Supreme Court of Ohio Clerk of Court - Filed September 26, 2016 - Case No. 2015-1309

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Appellee,	:	Case No. 2015-1309
-vs-	:	***Death Penalty Case***
SHAWN E. FORD,	:	
Appellant	:	

ON APPEAL FROM THE SUMMIT COUNTY
COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO, CASE NO. CR 2013 04 1008

MERIT BRIEF OF APPELLANT SHAWN E. FORD

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STATEMENT OF THE CASE

Shawn Ford, barely 18 years old in April, 2013 when Margaret and Jeffrey Schobert were murdered, was tried, convicted and sentenced to death. His IQ over the years tested to be anywhere between 62 and 80, rendering him low to borderline intelligence. Much of the evidence against Shawn was from information he provided to the police after they convinced him his cooperation could make a difference between aggravated murder and the death penalty when they presented charges to the grand jury.

The jury that convicted him was fraught with misconduct that was never properly investigated or otherwise addressed. The sentence of death was recommended by a jury that the defense was not permitted to properly voir dire on their willingness to consider specific mitigating factors in the weighing process. That same jury had been misled as to the proper process for weighing the aggravating circumstances.

Shawn Ford was convicted and sentenced to death in through a trial that was not fair, this result and this death sentence were not reliably obtained.

A. Statement of the Facts:

Shawn Ford was born September 30, 1994, in Minnesota, the second of three (3) children born to Kelly Ford and Shawn Ford, Sr. (Vol. 4, Mitigation, p.743,

745-747). Shawn's younger sister, Shantay, died when she was three (3) years old. (Vol. 5, Mitigation, p.746). After his sister died things were different in the home and Shawn did not talk for months. (Vol. 5, Mitigation, p.753) Shawn's parents fought often and the fights were both verbal and physical (Vol. 4, Mitigation, p.654) The fighting, which involved knives and hospital visits for his mom, has a serious effect upon Shawn. (Vol. 4, Mitigation, p. 656.) At a young age he tried to intervene and protect his mother, crawling on his father's back and begging him to "stop beating my mom." (Vol. 2, Mitigation, p. 315.) When the physical abuse between Kelly Ford and Shawn Ford Sr. escalated, Kelly left Shawn's father and, unable to take care of Shawn and his sister, Kelly sent the children to Chicago to live with their grandparents. (Vol. 5., Mitigation, p.753.) Shawn was 5 years when he moved to Chicago with his grandparents. (Id.) When Shawn was in Chicago his grandparents provided a loving home where discipline and structure were provided. (Vol. 2, Mitigation, p. 206, 212, 233) Even then, Shawn had difficulty in school and was teased and bullied in school because of his high pitched voice. (Vol. 5, Mitigation, p.652, 654, 656, 658, 672, 752.) A few years later, Kelly Ford wanted her children to come back and live with her again. When Shawn was to return to his mother in Akron, he had difficulty leaving his grandparents. (Vol. 2, Mitigation, p. 238.) After returning to Akron, he had little contact with his

grandparents because they never knew how to get in touch with the family. There was no stable address or phone number. (Vol. 2, Mitigation, p. 240.)

When Shawn returned to Akron, his mother was with Tracy Wooden. (Vol. 3, Mitigation, p. 376.) At seven years old, Shawn didn't say anything for the first 6-7 months. (Vol. 3, Mitigation, p. 376.) Shawn would ask for his biological father a lot, and his father was never around, despite promising Shawn and his sister he would come see them. (Vol. 3, Mitigation, p. 378; Vol. 5, Mitigation, p. 766.) Shawn continued having trouble in school, and his mother would "whoop" him and disciplined Shawn with a belt. (Vol. 3, Mitigation, p. 379.) No matter how hard he was hit, Shawn would never cry. (Vol. 3, Mitigation, p. 379.) When he was older, his mother would discipline him by making him stand with 25 pound weights above his head. (Vol. 3, Mitigation, p. 381.) As he had with his parents, Shawn witnessed physical and verbal abuse of his mother at the hands of Tracy Wooden. (Vol. 4, Mitigation, p. 668.) As Shawn grew up, he and Wooden would fight and the fight would be physical at time. (Vol. 5, Mitigation, p. 773.) Wooden was sent to prison for a year for selling drugs. (Vol. 3, Mitigation, p. 382-383.) When he got out of prison, Shawn was "running the streets" and "got wild." (Vol. 3, Mitigation, p. 384.) As a juvenile, Shawn was arrested and Wooden posted bond for Shawn. Wooden became upset when Shawn did not go to his probation officer.

(Vol. 3, Mitigation, p. 388.) Around this same time, Shawn met Chelsea Schobert on Facebook and the two began dating. Chelsea Schobert, was his first "real girlfriend." (Vol. 22, Trial, p. 4127; Vol. 5, Mitigation, p. 770.) Their relationship quickly became very serious, seeing each other daily. (Vol. 2, Trial, p. 4128). Chelsea came from a prominent, wealthy family and the Schobert's included Shawn and his step brother in when the family would go out to eat or celebrate the holidays. (Vol. 22, trial, p.4064; Vol. 5, Mitigation, p.772.) Wooden saw Cheslea giving Shawn and his brother money and gifts and thought Shawn should have given him some money. (Vol. 3, Mitigation, p. 411.)

One week before the assault on Chelsea Schobert, Detective Bertina King had been called out to the Allyn Street home where Shawn lived with his mother, Tracy Wooden, Tracy's children and his uncle with Alzheimer's. (Vol. 3, Mitigation, p. 343.) Wooden attacked Shawn and the two ended up in a physical altercation for which the police were called. (Vol. 3, Mitigation, p. 390) Wooden had hit Shawn with a baseball bat and bit him causing Shawn to go to the hospital. (Vol. 4, Mitigation, p. 494.) Detective King described the deplorable conditions at the house and how she could not enter it because of the stench. (Vol. 3, Mitigation, p. 346.) Shawn moved out of the family's Allen Street house and went to stay with his friend Josh Greathouse. (Vol. 3, Mitigation, p. 390.)

On March 21, 2013, Chelsea Schobert turned eighteen (18) years old, and decided to celebrate with Shawn on Friday, March 23rd. (Vol. 22, Trial, p.4066.) On the evening of March 23, 2016, Chelsea and Shawn went to Zach Keys' house, one of Shawn's friends. (Vol. 22, Trial, p. 4066.) At some point that evening they had picked up alcohol, and were drinking heavily. (Vol. 22, Trial, p.4072.) Though Chelsea denied there was any marijuana involved, (Vol. 22, Trial, p. 4073) Zach Keyes was also there and testified that all were very drunk and high, smoking marijuana. (Vol. 21, Trial, P. 3945-3947.) In fact, Zachary Keyes, Chelsea Schobert, and Josh Greathouse all testified about the events from March 23, 2013. All three (3) provided conflicting stories as to what happened in the home the evening they were celebrating Chelsea Schobert's birthday.

Zach Keyes testified that Chelsea and Shawn went into Zach's mom's bedroom, and approximately ten (10) to fifteen (15) minutes later, Zach Keyes claims he heard a loud thud, at which time he got up to see what was happening, and saw Chelsea half off the bed with a gash in her head, and that Shawn had left only to come back with a knife. (Vol. 21, Trial, p. 3948-3950). Keyes testified that he was the one who said that Chelsea had to go to the hospital, and that he and Shawn carried Chelsea out to the car and drove her to the hospital. (Vol. 21, Trial, p. 3950-3952.) Josh Greathouse, however, claimed he stayed on the couch and

could see Chelsea on the floor next to the bed, not laying off of the bed at Keyes testified, when Shawn walked out, "disappeared for a few minutes" and went back in and hit her in the head. (Vol. 22, Trial, p.4018-4019.) Josh Greathouse claimed he stayed on the couch the entire time, never went to help, and watched Zach Keyes pull Shawn off Chelsea Schobert. (Vol. 22, Trial, p.4020.) After taking Chelsea to the hospital, Zach Keyes, Josh Greathouse and Shawn Ford all provided a report to the police that involved a drug deal gone bad in Kent, Ohio. All three (3) were shown photo arrays and picked the same individual, not Mr. Ford, as the person responsible for Chelsea Schobert's injuries. (Vol. 23, Trial, P. 4237, 4238, 4239.) Chelsea's parents had placed a GPS on her car because she had begun breaking curfew and getting in trouble. (Vol. 23, Trial, p.4247.) The GPS confirmed that Chelsea was not in Kent on the evening of March 23, 2013. (Vol. 23, Trial, p.4247.) Chelsea remained in the hospital as a result in her injuries, but because of the questionable nature and how she was injured, her parents thought it was best for her to not have any contact with anyone while she was in the hospital. (Vol. 23, Trial, p.4244.) Chelsea's parents stayed with her at the hospital, taking shifts to be with her all the time. (Vol. 22, trial, p. 4081.)

Ten (10) days later, on April 2, 3013, contractors arrived at the Schobert home in New Franklin Township at approximately 8:00 a.m. to work on

renovations on their home. (Vol. 23, Trial, p.4314.) Nick Gerring arrived at the Schobert home at approximately 1:30pm on April 2nd to check on the progress of his crew working there. (Vol. 23, Trial, p.4316.) When Gerring went upstairs to use the bathroom, he noticed something odd in the Schobert's bedroom, and walked in to find Mr. and Mrs. Schobert dead. (Vol. 23, Trial, p.4319.) According to the Coroner's testimony, both Mr. and Mrs. Schobert had died of blunt force trauma, having been struck multiple times with a sledge hammer that was left in the bedroom. (Vol. 23, Trial, P. 4657.) Mr. Schobert had also sustained several stab wounds. (Vol. 23, Trial, P. 4657.)

Detective Hitchings with the New Franklin Township Police Department, responded to the Schobert's home at approximately 2:30 p.m. on April 2, 2013. (Vol. 26, Trial, p.4956.) Because the New Franklin Police Department was a relatively small police department, Ohio BCI was called in to assist with the crime scene analysis. (Vol. 26, Trial, p.4951.) Jeffrey Schobert's vehicle and some of Margaret Schobert's jewelry had been taken, but it was apparent many items of value were left and robbery was not the motive. (Vol. 26, Trial, p.4969, 4970.) Mr. Schobert's vehicle was ultimately found on Stover Drive in Akron, Ohio. (Vol. 26, Trial, p.4975.) Gloves, a knife and a hat believed to be used or worn on the evening of the homicide were found in a sewer in front of 869 Fried Street in

the City of Akron. (Vol. 26, Trial, p.4976-4978.) When officers went to 869 Fried Street, they spoke with Maurice Phillips' mother, and found Jamall Vaughn[1] and his girlfriend at 869 Fried Street. (Vol. 26, Trial, p.4985, 4987.) Inside the Phillip's home they located Jeffrey Schobert's watch in a bedroom where Jamall Vaughn stayed. (Vol. 26, Trial, p.4987.)

On April 2, 2013 Ford was arrested and charged with falsification as a result of reporting Chelsea had been assaulted in Kent, Ohio. (Suppression hearing, 9-15-14, p. 31.) That same day, Ford was interviewed and his clothes and shoes were taken by the police. (Vol. 26, Trial, p.4959, 4963-4965.) Ford was transported to Portage County and held in their County jail. (Suppression hearing, 9-15-14, p. 12.)

On April 3, 2013 Lt. Johnson with the Portage County Sheriff's Department brought George Beech from the jail to his office. (Suppression hearing, 9-15-14, p. 142.) Beech who was in the jail on burglary charges and housed with Ford in the jail, claimed Ford made statements to him about the murders. (Id.) Lt. Johnson had known Beech for 2 years, and Beech requested Johnson let the Judge on his case know he had helped them, (Suppression, 9-15-15, p. 144.)

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[1] Jamall Vaughn was the juvenile co-defendant charged in the case.

