

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
Appellee, : Case No. 2012-1212  
-vs- : Appeal taken from Franklin County  
 : Court of Common Pleas  
CARON E. MONTGOMERY, : Case No. 10CR-12-7125  
Appellant. : **This is a death penalty case**

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**Appellant Caron Montgomery's Motion for Reconsideration**

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Appellant Caron Montgomery, pursuant to S.Ct.Prac.R. 18.02, respectfully moves this Court for reconsideration of its August 24, 2016, opinion and decision affirming his convictions and death sentence. *State v. Montgomery*, Slip Opinion No. 2016-Ohio-5487. The reasons for this Motion are more fully set forth in the attached memorandum in support.

Respectfully submitted,  
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## MEMORANDUM IN SUPPORT

Appellant Caron Montgomery respectfully requests that this Court revisit its August 24, 2016 opinion, *State v. Montgomery*, Slip Opinion No. 2016-Ohio-5487 (hereinafter “Opinion”) with respect to Propositions of Law Nos. 1, 2, 3, and 7. The Court should grant reconsideration to correct those portions of its opinion which “were made in error.” *Dublin City Sch. Bd. of Educ. v. Franklin County Bd. of Revision*, 2014-Ohio-1940 ¶ 9. The Court did not fully consider the issues raised herein. *State v. Gillispie*, 2nd Dist. No. 24456, 2012-Ohio-2942, ¶ 9. Additionally, the Court should consider the new argument raised based on an opinion of this Court released the day after Montgomery’s case was decided. These arguments are addressed herein.

### **Proposition of Law No. 1**

When the State fails to introduce sufficient evidence of particular charges and there is not substantial evidence upon which a jury can conclude that all elements have been proven beyond a reasonable doubt, a resulting conviction deprives a capital defendant of substantive and procedural due process. U.S. Const. amends. VI, VIII, XIV; Article I, §§ 1, 2, 5, 9, 10, 16 and 20 of the Ohio Constitution.

**A. This Court Incorrectly Concluded that the Evidence was Sufficient to Prove Guilt Beyond a Reasonable Doubt of a Capital Specification Not Even Mentioned in the State’s Case-in-Chief.**

This Court should reconsider its conclusion that the evidence was sufficient to prove a capital specification beyond a reasonable doubt when the State produced absolutely no evidence of the R.C. 2929.04(A)(3) capital specification and failed to even mention the specification during the entire culpability phase of the proceedings. During the entirety of Montgomery’s trial, the State made only one passing mention of the escaping detection, apprehension, trial, or punishment for another offense specification (R.C. 2929.04(A)(3)), and that was during their closing argument in the *penalty* phase. See Trial Transcript (“Trial Tr.”) Vol. VIII, Tr. 342.

This Court correctly stated the proper standard regarding capital specification convictions, stating:

[I]n a capital case, the aggravating circumstances codified in R.C. 2929.04(A) require the production of evidence sufficient to prove their existence beyond a reasonable doubt. We reject the state’s argument that it had no duty to prove the capital specifications due to Montgomery’s guilty plea.

Opinion at ¶ 73 (emphasis added).

This Court failed to hold the State to this standard when it affirmed the capital specification conviction without requiring the production of *any* evidence regarding the specification. Viewing the evidence in a light most favorable to the State was not even possible when the State failed to mention the specification during the entirety of the culpability phase of the trial. By the time the specification was first mentioned in the State’s closing argument of the penalty phase—the *only* time the specification was ever argued during the trial—the panel had already found Montgomery guilty of the specification beyond a reasonable doubt.<sup>1</sup> This Court should reconsider its ruling regarding the sufficiency of the evidence for the escaping detection, apprehension, trial, or punishment for another offense specification when the State failed to produce any evidence of the specification.

**B. This Court Incorrectly Denied Montgomery’s Manifest Weight of the Evidence Claim When the State’s Sole Witness Offered No Evidence of the Capital Specification.**

This Court incorrectly rejected Montgomery’s manifest weight of the evidence claim regarding the capital specification based on the credibility of the State’s sole witness. Opinion at ¶ 79. The credibility of the witness was irrelevant to the manifest weight claim because the

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<sup>1</sup> The escaping detection, apprehension, trial, or punishment for another offense specification (R.C. 2929.04(A)(3), was also mistreated by this Court in its proportionality review. Instead of reviewing R.C. 2929.04(A)(3), this Court reviewed the proportionality of R.C. 2929.04(A)(8)—the witness-murder specification. See Opinion at ¶ 191 (citing cases with evaluation of R.C. 2929.04(A)(8)).

