ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Supreme Court Case No. 2014-1862
Plaintiff-Appellee	:	On Appeal from the Warren County Court of Common Pleas
-v-	:	CP Case No. CR08-2934
AUSTIN GREGORY MYERS,	:	**THIS IS A CAPITAL CASE**
Defendant-Appellant	:	

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It was a violation of Due Process and the Eighth Amendment when the less culpable accomplice receives the Death Penalty, while the principal offender who actually killed the victim receives life without parole.

PROPOSITION OF LAW TWO	15

It was a violation of due process when an accomplice receives the death penalty, where he was a 19 year-old immature adolescent with behavioral issues.

PROPOSITION OF LAW THREE	24

Evidenced obtained without a valid waiver of *Miranda* rights and after being in custody all night should be suppressed, which here it was not in violation of the 4th, 5th , 6th and 14th Amendments to the United States Constitution.

PROPOSITION OF LAW FOUR	33

The trial court erred to Myers' prejudice by permitting the State to engage in misconduct by failing to disclose discovery evidence in a timely manner and failing to disclose *Brady* material evidence in discovery which deprived him of his due process right to a fair trial under the Fifth, Sixth, Eighth and Fourteenth Amendments under the United States Constitution and Article One,§§2, 9, and 16 of the Constitution of the State of Ohio.

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The court erred by and violated Due Process of Law when it denied the defense's ability to be prepared for trial by denying the request for continuance of trial. U.S. Const. amends. V, VI, VIII, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16, and 20.

PROPOSITION OF LAW SIX 41

The acts and omissions of trial counsel deprived the defendant-appellant of a fair and reliable result in both phases of a capital trial. U.S. Const. amends. V,VI, VIII, and XIV; Ohio Const. art. I § 5, 10.

PROPOSITION OF LAW SEVEN 53

The court erred by and violated Due Process of Law when it denied the appointment of an expert for the defense. U.S. Const. amends. V, VI, VIII, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16, and 20.

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The court erred and violated Due Process of Law when it allowed the State to present an improperly examined piece of important evidence. U.S. Const. amends. V, VI, VIII, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16, and 20.

PROPOSITION OF LAW NINE 59

The court erred by and violated Due Process of Law when it ordered that the defendant be shackled in the legs and was unable to rise when the jury entered the room. U.S. Const. amends. V, VI, VIII, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16, and 20.

PROPOSITION OF LAW TEN 61

The trial court erred to Myers prejudice by permitting the State to engage in serious misconduct by making a prejudicial closing argument to the jury which deprived Myers of his constitutional due process rights to a fair trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Unites States Constitution and Article One, §§2, 9, and 16 of the Ohio Constitution.

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A defendant-appellant in a death penalty case has a fundamental right to a specific *voire dire* focused on fair selection of the venire in the capital case. Where the trial court does not allow rehabilitation of jurors expressing reluctance to impose death penalty and allows the defense to only conduct a general inadequate jury selection, the accused's rights are violated under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and under Article One §§2, 5, 9, 10, and 16 of the Ohio Constitution.

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The trial court erred to Myers prejudice by admitting into evidence gruesome repetitive crime scene and autopsy death photos of the victim.

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PROPOSITION OF LAW SEVENTEEN 79

The accused's right to due process under the Fourteenth Amendment to the United States Constitution and Article I, §16 of the Ohio Constitution is violated when the State's burden of persuasion is less than proof beyond a reasonable doubt.

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Ohio's death penalty law is unconstitutional. *Ohio Revised Code* §§2903.01, 2929.02, 2929.021, 2929.02, 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 Austin Myers. U.S. Constitutional Amendments V, VI, VIII, and XIV; Ohio Constitution Article I, §§ 2, 9, 10, and 16 Further, Ohio's death penalty statute violates the United States' obligations under international law.

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United Nations Charter and International Law. 84-109

STATEMENT OF THE CASE

The State of Ohio indicted defendant-appellant Austin Gregory Myers on February 24, 2014, with 9 counts, all related to the home-invasion robbery and homicide of decedent Justin Back. (R. 2, indictment). These counts included two capital charges: (1) aggravated murder with prior calculation and design, in violation of R.C. § 2903.01 (a), with death penalty specifications for committing aggravated murder while committing aggravated burglary, kidnapping and aggravated robbery in violation of R.C. § 2929.04 (a)(7) and; (2) aggravated murder, in violation of R.C. 2903.01 (b), with death penalty specifications in violation of R.C. § 2929.04 (a)(7). Additional charges included: (3) kidnapping; (4) aggravated robbery; (5) aggravated burglary; (6) theft of a firearm; (7) tampering with evidence; (8) safecracking; and (9) abuse of a corpse. All of the referenced charges contained firearm specifications, except for the kidnapping, tampering with evidence and safecracking counts. (R.2, indictment).

On February 28, 2014, Mr. Myers appeared with appointed counsel, and pled "not guilty" to the charges. (R. 8, arraignment entry). The parties engaged in extensive pre-trial motions practice, and those issues were resolved by the trial court. (6/18/14 T.p. 1 – 67). Of particular significance was the defendant's motion to suppress the alleged statements Myers had given to law enforcement, (8/5/14 T. p. 1 – 172, R. 194, 209). The court denied the motion after an evidentiary hearing. (R. 211, entry).

The first day of trial, Mr. Myers' counsel asked for a continuance, due to voluminous and untimely-provided discovery by the state. Defense counsel said they could not adequately represent Mr. Myers pursuant to the United States Constitution Sixth Amendment without a continuance. (Vol.I T.p.4-48). This was denied. *Id.*

The state's primary witness at trial was the co-defendant, Tim Mosley, who admittedly was the one who actually killed the victim. But he received a life without parole sentence in exchange for testimony against Mr. Meyers. (T.p.1048- 1059). The jury found Mr. Myers guilty of all charges and specifications. (T.p.1767).

After the subsequent Mitigation sentencing phase trial the jury recommended that Mr. Myers be sentenced to death, and the trial court did so. (R. 259 judgment/agg murder). The trial court also sentenced Myers to: an 11 year prison term for the kidnapping, aggravated robbery, aggravated burglary by merging counts 3, 4 and 5 into a single prison sentence, concurrent to the remaining counts; 36 months imprisonment on theft of a firearm and tampering with evidence charges, and 12 months on the safecracking and abuse of a corpse charges, to be served concurrently to the other charges; and a consecutive 3 year gun specification on the abuse of corpse charge. (10/16/14 T. p. 1 -30, Sentencing Hearing, R.261 judgment entry/felony counts, 262 amended judgment entry/felony counts).

Mr. Myers then timely filed this appeal of right to the Ohio Supreme Court. (R. 267).

STATEMENT OF FACTS

Pre trial Motion Hearing – Court order leg shackles on defendant, who then can't stand up when jury enters room.

There was an evidentiary hearing as to defense motion #15, requesting that Mr. Myers appear at trial without restraints. (6/18/14 T.p.3, R. 33). Defense counsel presented no evidence and submitted. *Id.* The state called Mr. Riley, the Warren County jail administrator. (T.p.4). He said that Myers was classified as a maximum-security inmate as he was charged with premeditated murder. (T.p.7-10). He also said that the co-defendant Tim Mosley claimed he would cause harm to Myers if he saw him. (T.p.11). He requested that during trial Myers be kept in maximum restraints, including leg shackles, belly chains, and handcuffs. (T.p.16-18).

On cross, Riley conceded that the jury would see the handcuffs when Myers wrote anything, that it would be difficult to write, and that the restraint chains make noise when they move. (T.p20-21). He also said that during trial there would be four –to- five deputies in the courtroom, with two in close proximity to Myers at all times. (T.p.22-23). Further Myers would be searched prior to entering the courtroom and when leaving the courtroom. (T.p.24).

Defense counsel argued it would be impractical for Myers to both adequately and effectively participate in his defense while in shackles. (T.p.34-37). The court said there would be no handcuffs, but would order leg shackles with a modesty panel. (T.p.38, see also R. 154).

Once trial started, Myers was dressed in street attire with the shackles, and court used a modesty panel to screen his legs. (Vol.I. T.p.45). However, during the majority of

voir dire, every time the jury came in and the bailiff said, "All rise," all the attorneys stood up, but Myers could not due to the shackles. (T.p. 762). Counsel argued the jury would think that was disrespectful, and the court ordered all to remain seated (from now on) when the jury entered. *Id.*

Pre trial Motion to Suppress Denied, Despite No Waiver of Rights by defendant

Mr. Myers filed a motion to suppress any statements made by him. (8/5/14 T.p.8, R.194, defense motion #57). The state called Warren County Det. Wyatt, who said on January 28, 2104, he responded to decedent Justin Back's residence around 10 pm for a possible missing person and burglary. (8/5/14 T.p.9-17). He saw possible blood stains on the carpet, furniture moved, kitchen rugs missing, and a gun and locked safe missing, so he believed a crime had been committed. (T.p.12-29). After he conferred with officers on scene, and neighbors who noticed a certain car at the residence during the day, Austin Myers and Tim Mosley were developed as suspects. (T.p.12-29). A "be on the lookout" for them was issued, and it was thought that Myers was at Mosley's house, about an hour away in Clayton, OH. (T.p.29).

At 1:14 am, Clayton Police Sgt Garrison located Myers for the Warren County Sherriff's Office at Logan Zennie's house, who was co-defendant Mosley's friend. (8/5/14 T.p.77-79, 141-158). Sgt. Garrison then informed Myers they were detaining him for questioning by Warren County Sherriffs, and he was placed in handcuffs and put in the back of their police car. *Id.* Garrison admitted Myers had his hands cuffed behind his back, and he was not free to leave. (T.p.148-158).

Warren County Det. Wyatt, *supra*, eventually was given custody of Myers. (8/5/14 T.p.78-84). Incredibly, Det. Wyatt claimed at the motion to suppress hearing that Myers was not in custody, even though he was in a standard police car with Clayton

police department emblems and light bar on the top. *Id.* He also claimed he was not aware that Myers was in handcuffs. *Id.* Wyatt admitted he had a conversation with Myers at Zennie's house where had to open the door of the police cruiser to talk to him, but then claimed he "didn't notice" he was cuffed even though his hands were behind his back. (T.p.84).

Det. Wyatt asked Myers, while he was cuffed and in the cruiser, to come to the police station as they were trying to find Justin Back. (8/5/14 T.p.34). When they arrived the Clayton police station, Wyatt asked them to take off Myers handcuffs as he came "voluntarily." (T.p35). Det. Wyatt, Det. Barger, and Myers went into the police station conference room, and the interview began at 3:07 AM and lasted approximately 45 minutes. (T.p.36-41). At the end of the interrogation, Myers asked to go the bathroom, and Det. Wyatt escorted him there and went into the restroom with him. (T.p.39-41, 100). Myers said he was tired, but Det. Wyatt continued to talk to him. (T.p.102-103). Finally, he drove him back to Tim Mosley's, but he was left in the police car, where he slept. (T.p. 41-46). Det. Wyatt then interviewed Logan Zennie, who told him that Tim Mosely said that he and Myers had stabbed and shot Justin Back, and dumped his body in the woods. (T.p.43-45). Det. Wyatt felt he now had probable cause to arrest Myers. *Id.*

At 7:42 am, Myers was again brought back to the police department, again handcuffed, but now placed in holding cell. (8/5/14 T.p.46-47). Det. Wyatt advised Myers of his Miranda rights, but he never asked him if he waived them. (T.p. 49-50, 116). Further, Det. Wyatt admitted that he simply read the rights off a small card he kept in his wallet, rather than the forms used by the Warren County Sherriff's Department which was on a 8 ½ by 11 piece of paper. (T.p.59). He also admitted that when they

interviewed Logan Zennie (at whose house Myer's had been located, *supra*), they used the large sheet of paper, had him initial next to the rights to show he understood, and had him sign the waiver. (T.p. 60-61).

They started another interrogation, but then Det. Wyatt said Myers asked for an attorney. (8/5/14 T.p.50, 116). Then he said at 9:27 am and 10:02 am Myers tapped on the glass and talked, and said where the body was and would show them. (T.p.51-57, 120-123).

The Court denied the Motion to Suppress. (R. 211).

Important New Discovery Provided Day of Trial, but Continuance Denied

On June 18, 2014, at a pretrial motion hearing, the court asked about the status of discovery to which the prosecutor said, "Your honor we've done our 'dump.'" (6/19/14 T.p.64). But there was much more discovery to follow.

On September 22, 2014, the first day of trial, defense counsel requested a continuance as the State had provided them new discovery that very morning, and the night before, and also the Friday before. (Vol.I T.p.4-48). This was a new "discovery dump" right at trial with over 102 pages of material, including interviews of witnesses, a narrative from the detective, photographs, and coroner exhibits. (T.p.8-15). Crucially, the new material also included an interview with co-defendant Mosley, whom the state offered a plea deal where in return for life without parole instead of the death penalty, he would testify against Myers. (T.p.4-15). However, the state's prior witness list to the defense did not include co-defendant Tim Mosley, but now the day of trial they were going to use him as a witness against Mr. Myer, and the recorded interview of Mosley provided by the state was approximately 6 hours long. *Id.* And Mosley had made over 400 phone calls in the time he was incarcerated, which the defense had not reviewed. *Id.*

Further, the night before trial started, the state sent defense counsel emails of photographs of a journal found in co-defendant (and now state's witness) Tim Mosley's bedroom, that allegedly could prove the prior calculation and design element of aggravated murder. (Vol.I T.p16-18). Defense counsel said they had been provided photographs of the journal, but not the actual journal. (T.p.31-38). Further it appeared that pages had been torn out, and they didn't know if it was really co-defendant Mosley's handwriting. *Id.* Defense counsel argued that getting the journal and photos the night before trial was a huge issue, as if there was no prior calculation and design then there was no death penalty. (T.p.34). Defense counsel had not as of trial even seen the actual journal or even the cd, and they had only seen two photos of it the state provided. (T.p. 37). Counsel argued they wanted to get a fingerprint and blood analysis of the journal, and have an expert look at it as it may be exculpatory. (T.p.37-38, 1035-1038).

Defense counsel then said that without a continuance to investigate the new discovery material just provided, they would be providing ineffective assistance of counsel, and that Mr. Meyers might as well represent himself. (Vol.I T.p.4, 35). Counsel also noted that this new discovery had not even been filed with the Warren County Clerk's Office. (T.p.8). The Warren County Prosecutor admitted that as to the co-defendant's journal) they wanted to offer it to show prior calculation and design on the part of Mr. Myers. (T.p.21-28). He also conceded that the material only provided this morning. *Id.*

The court said it would have an off the record "chat about whether or not I'm going to grant this (continuance) motion, so we don't need a court reporter." (Vol.I T.p.40-48). The court denied the continuance for trial, and also denied the defense

request for a handwriting expert (to analyze Mosley's alleged journal). *Id.* As to allowing Mosley' alleged journal into evidence, during the trial the court held an evidentiary hearing outside jury's presence, and co-defendant Tim Mosley was brought in under oath. (T.p.1043-1045). The Court asked him as to states exhibit 424, "Tell me the circumstances under which you wrote this?" (T.p.1046). Mosley said he and Myers were planning to kill Justin Back, and that he didn't recall what happened to the journal's missing pages. (T.p.1046). There were no questions by the defense. *Id.* The court made a preliminary ruling it was a complete writing, and was relevant as further proof of the enterprise. (T.p.1046-1047).

State's Case in Chief

On January 27, 2014, Mark Cates, step-father of decedent Justin Back, arrived home from work as usual around 3:30 pm. (T.p.783-789). He noticed a Chevy Cavalier vehicle in the driveway with the back window covered in plastic with red tape. (T.p.789-792). He went inside, where Back introduced him to Tim Mosley and Austin Myers, both of whom then left. (T.p.789-792). Later that night he saw Back playing video games, and went to bed. (T.p.793). The next day, Cates again arrived home from work around 3:30 pm, and noticed the dining room table pushed up against a window, and the kitchen rugs were not on the floor, and Back's cell phone was lying there. (T.p.802-813). Later he discovered that his watch, jewelry box, pistol, and safe were all missing. *Id.* He then realized they had been robbed and called 911. *Id.*

Warren County Officers responded, and they noticed blood stains on the carpet that appeared to have been cleaned as the carpet fibers were moved. (T.p. 829-842 878-884). After investigation they issued a general "be on the lookout" for the silver Cavalier automobile, as well as Myers, and Mosley. (T.p. 844-896). Officers spoke with Myers,

Mosley, and a third person named Logan Zennie. (T.p.887-888). After the interviews, the officers went to Zennie's house, and in Zennie's bedroom was Cates' missing safe. (T.p. 888-911). Zennie said Mosley had given him the safe. (T.p.904-911).

Two neighbors of the Cates/Back residence testified. (T.p. 917-973). Once saw a Chevy cavalier at the Cates residence earlier that day. (T.p. 917-929). Another neighbor said that around 8 am that day two young men were walking through the neighborhood, and also observed the same car. (T.p.953-973). When he found out about Justin Back missing he called officers about the car and the young men. Id. Later that night, officers discovered Bates' body in a field on Cry Baby Ridge. (T.p.896-899).