On April 3, 2014 Lt. Johnson contacted Detective Hitchings and informed him that Beech had information about the Schobert homicide. (Suppression hearing, 9-15-14, p. 47.) After interviewing Beech, Detective Hitchings then interviewed Ford. (Id. p. 51.) Ford was told this was a death penalty case that would be presented to the grand jury soon and that his cooperation would make the difference between aggravated murder and the death penalty. (Id, State Ex. D.) Ford was questioned for over an hour and he ultimately admitting Jamall Vaughn had stabbed Jeffrey Schobert, and that he had used the sledge hammer. (Vol. 27, Trial, p.5010.)

Mr. Ford was then transported from Portage County jail to the Akron jail where he was charged with murder. (Vol. 27, Trial, p.5014.) Once at the Akron City jail, Ford was again questioned for over an hour and asked if Zach Keyes was present, at which time he said it was him and Jamall that were involved in the homicide. (Vol. 27, Trial, p.5015.) Each time Ford was questioned he was read his Miranda rights, but never asked if he wanted to waive his rights because the Detective said he "was not required to." (Suppression hearing, 9-15-14, p. 106.)

After Ford was arrested and charged with murder, Akron police then executed a search warrant at 393 South Street in the City of Akron, Josh Greathouse's residence. (Vol. 27, Trial, p.5018.) At the Greathouse residence police found a

pair of jeans in the basement that had been partially burned. (Vol. 27, Trial, p.5019.) Heather Greathouse was present when the warrant was executed, and admitted that she had discarded a ring, owned by Margaret Schobert, which she had thrown in the dumpster at a local Family Dollar Store and had told her brother to burn the pants which had blood on them. (Vol. 27, Trial, p.5023, 5024.) Although Jeffrey Schobert's car was found a half a block from where Jamall Vaughn was found, at 938 Stover Avenue, and the Schobert's jewelry and burned pants were found where Jamall Vaughn was staying, and Ford initially told officers that Zach Keyes was involved, when Zach Keyes said he was out-of-town, officers did nothing to verify his alibi. (Vol. 27, Trial, p.5036, 5037, 5038, 5045.)

Officers believed Ford and Jamall Vaughn walked from Akron, approximately nine (9) miles away, to the Schobert's New Franklin Township home and broke into the house through a window. (Vol. 27, Trial, p.5048.) Neighbors, however, had reported seeing an SUV with flashing lights in the neighborhood the night the Schobert's were killed. (Vol. 27, Trial, p.5050.) No efforts were made to obtain video footage from the numerous businesses along the walk from Akron to New Franklin. (Vol. 27, Trial, p. 5048.)

B. Procedural History:

On April 19, 2013, the Summit County Grand Jury indicted Ford, via direct presentment, in an eleven (11) count indictment as follows:

Count	Charge	Date of Offense	Victim
Count 1	aggravated murder- prior calculation and design	4/2/13	Jeffrey Schobert
Specification 1 2929.04(A)(5)	course of conduct involving the purposeful killing, or attempt to kill two or more people		Jeffrey Schobert
Specification 2 2929.04(A)(7)	aggravated murder while committing aggravated robbery and Appellant was the principal offender		Jeffrey Schobert
Specification 2 2929.04(A)(7)	aggravated murder while committing aggravated robbery and aggravated murder committed prior calculation and design		Jeffrey Schobert
Specification 3 2929.04(A)(7)	aggravated murder while committing aggravated burglary and Appellant was the principal offender		Jeffrey Schobert
Specification 3 2929.04(A)(7)	aggravated murder while committing aggravated burglary and aggravated murder committed prior calculation and design		Jeffrey Schobert
Count 2	Aggravated murder while committing aggravated robbery	4/2/13	Jeffrey Schobert
Specification 1 2929.04(A)(5)	course of conduct involving the purposeful killing, or attempt to kill two or more people		Jeffrey Schobert
Specification 2 2929.04(A)(7)	aggravated murder while committing aggravated robbery and Appellant was the principal offender		Jeffrey Schobert
Specification 2 2929.04(A)(7)	aggravated murder while committing aggravated robbery and aggravated murder committed prior calculation and design		Jeffrey Schobert
Specification 3 2929.04(A)(7)	aggravated murder while committing aggravated burglary and Appellant was the principal offender		Jeffrey Schobert
Specification 3 2929.04(A)(7)	aggravated murder while committing aggravated burglary and aggravated murder committed prior calculation and design		Jeffrey Schobert
Count 3	Aggravated Murder aggravated murder while committing aggravated burglary	4/2/13	Jeffrey Schobert and/or Margaret Schobert

Specification 1 2929.04(A)(5)	course of conduct involving the purposeful killing, or attempt to kill two or more people		Jeffrey Schobert and/or Margaret Schobert
Specification 2 2929.04(A)(7)	aggravated murder while committing aggravated robbery and Appellant was the principal offender		Jeffrey Schobert and/or Margaret Schobert
Specification 2 2929.04(A)(7)	aggravated murder while committing aggravated robbery and aggravated murder committed prior calculation and design		Jeffrey Schobert and/or Margaret Schobert
Specification 3 2929.04(A)(7)	aggravated murder while committing aggravated burglary and Appellant was the principal offender		Jeffrey Schobert and/or Margaret Schobert
Specification 3 2929.04(A)(7)	aggravated murder while committing aggravated burglary and aggravated murder committed prior calculation and design		Jeffrey Schobert and/or Margaret Schobert
Count 4	aggravated murder with prior calculation and design	4/2/13	Margaret Schobert
Specification 1 2929.04(A)(5)	course of conduct involving the purposeful killing, or attempt to kill two or more people		Margaret Schobert
Specification 2 2929.04(A)(7)	aggravated murder while committing aggravated robbery and Appellant was the principal offender		Margaret Schobert
Specification 2 2929.04(A)(7)	aggravated murder while committing aggravated robbery and aggravated murder committed prior calculation and design		Margaret Schobert
Specification 3 2929.04(A)(7)	aggravated murder while committing aggravated burglary and Appellant was the principal offender		Margaret Schobert
Specification 3 2929.04(A)(7)	aggravated murder while committing aggravated burglary and aggravated murder committed prior calculation and design		Margaret Schobert
Count 5	aggravated murder while committing aggravated robbery	4/2/13	Margaret Schobert
Specification 1 2929.04(A)(5)	course of conduct involving the purposeful killing, or attempt to kill two or more people		Margaret Schobert

Specification 2 2929.04(A)(7)	aggravated murder while committing aggravated robbery and Appellant was the principal offender		Margaret Schobert
Specification 2 2929.04(A)(7)	aggravated murder while committing aggravated robbery and aggravated murder committed prior calculation and design		Margaret Schobert
Specification 3 2929.04(A)(7)	aggravated murder while committing aggravated burglary and Appellant was the principal offender		Margaret Schobert
Specification 3 2929.04(A)(7)	aggravated murder while committing aggravated burglary and aggravated murder committed prior calculation and design		Margaret Schobert
Count 6 R.C. 2911.01(A)(1)	Aggravated Robbery	4/2/13	Jeffrey Schobert
Count 7 R.C. 2911.01(A)(1)	Aggravated Robbery	4/2/13	Margaret Schobert
Count 8 R.C. 2911.11(A)(1)	Aggravated Burglary	4/2/13	Jeffrey Schobert and/or Margaret Schobert
Count 9 R.C. 2913.02(A)(1)	Grand theft	4/2/13	
Count 10 R.C. 2913.02(A)(1)	petty theft	4/2/13	
Count 11 R.C. 2903.11(A)(1)	Felonious Assault	3/23/13	Chelsea Schobert

(Indictment, Doc.# 3) As to the second and third specifications in each of the first five counts the State alleged, pursuant to R.C. §2929.04(A)(7), that Mr. Ford was both the principal offender and the murder was committed with prior calculation and design.

Ford was arraigned on these charges on April 24, 2013. At the arraignment the Ford acknowledged receiving a copy of the indictment but declined to enter a plea with defense counsel reserving the right to challenge the charges and

potentially enter a plea of not-guilty by reason of insanity. (Journal Entry, Doc. #17; Arraignment, 4-21-13, p.21.) Accordingly, the trial court entered a not-guilty plea on behalf of Ford and a pre-trial was set for April 30, 2013. (Journal Entry, Doc. #17; Arraignment, 4-21-13, p.22.) As required by Ohio law, the Court appointed two (2) attorneys to represent Ford as the Indictment contained capital specifications. (Orders, Doc. #15, 21.) At the initial pre-trial on May 7, 2013, the State's discovery obligations were extensively discussed. Because the defense had yet to receive any discovery, Ford did not waive speedy trial and defense counsel indicated that until discovery had been reviewed, issues regarding the trial and speedy trial waivers could not be addressed. (Pretrial, 5-7-13, p.10).

Jeffrey Schobert an Akron attorney, and his wife Margaret spent considerable time volunteering in the community and were well known and respected in Summit County. Recognizing that their murders caused a great deal of media coverage in Summit County, at the initial pre-trial the Court entered an Order addressing pre-trial publicity and decorum. (Pretrial. 5-17-13, p.18.) The Order restricted public comment about the case by the lawyers and court staff, citing concern over pretrial publicity potentially tainting the jury pool. (Order, Doc. # 9.) Though the defense filed a motion to permit individual voir dire on pretrial publicity, (Defense Motion 19, 22, Doc.#61) and a Motion requesting

special procedures to insulate the venire from prejudice once jurors arrived at the court. (Defense Motion 18, Doc. #51), no motion requesting a change of venue was filed. Four of the jurors who sat on the panel that decided Ford's fate had been exposed to pretrial publicity and knew details of the incident.

Throughout the initial pre-trials, Ford's competence and potential not guilty by insanity defense were discussed several times. Ultimately the defense filed a request for a competency and sanity evaluations (Defense Motion 5, Doc. #37) as well as a not guilty by reason of insanity plea. (Defense Motion 7; Doc. #38.) The Court ordered evaluations to be conducted by Dr. Woods with the psycho-diagnostic center and permitted the defense to conduct an independent examination utilizing Dr. Robert Byrnes. (Orders, Doc. #42, 47; Pretrial, 6-4-13, p.9.)

As discovery was produced in installments, Ford's counsel proceeded with filing routine pre-trial and death penalty pre-trial motions to include a request for individual sequestered voir dire (Defense Motion 22, Doc. #61), a motion to exclude venire persons who can not fairly consider mitigating evidence (Defense Motion 23, Doc. #63), and, a motion to permit Ford to appear at all proceedings without restraints (Defense Motion 38, Doc. #77). The motion was heard at a pretrial hearing where the Court overruled the motion stating:

> The Court obviously will take steps to ensure that Mr. Ford's rights are protected at all times. And there is

> nothing in the case law that I am aware of that would suggest that he has a statutory or constitutional right to appear without restraints when the trier of fact is not present.

(Pretrial, 7-23-13, p. 13). (Id.) The court put on a journal entry to that effect on July 26, 2013. (Doc. # 107) Ford appeared during the trial phase in civilian clothing but with restraints, including during voir dire, when counsel the court and the prospective juror were all sitting around a table.

The defense also filed various motions regarding the admissibility of evidence at trial to include a motion *in limine* to exclude prejudicial photographs (Defense Motion 42, Doc. # 81), a motion to suppress statements given by Ford in response to questioning from various law enforcement agencies. (Doc. # 201, 203) and motions requesting disclosure of grand jury witness names and transcripts of grand jury testimony (Defense Motions 31, 32, 33, Doc.# 70, 71, 72.) The trial court held ruling on the Motions addressing grand jury testimony in abeyance (Order, Doc. #140.) The State was ordered to produce to the defense, photographs intended to be used at trial, before trial commenced. (Pretrial, 2-4-14, p.34.)