State's sole witness never mentioned *any* evidence regarding the capital specification and the State never argued for the existence of the specification in its case-in-chief.

The manifest weight of the evidence review must be directed toward a determination of whether there is "substantial evidence" upon which a trier of fact could reasonably conclude that all of the elements have been proved beyond a reasonable doubt. *State v. Eley*, 56 Ohio St. 2d 169, 172, 383 N.E.2d 132, 134 (1978); *Glasser v. United States*, 315 U.S. 60, 80 (1942). Substantial evidence is more than a mere scintilla. *See United States v. Orrico*, 599 F.2d 113, 117 (6th Cir. 1979). It is evidence affording a substantial basis of fact from which the fact at issue can be reasonably inferred. *Id.* And as this Court stated in the Opinion, "the aggravating circumstances codified in R.C. 2929.04(A) require the production of evidence sufficient to prove their existence beyond a reasonable doubt." Opinion at ¶ 73.

The state did not carry its burden. The State produced absolutely no evidence of the capital specification, not even a mere scintilla. The State did not bother to argue for the specification in its culpability phase summation. The only evidence relating to the escaping detection, apprehension, trial, or punishment for another offense specification (R.C. 2929.04(A)(3)) actually negates it. Montgomery was found inside the apartment when the decedents' bodies were discovered. Trial Tr. Vol. VII at p. 34. He had not fled the scene of the crime. He ultimately took responsibility for the crimes and pled guilty. Thus, this Court must reconsider its decision affirming the capital specification conviction.

## **Proposition of Law No. 2**

A jury waiver and guilty plea are not made knowingly, intelligently and voluntarily when the capital defendant is medicated at the time he waives his rights and the full panoply of rights he is giving up is not explained to him. U.S. Const. amends. VI, VIII, XIV; Article I, §§ 1, 2, 5, 9, 10, 16 and 20 of the Ohio Constitution.

This Court denied Montgomery's claim in Proposition of Law No. 2 that the acceptance of his jury waiver and guilty pleas were not knowing, intelligent and voluntary. Montgomery moves this Court to reconsider that denial.

### **A. This Court Incorrectly Denied Montgomery's Claim Based on Unreliable Evidence.**

This Court based the denial of Montgomery's claim on insufficient or unreliable evidence for the purpose of a competency determination. The evidence relied upon lacks the constitutionally requisite indicia of reliability and objectivity necessary in a capital case. More process is due when the defendant forfeits his fundamental constitutional rights by waiving a jury and entering guilty pleas on all counts against him.

In deciding against Montgomery, this Court considered 1) Montgomery's signed jury waiver, Opinion at ¶ 28; 2) Montgomery's signed guilty plea that was entered the same day as his jury waiver, *id.* at ¶ 35; 3) his attorneys' assurances that Montgomery was competent, *id.* at ¶ 36, 51; along with 4) Montgomery's assurances that he understood what he was doing, *id.* at ¶ 38, 39. This Court reasoned those matters all meant that he was making knowing, intelligent and voluntary decisions. Each of these items relied on are either conduct or statements of Montgomery himself—the person whose competency was directly at issue—or from persons lacking the medical expertise necessary to offer any authoritative opinion on the matter and who lacked the benefit of advice from an expert retained for competency purposes.

Montgomery disclosed to the presiding judge at the jury waiver hearing and the panel at the plea hearing that he was currently taking two antipsychotic medications: Thorazine and Risperdal. Trial Tr. Vol. VI at p. 4; Vol. VII at p. 12. He stated that these medications were prescribed for depression. Trial Tr. Vol. VI at p. 5; Vol. VII at p. 13. No further inquiry was made at either hearing into the effects of the medications or Montgomery's diagnosis of depression. At the very least a competency evaluation should have been ordered.

**B. This Court Misapplied Its Own Analyses and Holdings from *Mink* and *Ketterer*.**

In finding no error with the panel's actions, this court cited to *State v. Mink*, 2004-Ohio-1580 as support. Opinion at ¶ 47. However, as observed by the dissenting opinion, the situation in *Mink* was entirely different from what transpired in Montgomery's case. *Id.* at ¶ 195.