Investigators started backtracking where Myers and Mosley had been earlier in the day, and discovered a shopping spree that including numerous stores and pharmacies. (T.p.901-1033). They recovered video, sales receipts, and witness statements. Id. Clerks and cashiers from the various stores testified that Mosley and Myers unsuccessfully tried to purchase cold medicine, bug wash, and syringes, as their credit card didn't work or they were required to speak to a pharmacist. *Id.* However, they did purchase gloves, ammonia, and a crowbar. *Id.*

Testimony of Co-defendant

Tim Mosley, age 19, said he was the co-defendant and charged with aggravated murder of Justin Back, and that he had a plea agreement where if he testified he would not receive the death penalty but would instead get life without parole. (T.p.1048- 1059, 1140-1152). He drove a Chevy Cavalier with a back windshield replaced with plastic. *Id.* He knew Myers through school and hung out with him outside of school; and claimed he did not previously know Justin Back. *Id.*

Mosley said that in January 27, 2014, he and Myers stayed overnight at his friend Logan Zennie's home. (T.p.1060-1064). They overslept through a job orientation. Id. He claimed Myers asked him if he wanted to make some money, and said they could either rob a rug dealer, or go to Justin Back's house where his father had a safe with money. Id. Mosley said yes, as he needed quick cash as he was not working and his mother had been yelling at him. (T.p.1170-1171). He drove them both to Back's house at noon. (T.p.1060-1064). Justin answered and let them in, and they decided their plan wouldn't work since they expected the house to be empty, so they could come back later. (T.p.1064-1072). They went to the Waynesville library, and Mosley claimed Myers suggested they kill Justin Back. *Id.* Mosley agreed, and suggested they fill a syringe with cold medicine and inject him. *Id.* However they couldn't purchase the required items as the credit card didn't work. *Id.*

Later in the afternoon of January 27, they returned to Justin Back's home, and Mosley wanted to get the safe then, but Myers said no as the step father was coming home. (T.p.1077-1078). They left and went back to Mosley's house, and they planned to strangle and kill Justin, then make it look like a runaway, and take the safe. (T.p.1082). Mosley said he wrote ideas for the murder in his notebook, such as "crowbar, wire, duct tape, "strangle," "Take clothes, money, phone, and charger," "disappear," "no public," and "Wrap up in a blanket." (T.p. 1082-1087). He tossed the notebook on the desk in his bedroom. *Id.* They then borrowed money from Logan Zennie, and purchased wire, gloves, ammonia, and septic enzmes, which would decompose the body. (T.p.1088-1093). They went back to Mosley's home, where Zennie then constructed the choke wire. *Id.*

Finally, they went to Justin Back's home again, and Mosley said that the plan was Myers would distract Back, while he would choke and kill Back from behind. (T.p. 1098-1099). He said they went inside, Back offered them a drink and went into the kitchen, and when he bent into the fridge Mosley put the choke wire on Back, and kicked his feet out form under him, while Myers restrained him. (T.p.1099-1101,1207-1209). He said they all fell to the ground, and Back pled for his life. *Id.* Mosley noticed he missed Back's throat and the choke wire was around his chin. (T.p.1101-1105). Mosley said he panicked, pulled out his knife, and stabbed Back about 21 times in the back. *Id*, (see also T.p.1152). He admitted Myers did not know he was going to stab him as he did that on his own out of panicking. (T.p. 1212). He said Myers told him later he thought he was just punching him as the blade was concealed in his hand. *Id.*

Mosley said they took the body in his trunk, cleaned up the blood, and took the safe, jewelry, credit cards, and Back's wallet. (T.p.1107-1115). Mosley said he and Myers were covered in blood. *Id.* They dumped the body in a field and poured ammonia and septic enzyms on the body. (T.p.1117-1136). He said Myers then shot the body two times. *Id.* They then bought a crowbar, and opened the safe at Mosley's house. *Id.* They burned their clothes. (T.p.1175). Mosley said that the intention was to strangle Back and kill him, not to stab him. (T.p. 1136).

On cross examination, Mosley admitted that when he was stabbing Back in the back, Myers had no idea he had a knife in his hand. (T.p.1154). He said when Myers brought up the money and safe, they had no intentions of killing anyone. (T.p.1171). He admitted it was his idea to burn these clothes, that he did not tell police everything, that it was his idea to get ammonia and gloves. (T.p.1175-1203). Further, he admitted he lied

when he told police it was Myers who made the wire choke/garrote but it was really Logan Zennie. (T.p.1205). Further, the garrote and knife were in his pockets, not Myers. (T.p.1206-1222).

After the state rested, Defense counsel made a Rule 29, which was denied. (T.p.1643-1644).

Defense Case in Chief – none

At the beginning of the trial, defense counsel said they reserved any opening statement until they began their case. (T.p.781). But after the state rested and at the time to put on a defense case in chief, counsel said they would be calling no witnesses, and rested. (T.p.1644-1647). The jury found Myers guilty as charged. (T.p.1767).

Mitigation Trial – no experts put on for Myers, jury recommends death

The state offered all exhibits at trial, submitted, and rested. (10/6/14 T.p.13-14). Defense counsel called Danielle Copeland, Myers' mother.("mother"). (T.p.14-15). She said her son was born January 4, 1995. *Id.* When Myers was born she was a young parent, only 21 years old. (T.p.15-18). She had six children, and Myers was the oldest. Id. She said Myers and his next brother Carson were very close. (T.p.20). Counsel showed some photos of Myers with his brothers. (T.p.20-23). Mother said when Myers was young he participated in soccer, football, and baseball. (T.p.23). He also played piano, and took lessons stating at age 8, and advanced quickly. (T.p.24-27). Mother said he could read music and had an ear for it; he even accompanied the school and church choir at recitals. *Id.*

Mother said she and Myer's father had problems in their marriage, and she became pregnant with a co-workers child during the marriage. (T.p.36-37). Mother told Myers that the baby was from another man, and she said Austin changed after that and

his grades suffered. (T.p.38-44). He ran away from home, but the Warren County Sherriff returned him. Id. She discovered he had been cutting on his arms, and had shot his own legs with a pellet gun. *Id.* Myers was placed in the Kettering Youth Services hospital, was given prescription medicine including Prozac and Resperdol, and was assigned a psychologist and psychiatrist. *Id.*

Shortly after that incident, Myers moved in with his father as he wanted to, and she felt he needed more structure than she could provide. (T.p.45-53). However, Mother said that Myers quit being involved in sports and extra-curricular activities. *Id.* Further, she claimed his father took Myers off of the medication and out of counseling. *Id.*

Bryce Myers, Myers 15 year old brother, testified that he loved his brother, and wanted him to have life in prison so he could be a positive influence and it would be comforting to know he was alive. (T.p. 75-86).

Greg Myers, the father, said drove a truck for a living and worked long hours. (T.p.90). He remarried after leaving mother, and Myers had a good relationship with his siblings. (T.p.87-92). Further, Myers was a good mentor to them and worked out problems at home with step-siblings. *Id.* He drove a truck all week long. (T.p. 90). On January 4, 2014, shortly before this incident, Myers turned 19 years old. (T.p.93-97).

Myers gave an unsworn statement, and said that he was sorry, and wished he could go back in time and stop it before it happened. (T.p.102). He said if he had to die, it wouldn't hurt him but it would hurt his mother and siblings. (T.p.103-104). Defense rested without calling a psychologist, psychiatrist, or other expert on behalf of Myers in death penalty mitigation. (T.p.104)

The jury found the aggravating circumstances outweighed the mitigating factors, and recommend a sentence of death. (T.p.162).

Sentencing- Court imposes death penalty on Myers, despite conceding he was not the principal offender, who received life without parole.

At sentencing, defense counsel offered in mitigation a letter from Danielle Copeland, Myers' mother. (10/16/14 T.p. 3-9). She was shocked by jury's decision to recommend the death penalty, as her son had just turned 19 a few weeks before this transpired, he had no prior criminal record, he was a troubled teen with mental health issues, and the co-defendant Mosley, who was the one who actually stabbed and killed Back, received life without parole. *Id.* Myers then spoke on own behalf and apologized. *Id.*

The court noted counts one and two merged for sentencing, and that the state elected to proceed on count 1, and specification 3. (T.p.9-10). The court conceded Myers was not the principle offender, but said that both defendants entered the residence with a specific plan to kill. (T.p.11-17). After reviewing the mitigating factors and aggravating circumstances, the court found the state proved beyond a reasonable doubt the aggravating circumstances outweigh the mitigating factors and imposed a sentence of death. (T.p.18-28). The court merged the robbery and burglary counts, and made the rest of the counts concurrent to each other and to count 1, consecutive to the gun specs. (T.p.21-28).

PROPOSITION OF LAW ONE

It was a violation of Due Process and the Eighth Amendment when the less culpable accomplice receives the Death Penalty, while the principal offender who actually killed the victim receives life without parole.

PROPOSITION OF LAW TWO

It was a violation of due process when an accomplice receives the death penalty, where he was a 19 year-old immature adolescent with behavioral issues.

(Argued Together)

Myers death sentence was excessive in relation to his moral capability, and as such was both cruel and unusual for two reasons. First, Myers sentence of death was comparatively disproportionate to the co-defendant Tim Mosley. Mosley, who actually had the knife and stabbed decedent Back 21 times, received a life sentence. Yet Myers, the accomplice, who was both unarmed and was not aware Mosley was going to stab Back, received the death penalty.

Second, Myer was an immature adolescent the time of the crime, and an application of the United States Supreme Court's recent decisions show that the mitigating factors of Myer's age and other developmental issues related to his youth indicate he should not have received the death penalty, but instead should have received life without parole.

Comparative Proportionality

Myers sentence was grossly disproportionate to the sentence of his co-defendant Tim Mosely. Admittedly, comparative proportionality between defendants is not mandated by the Constitution. *See Pulley v. Harris,* 465 U.S. 37, 43-45, 104 S.Ct. 871, 79 L.Ed. 2d 29, (1984), *United States v. Odeneal*, 517 F.3d 406(6th Cir. 2008).

However, while it is not mandated, comparative proportionality between defendants is certainly useful in making a Due Process analysis of whether a sentence of death in a particular case is in violation of the 8th Amendment. The purpose of proportionality review is to determine whether the penalty of death is unacceptable in the case under review because it is disproportionate to the punishment imposed on others convicted of the same crime. *Pulley v. Harris* (1984), 465 U.S. 37, 104 S.Ct.871, 79 L.Ed.2d 29. A proportionality review in Ohio includes only cases "in which the death penalty has been imposed." *State v. Steffen,* 31 Ohio St. 111, 31 OBR 273, 509 N.E.2d 383, paragraph one of the syllabus, RC § 2925.05(A).

A bedrock principle of capital jurisprudence in the United States is the need for procedural protections against "random or arbitrary imposition of the death penalty." *Gregg v. Georgia*, 428 U.S. 153, 206 (1976); see also *Mills v. Maryland*, 486 U.S. 367, 383-84 (1988). "Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution." *Kennedy v. Louisiana*, 554 U.S. 407, 420,436 (2008)

In this case, if anyone was most deserving of execution, it was principal offender Tim Mosley, who repeatedly stabbed the victim. If he was not given the death penalty, then accomplice Myers should not be given the death penalty either. Anything else results in unfairness rising to the level of a Due Process and 8th Amendment violation. The Eighth Amendment prohibits punishments that are excessive in relation to the moral culpability of the offender. *Roper v. Simmons*, 543 U.S. 551. 560 (2005), and *Graham v. Florida*, 130 S. Ct. 2011, 2012, 176 L. Ed. 2d 82 (2010).

A close review of the facts show that Mosley, age 19, admitted on the witness stand that he had a plea agreement where if he testified he would not receive the death penalty, but would instead get life without parole. (T.p.1048- 1059, 1140-1152). He proceeded to describe the murder of Justin Back, and described in detail the events during which he was unquestionably the actual killer. He said Myers asked him if he wanted to make some money, and said they could either rob a rug dealer, or go to Justin Backs house where his father had a safe with money. (T.p.1060-1064). Mosley said yes. Mosley then wrote ideas for a murder in his notebook, such as "crowbar, wire, duct tape, "strangle," "Take clothes, money, phone, and charger," "disappear," "no public," and "Wrap up in a blanket." (T.p. 1082-1087). Mosley suggested they fill a syringe with cold medicine and inject him. (T.p.1064-1072).

At Mosley's home his buddy Logan Zennie constructed a choke wire. (T.p.1088-1093). Mosley drove them over to Back's. (T.p. 1098-1099). Once inside, Mosley put the choke wire on Back as he bent into the fridge, and kicked his feet out form under him. (T.p.1099-1101,1207-1209). Mosley noticed he missed Back's throat and the choke wire was around his chin. (T.p.1101-1105). Mosley said he panicked, pulled out his knife, and stabbed Back about 21 times in the back. *Id*, see also T.p.1152.

All of these facts, assuming *arguendo* to be true, show that Mosley was the main offender. If the main offender gets life without parole, and the accomplice gets death, it is patently unfair. Yet this is exactly what happened, and as such Myer's sentence of death was in violation of the Eighth Amendment. The Eighth Amendment's prohibition of cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions, which "flows from the basic 'precept of justice that punishment for crime

should be graduated and proportioned' " to both the offender and the offense. *Roper v. Simmons*, 543 U. S. 551, 560.

Co-defendant Mosley admitted Myers did not know he was going to stab him, as he did that on his own, out of panicking. (T.p. 1212). Mosley admitted that when he was stabbing Justin Back in the back, Myers had no idea he even had a knife in his hand. (T.p.1154). He said when Myers brought up the money and safe, they had no intentions of killing anyone. (T.p.1171). He admitted it was his idea to burn these clothes, that he did not tell police everything, that it was his idea to get ammonia and gloves. (T.p.1175-1203). Despite all of this, in State's exhibit 7, in the plea agreement between Mosley and the State, the state took death off the table for the unquestioned principal offender. But it remained for the accomplice.

A comparative proportionality review between the death penalty sentence of accomplice Myers to co-defendant Mosley demonstrate on their face a violation of Due Process and the 8th Amendment. In Ohio, a trial court's felony sentence must be "consistent with sentences imposed for similar crimes committed by similar offenders." R.C. §2929.11(B). The sentence between Myers and Mosley are not. This Court has recognized the extreme unfairness of a co-defendant receiving a lesser sentence when he is the principal offender. *State v. Getsy*, 86 Ohio St.3d 329 (1998). But here, that is what happened. The principal offender who stabbed the victim was Mosley, and he received a life sentence. The accomplice Myers received a death sentence. Therefore, based on the above, Myers should receive life without parole, and not the death penalty.

Myers was an adolescent with no prior criminal record

In addition to the comparative proportionality, Myers should not receive the death penalty due to his age. He was just over the prohibition on executing children, as he had just turned 19 a few weeks prior to this offense. And the evidence showed that the mitigating circumstance of him being a late term adolescent with some mental issues. These facts, viewed in light of the ruling trends of the United States Supreme Court death penalty jurisprudence, meant that Myers should have received life without parole and not death.

The United States Supreme Court has increasingly carved out exceptions, based on age, as categorical exclusions from being put to death. In 2005 the Supreme Court ruled juveniles cannot be sentenced to death. *Roper v. Simmons*, 543 U.S. 551. 560 (2005). In 2010, the Supreme Court ruled juveniles could not be sentenced to "to life without the possibility of parole for a non-homicidal crime," as the harsh sentence violated juveniles' rights as set forth in the Eighth Amendment. *Graham v. Florida*, 130 S. Ct. 2011, 2012, 176 L. Ed. 2d 82 (2010). In 2012, the Supreme Court determined juveniles cannot be subjected to mandatory sentences of life in prison without the possibility of parole, but only applied to ongoing and future cases. *Miller v. Alabama* **132 S. Ct. 2455**, 567 U.S., 183 L. Ed. 2d 407 (2012).Then this year, the court retroactively extended this ruling to include inmates sentenced as juveniles prior to 2012, making more than 2,000 inmates nationwide eligible for resentencing or the possibility of eventual freedom.. *Montgomery v. Louisiana,*577 U.S.____, (2016).

Admittedly, Myers was not a child in the legal definition of the word. In Ohio, "child" means a person who is under eighteen years of age. R.C. 2152.02(C)(1). On

January 4, 2014, a few weeks prior to this incident, Myers turned 19 years old. (T.p.93-97). But Myers was on the tail end of adolesence, and the US Supreme Court seems to include this group in its recent cases. For example, in *Graham v. Florida*, the court said it is constitutionally impermissible to make a final, irrevocable judgment that a young teenager will forever be unsuited for life in free society and must be consigned to die in prison without any meaningful opportunity to obtain re- lease, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes. 130 S. Ct. 2011, 2012, 2033, 176 L. Ed. 2d 82 (2010).

Further, in evaluating the culpability of juvenile offenders convicted of aggravated homicides, the Court has noted that "scientific and sociological studies" of child development confirm what "any parent knows" about the frailties and vulnerability of adolescents. *Roper v. Simmons*, 543 U.S. 551, 543 (2005). "[A]dolescence is second only to the neonatal period in terms of both rapid biopsychosocial growth as well as changing environmental characteristics and demands. . . ." L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 Neurosci. & Biobehav. Rev. 417, 428 (2000). For most teens, the extensive maturation that occurs progressively throughout middle and late adolescence will alter their character and greatly increase their ability to regulate impulses and resist external forces that can predispose them to criminal behavior. *Id.*

Austin Myers was a late adolescent, having just turned 19. This offense occurred 24 days after his 19th birthday. (T.p.119). From birth until January 28, 2014, Myers had

no (legal) problems- he had no criminal record prior to this. Importantly, this Court recognizes a defendant's lack of criminal record is a significant mitigating factor. *State v. Leonard*, 104 Ohio St.3d 54 (2004).

But Myers had a lot of other problems, and they were of the type not easily processed by a non-adult. According to his mother, he was a troubled teen with mental health issues, and was taken off his medication, which caused him to spiral downward. (10/16/14 T.p. 3). His mother had an affair, became pregnant, and his parents divorced. (T.p. 19). Most significantly, he had mental health issues, as he both cut himself and shot himself in the leg. He received medical and psychiatric care at Kettering Youth Services.

At sentencing, the court acknowledged Myers youth was a significant factor, and that as a result lacked insight as to how precious life was. (T.p.14). The court also found that Myers lack of criminal history was a significant mitigating factor. (T.p.14 and 15). Myers at sentencing said he wished he could go back in time and change it all which was a sign of past lack of insight due to his age. The trial court also acknowledged Myers strong love and support from his family, but erroneously did not give it significant weight. (T.p. 15). This Court has held that the love and support of defendant's family is a significant mitigating factor. *State v. Fry*, 125 Ohio St.3d 163 (2010).

As discussed above, the United States Supreme Court is very concerned with a defendant's age in terms of who is eligible for the death penalty sanction. Children are constitutionally different from adults for sentencing purposes, as their "'lack of maturity'" and "'underdeveloped sense of responsibility'" lead to recklessness, impulsivity, and heedless risk-taking. *Roper*, 543 U. S., at 569. They "are more vulnerable . . . to negative influences and outside pressures," including from their family

and peers; they have limited "control over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. *Id.*

There is a helpful, recent case out of Illinois where that court found that ages 19 and 20 are no different from 18 in terms of getting life without parole, which the penalty in that case. *People v. House*, 2015 IL App (1st) 110580, (Dec. 24, 2015) ¶¶ 100-103. In that case, in 1993 defendant Antonio House, who had turned 19 two months earlier, acted as a lookout for his gang while his "boss" shot two rival gang members. Now, 20 plus years later, the court in Illinois vacated House's life sentence and ordered a new hearing based, in part, on a growing body of evidence from neuroscience that brains continue to develop well into a person's 20s. The Illinois court wrote that:

"The lack of discretion afforded the trial court for the imposition of a mandatory life sentence is especially relevant when the defendant is a young adult, over 18, but still not considered a fully mature adult. These considerations are significant in the instant case and support defendant's argument that the mandatory natural life sentencing statute is unconstitutional as applied to him. Turning to the case at bar, while clearly no longer a juvenile, defendant, at age 19 years and 2 months, was barely a legal adult and still a teenager. … Given defendant's age, his family background, his actions as a lookout as opposed to being the actual shooter, and lack of any prior violent convictions, we find that defendant's mandatory sentence of natural life shocks the moral sense of the community…. Since we have held that the proportionate penalties clause is unconstitutional as applied to defendant, we need not address defendant's arguments that the impositions of a mandatory life sentence was facially unconstitutional under the

eighth amendment and the proportionate penalties clause." *People v. House*, 2015 IL App (1st) 110580, ¶¶ 100-103.

