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	:	

APPENDIX TO THE MERIT BRIEF OF APPELLANT, AUSTIN GREGORY MYERS

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SUPREME COURT OF OHIO

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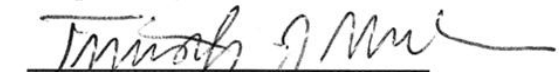
Respectfully submitted,



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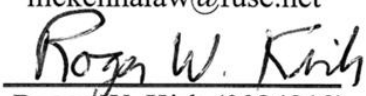

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CERTIFICATE OF SERVICE

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

Timothy J. McKenna (0075027)

267

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	CASE NO: 14-1862
Plaintiff -appellee	:	
-vs-	:	**THIS IS A CAPITAL CASE**
AUSTIN GREGORY MYERS	:	On appeal from the Warren County Common Pleas Court, Judge Oda
Defendant-appellant	:	Trial Case No. 14 CR 29826

NOTICE OF APPEAL

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SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	CASE NO:_____
Plaintiff -appellee	:	
-vs-	:	**THIS IS A CAPITAL CASE**
AUSTIN GREGORY MYERS	:	On appeal from the Warren County Common Pleas Court, Judge Oda
Defendant-appellant	:	Trial Case No. 14 CR 29826

NOTICE OF APPEAL

The Defendant-appellant, Austin Gregory Myers, by and through counsel, hereby gives notice of appeal to the Supreme Court of Ohio from the decision and entry of the Warren County Common Please Court, entered on October 16, 2014, and the subsequent amended judgment entry from October 17, 2014. (Attached "A" and "B").

Respectfully submitted,

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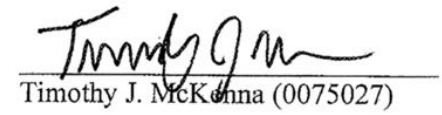
CERTIFICATE OF SERVICE

A copy of the foregoing pleading was personally served upon the Warren County Prosecutor, at their office, by US mail and fax, this 29 day of oct, 2014.



Timothy J. McKenna (0075027)

OCT 2014
COMMON PLEAS COURT
WARREN COUNTY OHIO
FILED
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JEAN A. SMITH
CLERK OF COURTS

(A)

STATE OF OHIO, WARREN COUNTY
COMMON PLEAS COURT
CRIMINAL DIVISION

STATE OF OHIO,	:	
Plaintiff,	:	CASE NO. 14CR29826
v.	:	
AUSTIN GREGORY MYERS,	:	
Defendant	:	JUDGMENT ENTRY OF SENTENCE ON AGGRAVATED MURDER WITH DEATH SPECIFICATIONS PURSANT TO R.C. § 2929.03(F)

This matter is before the Court for Sentencing on October 16, 2014. Present before the Court is the Defendant Austin Gregory Myers, represented by his attorneys Greg Howard and John Kaspar. The State is represented by County Prosecutor David Fornshell, John Arnold and Travis Vieux.

The case was tried to a jury beginning on September 22, 2014. In the Trial Phase, the jury returned a verdict of guilty on two counts of Aggravated Murder with Specifications, Kidnapping (Count Three), Aggravated Robbery (Count Four), Aggravated Burglary (Count Five), Grand Theft of A Firearm (Count Six), Tampering With Evidence (Count Seven), Safecracking (Count Eight) and Abuse of a Corpse (Count Nine). The Defendant was also found guilty on all the firearm specifications.

The Court found Counts One and Two of Aggravated Murder merge for the purposes of sentencing. The Court also found the Aggravated Murder specifications merge. The State of Ohio elected to proceed on Aggravated Murder (Count One) and the Aggravated Robbery Specification (Third Specification) to Count One. In the Sentencing Phase, the jury unanimously recommended a sentence of death be imposed.

The Court inquired of the Defendant as to whether he had anything to say in mitigation or as to why his sentence should not be imposed.

FACTS

On January 27, 2014, the Defendant Austin Gregory Myers ('Myers') and his co-defendant Timothy Mosley ('Mosley') planned to rob the home of Justin Back – a

WARREN COUNTY
COMMON PLEAS COURT
JUDGE DONALD E. ODA II
500 Justice Drive
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childhood friend of Myers. They visited the home of Justin Back in Waynesville, Ohio, where he lived with his mother, Sandy Cates and stepfather, Mark Cates. They were surprised to discover he was at home. They stayed for a short time, then left when Justin Back and Mark Cates had to leave to meet with a Navy recruiter.

Shortly thereafter, they formulated a plan to kill Justin Back and burglarize the home. As part of that plan, they originally attempted to purchase cold medicine, poison and syringes from stores in Waynesville. They were unsuccessful in these attempts when the debit card they were attempting to use was declined. Later that evening, they ended up borrowing $20.00 from a mutual friend, Logan Zennie ('Zennie'). With that money, they purchased wire cable and two handles to form a garrote or choke wire. It was Zennie who actually fashioned the garrote.

The following day, on Tuesday, January 28, 2014, Myers and Mosley purchased items to cover up the burglary, robbery and murder, specifically: septic enzymes, rubber gloves and ammonia from the Dollar General Store in Clayton. They traveled to Waynesville and Justin Back let them in the house under the pretense of hanging out and watching movies. The plan was for Myers to distract Justin Back in the kitchen area and for Mosley to come up behind him and strangle him with the garrote.

The two put this plan in motion sometime between the hours of 1:00 and 2:00 p.m. Myers lured the victim into the kitchen and Mosley approached him from behind. When Mosley attempted to use the garrote, he missed. The wire instead ended up across Justin Back's chin. Myers was attempting to restrain Justin Back's arms and a fight ensued where all three men ended up on the kitchen floor. In a panic, Mosley retrieved a knife from his pocket and proceeded to stab Justin Back in the back and chest. Justin Back died from blood loss on his kitchen floor as a result of the stab wounds.

Myers and Mosley cleaned up the crime scene and stole numerous items from the house, including jewelry, a safe, laptop, iPod, a gun and other items of personal property. It was their plan to make it appear as though Justin Back ran away. They wrapped the body in a blanket and put it in the trunk of Mosley's car. They dumped the body in Preble County in a secluded, wooded area near Fudge Road known as Cry Baby Bridge. Prior to leaving the body, Myers shot two rounds into Justin Back's dead body and placed the septic enzymes on the body to aid in decomposition.

The two were apprehended by law enforcement that same night. Both gave statements to police initially denying any involvement, but they eventually implicated themselves in most aspects of the theft and murder.

Both Myers and Mosley were charged with Aggravated Murder, Kidnapping, Aggravated Robbery, Aggravated Burglary, Theft of a Firearm, Safecracking and Abuse of a Corpse. Mosley reached a plea agreement in the week before trial in

which he agreed to testify against Myers and plead guilty to all charges in exchange for the dismissal of the death specifications.

AGGRAVATING CIRCUMSTANCE

The Aggravating Circumstance in this case is that the Aggravated Murder was committed with prior calculation and design and was committed while Myers was committing, attempting to commit and/or fleeing immediately after committing or attempting to commit the offense of Aggravated Robbery. At the Sentencing Phase, the State reintroduced some of the evidence submitted at the Trial Phase and no other evidence.

The Aggravating Circumstance in this case is significant. The Aggravated Murder was committed in the course of an Aggravated Robbery – meaning Myers and Mosley intended to inflict serious physical harm upon the victim in the course of a theft offense.

The offense was committed with Prior Calculation and Design. This fact, in and of itself, is not an Aggravating Circumstance. However, because the Defendant was not the principal offender in this case, the Court must consider whether the Aggravated Murder was committed with Prior Calculation and Design. The offense was planned out carefully over the course of two days. Myers and Mosley carefully considered a number of different methods by which to kill the victim and take property belonging to him and his family. This is not a case where a murder happens spontaneously in the course of the commission of another felony. Myers and Mosley entered the Back/Cates residence with a specific plan to kill.

The weight to be given to the Aggravating Circumstance is considerable.

MITIGATING FACTORS PRESENTED BY THE DEFENSE

The defense presented the following mitigating factors on behalf of Myers: 1) the youth of the Defendant; 2) the lack of significant prior criminal history or juvenile delinquency adjudications; 3) the love and support of his family; 4) the plea agreement of Mosley. The Court will address each of these factors in turn.

The youth of the Defendant is a significant mitigating factor. The Defendant is 19 years of age. Because of his youth, he lacks insight. The Defendant does not understand how precious life is – at his age, it would be virtually impossible for him to have such an appreciation. Likewise, the Defendant, because of his youth, has no concept of death. This is clear from his unsworn statement. Because he has had no time to appreciate his accomplishments, to reflect on his actions or even contemplate his own existence, he has no respect for death. His statements to the jury "wishing he could go back in time;" "If you kill me, it won't fix anything;" "It won't bother me;" "It won't hurt me;" "I won't feel anything." These are the statements of a child. The youth of the Defendant was given substantial weight by the Court

The lack of prior criminal history or juvenile delinquency adjudications is also a significant mitigating factor and was given substantial weight by the Court. There was no evidence presented at trial that Myers had ever been previously convicted of any criminal offense or adjudicated delinquent for any offense. It is not uncommon for the Court to see criminal defendants, even at age 19, with considerable misdemeanor and felony criminal records beginning at a young age. It is likewise not uncommon for the Court to see criminal defendants who begin with smaller crimes that gradually increase in frequency and intensity. The evidence suggests this is the first time the Defendant has been incarcerated for any reason. This fact merits significant weight in the balancing process.

The love and support of family was considered by the Court but is not a significant mitigating factor. The Court has considered the testimony of Myers family, the letters he has written and the potential that Myers could have to be a good influence on his siblings. The Court has reviewed the letters from the Defendant to his family offered in mitigation and finds them to be of little value with respect to mitigation. The Court has considered the love and support of family as a mitigating factor, but gives it almost no weight.

The plea agreement of Timothy Mosley is a troublesome mitigating factor. Mosley is the principal offender in this case, i.e. he is the actual killer. He is the one who snuck up behind Justin Back and tried to strangle him with the garrote. After this failed, Mosley is the one that pulled a knife from his pocket and stabbed Justin Back no less than 21 times. This murder weapon was not produced at trial despite more than 400 exhibits offered by the State. There was no testimony as to what became of this knife. In fact, it was barely mentioned at the trial. While Myers and Mosley planned this crime together, it was Myers who selected Justin Back as the victim. The Court also notes that in every picture and nearly at all times in the video surveillance, it was Myers in front and Mosley following behind. Because of the plea agreement with the State, the Court cannot consider death as a possible penalty for Mosley, as deserving as he may be of such a sentence. But, a person who contracts a murder for hire, for example, is not less culpable than the actual killer. Under such circumstances, he is more culpable because without his acts and the continuous chain of events following, the victim would still be alive. This is true of Justin Back. Without Myers, Mosley had no real predisposition to kill – certainly no reason to kill Justin Back. The evidence clearly shows the murder was Myers' idea. He selected Justin Back as the victim. He selected the Cates home as the location for the Aggravated Robbery. He does not escape culpability just because Mosley cannot be put to death for his crimes. But, the Court must consider, in light of Mosley's plea deal, whether a life sentence is a more appropriate penalty in this case for Myers, who was not the principal offender/actual killer. The Court finds the fact that Mosley is receiving a life sentence for his involvement in the crimes to be a mitigating factor of some significance in the weighing process.

The Court has considered the statements made at today's hearing in mitigation.

The Court has not considered any victim impact evidence in the weighing process, nor has the Court considered the aggravated murder itself as an aggravating circumstance.

THE JURY'S VERDICT

The jury did their job in this case. They were thoughtful and deliberate. The Court is proud of their service and humbled at the gravity with which they undertook this difficult decision. Whether the Court ultimately agrees with their decision or not does not mean they were not correct in their evaluation of the Aggravating Circumstance and the Mitigating Factors.

In Ohio, the death penalty is not handed down by a jury. It is imposed by a judge. This is how the system is designed to work. The judge cannot even consider the death penalty until a jury has considered the case and unanimously determined death is appropriate. However, the law requires the judge make a separate and independent determination as to the appropriateness of death as a sentence in this case without deference to the verdict of the jury.

The law does not allow a jury to be told their verdict is a recommendation for good reason: to do so would allow them to shift the responsibility to the judge - thus denying the gravity, immediacy and permanency of their decision. In the same vein, the law does not allow judges to give deference or weight to the jury's verdict in a capital case for the same reason: to do so would allow the Court to shift its responsibility to the jury and shirk the ultimate responsibility for the sentence.

OTHER MITIGATING FACTORS

The Court has carefully considered the nature and circumstances of the offense to determine if there is any mitigating value. There is not. The crime itself was carried out with precision and planning in a brutal fashion. Therefore, the Court finds no mitigating value in the nature and circumstances of the offense and therefore gives this potential mitigating factor no weight in the decision.

The Court has considered the troubled childhood of the Defendant to determine if there is any mitigating value. The evidence showed that Myers came from a dysfunctional home life and the circumstances of his parents' estrangement and ultimate divorce appear to have had a significant impact on him in his formative years. However, the Court notes that many children come from divorced parents and blended families. The Defendant stated to Dr. Chung in his examination at the Kettering Hospital Youth Services that his father physically abused him. This seems at odds with the rest of the evidence and the Defendant's choice to go live with his father shortly thereafter. The Court gives this potential mitigating factor some weight against the Aggravating Circumstance, but not much.

The Court finds the absence of other Aggravating Circumstances to be a mitigating factor, even though it was not raised by the defense. This is a not a case where the

victim was the president or governor. The victim was not a child under the age of 13 or a police officer. The Aggravated Murder was not committed as an act of terrorism, to escape detection for a separate crime or in the killing of two or more people. This is not to say the pain and loss of the Cates family are somehow less. They aren't. This does not mean the death of Justin Back is less tragic. It isn't. However, the law recognizes these classes of victims and categories of offenses as direct attacks on civilized society that go above and beyond an Aggravated Murder without those same qualities. To that extent, there is some mitigating value to the lack of other Aggravating Circumstances in this case.

The Court has carefully considered the testimony, exhibits and statement of the Defendant for any remorse and finds none. "I am sorry this happened" and "I made a horrible mistake" are not an apology nor are they a statement of genuine remorse. Therefore, the Court finds no mitigating value for any remorse of the Defendant and therefore gives this potential mitigating factor no weight in the decision.

THE WEIGHING PROCESS

The Court has considered all the evidence and balanced the Aggravating Circumstance against the Mitigating Factors set forth above.

The Court finds the State has proven beyond a reasonable doubt the Aggravating Circumstance outweighs the Mitigating Factors. Therefore, the sentence of death shall be imposed on Austin Gregory Myers on the charge of Aggravated Murder and the specification.