Mink was charged with the aggravated murder with death penalty specifications for the murder of two family members. *Mink*, 2004-Ohio-1580, ¶ 2, 6, 22-23. Mink sought to waive counsel, plead guilty, and receive the death penalty. *Id.* at ¶ 24-26. In response, the three-judge panel presiding over the case appointed two experts to conduct competency evaluations to ensure that Mink was competent to make these decisions. *Id.* at ¶ 24, 31. These evaluations were ordered even though an independent psychologist had already examined Mink and found that he was competent. *Id.* at ¶ 31.

Both experts were aware that Mink was taking or had taken antidepressant medication. *Id.* at ¶ 34. The psychologists found that Mink was competent, again factoring in the medication Mink was taking or had taken. *Id.* Thus, the trial court ensured that Mink was competent and that his decision was knowing, intelligent and voluntary when it "conducted a comprehensive inquiry of Mink before finding that he was competent to waive counsel and represent himself and competent to waive his right to a jury trial." *Id.* at ¶ 60. This Court determined that based on the

extent of the panel's actions, "[t]he trial court fully protected Mink's constitutional rights in determining his competency." *Id.* at ¶ 61.

The process in Montgomery's case was the complete opposite. Instead of ordering a competency evaluation or otherwise seeking advice of medical professionals, the three-judge panel made a nominal inquiry into Montgomery's competency to waive a jury and enter guilty pleas. That cursory inquiry consisted of the panel asking Montgomery's trial counsel about their opinion of whether Montgomery was competent, and asking Montgomery himself whether or not he knew what he was doing. Trial Tr. Vol. VI at p. 29; Vol. VII at pp. 36, 38-39, 51. The court should have mirrored the trial court's actions in *Mink* and ordered a competency evaluation where the impact of the medications Montgomery was taking was properly considered.

Similarly, in *State v. Ketterer*, the defendant sought to waive jury and plead guilty to the charges of aggravated murder with death penalty specifications. 2006-Ohio-5283, ¶ 10. The trial court found Ketterer competent to make those decisions. *Id.* at ¶ 72. The difference between *Ketterer* and *Montgomery* is that in *Ketterer* the psychologist who found him competent noted that he was taking psychotropic medication. *Id.* at ¶ 72. Montgomery's panel never ascertained the effects of the medications Montgomery was taking and whether those impaired his thinking.

**C. The Trial Court Had Direct Notice of Montgomery's Antipsychotic Medications and Diagnosed Mental Illness.**

The trial court had direct, sufficient notice that Montgomery was under the influence of antipsychotic medications and had a history of a diagnosed mental illness. It was reversible error to not order an adequate investigation into Montgomery's competency. In *U.S. v. Damon*, 191 F.3d 561 (4th Cir. 1999), cited in the dissenting opinion, (Opinion at ¶ 196) the trial court's decision finding Damon competent to enter a plea was reversed on appeal. In *Damon*, "the district court was put on direct notice that Damon could be under the influence of a drug while

entering his plea. Damon told the court that he was “currently” under the influence of antidepressant medication.” *Id.* at 565. The Fourth Circuit remanded the case “to the district court for a determination of whether Damon’s medication had the capability to affect his mental faculties sufficiently to render him incompetent to enter a guilty plea.” *Id.* at 566.

In a case such as Montgomery’s, where a capitally charged defendant wishes to waive jury and plead to the every charge in the indictment, the trial court must ensure that the decision is made by a competent defendant. Simply because Montgomery could answer questions “affirmative[ly] and in a coherent fashion” (Opinion at ¶ 50) and behave in a manner that “was not outrageous, irrational or confused” (*id.* at ¶ 59) does not indicate competency. The court had no idea whether the medications Montgomery was taking resulted in dulled affect and an ability to answer yes or no questions in a coherent fashion. The court did not ask a mental health professional about the effects the medication had on Montgomery. Nor did the court inquire as to when Montgomery began taking the antipsychotic drugs for his admitted “mental illness.” In this case, the assurance that Montgomery was competent to waive jury and plead to the indictment was not there.

Indicative of the trial court’s lack of care with Montgomery’s mental illness is found in the terse acknowledgement the court gave to his diagnosis of depression during the jury trial waiver hearing, which was taken earlier the same day that Montgomery’s guilty pleas were accepted:

THE COURT: Have you ever been found to be mentally ill or mentally incompetent?

THE DEFENDANT: Not that I know of.