There is a growing body of work recognizing age 18 is not a proper cut off point for the death penalty. See Requarth, Tim, "*Neuroscience is changing the debate over what role age should play in the courts*" http://newsweek.com/young-brains-neuroscience-juvenile-inamtes-criminal-justice-449000. "People are not magically different on their 18th birthday," says Elizabeth Scott, a professor of law at Columbia University whose work was cited in the seminal *Roper* case, *supra*. *Id.* "Their brains are still maturing, and the criminal justice system should find a way to take that into account." While it is obvious a 13 year-old is developmentally different than a 25 year year-old, the gray zone is what is in between. According to B.J. Casey, director of the Sackler Institute for Developmental Psychobiology at Cornell's Weill Medical College, for the criminal justice system, "it's basically a question of, When is an adolescent an adult?" *Id.* That is at issue here. Myers is just on the other side of 18 years old.

In summary as to this Proposition of Law, the trial court conceded that Myers was not the principal offender. (10/16/14 T.p.13). Co-defendant Mosley was the actual killer, but he got a life sentence. This is patently unfair, comparatively disproportionate, and an 8th Amendment violation. Further, Myers is a 19 year-old adolescent with mental problems that included past self-harm. The United Supreme Court has repeatedly carved out categorical exceptions based on youth to the death penalty, and Myers is just over the legal age in Ohio. It is abundantly clear that the prosecution did not prove beyond a reasonable doubt that the aggravating circumstance outweighed the mitigating factors. Rather, Myers mitigating factors clearly outweighed any aggravating circumstance

allegedly presented. Applying the recent USSC analysis and holdings on youth and the death penalty to this case, as well as the developing studies and awareness of age and culpability as to brain development, Myers should not get a sentence of death, but a sentence of life without parole.

PROPOSITION OF LAW THREE

Evidenced obtained without a valid waiver of *Miranda* rights and after being in custody all night should be suppressed, which here it was not in violation of the 4th, 5th , 6th and 14th Amendments to the United States Constitution.

The record is clear that the statement made by Myers should have been suppressed for any one of three legal errors. First, Myers was in custody and spoken too long before *Miranda* warnings were given. Second, he was never even asked if he waived his rights and never did waive them. Third, under the totality of the circumstances the statements were involuntary.

In all criminal prosecutions the accused shall enjoy the right to have assistance of counsel. *United States Constitution, Sixth Amendment*. The right to counsel attaches when the accused is seized by law enforcement officers, and evidence flowing from an illegal stop, detention, or arrest cannot be used to convict the defendant. *State v. Chatton*, (1984) 11 Ohio St.3d 59, 463 NE 2d 1237. If an oral statement is obtained by law enforcement officers in violation of the guarantees of the Fifth, Sixth, and Fourteenth Amendments, it is inadmissible in court proceedings. *Chapman v. California* (1967), 386 US 18, 87 S.CT. 824, *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.

(1) Myers was in custody and spoken too long before Miranda warning were given

The Warren County Detective spoke to Myers for some time while he in the marked police car, in handcuffs, and then taken to a police station. Despite that, the detective testified that Myers was not in custody.

In order for an accused's statement to be admissible at trial, police must have given the accused a Miranda warning if there was a custodial interrogation. *Miranda v. Arizona* (1966), 384 U.S. 436. If that condition is established, the court can proceed to consider whether there has been an express or implied waiver of Miranda rights. *Id.* at 476. A custodial interrogation occurs when a person has been taken into custody or otherwise deprived of his freedom of action in any significant way and a law enforcement officer questions that person. *Id.*

Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. *Thompson v. Keohane*, 516 U.S. 99, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995), Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. *Id.* at 112. Accordingly, courts must "examine all of the circumstances surrounding the interrogation," including those that "would have affected how a reasonable person" in the suspect's position "would perceive his or her freedom to leave," *Yarborough v. Alvarado*, 541 U.S. 652, 653, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004). *Stansbury v. California*, 511 U.S. 318, 322, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994);

State v. Mason, 82 Ohio St .3d 144, 153, 1998–Ohio–370, 694 N.E.2d 932 (1998); *State v. Gumm*, 73 Ohio St.3d 413, 429, 1995–Ohio–24, 653 N.E.2d 253 (1995).

In the case at bar, the following factors weigh in finding that Appellant was in custody. Warren County Det. Wyatt said that after developing Austin Myers and Tim Mosley as suspects, a "be on the lookout" for them was issued, and it was thought that they were about an hour away in Clayton, OH. (T.p.12-29). Later that night, on January 28, 2104, at 1:14 am, the Clayton Police Sgt Garrison did in fact locate Myers for the Warren County Sherriffs. (T.p.77-79, 141-158). Myers was at Tim Mosley's friend's Logan Zennie's house. (T.p.77-79, 141-158). Sgt. Garrison informed Myers they were detaining him for questioning by Warren County. *Id.* He was placed in handcuffs and put in the back of their marked police car. *Id.* Officer Garrison said Myers had his hands cuffed behind his back, and testified that he was not free to leave. (T.p.148-158).

Warren County Det. Wyatt, *supra*, later that night took custody of Myers. (T.p.78-84). Incredibly, Det. Wyatt claimed at the motion to suppress hearing that Myers was not in custody, even though he was in a standard police car with Clayton police department emblems and light bar on the top and handcuffed behind his back. *Id.* He also claimed he was not aware that Myers was in handcuffs. *Id.* Wyatt admitted he had a conversation with Myers where had to open the door of the police cruiser to talk to him, but then claimed he "didn't notice" he was cuffed even though his hands were behind his back. (T.p.84). When Myers asked to go the bathroom, Det. Wyatt escorted him there and went into the restroom with him. (T.p.39-41, 100).

On cross, Det. Wyatt was if he would agree that a person handcuffed in the back of a police cruiser for over an hour and half having contact with a detective and

transported to a police department might think they were not free to leave. (T.p. 88-89). The detective flippantly responded that Myers could have asked (to get out of the handcuffs). (T.p. 89-96).

Det. Wyatt then "asked" Myers, while he was cuffed and in the cruiser, to come to the police station as they were trying to find Justin Back. (T.p.34). When they arrived the Clayton police station, Wyatt asked them to take off Myers handcuffs as he came "voluntarily." (T.p35). Detective Wyatt's position that Myers was free to leave bordered on the absurd. He was in cuffs for some time, in a police cruiser, then transported to the station and interrogated all night. He was in custody.

The simple fact is Myers was in custody and not initially advised of his *Miranda* rights. Prior to being advised, the detective spoke to him. When an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subject to questioning, the accused must be informed of his rights. *Miranda v. Arizona*, (1966) 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602. Not giving Mr. Myers his Miranda warnings and allowing him to talk was in error. It was not until later on in the early morning Mr. Myers was advised of his rights. Unless and until such warnings or a voluntarily executed waiver of rights has been demonstrated by the prosecution, no evidence obtained as a result of the interrogation can be used against the accused.

(2) There was never any waiver of rights

Mr. Myers never once waived his *Miranda* rights. It is undisputed that Det. Watt administered *Miranda* warnings. But he did not follow through and obtained an express, written waiver immediately before he interrogated him. He didn't even ask for a verbal waiver. The detective admitted on cross he did not ask Myers to waive his rights.

"While voluntary waiver and voluntary confession are separate issues, the same test is used to determine both, i.e., whether the action was voluntary under the totality of the circumstances." *State v. Clark* (1988), 38 Ohio St. 3d 252, 261, 527 N.E.2d 844.

Once they reached the police station, Det. Wyatt, Det. Barger, and Myers went into the police station conference room, and the interview began at 3:07 am and lasted approximately 45 minutes. (T.p.36-41). At the end of the interrogation, Myers asked to go the bathroom, and Det. Wyatt escorted him there and went into the restroom with him. (T.p.39-41, 100). Myers said he was tired, but Det. Wyatt continued to talk to him. (T.p.102-103). Finally, he drove him back to Tim Mosley's, but Myers was left in the police car,. (T.p. 41-46). Det. Wyatt then interviewed Logan Zennie, who told him that Tim Mosely said that he and Myers had stabbed and shot Justin Back, and dumped his body in the woods. (T.p.43-45).

At 7:42 am, Myers was again brought back to Police Department, again handcuffed, but now placed in holding cell. (T.p.46-47). Det. Wyatt advised Myers of his Miranda rights, but he never asked him if he waived them. (T.p. 49-50, 116). Further, Det. Wyatt admitted that he simply read the rights off a small card he kept in his wallet, rather than the forms used by the Warren County Sherriffs Department which was on a 8 ½ by 11 piece of paper. (T.p.59). He also admitted that when they interviewed Logan Zennie (at whose house Myer's had been located, supra), they used the large sheet of paper, had him initial next to the rights to show he understood, and had him sign the waiver. (T.p. 60-61).

In *State v. Hale*, the investigating officer initially questioned Hale in order to obtain his personal information before administering *Miranda* warnings. Only after

giving the *Miranda* warnings did Baird interrogate Hale about the murder. This court ruled that by just giving routine booking questions giving prior to a complete *Miranda* warnings, and obtaining an express waiver before asking Hale any questions about the crime and not, the officer complied fully with the relevant constitutional requirements. 892 N.E.2d 864, 119 Ohio St.3d 118, 2008-Ohio-3426 (Ohio 2008)

In *State v. Tresh*, the defendant contended that his "tiredness," and "cocaine high" impaired his capacity to make informed decisions during the interrogation and that the officers never once asked him if he wanted to stop and rest. This court found that Tresh read and signed a written waiver and indicated on several occasions that he understood his rights. 739 N.E.2d 749, 90 Ohio St.3d 460, 2001-Ohio-4 (Ohio 2001)

This case is easily distinguishable from *Hale* and *Tess*. Here, Mr. Myers was never given a *Miranda* form to read, was never given a *Miranda* form to initial next to each right to show he understood it, was never even asked if he waived his rights. He did not.

On cross examination, Det. Wyatt admitted that he never asked Mr. Myers if waived his rights. (T.p.129-130).

Defense Counsel: "Once again, you dint ask him for a waiver?"

Detective: "No"

Defense counsel: "Didn't ask him to sign waiver?"

Detective: "No."

Counsel: "Why not?"

Detective: "I didn't have one with me..." (T.p129-130).

The detective also conceded that in his detailed report, he never wrote that he waived his right to attorney. (T.p. 132-133). In the seminal case of *Miranda v. Arizona*,

the mere fact that an interrogated defendant signed a statement with a typed in clause sitting he had full knowledge of his legal rights did not approach the knowing and intelligent waiver required to relinquish his right to counsel. (1966) 384 U.S 4346, 86 S.Ct. 1602. Here, the defendant was never even asked of he waived his rights, much less was he given the opportunity to sign a waiver. It is true the officer read the rights off a small card kept in his wallet. But regardless of the adequacy of the initial *Miranda* warnings, there was never a voluntary waiver of those rights.

Mr. Myers was denied his right to counsel

It is axiomatic that "an accused who requests an attorney, 'having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.' " *Minnick v. Mississippi* (1990), 498 U.S. 146, 150, 111 S.Ct.486, 489, 112 L.Ed.2d 489, 496, quoting *Edwards v. Arizona* (1981), 451 U.S. 477, 484-485, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378, 386; see, also, *State v. Dunlap* (1995), 73 Ohio St.3d 308, 313, 652 N.E.2d 988, 994; *State v. Knuckles* (1992), 65 Ohio St. 3d 494, 605 N.E.2d 54, paragraph one of the syllabus.

In *Knuckles*, *supra*, this court noted that the threshold inquiry is " 'whether the accused actually invoked his right to counsel.' " Id. at 496, 605 N.E.2d at 55, quoting *Smith v. Illinois* (1984), 469 U.S. 91, 95, 105 S.Ct. 490, 492-493, 83 L.Ed.2d 488, 493-494. After several interrogation sessions where Myers never actually was asked if he waived his rights or waived them, Det. Wyatt said that they started another interrogation, but then Myers asked for an attorney. (T.p.50, 116). He was never given one. Then Det.

Wyatt said at 9:27 am and 10:02 AM Myers tapped on the glass and talked. (T.p.51-57, 120-123).

No where in record at any time was Myers given counsel during the interrogation process, despite asking for one.

Under the Totality of the circumstances, Myers statements were involuntary

Myers was in custody for a long period of time, all night and into the late morning. He was in handcuffs and at a police station. At various times he was chained to a bench. He never had counsel, and never waived his rights. Under the totality of the circumstances, his statements were involuntary.

To use an accused's statements against themselves, the state needed to establish that the statements were made voluntarily. *Miranda v. Arizona*,(1966) 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602, *Escobedo v. Illinois*, (1964) 378 US 478, 12 L Ed 2d 977, 84 S Ct 1758, *Lego V. Toomey*, (1972) 404 US 477, 30 L Ed 2d 618, 92 S Ct 619. The burden is particularly heavy where the confession is made out of the presence of counsel. *State v. Cowans*, (1967) 10 Ohio St 2d 96, 39 Ohio Ops 2d 97, 227 NE2d 201. Whether the action was voluntary is determined under the totality of the circumstances." *State v. Clark* (1988), 38 Ohio St. 3d 252, 262, 527 N.E. 2d 844, 854. Evidence of use by the interrogators of an inherently coercive tactic (e.g., physical abuse, threats, deprivation of food, medical treatment, or sleep) will trigger the totality of the circumstances analysis." *Colorado v. Connelly* (1986), 479 U.S. 157, 107 S.cT.515, 93 L.Ed.2d 473.

On January 28, 2104, at 1:14 am, Clayton Police placed Myers in handcuffs and put in the back of their police car, and he was not free to leave. (T.p.77-79, 148-158).Warren County Detectives took him to the police station. (T.p.34, 78-84). The interview began at 3:07 am and lasted approximately 45 minutes. (T.p.36-41). At the end

of the interrogation, Myers asked to go the bathroom, and Det. Wyatt escorted him there and went into the restroom with him. (T.p.39-41, 100). Myers said he was tired, but Det. Wyatt continued to talk to him. (T.p.102-103). He drove Myers back to Tim Mosley's home, but he was left in the police car as he interviewed Logan Zennie. (T.p. 41-46). At 7:42 am, Myers was again brought back to Police Department, again handcuffed, but now placed in holding cell. (T.p.46-47). Det. Wyatt advised Myers of his Miranda rights, but he never asked him if he waived them. (T.p. 49-50, 116). Further, Det. Wyatt admitted that he simply read the rights off a small card he kept in his wallet, rather than the forms used by the Warren County Sherriff's Department which was on a 8 ½ by 11 piece of paper. (T.p.59). They started another interrogation, but then Myers asked for an attorney. (T.p.50, 116).

In *State v. Foust*, the police never subjected Foust to threats or physical abuse or deprived him of food, sleep, or medical treatment. Nor did the police make any promises to Foust in return for his cooperation. Foust was in police custody for only two and one-half hours prior to being interviewed. Furthermore, the interview lasted only two hours. Second, Foust appeared to be mentally alert and not under the influence of drugs or alcohol at the time of the interview. During the police interview, Foust stated that he had completed a GED course and had the highest score in his class. Thus, the court find no evidence of police coercion or overreaching showing that Foust's confession was involuntary. 105 Ohio St.3d 137 (Ohio 2004).

This case is distinguishable from *Foust* in that Myers was deprived of food and sleep. He was a young person with no record and no experience with police interrogation. He was arrested at 1AM, then by around 10 AM the next morning he was talking, after

having not waiving his *Miranda* rights and requesting counsel. If an individual's will was overborne or if his confession was not the product of a rational intellect and free will, his confession is inadmissible. *Townsend v. Sain* (1963), 372 US 293, 83 S.Ct. 745.

Mr. Myers was in custody while being interrogated from all night. The "totality of the circumstances" surrounding Myers statement as argued extensively above shows that he was never asked if he waived is rights, he did not voluntarily waived his Miranda rights regardless, and that his confession was unknowingly, unintelligently, and involuntarily made. Mr. Myers motion to suppress should have been granted. (8/5/14 T.p.8, defense motion #57). As a result of not being granted, his constitutional rights were violated and he did not receive a fair trial.

PROPOSITION OF LAW FOUR

The trial court erred to Myers' prejudice by permitting the State to engage in misconduct by failing to disclose discovery evidence in a timely manner, and failing to disclose *Brady* material evidence in discovery which deprived him of his due process right to a fair trial under the Fifth, Sixth, Eighth and Fourteenth under the United States Constitution and Article One,§§2, 9, and 16 of the Constitution of the State of Ohio.

The state failed to provide timely discovery, which substantially impaired Myers of a fair opportunity to defend himself at trial. Criminal Rule 16 states that upon proper written demand for discovery the prosecutor shall disclose and continue to disclose evidence including relevant written or recorded statements made by the defendant. In order to protect an accused's due process rights, the prosecutor also has a duty to provide exculpatory evidence to the defendant so they can prepare their defense.

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963); *State v. Johnston,* 39 Ohio St.3d 48, 529 N.E.2d 898 (1988); *State v. Moore,* 40 Ohio St.3d 63 (1988).

This did not occur. The law is well settled that the prosecution's withholding of evidence favorable to the accused violates his due process right to a fair trial where the evidence, is material to guilt or punishment; regardless of the prosecution intention to disclose or not disclose the information. When the State fails to abide by Criminal Rule 16, this Court has taken a strong stand in remedying the situation and has laid out the test for imposing sanctions upon the prosecution for egregious discovery violations by stating that if the record demonstrates: (1) the prosecutor's failure to disclose was willful, (2) that foreknowledge of the defendant's statement would have benefited the accused in the preparation of his defense, or that the accused was prejudiced by admission of the statement, the trial court can, in essence, exclude the evidence from being admitted. *State v. Parsons,* 6 Ohio St.3d 442, 453 N.E.2d 689 (1983) and *State v. Joseph*, 73 Ohio St.3d 450, 653 N.E.2d 285 (1995).

In the present case, the prosecutor repeatedly failed to provide the defense with essential discovery upon the eve of trial or actually during trial. This was the case despite the fact that the State, including law enforcement, had had the evidence since well before trial. (T.p. 498) The State never indicated that it had any *Brady* exculpatory material before trial, which was incorrect and unfair. This was also evidenced by their very late disclosure of their intent to call co-defendant, Timothy Mosley, as a star witness. (6/19/14,T.p.64) (Vol I T.p. 4-48). This was favorable evidence because Mosley had no credibility as a witness due to his receiving a plea bargain with the State on the eve of trial which took the possibility of the death penalty off the table and instead

provided for life imprisonment without the possibility of parole in exchange for testifying against Austin Myers. Moreover, it was totally improper for the State to provide the defense with a purported planning of murder diary/journal allegedly authored by Mosley just prior to Back's death, but not provided to the defense until the night before the trial. (T.p. 16-18). The defense indicated they had been provided a photo of the journal, but not the actual journal. (T.p. 31-38). The prosecutor admitted the journal was only provided to the defense the eve of trial and morning of. (T.p. 21-28).