On September 15, 2014 a hearing was held on the Motion to Suppress Ford's statements. Testimony revealed Ford had been questioned by Detective Bertina King on April 1, 2013, the day the Schobert's were killed. (Suppression hearing, 9-15-13, p.114.) On April 2, 2013 Ford was questioned again at the Akron

Police department. (Suppression hearing, 9-15-13, p. 56.) The same day Ford was arrested by Kent police for filing a false police report regarding the March 23, 2013 incident with Chelsea Schobert. (Suppression hearing, 9-15-13, p.30-31.) After a jail house snitch who had a long standing relationship with local law enforcement told the Portage County Sheriff's Department that Ford had made admissions to him while they were housed together in the jail, Ford was questioned a third time while he remained in the Portage County jail. (Suppression hearing, 9-15-13, p. 47, 49.) Ford was questioned a final time at the Akron Police Department after he was arrested for the murder of Jeffrey and Margaret Schobert. (Suppression hearing, 9-15-13, p. 57.) Though Ford was read his *Miranda* rights, there was no evidence that Ford was ever asked if he wanted to give up his rights. At the conclusion of the hearing, the trial court denied the motion to suppress. (Order, Doc. #210.)

Contained within the defense pre-trial motions was a motion to dismiss the death penalty asserting several arguments as to why the death penalty in Ohio is unconstitutional. (Defense Motions 47, 66, Doc.# 86, 101) These challenges to Ohio's death penalty were overruled by the Court. (Order, Doc. #183.)

On October 28, 2013, a competence hearing was held at the conclusion of which, the Court found Appellant competent to stand trial. (Doc. #126.)

Ford also filed several pretrial motions to address the scope of permissible evidence at the mitigation hearing, if one ultimately was to be held. Ford requested an order permitting the defense to include residual doubt about guilt as a mitigating factor (Defense Motion 52, Doc. #91), a request to order the State not use coercive practices during the mitigation phase (Defense Motion 55, Doc. #94), a motion *in limine* to limit the state's mitigation evidence to the aggravating circumstances proven during the culpability phase (Defense Motion 56, Doc. #95), a motion *in limine* to prohibit reference to the nature and circumstances of the offense as aggravating circumstances (Defense Motion 61, Doc. #99), and a motion for a mercy instruction in the mitigation phase. (Defense Motion 63, Doc. #100.) The trial court appears not to have entered orders addressing these mitigation phase issues.

Because the indictment contained allegations involving an incident on March 23, 2013, involving a felonious assault of Chelsea Schobert, and the aggravated murder of Jeffrey and Margaret Schobert which occurred ten (10) days later on April 2, 2013, the defense filed a motion to sever the felonious assault count from the remaining counts within the indictment. (Defense Motion 81, Doc. #219.) The Court denied the motion to sever. (Order, Doc. #234.)

Jury orientation began on September 24, 2014, and individual voir dire on pretrial publicity and the death penalty began on September 25, 2014. That there was extensive pretrial publicity regarding the case was evidence from the juror questionnaires (Doc. #724) and from juror responses to questions regarding pretrial publicity. Of the twelve jurors selected to decide Ford's fate, four had been exposed to media reports with details of the offenses. In his jury questionnaire, Juror number 72 said the names sounded familiar but he did not know specifics. (Doc.# 724.) In voir dire it was revealed Juror number 72 knew the murder centered around the couple's daughter, that two guys were involved in the homicide, an older one and younger one and the older one "coerced" the younger one to participate in the murders. (Vol. 10, Voir Dire, p. 1917-1919.) Juror 72 sat on the jury that recommended death.

Juror number 39 knew the case involved two people being beat to death in their home with a sledgehammer. After assuring the trial court that she had not formed any opinions and could decide the case based upon the evidence in the courtroom, defense counsel made no inquiry of Juror number 39. (Vol. 6, Voir Dire, p.1145.) When subsequently asked by the State if she had formed any opinions about the crime after reading the paper, Juror 39 stated she thought it was

"kind of harsh." (Vol. 6, Voire Dire, p. 1146.) Defense counsel again made no inquiry. Juror 39 sat on the jury recommended death.

Juror 48 also saw news reports. After receiving the summons for jury duty and appearing for orientation, Juror 48 received a text from a co-worker with a link to a newspaper article and saw an article in the break room at work. (Vol. 9, Voir Dire, p. 1779.) She testified she had not read the article. No one asked her what the text message said and when asked if she remembered details from what she had seen her response was "not from the newspaper." (Vol. 9, Voir Dire, p. 1782.) The defense asked no questions on pretrial publicity. (Volume 9, Voir Dire, p.1783) Juror 48 sat on the jury that recommended death.

Juror 78 was from New Franklin Township. (Vol. 12, Voir Dire, p.2299.) Juror number 78 did not know the Schobert's but he did know the case involved a "prominent couple" from New Franklin, that they had an adopted daughter. (Vol. 12, Voir Dire, p. 2300-2301.) Juror number 78 also knew they were killed in their bedroom, there was a bludgeoning involved and Ford was "accused. Someone believes he did it." (Vol. 12, Voir Dire, p. 2301.) Again, the defense made no inquiry regarding pretrial publicity. (Vol. 12, Voir Dire, p. 2302.) Juror 48 sat on the jury that recommended death.

While counsel failed to conduct the probing inquiry necessary to ferret out opinions or bias based upon the pretrial publicity, the trial court did not permit defense counsel to inquire on critical issues regarding the death penalty. Prior to the start of voir dire, defense counsel filed a motion to exclude persons who could not fairly consider mitigation, (Motion No. 24, Doc.# 63) and to allow defense counsel to thoroughly examine venire persons. (Motion No. 20, Doc. #49) The trial court denied Motion #24, "as it is phrased" and "will conduct voir dire in accordance with the Criminal Rules and applicable law." (Journal Entry, Doc. #177) The trial court granted Motion #20, with the caveat that the state's attorneys will not be precluded from raising objections to specific questions. (Journal Entry, Doc. # 180). While the State was permitted to make inquiry into specific aggravating circumstances, the trial Court did not permit Ford's counsel to inquire into specific areas of mitigation which were expected to be relevant in the case. (Vol. 4, Voir Dire, p.711, 721-724; Vol. 5, Voir Dire, p. 994; Vol. 5, Voir Dire, pp. 1043; Vol. 7, Voir Dire, pp. 1544; Vol. 10, Voir Dire, pp. 2002-2003, 2007-2008; p. 2046; Vol. 12, Voir Dire, pp. 2323-2324; 2533; Vol. 13, Voir Dire, pp2566-2567, 2569-2570, 2603; Vol. 14, Voir Dire, pp. 2757, 2786, 2788, 2822, 2830, 2832, Vol. 15, Voir Dire, pp. 3051, 3060.) The trial court consistently prevented

defense counsel from determining whether or not jurors would meaningfully consider specific areas of mitigation.

In addition, during voir dire the trial court did not permit Ford's counsel to ensure jurors understood and could accept that decision on whether the aggravating circumstances outweighed the mitigating factors was an individual decision such that if any one juror did not find the aggravating circumstances outweighed the mitigating factors, the jury must consider the other sentences. (Vol. 3, Voir Dire, p. 602.)

On October 9, 2014, opening statements were given. At that time, the defense renewed their motion to sever the felonious assault charges from March 23, 2013, involving Chelsea Schobert from ten (10) other counts involving the April 2, 2013 aggravated murders of Jeffrey and Margaret Schobert. (Vol. 21, Trial, p.3873.) Prior to opening statements Ford objected to the State's use of photographs during the opening, contending the photographs were more prejudicial than probative, which the Court overruled. (Vol. 21, Trial, p. 3843, 3844.)

During the State's opening, a member of the media pool became ill during the State's presentation of the photographs. (Vol. 21, Trial, p.3922.) The State did not mark the photographs as exhibits and, despite representing to the Court that State would submit a written copy of the opening statements with the photographs,

(Vol. 21, Trial, p. 3845), this was not done. As a result, there is no way to ascertain which photographs were actually used during the opening statement and whether the photographs were in fact more prejudicial than probative.

The State presented testimony from sixteen (16) witnesses. In addition to the coroner's testimony and crime laboratory technicians from Ohio BCI, the State offered testimony from Chelsea Schobert, New Franklin Township police officers and Akron Police. Other than Chelsea Schobert, these witnesses offered testimony regarding the murders of Jeffrey Schobert and Margaret Schobert. Four witness called to testify only presented testimony which only applied to the felonious assault count; Chelsea Schobert, Zachary Keys and Joshua Greathouse and Detective Bertina King. The lead Akron Police Department detective on the felonious assault case, Morrison, was not called to testify. Zachary Keys offered testimony regarding the felonious assault of Chelsea Schobert, but offered no substantive testimony regarding the aggravated murder, aggravated robbery, aggravated burglary or theft counts. (Vol. 21, Trial, pp. 3928-4002.) Likewise, Josh Greathouse presented testimony regarding the felonious assault charges involving Chelsea Schobert, but offered no substantive testimony regarding the aggravated murder, aggravated robbery, aggravated burglary or theft counts. (Vol.

22, Trial, pp. 4010-4051.) During trial, Ford renewed his motion to sever the charges. (Vol. 23, Trial, p. 4225.)

Throughout the trial, Ford objected to the introduction of numerous State's exhibits which were cumulative or because of their gruesome nature, were more prejudicial than probative. (Vol. 22, Trial, p. 4048; Vol. 23, Trial, p. 4303)

Closing arguments were given October 20, 2013. (Vol. 28, Trial, p. 5224.) During rebuttal arguments the prosecutor improperly and repeatedly impugned and denigrated defense counsel. (Vol. 28, trial, p. 5280-5298.) The rebuttal argument was designed to attack counsel and not the arguments counsel had made.

The jury began deliberation on October 20, 2014. During deliberations, Juror number 28 was excused as a result of illness in her family. (Vol. 28, Trial, p.7.) Alternate number 1, juror 78 was seated and the Court instructed the jury to begin their deliberations over from the beginning. (Vol. 28, Trial, p.5336-5337.) However, the jury was sent to lunch first, while the court addressed an issue with Juror 19. (Vol. 28, Trial, P. 5342)

The bailiff then disclosed to the prosecutor that there was "an issue with a juror." (Vol. 28, Trial p.5363.) As a result, the State conducted further inquiry at the prosecutor's office and determined that Juror number 19, a paralegal, was Facebook friends with several prosecutors. (Vol. 28, Trial, p. 5339.) Juror number

19 was excused and Ford moved for a mistrial raising three concerns: 1) deliberation had been occurring for over a day and Juror 19 tainted the entire jury pool; 2) the issues surrounding how the prosecutor obtain the additional information regarding Juror 19; and, 3) the defense was concerned about what message the removal of the juror was sending the remaining jurors, a message that told the jurors if they hold out they will be removed from jury service so they better go along. (Vol. 28, Trial, p. 5360-5365, 5375-5376.) The trial court denied the motion for mistrial without conducting the necessary investigation of the above issues. (Vol. 28, Trial, p.5377.)

The trial court excused Juror 19 and Juror No. 83 was moved into the jury box. (Vol. 28, Trial, p. 5377) The court told the jurors to put any previously signed verdicts into a sealed envelope and to begin their deliberations "from the beginning." (Vol. 28, Trial, p. 5377-5378)

Later that day the jury returned a verdict, finding Ford guilty of all counts contained within the indictment. However, Ford was not found guilty of all the capital specifications.