This matter shall be automatically appealed to the Ohio Supreme Court pursuant to R.C. § 2929.05

JUDGE DONALD E. ODA II

Cc: David Fornshell Warren County Prosecuting Attorney
John Arnold Assistant Prosecuting Attorney
Greg Howard Lead Counsel for Defendant
John Kaspar Co-Counsel for Defendant

Copies to be filed with the Court of Appeals and the Ohio Supreme Court

10-17-14

261

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WARREN COUNTY, OHIO
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JAMES L. SPAETH
CLERK OF COURTS

STATE OF OHIO, WARREN COUNTY
COMMON PLEAS COURT
CRIMINAL DIVISION

STATE OF OHIO,	:	
Plaintiff,	:	CASE NO. 14CR29826
v.	:	
AUSTIN GREGORY MYERS,	:	
Defendant	:	JUDGMENT ENTRY AND SENTENCE ON FELONY COUNTS AND SPECIFICATIONS

This matter is before the Court for Sentencing on October 16, 2014. Present before the Court is the Defendant Austin Gregory Myers, represented by his attorneys Greg Howard and John Kaspar. The State is represented by County Prosecutor David Fornshell, John Arnold and Travis Vieux.

The Court has, by separate Judgment Entry, set forth the sentence for the Aggravated Murder and Death Penalty Specification. With respect to the remaining counts, the Court has considered the record and the principles and purposes of sentencing under R.C. §2929.11. The Court has balanced the seriousness and recidivism factors under R.C. §2929.12 and considered the factors under R.C. §2929.13. The Court inquired if the Defendant had anything to say in mitigation regarding the sentence.

The Court finds the Defendant is not amenable to an available community control sanction and that prison is consistent with the purposes and principles of R.C. §2929.11.

It is hereby **ORDERED** that Defendant is hereby sentenced to a total of fifteen (15) years in prison, set forth as follows:

1) The Court finds Count Three – Kidnapping, R.C. § 2905.01(A)(2), a felony of the first degree (victim not released in a safe place); Count Four – Aggravated Robbery, R.C. § 2911.01(A)(3), a felony of the first degree;

WARREN COUNTY
COMMON PLEAS COURT
JUDGE DONALD E. ODA II
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Lebanon, Ohio 45036

and Count Five – Aggravated Burglary, R.C. § 2911.11(A)(1) a felony of the first degree merge for the purposes of sentencing. The defendant is sentenced to eleven (11) years in prison for the offenses of Kidnapping, Aggravated Robbery, and Aggravated Burglary.

2) Count Six Grand Theft of a Firearm, R.C. §2913.02(A)(1), a felony of the third degree: The defendant is sentenced to 36 months in prison.

3) Count Seven Tampering With Evidence, R.C.§2921.12(A)(1)a felony of the third degree: The defendant is sentenced to 36 months in prison.

4) Count Eight Safecracking, R.C. §2911.31(A), a felony of the fifth degree: The defendant is sentenced to 12 months in prison.

5) Count Nine Abuse of a Corpse, R.C. §2927.01(B), a felony of the fifth degree: The defendant is sentenced to 12 months in prison.

6) These prison terms shall be served concurrently with one another and concurrently with the sentence for Aggravated Murder with Specifications.

7) The defendant was also convicted of specifications to counts 4, 5, 6 (violations of R.C. 2941.141 1 year firearm) and count 9 (violation of R.C. 2941.145(A) 3 year firearm). As to the Firearm Specification to Count Nine, the Court imposes a sentence of 3 years in prison, to be served consecutively to all other sentences.

8) The Court finds the remaining Firearm Specifications merge. The Court imposes a sentence of one year in prison, to be served consecutively to all other sentences.

The Court finds the Defendant does not have nor is he reasonably expected to have the means to pay the financial sanctions, fines and court costs. There is no fine and costs are waived.

The Defendant is not eligible for a Risk Reduction Sentence pursuant to R.C. §2929.143.

Defendant shall receive jail time credit in the amount of 261 day(s) as of this date.

The Defendant shall submit a DNA sample pursuant to R.C. §2901.07.

The Defendant is also subject to a mandatory period of post-release control with a maximum term of five years.

The Defendant is hereby notified that a violation of any post-release control rule or condition can result in a more restrictive sanction when released, an increased duration of supervision or control, up to the maximum set out above and/or re-imprisonment even though the Defendant has served the entire stated prison sentence. Re-imprisonment can be imposed in segments of up to 9 months but cannot exceed a maximum of one-half of the total term imposed for all of the offenses set out above. The Defendant was also notified that commission of a new felony while subject to this period of control or

supervision may result in an additional prison term consisting of the maximum period of unserved time remaining on post-release control as set out above or 12 months whichever is greater. This prison term must be served consecutively to any term imposed for the new felony. The sentence imposed by the Court automatically includes any extension of the stated prison term by the Parole Board.

The Defendant did cause or threaten to cause physical harm to a person. Any Temporary Protection Order issued in this case is hereby terminated.

The Defendant shall be conveyed by the Warren County Sheriff to the custody of the Ohio Department of Rehabilitation and Corrections forthwith.

JUDGE DONALD E. ODA II

Cc: David Fornshell Warren County Prosecuting Attorney
John Arnold Assistant Prosecuting Attorney
Greg Howard Lead Counsel for Defendant
John Kaspar Co-Counsel for Defendant

Papers Sent
10-17-14

162

COMMON PLEAS COURT
WARREN COUNTY OHIO
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2014 OCT 17 AM 10: 43

CHARLES L. SPAETH
CLERK OF COURTS

(B)

STATE OF OHIO, WARREN COUNTY
COMMON PLEAS COURT
CRIMINAL DIVISION

STATE OF OHIO,	:	
Plaintiff,	:	CASE NO. 14CR29826
v.	:	
AUSTIN GREGORY MYERS,	:	
Defendant	:	AMENDED JUDGMENT ENTRY AND SENTENCE ON FELONY COUNTS AND SPECIFICATIONS

This matter is before the Court for Sentencing on October 16, 2014. Present before the Court is the Defendant Austin Gregory Myers, represented by his attorneys Greg Howard and John Kaspar. The State is represented by County Prosecutor David Fornshell, John Arnold and Travis Vieux.

The Court has, by separate Judgment Entry, set forth the sentence for the Aggravated Murder and Death Penalty Specification. With respect to the remaining counts, the Court has considered the record and the principles and purposes of sentencing under R.C. §2929.11. The Court has balanced the seriousness and recidivism factors under R.C. §2929.12 and considered the factors under R.C. §2929.13. The Court inquired if the Defendant had anything to say in mitigation regarding the sentence.

The Court finds the Defendant is not amenable to an available community control sanction and that prison is consistent with the purposes and principles of R.C. §2929.11.

It is hereby **ORDERED** that Defendant is hereby sentenced to a total of fifteen (15) years in prison, set forth as follows:

1) The Court finds Count Three – Kidnapping, R.C. § 2905.01(A)(2), a felony of the first degree (victim not released in a safe place); Count Four – Aggravated Robbery, R.C. § 2911.01(A)(3), a felony of the first degree;

RREN COUNTY
MMON PLEAS COURT
GE DONALD E. ODA II
Justice Drive
anon, Ohio 45036

and Count Five – Aggravated Burglary, R.C. § 2911.11(A)(1) a felony of the first degree merge for the purposes of sentencing. The defendant is sentenced to eleven (11) years in prison for the offenses of Kidnapping, Aggravated Robbery, and Aggravated Burglary.

2) Count Six Grand Theft of a Firearm, R.C. §2913.02(A)(1), a felony of the third degree: The defendant is sentenced to 36 months in prison.

3) Count Seven Tampering With Evidence, R.C.§2921.12(A)(1)a felony of the third degree: The defendant is sentenced to 36 months in prison.

4) Count Eight Safecracking, R.C. §2911.31(A), a felony of the fourth degree: The defendant is sentenced to 12 months in prison.

5) Count Nine Abuse of a Corpse, R.C. §2927.01(B), a felony of the fifth degree: The defendant is sentenced to 12 months in prison.

6) These prison terms shall be served concurrently with one another and concurrently with the sentence for Aggravated Murder with Specifications.

7) The defendant was also convicted of specifications to counts 4, 5, 6 (violations of R.C. 2941.141 1 year firearm) and count 9 (violation of R.C. 2941.145(A) 3 year firearm). As to the Firearm Specification to Count Nine, the Court imposes a sentence of 3 years in prison, to be served consecutively to all other sentences.

8) The Court finds the remaining Firearm Specifications merge. The Court imposes a sentence of one year in prison, to be served consecutively to all other sentences.

The Court finds the Defendant does not have nor is he reasonably expected to have the means to pay the financial sanctions, fines and court costs. There is no fine and costs are waived.

The Defendant is not eligible for a Risk Reduction Sentence pursuant to R.C. §2929.143.

Defendant shall receive jail time credit in the amount of 261 day(s) as of this date.

The Defendant shall submit a DNA sample pursuant to R.C. §2901.07.

The Defendant is also subject to a mandatory period of post-release control with a maximum term of five years.

The Defendant is hereby notified that a violation of any post-release control rule or condition can result in a more restrictive sanction when released, an increased duration of supervision or control, up to the maximum set out above and/or re-imprisonment even though the Defendant has served the entire stated prison sentence. Re-imprisonment can be imposed in segments of up to 9 months but cannot exceed a maximum of one-half of the total term imposed for all of the offenses set out above. The Defendant was also notified that commission of a new felony while subject to this period of control or

supervision may result in an additional prison term consisting of the maximum period of unserved time remaining on post-release control as set out above or 12 months whichever is greater. This prison term must be served consecutively to any term imposed for the new felony. The sentence imposed by the Court automatically includes any extension of the stated prison term by the Parole Board.

The Defendant did cause or threaten to cause physical harm to a person. Any Temporary Protection Order issued in this case is hereby terminated.

The Defendant shall be conveyed by the Warren County Sheriff to the custody of the Ohio Department of Rehabilitation and Corrections forthwith.

JUDGE DONALD E. ODA II

Cc: David Fornshell Warren County Prosecuting Attorney
John Arnold Assistant Prosecuting Attorney
Greg Howard Lead Counsel for Defendant
John Kaspar Co-Counsel for Defendant

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COMMON PLEAS COURT
WARREN COUNTY, OHIO
FILED

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JAMES L. SPAETH
CLERK OF COURTS

STATE OF OHIO, WARREN COUNTY
COMMON PLEAS COURT
CRIMINAL DIVISION

STATE OF OHIO,	:	
Plaintiff,	:	CASE NO. 14CR29826
v.	:	
AUSTIN GREGORY MYERS,	:	
Defendant	:	ORDER GRANTING IN PART DEFENDANT'S MOTION #15 TO APPEAR AT ALL HEARINGS WITHOUT RESTRAINTS AND ORDER ESTABLISHING SECURITY PROTOCOLS FOR HEARINGS AND TRIAL

Pending before the Court is the motion of the Defendant to appear at trial without restraints. The State has filed a memorandum in response and the Court heard testimony on June 18, 2014 regarding the issues of security.

Testimony was presented by Major Barry Riley. Major Riley testified regarding security concerns related to the building layout, the additional concerns related to the current construction, the general security concerns related to inmates and their safety and the safety of others, the individualized concerns related to this Defendant and the options for securing the defendant. Major Riley testified regarding the different security devices and procedures available and his preferred procedure. The options for securing the defendant include: full restraints (handcuffs, leg shackles and belly shackles), leg weights, leg shackles, no restraints or any combination of the above. The recommendation of the Sheriff's Department was that the Defendant be in full restraints at all times.

The Court finds it is necessary to balance the procedures generally utilized by the Sheriff's Department in providing courthouse security and their recommendations against the rights of the Defendant to a fair trial. The Court notes that the appearance of the Defendant in jail clothing,[1] with restraints or in the presence of excessive law enforcement personnel creates a risk the jury will infer guilt. However, the Court has a legitimate

RREN COUNTY
MMON PLEAS COURT
GE DONALD E. ODA II
Justice Drive
anon, Ohio 45036

[1] See Order Granting Defendant's Motion #16 to Appear At All Hearings In Civilian Clothing, filed herein on May 19, 2014.

interest in maintaining security at the trial for the protection of the public, the defendant, the participants and to ensure the trial proceeds in an orderly manner.

Based on the evidence and arguments of counsel, the Court finds the nature of the proceedings and the specific security risks posed by this Defendant require a heightened level of security.

The general procedure for the restraint and transport of the Defendant shall be as follows:

a) Defendant is to be transported to the courtroom by the Court Services Division of the Warren County Sheriff's Department in handcuffs and/or shackles as determined by the Sheriff's Department outside the view of the public to the extent possible.

b) Prior to the Defendant entering the courtroom, the bailiff shall clear the courtroom and media room of all non-court personnel. Upon entering the courtroom, the Defendant shall be unshackled except for leg restraints and seated at counsel table. Thereafter, the bailiff shall unlock the doors and reopen the courtroom and media room to the public.

c) The Court shall employ a modesty panel on both counsel tables which shall obscure the leg restraints from the view of the jury. It shall be the responsibility of defense counsel to position the Defendant at the counsel table so his leg restraints are obscured from the view of the jury.

d) In the event the Defendant is to testify in the case, he shall be placed on the witness stand outside the presence of the jury and his feet shall remain in leg restraints during his testimony. After his testimony, the jury shall be escorted out and the Defendant shall return to his seat outside the presence of the jury.

e) The Sheriff's Department may post up to two uniformed deputies in the immediate proximity of the Defendant and may post other security personnel as needed in the courtroom.

f) At the close of the hearing, the bailiff shall clear the courtroom and media room. The Defendant will be handcuffed and/or shackled at the discretion of the Sheriff's Department and transported from the courtroom outside the view of the public to the extent possible.

g) During the trial, the bailiff shall secure the jury in the jury room and hold them there during the transport of the Defendant to and from the courtroom.

h) During hearings and the trial, the Defendant may be in possession of his notes and papers, as well as one court-approved writing instrument and a pad of paper to make notes.

i) Counsel shall not provide nor may the Defendant be in possession of any other writing instrument other than the court-approved writing instrument.

j) The Defendant may not handle any exhibit without prior approval by the Court.

The Court further finds these procedures are the least restrictive means of security and restraint available.

The Court further finds that in the event of an imminent security risk, these procedures may be modified as needed depending on the circumstances presented and the nature of the risk.

