it is improper for the prosecutor to state or argue that the mitigating factors must diminish the appropriateness of the death penalty; actually, the converse is true; the aggravating circumstance (here the course of conduct specification only) outweighs beyond a reasonable doubt the mitigation (including mercy). See TR 4220, 4255, 4257.

Trial counsel should have objected to this burden shifting argument.

c. Defense Closing Argument

The closing argument in the penalty phase is the last chance that defense counsel has to persuade the jury to impose of the the life sentence options. However, near the end of the argument, the defense counsel stated: “[w]e’re not expecting something like, you know, life without the possibility of parole.” (Tr. 4266). However, that is exactly what they should have been expecting. ABA Guideline 10.11(L)(“Counsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client.”) Counsel should never have made that statement.

d. Allowed the Court to Close the Courtroom for the Jury Instructions

Just prior to jury instructions, the court told the public the following:

Those in the rear of the courtroom, you're certainly welcomed to stay; however, when I begin this instruction, it will take about a half hour and we're going to close the door and lock it, and it will remain closed for the duration. So if you don't want to stay for the duration, you should leave, so you're welcomed to do that now.

Tr. 4271-4272

By the court’s own words, he was closing the courtroom, and the door would be locked and the public would not be able to get in during the jury instructions. There is no notation in the record as to when the doors were once again open to the public. Defense counsel remained mute and failed to object to the closure of the courtroom. (Proposition of Law No. V incorporated herein)

There is a presumption against closing the courtroom. The Supreme Court has explained that “[t]he central aim of a criminal proceeding must be to try the accused fairly,” and the right to a public trial is “one created for the benefit of the defendant.” *Waller v. Georgia*, 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

The trial court offered no reason that the courtroom should be closed, and defense counsel should have objected to the closure. Counsel's failure denied him a right to a public trial as guaranteed by the Sixth Amendment. Defense counsel had a duty to assert all legal claims in the case. ABA Guideline 10.8.

5. Defendant's Presence

An accused has a fundamental right to be present at all critical stages of his criminal trial. However, "the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Snyder v. Massachusetts*, 291 U.S. 97, 107-108, 54 S. Ct. 330, 78 L. Ed. 674 (1934), overruled on other grounds by *Malloy v. Hogan*, 378 U.S. 1, 17, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

During the course of the trial proceedings the defense counsel took it upon themselves to waive Willie Wilks presence at the proceedings, without any apparent authority to do so. The trial court would sometimes acquiesce in the waiver, without consulting with the defendant, while at other times the trial court let the proceedings go forward without the defendant.

The following are examples of times Willie Wilks was not present:

- During the course of an excusal of jurors. (Tr. 226)
- When Juror 11 was brought in chambers to indicate he may know someone who is testifying (Tr. 3631-3634)
- Just prior to closing arguments in the trial phase, while court swears in the persons that will be involved with the jury. (Tr. 3650)
- After the jury was dismissed, a discussion on the exhibits was had. (Tr. 4099)
- Prior to the start of the penalty phase, when there was a discussion regarding the jury instructions (Tr. 4185)

- An in-chambers discussion with Juror McNally, who was then excused from service and the discussion regarding the replacement juror. (Tr. 4190-4200)

This was not counsel's call to make, it was the client's. Willie Wilks was on trial for his life and he had a right to decide whether he wanted to be present for ever discussion relating to him and the case. A couple of times the judge by-passed counsel's waiver and specifically asked Mr. Wilks if he was waiving his presence, such as for the jury view, but the remainder of the time, counsel made the choice. Counsel should have insured that his client was present at all proceedings. The failure to do so was ineffective assistance of counsel.

6. Conclusion.

The "cumulative effect" of counsel's errors and omissions violated Willie Wilks's Sixth Amendment right to effective counsel. *See State v. Gondor*, 112 Ohio St. 3d 377, 392, 860 N.E.2d 77, 90 (2006) (citing *State v. DeMarco*, 31 Ohio St. 3d 191, 196, 509 N.E.2d 1256, 1261 (1987); *Stouffer v. Reynolds*, 168 F.3d 1155, 1163-64 (10th Cir. 1999)). Wilks is entitled to a new trial or alternatively a new penalty phase under R.C. § 2929.06(B).

PROPOSITION OF LAW NO. XVIII

CUMULATIVE ERRORS DEPRIVED WILKS OF A FAIR TRIAL AND AN UNRELIABLE SENTENCING HEARING.

The combination of errors by the trial court, the prosecution and the ineffectiveness of the defense counsel deprived Wilks of a fair trial. The errors, if not individually, combined to cause the trial to be constitutionally infirm. *State v. DeMarco*, 31 Ohio St. 3d 191 (1987). These errors, as addressed in the Propositions of Law in this brief, combined to violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and also violates the Ohio Constitution.

Appellant Wilks incorporates the other Propositions of Law into this argument. The cumulative effect of all the error resulted in a verdict and/or sentence that is not reliable.

PROPOSITION OF LAW NO. XIX

OHIO’S DEATH PENALTY LAW IS UNCONSTITUTIONAL. OHIO REV. CODE ANN. §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, AND 2929.05 DO NOT MEET THE PRESCRIBED CONSTITUTIONAL REQUIREMENTS AND ARE UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED TO WILLIE WILKS. U.S. CONST. AMENDS. V, VI, VIII, AND XIV; OHIO CONST. ART. I, §§ 2, 9, 10, AND 16. FURTHER, OHIO’S DEATH PENALTY STATUTE VIOLATES THE UNITED STATES’ OBLIGATIONS UNDER INTERNATIONAL LAW.

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

Arbitrary And Unequal Punishment

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

Ohio’s capital punishment scheme allows the death penalty to be imposed in an arbitrary and discriminatory manner in violation of *Furman* and its progeny. Prosecutors’ virtually uncontrolled indictment discretion allows arbitrary and discriminatory imposition of the death

penalty. Mandatory death penalty statutes were deemed fatally flawed because they lacked standards for imposition of a death sentence and were therefore removed from judicial review. *Woodson v. North Carolina*, 428 U.S. 280 (1976). Prosecutors' uncontrolled discretion violates this requirement.

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

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

Unreliable Sentencing Procedures

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

The statutory scheme is unconstitutionally vague, which leads to the arbitrary imposition of the death penalty. The language "that the aggravating circumstances ... outweigh the mitigating factors" invites arbitrary and capricious jury decisions. "Outweigh" preserves

reliance on the lesser standard of proof by a preponderance of the evidence. The statute requires only that the sentencing body be convinced beyond a reasonable doubt that the aggravating circumstances were marginally greater than the mitigating factors. This creates an unacceptable risk of arbitrary or capricious sentencing.

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

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

Empirical evidence is developing in Ohio and around the country that, under commonly used penalty phase jury instructions, juries do not understand their responsibilities and apply inaccurate standards for decision. *See Cho*, Capital Confusion: The Effect of Jury Instructions on the Decision To Impose Death, 85 J. Crim. L. & Criminology 532, 549-557 (1994), and findings

of Zeisel discussed in *Free v. Peters*, 12 F.3d 700 (7th Cir. 1993). This confusion violates the federal and state constitutions. Because of these deficiencies, Ohio's statutory scheme does not meet the requirements of *Furman* and its progeny.

Induced ineffective assistance of counsel and denial of an impartial jury

Ohio's capital statutory scheme provides for a sentencing recommendation by the same jury which determines the facts at trial if the defendant is found guilty. This procedure violates defendant's rights to effective assistance of counsel and to a fair trial before an impartial jury as guaranteed by the State and Federal Constitutions.

Ohio's bifurcated capital trial process with the same jury violates defendant's right to effective assistance of counsel as guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution; *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970); *Powell v. Alabama*, 287 U.S. 45, 47 (1932); Ohio Const. art. I §§ 10 & 16; *State v. Hester*, 45 Ohio St. 2d 71 (1976).

First, under the operation of the current statute, if counsel argues to the jury a defense which loses at the guilt phase of the trial, in effect he is forced to simultaneously destroy defendant's credibility prior to the start of the trial's sentencing phase. By invoking the defendant's right to strenuously argue for his innocence in the first phase, a loss for the defense in the first phase means that counsel will have significantly reduced the credibility desperately needed to successfully argue for a life sentence.

The legislature should have eliminated this constitutional dilemma by providing for two separate juries, the first for determining guilt and the second for determining punishment. It is respectfully suggested that at the second trial the prosecuting attorney would be allowed to reiterate the specific evidence of aggravating circumstances. This proposed order of trial would

eliminate the impairment of the right to have a defense presented with the effective assistance of counsel. The State essentially has “prevented (counsel) from assisting the accused during a critical stage of the proceeding.” *United States v. Cronin*, 466 U.S. 648, 659, n.25 (1984). This creates constitutional error without any showing of prejudice necessary. Id.

The State’s claim that it has an interest in having a single jury for both phases of the trial and that this should surmount the defendant’s right to a fair and impartial trial phase jury is also belied by the Attorney General’s recent efforts in the Ohio legislature (through H.B. 585 and S.B. 258, introduced early 1996) to require that a second jury be selected for purposes of resentencing trials when a capital defendant’s death sentence is overturned on appeal. The Attorney General’s present claim that this two-jury practice would be workable and inexpensive flies in the face of the State’s earlier urgings against just such a two-jury practice at the initial trial. The State cannot have it both ways, and the capital criminal justice system must not force defendants into trial before a less than impartial jury. No Ohio court has yet considered the impact that the State’s contradictory positions have on the fairness of the present capital scheme.

Under Ohio’s death penalty statutory scheme, an intolerable risk exists that a defendant’s life may be put in the hands of a hostile venire, which in effect creates uncertainty in the reliability of the determination reached. Such a risk cannot be tolerated in a capital case. *Beck v. Alabama*, 447 U.S. 625, 638 (1980). Therefore, the statute must be struck down as an unconstitutional violation of defendant’s right to an impartial jury under the State and Federal constitutions.

Lack of individualized sentencing

The Ohio statutes are unconstitutional because they require proof of aggravating circumstances in the trial phase of the bifurcated proceeding. The Supreme Court of the United

States has approved schemes that separate the consideration of aggravating circumstances from the determination of guilt. Those schemes provide an individualized determination and narrow the category of defendants eligible for the death penalty. *See Zant v. Stephens*, 462 U.S. 862 (1983); *Barclay v. Florida*, 463 U.S. 939 (1983). Ohio's statutory scheme cannot provide for those constitutional safeguards.

The jury must be free to determine whether death is the appropriate punishment for a defendant. Requiring proof of the aggravating circumstances simultaneously with proof of guilt effectively prohibits a sufficiently individualized determination in sentencing as required by post-*Furman* cases. *See Woodson*, 428 U.S. at 961. This is especially prejudicial because this is accomplished without consideration of any mitigating factors.

Defendant's Right to a Jury is Burdened

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

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

Mandatory Submission of Reports and Evaluations

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

Ohio Rev. Code §§2929.03(D)(1) and 2929.04 are unconstitutionally vague

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

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

Ohio Rev. Code §2929.04(B) tells the sentencer that the nature and circumstances of the offense are selection factors in mitigation. Moreover, because the nature and circumstances of the offense are listed only in Ohio Rev. Code §2929.04(B), they must be weighed only as selection factors in mitigation. *See State v. Wogenstahl*, 75 Ohio St. 3d 344, 356 (1996).