Count	Charge	Victim	Verdict
1	aggravated murder- prior calculation and design	Jeffrey Schobert	Guilty
Specification 1 2929.04(A)(5)	course of conduct involving the purposeful killing, or attempt to kill two or more people	Jeffrey Schobert	Guilty

Specification 2 2929.04(A)(7)	aggravated murder while committing aggravated robbery and Appellant was the principal offender	Jeffrey Schobert	Guilty
Specification 2 2929.04(A)(7)	aggravated murder while committing aggravated robbery and aggravated murder committed prior calculation and design	Jeffrey Schobert	blank
Specification 3 2929.04(A)(7)	aggravated murder while committing aggravated burglary and Appellant was the principal offender	Jeffrey Schobert	Guilty
Specification 3 2929.04(A)(7)	aggravated murder while committing aggravated burglary and aggravated murder committed prior calculation and design	Jeffrey Schobert	blank
Count 2	Aggravated murder while committing aggravated robbery	Jeffrey Schobert	Guilty
Specification 1 2929.04(A)(5)	course of conduct involving the purposeful killing, or attempt to kill two or more people	Jeffrey Schobert	Guilty
Specification 2 2929.04(A)(7)	aggravated murder while committing aggravated robbery and Appellant was the principal offender	Jeffrey Schobert	Guilty
Specification 2 2929.04(A)(7)	aggravated murder while committing aggravated robbery and aggravated murder committed prior calculation and design	Jeffrey Schobert	Blank
Specification 3 2929.04(A)(7)	aggravated murder while committing aggravated burglary and Appellant was the principal offender	Jeffrey Schobert	Guilty
Specification 3 2929.04(A)(7)	aggravated murder while committing aggravated burglary and aggravated murder committed prior calculation and design	Jeffrey Schobert	Blank
Count 3	Aggravated Murder aggravated murder while committing aggravated burglary	Jeffrey Schobert and/or Margaret Schobert	Guilty
Specification 1 2929.04(A)(5)	course of conduct involving the purposeful killing, or attempt to kill two or more people	Jeffrey Schobert and/or Margaret Schobert	Guilty
Specification 2 2929.04(A)(7)	aggravated murder while committing aggravated robbery and Appellant was the principal offender	Jeffrey Schobert and/or Margaret Schobert	Guilty

Specification 2 2929.04(A)(7)	aggravated murder while committing aggravated robbery and aggravated murder committed prior calculation and design	Jeffrey Schobert and/or Margaret Schobert	Blank
Specification 3 2929.04(A)(7)	aggravated murder while committing aggravated burglary and Appellant was the principal offender	Jeffrey Schobert and/or Margaret Schobert	Guilty
Specification 3 2929.04(A)(7)	aggravated murder while committing aggravated burglary and aggravated murder committed prior calculation and design	Jeffrey Schobert and/or Margaret Schobert	Blank
Count 4	aggravated murder with prior calculation and design	Margaret Schobert	Guilty
Specification 1 2929.04(A)(5)	course of conduct involving the purposeful killing, or attempt to kill two or more people	Margaret Schobert	Guilty
Specification 2 2929.04(A)(7)	aggravated murder while committing aggravated robbery and Appellant was the principal offender	Margaret Schobert	Not Guilty
Specification 2 2929.04(A)(7)	aggravated murder while committing aggravated robbery and aggravated murder committed prior calculation and design	Margaret Schobert	Guilty
Specification 3 2929.04(A)(7)	aggravated murder while committing aggravated burglary and Appellant was the principal offender	Margaret Schobert	Not Guilty
Specification 3 2929.04(A)(7)	aggravated murder while committing aggravated burglary and aggravated murder committed prior calculation and design	Margaret Schobert	Guilty
Count 5	aggravated murder while committing aggravated robbery	Margaret Schobert	Guilty
Specification 1 2929.04(A)(5)	course of conduct involving the purposeful killing, or attempt to kill two or more people	Margaret Schobert	Guilty
Specification 2 2929.04(A)(7)	aggravated murder while committing aggravated robbery and Appellant was the principal offender	Margaret Schobert	Guilty
Specification 2 2929.04(A)(7)	aggravated murder while committing aggravated robbery and aggravated murder committed prior calculation and design	Margaret Schobert	Blank

Specification 3 2929.04(A)(7)	aggravated murder while committing aggravated burglary and Appellant was the principal offender	Margaret Schobert	Guilty
Specification 3 2929.04(A)(7)	aggravated murder while committing aggravated burglary and aggravated murder committed prior calculation and design	Margaret Schobert	blank
Count 6	Aggravated Robbery	Jeffrey Schobert	Guilty
Count 7	Aggravated Robbery	Margaret Schobert	Guilty
Count 8	Aggravated Burglary	Jeffrey Schobert and/or Margaret Schobert	Guilty
Count 9	Grand theft		Guilty
Count 10	petty theft		Guilty
Count 11	Felonious Assault	Chelsea Schobert	Guilty

While the jury found Ford guilty of aggravated murder of Margaret Schobert, with prior calculation and design in Count 4, the jury found Ford not guilty of the prior calculation and design of the death of Margaret Schobert in Count five (5.)

Prior to the mitigation hearing, the Ford requested a merger of counts in the indictment. (Defense Motion, Doc.#268.) The trial court ruled that sentencing would proceed on Counts two (2), four (4) and eleven (11) and all other counts would merge. (Doc.# 367.) Ford requested merger of the specifications, which the court denied. (Vol 1, Mitigation, p. 47.)

The mitigation phase proceeded on October 27, 2014. The State did not call any witnesses to testify and asked the court:

> to incorporate the evidence from the first phase of the trial and ask that the jury be allowed to consider those- - all evidence in that portion of the trial for

> purposes of deliberating on the relevant portions of that case in regard to making their decision regarding the aggravated circumstances in the mitigation phase."

(Vol. 1, Mitigation, p. 81.) The State did offer specific exhibits into evidence for the mitigation hearing. (Vol. 1 Mitigation, p. 78-80.) Many of the exhibits were accepted into evidence over defense objection. (Vol. 1, Mitigation, p. 6-53.) The trial court then instructed the jury that: "you will be permitted at this stage of the trial to consider testimony given in the earlier phase of the trial, and you will be permitted to consider the specific exhibits that I have just listed for you." (Vol. 1, Mitigation, p. 81-82.) Whatever it was that the State was asking be submitted as testimonial evidence, it was not offering any guidance to the jury as to what evidence from the trial phase was relevant for the mitigation phase, nor what evidence from the trial phase was being submitted in support of the aggravating circumstances. The trial court's instruction was equally nebulous.

Ford offered the testimony of eleven (11) witnesses in mitigation. Kathleen Kovach, a member of the Parole Board, testified regarding sentenced in Ohio and parole eligibility for a sentence of 20 years to life, 25 years to life, 30 years to life and life without the eligibility of parole. (Vol. 1, Mitigation, p. 101.) Kovach testified to mental health programs available in prison (Vol. 1, Mitigation, p. 98), general conditions of life and death in prison. (Vol. 1, Mitigation, p.115-118.) Kevin Floyd, a employee of Summit County's Juvenile Court testified about Ford's interactions with the juvenile court and programs which were offered to

Ford. Floyd confirmed that Ford had become involved in the juvenile court system because of criminal conduct. As a juvenile, Ford had little family support with the counseling or other programs offered by the juvenile court. (Vol. 1, Mitigation, p. 143.) Ford's family was homeless and without a car. (Vol. 1, Mitigation, p. 143.) While Ford's mom was cooperative and seemed concerned, she had trouble following through with programs and support. (Vol.1, Mitigation, p. 150, 172.)

William Parker also testified. He was employed with the Phoenix School for Juveniles. (Vol. 1, Mitigation, p. 181.) Parker testified about Ford's involvement in the Joy Park Recreation center and Ford's love of basketball. (Vol. 1, Mitigation, p. 181, 187.) Parker also testified about the lack of money and support from Shawn's family that made it impossible for Shawn to fully participate in the programs available. (Vol. 1, Mitigation, p. 190.) He described Shawn as "a good kid" with whom he had no trouble. He believed Shawn could have been different if there were more resources available for mentoring and help. (Vol. 1, Mitigation, p.187, 190.)

Detective Bertina King was called to testify at the mitigation hearing. One week before the assault on Chelsea Schobert, Detective Berta King had been called out to the Allyn Street home where Shawn lived with his mother, Tracy Wooden and Tracy's children and Wooden's uncle with Alzheimer's. (Vol. 3, Mitigation, p. 343.) King described the deplorable conditions at the house and how she could not enter it because of the stench. (Vol. 3, Mitigation, p. 346.)

Several of Shawn's family members testified at the mitigation hearing to include Shawn's mom, Kelly Ford, and sister, Patricia Ford, father Shawn Ford, Sr, and his grandparents, Eddie and Janice Ford testified and asked that Shawn's life be spared. Kelly Ford's boyfriend, Tracy Wooden also testified at the mitigation hearing.

Dr. Stankowski, a physician at Northcoast Behavioral Healthcare conducted a mitigation evaluation of Shawn. (Vol. 3, Mitigation, p.346.) Stankowski testified that she reviewed numerous records pertaining to Shawn and had interviewed him 4 times. (Vol. 4, Mitigation, p. 346.) Dr. Stankowski explained that "development hinges on two big things: What people are born with, their brains and their genes; and then how the environment shapes that over the years." (Vol. 4, Mitigation, p.489.) Stankowski found both to be at issue with Shawn. "There were some indications in Shawn's early years that he went through some things that increased his risk of having later problems: Specifically, some neglect, some separation from his mom and people who were caring for him, and he went through some abuse." (Vol. 4, Mitigation, p.490.) Stankowski also found what Shawn was "born with" to be significant:

> Well, I saw that Shawn had been diagnosed with learning disabilities at a young age, and then I saw that that had been backed up by some IQ testing over the years that showed that he consistently is below average. So what this means to me is that Shawn was born with, right out of the gate, fewer skills and resources than the

> average person. So an average IQ is 100. Shawn's IQ over the years tested to be anywhere between 62 and 80.

(Vol. 4, Mitigation, p.496.) Dr. Stankowski found the following mitigating factors were present; 1) Antisocial personality disorder resulting in impulsivity; 2) Low IQ which impacted Shawn's ability to reason and make decision; 3) abuse of alcohol and pill which impacted relationships and actions and enhanced reckless behavior, 4) Shawn's background and family circumstances to physical abuse, witnesses abusive relationships with his mom, bullying when young as a result of his speech, repeated separations at a young age including the death of his sister, separation from his mom and separation from his grandparents; and, 5) Shawn's young age. (Vol.4, Mitigation, p.493-505, 517-520.)

At the conclusion of Dr. Stankowski's testimony, the defense moved for dismissal of the death specifications because Shawn's IQ "falls outside the range of IQ as established by -- a minimum IQ by the Supreme Court. Specifically, his IQ has been quoted as being 62; it has a range between 62 and 80. It is our belief and our position that the death specifications should be dismissed by this Court at this time." (Vol.4, Mitigation, p. 629.) the trial court denied the motion. (Vol.4, Mitigation, p.625.)

Over the defense objection, the State offered rebuttal testimony from Dr. Wood with the Psycho-Diagnostic Clinic. (Vol. 6, Mitigation, p.817.) Dr. Wood had conducted the competency and sanity evaluations of Shawn. (Vol. 6, Mitigation, p.819.) Wood testified that she had conducted an IQ assessment of

Shawn and determined his full scale IQ score was 80 which would be low average intelligence. (Vol. 6, Mitigation, p.844.) On cross examination, Wood conceded there was a margin of error of 5 points and under the Wechsler test an IQ score of 60-70 was extremely low, 70-80 was borderline and 80-90 was low average. (Vol. 6, Mitigation, p.874, 876.)

On October 27, 2013, while the mitigation phase of the trial was being conducted, and before the jury was sequestered, the front page of the Akron Beacon Journal had an article with an interview from one of the jurors that had been excuse, Juror 19. (Vol. 3, Mitigation, p. 331; Doc. #669.) The article contained a detailed account of Juror 19's experience during deliberations in the trial phase before she was excused. The trial court assembled the jury in the courtroom and asked the juror if they had followed the trial court's admonitions to avoid all media and each juror said they had and the mitigation hearing continued. (Vol. 3, Mitigation, p.337.)

Closing arguments were given on October 30, 2013. The State, as it had in the trial phase, utilized its rebuttal to mock and denigrate defense counsel.