JUDGE DONALD E. ODA II

Cc: David Fornshell Warren County Prosecuting Attorney
John Arnold Assistant Prosecuting Attorney
Greg Howard Lead Counsel for Defendant
John Kaspar Co-Counsel for Defendant
Warren County Sheriff's Department

COMMON PLEAS COURT
WARREN COUNTY
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CLERK OF COURTS

STATE OF OHIO, WARREN COUNTY
COMMON PLEAS COURT
CRIMINAL DIVISION

STATE OF OHIO,	:	
Plaintiff,	:	CASE NO. 14CR29826
v.	:	
AUSTIN GREGORY MYERS,	:	
Defendant	:	ENTRY AND ORDER ON MOTION #57 DENYING MOTION TO SUPPRESS

This matter is before the Court on August 5, 2014 for evidentiary hearing on Defendant's Motion to Suppress (Motion #57). Present before the Court was the Defendant, represented by Greg Howard and John Kaspar. The State was represented by County Prosecutor David Fornshell and Assistant County Prosecutor Travis Vieux.

FACTUAL FINDINGS

The Court heard testimony from Detective Michael Wyatt of the Warren County Sheriff's Office ('WCSO'). On Tuesday, January 28, 2014, he received a call at 9:17 p.m. from Sgt. Hounshell, also of the WCSO, concerning a possible burglary and missing person at the residence located at 5376 Corwin Road in Waynesville, Ohio in Warren County. Mark Cates, Sandy Cates and Justin Back ('Back') were residents of this house.

He drove to the scene and spoke with officers who had already responded. He spoke with Deputy Roberts, who advised him that there were some items missing from the house and Back was missing. Deputy Roberts said

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GE DONALD E. ODA II
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anon, Ohio 45036

he received information from Mark Cates, Justin's dad, that Austin Myers ('Myers') and someone named 'Tim' – later identified as Timothy Mosley ('Mosley') – had been at the house on Monday in a silver Cavalier with a broken window and some identifiable stickers on the vehicle. He had further received information from a neighbor that the same silver Cavalier had been back at the house on Tuesday, January 28, 2014, between noon and 2:00 p.m. Deputy Roberts had obtained Myers cell phone number and had made contact with him requesting that he return to the scene to talk. Myers indicated he would return. A second call was placed to Myers and he indicated he did not drive and he would return when he could get a ride. A third call to his phone was not answered.

At this time, Back's mother was attempting to locate him on Facebook and by calling his friends. Someone told her that Myers had been known to commit burglaries. Mark Cates knew that Myers had been there the previous day. The neighbor also indicated that he saw a 'tall, skinny person' going back and forth between the residence and the car that was not Back.

Upon examination of the scene, Det. Wyatt was able to identify a kitchen table that was shoved up against the wall and there were several rugs that were missing. In addition, there was a gun, safe and a watch also missing. Det. Wyatt testified that the rugs are something that ordinarily would not have been stolen and their absence suggested to him evidence of covering up of a crime. At this time, he suspected that a burglary had occurred and he was concerned about a possible kidnapping. He was also working with Detective Paul Barger - sharing information about the investigation. Dispatch did a ping on Myers phone which indicated the phone was in the Englewood area.

Based upon this information, the WCSO issued a BOLO ('Be On Look Out') for Myers and the Chevy Cavalier at 12:17 a.m. on January 29, 2014. This was not a request for an arrest, and no warrant accompanied the BOLO. Det. Wyatt anticipated that other law enforcement agencies receiving the BOLO would detain the individual who was the subject of the BOLO and contact the WCSO for further instructions. Exhibit 3 was a printout of a call log from that night showing the comings and goings of the officers that evening - including the cell phone ping and the BOLO.

Based upon the information received from the WCSO, the Clayton Police Department ('CPD') went to the home of Myers' mother, she informed them he lived with his father. The CPD then went to Myers' father's house to locate him. He was not there, but they received information that Myers was with an individual named Logan Zennie ('Zennie'). CPD attempted to locate Myers at Zennie's home and were advised that he was at the home of Mosley at 6353 Freeport Drive in Clayton. Myers and the vehicle were ultimately located at the Mosley residence, by the CPD at 1:18 a.m. and CPD requested a call from the WCSO supervisor at 1:23 a.m.

Det. Wyatt testified he did not immediately learn that Myers had been detained. He had been in Lebanon to retrieve some chemicals that could be used at the crime scene to locate blood. He had also stopped to get some soda for the officers on the crime scene unit. While he was en route back to Waynesville, he received a call from Sgt. Hounshell that Myers had been located. Det. Wyatt dropped off the chemicals and spoke to Hounshell briefly at the Corwin Road residence. Then at approximately 2:00 a.m. Wyatt, Barger and Hounshell drove to Clayton.

When they arrived at the Freeport Drive address, about 50 minutes later, there was a CPD SUV and Crown Victoria vehicle on the scene. He made contact with the CPD officer and was directed to Myers who was asleep in one of the CPD vehicles. He did not know at that time whether or not

Myers was handcuffed. Det. Wyatt asked Myers if he would speak with him at the police station because it was so cold. He agreed.

Myers was then transported by the CPD to the station, which took two or three minutes. The WCSO followed behind. When they arrived at the station, Det. Wyatt realized Myers was in handcuffs and instructed the CPD to uncuff him, stating: "he is here voluntarily." He was uncuffed outside of the building.

He spoke with Myers in the conference room at the CPD. He was offered an interrogation room by the CPD, but opted for the conference room instead because Myers was not in custody at that time. The conference room had a table with chairs around it. The CPD did not participate in the interview.

When the interview ('the First Interview') began, Det. Wyatt, Barger and Myers were seated around the table and the door was closed for privacy reasons. At some point in the First Interview, they opened to the door because it was getting cold in the conference room and they tried to get some heat from the hall. The First Interview was recorded on a handheld device by Det. Wyatt.

Prior to the interview, Det. Wyatt told Myers that he was not under arrest and was free to leave at any time. The audio recording of the First Interview was admitted as State's Exhibit 1. The interview began at 3:07 a.m. on January 29, 2014. It ended at 3:54 a.m. Myers stated that he had not been drinking, nor was he under the influence of alcohol or drugs. Det. Wyatt said there were no threats and/or inducements with respect to Myers. At one point, he needs to use the restroom and he is escorted to the restroom by Det. Wyatt, who stood in the doorway.

The First Interview lasted about 45 minutes. At the conclusion of the interview, Myers was returned to the Mosley residence, unhandcuffed. He was transported by the CPD while WCSO officers followed behind in their vehicle. When police returned Myers to the residence, Mosley advised the officers he wanted to speak with them. Mosley told the officers that he did not want Myers to go back into the house because he did not want Myers to wake up Mosley's mom. Myers smoked a cigarette with Zennie and got back in the police SUV to stay warm.

Mosley was transported to the CPD station for an interview, which took approximately an hour. Mosley was likewise returned, unhandcuffed, to the Freeport Drive address. Det. Wyatt then spoke with Zennie at the CPD station in the same conference room as he used with Myers. While speaking with Zennie, Det. Wyatt received a text from Sgt. Hounshell asking if Myers and Mosley were free to leave. He responded, saying they were.

While interviewing Zennie, Det. Wyatt learned that while Myers was in the CPD cruiser, Mosley told Zennie that Myers had shot Back and Mosley had stabbed Back. At that time, Det. Wyatt told Det. Barger to advise Sgt. Hounshell that Myers and Mosley were not free to leave. Zennie was returned to the house and Det. Wyatt was informed that Mosley wanted to talk with him. He brought Mosley in for an interview at the CPD. At that time, Det. Wyatt testified he believed that Myers was asleep in the back of the SUV.

The CPD brought Myers back to the station at approximately 7:40 a.m. He was placed in one of the holding cells and handcuffed to a bench. Because there are no locks on the doors, the benches are specifically designed to have suspects handcuffed to them.

Myers was read his Miranda rights prior to be interviewed again ('the Second Interview'). Specifically, he was advised of his right to remain silent, his right to speak with an attorney and have him or her present during questioning, the right to an appointed attorney before any questioning and the ability to decide at any time to exercise these rights and stop answering questions. Det. Wyatt read them from a card – the same one he has used since approximately 2000. Det. Wyatt acknowledged that written Miranda waiver forms may have been available at the CPD, but he chose not to use them.

Myers acknowledged that he understood those rights and proceeded to speak with him. The Second Interview was audio and video recorded, admitted into evidence as Exhibits 2A and 2B.

In the Second Interview, Myers advises Det. Wyatt that he wants to be represented by an attorney because it is 'the safer way to go.' Det. Wyatt terminates the Second Interview. Thereafter, Myers is handcuffed and left alone in the interview room. Det. Wyatt advised that a call had been made to the WCSO to make arrangements for Myers to be transported to the Warren County Jail. The transport crew did not arrive until a little after 10:00 a.m. on January 29, 2014.

Myers reinitiates contact with the officers by tapping on the glass at approximately 9:27 a.m. In this interview ('the Third Interview'), Myers asks Det. Wyatt how he goes about getting an attorney. He tells Myers that he can hire a lawyer, or one will be appointed to him after the charges are filed. Det. Wyatt testified that never in his experience has a procedure been used to appoint an attorney prior to charges being filed. Det. Wyatt tells Myers that he is going to be charged. Myers asks if Mosley is in the same situation he is and asks for a bottle of water. The Third Interview is terminated without any significant discussion.

At 10:02 a.m., Myers taps on the glass again. He advises Det. Wyatt that he wants to 'help' them. At the start of the interview ('the Fourth Interview'), he is read the identical Miranda rights by Det. Wyatt from his card. In the Fourth Interview, Myers gives an account of his and Mosley's involvement in the killing of Back. The Fourth Interview lasts about an hour. He also advises Det. Wyatt where Back's body is located and offered to take police to it. After the Fourth Interview, Myers is again handcuffed to the bench and left alone in the interrogation room.

At approximately 1:30 p.m., Det. Wyatt and Det. Barger interview Myers again ('the Fifth Interview'). He is again read the same Miranda warnings by Det. Wyatt from his card. The Fifth Interview lasts about 30 minutes. After that, there is no further questioning of Myers. The only other interaction with law enforcement is when he is escorted from the room by transport deputies.

The Court also heard testimony from Sgt. Jeff Garrison of the CPD. On January 28, 2014, he received a dispatch from his department to assist in Warren County in an ongoing investigation. He was initially dispatched a little after midnight, but he was occupied with other calls. He was dispatched again approximately 45 minutes later. His instructions were to detain Myers.

Sgt. Garrison had information that Myers was at the Mosley home on Freeport Drive. He knocked on the door and Mosley, who is known to the officer, answered the door. He asked if Myers was there and Mosley invited them in. Mosley retrieved Myers and brought him downstairs. Myers was placed in handcuffs, searched for weapons and placed in the backseat of a cruiser at 1:14 a.m. Myers was told he was not free to leave at this time.

The CPD advised WCSO that Myers had been located. Myers asked why he was being detained, and he was told he was being held for the WCSO. Shortly thereafter, Myers fell asleep in the backseat. The WCSO officers arrived just before 3:00 a.m. WCSO officers requested permission to interview Myers at the CPD. He was transported to the station by Officer Campbell while Sgt. Garrison remained at the Freeport Drive residence.

When Myers returned from the CPD, he was not handcuffed. He was placed in the back of Sgt. Garrison's SUV, again unhandcuffed. A short time later, he was advised that the WCSO officers had made a decision that Myers was no longer free to leave. He was removed from the vehicle, handcuffed and transported to the CPD.

LEGAL ANALYSIS

It is well-settled that the State may not introduce any statements of a criminal defendant resulting from a custodial interrogation unless it demonstrates the statements are voluntary and police employ the procedural safeguards advising the defendant of his rights to an attorney and against self-incrimination. Miranda v. Arizona (1966), 384 U.S. 436, 444. If a suspect in a criminal investigation invokes his right to counsel at any time during a custodial interrogation, the police must cease all questioning until an attorney has been made available or until the suspect himself initiates further communication, exchanges, or conversations with the police. Edwards v. Arizona (1981), 451 U.S. 477.

The issues of voluntariness and compliance with Miranda are separate and distinct inquiries. State v. Chase (1978), 55 Ohio St.2d 237; State v. Fille, 2002 Ohio 3879, P15. A confession may be involuntary despite proper Miranda warnings if the will of the defendant is overcome by police action. Likewise, a confession may be completely voluntary, but will be rendered inadmissible by the failure of law enforcement to provide the proper warnings. Dickerson v. United States (2000), 530 U.S. 428.

DETENTION OF MYERS BY CLAYTON POLICE

There are three generally recognized categories of encounters between police and members of the public: 1) consensual encounter; 2) investigative detention; and 3) arrest. United States v. Avery (1997), 137 F.3d 343, 352. The consensual encounter may be initiated without an objective level of suspicion. Where the encounter either starts as or becomes non-consensual, law enforcement must have a reasonable, articulable suspicion of criminal activity. Terry v. Ohio (1968), 392 U.S. 1, 21. Finally, an arrest must be supported by probable cause. United States v. Watson (1976) 423 U.S. 411; Brinegar v. United States (1949), 338 U.S. 160.

The Court finds the encounter between Myers and the CPD constitutes an investigative detention, but not an arrest. At the time he was detained by the CPD, he was not free to terminate or walk away from this encounter.

Under the Fourth Amendment, police officers have limited authority to detain individuals. "The right of the people to be secure in their persons ... against unreasonable ... seizures ... shall not be violated." U.S. Const. Amend. IV. Under the Terry doctrine, a police officer may not detain an individual unless he or she has reasonable suspicion that the individual has committed a crime. Terry, 392 U.S. at 22. Reasonable suspicion is based on the totality of the circumstances and requires a particularized and objective basis for suspecting the seized individual of criminal activity. United States v. Cortez, (1981), 449 U.S. 411, 417.

At the time the BOLO was issued, police had the following information: the safe and a gun were missing from the Cates home; there was evidence of a struggle, including a broken lamp and kitchen table pushed against the wall; there were rugs missing and there was evidence the scene may have been cleaned of blood; and Back was missing, yet all his shoes and his phone were left behind. Additionally, the police had information that Myers and the Chevy Cavalier were at the property the previous day and

the vehicle was spotted again at the residence on the day Back went missing. These facts constitute a reasonable and articulable suspicion that Myers was involved in criminal activity.

If police have a reasonable suspicion, grounded in specific and articulable facts, that an individual was involved in or is wanted in connection with a completed felony, then the police may make a Terry stop to investigate that suspicion. United States v. Hensley (1985), 469 U.S. 221, 229. It is important to note that Myers, although handcuffed and placed in the cruiser, is not removed from the Freeport Drive residence where he was located by the CPD. He was held there until the WCSO arrived, about an hour later. The Court finds this is reasonable under the circumstances and the detention was no longer than necessary.