However, the clarity and specificity of Ohio Rev. Code §2929.04(B) is eviscerated by RC §2929.03(D)(1); selection factors that are strictly mitigating become part and parcel of the aggravating circumstance. Despite wide latitude, Ohio has carefully circumscribed its selection factors into mutually exclusive categories. *See* Ohio Rev. Code §2929.04(A) and (B); *Wogenstahl*, 75 Ohio St. 3d at 356. Ohio Rev. Code §2929.03(D)(1) makes Ohio Rev. Code §2929.04(B) vague because it incorporates the nature and circumstances of an offense into the aggravating circumstances. The sentencer cannot reconcile this incorporation. As a result of Ohio Rev. Code §2929.03(D)(1), the “nature and circumstances” of any offense become “too vague” to guide the jury in its weighing or selection process. *See Walton*, 497 U.S. at 654. Ohio Rev. Code §2929.03(D)(1) therefore makes Ohio Rev. Code §2929.04(B) unconstitutionally arbitrary.

Ohio Rev. Code §2929.03(D)(1) is also unconstitutional on its face because it makes the selection factors in aggravation in Ohio Rev. Code §2929.04(A)(1)-(8) “too vague.” *See Walton*, 497 U.S. at 654. Ohio Rev. Code §2929.04(A)(1)-(8) gives clear guidance as to the selection factors that may be weighed against the defendant’s mitigation. However, Ohio Rev. Code §2929.03(D)(1) eviscerates the narrowing achieved. By referring to the “nature and circumstances of the aggravating circumstance,” Ohio Rev. Code §2929.03(D)(1) gives the sentencer “open-ended discretion” to impose the death penalty. *See Maynard*, 486 U.S. at 362. That reference allows the sentencer to impose death based on (A)(1)-(8) plus any other fact in evidence arising from the nature and circumstances of the offense that the sentencer considers aggravating. This eliminates the guided discretion provided by Ohio Rev. Code §2929.04(A). *See Stringer*, 503 U.S. at 232.

Mandatory death penalty and failure to require appropriateness analysis

The Ohio death penalty statutory scheme precludes a mercy option, either in the absence of mitigation or when the aggravating circumstances “outweigh” the mitigating factors. The statutes in those situations mandate that death shall be imposed. Ohio Rev. Code §§2929.03, 2929.04. The sentencing authority is *impermissibly* limited in its ability to return a life verdict by this provision.

In *Gregg*, the United States Supreme Court stated, “nothing” in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. 428 U.S. at 199. *Gregg* held only 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.” *Id.* *Gregg* requires the State to establish, according to constitutionally sufficient criteria of aggravation and constitutionally mandated procedures, that capital punishment is appropriate for the defendant. Nothing requires the State to execute defendants for whom such a finding is made. Indeed the Georgia statute, approved in *Gregg* as being consistent with *Furman*, permits the jury to make a binding recommendation of mercy even though the jury did not find any mitigating circumstances in the case. *Fleming v. Georgia*, 240 S.E.2d 37 (Ga. 1977); *Hayes v. Georgia*, 282 S.E.2d 208 (Ga. 1981). Subsequent to *Lockett*, the Fifth and Eleventh Circuits repeatedly reviewed and remanded cases for error in the jury instructions when the trial court failed to clearly instruct the jury that they had the option to return a life sentence even if the aggravating circumstances outweighed mitigation. *Chenault v. Stynchcombe*, 581 F.2d 444 (5th Cir. 1978); *Spivey v. Zant*, 661 F.2d 464 (5th Cir. 1981); *Goodwin v. Balkcom*, 684 F.2d 794 (11th Cir. 1981); *Westbrooke v. Zant*, 704 F.2d 1487 (11th

Cir. 1983); *Tucker v. Zant*, 724 F.2d 882 (11th Cir. 1984); *Gray v. Lucas*, 677 F.2d 1086 (5th Cir. 1982); *Prejean v. Blackburn*, 570 F. Supp. 985 (D. La. 1983).

Capital sentencing that is constitutionally individualized requires a mercy option. An individualized sentencing decision requires that the sentencer possess the power to choose mercy and to determine that death is not the appropriate penalty for this defendant for this crime. In *Barclay v. Florida*, 463 U.S. at 950, the Court stated that the jury is free to “determine whether death is the appropriate punishment.”

Absent the mercy option, the Defendant faces a death verdict resulting from *Lockett*-type statute, i.e., a statute that mandated a death verdict in the absence of one of three specific mitigating factors. Under current Ohio law, the sentencer lacks the option of finding a life sentence appropriate in the face of a statute which requires that when aggravating circumstances outweigh mitigating factors “it shall impose a sentence of death on the offender.” Ohio Rev. Code §2929.03(D)(3).

A non-mandatory statutory scheme that affords the jury the discretion to recommend mercy in any case “avoids the risk that the death penalty will be imposed in spite of factors ‘too intangible to write into a statute’ which may call for a less severe penalty, and avoidance of this risk is constitutionally necessary.” *Conner v. Georgia*, 303 S.E.2d 266, 274 (Ga. 1983). Other state courts have also required a determination of “appropriateness” beyond mere weighing of aggravating circumstances and mitigating factors. *California v. Brown*, 726 P.2d 516 (Cal. 1985), *rev’d on other grounds*, 479 U.S. 538 (1987).

In *California v. Brown*, 479 U.S. 538, 543 (1987), the Supreme Court repeated “the Eighth Amendment's need for reliability in the determination that death is the appropriate punishment in a specific case.” In *Brown*, the Court agreed that jurors may be cautioned against

reliance on “extraneous emotional factors,” and that it was proper to instruct the jurors to disregard “mere sympathy.” *Id.* This instruction referred to the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase. The Court’s analysis clearly approved and mandated that jurors be permitted to consider mercy, i.e., sympathy tethered or engendered by the penalty phase evidence.

The Ohio statute does not permit an appropriateness determination; a death sentence is mandated after a mere weighing. Finally, while the Supreme Court of Ohio has claimed that a “jury is not precluded from extending mercy to a defendant,” *State v. Zuern*, 32 Ohio St. 3d 56, 64 (1987), Ohio jurors are not in fact informed of this capability. In fact, the Supreme Court of Ohio has permitted penalty phase jury instructions in direct contradiction to this extension of mercy capability. The Ohio “no-sympathy” instructions to juries do not in any way distinguish between “mere” sympathy (untethered), and that sympathy tied to the evidence presented in penalty phase, and therefore commit the very violation of the Eighth Amendment which the California instruction had narrowly avoided.

While the Supreme Court of Ohio claims extending mercy is permissible in Ohio, and acknowledges that “[s]entencing discretion is an absolute requirement of any constitutionally acceptable capital punishment statute,” *id.* at 65, there is in fact no such indication on the statute’s face, and no state court assurance that jurors are so informed. Bald, unsupported assertions of compliance with the constitution are inadequate.

Ohio’s “beyond a reasonable doubt” standard

The statutes fail to require proof beyond all doubt as to guilt that aggravating circumstances outweigh mitigating factors, and the appropriateness of death as a punishment before the death sentence may be imposed.

The burden of proof required for capital cases should be proof beyond all doubt. The jury should be instructed during both phases that the law requires proof beyond all doubt of all the required elements. Most importantly, death cannot be imposed as a penalty except upon proof beyond all doubt of both the crime itself and the fact that the aggravating circumstances outweigh the mitigating factors.

Insistence on reliability in guilt and sentencing determination is a vital issue in the United States Supreme Court's capital decisions. This emphasis on the need for reliability and certainty is a product of the unique decision that must be made in every capital case - the choice of life or death. The Supreme Court has consistently emphasized the "qualitative difference" of death as a punishment, stating that "death profoundly differs from all other penalties" and is "unique in its severity and irrevocability." *Woodson*, 428 U.S. at 305; *Lockett*, 438 U.S. at 605; *Gardner v. Florida*, 430 U.S. 349 (1977); *Gregg*, 428 U.S. at 187.

Proof beyond all doubt, a higher standard than the statutory proof beyond a reasonable doubt, should be required in a capital case because of the absolute need for reliability in both the guilt and penalty phases. The irrevocability of the death penalty demands absolute reliability. Absent such a safeguard, Defendant may be subject to a sentence of death in violation of his Eighth and Fourteenth Amendment rights.

The proof beyond a reasonable doubt standard is required in criminal cases "to safeguard men from dubious and unjust convictions." *In re Winship*, 397 U.S. 358, 363 (1970). The petitioner in *Winship* was a juvenile facing a possible six years imprisonment. Crucial to the Court's decision was its assessment of the importance of the defendant's right not to be deprived of his liberty. Proof beyond a reasonable doubt was demanded in recognition that "the accused during a criminal prosecution has at stake interests of immense importance, both because of the

possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the convictions.” *Id.* Only this standard of proof adequately commanded “the respect and confidence of the community in applications of the criminal law.” *Id.* at 364.

In a capital case, far more than liberty and stigmatization are at issue. The defendant’s interest in his life must be placed on the scales. Only then can an appropriate balancing of the interests be performed; only then can one know whether the “situation demands” a particular procedural safeguard. Given the magnitude of the interests at stake in a capital case and the necessity that the community “not be left in doubt whether innocent men are being condemned” a high standard is required which reduces the margin of error “as much as humanly possible,” *Id.*; *Eddings*, 455 U.S. at 878. This is all the more so when a petitioner’s “life” interest (protected by the “life, liberty and property” language in the Due Process Clause) is at stake in the proceeding. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998) (five Justices recognized a distinct “life” interest protected by the Due Process Clause in capital cases above and beyond liberty and property interests). The most stringent standard of proof that is “humanly possible” is proof beyond all doubt.

The American Law Institute’s Model Penal Code, cited by the United States Supreme Court as a statute “capable of meeting constitutional concerns,” adopts the beyond-all-doubt standard at the sentencing phase. *See Gregg v. Georgia*, 428 U.S. 153, 191-195 (1976). The Model Penal Code mandates a life sentence if the trial judge believes that “although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant’s guilt.” Model Penal Code §210.6(1)(f). If the trial judge has any doubt of the defendant’s guilt, life

imprisonment is automatically imposed without a sentencing hearing. The words used are “all doubt,” not merely “doubt” or “reasonable doubt.”

Ohio's definition of proof “beyond a reasonable doubt” results in a burden of proof insufficiently stringent to meet the higher reliability requirement in capital cases at the guilt phase, and this has not been cured by appellate courts in their review of convictions or death sentences.