> Ladies and gentlemen, what you just heard was not about the law, it wasn't about the facts, it wasn't about mitigation, it wasn't about aggravating circumstances. What you just heard is a plea.
>
> See, when you don't have the facts on your side you pound the law. When you don't have the law on your side you pound the facts. And when you got neither

> on your side, you beg and interject race. That's what you just heard.

(Vol. 6, Mitigation, p. 931). The State's arguments continued:

> It always makes me laugh, because when defense gets up and they talk with great emotion and softly, emotionally, trying to appeal to your purant interest, to your sympathies. I understand that. I get that.
>
> And then: these two are us. You know, they always call us "the government" and I always go home and tell my wife, "hey, guess who you're sleeping with tonight, the government."
>
> I am human. Do you think I don't feel bad when Mrs. Ford gets up there and asks you to save her son's life? Are you kidding me? There wasn't a dry eye in here.

(Vol. 6, Mitigation, p.932-933). The prosecutor told the jury to "*Please do not fall for that one.*" (Vol. 6, Mitigation, p.940) suggesting the defense was trying to make the jury feel like bad people if they followed the law.

The trial court instructed the jury that, though closing arguments were not evidence, the jury was permitted final arguments of counsel when deliberating. (Vol. 6, Mitigation, p. 958.) The following day the jury returned a verdict recommending life in prison without the possibility of parole for the aggravated murder of Jeffrey Schobert and a verdict recommending the death penalty for the aggravated murder of Margaret Schobert. (Vol. 6, Mitigation, p. 1004.) The jury was polled and all claimed the verdicts were their verdicts. (Vol. 6, Mitigation, p.

1006.)

After the end of the penalty phase, defense counsel filed a motion for a *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954) hearing, based on interviews of two jurors that appeared in the Akron Beacon Journal. (Doc. # 321). Attached to the Motion were two Akron Beacon Journal Articles with interviews from two Jurors; Juror 19 and Juror 46. While Juror 19 had been excused, Juror 46 remained on the jury and explained why the verdicts of death was not her verdict:

> I didn't want the death penalty at all, I fought for hours. I had one juror get in my face saying, "I can't believe you wouldn't give this kid the death penalty. What's wrong with you, something's wrong with you."
>
> Yes, I was intimidated. It was rough. It was hard. And I'm still not at peace that a death sentence was handed down. . . .I don't feel a death sentence is right for Shawn. He needs help, not a needle in the arm.

(Id.) The trial court did not grant a hearing, instead, the court issued a journal entry on December 9, 2014 "resolving" the motion. (Doc. # 330).

The Court then addressed whether to hold an *Atkins/Lott* hearing as requested by the defense. It was eventually decided that three evaluations would be conducted, one by the defense, one by the State and one by the Court.

Once the reports were prepared, a two-day hearing was held at which the three experts testified. (Vol. 1 and 2, Atkins Hearing) The trial court issued his journal entry on June 23, 2015 "Resolving Intellectual Disability Claim of Defendant."

(Doc. # 375) The trial court's final conclusion was: "Based on the evidence contained in the trial record, in the pretrial proceedings, and introduced at the *Atkins* hearing, the court finds that defendant has not met his burden of proving that he had significantly subaverage intellectual functioning, or significant limitations in two or more adaptive skills, at any time before the age of 18 or thereafter." (Id., at p. 17)

A sentencing hearing was held on June 19, 2015. The trial court's sentencing entry contains several improper factual and legal issues and spends considerable effort to consider and explain the things the trial did "not consider." The court states it did not consider: "letters sent to the court from Ford, the presentence investigation report, the felonious assault on Chelsea Schobert, victim impact evidence during the sentencing hearing, the aggravated murder itself, Ford's criminal record, "or any aggravating circumstances of which the defendant was found guilty that have been merged." (Doc. # 378, p. 5) The court further explain he did not consider any of the mitigating circumstance not raised by the defense, but later in the opinion will detail the ones "not considered." In reviewing the jury's verdict, the trial court inaccurately referred to the R.C. 2929.04(A)(5) as the "multiple murder specification." (Doc. # 378, p. 2) And, the trial court improperly addressed the improper capital specification verdicts finding Ford to be

both the principal offender and to have committed the aggravated murder with prior calculation and design. (Doc. #378, p. 15.) The trial court followed the recommendation of the jury and imposed life without parole on Count 2, and the death penalty on Count 4. (Doc. # 378.) Ford was also sentenced to a prison term of eight (8) years on the felonious assault charge. (Doc. #378.)

Appellate counsel was appointed and this timely appeal followed. (Doc.# 380, 721.)

ARGUMENT

PROPOSITION OF LAW NO. I

WHEN POLICE OFFICERS DO NOT OBTAIN A VALID WAIVER FROM AN 18-YEAR-OLD SUSPECT, AND USE DECEPTION AND A SNITCH TO OBTAIN A CONFESSION, WHICH WAS LATER USED AT TRIAL, THE USE OF THAT STATEMENT VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§2, 5 9 AND 16 OF THE OHIO CONSTITUTION.

On April 2, 2013, Shawn Ford was arrested by the Akron Police Department based upon a warrant issued by the Kent Police Department. (Suppression hearing, 9-15-13, p. 31.) Kent had charged Ford with falsification based upon his reports that Chelsea Schobert was assaulted in Kent, Ohio. (Id.) Detective Hitchings and Detective Morrison interviewed Ford that day before he was transported to Portage County. (Id., 36, State Ex. A.) On April 3, 2013 Lt. Johnson from the Portage County Sheriff's Department contacted Akron Police and told them an inmate in the Portage County jail, George Beech, had talked to Ford in the jail. Beech provided information to Lt. Johnson and Johnson conveyed that information to Summit County authorities. On April 3, 2013, Detectives Hitchings, Morrison, and Lt. Johnson from the Portage County Sheriff's Department again interviewed Ford, this time in the Portage County jail. (Id., 52, State Ex. B.) In this April 3, 2013 interview, armed with information from George Beech, a jail house informant, the

government obtained admissions from Ford regarding his involvement in the Schoberts' deaths. Ford was charged with aggravated murder and transported to the Summit County jail. Again, on April 4, 2013, Detective Hitchings interviewed Ford. (Id. p. 58, State Ex. C.) Each time Ford was interviewed, Officers read him his *Miranda*[2] rights but no effort was made to determine if he understood those rights or if wished to waive them.[3]

Detective Morrison readily admitted that he had a card which he used to read the *Miranda* rights to Ford and the card has a specific section that notifies a suspect "having these rights in mind, do you now wish to talk". (Id., p. 105.) This portion was not read to Ford because, according to Detective Morrison, he was not required to read it. No effort was made to ascertain whether Ford wanted to knowingly, intelligently and voluntarily waive his rights. Ford filed a Motion to Suppress challenging the admissibility of these statements. (Doc. # 201, 2013.) The trial court denied the Motion after conducting a hearing (Doc. #210) and the statements from each of these interviews were used against Ford at trial, over Ford's objection. (Vol. 27, Trial, p. 4958, 4989-4992, 5007-5011, 5015; Vol.23, Trial, p. 4223.)

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[2] *Miranda v. Arizona*, 284 U.S. 436 (1966)
[3] See, Proposition of Law No III addressing the Atkins issues and Ford's intellectual disabilities.

Ford's Fifth Amendment, Due Process, and Confrontation rights were violated by admission of his statements to the police on April 2nd, 3rd and 4th. The admission of the statements and confessions violated Ford's Fifth Amendment Due Process rights in two ways.[4]

There was No Valid Waiver of Rights by Mr. Ford

First, while the police read Ford his constitutional rights as required by *Miranda*, the police did absolutely nothing to secure a valid waiver of these rights before interrogating Ford. The officer simply read the rights, one at a time, and asked the Ford if he understood—not if he wished to relinquish his rights, just if he understood them. The closest that the Detective came to a waiver was to ask if Ford understood that he could stop answering questions at any time. The officer, however, never took the crucial step of asking Ford whether he wished to speak to them in the first instance and waive his right to counsel while doing so. In short, the police never secured a knowing, intelligent, and voluntary waiver of the privilege against self-incrimination or the right to counsel.

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[4] The Fifth Amendment rights are applicable to state criminal prosecutions. See, *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). Ohio has its own constitutional provision barring compelled self-incrimination. See, Article I, Sections 10 and 16 of the Ohio Constitution.

The burden is on the State to prove comprehension of, and waiver of *Miranda* rights. A court may not presume waiver from a suspect's silence or from the mere fact that a confession was eventually obtained. See, *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979). The burden is not on Ford to show there was not a valid waiver. *Miranda* itself held that the warnings must be given when there is custody and when there is interrogation.[5] The State's attempt to show that the confession was valid because the suspect did not exercise his rights was a reversal of the *Miranda* standard.

> Q. We did also have an opportunity to review the beginning of that and saw you read his *Miranda* warnings to him. Subsequent to that, at any time did he, Mr. , indicate that he wanted to exercise his right to remain silent?
>
> A. No.
>
> Q. And, likewise, to the best of your recollection, if you recall, did he ever ask for an attorney?

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[5] *See, Miranda*, 386 U.S., at 468-469:

> The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given.

A. No, he did not.

(Suppression hearing, 9-15-14 p.100-101.) But that is not the proper inquiry.

Miranda held that there are two aspects to the warnings before the police may take a statement from a suspect in custody. "*Miranda v. Arizona*, 384 U.S. 436 (1966), excludes confessions flowing from custodial interrogations unless adequate warnings were administered *and a waiver was obtained*." See, *Lego v. Twomey*, 404 U.S. 477, 487-488, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972). (Emphasis added.)

The first requirement is that there must be some understanding or comprehension by the accused of what are his rights. The second is that there must be a voluntary waiver or relinquishment of the privilege against self-incrimination and what over time has become to be known as the Fifth Amendment right to counsel. *Miranda* warnings, of course, apply only when there is the co-existence of custody and interrogation, as there clearly was here. Ford was detained in the County jail and in handcuffs. The questions of the three officers were undoubtedly designed to secure incriminating statements.

The videotapes of each interrogation show that the detectives did not explain the constitutional rights to the Ford. The detective simply asked after each sentence if Ford understood, but made no effort to insure comprehension. Equally

important, there was no evidence at all of waiver. (Suppression hearing, 9-15-13, State's Ex. A 4-2-13 Interview; 4-3-13 Interview, State Ex. B, Doc. # 388, at 16:21:37 and 4-4-13 Interview, State's Ex. C.)

Miranda places the burden of proving compliance with its strictures upon the government. That burden has been described as "great" by *Miranda* and later cases. Decisions subsequent to *Miranda* have emphasized the prosecution's "heavy burden" in proving waiver. See, e.g., *Tague v. Louisiana*, 444 U.S. 469, 470-471, 100 S.Ct. 652, 62 L.Ed.2d 622 (1980) (*per curiam*); *Fare v. Michael C.*, 442 U.S. 707, 724, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979). In *Tague* v. *Louisiana*, *supra*, United States Supreme Court granted certiorari and then reversed the case without even the necessity of oral argument. At the suppression hearing in the trial court, the arresting officer:

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

Id., 444 U.S., at 469. The Louisiana Supreme Court held that the officer was not compelled to give an intelligence test to a person who has been advised of his rights to determine if he understands them.

But one justice of the Louisiana Court wrote in dissent that the Louisiana Court was *reversing* the *Miranda* standard, thereby creating a "presumption that the defendant understood his constitutional rights," and placing "the burden of proof upon the defendant, instead of the state, to demonstrate whether the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id.,* 444 U.S., at 470; *State v. Tague*, 372 So.2d 555, 558 (La. 1978) (DENNIS, J., dissenting). Concerning the point made by the dissent, the United States Supreme Court, *per curiam,* said: "We agree. The majority's error is readily apparent. * * * In this case, no evidence at all was introduced to prove that petitioner knowingly and intelligently *waived* his rights before making the inculpatory statement. The statement was therefore inadmissible." *Id.,* 444 U.S., at 470. (Emphasis added.)