THE COURT: Okay. Are you currently under the influence of drugs?

THE DEFENDANT: Thorazine and Risperdal.

THE COURT: Those are prescribed by a medical doctor?

THE DEFENDANT: Yes, sir.

THE COURT: Are you currently under the influence of alcohol?

THE DEFENDANT: No, sir.

THE COURT: What are you taking those medications for, sir?

THE DEFENDANT: For mental illness.

THE COURT: For mental illness?

THE DEFENDANT: Yes, sir.

THE COURT: What is the nature of this mental illness?

THE DEFENDANT: Depression.

THE COURT: Depression. All right. *Other than depression, have you been diagnosed with any other mental issues?*

THE DEFENDANT: No.

Trial Tr. Vol. VI at pp. 4-5 (emphasis added).

“Additional inquiry is necessary into a defendant’s mental state once a defendant seeking to enter a guilty plea has stated that he is under the influence of drugs or medication” *Mink*, 2004-Ohio-1580, ¶ 66. *Mink’s* requirement was not satisfied in Montgomery’s case. The trial court at the very least should have heard testimony from a mental health professional about the medications Montgomery was taking and his attendant mental health issues. It is not a burden to require so little from the court when there is so much at stake and when neither the court nor the attorneys mental health or pharmacological experts. This Court should reconsider the decision denying Montgomery’s Proposition of Law No. 2.

### Proposition of Law No. 3

The defendant's right to the effective assistance of counsel is violated when counsel's performance during a capital trial is deficient to the defendant's prejudice. U.S. Const. amends. VI, VIII, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16 and 20.

#### A. Failure to Object to Confrontation and Hearsay.

The Confrontation Clause of the Sixth Amendment provides that “in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.” U.S. Const. amend. VI. This Court denied Montgomery's claims under that Amendment that his right of confrontation was violated, and that his attorneys were constitutionally ineffective when they failed to object, when the state used testimonial evidence from a non-testifying witness to prove his guilt.<sup>2</sup> These violations, alone and together, violate Montgomery's right to Due Process under the U.S. and Ohio constitutions. Montgomery moves this Court to reconsider its denial of his arguments.

The reasoning in this Court's decision conflates the Montgomery's Sixth Amendment's fundamental procedural right “to be confronted with the witnesses against him,” with a mere rule of evidence—hearsay—which can be easily defeated by myriad exceptions. Yet, “[i]f there is one theme that emerges from [the US Supreme Court's landmark ruling in] *Crawford v. Washington*], it is that the Confrontation Clause confers a powerful and fundamental right that is no longer subsumed by the evidentiary rules governing the admission of hearsay statements.” *United States v. Cromer*, 389 F.3d 662, 679 (6th Cir. 2004); *see also Crawford v. Washington*, 541 U.S. 36, 51 (2004) (“Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial

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<sup>2</sup> This Court only evaluated Montgomery's claim under one aspect of the Sixth Amendment—*Strickland v. Washington*. The Court did not address his Confrontation Clause argument nor his Due Process argument.

practices.”). Therefore, this Court’s reliance on the admission of the autopsy reports based on Ohio’s business records hearsay exception is misplaced and worthy of reconsideration.

**1. The autopsy reports admitted at Montgomery’s trial are testimonial.**

Confrontation issues arise whenever the state seeks to introduce out-of-court testimonial statements of a witness, who is not subject to cross-examination, to establish or prove some fact against an accused in a criminal proceeding. *See, e.g., Crawford*, 541 U.S. at 50-51. Formalized forensic reports are testimonial when they are created “under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009) (quoting *Crawford*, 541 U.S. at 52 (2004)); *see also Davis v. Washington*, 547 U.S. 813, 822 (2006) (statements are testimonial when “the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution”). Evidentiary hearsay rules cannot be used to defeat the right to confrontation when testimonial evidence is offered against the accused because “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” *Crawford*, 541 U.S. at 68.

The autopsy reports admitted as evidence in this case are testimonial. The reports were unquestionably written as part of a homicide investigation. Each of the three decedents in this case had visible lacerations on their necks. State’s Exs. 5B, 6B & 7B. Montgomery was found inside the apartment when the decedents’ bodies were discovered. Trial Tr. Vol. VII at p. 34. Montgomery was immediately a suspect in the killings. These facts unquestionably demonstrate that from the very inception of the homicide investigation each investigative step—including the autopsies—were conducted “under circumstances which would lead an objective witness

reasonably to believe that the statement would be available for use at a later trial” and with the primary purpose to “establish or prove past events potentially relevant to later criminal prosecution.” Moreover, Montgomery was clearly the key suspect in the case. When police have a clear suspect—and only one suspect—from inception of their investigation, it is a logical inference that the autopsy report declaring the cause of death to be homicide does accuse a specified individual.