Ohio law provides standard jury instructions of “reasonable doubt” and “proof beyond a reasonable doubt” as the applicable burden of proof in capital cases. Ohio RC §2901.05(D). However, Ohio’s definition actually articulates the standard for the lower burden of proof by a preponderance of the evidence; thus unconstitutionally diluting defendant’s rights to a fair trial. *See Cross v. Ledford*, 161 Ohio St. 469 (1954); *Holland v. United States*, 348 U.S. 121 (1954); *Scurry v. United States*, 347 F.2d 468, 470 (D.C. Cir. 1965) (“[I]mportant affairs is the traditional test for clear and convincing evidence ... The jury ... is prohibited from convicting unless it can say beyond a reasonable doubt that defendant is guilty as charged. ... To equate the two in the juror’s mind is to deny the defendant the benefit of a reasonable doubt.”). *State v. Crenshaw*, 51 Ohio App. 2d 63, 65 (1977); *cf. State v. Nabozny*, 54 Ohio St. 2d 195 (1978), vacated on other grounds, *Nabozny v. Ohio*, 439 U.S. 811 (1978); *State v. Seneff*, 70 Ohio App. 2d 171 (1980).

The Ohio reasonable doubt instructions fail to satisfy the requirement of reliability in a capital case. Even in Winship, when considering the reasonable doubt standard, the Court stated that the fact finder must be convinced of guilt “with utmost certainty,” and that the court must impress on the trier of fact the necessity of reaching a subjective state of certitude. Winship, 397 U.S. at 363, 364. Ohio’s definition of a reasonable doubt is inadequate to meet even these standards.

The Ohio death penalty statutes fail to require that the jury consider as a mitigating factor pursuant to Ohio Rev. Code §2929.04(B) that the evidence fails to preclude all doubt as to the defendant's guilt.

The language of RC §2929.04(D)(2) contemplates a balancing process focusing upon the mitigating factors present in the case as compared to the offender's "guilt" with respect to the aggravating specifications.

In determining the appropriateness of the death penalty, the fact that the evidence presented failed to foreclose all doubt as to guilt must be considered as a relevant mitigating factor. "The jury should have before it not only the prosecution's unilateral account of the offense but the defense version as well. The jury should be afforded the opportunity to see the whole picture" *California v. Terry*, 390 P.2d 381 (Cal. 1964). The failure to require jury consideration of the fact that the evidence does not foreclose all doubt as to guilt violates the constitutional standards established for the imposition of the death penalty.

Proportionality and Appropriateness Review

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

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

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

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

This Court's appropriateness analysis is also constitutionally infirm. R.C. § 2929.05(A) requires appellate courts to determine the appropriateness of the death penalty in each case. The statute directs affirmance only where the court is persuaded that the aggravating circumstances outweigh the mitigating factors and that death is the appropriate sentence. *Id.* This Court has not followed these dictates. The appropriateness review conducted is very cursory. It does not “rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not.” *Spaziano v. Florida*, 468 U.S. 447, 460 (1984).

The cursory appropriateness review also violates the capital defendant's due process rights as guaranteed by the Fifth and Fourteenth Amendments to the Constitution. The General Assembly provided capital appellants with the statutory right of proportionality review. When a

state acts with significant discretion, it must act in accordance with the Due Process Clause. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). The review currently used violates this constitutional mandate. An insufficient proportionality review violates Willie Wilks due process and liberty interest in R.C. § 2929.05.

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, Willie Wilks' capital convictions and sentences cannot stand.

International Law Binds Ohio.

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

Ohio's Obligations Under International Charters, Treaties, and Conventions

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

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

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

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. *See infra* Sections a–f.

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

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

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

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

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

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

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

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

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

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

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

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

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

Ohio's Obligations Under Customary International Law

International law is not merely discerned in treaties, conventions and covenants. International law “may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law.” *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820). Regardless of the source “international law is a part of our law[.]” *The Paquete Habana*, 75 U.S. at 700.

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

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

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

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

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

Conclusion

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

CONCLUSION

Willie Wilks has maintained his innocence from the moment he was arrested and gave a video recorded statement to the police. He maintained his innocence through the guilty verdict “I didn’t do this” and during his unsworn statement to the jury.

Unquestionably the evidence that convicted him was the eyewitness testimony of “Mister” and Morales. To the lay person, and even to many in the legal community, the eyewitness testimony from two individuals seems overwhelming; but in this case, there were two witnesses who identified someone other than Wilks and they never testified.

In addition, it is now known that the single greatest source of wrongful convictions in the United States are cases that rely on eyewitness testimony. Not only is Wilks wrongfully convicted, he is sentenced to death. The ultimate punishment based on the most unreliable type of evidence.

The case was flawed from the beginning: no significant police investigation, indicted in less than 48 hours, prosecutorial misconduct from the grand jury presentation through the end of the trial; defense attorneys who may have been well meaning but who grossly underperformed to the point of being constitutionally ineffective; the exclusion from the jury of a citizen who had the right to serve and who was dismissed from service due to no fault of his own and who was treated unfairly simply because the judge and attorneys were inconvenienced by his English language skills but who was able to communicate effectively in English; a courtroom that was effectively closed to the public during jury selection and whose doors were locked to the public at the end during jury instructions without any semblance of Due Process.

The convictions and sentence in this case must be reversed because our Ohio legal system can and must do better before taking the life of one of our own. Fundamental fairness demands as much.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Merit Brief of Appellant and the Attached Appendix to Merit Brief was forwarded by e-mail service to Paul Gaines (pgains@mahoningcountyoh.gov) and Ralph M. Rivera (rrivera@mahoningcountyoh.gov) this 1st. day of February, 2016.

s/Kathleen McGarry
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APPENDIX

ORIGINAL

In the Supreme Court of Ohio

STATE OF OHIO,

Appellee

-vs-

WILLIE G. WILKS, JR.,

Appellant

14-1035

Case N°

On Appeal from the Mahoning
County Court of Common Pleas

Case N° 2013 CR 00540

NOTICE OF APPEAL OF APPELLANT WILLIE G. WILKS, JR.

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Wilks Appeal Page 11 ORIGINAL

In the Supreme Court of Ohio

STATE OF OHIO,

Appellee

-vs-

WILLIE G. WILKS, JR.,

Appellant

Case N^o _____

On Appeal from the Mahoning
County Court of Common Pleas

Case N^o 2013 MA 00540

NOTICE OF APPEAL OF APPELLANT WILLIE G. WILKS, JR.

APPELLANT, WILLIE G. WILKS, JR., hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Mahoning County Court of Common Pleas entered on May 7, 2014 and amended on May 19, 2014. 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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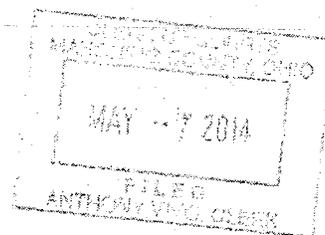
I hereby certify that a true copy of the foregoing was sent by regular U.S. mail on the 11th day of June, 2014 to: Mr. Paul J. Gains, Esq., Ms. Rebecca L. Doherty, Esq., Mr. Michael Yacavone, Esq., and Mr. Ralph M. Rivera, Esq., all at 21 West Boardman Street, Youngstown, Ohio 44503.



JOHN B. JUHASZ
COUNSEL FOR APPELLANT

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IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO



STATE OF OHIO)
)
 PLAINTIFF)
)
 VS.)
)
 WILLIE GENE WILKS JR.)
)
 DEFENDANT)
)

CASE NO. 13 CR 540
JUDGE LOU A. D'APOLITO
JUDGMENT ENTRY OF SENTENCE

Case called for imposition of sentence pursuant to Ohio Revised Code 2929.03 and 2929.04 this 7th day of May, 2014.

At the trial of this case the Defendant was found guilty on Count One of Aggravated Murder O.R.C. 2903.04(A)(F) beyond a reasonable doubt by the jury on April 15, 2014. The Defendant was also found guilty of the separate capital specifications under Ohio Revised Code 2929.04(A)(5), as well as a firearm specification, in violation of R.C. 2941.145.

The Defendant was found guilty beyond a reasonable doubt of the lesser included offense of Murder, in violation of R.C. 2903.01(A), and Firearm Specification, in violation of R.C. 2941.145; Count Two Murder, in violation of R.C. 2903.01(A) and Firearm Specification, in violation of R.C. 2941.145; Count Three Attempted Aggravated Murder, in violation of R.C. 2903.11(A)(2)(D)/ 2923.02 and Firearm Specification, in violation of R.C. 2941.145; Count Four Attempted Murder, in violation of R.C. 2903.11(A)(2)(D)/2923.02, and Firearm Specification, in violation of R.C. 2941.145; Count Five Felonious Assault, in violation of R.C. 2903.11(A)(2)(D), and Firearm Specification, in violation of R.C. 2941.145; Count Six Felonious Assault, in violation of R.C. 2903.11(A)(2)(D) and Firearm Specification, in violation of 2941.145; and Count Seven Improper Discharge at or Into a Habitation, in violation of R.C. 2923.161(A)(1)(C), and Firearm Specification, in violation of R.C. 2941.145.



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The Court received said verdicts and rendered judgment therein.

The Court further finds:

1. As it relates to Count 2 Murder, a lesser included offense of Aggravated Murder, it is the position of the Court that that count merges for sentencing purposes with Count One, the Aggravated Murder of Ororo Wilkins.
2. As it relates to Count 5 the Felonious Assault of Alexander Morales, it is the position of the Court that this count merges for sentencing purposes with Count 3, the Attempted Aggravated Murder of Alexander Morales.
3. As it relates to Count 6 the Felonious Assault of William 'Mister' Wilkins, it is the position of the Court that this count merges for sentencing purposes with Count 4, the Attempted Aggravated Murder of William 'Mister' Wilkins.
4. As it relates to Count Seven, the Improperly Discharging a Firearm at or into a Habitation, it is the position of the Court that this count does merge for sentencing purposes with the counts of Attempted Aggravated Murder and Aggravated Murder.
5. Regarding the firearm specifications for the Aggravated Murder, and both the Attempted Aggravated Murders, the Court orders that each (three) firearm specification run first and consecutive with each count, and consecutively with each other for a total of 9 (nine) mandatory years.

On April 28, 2014, at the second phase of this trial proceeding, the jury unanimously recommended that death be imposed upon the defendant.

Present in open Court this date were the prosecuting attorneys, the defendant and his counsel. The Defendant and his counsel were afforded the opportunity to speak, and the prosecuting attorney was also given the opportunity to speak. Victims' representatives were present in the Court and were not permitted to address the Court before sentence was imposed.

As required by Ohio Revised Code 2923.03(D)(3), this Court has considered all the relevant evidence raised at trial, the testimony, other evidence, arguments of counsel, the unsworn statement and allocution of Defendant, and the trial jury's recommendation that the sentence of death be imposed.

The Court is required by law to deliberate and to perform an independent judicial analysis in a separate finding as to the existence of any mitigating factors as set forth in 2929.04(B) of the revised code as well as any other factors that are relevant to the issue of whether the Defendant should be sentenced to death.

The Court must consider the mitigating factors; weigh the aggravating circumstance against the mitigating factors to determine whether the State of Ohio proved beyond a reasonable doubt that the aggravating circumstance does in fact outweigh the mitigating factors.