The summary nature of the disposition of *Tague* by the Court is a clear indicator that the *Miranda* standard and the components of the government's burden of proof, as Justice Antonin Scalia said in the context of another capital case, "Could not be clearer." See, *Hitchcock v. Dugger,* 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). Here, as in *Tague*, there is no evidence that the government did anything other than what is captured on the videotape, and what is

captured on the videotape fails to meet the *Miranda-Tague* standard. The Detective did nothing to ensure that the Ford understood his rights.

Miranda's rule is simple, yet prophylactic. See, *Dickerson v. United States*, 530 U.S. 428, 439, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000), n. 4, citing *Miranda, supra,* 384 U.S., at 479. ("The requirement of warnings *and* waiver of rights is * * * fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation."). (Emphasis added.) There must be both a recitation of the rights *and* a valid waiver before a statement may lawfully be taken. There was no valid waiver of rights, and *Miranda* requires that a suspect "may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently." *Miranda, supra*, 384 U.S., at 444. The statements of the Ford should have been suppressed, and Ford's conviction and death sentences must be vacated as they are premised in no small measure on the statements and confession made to the police.

Ford's Statement was Involuntary

The second way in which the statement's and admission violated Ford's constitutional rights is that the statement was involuntary. Here, there are two aspects: outright police coercion, and use of an informant to obtain a confession. Ford, a youth of 18 with low intelligence, was tricked in more than one way. First,

the police suggested that Ford had given the details of the crimes to another Portage County Jail inmate and that Lt. Johnson of the Portage County Sheriff's Department had retrieved the tapes, listened to them, and "had" Ford in the sense that the tape revealed Ford confessing details of the crime to the jailhouse snitch. There were no such tapes. The police also coerced Ford into speaking by using a variety of deceptive practices, each designed as a circumstance of "pressure against the power of resistance of the person confessing." *Stein v. New York*, 346 U.S. 156, 185, 97 L.Ed. 1522, 73 S.Ct. 1077 (1953).

For example, the police told Ford that, very soon, the case would be presented to the grand jury and the police officers would be called upon to render an opinion as to whether Ford had been "cooperative." The police represented to this young man, with no high school degree, that his cooperation or lack of cooperation would be the difference between life and death, between non-capital murder and charges that carried an "automatic" death penalty. The officers portrayed it as "agg murders" if Ford cooperated and told them the truth, and the "automatic" death penalty if he did not. (See, State Ex. B, Doc. # 388, at 16:25:23) Further, when Ford talked about spending the rest of his life in jail for the murders, the detective told Ford that he needed to quit looking at the situation as if there was no possibility for him short of life in prison. Because, the detective said, the

possibility "is here for you, but it's not going to be here for you if you sit here and lie." (See, State Ex. B, Doc. # 388, at 16:31:19). It is not wonder that Mr. Ford was upset prior to the start of the trial that the state would not offer him a plea deal, short of going to trial. (Pretrial, 9-12-14, p. 141, 142; Pretrial, 9-15-14, p. 187-189)

Here, there is nothing to demonstrate that the "totality of the circumstances surrounding the interrogation" revealed what the government was required to establish: an un-coerced choice and the requisite level of comprehension from which a court could properly conclude that the *Miranda* rights have been knowingly and voluntarily waived. See, *North Carolina v. Butler*, 441 U.S. 369, 374-75, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979); and, *State v. Brewer*, 48 Ohio St.3d 50, 58, 549 N.E.2d 491 (1990) (the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment, and the existence of threat or inducement are all factors to be considered).

A coerced confession is inadmissible under the Due Process Clause even though statements in it may be independently established as true. See, *Lisenba v. California*, 314 U.S. 219, 236-237, 62 S.Ct. 280, 86 L.Ed. 166 (1941). And the

Supreme Court held in *Watts v. Indiana*, 338 U.S. 49, 53, 69 S.Ct. 1347, 93 L.Ed. 1801 (1949):

> A confession by which life becomes forfeit must be the expression of free choice. A statement to be voluntary of course need not be volunteered. But *if it is the product of sustained pressure by the police* it *does not issue from a free choice*. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore *the reverse of voluntary*.

(Emphasis added.) Ford's statement here was not "'the product of a rational intellect and a free will.'" *See*, *Medeiros v. Shimoda*, 889 F.2d 819, 823 (9th Cir. 1989), quoting *Townsend v. Sain*, 372 U.S. 293, 307, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). Instead, here there was "coercive police activity" that produced the confession. See, *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986).

There are three requirements for a finding that a statement was involuntary due to police coercion, and all were present in this case. First, that the police activity was objectively coercive. Second, that the coercion in question was sufficient to overbear Ford's will. Third, that the police misconduct was the crucial motivating factor in the defendant's decision to offer the statement." See, *United*

States v. Mahan, 190 F.3d 416, 422 (6th Cir. 1999); *McCall v. Dutton*, 863 F.2d 454 (6th Cir. 1988).

All of these factors worked against the government, and in favor of a finding of involuntariness and suppression here. Besides the blanket of lies about the grand jury, the police lied to Ford and told him that, two days after the murders, they already had his DNA from the gloves, and that they had matched blood from the victims to Ford's shoes. In point of fact, the DNA analysis was not completed until October 24, 2013, nearly seven months after police represented having a laboratory match. The detective yelled at Ford: "We got your DNA on the inside of the fucking latex gloves, you dumb-ass. How hard is that?" (State Ex. B., Doc. # 388, at 16:30:14.) It was in fact *very* "hard," for the police had taken Ford's DNA sample only the day before, and would not have the match that they claimed to have for another 204 days. (See, State Ex. 249, Doc. # 603.) As set forth in Proposition of Law No. III and XVIII, Ford has a low IQ, grew up in an environment of abuse and bullying. The impact of these statements upon Ford, and his ability to make an intelligent, voluntary choice cannot be understated.

Though *Miranda* often occupies the forefront of admissibility of confessions, traditional voluntariness is far from discarded. See, e.g., *Dickerson v. United States, supra*, 530 U.S., at 434. ("We have never abandoned this due

process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily.") See, also, *Haynes v. Washington*, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963); *Mincey v. Arizona,* 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); *Lynumn v. Illinois*, 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963); *Spano v. New York*, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959); *United States v. Tingle*, 658 F.2d 1332 (9th Cir. 1981); *Williams v. Brewer*, 509 F.2d 227 (8th Cir. 1974);[4] and, *Williams v. Brewer*, 375 F.Supp. 170 (S.D. Iowa 1974).

Webster tells us that "involuntary" means done contrary to or without choice; compulsory; not subject to control of the will. Synonyms for involuntary include: coerced, forced, unintended, unintentional, unwilling, and will-less. The classic locution from the famous *Johnson v. Zerbst* case remains intact: "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional

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[4] *Cert granted*, 423 U.S. 1031, 96 S.Ct. 561, 46 L.Ed.2d 404 (1975); *affirmed on other grounds by Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). The Supreme Court affirmed on a denial of the right to counsel, but the District Court and Court of Appeals went further and found Williams' statement to be involuntary. The lower court cases are important because the Supreme Court did not find Williams' statements to be voluntary. The Court just sidestepped the issue, choosing to decide on right to counsel grounds, and leaving intact the findings of the District Court on the issue of voluntariness.

relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

In *Tingle*, *supra*, the statement was found involuntary because the purpose and objective of the interrogation was to cause Tingle to fear that, if she failed to cooperate, she would not see her young child for a long time. Here, the police, in addition to lying to the Ford, told him that whether he told them the "truth" would make a difference if he lived or died. The Ninth Circuit Court of Appeals found that Tingle would reasonably draw the conclusion that if she failed to cooperate, she would not see her young child for a long time, and the court said that she could draw that conclusion from the agent's use of technique. Here, the police went even stronger after the Ford. The "technique" was for three experienced law enforcement officers to cajole and misrepresent facts to an 18-year-old kid of low intelligence, representing that they had the case scientifically wrapped up, wrapped up with admissions made to a snitch, and that the only thing that could save Ford from the "automatic" sentence of death would be for Ford to confess and tell the police the truth. The Ninth Circuit Court observed that there is little more than family that is precious enough to make any statements obtained by invoking family involuntary:

> The relationship between parent and child embodies a primordial and fundamental value of our

> society. When law enforcement officers deliberately prey upon the maternal instinct and inculcate fear in a mother that she will not see her child in order to elicit "cooperation," they exert the "improper influence" proscribed by *Malloy*.[5]

Family is important, to be sure. Life-and-death, however, particularly to a troubled 18-year-old was far more important, far more precious. Subtle psychological coercion suffices as well as the bright light and the hose, and at times more effectively, to overbear a rational intellect and a free will. In *Haynes*, the Court found involuntary a statement made when the police refused to allow a suspect to call his wife until he confessed. *Haynes v. Washington*, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963). That certainly is less egregious than the representations that Ford would get the automatic death penalty unless he confessed.

In *Lynumn v. Illinois*, 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963), the Supreme Court considered a confession that had been made only after the police had told the defendant that state financial aid for her infant children would be cut off, and her children would be taken from her, if she did not "cooperate." Like Ford here, Lynumn had no reason not to believe that the police had ample power to

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[5] *Malloy* is *Malloy v. Hogan*, 378 U.S. 1, 7, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653 (1964). (Footnote not in original.)

carry out their threats. The Court concluded that the confession in *Lynumn* had been coerced. The conduct of the three officers here, was far more egregious, and the trial court, with due deference, was wrong not to find so.

In *Mincey*, the defendant was wounded in a shootout with police in which an officer was killed. The Court found it hard to imagine a situation less conducive to the exercise of "a rational intellect and a free will" than Mincey's. He had been seriously wounded just a few hours earlier, and had arrived at the hospital "depressed almost to the point of coma," according to his attending physician. Although he had received some treatment, his condition at the time of the interrogation was still sufficiently serious that he was in the intensive care unit. He complained of "unbearable" pain. He was evidently confused and unable to think clearly about either the events of that afternoon or the circumstances of his interrogation. The Court found that the statement was involuntary.

Spano refused to speak to police and asked for a lawyer. Police finally sent in a close friend of Spano's who was a young police officer. He told Spano that if Spano did not confess the officer would lose his job. The United States Supreme Court found Spano's confession to be involuntary. *See, Spano v. New York, supra*. Again, that representation pales in comparison to promises of an "automatic" death penalty, and that the police had confirmed Ford's involvement through DNA on his

shoes. The police also represented that the informant, who is "very good" (State Ex. B, Doc. # 388, at 16:29:32), would say that Ford had confessed where he got the sledgehammer and how Ford came into the house of the Schoberts (State Ex. B, at 16:27:33) to how Ford waited until the mom (Margaret Schobert) came home (State Ex. B, at 16:27:37) and how Ford confessed all these details to the snitch (State Ex. B, at 16:27:50).

In *Williams v. Brewer*, the district court found the conduct of the police so palpably impelled the involuntary statement that it even pushed habeas law to its limits, using its limited fact-finding functions. It is easy to see why. Williams surrendered himself to Iowa police and had engaged counsel, who had instructed that no questioning take place during a car trip between Davenport and Des Moines. During the trip, one detective and Williams sat in the rear seat. They engaged in conversation about religion, Williams' reputation, Williams' friends, police procedures, aspects of the police investigation into this matter, and various other topics. Then the detective said to Williams:

> I want to give you something to think about while we're traveling down the road. Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself

> have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way to Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas Eve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.