Autopsy reports are clearly testimonial under state law as well. In Ohio, the medical examiner is statutorily required to:

promptly deliver, to the prosecuting attorney of the county in which such death occurred, copies of all necessary records relating to every death in which, in the judgment of the coroner or prosecuting attorney, *further* investigation is advisable. The sheriff of the county, the police of the city, the constable of the township, or marshal of the village in which the death occurred may be requested to furnish more information or make *further* investigation when requested by the coroner or his deputy.

RC § 313.09 (emphasis added).<sup>3</sup> Under the specified circumstance, the statute permits “further” investigation, in addition to that already completed when conducting the autopsy. The plain language of statute indicates that the Legislature considers the powers it conferred upon the medical examiner to be investigative in nature.

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<sup>3</sup> ORC § 313.15 also requires the medical examiner to confer with authorities prior to releasing a body in its custody:

All dead bodies in the custody of the coroner shall be held until such time as the coroner, after consultation with the prosecuting attorney, or with the police department of a municipal corporation, if the death occurred in a municipal corporation, or with the sheriff, has decided that it is no longer necessary to hold such body to enable him to decide on a diagnosis giving a reasonable and true cause of death, or to decide that such body is no longer necessary to assist any of such officials in his duties.

Likewise, Ohio’s statutory scheme mandates that a “certified” copy of medical examiner’s records which contain “the detailed descriptions of the observations written during the progress of an autopsy and the conclusions drawn from those observations” “shall be received as evidence in any criminal or civil action or proceeding in a court in this state, as to the facts contained in those records.” Ohio Rev. Code §§ 313.10(A)(1). Accordingly, the medical examiner’s office creates a formalized forensic report under applicable state-law requirements, while knowing these are likely to be used in a criminal prosecution. The U.S. Supreme Court has held that formalized forensic reports fall within the “core class of testimonial statements” covered by the Confrontation Clause. *Melendez-Diaz*, 557 U.S. at 310. Thus, the autopsies created in this case are testimonial.

However, this Court held that autopsy reports are nontestimonial and admissible under the business records exception to the hearsay rule of evidence. Opinion at ¶ 93 citing *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, 853 N.E.2d 621, ¶ 88, and *Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, at ¶ 59 (“although autopsy reports are sometimes relevant in criminal prosecutions, *Craig* rightly held that they are not created primarily for a prosecutorial purpose”); *see also State v. Adams*, 146 Ohio St.3d 232, 2016-Ohio-3043, 54 N.E.3d 1227, ¶ 4. Montgomery asks this Court to reconsider this holding.

**2. A police officer is not a competent witness to introduce medical conclusions contained in autopsy reports and scientific conclusions in DNA lab reports.**

The state introduced in its case-in-chief evidence from all three of the autopsy reports at issue. (State Trial Exhibits 5B, 6B, 7B). Further exacerbating the confrontation issue in this case is the fact that those autopsy reports were admitted through the testimony of the lead homicide detective on the case—a witness without any medical expertise or independent knowledge of the decedents’ autopsies. (Trial Tr., Vol. VII at pp. 145-160).

Similarly, the court also admitted testimony in the case-in-chief offered by the state through the lead detective about conclusions in DNA laboratory analyses. (Trial Tr., Vol. VII at pp. 137-144; State Trial Exhibits 12A1 to 15). For example, the state elicited testimony from Detective Croom that the lab's findings were consistent with the out-of-court statements of a man with whom one of the decedents had had a recent sexual encounter:

Q. Okay. So, to be fair, it says that the skin cells from the vaginal swabs match Tia but the sperm fraction is not the defendant?

A. That's correct.

Q. Okay. And then once you got Mr. Taylor's DNA, did you say, "Here, check this one too"?

A. That's correct.

Q. Okay. And is that one contained in 12A6 that you told the Court matched his DNA?

A. That's correct. It matched his oral swab standard of Frederick Taylor.<sup>4</sup>

Q. And was that consistent with what he reported, that they had had a consensual encounter and she left about 3:30 in the morning?