The Court has considered all of the mitigating factors presented by the Defense as well as any revealed during trial, including any presented involving the nature and circumstance of the offense, the statements and arguments of counsel, the evidence, the testimony of witnesses, exhibits offered into evidence and the unsworn statement and allocution of the Defendant, Willie Gene Wilks, Jr., and a letter received after jury verdict from Defendant's mother.

The aggravated murder of Ororo Wilkins is not an aggravating circumstance and is not considered as such by the Court.

The Court finds no mitigating factors as relates to the nature and circumstance of the offense charged.

The Court did consider in accordance with O.R.C. 2929.04(B) and 2929.04(B)(7). The following mitigating factors:

- Proportionality
- The empathy you expressed towards the victim's family
- The effect your sentence will have on your 3 year old son and your family
- The fact that you had a difficult childhood. You last saw your father when you were 9 months old. Your mother was a less than perfect parent who had medical issues and a drinking problem
- You have a family that loves you who have asked me to spare your life
- That you were involved in your son's life. You provided support to your son and your family
- That you worked two jobs at the time of this incident

- That the victim William 'Mister' Wilkins verbally provoked you earlier the day of the incident
- The Court also considered the photo exhibits admitted into evidence, the arguments of counsel, the testimony of your mother, brother and mother of your son. I considered your unsworn statement and your allocution offered today.
- The Court also considered a letter received after jury verdict from Defendant's mother.

The Court has weighed all of the mitigating factors. When considered individually and together, they have at best minimal mitigating value. Separately or combined they provide very little weight to lessen the moral culpability of the Defendant.

The Court finds that the mitigating factors pale and are dwarfed in comparison to the aggravating circumstance.

Therefore the Court finds that the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt.

The Court accepts the Jury's recommendation.

The Court orders that Willie Gene Wilks, Jr. is by law hereby sentenced to death for the aggravated murder of Ororo Wilkins.

The Court further sentences the Defendant on the remaining counts of the indictment for which Mr. Wilks was found guilty.

- The Attempted Aggravated Murder of Alexander Morales – eleven (11) years
Firearm Specification – three (3) years
- The Attempted Aggravated Murder of William 'Mister' Wilkins – eleven (11) years
Firearm Specification – three (3) years

Each count and specification consecutive for a total of thirty one (31) years consecutive to the sentence of death. Credit for time served.

The Court sentences the Defendant to consecutive sentences in accordance with O.R.C. 2929.14(E), that consecutive sentences are necessary to protect the public from future crimes, and to properly punish this offender. The Court further finds that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger this offender poses to the public. Further, the Court finds that the harm caused by these offenses is so great and so unusual that no single prison term or sentence adequately reflects the seriousness of Defendant's conduct.

A writ of execution of the death penalty shall issue forthwith, which shall be directed to the Sheriff of Mahoning County directing him, within 30 days, in a private manner, to convey the Defendant, Willie Gene Wilks, Jr. to the Ohio Department of Rehabilitation and Corrections, where the Defendant is ordered to be held in custody until the 7th day of September, 2014 at which time, and not later than midnight of such date, this sentence shall be carried out and the Defendant shall be put to death in accordance with law.

The warden of the correctional institution in which the sentence is to be carried out or another person selected by the director of Rehabilitation and Corrections shall ensure that the death sentence is executed, all as provided in Ohio Revised Code 2949.22(A)(B).

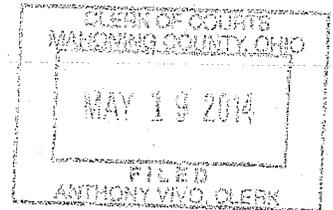
The Defendant was advised of his appellate rights pursuant to Criminal Rule 32 and was further advised pursuant to 2929.19(B)(3), 2953.08 and 2967.28.

Defendant's counsel was ordered to file proper notices to pursue Defendant's appeal.

5/7/14
DATE



JUDGE LOU A. D'APOLITO



IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

STATE OF OHIO)	CASE NO. 13 CR 540
)	
PLAINTIFF)	JUDGE LOU A. D'APOLITO
)	
VS.)	<u>AMENDED</u> JUDGMENT ENTRY
)	OF SENTENCE
WILLIE GENE WILKS JR.)	
)	
DEFENDANT)	
)	

Case called for imposition of sentence pursuant to Ohio Revised Code 2929.03 and 2929.04 this 7th day of May, 2014.

At the trial of this case the Defendant was found guilty on Count One of Aggravated Murder O.R.C. 2903.01(A)(F) beyond a reasonable doubt by the jury on April 15, 2014. The Defendant was also found guilty of the separate capital specifications under Ohio Revised Code 2929.04(A)(5), as well as a firearm specification, in violation of R.C. 2941.145.

The Defendant was found guilty beyond a reasonable doubt of the lesser included offense of Murder, in violation of R.C. 2903.01(A), and Firearm Specification, in violation of R.C. 2941.145; Count Two Murder, in violation of R.C. 2903.02(B)(D) and Firearm Specification, in violation of R.C. 2941.145; Count Three Attempted Aggravated Murder, in violation of R.C. 2903.01(A)/ 2923.02 and Firearm Specification, in violation of R.C. 2941.145; Count Four Attempted Aggravated Murder, in violation of R.C. 2903.01(A)/2923.02, and Firearm Specification, in violation of R.C. 2941.145; Count Five Felonious Assault, in violation of R.C. 2903.11(A)(2)(D), and Firearm Specification, in violation of R.C. 2941.145; Count Six Felonious Assault, in violation of R.C. 2903.11(A)(2)(D) and Firearm Specification, in violation of 2941.145; and Count Seven Improper Discharge at or Into a Habitation, in violation of R.C. 2923.161(A)(1)(C), and Firearm Specification, in violation of R.C. 2941.145.



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The Court received said verdicts and rendered judgment therein.

The Court further finds:

1. As it relates to Count 2 Murder, a lesser included offense of Aggravated Murder, it is the position of the Court that that count merges for sentencing purposes with Count One, the Aggravated Murder of Ororo Wilkins.
2. As it relates to Count 5 the Felonious Assault of Alexander Morales, it is the position of the Court that this count merges for sentencing purposes with Count 3, the Attempted Aggravated Murder of Alexander Morales.
3. As it relates to Count 6 the Felonious Assault of William 'Mister' Wilkins, it is the position of the Court that this count merges for sentencing purposes with Count 4, the Attempted Aggravated Murder of William 'Mister' Wilkins.
4. As it relates to Count Seven, the Improperly Discharging a Firearm at or into a Habitation, it is the position of the Court that this count does merge for sentencing purposes with the counts of Attempted Aggravated Murder and Aggravated Murder.
5. Regarding the firearm specifications for the Aggravated Murder, and both the Attempted Aggravated Murders, the Court orders that each (three) firearm specification run first and consecutive with each count, and consecutively with each other for a total of 9 (nine) mandatory years.

On April 28, 2014, at the second phase of this trial proceeding, the jury unanimously recommended that death be imposed upon the defendant.

Present in open Court this date were the prosecuting attorneys, the defendant and his counsel. The Defendant and his counsel were afforded the opportunity to speak, and the prosecuting attorney was also given the opportunity to speak. Victims' representatives were present in the Court and were not permitted to address the Court before sentence was imposed.

As required by Ohio Revised Code 2923.03(D)(3), this Court has considered all the relevant evidence raised at trial, the testimony, other evidence, arguments of counsel, the unsworn statement and allocution of Defendant, and the trial jury's recommendation that the sentence of death be imposed.

The Court is required by law to deliberate and to perform an independent judicial analysis in a separate finding as to the existence of any mitigating factors as set forth in 2929.04(B) of the revised code as well as any other factors that are relevant to the issue of whether the Defendant should be sentenced to death.

The Court must consider the mitigating factors; weigh the aggravating circumstance against the mitigating factors to determine whether the State of Ohio proved beyond a reasonable doubt that the aggravating circumstance does in fact outweigh the mitigating factors.

The Court has considered all of the mitigating factors presented by the Defense as well as any revealed during trial, including any presented involving the nature and circumstance of the offense, the statements and arguments of counsel, the evidence, the testimony of witnesses, exhibits offered into evidence and the unsworn statement and allocution of the Defendant, Willie Gene Wilks, Jr., and a letter received after jury verdict from Defendant's mother.

The aggravated murder of Ororo Wilkins is not an aggravating circumstance and is not considered as such by the Court.

The Court finds no mitigating factors as relates to the nature and circumstance of the offense charged.

The Court did consider in accordance with O.R.C. 2929.04(B) and 2929.04(B)(7). The following mitigating factors:

- Proportionality
- The empathy you expressed towards the victim's family
- The effect your sentence will have on your 3 year old son and your family
- The fact that you had a difficult childhood. You last saw your father when you were 9 months old. Your mother was a less than perfect parent who had medical issues and a drinking problem
- You have a family that loves you who have asked me to spare your life
- That you were involved in your son's life. You provided support to your son and your family
- That you worked two jobs at the time of this incident

- That the victim William 'Mister' Wilkins verbally provoked you earlier the day of the incident
- The Court also considered the photo exhibits admitted into evidence, the arguments of counsel, the testimony of your mother, brother and mother of your son. I considered your unsworn statement and your allocution offered today.
- The Court also considered a letter received after jury verdict from Defendant's mother.

The Court has weighed all of the mitigating factors. When considered individually and together, they have at best minimal mitigating value. Separately or combined they provide very little weight to lessen the moral culpability of the Defendant.

The Court finds that the mitigating factors pale and are dwarfed in comparison to the aggravating circumstance.

Therefore the Court finds that the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt.

The Court accepts the Jury's recommendation.

The Court orders that Willie Gene Wilks, Jr. is by law hereby sentenced to death for the aggravated murder of Ororo Wilkins.

The Court further sentences the Defendant on the remaining counts of the indictment for which Mr. Wilks was found guilty.

- The Attempted Aggravated Murder of Alexander Morales – eleven (11) years
 - Firearm Specification – three (3) years
- The Attempted Aggravated Murder of William 'Mister' Wilkins – eleven (11) years
 - Firearm Specification – three (3) years

Each count and specification consecutive for a total of thirty one (31) years consecutive to the sentence of death. Credit for time served.

The Court sentences the Defendant to consecutive sentences in accordance with O.R.C. 2929.14(E), that consecutive sentences are necessary to protect the public from future crimes, and to properly punish this offender. The Court further finds that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger this offender poses to the public. Further, the Court finds that the harm caused by these offenses is so great and so unusual that no single prison term or sentence adequately reflects the seriousness of Defendant's conduct.

A writ of execution of the death penalty shall issue forthwith, which shall be directed to the Sheriff of Mahoning County directing him, within 30 days, in a private manner, to convey the Defendant, Willie Gene Wilks, Jr. to the Ohio Department of Rehabilitation and Corrections, where the Defendant is ordered to be held in custody until the 7th day of September, 2014 at which time, and not later than midnight of such date, this sentence shall be carried out and the Defendant shall be put to death in accordance with law.

The warden of the correctional institution in which the sentence is to be carried out or another person selected by the director of Rehabilitation and Corrections shall ensure that the death sentence is executed, all as provided in Ohio Revised Code 2949.22(A)(B).