509 F.2d, at 230. Williams shortly thereafter told the detective that he would show him where the body was located. The Court found the statement to have been involuntarily compelled from Williams. Based upon the District Court's reasons in *Williams*, the statement here clearly is involuntary. Ford was told everything from he had to "get in front of this" case to whether he cooperated depended upon the level of charges and whether he might receive the death penalty. In fact, "might" was not part of the equation, as the officers characterized it as an "automatic" death penalty. As lawyers, we certainly know there is no such thing, but a low intelligence 18-year-old does not. The Fifth Amendment secures "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty ... for such silence." *Malloy v. Hogan*, *supra*, 378 U.S., at 8. Ford's statement was the opposite of voluntary. It was error to refuse to suppress the statement, and the constitutional violations are manifest.

Ford's convictions and sentence of death, premised, even partially upon this involuntary confession, cannot stand.

Aside from the conduct of the police in the interrogation room, the conduct of the police produced an involuntary statement in another way: Ford's statement is also involuntary because it was coerced through the use of a government informant. Detective Michael Hitchings testified:

> Q. * * * . So after you collect the items from 869 Fried Street, what's the next thing that you do in your investigation that's of significance?
>
> A. After that, we decided to go over to Portage County Jail and meet with Lieutenant Greg Johnson.
>
> Q. Okay.
>
> And –
>
> A. Once we met with Lieutenant Greg Johnson, we spoke with an inmate over there by the name of George Beech.
>
> Q. All right.
>
> A. George –
>
> Q. And why did you speak with George Beech?
>
> A. George Beech had information reference our homicide. It was given to him by Shawn .
>
> Q. All right. And so you talked to him. After talking to him, what did you do?
>
> A. After we talked to him, we brought Shawn in to interview him.
>
> Q. All right.

(Vol. 27, Trial, p.4989.)

Ford had been arrested on a falsification charge and was in the Kent Municipal Jail. It was then that George Beech contacted the police and informed

them that Ford purportedly had made incriminating statements. Armed with that information, the police then came to the jail in Kent. They interviewed Beech then interviewed Ford, using the claimed admissions as a way to destroy Ford's resolve.

Oreste Fulminante was arrested for the murder of his stepdaughter. Diminutive in stature and charged with a crime against a child, Fulminante had plenty to worry about from other inmates. Anthony Sarivola, a man with a checked past, including working as a police officer, and being an associate of the mafia, was also in prison, but Sarivola was serving as a government informant.

At the direction of government officers, Sarivola befriended Fulminante and assured Fulminante he could furnish him protection. Sarivola, however, said that in order to have his protection, Fulminante would have to confess to what he did. Fulminante confessed the murder of the step-daughter to Sarivola.

Shawn was in the Portage County Jail, though charged as a falsification, knowing that he was a suspect in the double murder of Jeffrey and Margaret Schobert. He was placed in the same portion of the jail as George Beech, who had been known to Portage County officials for several years. Shawn, just 18 years old and of low intelligence, purportedly confessed to Beech, who immediately contacted authorities. Portage County authorities immediately contacted authorities investigating the Schobert homicides. (T.p. Vol. I, pp. 144.) Those authorities

came to the Portage County Jail, confronted with the claimed admissions to Beech, and ultimately confessed to being at the Schobert home for at least one of the murders.

In *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), the United States Supreme Court affirmed the findings of the Arizona State Courts that Fulminante's confession to Sarivola was not voluntary.[6] Many of the same factors present in the *Fulminante* case are present here.

A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." *Bruton v. United States*, 391 U.S. 123, at 139-140, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (WHITE, J., dissenting). While "some statements by a defendant may concern isolated aspects of the crime or may be incriminating only

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[6] The other issues in the Fulminante case was whether admission of an involuntary confession could ever be harmless error. The Court changed years of jurisprudence by holding that an involuntary confession could be a harmless error. That point is not up for debate here. The effect of Ford's confession is overwhelming, and it would be blinking reality to claim that, despite the confession, Ford would have been convicted and sentenced to death nonetheless.

when linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision." *Arizona v. Fulminante*, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).

The Court in *Fulminante* was concerned about Fulminante's confession to Anthony Sarivola, given Sarivola's lack of moral integrity demonstrated by his testimony that he had worked for organized crime during the time he was a uniformed police officer. His overzealous approach to gathering information for which he would be paid by authorities, was revealed by his admission that he had fabricated a tape recording in connection with an earlier, unrelated FBI investigation, his receipt of immunity in connection with the information he provided his eagerness to get in and stay in the federal Witness Protection Program that provided a motive for giving detailed information to authorities.

In *Wearry v. Cain*, __U.S.__, 136 S.Ct. 1002, 194 L.Ed.2d 78, 2016 U.S. LEXIS 1654 (2016) (*per curiam*), the United States Supreme Court noted the impact that informants can have concerning the establishment of reasonable doubt once their entire "credentials" are known to the jury. The Court noted that the State had failed to disclose that, contrary to the prosecution's assertions at trial, the snitch had twice sought a deal to reduce his existing sentence in exchange for

testifying against Wearry and the police had told Brown (the informant) that they would "'talk to the D. A. if he told the truth.'" The case also recognized that snitches sometimes want to help themselves, and sometimes want to settle a personal score. Id, at 1007-1008. Here, Beech, who had burglary charges pending and whose son was also in trouble with the law, asked Lt. Johnson to let the Judge on his case know he provided help. (Suppression hearing, 9-15-13, 145-146, 168.) Though Lt. Johnson wasn't certain, Beech may have mentioned the son's legal troubles as well. (Id., p. 169-170.) There seems little evidence here that Beech wanted to settle a personal score, but the jury, certainly found out that a jail house informant had led the police to the recovery of the Schobert vehicle, the knife and gloves. (Vol. 27, Trial, p.4971.) Using a map as a demonstrative aid, Hitchings testified to all the places they went, and all the items found, based upon the information Beech provided to Lt. Johnson. (Id., 49724984.) Through implication, the jury was told what Beech claimed Ford had said to him, though the jury never heard from Beech. Just as in *Smith v. Cain*, 565 U.S. 73, 132 S.Ct. 627, 181 L.Ed.2d 571 (2012), the court noted that even if the jury—armed with all of [the undisclosed] new evidence—*could* have voted to convict Wearry, the Court had "no confidence that it *would* have done so." *Wearry, supra*, at __, citing *Smith, supra*, at ___, 132 S. Ct. 627, 635, 181 L. Ed. 2d 571, 580.

Miller v. Fenton, 474 U.S. 104, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985), held that the review of confessions for voluntariness must determine "whether the techniques for extracting the statements, as applied to this suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means [and] whether the defendant's will was in fact overborne." 474 U.S., at 116, citing *Gallegos v. Colorado*, 370 U.S. 49, 51, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962). This is to ensure that the inquisitorial means do not infect the criminal process. This safeguard is necessary to protect and enforce the societal and constitutional belief "that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed." *Fenton, supra*, 474 U.S., at 109; *Chambers v. Florida*, 309 U.S. 227, 237, 60 S.Ct. 472, 84 L.Ed. 716 (1940). This is because "certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment." The second inquiry, by focusing on whether a suspect's will was in fact overborne, safeguards the Fifth Amendment right to be free from compelled self-incrimination. See *Gallegos, supra*, at 51.

No matter what standard is employed, it cannot be said that a frightened 18 year old with diminished intellect could have felt anything other than he had to tell the police what happened.

Violation of the Confrontation Clause

The Confrontation Clause of the Sixth Amendment, made applicable to the states by virtue of the Fourteenth Amendment, *Pointer* v. *Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), provides: "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." This provision is the embodiment of traditional preference for testimony of a witness who can be cross-examined and who can be *observed face-to-face* by the trier of fact. The preference of the Confrontation Clause and Ohio Constitution Article I, §10 create barriers to the unfettered use of hearsay, but do not act as an absolute bar.

The Confrontation right is a trial right. See, *State* v. *Irwin*, 7th Dist. No. 06 MA 20, 2007 Ohio 4996, 2007 Ohio App. LEXIS 4391, discretionary appeal not allowed by, *State* v. *Irwin*, 117 Ohio St.3d 1406, 2008 Ohio 565, 881 N.E.2d 274, citing *Barber* v. *Page*, 390 U.S. 719, 725, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968); *Mattox* v. *United States*, 156 U.S. 237, 244, 15 S.Ct. 337, 39 L.Ed. 409 (1895);

Craw v. Washington, 541 U.S. 36, at 57, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); and, *State* v. *Keairns*, 9 Ohio St.3d 228, 460 N.E.2d 245 (1984).

Under *Craw*, it is clear that where testimonial statements are involved, "we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" In fact, *Craw* held that "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but 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. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. Cf. 3 Blackstone, *Commentaries*, at 373 ('This open examination of witnesses . . . is much more conducive to the clearing up of truth'); M. Hale, *History and Analysis of the Common Law of England* 258 (1713) (adversarial testing 'beats and bolts out the Truth much better')." See, *Craw, supra*, 541 U.S., at 61-62.

What was placed before the jury was that Beech told Johnson who told the Akron Police where to find the car, knife, and the gloves and other items.

The Sixth Amendment, applicable to the states through the Fourteenth Amendment, states that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." The Confrontation Clause provides that a declarant's "testimonial" out-of-court statements will be admitted against the accused *only* if the declarant is unavailable to testify *and* the accused had a prior opportunity to cross-examine the declarant. See, *Craw v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Statements given at a suppression hearing, like statements given at a preliminary hearing are "testimonial" for purposes of the Confrontation Clause. Id. at 68. Thus, when the prosecution wishes to offer preliminary hearing testimony against a criminal defendant where the defendant had a prior opportunity to cross-examine the declarant, the pivotal question for purposes of the Confrontation Clause turns on whether the declarant is "unavailable."

In this case, the jury had placed before it multiple levels of hearsay, namely, Lt. Johnson telling the Akron Police Department what George Beech had told Lt. Johnson, supposedly told to Beech by Ford. (See, Vol. 26, Trial, pp. 4971 et seq.). There was no evidence that Johnson was not available for trial. Nor was there evidence that Beech was unavailable for trial. Johnson had been cross-examined at

the suppression. Beech had never testified in the case and obviously was not cross-examined.

A declarant is unavailable for purposes of the Confrontation Clause and Evid.R. 804 (A)(5), when the declarant is "absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance * * * through process or other reasonable means." *State v. Keairns*, 9 Ohio St.3d 228, 232, 460 N.E.2d 245 (1984). The prosecution must establish the unavailability of the declarant based upon the testimony of witnesses rather than hearsay which was not procured under oath, unless unavailability is conceded by the party against whom the statement is being offered. No such concession was made in this case.

Section 10, Article I, of the Ohio Constitution requires that an accused "meet the witnesses face to face." See, *State* v. *Storch*, 66 Ohio St.3d 280, 292, 1993 Ohio 38, 612 N.E.2d 305. Both of these provisions, state and federal, were violated when Detective Hitchings was permitted to testify that Lt. Johnson gave him information from George Beech claims Ford said to Beech. This “paradigmatic” violation of the confrontation guarantees of the state and federal constitutions warrants that Ford’s convictions and sentences be vacated.

No effort was made to obtain a knowing, intelligent and voluntary waiver of rights before Ford was interrogated multiple times. The coercive tactics employed while interviewing Ford on April 3 led directly to Ford giving incriminating statement to the police such that his will was overborne and it cannot be said that the statements were voluntarily given. Accordingly, the statements should not have been utilized at trial and Ford's conviction and sentence must be vacated.

PROPOSITION OF LAW NO. II

WHEN THE JURY IS ASKED TO FIND AND DOES FIND CONFLICTING VERDICTS ON A CAPITAL SPECIFICATION, THE SPECIFICATION AND THE DEATH SENTENCE MUST BE VACATED SINCE SUCH A VERDICT IS CONTRARY TO THE OHIO CONSTITUTION, ARTICLE I, §§ 9 AND 16 AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The R.C. §2929.04(A)(7) capital specifications in this case charged Shawn Ford both with being the principal offender and with *not* being the principal offender. "Principal offender" in an aggravated murder means the "actual killer." See, *State v. Taylor*, 66 Ohio St.3d 295, 308, 612 N.E.2d 316 (1993); *State v. Penix*, 32 Ohio St.3d 369, 371, 513 N.E.2d 744 (1987). This simply cannot be, in light of the facts of this case. If the jury believed, as it obviously did, that Ford was the killer, then he was the principal offender under R.C. §2929.04(A)(7). The government's nonsensical and confusing indictment says in the very same specifications that the Ford was and was not the actual killer, and the trial court did nothing to correct this manifest error or to force the State to choose which theory they were going to submit to the jury.