Even assuming the Terry stop was either longer than necessary or involved such a restriction of movement as to constitute an arrest, exclusion of the statements based on the initial encounter is still not warranted. Det. Wyatt's encounter with Myers, once he took over the scene, was sufficient to end the detention and convert the situation back to a consensual encounter. The Court finds Det. Wyatt's statements to Myers, both at the Freeport Drive residence and again at the CPD station clearly and unequivocally break the detention. Myers was free to leave, and he elected not to do so.

CUSTODIAL/NON-CUSTODIAL NATURE OF THE FIRST INTERVIEW

The warnings set forth in Miranda are only required when the defendant is 'in custody.' Oregon v. Mathiason (1977), 429 U.S. 492, 494. The determination of whether an individual was in custody is based on the totality of the circumstances surrounding the questioning. State v. Coleman, Butler App. No. CA2001-10-241, 2002 Ohio 2068, P23. The ultimate inquiry is whether there was a formal arrest or there was such a restraint on the defendant's freedom of movement to constitute an arrest. California v. Beheler (1983), 463 U.S. 1121, 1125.

A noncustodial situation is not necessarily a custodial situation simply because questioning takes place in a police station. Mathiason, 429 U.S. at 495. The determination of whether an individual is in custody, for purposes of Miranda, depends on the objective circumstances of the interrogation, not on the subjective opinions of law enforcement or the defendant. Stansbury v. California (1994), 511 U.S. 318, 323.

Several factors are considered in determining whether detention and questioning constitutes custodial interrogation. These factors include: (1) whether a reasonable person in the suspect's position would feel free to leave; (2) the purpose of the questioning; (3) the length of the questioning; (4) whether the questioning was hostile or coercive; (5) other indicia of custody such as whether the suspect was informed that the questioning was voluntary or whether the suspect possessed unrestrained freedom of movement or whether the suspect acquiesced to the officers' requests to answer some questions. United States v. Crossley (2000), 224 F.3d 847, 861.

The Court finds Myers was free to leave the CPD station and was not in custody. The First Interview took place in a conference room, not an interrogation room or holding cell. Myers was not handcuffed during the First Interview, and he was returned to the Freeport Drive residence unrestrained after he requested that the interview end. Therefore, the Court finds Miranda warnings are not necessary for the First Interview.

Upon his return to the Freeport Drive residence, Myers was again free to go. However, because Mosley would not permit him to return inside his house for fear of waking his mother, Myers had no place immediately to go. He stood outside with Zennie and smoked. He then took refuge from the frigid temperatures in the CPD vehicle, where he slept unhandcuffed in the back. It is only after the statements given by Zennie and Mosley that Myers was removed from the vehicle, handcuffed and arrested.

PROBABLE CAUSE TO ARREST

Probable cause exists where the facts and circumstances known to the officer warrant a prudent person in believing that a criminal offense has been committed. Logsdon v. Hains (2007), 492 F.3d 334, 341; Henry v. United States (1959), 361 U.S. 98, 102. This fact-intensive determination depends on reasonable conclusions drawn from facts known at the time of arrest.

At the time of Myers' arrest, Det. Wyatt had, in addition to those facts outlined for reasonable suspicion, the statements Mosley made to Zennie implicating Myers in the killing of Back. These facts are sufficient for the warrantless arrest of Myers.

MIRANDA WARNINGS AND WAIVER

A statement made during custodial interrogation is inadmissible at trial unless the State can establish the defendant made a knowing, voluntary and intelligent waiver of his or her Miranda rights. North Carolina v. Butler (1979), 441 U.S. 369, 373. Evaluation of such a waiver has two distinct inquiries: 1) whether the waiver was voluntary in the sense that it was the product of a free and deliberate choice, and 2) whether the waiver was made with full awareness of both the nature of the right being abandoned and the consequences of the decision. Moran v. Burbine (1986), 475 U.S. 412, 421.

While a formal, express statement of a defendant's intent to waive his or her Miranda rights is preferable, the lack of such a definite expression is not fatal to the State's case. The Miranda Court stated: a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. Miranda, 384 U.S. at 475. This decision placed a heavy burden on the state to demonstrate a defendant knowingly and intelligently

waived his privilege against self-incrimination and his right to retained or appointed counsel. Id.

Since Miranda was decided, however, courts have retreated from this stringent application to permit these rights to be waived absent formal or express statements of waiver. The purpose of Miranda is to be sure an accused is advised of and understands the right to remain silent and the right to counsel, not to put forth a ritualistic and meaningless set of hurdles to clear. The right to counsel, for example, must be invoked unambiguously. Davis v. United States (1994), 512 U.S. 452, 459.

Det. Wyatt's warnings, read from his card, are almost a word-for-word recitation of the rights set forth in Miranda. There is nothing in the record to suggest that Myers did not fully understand his right to remain silent and his right to an attorney. In fact, he invokes this right to an attorney in the Second Interview and in the Third Interview. Each of these interviews were terminated by Det. Wyatt and no attempt to question him was made after the invocation of his rights.

However, Myers reinitiated contact with law enforcement after invoking those rights. He asked questions about how he would go about getting an attorney. Then he chose to continue speaking with the detectives. The Court finds, based on the totality of the interviews, that Myers made a knowing and voluntary implicit waiver of his right to an attorney and his right to remain silent. The Court further finds, based on the totality of the evidence, Myers understood the nature of these rights and the consequences in declining to exercise them

The defendant has argued that because Myers' questions concerning his rights were improperly answered, he did not make a knowing and intelligent waiver. The Supreme Court has held otherwise. In Duckworth v. Eagan (1989), 492 U.S. 195, the court held that Miranda does not require an attorney be produced at the very moment of such a request. Rather, a suspect need only be advised that he had a right to an attorney

before and during questioning and that an attorney would be appointed for him if he could not afford one. Id.

VOLUNTARY NATURE OF THE STATEMENT

Notwithstanding the proper advisement and waiver of rights, statements by a defendant made after a Miranda warning may still be inadmissible if the confession is not made voluntarily, knowingly, and intelligently. State v. Wilson (1996), 117 Ohio App.3d 290, 293. This determination is made, based on the totality of the circumstances, including the age, mentality, and prior criminal experience of the defendant; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement. State v. Brinkley (2005), 105 Ohio St.3d 231. There is nothing to suggest Myers was the subject of any mistreatment. He made reasonable requests to use the restroom and for water which were granted by the officers. The record demonstrates the officers were polite, accommodating and professional in all respects.

Furthermore, all the interviews were recorded. The custodial interrogations have both audio and video recording. Pursuant to R.C. § 2933.81(B), such interviews are presumed to be voluntary. Myers has the burden of proving the statements were not voluntary, which he has not done.

CONCLUSION

Based on the foregoing, the Court finds the Motion to Suppress is not well-taken and is hereby **DENIED.**

JUDGE DONALD E. ODA II

Cc: David Fornshell Warren County Prosecuting Attorney
John Arnold Assistant Prosecuting Attorney
Greg Howard Lead Counsel for Defendant
John Kaspar Co-Counsel for Defendant

AMENDMENT V, UNITED STATES CONSTITUTION

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

AMENDMENT VI, UNITED STATES CONSTITUTION

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

AMENDMENT VIII, UNITED STATES CONSTITUTION

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

AMENDMENT IX, UNITED STATES CONSTITUTION

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT XIV, UNITED STATES CONSTITUTION

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

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

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

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

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

SECTION 1, ARTICLE I, OHIO CONSTITUTION

§ 1 inalienable rights

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

SECTION 2, ARTICLE I, OHIO CONSTITUTION

§ 2. Right to alter, reform, or abolish government, and repeal special privileges

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

SECTION 5, ARTICLE I, OHIO CONSTITUTION

§ 5. Trial by jury; reform in civil jury system

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

SECTION 9, ARTICLE I, OHIO CONSTITUTION

§ 9. Bail; cruel and unusual punishments

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

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

SECTION 10, ARTICLE I, OHIO CONSTITUTION

§ 10. Trial of accused persons and their rights; depositions by state and comment on failure of accused to testify in criminal cases

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

SECTION 16, ARTICLE I, OHIO CONSTITUTION

§ 16. Redress in courts

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

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

SECTION 20, ARTICLE I, OHIO CONSTITUTION

§ 20. Powers reserved to the people

This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers, not herein delegated, remain with the people.

2152.02 (C)(1)

Delinquent children - juvenile

As used in this chapter:

(C)
(1) "Child" means a person who is under eighteen years of age, except as otherwise provided in divisions (C)(2) to (8) of this section.

R.C.2901.05

Burden of proof - reasonable doubt - self-defense.

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.
(B)
(1) Subject to division (B)(2) of this section, a person is presumed to have acted in self defense or defense of another when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used is in the process of unlawfully and without privilege to do so entering, or has unlawfully and without privilege to do so entered, the residence or vehicle occupied by the person using the defensive force.
(2)
(a) The presumption set forth in division (B)(1) of this section does not apply if the person against whom the defensive force is used has a right to be in, or is a lawful resident of, the residence or vehicle.
(b) The presumption set forth in division (B)(1) of this section does not apply if the person who uses the defensive force uses it while in a residence or vehicle and the person is unlawfully, and without privilege to be, in that residence or vehicle.

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

(C) As part of its charge to the jury in a criminal case, the court shall read the definitions of "reasonable doubt" and "proof beyond a reasonable doubt," contained in division (D) of this section.
(D) As used in this section:
(1) An "affirmative defense" is either of the following:
(a) A defense expressly designated as affirmative;
(b) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which the accused can fairly be required to adduce supporting evidence.

(2) "Dwelling" means a building or conveyance of any kind that has a roof over it and that is designed to be occupied by people lodging in the building or conveyance at night, regardless of whether the building or conveyance is temporary or permanent or is mobile or immobile. As used in this division, a building or conveyance includes, but is not limited to, an attached porch, and a building or conveyance with a roof over it includes, but is not limited to, a tent.
(3) "Residence" means a dwelling in which a person resides either temporarily or permanently or is visiting as a guest.
(4) "Vehicle" means a conveyance of any kind, whether or not motorized, that is designed

to transport people or property.

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

§ 2903.01. Aggravated murder

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

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

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

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

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

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

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

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

(G) As used in this section:

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

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

§ 2905.01. Kidnapping

(A) 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:

(1) To hold for ransom, or as a shield or hostage;

(2) To facilitate the commission of any felony or flight thereafter;

(3) To terrorize, or to inflict serious physical harm on the victim or another;

(4) To engage in sexual activity, as defined in *section 2907.01 of the Revised Code*, with the victim against the victim's will;

(5) To hinder, impede, or obstruct a function of government, or to force any action or concession on the part of governmental authority;

(6) To hold in a condition of involuntary servitude.

(B) 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 knowingly do any of the following, under circumstances that create a substantial risk of serious physical harm to the victim or, in the case of a minor victim, under circumstances that either create a substantial risk of serious physical harm to the victim or cause physical harm to the victim:

(1) Remove another from the place where the other person is found;

(2) Restrain another of the other person's liberty.

(C) (1) Whoever violates this section is guilty of kidnapping. Except as otherwise provided in this division or division (C)(2) or (3) of this section, kidnapping is a felony of the first degree. Except as otherwise provided in this division or division (C)(2) or (3) of this section, if an offender who violates division (A)(1) to (5), (B)(1), or (B)(2) of this section releases the victim in a safe place unharmed, kidnapping is a felony of the second degree.

(2) If the offender in any case also is convicted of or pleads guilty to a specification as described in *section 2941.1422 of the Revised Code* that was included in the indictment, count in the indictment, or information charging the offense, the court shall order the offender to make restitution as provided in division (B)(8) of *section 2929.18 of the Revised Code* and, except as otherwise provided in division (C)(3) of this section, shall sentence the offender to a mandatory prison term as provided in division (B)(7) of *section 2929.14 of the Revised Code*.

(3) If the victim of the offense is less than thirteen years of age and if the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, kidnapping is a felony of the first degree, and, notwithstanding the definite sentence provided for a felony of the first degree in *section 2929.14 of the Revised Code*, the offender shall be sentenced pursuant to *section 2971.03 of the Revised Code* as follows:

(a) Except as otherwise provided in division (C)(3)(b) of this section, the offender shall be sentenced pursuant to that section to an indefinite prison term consisting of a minimum term of fifteen years and a maximum term of life imprisonment.

(b) If the offender releases the victim in a safe place unharmed, the offender shall be sentenced pursuant to that section to an indefinite term consisting of a minimum term of ten years and a maximum term of life imprisonment.

(D) As used in this section:

(1) "Involuntary servitude" has the same meaning as in *section 2905.31 of the Revised Code.*

(2) "Sexual motivation specification" has the same meaning as in *section 2971.01 of the Revised Code.*

2911.01

Aggravated robbery.

(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:
(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;
(2) Have a dangerous ordnance on or about the offender's person or under the offender's control;
(3) Inflict, or attempt to inflict, serious physical harm on another.

(B) No person, without privilege to do so, shall knowingly remove or attempt to remove a deadly weapon from the person of a law enforcement officer, or shall knowingly deprive or attempt to deprive a law enforcement officer of a deadly weapon, when both of the following apply:
(1) The law enforcement officer, at the time of the removal, attempted removal, deprivation, or attempted deprivation, is acting within the course and scope of the officer's duties;
(2) The offender knows or has reasonable cause to know that the law enforcement officer is a law enforcement officer.

(C) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.
(D) As used in this section:
(1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.
(2) "Law enforcement officer" has the same meaning as in section 2901.01 of the Revised Code and also includes employees of the department of rehabilitation and correction who are authorized to carry weapons within the course and scope of their duties.

2911.11

Aggravated burglary.

(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:
(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;
(2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

(B) Whoever violates this section is guilty of aggravated burglary, a felony of the first degree.
(C) As used in this section:
(1) "Occupied structure" has the same meaning as in section 2909.01 of the Revised Code.
(2) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.eir duties.

2911.31

Safecracking.

(A) No person, with purpose to commit an offense, shall knowingly enter, force an entrance into, or tamper with any vault, safe, or strongbox.
(B) Whoever violates this section is guilty of safecracking, a felony of the fourth degree.

2913.02

Theft.

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:
(1) Without the consent of the owner or person authorized to give consent;
(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;
(3) By deception;
(4) By threat;
(5) By intimidation.