The Defendant was advised of his appellate rights pursuant to Criminal Rule 32 and was further advised pursuant to 2929.19(B)(3), 2953.08 and 2967.28.

Defendant's counsel was ordered to file proper notices to pursue Defendant's appeal.

5/19/14
DATE


JUDGE LOU A. D'APOLITO

PLEASE COPY TO ALL COUNCIL
OF JURISDICTION PARTY.

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

STATE OF OHIO)
)
 PLAINTIFF)
)
 VS.)
)
 WILLIE GENE WILKS JR.)
)
 DEFENDANT)
)

CASE NO. 13 CR 540
JUDGE LOU A. D'APOLITO
TRIAL COURTS OPINION

This opinion of the Trial Court is made pursuant to 2929.03F of the Ohio Revised Code.

On April 28, 2014 the Jury in this case signed a verdict to sentence the Defendant, Willie Gene Wilks, Jr. to death for the aggravated murder of Ororo Wilkins with the specification that the Defendant Willie Gene Wilks Jr. engaged in a course of conduct involving the purposeful killing of or attempt to kill two or more persons.

The evidence presented at trial proved beyond a reasonable doubt that the Defendant Willie Gene Wilks Jr. did purposely and with prior calculation and design cause the death of Ororo Wilkins in violation O.R.C. 2903.01(A)(F) by shooting her in the head at close range with an AK47. The Defendant Willie Gene Wilks Jr. then shot victim Alexander Morales in the back as he was attempting to run away from the Defendant. The Defendant Willie Gene Wilks Jr. also shot at victim William "Mister" Wilkins as he was looking out of a second floor bedroom window, and then fled the scene.

Based on the evidence presented it was proven beyond a reasonable doubt that Defendant Willie Gene Wilks Jr. did engage in conduct involving the purposeful attempt to kill Alexander Morales and William "Mister" Wilkins.

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Therefore, the Court finds pursuant to O.R.C. 2929.04(A)(5) that the aggravating circumstance charged herein was proven beyond a reasonable doubt.

The Court is required by law to deliberate and to perform an independent judicial analysis in a separate finding as to the existence of any mitigating factors as set forth in 2929.04(B) of the revised code as well as any other factors that are relevant to the issue of whether the Defendant should be sentenced to death.

The Court must consider the mitigating factors; weigh the aggravating circumstance against the mitigating factors to determine whether the State of Ohio proved beyond a reasonable doubt that the aggravating circumstance does in fact outweigh the mitigating factors.

The Court has considered all the mitigating factors presented by the Defense as well as any revealed during the trial, including any present involving the nature and circumstance of the offense, the statements and arguments of Counsel, the evidence, the testimony of witnesses, exhibits offered into evidence, the unsworn statement and allocution of the Defendant, Willie Gene Wilks, Jr. and other evidence.

The aggravated murder of Ororo Wilkins is not an aggravating circumstance and is not considered as such by the Court.

The Court finds no mitigating factors as relates to the nature and circumstance of the offense charged.

The Court did consider in accordance with O.R.C. 2929.04(B) and 2929.04(B)(7). The following mitigating factors:

- Proportionality
- The Defendant expressed empathy toward the victim's family for their loss and pain.
- The Defendant asked for leniency.
- The Defendant wants to live and have some involvement in his son's life.
- The effect a death sentence would have on Defendant's three (3) year old son, as well as the rest of Defendant's family.

- The Defendant had no male role model in his life growing up. The Defendant last saw his father when the Defendant was nine (9) months old.
- The Defendant had a difficult childhood. His mother was a less than perfect parent who had medical issues and a drinking problem.
- The testimony of the Defendant's family who expressed their love for him and asked that his life be spared.
- The Defendant worked two jobs at the time of this incident and provided support to his son, mother, and family.
- The Defendant was attentive to his mentally challenged uncle.
- The victim William "Mister" Wilkins verbally provoked the Defendant earlier the day of the incident.
- The mother of the Defendant's child described the Defendant as a caring father involved in his son's life on a daily basis.
- A letter received by the Court from Defendant's mother after verdict and before sentence.

The Court did not permit the victim's family to present a victim impact statement but did however, permit victim's family to address the Court after the Court announced its sentence.

Having made specific findings as to the existence of mitigating factors set forth in Division (B) of 2929.04 of the Revised Code, the existence of any other mitigating factors, and the aggravating circumstance the Defendant was found guilty of committing, it is now the responsibility of the Court to state the specific reasons why the aggravating circumstances the Defendant was found guilty of committing were sufficient to outweigh the mitigating factors.

The Defendant, Willie Gene Wilks Jr., took a simple garden variety domestic dispute between he and his girlfriend's son over a bank card. He had plenty of time and distance to cool down, to think it thru and put things in perspective. Instead, he unreasonably escalated the dispute to a deadly pitch killing one human being, attempting to kill two others and placing a child in harms way.

The Defendant purposely killed Ororo Wilkins and attempted to kill Alexander Morales and William (Mister) Wilkins.

The Court has weighed all the mitigating factors. When considered individually and together, they have at best minimal mitigating value. Separately or combined they provide very little weight to lessen the moral culpability of the Defendant.

The Court finds that the mitigating factors pale and are dwarfed in comparison to the aggravating circumstance.

Therefore, the Court finds that the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt.

The Court accepts the Jury's recommendation.

The Court orders that Willie Gene Wilks, Jr. is by law hereby sentenced to Death for the aggravated murder of Ororo Wilkins.

5/12/14
DATE/



JUDGE LOU A. D'APOLITO

UNITED STATES CONSTITUTION

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT

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

SIXTH AMENDMENT

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

EIGHTH AMENDMENT

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

FOURTEENTH AMENDMENT

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and 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

I.05 Trial by jury (1851, amended 1912)

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.

(As amended September 3, 1912.)

I.10 Trial for crimes; witness (1851; amended 1912)

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

(As amended September 3, 1912.)

I.16 Redress in courts (1851, amended 1912)

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

(As amended September 3, 1912.)

IV.03 Court of appeals

(A) The state shall be divided by law into compact appellate districts in each of

which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B)(1) The courts of appeals shall have original jurisdiction in the following:

- (a) Quo warranto;
- (b) Mandamus;
- (c) Habeas corpus;
- (d) Prohibition;
- (e) Procedendo;
- (f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2(B)(2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

(Amended November 8, 1994)

§2901.01 DEFINITIONS

(A) As used in the Revised Code:

- (1) “Force” means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.
- (2) “Deadly force” means any force that carries a substantial risk that it will proximately result in the death of any person.
- (3) “Physical harm to persons” means any injury, illness, or other physiological impairment, regardless of its gravity or duration.
- (4) “Physical harm to property” means any tangible or intangible damage to property that, in any degree, results in loss to its value or interferes with its use or enjoyment. “Physical harm to property” does not include wear and tear occasioned by normal use.
- (5) “Serious physical harm to persons” means any of the following:
 - (a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;
 - (b) Any physical harm that carries a substantial risk of death;
 - (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;
 - (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;
 - (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.
- (6) “Serious physical harm to property” means any physical harm to property that does either of the following:
 - (a) Results in substantial loss to the value of the property or requires a substantial amount of time, effort, or money to repair or replace;
 - (b) Temporarily prevents the use or enjoyment of the property or substantially interferes with its use or enjoyment for an extended period of time.
- (7) “Risk” means a significant possibility, as contrasted with a remote possibility, that a certain result may occur or that certain circumstances may exist.
- (8) “Substantial risk” means a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist.
- (9) “Offense of violence” means any of the following:
 - (a) A violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2903.13, 2903.15, 2903.21, 2903.211, 2903.22, 2905.01, 2905.02, 2905.11, 2905.32, 2907.02, 2907.03, 2907.05, 2909.02, 2909.03, 2909.24, 2911.01, 2911.02, 2911.11, 2917.01, 2917.02, 2917.03, 2917.31, 2919.25, 2921.03, 2921.04, 2921.34, or 2923.161, of division (A)(1), (2), or (3) of section 2911.12, or of division (B)(1), (2), (3), or (4) of section 2919.22 of the Revised Code or felonious sexual penetration in violation of former section 2907.12 of the Revised Code;
 - (b) A violation of an existing or former municipal ordinance or law of this or any other state or the United States, substantially equivalent to any section, division, or offense listed in division (A)(9)(a) of this section;
 - (c) An offense, other than a traffic offense, under an existing or former municipal ordinance or law of this or any other state or the United States, committed purposely or knowingly, and involving physical harm to persons or a risk of serious physical harm to persons;

(d) A conspiracy or attempt to commit, or complicity in committing, any offense under division (A)(9)(a), (b), or (c) of this section.

(10)(a) "Property" means any property, real or personal, tangible or intangible, and any interest or license in that property. "Property" includes, but is not limited to, cable television service, other telecommunications service, telecommunications devices, information service, computers, data, computer software, financial instruments associated with computers, other documents associated with computers, or copies of the documents, whether in machine or human readable form, trade secrets, trademarks, copyrights, patents, and property protected by a trademark, copyright, or patent. "Financial instruments associated with computers" include, but are not limited to, checks, drafts, warrants, money orders, notes of indebtedness, certificates of deposit, letters of credit, bills of credit or debit cards, financial transaction authorization mechanisms, marketable securities, or any computer system representations of any of them.

(b) As used in division (A)(10) of this section, "trade secret" has the same meaning as in [section 1333.61 of the Revised Code](#), and "telecommunications service" and "information service" have the same meanings as in [section 2913.01 of the Revised Code](#).

(c) As used in divisions (A)(10) and (13) of this section, "cable television service," "computer," "computer software," "computer system," "computer network," "data," and "telecommunications device" have the same meanings as in [section 2913.01 of the Revised Code](#).

(11) "Law enforcement officer" means any of the following:

(a) A sheriff, deputy sheriff, constable, police officer of a township or joint police district, marshal, deputy marshal, municipal police officer, member of a police force employed by a metropolitan housing authority under [division \(D\) of section 3735.31 of the Revised Code](#), or state highway patrol trooper;

(b) An officer, agent, or employee of the state or any of its agencies, instrumentalities, or political subdivisions, upon whom, by statute, a duty to conserve the peace or to enforce all or certain laws is imposed and the authority to arrest violators is conferred, within the limits of that statutory duty and authority;

(c) A mayor, in the mayor's capacity as chief conservator of the peace within the mayor's municipal corporation;

(d) A member of an auxiliary police force organized by county, township, or municipal law enforcement authorities, within the scope of the member's appointment or commission;

(e) A person lawfully called pursuant to [section 311.07 of the Revised Code](#) to aid a sheriff in keeping the peace, for the purposes and during the time when the person is called;

(f) A person appointed by a mayor pursuant to [section 737.01 of the Revised Code](#) as a special patrolling officer during riot or emergency, for the purposes and during the time when the person is appointed;

(g) A member of the organized militia of this state or the armed forces of the United States, lawfully called to duty to aid civil authorities in keeping the peace or protect against domestic violence;

(h) A prosecuting attorney, assistant prosecuting attorney, secret service officer, or municipal prosecutor;

(i) A veterans' home police officer appointed under [section 5907.02 of the Revised Code](#);

(j) A member of a police force employed by a regional transit authority under [division \(Y\) of section 306.35 of the Revised Code](#);

(k) A special police officer employed by a port authority under [section 4582.04 or 4582.28 of the Revised Code](#);

(l) The house of representatives sergeant at arms if the house of representatives sergeant at arms has arrest authority pursuant to [division \(E\)\(1\) of section 101.311 of the Revised Code](#) and an assistant house of representatives sergeant at arms;

(m) The senate sergeant at arms and an assistant senate sergeant at arms;

(n) A special police officer employed by a municipal corporation at a municipal airport, or other municipal air navigation facility, that has scheduled operations, as defined in [section 119.3 of Title 14 of the Code of Federal Regulations, 14 C.F.R. 119.3](#), as amended, and that is required to be under a security program and is governed by aviation security rules of the transportation security administration of the United States department of transportation as provided in Parts 1542. and 1544. of Title 49 of the Code of Federal Regulations, as amended.