Q. It is consistent.

Trial Tr., Vol. VII at pp. 141-42. Detective Croom did not perform the DNA tests, and thus, should not have been permitted to testify about their contents in any capacity. *See, e.g., State v. Austin*, 131 Ohio App.3d 329, 339, 722 N.E.2d 555 (1st Dist. 1998) ("Austin argues that the trial court erred in allowing [a] police officer [ ] to testify about the contents of the coroner's lab report, particularly the findings regarding sperm and semen testing. The state concedes this was error, which it was \*\*\*. [The police officer] could testify about the chain of custody, but not the

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<sup>4</sup>This is a scientific conclusion Croom is unqualified to make. Furthermore, testifying that someone is a "match" is improper terminology in the field of DNA. This error is repeat throughout his testimony on the DNA. *See* Trial Tr., Vol. VII at pp. 137-144.

performance or results of the tests, for the fundamental reason that she did not perform the tests.”)

Similarly, Detective Croom is not a DNA expert nor does he possess adequate expertise in any field to opine about or expound upon the findings in the DNA crime Lab report. Detective Croom has no expert or independent knowledge of the quality, motility, or other characteristics of the spermatozoa sample which was tested by the lab that might allow for a timeframe to be placed on when the sperm was deposited.<sup>5</sup> Importantly, the report itself does not describe or discuss these facts. (State Trial Exhibits 12A-3). Detective Croom seemingly testified that this evidence was “consistent with” decedent’s “consensual” sexual encounter and was “consistent with” her leaving after that encounter at some time “about 3:30 in the morning[.]” Circumstances of consent can never be adduced from DNA in this manner, nor can a timeframe be established from DNA testing which is silent on critical facts. When the person testifying about DNA issues is not an expert in that field the problems are amplified and the threat of improper testimony being elicited and admitted, as it was here, is amplified. It was a Confrontation Clause violation to admit all the testimonial forensic reports in this case.

**3. Trial counsel were constitutionally ineffective for failing to object to the autopsy and DNA reports, and the hearsay evidence erroneously admitted at trial.**

Contrary to this Court’s decision, trial counsel’s failure to object was unreasonable, and constitutes deficient performance. A competent capital trial lawyer would have been well aware of the fundamental shift in the law governing the admissibility of evidence against an accused at

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<sup>5</sup> Determining a timeframe when sperm was deposited requires expertise and can be source of disagreement amongst experts. See, e.g., *State v. King*, 8th Dist. Cuyahoga No. 97683, 2012-Ohio-4398, ¶¶ 63, 66-67; *Wingert v. Warren*, No. 05-74144, 2013 U.S. Dist. LEXIS 24182, at \*17-18 (E.D.Mich. Feb. 22, 2013).

trial in the years immediately following the decision in *Crawford*. The law in this area was rapidly developing, thus the need to stay abreast of recent decisions, and issues pending before the U.S. Supreme Court, is obvious. Montgomery's trial was held in May 2012. *Crawford* was decided in 2004, followed by *Davis v. Washington*, 547 U.S. 813 (2006); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Michigan v. Bryant*, 562 U.S. 344, 345, 131 S.Ct. 1143 (2011); and *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). All of these cases deal with the key issue of the admissibility of testimonial statements.

If the state wanted to admit the autopsy and DNA reports, then it was obligated to call the expert who prepared the forensic report to testify to its contents. "The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience." *Melendez-Diaz*, 557 U.S. at 325. That defense counsel did not object or demand does not change the calculus of what the constitution requires. *See Melendez-Diaz*, 557 U.S. at 324-25 ("[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court."). The Sixth Circuit has held that "a defendant only forfeits his confrontation right if his own wrongful conduct is responsible for his inability to confront the witness." *Cromer*, *supra*, 389 F.3d at 679. Therefore, it is of no consequence if this Court were to find it was strategic, or continue to main that it was reasonable for trial counsel to fail to insist that competent witnesses testify against Montgomery (Opinion at ¶ 94), because "[a] foolish strategic decision does not rise to the level of such misconduct and so will not cause the defendant to forfeit his rights under the Confrontation Clause." *Cromer*, 389 F.3d at 679.