(B)
(1) Whoever violates this section is guilty of theft.
(2) Except as otherwise provided in this division or division (B)(3), (4), (5), (6), (7), (8), or (9) of this section, a violation of this section is petty theft, a misdemeanor of the first degree. If the value of the property or services stolen is one thousand dollars or more and is less than seven thousand five hundred dollars or if the property stolen is any of the property listed in section 2913.71 of the Revised Code, a violation of this section is theft, a felony of the fifth degree. If the value of the property or services stolen is seven thousand five hundred dollars or more and is less than one hundred fifty thousand dollars, a violation of this section is grand theft, a felony of the fourth degree. If the value of the property or services stolen is one hundred fifty thousand dollars or more and is less than seven hundred fifty thousand dollars, a violation of this section is aggravated theft, a felony of the third degree. If the value of the property or services is seven hundred fifty thousand dollars or more and is less than one million five hundred thousand dollars, a violation of this section is aggravated theft, a felony of the second degree. If the value of the property or services stolen is one million five hundred thousand dollars or more, a violation of this section is aggravated theft of one million five hundred thousand dollars or more, a felony of the first degree.
(3) Except as otherwise provided in division (B)(4), (5), (6), (7), (8), or (9) of this section, if the victim of the offense is an elderly person , disabled adult, active duty service member, or spouse of an active duty service member, a violation of this section is theft from a person in a protected class, and division (B)(3) of this section applies. Except as otherwise provided in this division, theft from a person in a protected class is a felony of the fifth degree. If the value of the property or services stolen is one thousand dollars or more and is less than seven thousand five hundred dollars, theft from a person in a protected class is a felony of the fourth degree. If the value of the property or services stolen is seven thousand five hundred dollars or more and is less than thirty-seven thousand five hundred dollars, theft from a person in a protected class is a felony of the third degree. If the value of the property or services stolen is thirty-seven thousand five hundred dollars or more and is less than one hundred fifty thousand dollars, theft from a person in a protected class is a felony of the second degree. If the value of the property or

services stolen is one hundred fifty thousand dollars or more, theft from a person in a protected class is a felony of the first degree.
(4) If the property stolen is a firearm or dangerous ordnance, a violation of this section is grand theft. Except as otherwise provided in this division, grand theft when the property stolen is a firearm or dangerous ordnance is a felony of the third degree, and there is a presumption in favor of the court imposing a prison term for the offense. If the firearm or dangerous ordnance was stolen from a federally licensed firearms dealer, grand theft when the property stolen is a firearm or dangerous ordnance is a felony of the first degree. The offender shall serve a prison term imposed for grand theft when the property stolen is a firearm or dangerous ordnance consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.
(5) If the property stolen is a motor vehicle, a violation of this section is grand theft of a motor vehicle, a felony of the fourth degree.
(6) If the property stolen is any dangerous drug, a violation of this section is theft of drugs, a felony of the fourth degree, or, if the offender previously has been convicted of a felony drug abuse offense, a felony of the third degree.
(7) If the property stolen is a police dog or horse or an assistance dog and the offender knows or should know that the property stolen is a police dog or horse or an assistance dog, a violation of this section is theft of a police dog or horse or an assistance dog, a felony of the third degree.
(8) If the property stolen is anhydrous ammonia, a violation of this section is theft of anhydrous ammonia, a felony of the third degree.
(9) Except as provided in division (B)(2) of this section with respect to property with a value of seven thousand five hundred dollars or more and division (B)(3) of this section with respect to property with a value of one thousand dollars or more, if the property stolen is a special purpose article as defined in section 4737.04 of the Revised Code or is a bulk merchandise container as defined in section 4737.012 of the Revised Code, a violation of this section is theft of a special purpose article or articles or theft of a bulk merchandise container or containers, a felony of the fifth degree.
(10) In addition to the penalties described in division (B)(2) of this section, if the offender committed the violation by causing a motor vehicle to leave the premises of an establishment at which gasoline is offered for retail sale without the offender making full payment for gasoline that was dispensed into the fuel tank of the motor vehicle or into another container, the court may do one of the following:
(a) Unless division (B)(10)(b) of this section applies, suspend for not more than six months the offender's driver's license, probationary driver's license, commercial driver's license, temporary instruction permit, or nonresident operating privilege;
(b) If the offender's driver's license, probationary driver's license, commercial driver's license, temporary instruction permit, or nonresident operating privilege has previously been suspended pursuant to division (B)(10)(a) of this section, impose a class seven suspension of the offender's license, permit, or privilege from the range specified in division (A)(7) of section 4510.02 of the Revised Code, provided that the suspension shall be for at least six months.
(c) The court, in lieu of suspending the offender's driver's or commercial driver's license, probationary driver's license, temporary instruction permit, or nonresident operating privilege pursuant to division (B)(10)(a) or (b) of this section, instead may require the

offender to perform community service for a number of hours determined by the court.

(11) In addition to the penalties described in division (B)(2) of this section, if the offender committed the violation by stealing rented property or rental services, the court may order that the offender make restitution pursuant to section 2929.18 or 2929.28 of the Revised Code. Restitution may include, but is not limited to, the cost of repairing or replacing the stolen property, or the cost of repairing the stolen property and any loss of revenue resulting from deprivation of the property due to theft of rental services that is less than or equal to the actual value of the property at the time it was rented. Evidence of intent to commit theft of rented property or rental services shall be determined pursuant to the provisions of section 2913.72 of the Revised Code.

(C) The sentencing court that suspends an offender's license, permit, or nonresident operating privilege under division (B)(10) of this section may grant the offender limited driving privileges during the period of the suspension in accordance with Chapter 4510. of the Revised Code.
ny of the fourth degree.

2921.12

Tampering with evidence.

(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:
(1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation;
(2) Make, present, or use any record, document, or thing, knowing it to be false and with purpose to mislead a public official who is or may be engaged in such proceeding or investigation, or with purpose to corrupt the outcome of any such proceeding or investigation.

(B) Whoever violates this section is guilty of tampering with evidence, a felony of the third degree.

2927.01

Abuse of a corpse.

(A) No person, except as authorized by law, shall treat a human corpse in a way that the person knows would outrage reasonable family sensibilities.
(B) No person, except as authorized by law, shall treat a human corpse in a way that would outrage reasonable community sensibilities.
(C) Whoever violates division (A) of this section is guilty of abuse of a corpse, a misdemeanor of the second degree. Whoever violates division (B) of this section is guilty of gross abuse of a corpse, a felony of the fifth degree.

§ 2929.02. Penalties for aggravated murder or murder

(A) Whoever is convicted of or pleads guilty to aggravated murder in violation of *section 2903.01 of the Revised Code* shall suffer death or be imprisoned for life, as determined pursuant to *sections 2929.022 [2929.02.2], 2929.03*, and *2929.04 of the Revised Code*, except that no person who raises the matter of age pursuant to *section 2929.023 [2929.02.3] of the Revised Code* and who is not found to have been eighteen years of age or older at the time of the commission of the offense shall suffer death. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

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

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

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

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

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

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

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

§ 2929.021. Notice to supreme court of indictment charging aggravated murder; plea

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

(1) The name of the person charged in the indictment or count in the indictment with aggravated murder with a specification;

(2) The docket number or numbers of the case or cases arising out of the charge, if available;

(3) The court in which the case or cases will be heard;

(4) The date on which the indictment was filed.

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

(1) The name of the person who entered the guilty or no contest plea or who is named in the indictment or count that is dismissed;

(2) The docket numbers of the cases in which the guilty or no contest plea is entered or in which the indictment or count is dismissed;

(3) The sentence imposed on the offender in each case.

§ 2929.022. Determination of aggravating circumstances of prior conviction

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

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

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

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

(b) If the offender raises the matter of age at trial pursuant to *section 2929.023 [2929.02.3] of the Revised Code* and is not found at trial to have been eighteen years of age or older at the time of the commission of the offense, conduct a hearing to determine if the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of *section 2929.04 of the Revised Code* is proven beyond a reasonable doubt. After conducting the hearing, the panel or judge shall proceed as follows:

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

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

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

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

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

§ 2929.023. Defendant may raise matter of age

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

2929.024

Investigation services and experts for indigent defendant.

If the court determines that the defendant is indigent and that investigation services, experts, or other services are reasonably necessary for the proper representation of a defendant charged with aggravated murder at trial or at the sentencing hearing, the court shall authorize the defendant's counsel to obtain the necessary services for the defendant, and shall order that payment of the fees and expenses for the necessary services be made in the same manner that payment for appointed counsel is made pursuant to Chapter 120. of the Revised Code. If the court determines that the necessary services had to be obtained prior to court authorization for payment of the fees and expenses for the necessary services, the court may, after the services have been obtained, authorize the defendant's counsel to obtain the necessary services and order that payment of the fees and expenses for the necessary services be made as provided in this section.

§ 2929.03. Imposing sentence for aggravated murder

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

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

(a) Life imprisonment without parole;

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

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

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

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

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

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of *section 2929.04 of the Revised Code*, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to *section 2929.023 [2929.02.3] of the Revised Code*, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard. The instruction to the jury shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but the instruction shall not mention the penalty that may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) (1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of *section 2929.04 of*

the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to *section 2929.023 [2929.02.3] of the Revised Code*, the trial court shall impose sentence on the offender as follows:

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

(i) Life imprisonment without parole;

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

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

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

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

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

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

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

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

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

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

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

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

(D) (1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to *section 2929.023 [2929.02.3] of the Revised Code* and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to *section 2947.06 of the Revised Code*. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or the offender's counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of *section 2929.04 of the Revised Code*, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of *section 2929.04 of the Revised Code* and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, the offender is subject to cross-examination only if the offender consents to make the statement under oath or affirmation.

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

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

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

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

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

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

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

sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

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

(i) Life imprisonment without parole;

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

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

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

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

(E) If the offender raised the matter of age at trial pursuant to *section 2929.023 [2929.02.3] of the Revised Code*, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of *section 2929.04 of the Revised Code*, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

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

(a) Life imprisonment without parole;

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

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

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

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the

indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to *section 2971.03 of the Revised Code*.

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

(G) (1) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed before January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

(2) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed on or after January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the supreme court.

§ 2929.03.

Imposing sentence for aggravated murder.

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

§ 2929.04. Criteria for imposing death or imprisonment for a capital offense

(A) Imposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment or count in the indictment pursuant to *section 2941.14 of the Revised Code* and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or a person in line of succession to the presidency, the governor or lieutenant governor of this state, the president-elect or vice president-elect of the United States, the governor-elect or lieutenant governor-elect of this state, or a candidate for any of the offices described in this division. For purposes of this division, a person is a candidate if the person has been nominated for election according to law, if the person has filed a petition or petitions according to law to have the person's name placed on the ballot in a primary or general election, or if the person campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was under detention or while the offender was at large after having broken detention. As used in division (A)(4) of this section, "detention" has the same meaning as in *section 2921.01 of the Revised Code*, except that detention does not include hospitalization, institutionalization, or confinement in a mental health facility or mental retardation and developmentally disabled facility unless at the time of the commission of the offense either of the following circumstances apply:

(a) The offender was in the facility as a result of being charged with a violation of a section of the Revised Code.

(b) The offender was under detention as a result of being convicted of or pleading guilty to a violation of a section of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer, as defined in *section 2911.01 of the Revised Code*, whom the offender had reasonable cause to know or knew to be a law enforcement officer as so defined, and either the victim, at the time of the commission of the offense, was engaged in the victim's duties, or it was the offender's specific purpose to kill a law enforcement officer as so defined.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent the victim's testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for the victim's testimony in any criminal proceeding.

(9) The offender, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense, and either the offender was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design.

(10) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit terrorism.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to *section 2929.023 [2929.02.3] of the Revised Code* or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

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

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

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

(4) The youth of the offender;

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

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

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

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

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender but shall be weighed pursuant to divisions (D)(2) and (3) of *section 2929.03 of the Revised Code* by the trial court, trial jury, or

the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

§ 2929.05. Appellate review of death sentence

(A) Whenever sentence of death is imposed pursuant to *sections 2929.03* and *2929.04 of the Revised Code*, the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall review upon appeal the sentence of death at the same time that they review the other issues in the case. The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They also shall review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors. The court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case.

A court of appeals that reviews a case in which the sentence of death is imposed for an offense committed before January 1, 1995, shall file a separate opinion as to its findings in the case with the clerk of the supreme court. The opinion shall be filed within fifteen days after the court issues its opinion and shall contain whatever information is required by the clerk of the supreme court.

(B) The court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall give priority over all other cases to the review of judgments in which the sentence of death is imposed and, except as otherwise provided in this section, shall conduct the review in accordance with the Rules of Appellate Procedure.

(C) At any time after a sentence of death is imposed pursuant to *section 2929.022* or *2929.03 of the Revised Code*, the court of common pleas that sentenced the offender shall vacate the sentence if the offender did not present evidence at trial that the offender was not eighteen years of age or older at the time of the commission of the aggravated murder for which the offender was sentenced and if the offender shows by a preponderance of the evidence that the offender was less than eighteen years of age at the time of the commission of the aggravated murder for which the offender was sentenced. The court is not required to hold a hearing on a motion filed pursuant to this division unless the court finds, based on the motion and any supporting

information submitted by the defendant, any information submitted by the prosecuting attorney, and the record in the case, including any previous hearings and orders, probable cause to believe that the defendant was not eighteen years of age or older at the time of the commission of the aggravated murder for which the defendant was sentenced to death.

2929.11

Purposes of felony sentencing.

(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

(C) A court that imposes a sentence upon an offender for a felony shall not base the sentence upon the race, ethnic background, gender, or religion of the offender.

§ 2929.14. Basic prison terms

(A) Except as provided in division (B)(1), (B)(2), (B)(3), (B)(4), (B)(5), (B)(6), (B)(7), (B)(8), (E), (G), (H), or (J) of this section or in division (D)(6) of *section 2919.25 of the Revised Code* and except in relation to an offense for which a sentence of death or life imprisonment is to be imposed, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a definite prison term that shall be one of the following:

(1) For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, ten, or eleven years.

(2) For a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years.

(3) (a) For a felony of the third degree that is a violation of *section 2903.06*, *2903.08*, *2907.03*, *2907.04*, or *2907.05 of the Revised Code* or that is a violation of *section 2911.02* or *2911.12 of the Revised Code* if the offender previously has been convicted of or pleaded guilty in two or more separate proceedings to two or more violations of *section 2911.01*, *2911.02*, *2911.11*, or *2911.12 of the Revised Code*, the prison term shall be twelve, eighteen, twenty-four, thirty, thirty-six, forty-two, forty-eight, fifty-four, or sixty months.

(b) For a felony of the third degree that is not an offense for which division (A)(3)(a) of this section applies, the prison term shall be nine, twelve, eighteen, twenty-four, thirty, or thirty-six months.

(4) For a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.

(5) For a felony of the fifth degree, the prison term shall be six, seven, eight, nine, ten, eleven, or twelve months.