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

(13) “Contraband” means any property that is illegal for a person to acquire or possess under a statute, ordinance, or rule, or that a trier of fact lawfully determines to be illegal to possess by reason of the property's involvement in an offense. “Contraband” includes, but is not limited to, all of the following:

(a) Any controlled substance, as defined in [section 3719.01 of the Revised Code](#), or any device or paraphernalia;

(b) Any unlawful gambling device or paraphernalia;

(c) Any dangerous ordnance or obscene material.

(14) A person is “not guilty by reason of insanity” relative to a charge of an offense only if the person proves, in the manner specified in [section 2901.05 of the Revised Code](#), that at the time of the commission of the offense, the person did not know, as a result of a severe mental disease or defect, the wrongfulness of the person's acts.

(B)(1)(a) Subject to division (B)(2) of this section, as used in any section contained in Title XXIX of the Revised Code that sets forth a criminal offense, “person” includes all of the following:

(i) An individual, corporation, business trust, estate, trust, partnership, and association;

(ii) An unborn human who is viable.

(b) As used in any section contained in Title XXIX of the Revised Code that does not set forth a criminal offense, “person” includes an individual, corporation, business trust, estate, trust, partnership, and association.

(c) As used in division (B)(1)(a) of this section:

(i) “Unborn human” means an individual organism of the species *Homo sapiens* from fertilization until live birth.

(ii) “Viable” means the stage of development of a human fetus at which there is a realistic possibility of maintaining and nourishing of a life outside the womb with or without temporary artificial life-sustaining support.

(2) Notwithstanding division (B)(1)(a) of this section, in no case shall the portion of the definition of the term “person” that is set forth in division (B)(1)(a)(ii) of this section be applied or construed in any section contained in Title XXIX of the Revised Code that sets forth a criminal offense in any of the following manners:

(a) Except as otherwise provided in division (B)(2)(a) of this section, in a manner so that the offense prohibits or is construed as prohibiting any pregnant woman or her physician from performing an abortion with the consent of the pregnant woman, with the consent of the pregnant woman implied by law in a medical emergency, or with the approval of one otherwise authorized

by law to consent to medical treatment on behalf of the pregnant woman. An abortion that violates the conditions described in the immediately preceding sentence may be punished as a violation of [section 2903.01, 2903.02, 2903.03, 2903.04, 2903.05, 2903.06, 2903.08, 2903.11, 2903.12, 2903.13, 2903.14, 2903.21, or 2903.22 of the Revised Code](#), as applicable. An abortion that does not violate the conditions described in the second immediately preceding sentence, but that does violate [section 2919.12, division \(B\) of section 2919.13, or section 2919.151, 2919.17, or 2919.18 of the Revised Code](#), may be punished as a violation of [section 2919.12, division \(B\) of section 2919.13, or section 2919.151, 2919.17, or 2919.18 of the Revised Code](#), as applicable. Consent is sufficient under this division if it is of the type otherwise adequate to permit medical treatment to the pregnant woman, even if it does not comply with [section 2919.12 of the Revised Code](#).

(b) In a manner so that the offense is applied or is construed as applying to a woman based on an act or omission of the woman that occurs while she is or was pregnant and that results in any of the following:

(i) Her delivery of a stillborn baby;

(ii) Her causing, in any other manner, the death in utero of a viable, unborn human that she is carrying;

(iii) Her causing the death of her child who is born alive but who dies from one or more injuries that are sustained while the child is a viable, unborn human;

(iv) Her causing her child who is born alive to sustain one or more injuries while the child is a viable, unborn human;

(v) Her causing, threatening to cause, or attempting to cause, in any other manner, an injury, illness, or other physiological impairment, regardless of its duration or gravity, or a mental illness or condition, regardless of its duration or gravity, to a viable, unborn human that she is carrying.

(C) As used in Title XXIX of the Revised Code:

(1) “School safety zone” consists of a school, school building, school premises, school activity, and school bus.

(2) “School,” “school building,” and “school premises” have the same meanings as in [section 2925.01 of the Revised Code](#).

(3) “School activity” means any activity held under the auspices of a board of education of a city, local, exempted village, joint vocational, or cooperative education school district; a governing authority of a community school established under Chapter 3314. of the Revised Code; a governing board of an educational service center, or the governing body of a school¹ for which the state board of education prescribes minimum standards under [section 3301.07 of the Revised Code](#).

(4) “School bus” has the same meaning as in [section 4511.01 of the Revised Code](#).

CREDIT(S)

(2012 H 487, eff. 9-10-12; 2011 H 153, eff. 9-29-11; 2010 S 235, eff. 3-24-11; 2006 H 241, eff. 7-1-07; 2002 H 675, eff. 3-14-03; 2002 H 364, eff. 4-8-03; 2002 H 545, eff. 3-19-03; 2002 S 184, eff. 5-15-02; 2000 S 317, eff. 3-22-01; 2000 H 351, eff. 8-18-00; 2000 S 137, eff. 5-17-00; 1999 S 107, eff. 3-23-00; 1999 H 162, eff. 8-25-99; 1999 S 1, eff. 8-6-99; 1998 H 565, eff. 3-30-99; 1996 S 277, eff. 3-31-97; 1996 S 269, eff. 7-1-96; 1996 S 239, eff. 9-6-96; 1996 H 445, eff. 9-3-96; 1995 S 2, eff. 7-1-96; 1991 S 144, eff. 8-8-91; 1991 H 77; 1990 S 24; 1988 H 708, § 1)

§2901.05 Presumption of innocence; proof of offense; of affirmative defense; as to each; reasonable doubt

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

(B)(1) Subject to division (B)(2) of this section, a person is presumed to have acted in self defense or defense of another when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used is in the process of unlawfully and without privilege to do so entering, or has unlawfully and without privilege to do so entered, the residence or vehicle occupied by the person using the defensive force.

(2)(a) The presumption set forth in division (B)(1) of this section does not apply if the person against whom the defensive force is used has a right to be in, or is a lawful resident of, the residence or vehicle.

(b) The presumption set forth in division (B)(1) of this section does not apply if the person who uses the defensive force uses it while in a residence or vehicle and the person is unlawfully, and without privilege to be, in that residence or vehicle.

(3) The presumption set forth in division (B)(1) of this section is a rebuttable presumption and may be rebutted by a preponderance of the evidence.

(C) As part of its charge to the jury in a criminal case, the court shall read the definitions of “reasonable doubt” and “proof beyond a reasonable doubt,” contained in division (D) of this section.

(D) As used in this section:

(1) An “affirmative defense” is either of the following:

(a) A defense expressly designated as affirmative;

(b) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which the accused can fairly be required to adduce supporting evidence.

(2) “Dwelling” means a building or conveyance of any kind that has a roof over it and that is designed to be occupied by people lodging in the building or conveyance at night, regardless of whether the building or conveyance is temporary or permanent or is mobile or immobile. As used in this division, a building or conveyance includes, but is not limited to, an attached porch, and a building or conveyance with a roof over it includes, but is not limited to, a tent.

(3) “Residence” means a dwelling in which a person resides either temporarily or permanently or is visiting as a guest.

(4) “Vehicle” means a conveyance of any kind, whether or not motorized, that is designed to transport people or property.

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

§2903.01 Aggravated murder

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

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

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

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

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

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

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

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

(G) As used in this section:

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

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

Credits

(2011 H 86, eff. 9-30-11; 2002 S 184, eff. 5-15-02; 1998 S 193, eff. 12-29-98; 1998 H 5, eff. 6-30-98; 1997 S 32, eff. 8-6-97; 1996 S 239, eff. 9-6-96; 1981 S 1, eff. 10-19-81; 1972 H 511)

R.C. § 2903.01, OH ST § 2903.01

Current through all 2012 laws and statewide issues of the 129th GA (2011-2012).

§2903.02 Murder

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

CREDIT(S)

(1998 H 5, eff. 6-30-98; 1996 S 239, eff. 9-6-96; 1972 H 511, eff. 1-1-74)

§2923.161 Improperly discharging firearm at or into habitation or school safety zone

(A) No person, without privilege to do so, shall knowingly do any of the following:

(1) Discharge a firearm at or into an occupied structure that is a permanent or temporary habitation of any individual;

(2) Discharge a firearm at, in, or into a school safety zone;

(3) Discharge a firearm within one thousand feet of any school building or of the boundaries of any school premises, with the intent to do any of the following:

(a) Cause physical harm to another who is in the school, in the school building, or at a function or activity associated with the school;

(b) Cause panic or fear of physical harm to another who is in the school, in the school building, or at a function or activity associated with the school;

(c) Cause the evacuation of the school, the school building, or a function or activity associated with the school.

(B) This section does not apply to any officer, agent, or employee of this or any other state or the United States, or to any law enforcement officer, who discharges the firearm while acting within the scope of the officer's, agent's, or employee's duties.

(C) Whoever violates this section is guilty of improperly discharging a firearm at or into a habitation, in a school safety zone, or with the intent to cause harm or panic to persons in a school, in a school building, or at a school function or the evacuation of a school function, a felony of the second degree.

(D) As used in this section, "occupied structure" has the same meaning as in [section 2909.01 of the Revised Code](#).

CREDIT(S)

(2002 H 442, eff. 10-11-02; 1999 S 1, eff. 8-6-99; 1998 H 5, eff. 6-30-98; 1995 S 2, eff. 7-1-96; 1990 S 258, eff. 11-20-90)

§2923.131 Possession of deadly weapon while under detention

(A) “Detention” and “detention facility” have the same meanings as in [section 2921.01 of the Revised Code](#).

(B) No person under detention at a detention facility shall possess a deadly weapon.

(C) Whoever violates this section is guilty of possession of a deadly weapon while under detention.

(1) If the offender, at the time of the commission of the offense, was under detention as an alleged or adjudicated delinquent child or unruly child and if at the time the offender commits the act for which the offender was under detention it would not be a felony if committed by an adult, possession of a deadly weapon while under detention is a misdemeanor of the first degree.