The performance of Montgomery’s counsel at trial was deficient and he was prejudiced when the state failed to proffer admissible evidence against him to prove his guilt. Even when, as here, the defendant pleads guilty to a capital offense, the law still requires the state to prove his guilt beyond a reasonable doubt. Opinion at ¶ 73. And the law still guarantees him competent counsel to ensure the protections of our adversarial process.

#### **4. Conclusion to argument regarding failure to object to confrontation and hearsay.**

The form-over-substance argument—that autopsy reports are nontestimonial—so far adhered to by this Court has no place in our criminal law, especially when it is applied in a capital trial where a life is at stake. Any independent veracity a testimonial statement may contain does not matter under the proper legal analysis. This is because, as the Supreme Court explained in *Crawford*, while the “[Confrontation] Clause’s ultimate goal is to ensure reliability of evidence, [ ] it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” 541 U.S. at 61. Similar, it is of no import that Montgomery pled guilty to the charges against him. *See id.* at 62 (“Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.”) Regardless as to how Montgomery came to be on trial, the constitution guarantees the same procedural safeguards for his trial as it does for every other person who is accused of a crime by the state: the evidence offered against him must be competent and to be constitutionally competent, testimonial evidence must be subject to confrontation. Montgomery was deprived of this fundamental right. Thus, his Sixth Amendment and Due Process rights were violated at trial through the use of improper evidence and procedures, and his attorney’s failure to object to the same.

**B. Failure to Present Testimony from a Psychologist and Sex-Abuse Expert.**

Montgomery moves this Court to reconsider its denial of his argument that his counsel were ineffective for failing to secure appropriate and necessary expert assistance to place his youthful transgressions and sexual acting out into proper focus. Without this assistance, and absent the benefit of guidance recently handed down by this Court, the panel placed impermissible weight on Montgomery's juvenile record and conduct.

Instead of presenting expert testimony to explain the woeful circumstances of Montgomery's youth, his attorneys presented his troubled background through two former Franklin County Children's Services (FCCS) workers, Roberta Thomas and Timothy Brown. *See* Trial Tr. Vol. VIII at pp. 243-98.<sup>6</sup> They testified regarding Montgomery's time in FCCS custody and his positive reaction to them by "relying on (their) memories of events that occurred about 25 years ago," and they "provided no records to corroborate any critical statements." Sent. Op. at p. 8. In further diminishing the value of the weight assigned to this testimony presented by Montgomery in mitigation, the trial court impermissibly considered youthful acts by Montgomery as aggravating. Montgomery urges the Court to revisit the propriety of the trial court's actions based on its recent decision, *State v. Hand*, Slip Opinion No. 2016-Ohio-5504.

In *Hand*, this Court articulated the principle "it is fundamentally unfair to treat a juvenile adjudication as a previous conviction that enhances either the degree of or the sentence for a subsequent offense committed as an adult." 2016-Ohio-5504, ¶ 37. This is consistent with the Supreme Court's conclusion that "it would be misguided to equate the failings of a minor with those of an adult \*\*\*." *Graham v. Florida*, 560 U.S. 48, 68 (2010). Due to their still-developing brain structure, teenagers show "[a] lack of maturity and an underdeveloped sense of

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<sup>6</sup> Thomas and Brown initiated contact with trial counsel after reading about Montgomery's case in the paper the week before trial. *Id.* at 244-45.

responsibility,” “are more vulnerable or susceptible to negative influences and outside pressures” and their character “is not as well formed as that of an adult.” *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005). Reliance on any evidence of acts committed during this stage of development results in an unreliable death sentence.

Though the trial court did not violate the letter of *Hand*, it undermines its spirit when it lessened the mitigating weight assigned to testimony of persons who knew him as a child based on his conduct at the time, including that reported in delinquency adjudications. Trial counsel’s failure to call any witnesses who had expertise necessary to explain Montgomery’s transgressions as a youth allowed the court to erroneously assess the information it presented in mitigation.