(B) (1) (a) Except as provided in division (B)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification of the type described in *section 2941.141*, *2941.144*, or *2941.145 of the Revised Code*, the court shall impose on the offender one of the following prison terms:

(i) A prison term of six years if the specification is of the type described in *section 2941.144 of the Revised Code* that charges the offender with having a firearm that is an automatic firearm or that was equipped with a firearm muffler or silencer on or about the offender's person or under the offender's control while committing the felony;

(ii) A prison term of three years if the specification is of the type described in *section 2941.145 of the Revised Code* that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the offense and displaying the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using it to facilitate the offense;

(iii) A prison term of one year if the specification is of the type described in *section 2941.141 of the Revised Code* that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the felony.

(b) If a court imposes a prison term on an offender under division (B)(1)(a) of this section, the prison term shall not be reduced pursuant to section 2967.19, section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. Except as provided in division (B)(1)(g) of this section, a court shall not impose more than one prison term on an offender under division (B)(1)(a) of this section for felonies committed as part of the same act or transaction.

(c) Except as provided in division (B)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a violation of *section 2923.161 of the Revised Code* or to a felony that includes, as an essential element, purposely or knowingly causing or attempting to cause the death of or physical harm to another, also is convicted of or pleads guilty to a specification of the type described in *section 2941.146 of the Revised Code* that charges the offender with committing the offense by discharging a firearm from a motor vehicle other than a manufactured home, the court, after imposing a prison term on the offender for the violation of *section 2923.161 of the Revised Code* or for the other felony offense under division (A), (B)(2), or (B)(3) of this section, shall impose an additional prison term of five years upon the offender that shall not be reduced pursuant to section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one additional prison term on an offender under division (B)(1)(c) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term on an offender under division (B)(1)(c) of this section relative to an offense, the court also shall impose a prison term under division (B)(1)(a) of this section relative to the same offense, provided the criteria specified in that division for imposing an additional prison term are satisfied relative to the offender and the offense.

(d) If an offender who is convicted of or pleads guilty to an offense of violence that is a felony also is convicted of or pleads guilty to a specification of the type described in *section 2941.1411 of the Revised Code* that charges the offender with wearing or carrying body armor while committing the felony offense of violence, the court shall impose on the offender a prison term of two years. The prison term so imposed, subject to divisions (C) to (I) of *section 2967.19 of the Revised Code*, shall not be reduced pursuant to section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (B)(1)(d) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term under division (B)(1)(a) or (c) of this section, the court is not precluded from imposing an additional prison term under division (B)(1)(d) of this section.

(e) The court shall not impose any of the prison terms described in division (B)(1)(a) of this section or any of the additional prison terms described in division (B)(1)(c) of this section upon an offender for a violation of *section 2923.12* or *2923.123 of the Revised Code*. The court shall not impose any of the prison terms described in division (B)(1)(a) or (b) of this section upon an offender for a violation of section 2923.122 that involves a deadly weapon that is a firearm other than a dangerous ordnance, *section 2923.16*, or *section 2923.121 of the Revised Code*. The court shall not impose any of the prison terms described in division (B)(1)(a) of this section or any of the additional prison terms described in division (B)(1)(c) of this section upon

an offender for a violation of *section 2923.13 of the Revised Code* unless all of the following apply:

(i) The offender previously has been convicted of aggravated murder, murder, or any felony of the first or second degree.

(ii) Less than five years have passed since the offender was released from prison or post-release control, whichever is later, for the prior offense.

(f) If an offender is convicted of or pleads guilty to a felony that includes, as an essential element, causing or attempting to cause the death of or physical harm to another and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1412 of the Revised Code* that charges the offender with committing the offense by discharging a firearm at a peace officer as defined in *section 2935.01 of the Revised Code* or a corrections officer, as defined in *section 2941.1412 of the Revised Code*, the court, after imposing a prison term on the offender for the felony offense under division (A), (B)(2), or (B)(3) of this section, shall impose an additional prison term of seven years upon the offender that shall not be reduced pursuant to section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. If an offender is convicted of or pleads guilty to two or more felonies that include, as an essential element, causing or attempting to cause the death or physical harm to another and also is convicted of or pleads guilty to a specification of the type described under division (B)(1)(f) of this section in connection with two or more of the felonies of which the offender is convicted or to which the offender pleads guilty, the sentencing court shall impose on the offender the prison term specified under division (B)(1)(f) of this section for each of two of the specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications. If a court imposes an additional prison term on an offender under division (B)(1)(f) of this section relative to an offense, the court shall not impose a prison term under division (B)(1)(a) or (c) of this section relative to the same offense.

(g) If an offender is convicted of or pleads guilty to two or more felonies, if one or more of those felonies are aggravated murder, murder, attempted aggravated murder, attempted murder, aggravated robbery, felonious assault, or rape, and if the offender is convicted of or pleads guilty to a specification of the type described under division (B)(1)(a) of this section in connection with two or more of the felonies, the sentencing court shall impose on the offender the prison term specified under division (B)(1)(a) of this section for each of the two most serious specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications.

(2) (a) If division (B)(2)(b) of this section does not apply, the court may impose on an offender, in addition to the longest prison term authorized or required for the offense, an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in *section 2941.149 of the Revised Code* that the offender is a repeat violent offender.

(ii) The offense of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(iii) The court imposes the longest prison term for the offense that is not life imprisonment without parole.

(iv) The court finds that the prison terms imposed pursuant to division (B)(2)(a)(iii) of this section and, if applicable, division (B)(1) or (3) of this section are inadequate to punish the offender and protect the public from future crime, because the applicable factors under *section 2929.12 of the Revised Code* indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.

(v) The court finds that the prison terms imposed pursuant to division (B)(2)(a)(iii) of this section and, if applicable, division (B)(1) or (3) of this section are demeaning to the seriousness of the offense, because one or more of the factors under *section 2929.12 of the Revised Code* indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense.

(b) The court shall impose on an offender the longest prison term authorized or required for the offense and shall impose on the offender an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in *section 2941.149 of the Revised Code* that the offender is a repeat violent offender.

(ii) The offender within the preceding twenty years has been convicted of or pleaded guilty to three or more offenses described in division (CC)(1) of *section 2929.01 of the Revised Code*, including all offenses described in that division of which the offender is convicted or to which the offender pleads guilty in the current prosecution and all offenses described in that division of which the offender previously has been convicted or to which the offender previously pleaded guilty, whether prosecuted together or separately.

(iii) The offense or offenses of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(c) For purposes of division (B)(2)(b) of this section, two or more offenses committed at the same time or as part of the same act or event shall be considered one offense, and that one offense shall be the offense with the greatest penalty.

(d) A sentence imposed under division (B)(2)(a) or (b) of this section shall not be reduced pursuant to section 2929.20, section 2967.19, or section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. The offender shall serve an additional prison term imposed under this section consecutively to and prior to the prison term imposed for the underlying offense.

(e) When imposing a sentence pursuant to division (B)(2)(a) or (b) of this section, the court shall state its findings explaining the imposed sentence.

(3) Except when an offender commits a violation of *section 2903.01* or *2907.02 of the Revised Code* and the penalty imposed for the violation is life imprisonment or commits a violation of *section 2903.02 of the Revised Code*, if the offender commits a violation of *section 2925.03* or *2925.11 of the Revised Code* and that section classifies the offender as a major drug offender, if the offender commits a felony violation of section 2925.02, 2925.04, 2925.05, 2925.36, 3719.07, 3719.08, 3719.16, 3719.161, 4729.37, or 4729.61, division (C) or (D) of section 3719.172, division (C) of section 4729.51, or division (J) of *section 4729.54 of the Revised Code* that includes the sale, offer to sell, or possession of a schedule I or II controlled substance, with the exception of marihuana, and the court imposing sentence upon the offender finds that the offender is guilty of a specification of the type described in *section 2941.1410 of the Revised Code* charging that the offender is a major drug offender, if the court imposing sentence upon an offender for a felony finds that the offender is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree, or if the offender is guilty of an attempted violation of *section 2907.02 of the Revised Code* and, had the offender completed the violation of *section 2907.02 of the Revised Code* that was attempted, the offender would have been subject to a sentence of life imprisonment or life imprisonment without parole for the violation of *section 2907.02 of the Revised Code*, the court shall impose upon the offender for the felony violation a mandatory prison term of the maximum prison term prescribed for a felony of the first degree that, subject to divisions (C) to (I) of *section 2967.19 of the Revised Code*, cannot be reduced pursuant to section 2929.20, section 2967.19, or any other provision of Chapter 2967. or 5120. of the Revised Code.

(4) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of *section 2929.13 of the Revised Code*, the sentencing court shall impose upon the offender a mandatory prison term in accordance with that division. In addition to the mandatory prison term, if the offender is being sentenced for a fourth degree felony OVI offense, the court, notwithstanding division (A)(4) of this section, may sentence the offender to a definite prison term of not less than six months and not more than thirty months, and if the offender is being sentenced for a third degree felony OVI offense, the sentencing court may sentence the offender to an additional prison term of any duration specified in division (A)(3) of this section. In either case, the additional prison term imposed shall be reduced by the sixty or one hundred twenty days imposed upon the offender as the mandatory prison term. The total of the additional prison term imposed under division (B)(4) of this section plus the sixty or one hundred twenty days imposed as the mandatory prison term shall equal a definite term in the range of six months to thirty months for a fourth degree felony OVI offense and shall equal one of the authorized prison terms specified in division (A)(3) of this section for a third degree felony OVI offense. If

the court imposes an additional prison term under division (B)(4) of this section, the offender shall serve the additional prison term after the offender has served the mandatory prison term required for the offense. In addition to the mandatory prison term or mandatory and additional prison term imposed as described in division (B)(4) of this section, the court also may sentence the offender to a community control sanction under *section 2929.16* or *2929.17 of the Revised Code*, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

If the offender is being sentenced for a fourth degree felony OVI offense under division (G)(1) of *section 2929.13 of the Revised Code* and the court imposes a mandatory term of local incarceration, the court may impose a prison term as described in division (A)(1) of that section.

(5) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1414 of the Revised Code* that charges that the victim of the offense is a peace officer, as defined in *section 2935.01 of the Revised Code*, or an investigator of the bureau of criminal identification and investigation, as defined in *section 2903.11 of the Revised Code*, the court shall impose on the offender a prison term of five years. If a court imposes a prison term on an offender under division (B)(5) of this section, the prison term, subject to divisions (C) to (I) of *section 2967.19 of the Revised Code*, shall not be reduced pursuant to section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (B)(5) of this section for felonies committed as part of the same act.

(6) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1415 of the Revised Code* that charges that the offender previously has been convicted of or pleaded guilty to three or more violations of division (A) or (B) of *section 4511.19 of the Revised Code* or an equivalent offense, as defined in *section 2941.1415 of the Revised Code*, or three or more violations of any combination of those divisions and offenses, the court shall impose on the offender a prison term of three years. If a court imposes a prison term on an offender under division (B)(6) of this section, the prison term, subject to divisions (C) to (I) of *section 2967.19 of the Revised Code*, shall not be reduced pursuant to section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (B)(6) of this section for felonies committed as part of the same act.

(7) (a) If an offender is convicted of or pleads guilty to a felony violation of section 2905.01, 2905.02, 2907.21, 2907.22, or 2923.32, division (A)(1) or (2) of section 2907.323, or division (B)(1), (2), (3), (4), or (5) of *section 2919.22 of the Revised Code* and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1422 of the Revised Code* that charges that the offender knowingly committed the offense in furtherance of human trafficking, the court shall impose on the offender a mandatory prison term that is one of the following:

(i) If the offense is a felony of the first degree, a definite prison term of not less than five years and not greater than ten years;

(ii) If the offense is a felony of the second or third degree, a definite prison term of not less than three years and not greater than the maximum prison term allowed for the offense by division (A) of *section 2929.14 of the Revised Code*;

(iii) If the offense is a felony of the fourth or fifth degree, a definite prison term that is the maximum prison term allowed for the offense by division (A) of *section 2929.14 of the Revised Code.*

(b) Subject to divisions (C) to (I) of *section 2967.19 of the Revised Code*, the prison term imposed under division (B)(7)(a) of this section shall not be reduced pursuant to section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. of the Revised Code. A court shall not impose more than one prison term on an offender under division (B)(7)(a) of this section for felonies committed as part of the same act, scheme, or plan.

(8) If an offender is convicted of or pleads guilty to a felony violation of *section 2903.11*, *2903.12*, or *2903.13 of the Revised Code* and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1423 of the Revised Code* that charges that the victim of the violation was a woman whom the offender knew was pregnant at the time of the violation, notwithstanding the range of prison terms prescribed in division (A) of this section for felonies of the same degree as the violation, the court shall impose on the offender a mandatory prison term that is either a definite prison term of six months or one of the prison terms prescribed in *section 2929.14 of the Revised Code* for felonies of the same degree as the violation.

(C) (1) (a) Subject to division (C)(1)(b) of this section, if a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(a) of this section for having a firearm on or about the offender's person or under the offender's control while committing a felony, if a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(c) of this section for committing a felony specified in that division by discharging a firearm from a motor vehicle, or if both types of mandatory prison terms are imposed, the offender shall serve any mandatory prison term imposed under either division consecutively to any other mandatory prison term imposed under either division or under division (B)(1)(d) of this section, consecutively to and prior to any prison term imposed for the underlying felony pursuant to division (A), (B)(2), or (B)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(b) If a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(d) of this section for wearing or carrying body armor while committing an offense of violence that is a felony, the offender shall serve the mandatory term so imposed consecutively to any other mandatory prison term imposed under that division or under division (B)(1)(a) or (c) of this section, consecutively to and prior to any prison term imposed for the underlying felony under division (A), (B)(2), or (B)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(c) If a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(f) of this section, the offender shall serve the mandatory prison term so imposed consecutively to and prior to any prison term imposed for the underlying felony under division (A), (B)(2), or (B)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(d) If a mandatory prison term is imposed upon an offender pursuant to division (B)(7) or (8) of this section, the offender shall serve the mandatory prison term so imposed consecutively to any other mandatory prison term imposed under that division or under any other provision of law and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(2) If an offender who is an inmate in a jail, prison, or other residential detention facility violates *section 2917.02*, *2917.03*, or *2921.35 of the Revised Code* or division (A)(1) or (2) of *section 2921.34 of the Revised Code*, if an offender who is under detention at a detention facility commits a felony violation of *section 2923.131 of the Revised Code*, or if an offender who is an inmate in a jail, prison, or other residential detention facility or is under detention at a detention facility commits another felony while the offender is an escapee in violation of division (A)(1) or (2) of *section 2921.34 of the Revised Code*, any prison term imposed upon the offender for one of those violations shall be served by the offender consecutively to the prison term or term of imprisonment the offender was serving when the offender committed that offense and to any other prison term previously or subsequently imposed upon the offender.