All of that evidence was material to the defense. Evidence is considered material if there is a reasonable probability that had the State disclosed the evidence to the defense, the result of the trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *See Johnston, supra.* It is important to note that a showing of materiality does not require the defendant to demonstrate that disclosure of the evidence would have resulted in acquittal, but rather, absent the exculpatory evidence the defendant did not receive a fair trial. *Kyles v. Whitley,* 514 U.S. 419, 150 S.Ct. 1555, 131 L.Ed.2d 490 (1995). (Holding that although the prosecution was not aware of the undisclosed evidence, it was still subject to the *Brady* rule since it was in the hands of the police, and noting materiality is defined in terms of suppressed evidence considered collectively, not item by item.). All the defendant is required to show is that the favorable evidence puts the case in a different light so as to undermine confidence in the outcome. Moreover, once an appellate court has found a due process error in the State's failure to disclose material evidence favorable to the accused, no need exists for further harmless error review.

The incomplete and late discovery disclosure by the State consisted of providing on September 4, 2014, interviews of key witnesses, a detective's narrative, photographs, coroner's exhibits of the alleged victim; on September 10, two additional undisclosed witnesses, compact discs and photos; on September 15, 2014, a first-time provided compact disc of co-defendant Mosley; on September 16, 2014, first-time provided jail cell recordings of Austin Myers, and then on the Friday eve of the Monday trial, the State provided large amounts of other important discovery documents that defense counsel did not see until the night before the trial began. (T.p. 8-15) . This prejudiced Myers and his defense team because such late disclosure eliminated any meaningful possibility that they would have investigated or interviewed Mosley with their own investigator to challenge the veracity of the diary contents. It was simply trial by ambush.

The defense was especially prejudiced because the State's previous witness list which was given months before the trial date did not include co-defendant Mosley. Only after months of litigation was Mosley's name provided, a 6-hour compact disc of his statement made to law enforcement provided to the defense who had had virtually no time to listen to the CD, nor prepare for Mosley's cross examination. Myers' jail recording also was not provided to the defense until the eve of trial, once again depriving them of any meaningful ability to prepare an effective or meaningful defense. The defense strenuously objected to the very late discovery and asked for a reasonable continuance of the trial in order to investigate the late discovery and prepare their defense. (T.p. 4-15, 35) It is abundantly clear that the State knew they had the referenced co-defendant as a witness, co-defendant's statement, co-defendant's journal and Myers' purported jailhouse audio recording and this their late disclosure was willful

and knowingly done in order to gain the ultimate advantage to win the trial. This obviously was a willful prosecutorial violation of Crim.R. 16, *Brady v. Maryland*, and met the first test of prosecutor's willful denial of discovery. Ohio Supreme Court cases of *State v. Parsons* (1983), 6 Ohio St.3d 442, 453 N.E.2d 689, *State v. Joseph* (1995), 73 Ohio St.3d 450, 653 N.E.2d 285. The State's discovery violation also violated fundamental fairness and thereby constituted a violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. *Bugh v. Mitchell* (6th Cir. 2003), 329 F.3d 496.

As to the second test of *Parsons* and *Joseph*, co-defendant Mosley's testimony, statement and journal were of critical importance in convicting Myers with a death penalty specification because Mosley's testimony allegedly detailed the prior intent, design calculation and planning for the aggravated robbery and murder of Justin Back. The State's failure to disclose this evidence until the last possible minute regarding Mosley's be called as a witness against Myers, his statement to impeach his credibility on cross and last-minute disclosure and provision of Mosley's alleged planning diary prejudiced the very core of Myers' due process rights to a fair trial. Timely disclosure of the evidence would have aided the defense. Again, it was trial by ambush by the State who played by any rules it wanted in order to obtain a death penalty conviction of 19 year-old Austin Myers.

The importance and critical nature of the last-minute discovery dump on the defense meant that the defense could not effectively prepare or cross examine co-defendant turned State's witness, Mosley, nor investigate or cross examine Mosley on his purported journal that the prosecution argued proved prior calculation, design and

premeditated planning of Justin Back concerning the death penalty murder specification. Myers was clearly prejudiced by this Brady discovery violation by not being given adequate time to review the evidence and investigate on his own before trial where he received the ultimate, harshest penalty possible, his death sentence

In sum, the discovery violation violated fundamental fairness and thereby constituted a violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. *Bugh v. Mitchell*, 329 F.3d 496 (6th Cir. 2003). The prosecutorial discovery violation was clear misconduct and was made abundantly clear to the trial court on the morning of trial, when the defense objected to the late disclosure and asked for a reasonable continuance of the trial for them to prepare. (T.p. 4-38). The defense request for a continuance should have been granted (argued in a different proposition of law) but since it was not then the late discovery evidence should have been excluded as a sanction against the State. Based on this ground in and of itself, Myers' conviction and death penalty sentence should be reversed.

PROPOSITION OF LAW FIVE

The court erred by and violated Due Process of Law when it denied the defense's ability to be prepared for trial by denying the request for continuance of trial. U.S. Const. amends. V, VI, VIII, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16, and 20.

The trial court violated Due Process when the court failed to give the defense time to prepare for trial. The state provided the defense with a large amount of material, important discovery several days before trial, the night before trial, and the morning of trial, which is discussed at length in the prior proposition of law, *supra*. But when defense counsel requested a continuance for trial to review the material, the court denied the

request. The court in denying the continuance to review the discovery abused its discretion, violated the Due Process rights of Mr. Myers, and materially affected the outcome of the trial.

" 'The grant or denial of a continuance is a matter [that] is entrusted to the broad, sound discretion of the trial judge.' " *State v. Jones* (2001), 91 Ohio St.3d 335, 342, 744 N.E.2d 1163, quoting *State v. Unger* (1981), 67 Ohio St.2d 65, 67, 21 O.O.3d 41, 423 N.E.2d 1078. An abuse of discretion is " `more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.' "*Blakemore v. Blakemore* (1983), 20 Ohio St. 3d 217, 219, 20 N.E. 2d 140. In evaluating a motion for a continuance, "[s]everal factors can be considered: the length of delay requested, prior continuances, inconvenience, the reasons for the delay, whether the defendant contributed to the delay, and other relevant factors." *State v. Landrum*, 53 Ohio St.3d at 115, 559 N.E.2d 710. A defendant is entitled to effectively confront and cross-examine the State's witnesses as provided for by the Ohio and Federal Constitutions. U.S. Const. amends. V, VI, VIII, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16, and 20.

Providing Mr. Myers with the opportunity to effectively prepare for cross-examination of the State's witnesses was all the more critical here because this is a capital case.

In State v. Ahmed, the state provided defense counsel with numerous witness the day before trial, but trial court's denial of a continuance did not result in ineffective assistance or reflect an abuse of discretion, as the list of names of potential witnesses was just that, a list of names. No phone numbers or addresses were provided, only general locations. 103 Ohio St.3d 27, 2004-Ohio-4190.

This case is distinguishable from *Ahmed,* as here the discovery went beyond a mere general list of names but was specific and important. The night before trial started, the state sent defense counsel emails of photographs of a journal found in co-defendant (and now state's witness) Tim Mosley's bedroom that allegedly could prove prior calculation and design element. (T.p16-18). Defense counsel said they had been provided photographs of the journal, but not the actual journal. (T.p.31-38). Counsel explained that a that getting the journal and photos the night before trial was a "huge issue," as if there was no prior calculation and design then there was no death penalty. (T.p.34). The Warren County Prosecutor admitted that as to the co-defendant's journal they wanted to offer it to show prior calculation and design on the part of Mr. Myers. (T.p.21-28).

Incredibly, despite this most important evidence not being reviewed, the court denied the defendant's continuance, in violation of Due Process. Indeed, instead of granting a continuance, the court said there would be an off the record "chat about whether or not I'm going to grant this (continuance) motion, so we don't need a court reporter." (T.p.40-43). The court then denied the continuance for trial, but claimed it had properly preserved the effectiveness of Mr. Myers attorneys and his right to a fair trial. (T.p.40-48). This was in error and was a significant violation of Due Process.

As the United States Supreme Court's jurisprudence has made evident, death is different; for that reason more process is due, not less. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). 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, 288 (1998) (O'Connor, Souter, Ginsberg,

and Breyer, J.J., concurring); id. at 291 (Stevens, J., dissenting) (recognizing a distinct, continuing, life interest protected by the Due Process Clause in capital cases). All measures must be taken to prevent arbitrary, cruel, and unusual results in a capital trial. *See Lockett*, 438 U.S. at 604; *Woodson*, 428 U.S. at 304-05.

A continuance should have been granted. As it was not, Mr. Myers did not receive a fair trial. Defense counsel pleaded with the court that without a continuance to investigate the new material just provided, they would be providing ineffective assistance of counsel. They even said that Mr. Myers might as well represent himself. (T.p.4,35). Counsel also noted that this new discovery had not even been filed with the Warren County Clerk's Office. (T.p.8). The Warren County Prosecutor conceded that the material only provided this morning. (T.p.21-28).

It is a patent error in a death penalty case that when the state provides the defense with important and not simply cumulative or minor discovery the day of trial, and the defense asks for a continuance and the court denies it, that Due Process has been violated.

PROPOSITION OF LAW SIX

The acts and omissions of trial counsel deprived the defendant-appellant of a fair and reliable result in both phases of a capital trial. U.S. Const. amends. V,VI, VIII, and XIV; Ohio Const. art. I § 5, 10.

Mr. Myers received ineffective assistance from his trial counsel in four critical instances that prejudiced the outcome of the case. First and most importantly, defense counsel received voluminous and important discovery immediately before trial, which they had not had a chance to properly review and incorporate into their case. As a result, defense counsel were not prepared for trial, and even admitted they would be ineffective

if the trial went forward without a continuance. Second, they failed to cross-examine a large amount of the state's witnesses. Third, they failed to do an opening statement, told the jurors they would present a defense case and did not. Fourth, at the mitigation trial they failed to call an expert to testify as to Myer's mental conditions, his family background, and how those were mitigating factors against death.

The Sixth Amendment to the United States Constitution provides that in all crimes and prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense. A defendant must meet a two prong test to prevail on an ineffective assistance of counsel claim: first, that counsels performance was deficient, and second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984), *State v. Ballew* (1996) 76 Ohio St.3d 244, *State v. Bradley* (1989), 42 Ohio St. 3d 136, 142, 538 N.E.2d 373. In any case presenting an ineffective claim, the performance inquiry must be whether counsel's assistance was reasonable under the circumstances. *Id.*

(1) Ineffective by admission - Counsel could not review newly provided important discovery.

At the threshold, counsel provided ineffective assistance by their own admission, as they were unable to properly review the discovery just provided at trial. (T.p.4, 35). The state provided the defense with voluminous, but also critical, discovery not only two weeks prior to trial, but the Friday before trial, and the night before trial, and even the morning of trial. Counsel said without a continuance to review and prepare the case in light of the new discovery, they would provide ineffective assistance. *Id.*

The graveaman of this ineffectiveness was that defense counsel was unprepared for trial, as they had literally just received a large amount of discovery. The Ohio Rules of Professional Conduct are clear as to thoroughness and preparation:

> "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem....It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake... OH. R. Prof. Conduct 1.1(5).

Counsel was not prepared to deal with the discovery provided at trial, which was not just voluminous but was important and meaningful to the outcome of the case. This importance and meaningfulness was particularly true as to counsel being unable to effectively cross-examine the co-defendant-turned-state's witness Tim Mosley, and in dealing with his writing journal that the state argued showed prior calculation and design to the death penalty murder specification.

In *State v. Spivey*, this court ruled that defense counsel's alleged unfamiliarity with certain items of evidence suggests deficient performance, but did not rise to the level of ineffective assistance of counsel as a review of the record revealed that the unfamiliar items to trial counsel were ancillary to the overall case. 2013-Ohio-851, 9-12-27.

This case is distinguishable from *Spivey* in that the discovery in that case was merely ancillary, while the discovery here was important. A review of when and what discovery was provided and not properly reviewed shows this. Specifically, on September 4 the state provided interviews of witnesses, a narrative from the detective, photographs, and exhibits from the coroner; on September 10 they provided two additional witnesses, cds, and photographs; on September 15, they gave a cd of an interview with co-defendant turned state's witness Mr. Mosley, whom the state offered a

plea deal where in return for testimony he would receive life without parole instead of the death penalty; on September 16 they gave jail calls from Austin Myers; and then on September 19 (the Friday before trial) they provided another large amount of documents. (T.p.8-15).

Crucially, while the state's prior witness list did not include co-defendant Tim Mosley, now on the day of trial they were going to use him as a witness against Mr. Myer. (T.p.4-15). The recorded interview of Mosley provided by the state was approximately 6 hours long. *Id.* Defense counsel explained that trial was starting but, "I don't have (Mosley's) statement, don't have his cd, (and) don't have transcripts of his statements to the detective." (T.p.15). They had not even heard the long audio recording of Mosley. Defense counsel also informed the court that apparently Mosley had made over 400 phone calls in the time he was incarcerated, many of which were over 15 minutes long, which they also had not reviewed. (T.p.4-15).

In fact, lead counsel even advised the court that:

> "...By giving it (discovery) to us the night before trial, with no opportunity to do anything with it and we're supposed to start this case today, puts us in a huge whole. *It makes us ineffective. We might as well just walk out of the courtroom and let him (Mr. Myers) try the case on his own.*" (T.p.35.) (*italics* added)

Further, the night before the trial started the state sent defense counsel emails of photographs of a journal found in co-defendant (and now state's witness) Tim Mosley's bedroom, which allegedly could prove the crucial prior calculation and design element of death penalty murder. (T.p16-18). Defense counsel again said that they would be ineffective (if the continuance was not granted), as even if the state didn't use the

information or the journal, they had not reviewed or analyzed it for cross examination purposes. (Id.).

It is clear that large and important portions of discovery were provided at the 11th hour, including items related to co-defendant Mosley and his notebook, which were among the most important evidence the state put on in its case-in-chief. But this was the very material that defense counsel did not get to properly and thoroughly review. Defense counsel told the court that they would be ineffective if the trial went forward without an opportunity to do so. It did go forward and they were right. Mr. Meyers received ineffective assistance due to lack of preparation and thoroughness as to discovery.

(2) Trial Counsel failed to cross-examine numerous important witnesses

Defense counsel failed to cross numerous material witness, and by failing to ask appropriate questions did not to raise doubts as to the credulity of the prosecutions witness' and it's theory of the case to the jury.

Admittedly, this court has recognized that "trial counsel need not cross-examine every witness * * *. The strategic decision not to cross-examine witnesses is firmly committed to trial counsel's judgment.' " *State v. Campbell* (2000), 90 Ohio St.3d 320, 738 N.E.2d 1178, quoting *State v. Otte* (1996), 74 Ohio St.3d 555, 660 N.E.2d 711.

However, where trial counsel chooses not to cross-examine a large number of the prosecution's witnesses, it has been declared deficient performance. See *Blackburn v. Foltz*, 828 F2d 1`177, 1183 (6th Cir. 1987), *Groseclose v. Bell*, 130 F. 3d. 1161 (6th Cir. 1997).

In *Groseclose v. Bell*, the defendant's trial counsel failed "to conduct any meaningful adversarial challenge" and the defendant was unconstitutionally denied effective assistance of counsel under the Sixth Amendment in a capital case. 130 F. 3d.

1161 (6th Cir. 1997). In reaching this conclusion, the court found that that among other things defense counsel failed to conduct any meaningful adversarial challenge, as shown by his failure to cross-examine more than half of the prosecution's witnesses, to object to any evidence, to put on any defense witnesses, to make a closing argument, and, at sentencing, to put on any meaningful mitigation evidence.

This case is analogous to *Groseclose, supra*, as here defense counsel failed to cross-examine an incredible amount of witnesses who were important to proving the state's case. The failure to challenge the states case by defense counsel resulted in practically no adversarial testing. This included an incredible portion of the states' witness where:

- there was no cross examination of the criminalist/evidence technician who responded to the house and collected evidence, including blood droplets near the refrigerator and household cleaner odor near a rocking chair, and submitted carpet samples to the lab. (T.p.849-877).

-there was no cross examination of Andrew Raymond, the neighbor to Mark and Sandy Cates, who noticed that on Tuesday January 28 a vehicle was in their their driveway around 11 am, specifically a silver Cavalier with a broken back window and red duct tape. (T.p.917-930).

- there was no cross examination of Donna Hubbs, who worked as a cashier at Hometown Marketplace. (T.p. 930-952). She said that on January 27, 2014, two males came in to buy three boxes of cold medicine and bug wash, but their credit card didn't work. *Id.* She said they said their family was sick. *Id.*

-there was no cross examination of Gregory Lynch, auto salesman, who lived near Mark and Sandy Cates, and on Tuesday, Jan 28, 2014, said there was snow on ground and it was 20 below zero when he went to his car at 8 am for work. (T.p.953-973). He saw 2 young men walking without heavy winter coats and he asked if they needed help or a ride and they declined. Id. He got in his own car, and in his rear view mirror saw they jumped a ditch and backtracked toward his home. He thought they were casing his home, and did a u-turn. He saw a silver Cavalier with busted rear window and wrote down license number . *Id.*

- there was no cross examination of Janice Peters, clerk at Mad Anthony Curiosity Shop, who said that on Tuesday January 28, 2014, two individuals came in and discussed knives, coins and the military. (T.p. 986-994). That night she watched the news and saw photos of the individuals. *Id.*

- there was no cross examination of Loren Patrick, owner of Pat's Place who sold sell gas, coffee, and donuts. (T.p. 996-1006). Video surveillance system showed that on January 28, 2014, they bought $7 in gas. *Id.*

- there was no cross examination of Homer Ramby, a volunteer fireman, who installed surveillance cameras at the intersection of Corwin Road, and police asked him to play 1:10 pm and 2:13 pm on the afternoon of January 28, 2014. (T.p. 1016-1022).

- there was no cross examination of Det. Brandi Carter who discovered one of the victim's missing laptop in a dumpster, then went to dollar General and discovered the defendants purchased gloves, ammonia, and septic enzymes. (T.p. 1023-1033).

-there was also no cross of numerous other witness of smaller matters, including Erin Snowden, teacher at Northmont High School, who received a letter from Myers (T.p. 1321-1325); Dustin Koontz, a UPS driver who discovered the mobile phone wrapped in red tape which was Justin Back's (T.p.1327); manager of Lowe's who identified video showing purchase of steel cable (T.p.1333-1340); Alecia Detrick from Dollar General who identified video surveillance showing the purchase of ammonia and gloves (T.p. 1349-1350); and finally no questions for Sandra Cates, decedent's mother. (T.p.1555-1573).