(2) If the offender, at the time of the commission of the offense, was under detention in any other manner, possession of a deadly weapon while under detention is one of the following:

(a) A felony of the first degree, when the most serious offense for which the person was under detention is aggravated murder or murder and regardless of when the aggravated murder or murder occurred or, if the person was under detention as an alleged or adjudicated delinquent child, when the most serious act for which the person was under detention would be aggravated murder or murder if committed by an adult and regardless of when that act occurred;

(b) A felony of the second degree if any of the following applies:

(i) The most serious offense for which the person was under detention is a felony of the first degree committed on or after July 1, 1996, or an aggravated felony of the first degree committed prior to July 1, 1996.

(ii) If the person was under detention as an alleged or adjudicated delinquent child, the most serious act for which the person was under detention was committed on or after July 1, 1996, and would be a felony of the first degree if committed by an adult, or was committed prior to July 1, 1996, and would have been an aggravated felony of the first degree if committed by an adult.

(c) A felony of the third degree if any of the following applies:

(i) The most serious offense for which the person was under detention is a felony of the second degree committed on or after July 1, 1996, or is an aggravated felony of the second degree or a felony of the first degree committed prior to July 1, 1996.

(ii) If the person was under detention as an alleged or adjudicated delinquent child, the most serious act for which the person was under detention was committed on or after July 1, 1996, and would be a felony of the second degree if committed by an adult, or was committed prior to July 1, 1996, and would have been an aggravated felony of the second degree or a felony of the first degree if committed by an adult.

(d) A felony of the fourth degree if any of the following applies:

(i) The most serious offense for which the person was under detention is a felony of the third degree committed on or after July 1, 1996, is an aggravated felony of the third degree or a felony of the second degree committed prior to July 1, 1996, or is a felony of the third degree committed prior to July 1, 1996, that, if it had been committed on or after July 1, 1996, also would be a felony of the third degree.

(ii) If the person was under detention as an alleged or adjudicated delinquent child, the most serious act for which the person was under detention was committed on or after July 1, 1996, and

would be a felony of the third degree if committed by an adult, was committed prior to July 1, 1996, and would have been an aggravated felony of the third degree or a felony of the second degree if committed by an adult, or was committed prior to July 1, 1996, would have been a felony of the third degree if committed by an adult, and, if it had been committed on or after July 1, 1996, also would be a felony of the third degree if committed by an adult.

(e) A felony of the fifth degree if any of the following applies:

(i) The most serious offense for which the person was under detention is a felony of the fourth or fifth degree committed on or after July 1, 1996, is a felony of the third degree committed prior to July 1, 1996, that, if committed on or after July 1, 1996, would be a felony of the fourth degree, is a felony of the fourth degree committed prior to July 1, 1996, or is an unclassified felony or a misdemeanor regardless of when the unclassified felony or misdemeanor is committed.

(ii) If the person was under detention as an alleged or adjudicated delinquent child, the most serious act for which the person was under detention was committed on or after July 1, 1996, and would be a felony of the fourth or fifth degree if committed by an adult, was committed prior to July 1, 1996, would have been a felony of the third degree if committed by an adult, and, if it had been committed on or after July 1, 1996, would be a felony of the fourth degree if committed by an adult, was committed prior to July 1, 1996, and would have been a felony of the fourth degree if committed by an adult, or would be an unclassified felony if committed by an adult regardless of when the act is committed.

§2929.03 Imposing sentence for a capital offense; procedures; proof of relevant factors; alternative sentences

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

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

(a) Life imprisonment without parole;

(b) Subject to [division \(A\)\(1\)\(e\) of this section](#), life imprisonment with parole eligibility after serving twenty years of imprisonment;

(c) Subject to [division \(A\)\(1\)\(e\) of this section](#), life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(d) Subject to [division \(A\)\(1\)\(e\) of this section](#), life imprisonment with parole eligibility after serving thirty full years of imprisonment;

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

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

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

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

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

(i) Life imprisonment without parole;

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

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

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

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

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

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

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

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

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

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

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

trial by jury;

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

(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to [section 2929.023 of the Revised Code](#) and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to [section 2947.06 of the Revised Code](#). No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or the offender's counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in [division \(B\) of section 2929.04 of the Revised Code](#), and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in [division \(B\) of section 2929.04 of the Revised Code](#) and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, the offender is subject to cross-examination only if the offender consents to make the statement under oath or affirmation. The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

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

(a) Except as provided in division (D)(2)(b) or (c) of this section, to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of

imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(b) Except as provided in division (D)(2)(c) of this section, if the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the jury does not recommend a sentence of life imprisonment without parole pursuant to division (D)(2)(a) of this section, to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to [division \(B\)\(3\) of section 2971.03 of the Revised Code](#) and served pursuant to that section.

(c) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, to life imprisonment without parole.

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

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

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

(i) Life imprisonment without parole;

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

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

(iv) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (D)(3)(a)(i) of this section, the court or panel shall sentence the offender pursuant to [division](#)

(B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

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

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

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

(a) Life imprisonment without parole;

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

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

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

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

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

to be prepared by this division with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G)(1) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed before January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

(2) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed on or after January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the supreme court.

CREDIT(S)

(2007 S 10, eff. 1-1-08; 2004 H 184, eff. 3-23-05; 1996 H 180, eff. 1-1-97; 1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1-96; 1995 S 4, eff. 9-21-95; 1981 S 1, eff. 10-19-81; 1972 H 511)

§2929.04 Criteria for imposing death or imprisonment for a capital offense

(A) Imposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment or count in the indictment pursuant to [section 2941.14 of the Revised Code](#) and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or a person in line of succession to the presidency, the governor or lieutenant governor of this state, the president-elect or vice president-elect of the United States, the governor-elect or lieutenant governor-elect of this state, or a candidate for any of the offices described in this division. For purposes of this division, a person is a candidate if the person has been nominated for election according to law, if the person has filed a petition or petitions according to law to have the person's name placed on the ballot in a primary or general election, or if the person campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was under detention or while the offender was at large after having broken detention. As used in division (A)(4) of this section, "detention" has the same meaning as in [section 2921.01 of the Revised Code](#), except that detention does not include hospitalization, institutionalization, or confinement in a mental health facility or mental retardation and developmentally disabled facility unless at the time of the commission of the offense either of the following circumstances apply:

(a) The offender was in the facility as a result of being charged with a violation of a section of the Revised Code.

(b) The offender was under detention as a result of being convicted of or pleading guilty to a violation of a section of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer, as defined in [section 2911.01 of the Revised Code](#), whom the offender had reasonable cause to know or knew to be a law enforcement officer as so defined, and either the victim, at the time of the commission of the offense, was engaged in the victim's duties, or it was the offender's specific purpose to kill a law enforcement officer as so defined.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent the victim's testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the

commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for the victim's testimony in any criminal proceeding.

(9) The offender, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense, and either the offender was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design.

(10) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit terrorism.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to [section 2929.023 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.

CREDIT(S)

(2002 S 184, eff. 5-15-02; 1998 S 193, eff. 12-29-98; 1997 H 151, eff. 9-16-97; 1997 S 32, eff. 8-6-97; 1981 S 1, eff. 10-19-81; 1972 H 511)

§2929.05 Appeals; procedures

(A) Whenever sentence of death is imposed pursuant to [sections 2929.03](#) and [2929.04 of the Revised Code](#), the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall review upon appeal the sentence of death at the same time that they review the other issues in the case. The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They also shall review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors. The court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case. A court of appeals that reviews a case in which the sentence of death is imposed for an offense committed before January 1, 1995, shall file a separate opinion as to its findings in the case with the clerk of the supreme court. The opinion shall be filed within fifteen days after the court issues its opinion and shall contain whatever information is required by the clerk of the supreme court.

(B) The court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall give priority over all other cases to the review of judgments in which the sentence of death is imposed and, except as otherwise provided in this section, shall conduct the review in accordance with the Rules of Appellate Procedure.

(C) At any time after a sentence of death is imposed pursuant to [section 2929.022](#) or [2929.03 of the Revised Code](#), the court of common pleas that sentenced the offender shall vacate the sentence if the offender did not present evidence at trial that the offender was not eighteen years of age or older at the time of the commission of the aggravated murder for which the offender was sentenced and if the offender shows by a preponderance of the evidence that the offender was less than eighteen years of age at the time of the commission of the aggravated murder for which the offender was sentenced. The court is not required to hold a hearing on a motion filed pursuant to this division unless the court finds, based on the motion and any supporting information submitted by the defendant, any information submitted by the prosecuting attorney, and the record in the case, including any previous hearings and orders, probable cause to believe that the defendant was not eighteen years of age or older at the time of the commission of the aggravated murder for which the defendant was sentenced to death.

CREDIT(S)

(1998 S 107, eff. 7-29-98; 1995 S 4, eff. 9-21-95; 1981 S 1, eff. 10-19-81)

§2929.06 Resentencing after sentence of death is set aside, nullified, or vacated

(A) If a sentence of death imposed upon an offender is set aside, nullified, or vacated because the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, or the supreme court, in cases in which the supreme court reviews the sentence upon appeal, could not affirm the sentence of death under the standards imposed by [section 2929.05 of the Revised Code](#), is set aside, nullified, or vacated for the sole reason that the statutory procedure for imposing the sentence of death that is set forth in [sections 2929.03 and 2929.04 of the Revised Code](#) is unconstitutional, is set aside, nullified, or vacated pursuant to [division \(C\) of section 2929.05 of the Revised Code](#), or is set aside, nullified, or vacated because a court has determined that the offender is mentally retarded under standards set forth in decisions of the supreme court of this state or the United States supreme court, the trial court that sentenced the offender shall conduct a hearing to resentence the offender. At the resentencing hearing, the court shall impose upon the offender a sentence of life imprisonment or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that is determined as specified in this division. If [division \(D\) of section 2929.03 of the Revised Code](#), at the time the offender committed the aggravated murder for which the sentence of death was imposed, required the imposition when a sentence of death was not imposed of a sentence of life imprisonment without parole or a sentence of an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to [division \(A\) or \(B\)\(3\) of section 2971.03 of the Revised Code](#) and served pursuant to that section, the court shall impose the sentence so required. In all other cases, the sentences of life imprisonment that are available at the hearing, and from which the court shall impose sentence, shall be the same sentences of life imprisonment that were available under [division \(D\) of section 2929.03](#) or under [section 2909.24 of the Revised Code](#) at the time the offender committed the offense for which the sentence of death was imposed. Nothing in this division regarding the resentencing of an offender shall affect the operation of [section 2971.03 of the Revised Code](#).