(3) If a prison term is imposed for a violation of division (B) of *section 2911.01 of the Revised Code*, a violation of division (A) of *section 2913.02 of the Revised Code* in which the stolen property is a firearm or dangerous ordnance, or a felony violation of division (B) of *section 2921.331 of the Revised Code*, the offender shall serve that prison term consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to *section 2929.16*, *2929.17*, or *2929.18 of the Revised Code*, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

(5) If a mandatory prison term is imposed upon an offender pursuant to division (B)(5) or (6) of this section, the offender shall serve the mandatory prison term consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* pursuant to division (A) of this section or *section 2929.142 of the Revised Code*. If a mandatory prison term is imposed upon an offender pursuant to division (B)(5) of this section, and if a mandatory prison term also is imposed upon the offender pursuant to division (B)(6) of this section in relation to the same violation, the offender shall serve the

mandatory prison term imposed pursuant to division (B)(5) of this section consecutively to and prior to the mandatory prison term imposed pursuant to division (B)(6) of this section and consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of *section 2903.06 of the Revised Code* pursuant to division (A) of this section or *section 2929.142 of the Revised Code*.

(6) When consecutive prison terms are imposed pursuant to division (C)(1), (2), (3), (4), or (5) or division (H)(1) or (2) of this section, the term to be served is the aggregate of all of the terms so imposed.

(D) (1) If a court imposes a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division. If a court imposes a sentence including a prison term of a type described in this division on or after July 11, 2006, the failure of a court to include a post-release control requirement in the sentence pursuant to this division does not negate, limit, or otherwise affect the mandatory period of post-release control that is required for the offender under division (B) of *section 2967.28 of the Revised Code. Section 2929.191 of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

(2) If a court imposes a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (D)(1) of this section, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division, if the parole board determines that a period of post-release control is necessary. *Section 2929.191 of the Revised Code* applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

(E) The court shall impose sentence upon the offender in accordance with *section 2971.03 of the Revised Code*, and Chapter 2971. of the Revised Code applies regarding the prison term or term of life imprisonment without parole imposed upon the offender and the service of that term of imprisonment if any of the following apply:

(1) A person is convicted of or pleads guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense, and, in relation to that offense, the offender is adjudicated a sexually violent predator.

(2) A person is convicted of or pleads guilty to a violation of division (A)(1)(b) of *section 2907.02 of the Revised Code* committed on or after January 2, 2007, and either the court does not impose a sentence of life without parole when authorized pursuant to division (B) of *section 2907.02 of the Revised Code*, or division (B) of *section 2907.02 of the Revised Code* provides that the court shall not sentence the offender pursuant to *section 2971.03 of the Revised Code*.

(3) A person is convicted of or pleads guilty to attempted rape committed on or after January 2, 2007, and a specification of the type described in *section 2941.1418*, *2941.1419*, or *2941.1420 of the Revised Code*.

(4) A person is convicted of or pleads guilty to a violation of *section 2905.01 of the Revised Code* committed on or after January 1, 2008, and that section requires the court to sentence the offender pursuant to *section 2971.03 of the Revised Code*.

(5) A person is convicted of or pleads guilty to aggravated murder committed on or after January 1, 2008, and division (A)(2)(b)(ii) of section 2929.022, division (A)(1)(e), (C)(1)(a)(v), (C)(2)(a)(ii), (D)(2)(b), (D)(3)(a)(iv), or (E)(1)(d) of section 2929.03, or division (A) or (B) of *section 2929.06 of the Revised Code* requires the court to sentence the offender pursuant to division (B)(3) of *section 2971.03 of the Revised Code*.

(6) A person is convicted of or pleads guilty to murder committed on or after January 1, 2008, and division (B)(2) of *section 2929.02 of the Revised Code* requires the court to sentence the offender pursuant to *section 2971.03 of the Revised Code*.

(F) If a person who has been convicted of or pleaded guilty to a felony is sentenced to a prison term or term of imprisonment under this section, sections 2929.02 to 2929.06 of the *Revised Code, section 2929.142* of the *Revised Code, section 2971.03* of the Revised Code, or any other provision of law, *section 5120.163 of the Revised Code* applies regarding the person while the person is confined in a state correctional institution.

(G) If an offender who is convicted of or pleads guilty to a felony that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in *section 2941.142 of the Revised Code* that charges the offender with having committed the felony while participating in a criminal gang, the court shall impose upon the offender an additional prison term of one, two, or three years.

(H) (1) If an offender who is convicted of or pleads guilty to aggravated murder, murder, or a felony of the first, second, or third degree that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in *section 2941.143 of the Revised Code* that charges the offender with having committed the offense in a school safety zone or towards a person in a school safety zone, the court shall impose upon the offender an additional prison term of two years. The offender shall serve the additional two years consecutively to and prior to the prison term imposed for the underlying offense.

(2) (a) If an offender is convicted of or pleads guilty to a felony violation of *section 2907.22*, *2907.24*, *2907.241*, or *2907.25 of the Revised Code* and to a specification of the type described in *section 2941.1421 of the Revised Code* and if the court imposes a prison term on the offender for the felony violation, the court may impose upon the offender an additional prison term as follows:

(i) Subject to division (H)(2)(a)(ii) of this section, an additional prison term of one, two, three, four, five, or six months;

(ii) If the offender previously has been convicted of or pleaded guilty to one or more felony or misdemeanor violations of *section 2907.22*, *2907.23*, *2907.24*, *2907.241*, or *2907.25 of the Revised Code* and also was convicted of or pleaded guilty to a specification of the type described in *section 2941.1421 of the Revised Code* regarding one or more of those violations, an

additional prison term of one, two, three, four, five, six, seven, eight, nine, ten, eleven, or twelve months.

(b) In lieu of imposing an additional prison term under division (H)(2)(a) of this section, the court may directly impose on the offender a sanction that requires the offender to wear a real-time processing, continual tracking electronic monitoring device during the period of time specified by the court. The period of time specified by the court shall equal the duration of an additional prison term that the court could have imposed upon the offender under division (H)(2)(a) of this section. A sanction imposed under this division shall commence on the date specified by the court, provided that the sanction shall not commence until after the offender has served the prison term imposed for the felony violation of *section 2907.22*, *2907.24*, *2907.241*, or *2907.25 of the Revised Code* and any residential sanction imposed for the violation under *section 2929.16 of the Revised Code*. A sanction imposed under this division shall be considered to be a community control sanction for purposes of *section 2929.15 of the Revised Code*, and all provisions of the Revised Code that pertain to community control sanctions shall apply to a sanction imposed under this division, except to the extent that they would by their nature be clearly inapplicable. The offender shall pay all costs associated with a sanction imposed under this division, including the cost of the use of the monitoring device.

(I) At the time of sentencing, the court may recommend the offender for placement in a program of shock incarceration under *section 5120.031 of the Revised Code* or for placement in an intensive program prison under *section 5120.032 of the Revised Code*, disapprove placement of the offender in a program of shock incarceration or an intensive program prison of that nature, or make no recommendation on placement of the offender. In no case shall the department of rehabilitation and correction place the offender in a program or prison of that nature unless the department determines as specified in *section 5120.031* or *5120.032 of the Revised Code*, whichever is applicable, that the offender is eligible for the placement.

If the court disapproves placement of the offender in a program or prison of that nature, the department of rehabilitation and correction shall not place the offender in any program of shock incarceration or intensive program prison.

If the court recommends placement of the offender in a program of shock incarceration or in an intensive program prison, and if the offender is subsequently placed in the recommended program or prison, the department shall notify the court of the placement and shall include with the notice a brief description of the placement.

If the court recommends placement of the offender in a program of shock incarceration or in an intensive program prison and the department does not subsequently place the offender in the recommended program or prison, the department shall send a notice to the court indicating why the offender was not placed in the recommended program or prison.

If the court does not make a recommendation under this division with respect to an offender and if the department determines as specified in *section 5120.031* or *5120.032 of the Revised Code*, whichever is applicable, that the offender is eligible for placement in a program or prison of that nature, the department shall screen the offender and determine if there is an available program of shock incarceration or an intensive program prison for which the offender is suited. If there is an available program of shock incarceration or an intensive program prison for which the offender is suited, the department shall notify the court of the proposed placement of the offender as specified in *section 5120.031* or *5120.032 of the Revised Code* and shall include with the

notice a brief description of the placement. The court shall have ten days from receipt of the notice to disapprove the placement.

(J) If a person is convicted of or pleads guilty to aggravated vehicular homicide in violation of division (A)(1) of *section 2903.06 of the Revised Code* and division (B)(2)(c) of that section applies, the person shall be sentenced pursuant to *section 2929.142 of the Revised Code*.

2947.23

Costs and jury fees

(A)
(1)
(a) In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution, including any costs under section 2947.231 of the Revised Code, and render a judgment against the defendant for such costs. If the judge or magistrate imposes a community control sanction or other nonresidential sanction, the judge or magistrate, when imposing the sanction, shall notify the defendant of both of the following:
(i) If the defendant fails to pay that judgment or fails to timely make payments towards that judgment under a payment schedule approved by the court, the court may order the defendant to perform community service until the judgment is paid or until the court is satisfied that the defendant is in compliance with the approved payment schedule.
(ii) If the court orders the defendant to perform the community service, the defendant will receive credit upon the judgment at the specified hourly credit rate per hour of community service performed, and each hour of community service performed will reduce the judgment by that amount.

(b) The failure of a judge or magistrate to notify the defendant pursuant to division (A)(1)(a) of this section does not negate or limit the authority of the court to order the defendant to perform community service if the defendant fails to pay the judgment described in that division or to timely make payments toward that judgment under an approved payment plan.

(2) The following shall apply in all criminal cases:
(a) If a jury has been sworn at the trial of a case, the fees of the jurors shall be included in the costs, which shall be paid to the public treasury from which the jurors were paid.
(b) If a jury has not been sworn at the trial of a case because of a defendant's failure to appear without good cause or because the defendant entered a plea of guilty or no contest less than twenty-four hours before the scheduled commencement of the trial, the costs incurred in summoning jurors for that particular trial may be included in the costs of prosecution. If the costs incurred in summoning jurors are assessed against the defendant, those costs shall be paid to the public treasury from which the jurors were paid.

(B) If a judge or magistrate has reason to believe that a defendant has failed to pay the judgment described in division (A) of this section or has failed to timely make payments towards that judgment under a payment schedule approved by the judge or magistrate, the judge or magistrate shall hold a hearing to determine whether to order the offender to perform community service for that failure. The judge or magistrate shall notify both the defendant and the prosecuting attorney of the place, time, and date of the hearing and shall give each an opportunity to present evidence. If, after the hearing, the judge or magistrate determines that the defendant has failed to pay the judgment or to timely make

payments under the payment schedule and that imposition of community service for the failure is appropriate, the judge or magistrate may order the offender to perform community service until the judgment is paid or until the judge or magistrate is satisfied that the offender is in compliance with the approved payment schedule. If the judge or magistrate orders the defendant to perform community service under this division, the defendant shall receive credit upon the judgment at the specified hourly credit rate per hour of community service performed, and each hour of community service performed shall reduce the judgment by that amount. Except for the credit and reduction provided in this division, ordering an offender to perform community service under this division does not lessen the amount of the judgment and does not preclude the state from taking any other action to execute the judgment.

(C) The court retains jurisdiction to waive, suspend, or modify the payment of the costs of prosecution, including any costs under section 2947.231 of the Revised Code, at the time of sentencing or at any time thereafter.

(D) As used in this section:

(1) "Case" means a prosecution of all of the charges that result from the same act, transaction, or series of acts or transactions and that are given the same case type designator and case number under Rule 43 of the Rules of Superintendence for the Courts of Ohio or any successor to that rule.

(2) "Specified hourly credit rate" means an hourly credit rate set by the judge or magistrate, which shall not be less than the wage rate that is specified in 26 U.S.C.A. 206(a)(1) under the federal Fair Labor Standards Act of 1938, that then is in effect, and that an employer subject to that provision must pay per hour to each of the employer's employees who is subject to that provision.

2953.08

Appeal as a matter of right - grounds.

(A) In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds:
(1) The sentence consisted of or included the maximum prison term allowed for the offense by division (A) of section 2929.14 or section 2929.142 of the Revised Code, the maximum prison term was not required for the offense pursuant to Chapter 2925. or any other provision of the Revised Code, and the court imposed the sentence under one of the following circumstances:
(a) The sentence was imposed for only one offense.
(b) The sentence was imposed for two or more offenses arising out of a single incident, and the court imposed the maximum prison term for the offense of the highest degree.

(2) The sentence consisted of or included a prison term and the offense for which it was imposed is a felony of the fourth or fifth degree or is a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and that is specified as being subject to division (B) of section 2929.13 of the Revised Code for purposes of sentencing. If the court specifies that it found one or more of the factors in division (B)(1)(b) of section 2929.13 of the Revised Code to apply relative to the defendant, the defendant is not entitled under this division to appeal as a matter of right the sentence imposed upon the offender.
(3) The person was convicted of or pleaded guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense, was adjudicated a sexually violent predator in relation to that offense, and was sentenced pursuant to division (A)(3) of section 2971.03 of the Revised Code, if the minimum term of the indefinite term imposed pursuant to division (A)(3) of section 2971.03 of the Revised Code is the longest term available for the offense from among the range of terms listed in section 2929.14 of the Revised Code. As used in this division, "designated homicide, assault, or kidnapping offense" and "violent sex offense" have the same meanings as in section 2971.01 of the Revised Code. As used in this division, "adjudicated a sexually violent predator" has the same meaning as in section 2929.01 of the Revised Code, and a person is "adjudicated a sexually violent predator" in the same manner and the same circumstances as are described in that section.
(4) The sentence is contrary to law.
(5) The sentence consisted of an additional prison term of ten years imposed pursuant to division (B)(2)(a) of section 2929.14 of the Revised Code.

(B) In addition to any other right to appeal and except as provided in division (D) of this section, a prosecuting attorney, a city director of law, village solicitor, or similar chief legal officer of a municipal corporation, or the attorney general, if one of those persons prosecuted the case, may appeal as a matter of right a sentence imposed upon a defendant who is convicted of or pleads guilty to a felony or, in the circumstances described in division (B)(3) of this section the modification of a sentence imposed upon such a

defendant, on any of the following grounds:
(1) The sentence did not include a prison term despite a presumption favoring a prison term for the offense for which it was imposed, as set forth in section 2929.13 or Chapter 2925. of the Revised Code.
(2) The sentence is contrary to law.
(3) The sentence is a modification under section 2929.20 of the Revised Code of a sentence that was imposed for a felony of the first or second degree.