The prejudice resulting from Mr. Myers trial counsel failure to cross examine or do any adversarial testing of so many witnesses is patent. It is quite clear that cross examination by a reasonably competent attorney would have created a reasonable probability that, in the absence of counsel incompetence, the jury would have had a reasonable doubt respecting Mr. Myer's possible guilt.

(3) Trial counsel failed to Give an Opening Statement, and then counsel failed to put on a defense case in chief after telling the jury they would.

At the very beginning of the trial, defense counsel did not give an opening statement, but instead "reserved any opening until we begin our case." (T.p.781). But then after the state rested, they put in no case, no evidence, nothing.

Opening statements have the practical purpose of directing the attention of the jurors to the nuances of the proposed evidence in such a way as to make the usual piecemeal presentation of testimony more understandable as it is received. . . . *United States v. Stanfield*, 521 F.2d 1122 (9th Cir. 1975). There are no unimportant stages of court proceedings that have as their object the taking of the life of a human being. *Shields*

v. U.S. (1927), 273 U.S. 583, *Geders v. U.S.* (1976), 425 U.S. 80; *Ferguson v. Georgia* (1961), 365 U.S. 570; *Faretta v. California* (1975) 422 U.S. 806; *Snyder v. Massachusetts* (1934), 291 U.S. 97.

Indeed, Mr. Myers received ineffective assistance by defense counsel's failure to give opening statements because as a result of not doing so, they failed to give the jury a clear picture of the case, including its major events, participants, instrumentalities, disputes and contentions. The lack of opening also failed to arouse the interest of the jurors in a general theory of the defense. By not doing an opening defense counsel failed to build rapport with the jurors. Most importantly, by failing to do an opening statement, defense counsel passed up the opportunity to alert jurors that there will be two sides to the case so they do not make up their minds too soon. The entire trial the jury heard the evidence with only the state's opening statement to provide a roadmap.

After the state rested, defense counsel said they were not calling any witnesses, that they would rest, and did not give an opening statement. (T.p. 1644).

"Ineffective assistance" does not exist merely because counsel failed 'to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it.'" *Smith v. Murray*, 477 U.S. 527, 535, 106 S.CT.2661 (1986). "Reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial. *State v. Waddy*, 63 Ohio St. 3d 424 433 (1992), superseded by constitutional amendment on other grounds as recognized by *State v. Smith*,80 Ohio St. 3d 89,103 (1997).

Obviously the entire burden of the case was on the state, and the defense was not required to do anything. But this was a death penalty, and by not putting on a case after telling the jury they would, there was a reasonable probability the jury would find Myers

guilty as they only heard the state's case, and were expecting to a defense case as counsel told them they would be hearing one. This cost them credibility with the jury and created the perception of guilty.

In *State v. Foust*, this court said it was not deficient when counsel failed to introduce any evidence to support their assertion that the defendant had asked the police to let him speak to an attorney, and that Counsel's decision "fell within the realm of trial strategy." 105 Ohio St. 3d at 150, *see also State v. Gross*, 97 Ohio St. 3d 121, 2002.

But this case here goes beyond *Foust*, as it went beyond trial strategy, but rather went into the realm of credibility with the jury. This was not a simple matter of defense counsel deciding not to ask the next question or not to take a hard line approach in cross examination and instead use a soft one. Rather, defense counsel told the jury at the beginning of the case, as in there would be a defense case in chief, and waived opening statements until that time. They were waiting to hear the as-promised defense case after the state finished theirs, except there was no defense case. This is beyond trial strategy and goes to ineffectiveness. Counsel asserting they would then not doing it lost the jury.

(4) Mitigation – trial counsel failed to put on any expert testimony for Myers

Counsel's performance in mitigation was inadequate. They simply put on 3 family members, and failed to present to the jury for consideration a psychologist, psychiatrist, or other expert on behalf of Myers in death penalty mitigation.

The proper test to demonstrate prejudice is whether there is a reasonable probability a single juror would have reached a different conclusion. *Wiggin v. Smith*, 539 U.S. 510, 537, (2003). This test applies to the trial phase as well as the sentencing phase in a capital trial. *Romonez v. Berghuis*, 490 F.3d 482, 491(6th Cir. 2007).

The only testimony defense counsel put on was mother, father, and a brother. During mother's testimony, mother said she and Myers father had problems in their marriage, and she had an affair and became pregnant with a co-workers child during the marriage. (T.p.36-37). Mother told Myers that the baby was from another man. She said Austin changed after that and his grades suffered. (T.p.38-44). He ran away from home, and he had been cutting on his arms, and had shot his own legs with a pellet gun. Id. Myers was placed in the Kettering Youth Services hospital, was given prescription medicine including Prozac and Resperdol, and was assigned a psychologist and psychiatrist. Id. "[i]n Ohio, a solitary juror may prevent a death penalty recommendation." *State v. Brooks* (1996) 75 Ohio St.3d 148, 162, 661 N.E.2d 1030, 1042. If a jury cannot agree on a verdict of life or death, no retrial is necessary. The judge simply imposes a life sentence. *State v. Springer* (1992), 63 Ohio St.3d 167, 586 N.E.2d 96, syllabus.

Incredibly, defense counsel did not put any of the professionals involved with Myers from Kettering. Nor did he put on an independent expert to discuss the cutting and what that means. And they put on no expert as to the development of the brain in youth and how that might affect the decision making process. On January 4, 2014, shortly before this incident, Myers turned 19 years old. (T.p.93-97).

During closing arguments in the mitigation phase, defense counsel said to the jury, "We could have brought in a psychologist in here to say they examined Myers, he did this, he has that diagnosis. (T.p.128). Then counsel said that for him to bring in a psychologist t would be kin to offering excuse for what happened, and "I'm not going to

do that." (T.p.129). He also admitted that they could have brought in dozens of other witness' on Myers' behalf. (T.p.129).

Any one of these topics could have swayed one – just one juror that death was off the table. There is a reasonable probability that one or more jurors would not have recommended the death penalty if trial counsel's performance had not been ineffective.

Conclusion: Mr. Myers was prejudiced by Defense Counsel's deficient performance

There is no question that counsel's performance was deficient. The record as examined above shows that the kind of adversarial testing required in a death penalty did not occur.

"The right to effective assistance of counsel is…the right of the accused to require the prosecutions cases to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *United States v. Cronic*, 466 U.S. 654, (1984).

Defense counsel was admittedly not prepared for trial due to the complete lack of review of the late hour discovery dump. They even told the court they would be ineffective and Mr. Myers might as well represent himself. Then they failed to do an opening statement, and compounded that error with a promise of putting on a defense case in chief, which they then did not. They failed to portion the majority of the state's witnesses. Finally, in mitigation they called no professional to comment on any one of several topics that might have swayed just one juror for no death, be it brain development in youth and how that affects decision making, any of treating physicians over cutting

and shooting himself in the legs, or any independent expert as to the same. Without these errors, there was a reasonable probability that the outcome would have been different.

Looking at the totality of the circumstances, counsel's deficient performance so undermined the proper functioning of the adversarial process that the trial cannot have produced a just result.

This court should sustain this proposition of law. It should vacate the convictions and remand the matter for new trial. In the alternative, it should vacate the death sentence and either impose life without parole or remand for a new sentencing hearing.

PROPOSITION OF LAW SEVEN

The court erred by and violated Due Process of Law when it denied the appointment of an expert for the defense. U.S. Const. amends. V, VI, VIII, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16, and 20.

The court violated Mr. Myers' Due Process rights when it denied his request for a handwriting expert. The state provided the defense with what was purported to be a journal from co-defendant Mosley. Defense counsel argued they wanted to get a handwriting expert to look at it, as it as it may be exculpatory. (T.p.37-38). Defense counsel argued that the state gets to appoint experts, and the defense asked for same thing too. (T.p.38, 1035-1038).

But the court denied the pre-trial request for a handwriting expert. (T.p. 40-48). Then during trial, the court held an evidentiary hearing outside the jury's presence where co-defendant Tim Mosley was brought in under oath.(T.p.1043-1045). The court noted that state's exhibit 424 was one page of writing, and then asked Mosley, "Tell me the circumstances under which you wrote this?" (T.p.1046). Mosley said he and Myers were

planning to kill Justin Back, and he didn't recall what happened to the journal's missing pages. (T.p.1046).

As a matter of due process, indigent defendants are entitled to receive the "raw materials" and the " 'basic tools of an adequate defense,' " which may include provision of expert assistance. *Ake v. Oklahoma* (1985), 470 U.S. 68, 77, 105 S.Ct. 1087, 1093, 84 L.Ed.2d 53, 62 (quoting *Britt v. North Carolina* [1971], 404 U.S. 226, 227, 92 S.Ct. 431, 433-434, 30 L.Ed.2d 400, 403). (holding that provision of an expert to a defendant was required when necessary to prepare an effective defense based on his mental condition, when his sanity at the time is seriously in question.). While *Ake* involved the provision of expert psychiatric assistance, now the case is generally recognized to support the proposition that due process may require that a criminal defendant be provided other types of expert assistance when necessary to present an adequate defense. *State v. Mason*, 82 Ohio St. 3d. 144, 1998-Ohio-370 -694 N.E.2d 932.

It is appropriate to consider three factors in determining whether the provision of an expert witness is required: (1) the effect on the defendant's private interest in the accuracy of the trial if the requested service is not provided, (2) the burden on the government's interest if the service is provided, and (3) the probable value of the additional service and the risk of error in the proceeding if the assistance is not provided. *Ake* at 78-79, 105 S.Ct. at 1093-1094, 84 L.Ed.2d at 63.

Further, Due Process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution, requires that an indigent criminal defendant be provided funds to obtain expert assistance at state expense only where the trial court finds, in the exercise of a sound discretion, that the

defendant has made a particularized showing (1) of a reasonable probability that the requested expert would aid in his defense, and (2) that denial of the requested expert assistance would result in an unfair trial. *State v. Mason*, 82 Ohio St .3d 144, 153, 1998–Ohio– 370, 694 N.E.2d 932 (1998), ***State v. Broom*** (1988), 40 Ohio St.3d 277, 283, 533 N.E.2d 682, 691

Finally, as a matter of statutory law, trial judges must grant funds in aggravated murder cases for investigative services and experts when "reasonably necessary for the proper representation" of indigent defendants. R.C. 2929.024. Such decisions are to be made "in the sound discretion of the court" based upon "(1) the value of the expert assistance to the defendant's proper representation * * * and (2) the availability of alternative devices that would fulfill the same functions." *State v. Jenkins* (1984), 15 Ohio St.3d 164, 15 OBR 311, 473 N.E.2d 264, paragraph four of the syllabus.

In *State v. Mason*, the appellant argued that the trial court violated his constitutional and statutory rights by failing to provide adequate funds for investigative and expert assistance for various disciplines, including among them a soils and trace evidence expert. 82 Ohio St .3d 144, 153, 1998–Ohio– 370, 694 N.E.2d 932 (1998). This court concluded that Mason had not demonstrated that the trial court abused its discretion in denying him some funds for experts, while allowing other funds. For example, Mason did not demonstrate a particularized need for a soils expert, because at trial, Mason repeatedly made his primary point, namely, that the state produced no evidence of dirt or debris on his clothing showing that he had been walking through farm fields four days before.

This case in distinguishable from *Mason* in that while Mason did not need a soils expert to make his point, here Mr. Myers did demonstrate a particularized need for a handwriting expert. The Warren County Prosecutor admitted that as to the co-defendant's journal, they wanted to offer it to show prior calculation and design on the part of Mr. Myers. (T.p.16-18, 21-28). The court then made a preliminary ruling that it was a complete writing and was relevant as further poof of the criminal enterprise. (T.p. 1046-1047). As this evidence went directly to the death penalty, there was a particularized need for an expert to refute that evidence. Yet an expert was not allowed, and therefore one of the most important pieces of evidence in the trial went insufficiently challenged. This unchallenged testimony was that during the state's case in chief, co-defendant Mosley said he wrote ideas for the murder in his notebook, such as "crowbar, wire, duct tape, "strangle," "Take clothes, money, phone, and charger," "disappear," "no public," and "Wrap up in a blanket." (T.p. 1082-1087). All of this was purported to show prior calculation and design to the jury.

Yet defense counsel didn't know if it was really co-defendant Mosley's handwriting. (T.p.31-38). And there were pages that had been torn out. Mosley's journal was missing 4 pages. (T.p.1686) The defense needed to have a handwriting analysis of this journal to effectively challenge the veracity of Mosley and the journal. Since the court denied the expert to the defense, a primary piece of evidence was allowed in that led directly to the conviction as to the capital murder counts.

PROPOSITION OF LAW EIGHT

The court erred and violated Due Process of Law when it allowed the State to present an improperly examined piece of important evidence. U.S. Const. amends. V, VI, VIII, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16, and 20.

In addition to not allowing the defense to have a handwriting expert examine the co-defendant's journal, *supra*, the trial court abused its discretion in allowing the state to even present co-defendant Mosley's journal in its case in chief in violation of Evid. R. 403 and 404. A trial court enjoys broad discretion in admitting evidence, and it will disturbed unless it clearly has been abused and the criminal defendant thereby has suffered material prejudice. *State v. Sage*, 31 Ohio St. 3d 173, 510 N.E.2d 343 (1987). Evid.R. 403(A) mandates that a judge must exclude evidence, regardless of its relevance, if "its probative value is substantially outweighed by the danger of unfair prejudice." Unfairly prejudicial evidence usually appeals to the jury's emotions, rather than to intellect. *Oberlin v. Akron Gen. Med. Ctr.*, 91 Ohio St. 3d 169, 743 N.E. 2d 890 (2001).

In deciding whether to allow in Mosley's alleged journal during the trial, the court held an evidentiary hearing outside the jury's presence. The court asked Mosley, as to States exhibit 424 (which was one page of writing), "Tell me the circumstances under which you wrote this?" (T.p. 1043-1046). This was a leading question that assumed Mosley wrote the document in the first place. And this was after the court had denied the defense the opportunity to get a handwriting expert to test the documents authenticity. The court allowed in Mosley's notebook, even though it was missing pages, and Mosley had no idea of what happened to them. (T.p.1043-1046). The journal and testimony as to it created substantial and unfair prejudice.

The journal was improperly admitted under Evid.R. 403. Evid.R. 403(A) mandates the exclusion of relevant evidence when "its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." The written statements were not probative, because they did not go to Mr. Myer's identity as an accomplice. Rather, the alleged written statements show that Mosley wrote down his thoughts on allegedly robbing or killing someone. Further, the writings emotionally painted a picture of an unstable, generally dangerous person and thereby encouraged the jury to decide the case on the basis of fear, not reason. The trial court's balancing of allowing in this journal writing of the co-defendant was unreasonable and an abuse of discretion under Evid. R. 403. See *Blakemore*, 5 Ohio St.3d at 219, 450 N.E. 2d 1140.

Additionally, these statements were improper character evidence, admitted in violation of Evid.R. 404(A)(1). This rule provides: " Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion * * *." The journal was submitted to show that Myers planned and calculated murder. But the writing was not probative of any alleged intent to kill by Mr. Myers. It was Mosley who wrote it, not Myers. Mosley, who with his plea deal, had no incentive to admit anything. As such this evidence did violate Evid.R. 404. Not only that, but it affected the outcome of the trial, for without the journal, there was much less evidence of a purposeful, calculated murder.

PROPOSITION OF LAW NINE

The court erred by and violated Due Process of Law when it ordered that the defendant be shackled in the legs and was unable to rise when the jury entered the room. U.S. Const. amends. V, VI, VIII, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16, and 20.

The defense moved that Mr. Myers be allowed to appear in court without restraints. (R. 33, motion). The court granted this in part, allowing the defendant to appear without handcuffs. (R. 154, order). However, the court ordered Myers' legs to be shackled. *Id.* This violated Due Process, and prevented him from having a fair trial, as the restraints prevented him from standing when the jury entered or left the room. This distracted everyone, and let everyone in the room know Myers was incarcerated as the shackles made noise whenever he moved.

In a jury trial, a criminal defendant has the right to remain free of physical restraints that are visible to the jurors. *Deck v. Missouri,* 544 U.S.622, 628-629, 125 S.CT.2007, 161 L.Ed.2d 953 (2005) That right may be overcome in a particular instance by the need for physical security, escape prevention, or courtroom decorum. *Id.*; *State v. Franklin,* 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶ 79.

At the threshold, the court improperly deferred to security personnel in ordering him shackled, after an evidentiary hearing as to defense motion #15, requesting that Mr. Myers appear at trial without restraints. (6/18/14 T.p.3). "The trial court must exercise its own discretion and not leave the issue up to security personnel." *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶ 104, *State v. Richey*, 64 Ohio St. 3d 353, 358, 1992 Ohio 44, 595 N.E.2d 915 (1992).

. Mr. Riley, the Warren County jail administrator, said that Myers was classified as a maximum-security inmate as he was charged with premeditated murder, and

requested Myers during trial be kept in maximum restraints, including leg shackles, belly chains, and handcuffs.. (T.p.4-18). Thus, by leaving Myers' legs shackled, the trial court left the decision on the mode of restraints to security personnel.

In *State v. Jackson*, this Court ruled that no prejudice occurred when the defendant appeared in shackles because he was before the three-judge panel. 141 Ohio St. 3d 201. This is easily distinguishable as it was a jury trial. In particular, the jury was prejudiced by constantly being reminded Myers was incarcerated, and Myers could not fully participate in his trial. At the hearing on the defense motion, Jail Administrator Riley conceded that the jury would hear the restraint chains make noise whenever they were moved. (T.p20-21). In other words, every single time during the lengthy trial when Myers moved his legs, the leg chains could clank. By having him in shackles, which made noise and clanked, it was a continuous reminder that the jury should not presume Mr. Myers's innocence as he was incarcerated. Additionally, it was impractical for Myers to both adequately and effectively participate in his defense while in leg shackles. (see T.p.34-38). It is not difficult to imagine if one had leg shackles on all day, it would affect the mental concentration and physical comfort of the restrained person.

Further, the restraints were unnecessary. There were already extraordinary security measures in the room. There were four to five deputies in the courtroom, and two were in close proximity to Myers at all times. (T.p.22-23). Further, Myers was searched prior to entering the courtroom and when leaving the courtroom. (T.p.24). The shackles were too much.

And Myers was prejudiced by the leg shackles as he was unable to stand for the jury. Once trial started, Myers was dressed in street attire with the shackles, and court

used a modesty panel to screen his legs. (Vol.I. T.p.45). However, during the majority of *voir dire*, every time the jury came in and the bailiff said "All rise," all the attorneys stood up, but Myers could not due to the shackles. (T.p. 762). Counsel finally argued the jury would think that was disrespectful, and the court ordered all to remain seated (from now on) when jury entered. *Id.* Yet the damage was done, as a bad impression had been made. In death penalty cases, more Due Process, not less, is due. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). The court should have granted Mr. Myers motion to appear in court without restraints in full. Due Process required it in a case where life or death was at stake.