(B) Whenever any court of this state or any federal court sets aside, nullifies, or vacates a sentence of death imposed upon an offender because of error that occurred in the sentencing phase of the trial and if [division \(A\) of this section](#) does not apply, the trial court that sentenced the offender shall conduct a new hearing to resentence the offender. If the offender was tried by a jury, the trial court shall impanel a new jury for the hearing. If the offender was tried by a panel of three judges, that panel or, if necessary, a new panel of three judges shall conduct the hearing. At the hearing, the court or panel shall follow the procedure set forth in [division \(D\) of section 2929.03 of the Revised Code](#) in determining whether to impose upon the offender a sentence of death, a sentence of life imprisonment, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment. If, pursuant to that procedure, the court or panel determines that it will impose a sentence other than a sentence of death, the court or panel shall impose upon the offender one of the sentences of life imprisonment that could have been imposed at the time the offender committed the offense for which the sentence of death was imposed, determined as specified in this division, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that is determined as specified in this division. If [division \(D\) of section 2929.03 of the Revised Code](#), at the time the offender committed the aggravated murder for which the sentence of death was imposed, required the

imposition when a sentence of death was not imposed of a sentence of life imprisonment without parole or a sentence of an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (A) or (B)(3) of section 2971.03 of the Revised Code and served pursuant to that section, the court or panel shall impose the sentence so required. In all other cases, the sentences of life imprisonment that are available at the hearing, and from which the court or panel shall impose sentence, shall be the same sentences of life imprisonment that were available under division (D) of section 2929.03 or under section 2909.24 of the Revised Code at the time the offender committed the offense for which the sentence of death was imposed.

(C) If a sentence of life imprisonment without parole imposed upon an offender pursuant to section 2929.021 or 2929.03 of the Revised Code is set aside, nullified, or vacated for the sole reason that the statutory procedure for imposing the sentence of life imprisonment without parole that is set forth in sections 2929.03 and 2929.04 of the Revised Code is unconstitutional, the trial court that sentenced the offender shall conduct a hearing to resentence the offender to life imprisonment with parole eligibility after serving twenty-five full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(D) Nothing in this section limits or restricts the rights of the state to appeal any order setting aside, nullifying, or vacating a conviction or sentence of death, when an appeal of that nature otherwise would be available.

(E) This section, as amended by H.B. 184 of the 125th general assembly, shall apply to all offenders who have been sentenced to death for an aggravated murder that was committed on or after October 19, 1981, or for terrorism that was committed on or after May 15, 2002. This section, as amended by H.B. 184 of the 125th general assembly, shall apply equally to all such offenders sentenced to death prior to, on, or after March 23, 2005, including offenders who, on March 23, 2005, are challenging their sentence of death and offenders whose sentence of death has been set aside, nullified, or vacated by any court of this state or any federal court but who, as of March 23, 2005, have not yet been resentenced.

CREDIT(S)

(2007 S 10, eff. 1-1-08; 2004 H 184, eff. 3-23-05; 1998 S 107, eff. 7-29-98; 1996 H 180, eff. 1-1-97; 1996 S 258, eff. 10-16-96; 1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1-96; 1995 S 4, eff. 9-21-95; 1981 S 1, eff. 10-19-81)

OHIO RULES

Crim R 11 Pleas, rights upon plea

(A) Pleas

A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant's attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) Effect of guilty or no contest pleas

With reference to the offense or offenses to which the plea is entered:

- (1) The plea of guilty is a complete admission of the defendant's guilt.
- (2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.
- (3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under **Crim. R. 32**.

(C) Pleas of guilty and no contest in felony cases

- (1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to **Crim. R. 44** by appointed counsel, waives this right.
- (2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:
 - (a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.
 - (b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.
 - (c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.
- (3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting a plea of guilty or no contest the court shall so advise the defendant and determine that the defendant understands the consequences of the plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications that are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

(D) Misdemeanor cases involving serious offenses

In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to **Crim. R. 44** by appointed counsel, waives this right.

(E) Misdemeanor cases involving petty offenses

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

The counsel provisions of **Crim. R. 44(B) and (C)** apply to division (E) of this rule.

(F) Negotiated plea in felony cases

When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court.

(G) Refusal of court to accept plea

If the court refuses to accept a plea of guilty or no contest, the court shall enter a plea of not guilty on behalf of the defendant. In such cases neither plea shall be admissible in evidence nor be the subject of comment by the prosecuting attorney or court.

(H) Defense of insanity

The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial.

CREDIT(S)

(Adopted eff. 7-1-73; amended eff. 7-1-76, 7-1-80, 7-1-98)

Crim R 24 Trial jurors

(A) Brief introduction of case. To assist prospective jurors in understanding the general nature of the case, the court, in consultation with the parties, may give jurors a brief introduction to the case.

(B) Examination of prospective jurors. Any person called as a prospective juror for the trial of any cause shall be examined under oath or upon affirmation as to the prospective juror's 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. Nothing in this rule shall limit the court's discretion, with timely notice to the parties at anytime prior to trial, to allow the examination of all prospective jurors in the array or, in the alternative, to permit individual examination of each prospective juror seated on a panel, prior to any challenges for cause or peremptory challenges.

(C) Challenge for cause. A person called as a juror may be challenged for the following causes:

- (1) That the juror has been convicted of a crime which by law renders the juror disqualified to serve on a jury.
- (2) That the juror is a chronic alcoholic, or drug dependent person.
- (3) That the juror was a member of the grand jury that found the indictment in the case.
- (4) That the juror served on a petit jury drawn in the same cause against the same defendant, and the petit jury was discharged after hearing the evidence or rendering a verdict on the evidence that was set aside.
- (5) That the juror served as a juror in a civil case brought against the defendant for the same act.
- (6) That the juror has an action pending between him or her and the State of **Ohio** or the defendant.
- (7) That the juror or the juror's 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 the juror.
- (8) That the juror has been subpoenaed in good faith as a witness in the case.
- (9) That the juror 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 the juror will render an impartial verdict according to the law and the evidence submitted to the jury at the trial.
- (10) That the juror 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 the juror 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 the juror 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 (C)(11) of this rule.
- (13) That English is not the juror's native language, and the juror's knowledge of English is insufficient to permit the juror to understand the facts and the law in the case.
- (14) That the juror is otherwise unsuitable for any other cause to serve as a juror.

The validity of each challenge listed in division (C) of this rule shall be determined by the court.

(D) Peremptory challenges. In addition to challenges provided in division (C) of this rule, if

there is one defendant, each party peremptorily may challenge three prospective jurors in misdemeanor cases, four prospective jurors in felony cases other than capital cases, and six prospective jurors in capital cases. If there is more than one defendant, each defendant peremptorily may challenge the same number of prospective jurors as if the defendant was the sole defendant.

In any case where there are multiple defendants, the prosecuting attorney peremptorily may challenge a number of prospective jurors equal to the total peremptory challenges allowed all defendants. In case of the consolidation of any indictments, informations, or complaints 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.

(E) Manner of exercising peremptory challenges. 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, but does not constitute a waiver of any subsequent challenge. However, 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.

Nothing in this rule shall limit the court's discretion to allow challenges under this division or division (D) of this rule to be made outside the hearing of prospective jurors.

(F) 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 division (B) of this rule 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.

(G) Alternate jurors.

(1) Non-capital cases. The court may direct that not more than six jurors in addition to the regular jury be called and impaneled 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. The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew. Each party is entitled to one peremptory challenge in addition to those otherwise allowed if one or two alternate jurors are to be impaneled, two peremptory challenges if three or four alternate jurors are to be impaneled, and three peremptory challenges if five or six alternative jurors are to be impaneled. 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.

(2) Capital cases. The procedure designated in division (G)(1) of this rule shall be the same in capital cases, except that any alternate juror shall continue to serve if more than one deliberation is required. If an alternate juror replaces a regular juror after a guilty verdict, the court shall

instruct the alternate juror that the juror is bound by that verdict.

(H) 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 instruction, 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.

(I) Taking of notes by jurors. The court, after providing appropriate cautionary instructions, may permit jurors who wish to do so to take notes during a trial. If the court permits the taking of notes, notes taken by juror may be carried into deliberations by that juror. The court shall require that all juror notes be collected and destroyed promptly after the jury renders a verdict.

(J) Juror questions to witnesses. The court may permit jurors to propose questions for the court to ask of the witnesses. If the court permits jurors to propose questions, the court shall use procedures that minimize the risk of prejudice, including all of the following:

- (1) Require jurors to propose any questions to the court in writing;
- (2) Retain a copy of each proposed question for the record;
- (3) Instruct the jurors that they shall not display or discuss a proposed question with other jurors;
- (4) Before reading a question to a witness, provide counsel with an opportunity to object to each question on the record and outside the hearing of the jury;
- (5) Read the question, either as proposed or rephrased, to the witness;
- (6) Permit counsel to reexamine the witness regarding a matter addressed by a juror question;
- (7) If a question proposed by a juror is not asked, instruct the jurors that they should not draw any adverse inference from the court's refusal to ask any question proposed by a juror.

CREDIT(S)

(Adopted eff. 7-1-73; amended eff. 7-1-75, 7-1-02, 7-1-05, 7-1-06, 7-1-08, 7-1-09)

Crim R 29 Motion for acquittal

(A) Motion for judgment of acquittal

The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

(B) Reservation of decision on motion

If a motion for a judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict, or after it returns a verdict of guilty, or after it is discharged without having returned a verdict.

(C) Motion after verdict or discharge of jury

If a jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within fourteen days after the jury is discharged or within such further time as the court may fix during the fourteen day period. If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal. It shall not be a prerequisite to the making of such motion that a similar motion has been made prior to the submission of the case to the jury.

CREDIT(S)

(Adopted eff. 7-1-73)

Crim R 52 Harmless error and plain error

(A) Harmless error

Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(B) Plain error

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

CREDIT(S)

(Adopted eff. 7-1-73)

Evid R 101 Scope of rules: applicability; privileges; exceptions

(A) Applicability

These rules govern proceedings in the courts of this state, subject to the exceptions stated in division (C) of this rule.

(B) Privileges

The rule with respect to privileges applies at all stages of all actions, cases, and proceedings conducted under these rules.

(C) Exceptions

These rules (other than with respect to privileges) do not apply in the following situations:

(1) *Admissibility determinations*. Determinations prerequisite to rulings on the admissibility of evidence when the issue is to be determined by the court under [Evid.R. 104](#).

(2) *Grand jury*. Proceedings before grand juries.

(3) *Miscellaneous criminal proceedings*. Proceedings for extradition or rendition of fugitives; sentencing; granting or revoking probation; proceedings with respect to community control sanctions; issuance of warrants for arrest, criminal summonses and search warrants; and proceedings with respect to release on bail or otherwise.

(4) *Contempt*. Contempt proceedings in which the court may act summarily.

(5) *Arbitration*. Proceedings for those mandatory arbitrations of civil cases authorized by the rules of superintendence and governed by local rules of court.

(6) *Other rules*. Proceedings in which other rules prescribed by the Supreme Court govern matters relating to evidence.

(7) *Special non-adversary statutory proceedings*. Special statutory proceedings of a non-adversary nature in which these rules would by their nature be clearly inapplicable.

(8) *Small claims division*. Proceedings in the small claims division of a county or municipal court.

CREDIT(S)

(Adopted eff. 7-1-80; amended eff. 7-1-90, 7-1-96, 7-1-99)

Evid R 401 Definition of “relevant evidence”

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

CREDIT(S)

(Adopted eff. 7-1-80)

Evid R 403 Exclusion of relevant evidence on grounds of prejudice, confusion, or undue delay

(A) Exclusion mandatory

Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

(B) Exclusion discretionary

Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.

CREDIT(S)

(Adopted eff. 7-1-80; amended eff. 7-1-96)