(C)
(1) In addition to the right to appeal a sentence granted under division (A) or (B) of this section, a defendant who is convicted of or pleads guilty to a felony may seek leave to appeal a sentence imposed upon the defendant on the basis that the sentencing judge has imposed consecutive sentences under division (C)(3) of section 2929.14 of the Revised Code and that the consecutive sentences exceed the maximum prison term allowed by division (A) of that section for the most serious offense of which the defendant was convicted. Upon the filing of a motion under this division, the court of appeals may grant leave to appeal the sentence if the court determines that the allegation included as the basis of the motion is true.
(2) A defendant may seek leave to appeal an additional sentence imposed upon the defendant pursuant to division (B)(2)(a) or (b) of section 2929.14 of the Revised Code if the additional sentence is for a definite prison term that is longer than five years.

(D)
(1) A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge.
(2) Except as provided in division (C)(2) of this section, a sentence imposed upon a defendant is not subject to review under this section if the sentence is imposed pursuant to division (B)(2)(b) of section 2929.14 of the Revised Code. Except as otherwise provided in this division, a defendant retains all rights to appeal as provided under this chapter or any other provision of the Revised Code. A defendant has the right to appeal under this chapter or any other provision of the Revised Code the court's application of division (B)(2)(c) of section 2929.14 of the Revised Code.
(3) A sentence imposed for aggravated murder or murder pursuant to sections 2929.02 to 2929.06 of the Revised Code is not subject to review under this section.

(E) A defendant, prosecuting attorney, city director of law, village solicitor, or chief municipal legal officer shall file an appeal of a sentence under this section to a court of appeals within the time limits specified in Rule 4(B) of the Rules of Appellate Procedure, provided that if the appeal is pursuant to division (B)(3) of this section, the time limits specified in that rule shall not commence running until the court grants the motion that makes the sentence modification in question. A sentence appeal under this section shall be consolidated with any other appeal in the case. If no other appeal is filed, the court of appeals may review only the portions of the trial record that pertain to sentencing.
(F) On the appeal of a sentence under this section, the record to be reviewed shall include all of the following, as applicable:

(1) Any presentence, psychiatric, or other investigative report that was submitted to the court in writing before the sentence was imposed. An appellate court that reviews a presentence investigation report prepared pursuant to section 2947.06 or 2951.03 of the Revised Code or Criminal Rule 32.2 in connection with the appeal of a sentence under this section shall comply with division (D)(3) of section 2951.03 of the Revised Code when the appellate court is not using the presentence investigation report, and the appellate court's use of a presentence investigation report of that nature in connection with the appeal of a sentence under this section does not affect the otherwise confidential character of the contents of that report as described in division (D)(1) of section 2951.03 of the Revised Code and does not cause that report to become a public record, as defined in section 149.43 of the Revised Code, following the appellate court's use of the report.
(2) The trial record in the case in which the sentence was imposed;
(3) Any oral or written statements made to or by the court at the sentencing hearing at which the sentence was imposed;
(4) Any written findings that the court was required to make in connection with the modification of the sentence pursuant to a judicial release under division (I) of section 2929.20 of the Revised Code.

(G)
(1) If the sentencing court was required to make the findings required by division (B) or (D) of section 2929.13 or division (I) of section 2929.20 of the Revised Code, or to state the findings of the trier of fact required by division (B)(2)(e) of section 2929.14 of the Revised Code, relative to the imposition or modification of the sentence, and if the sentencing court failed to state the required findings on the record, the court hearing an appeal under division (A), (B), or (C) of this section shall remand the case to the sentencing court and instruct the sentencing court to state, on the record, the required findings.
(2) The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.
The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:
(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
(b) That the sentence is otherwise contrary to law.

(H) A judgment or final order of a court of appeals under this section may be appealed, by leave of court, to the supreme court.

Rule 11. Pleas, rights upon plea

(A) Pleas.

A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant's attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) Effect of guilty or no contest pleas.

With reference to the offense or offenses to which the plea is entered:

(1) The plea of guilty is a complete admission of the defendant's guilt.

(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under *Crim.R. 32*.

(C) Pleas of guilty and no contest in felony cases.

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to *Crim.R. 44* by appointed counsel, waives this right.

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

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

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

(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting a plea

of guilty or no contest the court shall so advise the defendant and determine that the defendant understands the consequences of the plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications that are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

(D) Misdemeanor cases involving serious offenses.

In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to *Crim.R. 44* by appointed counsel, waives this right.

(E) Misdemeanor cases involving petty offenses.

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

The counsel provisions of *Crim.R. 44(B)* and (C) apply to division (E) of this rule.

(F) Negotiated plea in felony cases.

When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court.

(G) Refusal of court to accept plea.

If the court refuses to accept a plea of guilty or no contest, the court shall enter a plea of not guilty on behalf of the defendant. In such cases neither plea shall be admissible in evidence nor be the subject of comment by the prosecuting attorney or court.

RULE 16. Discovery and Inspection

(A) Purpose, Scope and Reciprocity. This rule is to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system and the rights of defendants, and to protect the well- being of witnesses, victims, and society at large. All duties and remedies are subject to a standard of due diligence, apply to the defense and the prosecution equally, and are intended to be reciprocal. Once discovery is initiated by demand of the defendant, all parties have a continuing duty to supplement their disclosures.

(B) Discovery: Right to Copy or Photograph. Upon receipt of a written demand for discovery by the defendant, and except as provided in division (C), (D), (E), (F), or (J) of this rule, the prosecuting attorney shall provide copies or photographs, or permit counsel for the defendant to copy or photograph, the following items related to the particular case indictment, information, or complaint, and which are material to the preparation of a defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant, within the possession of, or reasonably available to the state, subject to the provisions of this rule:
(1) Any written or recorded statement by the defendant or a co-defendant, including police summaries of such statements, and including grand jury testimony by either the defendant or co-defendant;
(2) Criminal records of the defendant, a co-defendant, and the record of prior convictions that could be admissible under Rule 609 of the Ohio Rules of Evidence of a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal;
(3) Subject to divisions (D)(4) and (E) of this rule, all laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings, or places;
(4) Subject to division (D)(4) and (E) of this rule, results of physical or mental examinations, experiments or scientific tests;

5. (5) Any evidence favorable to the defendant and material to guilt or punishment;
6. (6) All reports from peace officers, the Ohio State Highway Patrol, and federal law

enforcement agents, provided however, that a document prepared by a person other than the witness testifying will not be considered to be the witness's prior statement for purposes of the cross examination of that particular witness under the Rules of Evidence unless explicitly adopted by the witness;
(7) Any written or recorded statement by a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal.

(C) Prosecuting Attorney's Designation of "Counsel Only" Materials. The prosecuting attorney may designate any material subject to disclosure under this rule as "counsel only" by stamping a prominent notice on each page or thing so designated. "Counsel only" material also includes materials ordered disclosed under division (F) of this rule. Except as otherwise provided, "counsel only" material may not be shown to the defendant or any other person, but may be disclosed only to defense counsel, or the

agents or employees of defense counsel, and may not otherwise be reproduced, copied or disseminated in any way. Defense counsel may orally communicate the content of the "counsel only" material to the defendant.

(D) Prosecuting Attorney's Certification of Nondisclosure. If the prosecuting attorney does not disclose materials or portions of materials under this rule, the prosecuting attorney shall certify to the court that the prosecuting attorney is not disclosing material or portions of material otherwise subject to disclosure under this rule for one or more of the following reasons:
(1) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will compromise the safety of a witness, victim, or third party, or subject them to intimidation or coercion;
(2) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will subject a witness, victim, or third party to a substantial risk of serious economic harm;
(3) Disclosure will compromise an ongoing criminal investigation or a confidential law enforcement technique or investigation regardless of whether that investigation involves the pending case or the defendant;
(4) The statement is of a child victim of sexually oriented offense under the age of thirteen;
(5) The interests of justice require non-disclosure.
Reasonable, articulable grounds may include, but are not limited to, the nature of the case, the specific course of conduct of one or more parties, threats or prior instances of witness tampering or intimidation, whether or not those instances resulted in criminal charges, whether the defendant is pro se, and any other relevant information.
The prosecuting attorney's certification shall identify the nondisclosed material.

(E) Right of Inspection in Cases of Sexual Assault.
(1) In cases of sexual assault, defense counsel, or the agents or employees of defense counsel, shall have the right to inspect photographs, results of physical or mental examinations, or hospital reports, related to the indictment, information, or complaint as described in section (B)(3) or (B)(4) of this rule. Hospital records not related to the information, indictment, or complaint are not subject to inspection or disclosure. Upon motion by defendant, copies of the photographs, results of physical or mental examinations, or hospital reports, shall be provided to defendant's expert under seal and under protection from unauthorized dissemination pursuant to protective order.
(2) In cases involving a victim of a sexually oriented offense less than thirteen years of age, the court, for good cause shown, may order the child's statement be provided, under seal and pursuant to protective order from unauthorized dissemination, to defense counsel and the defendant's expert. Notwithstanding any provision to the contrary, counsel for the defendant shall be permitted to discuss the content of the statement with the expert.

(F) Review of Prosecuting Attorney's Certification of Non-Disclosure. Upon motion of the defendant, the trial court shall review the prosecuting attorney's decision of nondisclosure or designation of "counsel only" material for abuse of discretion during an *in camera* hearing conducted seven days prior to trial, with counsel participating.

(1) Upon a finding of an abuse of discretion by the prosecuting attorney, the trial court may order disclosure, grant a continuance, or other appropriate relief.
(2) Upon a finding by the trial court of an abuse of discretion by the prosecuting attorney, the prosecuting attorney may file an interlocutory appeal pursuant to division (K) of Rule 12 of the Rules of Criminal Procedure.
(3) Unless, for good cause shown, the court orders otherwise, any material disclosed by court order under this section shall be deemed to be "counsel only" material, whether or not it is marked as such.
(4) Notwithstanding the provisions of (E)(2), in the case of a statement by a victim of a sexually oriented offense less than thirteen years of age, where the trial court finds no abuse of discretion, and the prosecuting attorney has not certified for nondisclosure under (D)(1) or (D)(2) of this rule, or has filed for nondisclosure under (D)(1) or (D)(2) of this rule and the court has found an abuse of discretion in doing so, the prosecuting attorney shall permit defense counsel, or the agents or employees of defense counsel to inspect the statement at that time.
(5) If the court finds no abuse of discretion by the prosecuting attorney, a copy of any discoverable material that was not disclosed before trial shall be provided to the defendant no later than commencement of trial. If the court continues the trial after the disclosure, the testimony of any witness shall be perpetuated on motion of the state subject to further cross-examination for good cause shown.

(G) Perpetuation of Testimony. Where a court has ordered disclosure of material certified by the prosecuting attorney under division (F) of this rule, the prosecuting attorney may move the court to perpetuate the testimony of relevant witnesses in a hearing before the court, in
which hearing the defendant shall have the right of cross-examination. A record of the witness's testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state.

(H) Discovery: Right to Copy or Photograph. If the defendant serves a written demand for discovery or any other pleading seeking disclosure of evidence on the prosecuting attorney, a reciprocal duty of disclosure by the defendant arises without further demand by the state. The defendant shall provide copies or photographs, or permit the prosecuting attorney to copy or photograph, the following items related to the particular case indictment, information or complaint, and which are material to the innocence or alibi of the defendant, or are intended for use by the defense as evidence at the trial, or were obtained from or belong to the victim, within the possession of, or reasonably available to the defendant, except as provided in division (J) of this rule:
(1) All laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings or places;

2. (2) Results of physical or mental examinations, experiments or scientific tests;
3. (3) Any evidence that tends to negate the guilt of the defendant, or is material to punishment, or tends to support an alibi. However, nothing in this rule shall be construed to require the defendant to disclose information that would tend to incriminate that defendant;
4. (4) All investigative reports, except as provided in division (J) of this rule;

5. (5) Any written or recorded statement by a witness in the defendant's case-in-chief,

or any witness that it reasonably anticipates calling as a witness in surrebuttal.

(I) Witness List. Each party shall provide to opposing counsel a written witness list, including names and addresses of any witness it intends to call in its case-in-chief, or reasonably anticipates calling in rebuttal or surrebuttal. The content of the witness list may not be commented upon or disclosed to the jury by opposing counsel, but during argument, the presence or absence of the witness may be commented upon.

(J) Information Not Subject to Disclosure. The following items are not subject to disclosure under this rule:

(1) Materials subject to the work product protection. Work product includes, but is not limited to, reports, memoranda, or other internal documents made by the prosecuting attorney or defense counsel, or their agents in connection with the investigation or prosecution or defense of the case;

(2) Transcripts of grand jury testimony, other than transcripts of the testimony of a defendant or co-defendant. Such transcripts are governed by Crim. R. 6;

(3) Materials that by law are subject to privilege, or confidentiality, or are otherwise prohibited from disclosure.

(K) Expert Witnesses; Reports. An expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications. The written report and summary of qualifications shall be subject to disclosure under this rule no later than twenty-one days prior to trial, which period may be modified by the court for good cause shown, which does not prejudice any other party. Failure to disclose the written report to opposing counsel shall preclude the expert's testimony at trial.

(L) Regulation of discovery.

(1) The trial court may make orders regulating discovery not inconsistent with this rule. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

(2) The trial court specifically may regulate the time, place, and manner of a *pro se* defendant's access to any discoverable material not to exceed the scope of this rule.

(3) In cases in which the attorney-client relationship is terminated prior to trial for any reason, any material that is designated "counsel only", or limited in dissemination by protective order, must be returned to the state. Any work product derived from said material shall not be provided to the defendant.

(M) Time of motions. A defendant shall make his demand for discovery within twenty-one days after arraignment or seven days before the date of trial, whichever is earlier, or at such reasonable time later as the court may permit. A party's motion to compel compliance with this rule shall be made no later than seven days prior to trial, or three

days after the opposing party provides discovery, whichever is later. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon showing of cause why such motion would be in the interest of justice.
[Effective: July 1, 1973; amended effective July 1, 2010.]

OH. Evid. R.403.

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Undue Delay

(A) Exclusion mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

(B) Exclusion discretionary. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.

OH. R. Prof. Conduct 1.1(5).

I. CLIENT-LAWYER RELATIONSHIP RULE 1.1: COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation *reasonably* necessary for the representation.

Comment

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Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c). The lawyer should consult with the client about the degree of thoroughness and the level of preparation required, as well as the estimated costs involved under the circumstances.