PROPOSITION OF LAW TEN

The trial court erred to Myers prejudice by permitting the State to engage in serious misconduct by making an unfairly prejudicial closing argument to the jury which deprived Myers of his constitutional due process rights to a fair trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Unites States Constitution and Article One, §§2, 9, and 16 of the Ohio Constitution.

The prosecutor violated Austin Myers' due process right to a fair trial by his multiple improper statements during closing argument, at both the trial and sentencing phases. At the trial closing argument, these violations included: (a) personally vouching for the credibility of their witnesses; (b) misstating evidence; (c) shifting the burden of proof to Mr. Myers; (d) improperly calling upon the jury to use their sown duty to find guilt; (e) improperly referencing punishment; and (f) telling the jury to consider victim's final moments of which the evidence stated was inaccurate. Then during the sentencing phase closing argument, the prosecutor improperly stated the law on death sentence criteria and evidence.

It has been consistently held that a defendant's conviction can be reversed for prosecutorial misconduct if a reviewing court finds that the prosecutor's remarks were (1) improper, and (2) that they prejudicially affected the due process rights of the accused. *State v. Smith*, 14 Ohio St.3d 13, 470 N.E.2d 883 (1984); *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, 793 N.E.2d 446; *State v. Fears*, 86 Ohio St.2d 329, 715 N.E.2d 136 (1999); *Smith v. Phillips*, 455 U.S. 209 (1982); *State v. Keenan*, 66 Ohio St.3d 402 (1993); *United States v. Francis*, 170 F.3d 546 (6th Cir. 1999).

a. The prosecutor personally vouched for credibility of state's witnesses

The Ohio Supreme Court has held that it is improper for a prosecutor to express their opinion and vouch for the credibility of a witness. *State v. Williams*, 79 Ohio St.2d 583 (1982). Federal Courts have also acknowledged the prejudice in the prosecutor's expressing personal opinion vouching for truthfulness of a State witness. *United States v. Young*, 470 U.S. 1 (1985). The prejudice to a defendant when the prosecutor's vouching occurs is that the jury gives such opinion undue and unsupported weight merely because the prosecutor is clothed in the appearance of power and righteousness due to his position of protecting citizens against crime by obtaining convictions against dangerous defendants. See *United States v. Garcia*, 522 F.3d 597 (5th Cir. 2008).

In the present case, during the State's closing argument, the prosecutor improperly vouched for the credibility of co-defendant turned State's witness, Tim Mosley. Specifically, the prosecutor stated the following about Mosley:

> … Did he (Mosley) have an opportunity to see the things about which he was testifying? He certainly did. Was he consistent? Yes he was. What was his demeanor like? When he came forward ladies and gentlemen, he was very forthcoming. (T.p. 1667) . . . And, ladies and gentlemen, it's not inconsistent when somebody gives a statement and then at a later point

> they're asked for further detail and they respond honestly to that further detail and that's what we have in this case. . . (T.p. 1669)

Defense counsel failed to object to these vouching comments. However, it is plain error for the trial court to have permitted the prosecutor vouching. Clearly Myers suffered irreparable damage to his case by these comments since the prosecutor made the statements, and the jury took them as gospel, in an authoritative role which was not challenged by the defense or corrected by the trial court.

b. *Prosecutor misstates evidence during closing argument*

A prosecutor may not knowingly misstate his recitation of evidence during closing argument. *State v. Sheppard*, 84 Ohio St.3d 230 (1998); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429 (1988).

In this case, the prosecutor misstated the evidence in closing argument when he told the jury: "...As Myers tried to restrain Justin, Tim Mosley tried to choke him to death. That didn't work. Justin was fighting back. And when that failed, they turned to the knife..." (T.p. 1664) The prosecutor obviously knew this was a mischaracterized statement since he commented shortly thereafter. "They chose to kill, and as Myers held Justin, Mosley choked and then stabbed him to death." (T.p. 1665) It was abundantly clear from the evidence that Mosley stabbed and choked Justin Back and that Myers did not commit those acts, instead holding Back in place. The prosecutor argued these facts throughout the trial and was thus aware the initial "they" used the knife count was inaccurate. Myers was seriously prejudiced because, based on this improper prosecutorial misconduct in closing argument, the jury erroneously heard Myers had stabbed the victim and convicted him of death penalty offenses and specifications.

c. Prosecutor improperly shifted burden of proof onto defendant

The defense had no burden of proof in this case to prove Myers not guilty. It is a violation of Myers' due process right to a fair trial when the prosecutor in his closing argument improperly made comments that imply the jury needed to know what Myers was thinking at these proceedings, during and after the alleged murder of Justin Back. This was clearly improper and served to switch the burden of proof to Myers to explain his actions to the jury where he had a 5th Amendment right to remain silent and not put on any defense.

The prosecutor also improperly shifted the burden of proof onto Myers by commenting in the rebuttal section of his closing argument that Myers had alleged in his statement to police that he was not present at the crime scene at the time of Back's homicide. (T.p. 1707, 1708, 1709, 1710, 1711, 1712, 1713, 1714, 1715) Because Myers never presented, nor filed any alibi defense, the prosecutor implied Myers should have presented an alibi defense if he had one. This improperly shifted the burden of proof with a message to the jury that Myers needed to now prove an alibi defense he never presented in order to be found not guilty. The State's comment was thus prejudicial to Myers' due process right to a fair trial.

d. Prosecutor improperly called upon the jury to use their "sworn duty" to find Myers guilty

Prosecutors in closing argument may call for jurors to follow their oath to convict a defendant based on evidence. They may not tell the jurors to follow their sworn oath to convict a defendant in order to influence the jurors' emotions to take a dangerous defendant forever out of society or to send a message to other defendants (community). *State v. Bey*, 85 Ohio St.3d 487 (1999); *State v. Hicks*, 43 Ohio St.3d ___, 538 N.E. 2d

1030. In the present case, the prosecutor commented in closing argument: "...But ladies and gentlemen, it's your sworn duty as jurors, based on the overwhelming evidence and the law to find Austin Myers guilty of all the charges..." (T.p. 1671). The prosecutor's comment was improper and prejudicial to Myers because it impliedly sent a message to the jury that it had a duty to convict Myers in order to serve justice and protect society.

e. Prosecutor improperly referenced punishment during trial phase closing argument

One of the most egregious incidents of prosecutor's improper comments came during his trial phase closing argument when he stated "...Your verdict at this time is not about punishment. *That will come at a later time...*" (T.p. 1671). (Emphasis added) This comment on sentencing in the trial phase before the jury had deliberated on guilt or not guilty findings severely prejudiced Myers because the jury heard the authoritarian-appearing prosecutor proclaim and demand almost as a foregone conclusion that the jury would shortly be deciding in a sentencing hearing Austin Myers' fate even though no guilty verdict had been rendered at that time. Defense counsel failed to object to the comment, but it was clearly plain error for the trial court to have allowed the prosecutor to make the prejudicial comment about sentencing at the trial phase portion of the trial.

f. Prosecutor improperly misstated evidence by commenting that jury should consider facts of victim's final moments just before death, which were inaccurate

A prosecutor's comments which misstate what a victim is thinking in his final moments before death are improper and prejudicial when they misstate the evidence and incite jurors' emotions through insinuations and assertions that are not supported by the evidence, are speculative and are therefore calculated to mislead the jury. *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818 (2014), quoting *State v.*

Smith, 14 Ohio St.3d 13, 470 N.E.2d 883 (1984); *State v. Moore*, 81 Ohio St.3d 22 (1998).

In the present case, the prosecutor recited during the rebuttal closing argument the evidence of the actions Timothy Mosley and Austin Myers took to allegedly take the life of Justin Back. (T.p. 1716-1717) However, the prosecution misstated the testimony of co-defendant turned last-minute State's witness Mosley when he stated:

> And as he's simultaneously being held down by Austin Myers and strangled and stabbed by Tim Mosley, he keeps asking the same question over and over again. Why? Why? Please help me. Austin please stop. Why? Justin Back bled out and died before he ever got an answer to that question and even though it's too late for him now, I'd still like to answer that question. He just wanted to kill." (T.p. 1716-1717)(Emphasis provided).

While Mosley did testify that Mr. Back was asking both defendants why, there is absolutely no evidence that he made any comment to Austin Myers to please stop. (T.p. 1102, 1103, 1104, 1105). Rather, the evidence in the case showed that Mosley strangled, stabbed and killed Justin Back, not Austin Myers. Therefore, the prosecutor's comments misstating and speculating on the evidence of Justin Back's final moments of life were improper and calculated to dramatically inflame the emotions of the jurors with inaccurate evidence to Myers' prejudice.

2. Prosecutorial misconduct during sentencing phase of closing argument

a. Prosecutor improperly states law on death sentence criteria and evidence.

As indicated *supra*, the prosecutor may not deliberately misstate the status of the law in closing argument. *State v. Kirkland*; *McCoy, supra*. In the present case, during the assistant prosecutor's initial and then rebuttal portion of their sentencing closing

argument the prosecutor misstated the legal standard for the jury returning a death verdict when he stated:

> … The State has proven its aggravating circumstance beyond a reasonable doubt, but in this sentencing phase, it is not a matter of proven beyond a reasonable doubt in comparison to the mitigating factors. In this phase, beyond a reasonable doubt is a measure of your conviction, that you are firmly convinced that the aggravating circumstance outweighs the mitigating factor. I know that sounds somewhat confusing, but what's important to consider is you don't have to find that the aggravating circumstance outweighs the mitigating factors by a tremendous degree, what we would think of as the highest standard in the law. You only have to find by whatever unit of measurement in your heart and mind that the aggravating circumstance outweighs the mitigating factors and that you are convinced that this is the correct determination. Judge will instruct you that …

(Sentencing Phase Volume, T.p. 111) Defense counsel objected, but the trial court made no ruling either overruling or sustaining the objection, but rather an inappropriate admonition to the jury to follow jury instructions. (Sentencing Phase Volume, T.p. 112).

The above prosecutor's comment was a wholly inaccurate statement of the beyond the reasonable doubt standard regarding weighing of aggravating circumstance versus mitigating factors to determine whether a death penalty verdict was just. The comment was obviously intended to influence an already easily influenced and inflamed emotional jury to apply a watered-down lesser legal standard to find Myers that Myers should receive the death penalty, versus the actual murderer, Timothy Mosley, who received a non-death sentence of life without possibility of parole as a reward for his testifying against Austin Myers.

The misstatements of law continued unabated in the county prosecutor's rebuttal closing argument when he stated: " this issue of, do you believe by proof beyond a reasonable doubt, that the aggravating circumstance outweighs even ever so slightly, the mitigating factors presented…" (Sentencing Phase Volume, T.p. 133) This was once again a misstatement of law obviously designed to water down the beyond a reasonable doubt regarding aggravating circumstance versus mitigating factors for the jury's determination whether to return a verdict of death on Myers. Myers was prejudiced by the improper comment because it misinformed the jury that it could use a minimal standard to vote to impose the harshest penalty imagined under the law – death upon Austin Myers.

The prosecution also improperly commented on Myers' use of the unsworn statement and implied it was not as credible as witness' under oath testimony. Thus Austin Myers was denigrated by the prosecutor for offering his unsworn statement, notwithstanding the fact that using such a statement is expressly granted under Ohio's sentencing law. (Sentencing phase, October 6, 2014 T.p. 113) The improper conduct and prejudice to Austin Myers was compounded by the prosecutor when he stated the co-defendant "took responsibility" by testifying, but that Austin Myers never took responsibility for the crime in his unsworn statement. (Sentencing Phase Volume, T.p. 136, 137) This was improper and prejudicial because it switched burden of proof to Myers and implied to the jury that he should be punished to the maximum extent possible, death, for exercising his constitutional due process right to trial.

Finally, the prosecutor improperly speculated on facts not in evidence when he in essence indicated that Myers was the reason Justin Back was killed, not Mosley. Specifically, he stated: "...If it wasn't for Austin Myers, none of you may have ever heard the name Justin Back. If it wasn't for Austin Myers, Justin Back would still be alive today." (Sentencing Phase Volume, T.p. 139) This was total unfounded speculation by the prosecutor which served to discount the role of Mosley who was in reality the person who stabbed and strangled Justin Back to death, not Austin Myers. It served to improperly inflame the passion of an already emotionally charged jury to impose the death penalty verdict on 19 year old with no criminal record, Austin Myers. No greater prejudice could have been suffered by Myers in trying to obtain a fair trial and sentencing.

PROPOSITION OF LAW ELEVEN

A criminal conviction that is not supported by substantial credible evidence will be reversed on appeal.

The state failed to prove that Austin Myers committed aggravated murder or even murder in Count 1 and count 2 by the weight and sufficiency of the evidence. It also failed to prove any of the remaining counts.

Murder Counts

There was no credible evidence showing that the murder of victim Back was done with prior calculation and design by Mr. Myers. Even assuming *arguendo* all the evidence in a light most favorable to the state, Mr. Myers was not aware Mosley was going to stab and kill decedent Back. The aggravated murder convictions should be

overturned as against the weight and sufficiency of the evidence. The state did not meet its burden, as explained below.

Sufficiency is essentially a test of adequacy and asks whether, if the state's evidence is believed, it is sufficient to support a conviction. See *State v. Thompkins,* 78 Ohio St.3d 380, 390, 1997-Ohio-52, 678 N.E.2d 541 (Cook, J., concurring). In reviewing a record for sufficiency, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St. 3d 259, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S.307, 99 S.ct. 2781, 61 L.Ed.2d 560.

On the other hand, a weight-of-the-evidence review requires an appellate court to sit as a "thirteenth juror" and to reweigh the evidence to determine if the jury "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Id. at 387, 678 N.E.2d 541; see *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

The state has not proven all elements of aggravated murder as to Austin Myers. See *State v. Waddy* (1991), 63 Ohio St.3d 424, 588 N.E.2d 819, certiorari denied (1992), 506 U.S. 921, 113 S.Ct. 338. For count 1 of the Indictment, aggravated murder, the state had to prove beyond a reasonable doubt that on January 28, 2014, Austin Myers purposefully with prior calculation and design caused death of Justin Back. This included three specifications, purposefully causing the death of another while committing kidnapping, aggravated burglary, and robbery, respectively. In Count 2 of the indictment, the state had to prove beyond a reasonable doubt that on January 28, 2014, Austin Myers

purposefully caused the death of another while committing felony, in this case the state alleging kidnapping, aggravated robbery, or burglary.

Yet the state in this case did not produce substantial credible evidence upon which a jury could have reasonably concluded that Mr. Myers committed murder with prior calculation or design, or even committed murder. The state's main evidence was the testimony of co-defendant Tim Mosley. Mosley admitted that nobody was supposed to get hurt. He said when Myers brought up the money and safe, they had no intentions of killing anyone. (T.p.1171). He even conceded that Mr. Myers never even saw the knife blade he stabbed Back with, as it was mostly covered by his hand.

There is no dispute Mosley was the main offender. He was the one who actually killed Back by stabbing. He went into the bedroom for the safe. He cleaned up the blood, and they went to his house after the crime. He had the idea to hide the body at Cry Baby Ridge. It was his notebook that allegedly had the plan in it. The third party, Logan Zennie, who made the garrote and had the stolen items, was Mosley's friend. The notebook was Mosley's with his thoughts in it, not Myers.

There were over 400 exhibits, but no one showed that Mr. Myers by prior calculation and design purposefully contemplated in advance the death of Back. Myers didn't buy the Nyquil, didn't buy the bug wash, and didn't buy the syringes. As defense counsel indicated at trial, Myers was a coach surfer, gullible, and no one knew what he was thinking - and that was reasonable doubt. (T.p.1700).

Non-murder counts

Furthermore, the state did not prove by the weight and sufficiency of the evidence the kidnapping, aggravate robbery, aggravated burglary, grand theft of a firearm,

tampering, safecracking, and abuse of corpse counts. The evidence showed that co-defendant Mosley testified after he received a plea bargain from death to life without parole. There was no showing that Myers knowingly participated with Mosley in this acts.

Kidnapping

In particular, the state did not meets its burden on kidnapping. Kidnapping is defined as " No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes. ....to facilitate the commission of any felony or flight thereafter RC 2905. 01.

The concepts of "incidental restraint" and "prolonged" restraint are derived from case law involving the analysis of kidnapping crimes already committed. See *State v. Lytle*, 2016-Ohio-1552, *State v. Elmore*, 111 Ohio St.3d 515, 2006- Ohio-6207.

In *State v. Logan*, this honorable court held that the defendant could not be convicted of both rape and kidnapping when he had moved the victim a mere few feet and had released the victim immediately after the rape. 60 Ohio St. 2d 126, 397 N.E.2d 1345, 14 Ohio Op. 3d 373 (1979). Under the facts of the case, the asportation had no significance apart from the rape offense. According to the court, the defendant had displayed no animus beyond that necessary to commit rape, so punishment for both rape and kidnapping was not warranted.

It is the same here as in *Logan, supra*. The acts constitution the kidnapping had no significance apart from the murder offenses. All of the actions occurred almost

immediately in the same place, Back's house. Thus, examining the matter in light most favorable to the state, there was no testimony or evidence as to express or implied references to restraint, incidental, prolonged, or otherwise.

The court should sustain this proposition of law and remand the matter for new trial.

PROPOSITION OF LAW TWELVE

The trial court erred to Myers' prejudice by not filing a separate sentencing opinion pursuant to *O.R.C.* §2929.03(F)

The trial court failed to issue a separate sentencing opinion. R.C. §2929.03(F) requires the trial court to issue a separate sentencing opinion in addition to the judgment of conviction and sentencing entry in cases in which the death penalty may be imposed. The statute provides:

> The Court or the panel of three judges, when it imposes a 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 §2929.04 of the Ohio 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… 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 sentences. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed. *State v. Ketterer*, 126 Ohio St.3d 449, 2010-Ohio-3831 (2010).

In the present case, although the trial court verbalized in detail its reasoning in imposing the death sentence upon Myers during the sentencing hearing, the record does not indicate that the court filed within 15 days of judgment or even ever prepared, or filed, a separate written sentencing opinion as required by R.C. §2929.03(F) in all capital cases where the trial court imposes the death penalty. The court did make a written analysis of what it did, however, that was done in a judgment entry, not a separate sentencing opinion. (See R. 259, judgment entry). That was not in compliance with the law. The statute is clear: "shall state in a separate opinion." It does not say write in a judgment entry.

The record is clear in that the trial court did not issue a separate sentencing opinion in this case. And according to the statute, the judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed. Accordingly, the judgment in Myers' case is not final as required by §2929.03(F) and the matter must be remanded for re-sentencing.

PROPOSITION OF LAW THIRTEEN

The trial court erred to Myers prejudice by permitting the prosecutor to commit misconduct by asking repeated leading questions of State's witnesses.