When he was twelve years old, Montgomery was taken to DYS custody and was receiving counseling “because of his inappropriate sexual behavior.” Joint Ex. 2 at p. 19. The records are replete with references of his rape as a child by a group of older boys—a sexual assault for which he never received adequate counseling. *See, e.g., id.* at p. 21. Montgomery is also repeatedly described as being under-socialized and not having parental supervision or guidance. *Id.* at pp. 13, 23. His mother isolated and neglected him. In spite of this, the State was able to persuade the court to place the onus on Montgomery for his disturbing behavior as a youth because no expert testimony was presented. For example, the State argued that Montgomery was placed with the worst children because he “sabotaged” his placement at Boys’ Village.<sup>7</sup> Trial Tr. Vol. VIII at pp. 257, 325. This occurred when Montgomery was just twelve

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<sup>7</sup> Trial counsel failed to point out, and the trial panel did not independently note, that Montgomery may have had other motivations to leave his living arrangements given that he was “the youngest boy in the cottage” and thus not likely in the most age-appropriate setting. *See* Joint Ex. 2 at p. 22.

years old. Joint Ex. 1 at p. 12. Unfortunately, the court was persuaded by the State's argument.

In its sentencing opinion setting forth the findings of fact and conclusions of law imposing the death sentence upon Montgomery, the court wrote that "while it is probably true that every life has some value, the net value of a particular life may be close to zero. . . . as the Defendant said in his unsworn statement, he was a mess-up, always in trouble." Sent. Op. at p. 9. The panel devoted a significant portion of its brief sentencing opinion disparaging Montgomery for behavioral the problems he had as a juvenile. *Id.* at pp. 7-8.

Montgomery's juvenile court adjudications and references to them are found throughout the sentencing record in this case. *See* Joint Exs. 1 & 2, *passim*. These exhibits were submitted by his trial counsel during the sentence phase of his capital trial. The trial panel undoubtedly reviewed and considered the details of these prior juvenile offenses when determining the sentence to impose upon Montgomery, an adult. The introduction of these juvenile offenses was error under the animating principles of *Hand*. The reliability of juvenile proceedings are not constitutionally sufficient to permit their consideration in capital proceedings. Because the risk that inappropriate value will be placed on an adult for conduct as a youth, such transgressions must not be introduced in capital trials because the risk of use as an improper aggravator is impermissibly high and their prejudicial effect outweighs any possible probative value.

Their potential for misuse and prejudicial application is demonstrated in this case. The panel explicitly references Montgomery's "involve[ment] in serious delinquent activity" and the details of his juvenile court delinquency adjudications which include him "[stealing] his mother's rental car, [going] joyriding, and hit[ting] a police cruiser." *Id.* at p. 7. More troubling perhaps is the panel's willingness to assign blame to Montgomery as a 13-year-old, uncounseled, childhood-rape-survivor for his lack of "effort to eliminate inappropriate sexual behaviors from

his lifestyle.” *Id.* The panel was all too receptive to arguments placing fault on Montgomery for situations beyond his control as a child and for circumstances not of his making. The absence of psychological testimony left no explanation about how Montgomery was affected by the abuse he suffered. And the absence of the guidance found in *Hand* allowed the court to consider inappropriate factors when deliberating on the propriety of an adult sentence. Consequentially, the outcome of his capital trial was not reliable, and Montgomery was prejudiced.

### **Proposition of Law No. 7**

The cumulative effect of trial error renders a capital defendant’s trial unfair and his sentence arbitrary and unreliable. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16 and 20.

Montgomery raised numerous errors worthy of this Court’s reconsideration. Each error, standing alone, is sufficient to warrant reconsideration. However, by viewing the many errors together, it is apparent that their cumulative impact rendered Montgomery’s trial fundamentally unfair and requires reexamination. Assuming, *arguendo*, that none of the errors Montgomery raises alone warrant reconsideration, this Court should consider the cumulative effect of the errors, which were prejudicial, and order a new trial.

Montgomery’s convictions based upon cumulative error denied him a fair trial and his right to due process. U.S. Const. amends. VI, XIV; Ohio Const. art. I, § 5, 16. Additionally, these same errors render Montgomery’s death sentence unreliable and arbitrary. U.S. Const. amends. VIII, XIV; Ohio Const. art. I, §§ 9, 16.

### **CONCLUSION**

For the foregoing reasons, Montgomery respectfully requests that this Court reconsider its August 24, 2016, opinion in this matter and either order supplemental briefing on the issues raised herein, or grant the relief requested.

Respectfully submitted,

Office of the Ohio Public Defender

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing **Appellant Caron Montgomery's Motion for Reconsideration** was forwarded by first-class, postage prepaid U.S. Mail to Steven L. Taylor, Chief Counsel, Appellate Division, Franklin County Prosecutor's Office, 373 South High Street, 13th Floor, Columbus, Ohio 43215, on this 2nd day of September, 2016.

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