The prosecutor in this case committed misconduct by repeatedly asking multiple State's witnesses leading questions to put forth his theories of the case to the jury by suggesting in his question the answer he wished to hear in order to convict Austin Myers.

The prosecutor asked leading improper questions of almost all state's witnesses (T.p. 886,932,933,950,978,988,1973,1080).

Even though the trial court has reasonable discretion to allow leading questions in some exceptional circumstances to elicit testimony, the prosecutor may not do so when the adverse effect of the improper leading questions is to deny the defendant's right to a fair trial. *State v. Diar* (2008), 120 Ohio St.3d 460; *State v. Lamar* (2002), 95 Ohio St.3d 181, 2002-Ohio-2128.

Here the prosecutor committed misconduct by continuing to ask leading questions of his witnesses eliciting testimony that tended to implicate Myers. In some instances, this was in spite of the defense objecting and trial court sustaining the objection. All the prosecutor's leading questions prejudiced Myers' right to a fair trial because the questions improperly suggested damaging evidence against Myers through the questions. This was an extremely close case and the prosecution improper questioning tipped the balance to conviction.

PROPOSITION OF LAW FOURTEEN

A defendant-appellant in a death penalty case has a fundamental right to a specific *voire dire* focused on fair selection of the venire in the capital case. Where the trial court does not allow rehabilitation of jurors expressing reluctance to impose the death penalty and allows the defense to only conduct a general inadequate jury selection, the accused's rights are violated under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and under Article One §§2, 5, 9, 10, and 16 of the Ohio Constitution.

The trial court erred to Myers' prejudice by allowing the assistant prosecutor to state that if the juror found that the aggravated circumstance outweighed the mitigating factors that the juror would return "a recommendation for death." Dogmatic run-of-the-

mill questions to rehabilitate jurors either prone to automatic death penalty verdict or jurors reluctant to impose the death penalty verdict are ineffective and can prejudice an accused's right to a fair jury selection and trial. See *Morgan v. Illinois*, 504 U.S. 718 (1992); *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *State v. Poindexter*, 36 Ohio St.3d 1 (1988); *State v. Williams*, 79 Ohio St.3d 1 (1997). There must substantial evidence that juror bias cannot be overcome by jurors' promise to be fair and to follow the judge's jury instructions on the law. *State v. Allen*, 73 Ohio St.3d 626 (1995).

The assistant prosecutor stated that if the juror found that the aggravated circumstance outweighed the mitigating factors that the juror would return "a recommendation for death." The defense made an objection, which the court did not expressly rule upon. However, the court did state to the jury that "...any verdict is rendered by you should be considered by you as if it is absolute and will be carried out in this case..." (T.p. 368). However, the court's admonition did not unring the bell to the jury that the prosecutor told them that a death sentence verdict was only a recommendation by the jury, which minimized the possible consequences of their decision on Myers.

Thus it was error for the trial court to grant the prosecutor's motion to excuse prospective juror P-----g for cause. (T.p. 514-527). The defense argued that she was not biased, and had been rehabilitated to indicate that she would follow the court's jury instruction on the criteria for returning a death verdict or other verdict. (T.p. , 527) The trial court's ruling that she could not be fair and impartial was not supported by the evidence. (T.p. 527). The fact that she showed emotion by crying throughout the *voire dire* questions only indicated she understood the gravity of the possible death sentence

verdict, not that she could not impose it if warranted. (T.p. 527) Her answers were appropriate and clearly showed she was unbiased, would have been impartial, and should not have been dismissed for cause. (T.p. 514, 515, 527)

Capital cases are the only ones where the jury has specific input in rendering a verdict that could include the imposition of the death penalty upon an accused. Death is the potential ultimate penalty and therefore the accused deserves the absolute protection of due process in his jury selection process, for the composition of the jury with all its possible biases and life experiences impact their views of presentation of the evidence in the mitigation/sentencing portion of the trial. Juries must know that "recommending" death is tantamount to actually imposing the death sentence, since trial judges rarely fail to abide by a jury's death sentence verdict.

PROPOSITION OF LAW FIFTEEN

The trial court erred to Myers prejudice by admitting into evidence gruesome repetitive crime scene and autopsy death photos of the victim.

Mr. Myers was unfairly prejudiced by the admission of repetitive gruesome photographs. It is well established that it is prejudicial error for a trial court to grant the State's motion to admit into evidence death photos of a victim from the crime scene and autopsy when the photos are graphic, repetitive of each other and gruesome they tend to inflame the emotions of the jury and distract them from contested evidence in the case. *State v. Thompson*, 33 Ohio St.3d 1 (1987); *State v. Keenan*, 66 Ohio St.3d 402 (1993).

In the present case, the State moved the trial court to admit numerous photographic exhibits which showed graphic, gruesome death pictures of the victim,

Justin Back. (T.p. 1586-1625). Defense did not object, and the trial court entered into evidence some, but not all of, the photos. Yet the admitted photos were still repetitious and gruesome which inflamed the jury's emotions and distracted them from reviewing contested issues to Austin Myers' prejudice. Based on the admission of unfairly prejudicial evidence, Myers should get a new trial.

PROPOSITION OF LAW SIXTEEN

The cumulative effect of trial errors renders a capital defendant's trial unfair and his sentence arbitrary and unreliable. U.S. Const. Amends. VI, XIV, Ohio Const. art I § 5, 16.

Mr. Myers raised numerous errors any one of which warrant this honorable Court granting relief from a sentence of death. Even, assuming *arguendo* they were not alone enough to warrant reversal, when viewing these many errors together, their cumulative impact made the trial fundamentally unfair. See, *Walker v. Engle*, 703 F.2d 959, 963 (6th Cir. 1983).

Under the doctrine of cumulative error, a conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of a fair trial, even though each of the numerous instances of trial court error does not individually constitute cause for reversal. *State v. DeMarco*, 31 Ohio St.3d 191, 196-197 509 N.E.2d 1256 (1987), see also *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, at ¶ 222-224; *State v. Garner*, 74 Ohio St.3d 49, 64, 656 N.E.2d 623 (1995). It is not whether the legally admitted evidence was sufficient to support the verdict, but rather whether the prosecution has proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Satterwhite v. Texas*, 486 U.S. 249 (1988). Review

must also determine whether the cumulative effect of the errors rendered the trial fundamentally unfair. *Walker* at 963.

Starting at jury selection and ending at sentencing, Myers capital trial was ripe with prejudicial error. See all of the Propositions of Law, *supra*. His sentence is based upon a trial that was fundamentally unfair due to cumulative error which was a violation of Due Process. U.S. Const. Amends. VI, XIV, Ohio Const. art I, § 9, 16. Assuming *arguendo* that none of them alone warrant reversal of the death sentence, the cumulative effect of the errors was so prejudicial that this Court must reverse and remand for a new trial.

PROPOSITION OF LAW SEVENTEEN

The accused's right to due process under the Fourteenth Amendment to the United States Constitution and Article I, §16 of the Ohio Constitution is violated when the State's burden of persuasion is less than proof beyond a reasonable doubt.

During the trial phase, Austin Myers' jury was instructed on the statutory definition of reasonable doubt under R.C. § 2901.05 (T.p. 1718,1919). Admittedly, this Court has held that the statutory reasonable doubt definition is not an unconstitutional dilution of the State's burden of proof. *State v. Nabozny,* 54 Ohio St. 2d 195, 202-203, 375 N.E.2d 784, 791(1978), *State v. Van Gundy*, 64 Ohio St.3d 230, 594 N.E..2d 604 (1992). However, this Court has also recognized the propriety of raising "settled" claims in death penalty appeals. *State v. Pointdexter*, 36 Ohio St.3d 1, 520 N.E.2d 568 (1988).

The court below instructed the jury as follows:

> The defendant is presumed innocent until guilt is established beyond a reasonable doubt. The defendant must be acquitted unless the State produces evidence which convinces you beyond a reasonable doubt of every essential element of the offense charged.
>
> Reasonable doubt is present after having carefully considered and compared all the evidence you cannot say that you are firmly convinces of the truth of the charge. It's 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 in the most important of that person's affairs. (T.p.1718).

As such, the reasonable doubt jury charge, taken as a whole, did not adequately convey to jurors the stringent "beyond a reasonable doubt" standard for two reasons. First, the "willing to rely and act" language of R.C. §2901.05 did not guide the jury because it is too lenient. Second, the statutory definition of reasonable doubt is flawed because the "firmly convinced" language represents only a clear and convincing standard. As a result, the jury convicted Austin Myers on a standard below that which is required by the Due Process Clause of the Fourteenth Amendment. This is a fundamental, structural error that requires reversal Myers' convictions. *See Sullivan* v. *Louisiana,* 508 U.S, 275 (1993).

In *In re Winship,* 397 U.S. 358 (1970), the Supreme Court addressed the fundamental nature of the reasonable doubt concept. The court noted that "[t]here is always in litigation a margin of error" and stressed that "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *Id* at 364. To maintain confidence in our system of laws, the court continued, proof beyond a reasonable doubt must be held to be proof of guilt "with utmost certainty." *Id.* Following *Winship,* the Supreme Court

reversed a Louisiana defendant's capital conviction and death sentence because the instruction on reasonable doubt could have led jurors to find guilt "based on a degree of proof below that required by the Due Process Clause." *Cage v. Louisiana,* 498 U.S. 39, 41 (1990).

In this case, like in *Winship*, the trial court's definition of reasonable doubt allowed the jurors to find guilt on proof below that which is required by the Due Process Clause. The United States Supreme Court, federal circuit courts, and lower Ohio courts have condemned the language in the statute that defines reasonable doubt as "proof of such character that an ordinary person would be willing to rely and act upon in the most important of his own affairs," as discussed below.

First, there is the issue of the willing to rely and act language. For example, in *Holland* v. *United States,* 348 U.S. 121, 140 (1954), the court indicated strong disapproval of the "willing to act" language when defining proof beyond a reasonable doubt. The United States Court of Appeals has also noted that "there is a substantial difference between a juror' s verdict of guilt beyond a reasonable doubt and a person making a judgment in a matter of personal importance to him." *Scurry* v. *United States,* 347 F2d 468, 470 (D.C. Cir. 1965). The *Scurry* court stated that human experience shows that a prudent person, called upon to act in his more important business or family affairs, would gravely weigh the risks and considerations tending in both directions. After weighing these considerations, however, a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment. *Id.* Indeed, several federal circuit courts have disapproved of the "willing to act" phrase and adopted a preference for defining proof beyond a reasonable doubt in terms of a prudent person

who would hesitate to act when confronted with such evidence. See, *Monk* v. *Zelez,* 901 F.2d 885 (10th Cir. 1990); *United States* v. *Colon,* 835 F.2d 27 (2nd Cir. 1987); *United States v. Pinkney,* 551 F.2d 1241 (D.C. Cir. 1976); *United States v. Conley.* 523 F.2d 650 (8th Cir. 1975).

Ordinary people who serve as jurors are frequently required to make important decisions based upon proof of a lesser nature by choosing the most preferable action. This was recognized in *State v. Crenshaw,* 51 Ohio App. 2d 63, 65, 366 N.E.2d 84, 85 (1977), where the court stated that the "willing to act" language was the traditional test for the clear and convincing evidence standard of proof: "A standard based upon the most important affairs of the average juror ... reflects adversely upon the accused." Thus, Federal courts and several Ohio courts have recognized, the "willing to act" language in *O.R.C.* §2901.05(D) does not meet the standard of proof beyond a reasonable doubt standard. This is because most people do not make important decisions based upon a reasonable doubt standard but rather are "willing to act" upon a lesser standard.

Second, there is a defect in the "firmly convinced" portion of the definition. The "firmly convinced" language in the first sentence of the Court's instruction did not define the reasonable doubt standard. Rather, it defined the clear and convincing standard. In *Cross* v. *Ledford,* 161 Ohio St. 469, 120 N.E.2d 118 (1954), this Court defined clear and convincing evidence as that "which will provide in the mind of the trier of facts a firm belief or conviction to the facts sought to be established." That definition is similar to R.C. §2901.05(D) where reasonable doubt is present only if jurors "cannot say they are firmly convinced of the truth of the charge." The jurors were given a definition of

reasonable doubt in this instruction that failed to satisfy the requirements of the Due Process Clause.

Thus, juries in Ohio are convicting criminal defendants on a clear and convincing evidence standard. A majority of the federal courts agree that the "willing to act" language found in R.C. §2901.05(D) represents the standard of proof below that required by the Due Process Clause. Furthermore, the "firmly convinced" language in the first sentence of R.C. §2901.05(D) defines the presence of reasonable doubt in terms nearly identical to the accepted definition of clear and convincing evidence.

Courts that have disapproved of the "willing to act" language have generally allowed it to be used only when the instruction, taken in its entirety, conveyed the true meaning of "reasonable doubt" as required by the Due Process Clause. See *Holland,* 384 U.S. at 140. This is not, however, the case in Ohio. R.C §2901.05(D) defines reasonable doubt in terms far too similar to the definition of "clear and convincing" evidence. The "willing to act" language in the last sentence of R.C. §2901.05(D) is defective because reasonable doubt is also defined in a clear and convincing standard from the outset in the phrase "firmly convinced." R.C. § 2901.05.(D), as applied to this case, defines reasonable doubt by an insufficient standard. Accordingly, the instructions in Austin Myers' trial allowed his jury to find him guilty "based on a degree of proof below that required by the Due Process Clause." *Cage,* 498 U.S. at 41. Austin Myers is prejudicially affected by, and presented these arguments on the unconstitutionality of Ohio death penalty in pretrial motions and pretrial motion hearings. (T.p. 1-67, Pretrial hearing, June 18, 2014). Austin Myers' convictions must be reversed.

PROPOSITION OF LAW EIGHTEEN

\Ohio's death penalty law is unconstitutional. *Ohio Revised Code* §§2903.01, 2929.02, 2929.021, 2929.02, 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 Austin Myers. U.S. Constitutional Amendments V, VI, VIII, and XIV; Ohio Constitution Article I, §§ 2, 9, 10, and 16 Further, Ohio's death penalty statute violates the United States' obligations under international law.

Austin Myers cannot be put to death has the Ohio death penalty scheme is unconstitional. 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, 592, (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, 282, (1972), (Brennan, J., concurring); *Rhodes v. Chapman*, 452 U.S. 337, 361, (1981); *Trop v. Dulles*, 356 U.S. 86, 100-101, (1958).

The Ohio death penalty scheme offends this fundamental principle in 11 ways, discussed below.

1.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 cruel and unusual punishment. *Id.* Any arbitrary use of the death penalty also offends the Eighth Amendment. *Id.*

Yet Ohio's capital punishment scheme permits imposition of the death penalty in an arbitrary or discriminatory manner, in violation of *Furman*. The prosecutors' virtually uncontrolled indictment discretion results in arbitrary and discriminatory imposition of the death penalty. Mandatory death penalty statutes have been deemed fatally flawed because they lacked standards for imposition of a death sentence and therefore were removed from judicial review. *See Woodson v. North Carolina*, 428 U.S. 280, (1976). The Prosecutors' uncontrolled discretion violates this requirement.

And 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, Supra* at 678.

The death penalty is neither the least restrictive means of punishment, nor an effective deterrent to crime. A less restrictive means can best serve both isolation of the offender and retribution. Society's interests do not justify the death penalty as there are other alternatives.

2. 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, 193-195, (1976); *Furman, Supra* at 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. Thus, the statutory scheme is unconstitutionally vague, which leads to the arbitrary imposition of the death penalty. The language "that the aggravating circumstance . . . 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 circumstance was marginally greater than the mitigating factors. This creates an unacceptable risk of arbitrary or capricious sentencing.

Additionally, the aggravating circumstance is 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. *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* (1994), 69 Ohio St.3d 183, 193, 631 N.E.2d 124, 132 (1994). Giving so much discretion to juries leads to arbitrary and capricious judgments. The Ohio 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, 116 (1982) mental disease or defect, *Penry v. Lynaugh* (1989), 492 U.S. 302, 319, *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, 798 (1982), or lack of criminal history *Delo v. Lashley* (1993), 507 U.S. 272, 279 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 death penalty 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); *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 and is unconstitutional.

3.The Right to a Jury is Burdened with a "built in" ineffectiveness of counsel.

Ohio's capital statutory scheme provides for a sentencing recommendation by the very same jury which determines the facts at trial if the accused is found guilty. This procedure violates defendant's rights to effective assistance of counsel and to a fair trial before an impartial jury and guaranteed by the State and Federal Constitutions. This bifurcated capital trial process with the same jury violates the 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 Constitution* Article I §§10 and 16; *State v. Hester*, 45 Ohio St.2d 71, 341 N.E.2d 304 (1976).

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 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. Cronic* 466 U.S. 648, 659, n.25 (1984). This creates constitutional error without any showing of prejudice necessary. *Id.*

Under Ohio's death penalty statutory scheme, an unacceptable 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.

4. *Lack of individualized sentencing*

The Ohio statutes are unconstitutional because they require proof of aggravating circumstance 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 also 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 v. North Carolina*, 428 U.S. 280 at 961 (1976). This is especially prejudicial because this is accomplished without consideration of any mitigating factors.

5. *Defendant's right to a jury is burdened versus a plea*

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 Rules of Criminal Procedure* 11(C)(3). Accordingly, the capital indictment may be dismissed regardless of mitigating circumstances. Yet 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 burdens the defendant's exercise of his right to a trial by jury. Since the Supreme Court's decision in *Lockett*, this infirmity has not been cured and Ohio's statute remains unconstitutional.

6. *The definition of mitigating factors in O.R.C. §2929.04(B)(7) violates the reliability component of the Eighth Amendment.*

"Any other factors that are relevant to the issue of whether the offender should be sentenced to death" may be introduced as mitigation under R.C. §2929.04(B)(7) (emphasis added). The court's charge and the definition in RC. §2929.04(B)(7) are both unconstitutional, as they both permit the sentencer to convert (B)(7) mitigation into reasons for imposing death.

The Eighth Amendment requires that the class of death eligible offenders be narrowly and rationally guided by state law. *McCleskey v. Kemp*, 481 U.S. 279, 305 (1987) In Ohio, the factors that make a defendant death-eligible are detailed in R.C. § 2929.04(A) is flawed because it literally invites the sentencer to consider any factor relevant to imposing death. That language creates a "reasonable likelihood" that the sentencer will view proffered (B)(7) mitigation as a non-statutory aggravator, rather than evidence that weighs against a death sentence. *See Stringer v. Black*, 503 U.S. 222, 231-235 (1992); *Boyde v. California* (1990), 494 U.S. 370, 380-381.

The (B)(7) definition also precludes the jury from giving mitigating evidence its full consideration and effect, even though the intent was to allow the jury to consider all relevant evidence supporting a life sentence. *See Lockett v. Ohio* ,438 U.S. 586; *See also*

R.C. §2929.04(C). Ambiguous wording frustrates the General Assembly's intent. The definition shifts the focus of the (B)(7) mitigating evidence to reasons to impose a death sentence. Because (B)(7) mitigating evidence can be construed as an aggravating factor, it is stripped of its full mitigating effect. To satisfy the Eighth Amendment, each actor in the capital sentencing scheme must be able to give consideration and full mitigating effect to all relevant mitigating evidence offered by the defendant. *Penry v. Lynaugh,* 492 U.S. 302; *Eddings v. Oklahoma*, 455 U.S. 104; *Lockett,* 438 U.S. 586; *See Graham v. Collins*, 506 U.S. 461, 510 (1993), (Souter,J., dissenting)

7. R.C. §2929.04(A)(7) is Constitutionally Invalid When Used to Aggravate O.R.C. §2903.01(B) Aggravated Murder.

"[T]o avoid [the] constitutional flaw of vagueness and over breadth under the Eighth Amendment, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more sever sentence of a defendant as compared to others found guilty of (aggravated) murder." *Zant* v. *Stephens,supra.* Ohio's statutory scheme fails to meet this constitutional requirement because R.C. §2929.04(A)(7) fails to genuinely narrow the class of individuals eligible for the death penalty. This precise error occurred in Myers' case; he was convicted of felony murder along with the R.C. §2929.04(A)(7) specification.

R.C. §2903.01(B) defines the category of felony-murderers. If the indictment specifies any factor listed in R.C. §2929.04(A), and it is proved beyond a reasonable doubt, the defendant becomes eligible for the death penalty. R.C. §§2929.02(A) and 2929.03. The scheme is unconstitutional because the RC. §2929.04(A)(7) aggravating

circumstance merely repeats, as an aggravating circumstance, factors that distinguish aggravated felony-murder from murder. It simply repeats the definition of felony-murder as alleged, which automatically qualifies the defendant for the death penalty. R.C. §2929.04(A)(7) does not reasonably justify the imposition of a more severe sentence on felony-murderers. But the statute gives the prosecuting attorney and the sentencing body unbounded discretion that maximizes the risk of arbitrary and capricious action -and deprivation of a defendant's life -without substantial justification. The aggravating circumstance must therefore fail. *Zant, supra* at 877

As compared to other aggravated murderers, the felony-murderer is treated more severely. Each R.C. §2929.04(A) circumstance, when used in connection with R.C. §2903.01(A), adds an additional measure of culpability to an offender such that society arguably should be permitted to punish him more severely with death. But the aggravated murder defendant alleged to have killed during the course of a felony is automatically eligible for the death penalty - not a single additional proof of fact is necessary.

Felony-murder also fails to reasonably justify the death sentence because this Court has interpreted R.C. §2929.04(A)(7) as not requiring that intent to commit a felony precede the murder. *State* v. *Williams* (1996), 14 Ohio St. 3d 569, 660 N.E.2d 724, syl. 2. The asserted state interest in treating felony-murder as deserving of greater punishment is to deter the commission of felonies in which individuals may die. Generally courts have required that the killing result from an act done in furtherance of the felonious purpose. *Id.* Without such a limitation, no state interest justifies a stiffer punishment. This Court has eliminated the only arguable reasonable justification for

imposition of the death sentence on such individuals, a position that engenders constitutional violations. *Zant,* 462 U.S. 862. Further, this Court's current position is inconsistent with previous cases, thus creating the likelihood of arbitrary and inconsistent applications of the death penalty. See *State* v. *Rojas* (1992), 64 Ohio St. 3d 131, 139, 592 N.E.2d 1376, 1384.

Equal protection of the law requires that legislative classifications be supported by, at least, a reasonable relationship to legitimate state interests. *Skinner v. Oklahoma,* 316 U.S. 535 (1942). The state has arbitrarily selected one class of murderers who may be subjected to the death penalty automatically. This statutory scheme is inconsistent with the purported state interests. The most brutal, cold-blooded, and premeditated murderers do not fall within the types of murder that are automatically eligible for the death penalty. There is no rational basis or any state interest for this distinction and its application is arbitrary and capricious.

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

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

To avoid arbitrariness in capital sentencing, states must limit and channel the sentencer's discretion with clear and specific guidance. *Lewis v. Jeffers,* 497 U.S. 764, 774 (1990);*Maynard v. Cartwright,* 486 U.S. 356, 362 (1988). A vague aggravating circumstance fails to give that guidance. *Walton v. Arizona,* 497 U.8- 639, 653 (1990), *vacated on other grounds, Ring v. Arizona,* 536 U.S. 584 (2002); *Godfrey,* 446 U.S. at 428. Moreover, a vague aggravating circumstance is unconstitutional whether it is eligibility or a selection factor. *Tuilaepa v. California,* 512 U.S. 967, 972 (1994). The aggravating circumstances in *O.R.C.* §2929.04(A)(l)-(8) are both.

R.C. §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 *O.R.C.* §2929.04(B), the sentencer must weigh them only as selection factors in mitigation. *See State v. Wogenstahl,* 75 Ohio St. 3d 344, 356, 662 N.E.2d 311, 321-322 (1996). However, *O.R.C.* §2929.03(D)(l) eviscerates the clarity and specificity of *O.R.C.* §2929.04(B); 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. R.C. § 2929.04(A) and (B); *Wogenstahl,* 75 Ohio St. 3d at 356, 662 N.E.2d at 321-322. R.C. §2929.03(D)(l) makes R.C. §2929.04(B) vague because it in-corporates the nature and circumstances of an offense into the aggravating circumstances. The sentencer cannot reconcile this incorporation. As a result of R.C. §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. R.C. §2929.03(D)(1) therefore makes R.C. §2929.04 (B) unconstitutionally arbitrary.

R.C. §2929.03(D)(1) is also unconstitutional on its face because it makes the selection factors in aggravation in R.C. §2929.04(A)(l)-(8) "too vague." See *Walton,* 491 U.S. at 654. R.C §2929.04(A)(l)-(8) gives clear guidance *as* to the selection factors that the sentencer may weigh against the defendant's mitigation. However, R.C. §2929.03(D)(l) eviscerates the narrowing achieved. By referring to the "nature and circumstances of the aggravating circumstance," R.C. §2929.03(D)(1) gives the sentencer "open-ended discretion" to impose the death penalty. *Maynard,* 486 U.S. at 362. That reference allows the sentencer to impose death based on (A)(l)-(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 R.C §2929.04(A). See *Stringer v. Black,* 503 U.S. 222, 232 (1992).

9. Proportionality and Appropriateness Review.

R.C §§2929.021 and 2929.03 require trial courts to report data 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 prevents fair and complete appellate review.

Adequate appellate review is a precondition to the constitutionality of a state death penalty system. *Zant,* 462 U.S. at 879; *Pulley v. Harris,* 465 U.S. 37, 50 (1984). The standard for review is one of careful scrutiny. *Zant,* 462 U.S. at 884-885. 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. Para 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 flawed. 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 circumstance 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 who 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. *Evitss v. Lucey,* 469 U.S. 387, 401 (1985). The review currently used violates this constitutional mandate. An insufficient proportionality review violates Austin Myer's due process and liberty interest in R.C. § 2929.05.

10. Lethal injection is cruel and unusual punishment.

O.R.C. §2949.22 (A) provides that death by lethal injection "shall be executed by causing the application to the person of a lethal injection drug or combination of drugs of sufficient dosage to quickly and painlessly cause death[.]" This mode of punishment offends not only contemporary standards of decency, *Trop* at 101, but does not necessarily cause "quickly and painlessly cause death" as the statute mandates.

Lethal injection causes unnecessary pain. *See* Marian J. Borg and Michael Radelet, "Botched Lethal Injections," 53 *Capital Report,* March/April 1998; Kathy Sawyer, "Protracted Execution In Texas Draws Criticism: Lethal Injection Delayed by Search for Vein," *Washington Post,* March 14, 1985; " *Gregg* v. *Georgia,* 428 U.S. 153, 173 (1976) (Eighth Amendment proscribes "the unnecessary and wanton infliction of pain."). Prisoners have been stuck repeatedly with a needle for almost an hour in an effort

to find a vein suitable for use. Marian J. Borg and Michael Radelet, "Botched Lethal Injections," 53 *Capital Report,* March/April 1998. Prisoners have actually had to assist technicians in finding vein suitable to use. This happened specifically in Ohio in the case of Ronell Broom. Jon Craig and Lisa Preston, "Problems Postpone Execution," *Cincinnati Enquirer,* September 16, 2009. There can be dosage miscalculations or errors. In Missouri, a doctor who was involved in dozens of executions was quoted recently as saying he was dyslexic and occasionally altered the amounts of anesthetic given. Ron Word , "No Cruel or Unusual Punishments: Can Lethal Injection Ever Meet the Constitutional Standard?," *Cincinnati Enquirer,* October 6, 2007.

Equipment failures are not uncommon. Marian J. Borg and Michael Radelet, "Botched Lethal Injections,"*53 Capital Report,* March/April 1998. Gasping and choking from the prisoner is not uncommon. *Id.* Because the prisoner is restrained and paralyzed there may be no reaction to the pain felt, but death by lethal injection is not painless. Rather, it is cruel and unusual punishment prohibited under the Eighth Amendment to the United States Constitution, the ICCPR, and the CAT. Lethal injection also violates the United States' obligations under the International Convention on Civil and Political Rights (1992) (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (1994) (CAT).

11. 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, Myers' capital convictions and sentences cannot stand.

A. International law binds Ohio

"International law is a part of our law[.]" *The Paquete Habana,* 115 U.S. 677, 700 (1900). A treaty made by the United States is the supreme law of the land. Article VI, U.S. Const. 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); *Clark v. Allen,* 331 U.S. 503, 508 (1947); *United States v. Pink,* 315 U.S. 203, 230 (1942); *Kansas v. Colorado*, 206 U.S. 46, 48 (1907); *Asakura v. Seattle*, 265 U.S. 332, 341 (1924). International law creates remediable rights for United States citizens. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980).

B.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. Under the Supremacy Clause, the ICCPR, the ICERD, and the CAT are the supreme laws of the land. As such, the United States must fulfill the obligations incurred through ratification. But 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 Supra)

C. 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)(e)), 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 also denies equal protection and due process in several ways. It allows for arbitrary and unequal treatment in punishment; it's procedures are unreliable; it's statutory scheme fails to provide individualized sentencing; the statutory

scheme adversely affects a defendant's right to a jury. R.C. §2929.04(B)(7) arbitrarily selects certain defendants who may be automatically eligible for death upon conviction. Further, Ohio's proportionality and appropriateness review is wholly inadequate. As a result, Ohio's-statutory scheme violates the ICCPR's and the ICERD's guarantees of equal protection and due process. This is a direct violation of international law and of the Supremacy Clause of the Constitution.

D. 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. Punishment is arbitrary and unequal, sentencing procedures are unreliable, and Ohio's statutory scheme lacks individualized sentencing. The (A)(7) aggravator maximizes the risk of arbitrary and capricious action by singling one class of murderers who are eligible automatically for the death penalty. And the vagueness of R.C. §§2929.03(D)(l) and 2929.-04 similarly render sentencing arbitrary and unreliable. Ohio's proportionality and appropriateness review fails to distinguish those who deserve death from those who do not. See discussion *supra*. As a result, executions in Ohio result in the arbitrary deprivation of life and thus violate the ICCPR's death penalty

protections. This is a direct violation of international law and a violation of the Supremacy Clause.

E. Ohio's Statutory Scheme Violates the ICCPR's and the CAT's Prohibitions again 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 the 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 in violation of both the ICCPR and the CAT. Thus, there is a violation of international law and the Supremacy Clause.

F. Ohio's Obligations Under the ICCPR, the ICERD, and the CAT are not Limited by the Reservations and Conditions Placed on These Conventions by the Senate.

The conditions, reservations, and understandings accompanied the United States' ratification of the ICCP the ICERD, and the CAT cannot stand for two reasons. First, 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 follow.

Thus, the Senate's inclusion of conditions and reservations in treaties goes beyond that role. The Senate picks and chooses which items of a treaty will bind the United States. 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*

Second, 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 make, 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 life and any reservation inconsistent with that purpose violates the Vienna Convention. Thus, the United States' reservations cannot stand under the Vienna Convention as well.

G. 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). 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 is 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.

H. 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, 160-161(1820). 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); *See also* William A. Schabas, *The Death Penalty as Cruel Treatment and Torture* (1996).

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. (See discussion supra) Thus, Ohio's statutory scheme violates customary international law as codified in the OHR and cannot stand.

However, the DHR is not alone in its codification of 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 160-161. Ohio should be aware 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. Included among these are:

1. The American Convention on Human Rights drafted by the OAS and entered into force in 1978. It provides numerous human rights guarantees, including: equal protection (Art. 1, 24), the right to life, (Art. 4(1)), prohibition against arbitrary deprivation of life (Art. 4(1)), imposition of the death penalty only for the most serious crimes (Art. 4(2)), no re-establishment of death penalty once abolished (Art. 4(3)), prohibits torture, cruel, inhuman, or degrading punishment (Art. 5(2)),and guarantees the right to a fair trial (Art. 8).

2. The United Nations Declaration on the Elimination of All Forms of Racial Discrimination proclaimed by U.N. General Assembly Resolution 1904 (XVIII) in 1963. It prohibits racial discrimination and requires that states take affirmative action in ending racial discrimination.

3. The American Declaration of the Rights and Duties of Man adopted by the Ninth International Conference of American States in 1948. It includes numerous human rights guarantees: the right to life (Art. 1), equality before the law (Art. 2), the right to a fair trial (Art. 16), and due process (Art. 26).

4. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman. or Degrading Treatment or Punishment adopted by the U.N. General Assembly in Resolution 3452 in 1975. It prohibits torture, defined to include severe mental or physical pain intentionally inflicted by or at the instigation of a public official for a purpose including punishing him for an act he has committed, and requires that the states take action to prevent such actions. Art. l, 4.

5. The Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty adopted and proclaimed by the U.N. General Assembly in Resolution 44/128 in 1989. This prohibits execution (Art.1(1)) and requires that states abolish the death penalty (Art. 1(2)). These documents are drafted by the people Smith contemplates and are subscribed to by a substantial segment of the world. As such they are binding on the United States as customary international law. A comparison of the §§1-9 clearly demonstrates that Ohio's statutory scheme is in violation of customary international law.

Based on all of the above, Ohio's death penalty scheme fails to ensure that arbitrary and discriminatory imposition of the death penalty will not occur to Austin Myers. The procedures actually promote the imposition of the death penalty and, thus, are constitutionally intolerable. R.C. §§2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution and Article I, §§2, 9, 10, and 16 of the Ohio Constitution, and international law. As Justice Pfiefer once wrote:

> Having seen so many death penalty cases-and the killers' callous disregard for human life-I have come to believe that no civilized level of punishment is a deterrent. If deterrence doesn't work, that leaves us only with the retribution; it's human nature to want to even the score, so why not put killers to death?
>
> After all, do murderers show mercy to their victims? No. So then do they deserve mercy form us? Probably not. Our quest is for justice. But mercy rendered in the name of justice has a power to redeem greater than retribution has a power to cure. Pfeifer, Justice Paul, "Death Penalty Not the Answer," *Brown County News Democrat*, February 11, 1999.

Based on the foregoing, Myers death sentences must be vacated.

CONCLUSION

There were numerous constitutional level errors during trial or sentencing that warrant one of three remedies: outright acquittal; reversal and remand for a new trial; or imposition of life without parole in lieu of the death penalty.

Pre-trial motions

Prior to trial, the court improperly denied the defendant's motion to suppress the defendant's statements made while in the custody of the authorities. (Prop. of Law 3). The court also improperly ordered Myers, despite the fact there were 5 deputies in the courtroom, to wear clanking, noisy leg shackles during trial that interfered with his effective participation in trial and constantly reminded the jury that he was in custody. (Prop. Of Law 9).

Discovery and Related Errors

Then the state committed serious *Brady* violations by disclosing and turning over materially important discovery only at the latest hour, immediately before trial, including that the codefendant would testify as a state's witness and that there was a journal that allegedly showed prior calculation and design for murder. (Prop. Of Law 4).

The lower court compounded this late discovery problem in several ways: by denying the defense's request for a continuance to review the evidence (Prop. Of Law Five 5); by denying the defense request for a handwriting expert to examine the journal alleged to show prior calculation and design (Prop. Of Law 7); and allowing all the newly disclosed evidence into trial, even though it was improperly and incompletely examined by the defense. (Prop. Of Law 8). This resulted in counsel being admittedly ineffective.

(Prop. Of Law 6).

Trial Errors

The state also did an improper *voir dire*, repeatedly made unfairly prejudicial leading questions, and made improper unfairly prejudicial remarks at closing. (Prop. Of Law 14, 13, 10). During trial, the court allowed gruesome and repetitive photos, and instructed the jury with Ohio's improper beyond a reasonable doubt standard. (Prop. Of Law 15, 17). Ultimately, the state failed to prove the case by the weight and sufficiency of the evidence, in particular as to premeditate murder and kidnapping. (Prop. Of Law 11).

Sentencing Errors

During the mitigation phase, defense counsel failed to put on any mental health medical expert on Myer's behalf. (Prop. Of Law 6). The court then crucially failed to do a separate sentencing opinion as required by statute. (Prop. Of Law 12). Any of the above errors are reason for reversal and remand. And all of these errors, even if not singularly a cause for reversal, were so cumulatively. (Prop. Of Law 16).

Finally, the imposition of the death penalty was so grossly unfair that it shocks the conscience in that the actual killer Mosley received life without, while the accomplice Myers received the death penalty. Even beyond that comparison, Myers' age and mental development, when viewed through the lens of recent USSC jurisprudence as to youth, brain development, and the death penalty, should prohibit the imposition of capital punishment in this case. (Prop. Of Law 1 and 2). These last two propositions of law, along with the court's failure to do a proper sentencing opinion, *supra*, warrant remand for resentencing to life without parole.

For all of the reasons set forth above, Mr. Myers's rights under the Constitution of the United States and the Ohio Constitution were violated and he was denied a fair trial and sentencing proceeding. Accordingly, this Court should reverse and discharge the defendant or grant a new trial. In the alternative, this Court should vacate the death sentence, remand for a resentencing hearing, and order the life sentence imposed.

Respectfully submitted,

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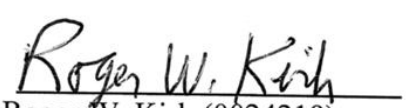

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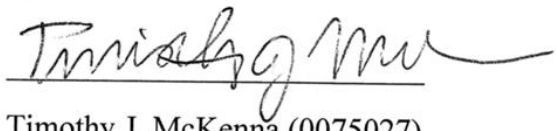
CERTIFICATE OF SERVICE

A copy of the foregoing pleading was served upon the Warren County Prosecutor office by mail this day of filing.



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