The plain and clear wording of the specification reflects the error in this case, prior calculation and design is **only** to be considered if the defendant **is not the principal offender**. The specification within R.C. §2929.04(A)(7) provides:

> 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 2941.14 of the Revised Code and proved beyond a reasonable doubt
>
> (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*.

(Emphasis added.) Ford cannot have been lawfully convicted of the specification that charged, and which the jury found, that the aggravated murder of Margaret Schobert was committed with prior calculation and design because the jury found Ford was guilty as the principal offender of Margaret Schobert. That portion of the R.C. §2929.04(A)(7) specification should not have been charged, and should not have been submitted to the jury for its consideration, as prior calculation and design is an aggravating circumstance **only** in the case of an offender who did not personally kill the victims. Thus, it was clear constitutional error, a violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, § 9 and Article I, §16 of the Constitution of Ohio to allow the indictment to remain as drafted, and to submit the "prior calculation and design" specifications to the

jury in a case where the State claimed that the offender did personally kill the victims.

Though the specifications should not have been submitted as to any of the counts, it is nonetheless true that the jury left blank Specification 2 to Count 1 (Doc. # 274); Specification 3 to Count 1 (Doc. # 276); Specification 2 to Count 2 (Doc. # 280); Specification 3 to Count 2 (Doc. # 282); Specification 2 to Count 3 (Doc. # 286); and, Specification 3 to Count 3 (Doc. # 288). As to those counts, the jury did not consider prior calculation and design once it determined Ford was the principal offender.

However, the jury did consider both alternative specifications attached to Counts 4 and 5. More troubling is that the jury did exactly what the Court has said cannot occur under a proper reading of R.C. §2941.14 and R.C. §2929.04(A)(7), the jury found Ford to be the principal offender in the murder of Mrs. Schobert and to have committed the offense with prior calculation and design. In a case where the State claimed and argued that Ford was the actual killer, the jury found Ford guilty beyond a reasonable doubt:

> of committing the offense while he was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery and committed the aggravated murder with prior calculation and design.

(Doc. # 292.) And the jury did so even though prior calculation and design is an aggravating circumstance only in the case of an offender who did not personally kill the victims. The very same thing is true concerning Specification 3 to Count 4. Once again the jury found Appellant guilty beyond a reasonable doubt:

> of committing the offense while he was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery and committed the aggravated murder with prior calculation and design.

(Doc. # 294.) This was not the fault of the jury. The trial court should have corrected the error.

The constitutional violations are because it was Count 4 into which the other counts relating to Margaret Schobert were merged. This of course means that with regard to Margaret Schobert, the victim for whose murder the jury sentenced Ford to death, the aggravating circumstances were, first, that Ford engaged in a course of conduct involving the purposeful killing or attempt to kill two or more persons by him (Doc.. # 290). The second aggravator was that Ford was guilty of murdering Mrs. Schobert while he was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery and committed the aggravated murder with prior calculation and design (Doc. # 292). The third aggravator was that Ford was guilty of murdering Mrs. Schobert

while he was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated burglary and that he committed the aggravated murder with prior calculation and design (Doc. # 294). Yet, in Count 5, which also applied to the murder of Mrs. Schobert, the jury found Ford to be the principal offender.

Count 4	aggravated murder with prior calculation and design	Margaret Schobert	Guilty
Specification 1 2929.04(A)(5)	course of conduct involving the purposeful killing, or attempt to kill two or more people	Margaret Schobert	Guilty
Specification 2 2929.04(A)(7)	aggravated murder while committing aggravated robbery and Appellant was the principal offender in the aggravated murder	Margaret Schobert	Not Guilty
Specification 2 2929.04(A)(7)	aggravated murder while committing aggravated robbery and aggravated murder committed with prior calculation and design	Margaret Schobert	Guilty
Specification 3 2929.04(A)(7)	aggravated murder while committing aggravated burglary and Appellant was the principal offender in the aggravated murder	Margaret Schobert	Not Guilty
Specification 3 2929.04(A)(7)	aggravated murder while committing aggravated burglary and aggravated murder committed with prior calculation and design	Margaret Schobert	Guilty
Count 5	aggravated murder while committing aggravated robbery	Margaret Schobert	Guilty
Specification 1 2929.04(A)(5)	course of conduct involving the purposeful killing, or attempt to kill two or more people	Margaret Schobert	Guilty
Specification 2 2929.04(A)(7)	aggravated murder while committing aggravated robbery and Appellant was the principal offender in the aggravated murder	Margaret Schobert	Guilty
Specification 2 2929.04 (A)(7)	aggravated murder while committing aggravated robbery and aggravated murder committed prior calculation and design	Margaret Schobert	Blank

Specification 3 2929.04 (A)(7)	aggravated murder while committing aggravated burglary and Appellant was the principal offender	Margaret Schobert	Guilty
Specification 3 2929.04 (A)(7)	aggravated murder while committing aggravated burglary and aggravated murder committed prior calculation and design	Margaret Schobert	blank

Indeed, the improper specifications are a large part of what the trial judge, as well as the jury, relied upon in imposing a death sentence. This is clear error, as this Court has held on several occasions. These specifications should never have been submitted to the trial jury, let alone constitute the reasons for the jurors to consider death and to weigh these aggravators against the mitigating evidence.

In *State v. Penix*, 32 Ohio St.3d 369, 513 N.E.2d 744 (1987), this Court held:

> Prior calculation and design is an aggravating circumstance only in the case of an offender who did not personally kill the victim. Thus, the criteria set forth in R.C. 2929.04(A)(7) are constructed in the alternative. If the aggravated murder was committed during the course of one of the enumerated felonies, then the death penalty may be imposed only where the defendant was the principal offender (i.e., the actual killer), or where the defendant was not the principal offender, if he committed the murder with prior calculation and design. The language of the statute provides that these are alternatives which are not to be charged and proven in the same cause. Thus, if the defendant is found to be the principal offender, then the aggravating circumstance is established, and the question of whether the offense was committed with prior calculation and design is irrelevant with respect to the death sentence.

> * * * . Like all penalty provisions, R.C. 2929.04(B) must "* * * be strictly construed against the state, and liberally construed in favor of the accused." R.C. §2901.04(A).
>
> In *State v. Johnson* (1986), 24 Ohio St.3d 87, 94, 24 OBR 282, 288, 494 N.E. 2d 1061, 1067, this court held that "[p]resenting the jury with specifications not permitted by statute impermissibly tips the scales in favor of death, and essentially undermines the required reliability in the jury's determination." Therefore, we held that " R.C. 2941.14 limits the aggravating circumstances which may be considered in imposing the death penalty to those specifically enumerated in R.C. 2929.04(A)," and vacated the death sentence. Johnson, supra, at the syllabus.

Penix, supra, 32 Ohio St.3d, at 371 (Emphasis added.) And in *State v. Taylor*, 66 Ohio St.3d 295, 307, 612 N.E.2d 316 (1993), this Court repeated the above holding and also noted that one cannot by aiding and abetting become the "principal offender" for purposes of R.C. 2929.04(A)(7). See, also, *State v. Dixon*, 101 Ohio St.3d 328, 2004 Ohio 1585, 805 N.E.2d 1042 concluding that, "'Prior calculation and design,' however, should ***never*** be used in the conjunctive with 'principal offender' because 'prior calculation and design' is relevant in the specifications only if the defendant is not a principal offender. See *State v. Penix* (1987), 32 Ohio St.3d 369, 371, 513 N.E.2d 744. See, also, e.g., *State v. Holloway* (1988), 38 Ohio

St.3d 239, 244, 527 N.E.2d 831, fn. 2." *State v. Dixon*, 101 Ohio St.3d at 328. (Emphasis added.)

The Eighth Amendment's prohibition against excessive or cruel and unusual punishments directs that the government's power to punish be exercised within the limits of civilized standards. See, *Trop* v. *Dulles*, 356 U.S. 86, 99, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion). *Trop's* "evolving standards of decency that mark the progress of a maturing society" command the most reticent application of the death penalty possible. This means an insistence upon requiring the State to fashion narrow, rather than broad, definitions of the aggravating factors that warrant consideration of a sentence of death. To avoid a capital punishment scheme with standards so vague that they would fail adequately to channel the sentencing decision patterns of juries, with the result being a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. *See*, *Zant v. Stephens*, 462 U.S. 862, 876, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). It can hardly be called a narrow reading of the Ohio statutes to submit to the trial jury a specification drafted in the

alternative when this Court has explicitly held that those two alternatives "which are not to be charged and proven in the same cause" as they were here. Indeed, that is an illicitly broad reading of the statute.

Moreover, it is the impact of submitting the improper specifications that has an odious impact upon the proceedings and that tips the scales of death impermissibly in favor of the State. This Court made that point abundantly clear in *Penix, supra*.

> In *State v. Johnson* (1986), 24 Ohio St.3d 87, 94, 24 OBR 282, 288, 494 N.E. 2d 1061, 1067, this court held that "[p]resenting the jury with specifications not permitted by statute impermissibly tips the scales in favor of death, and essentially undermines the required reliability in the jury's determination." Therefore, we held that " R.C. 2941.14 limits the aggravating circumstances which may be considered in imposing the death penalty to those specifically enumerated in R.C. 2929.04(A)," and vacated the death sentence. *Johnson, supra*, at the syllabus.

Penix, supra, 32 Ohio St.3d, at 371.

What was done here is precisely what this Court has held is prohibited by law under a plain reading of the statutes, R.C. 2941.14 and R.C. 2929.04(A)(7). Indeed the trial court compounded the error through the verdict forms that were submitted to the jurors. The verdict forms did not instruct the jury that they could only consider prior calculation and design if they found Mr. Ford was not the

principal offender. The court erred in not instructing the jury to be unanimous in agreeing on which alternative the defendant was guilty of. *State v. Moore*, 81 Ohio St.3d 22, 40, 1998 Ohio 441, 689 N.E.2d 1. In *Moore*, this Court found the trial court's error in not instructing the jury that it had to unanimously agreed on which alternative the defendant was guilty of was harmless because the jury had unanimously agreed on prior calculation and design. Here, the error is apparent, the jury found both as to Margaret Schobert's murder.

This Court in the past has said on any number of occasions that its own independent review and re-weighing of the aggravating circumstances against the mitigating factors cures any errors which occurred in the trial court. In this case, however, any attempt at such a cure would be a sham. First, the jury on Count 4 did not find both alternatives of the R.C. §2929.04(A)(7) specification. Even if it had, for the Court to re-weigh would be to make a *factual* finding. Any such finding would be making the kind of factual finding which substantiates imposition of a sentence greater than that normally imposed by law. See, e.g., *Apprendi* v. *New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Ring* v. *Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); and the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, § 10 of the Constitution of Ohio. The process of weighing aggravating circumstances

against mitigating factors is designed to guide the sentencer's discretion by focusing on the circumstances of the offense and the individual offender, thereby reducing the arbitrary and capricious imposition of death sentences.[6] An indictment which asserts multiple alternatives, which are clearly intended to be mutually exclusive alternatives, into one specification undermines the process of individualized consideration of the aggravating circumstances.

The State never pursued a theory that Mr. Ford was not the actual killer. There was little mentioned of the co-defendant in the case. Under that scenario, the State should not have been allowed to present the alternative theories in the R.C. 2929.04(A)(7) aggravating circumstance. The State should have only charged that Mr. Ford was the principal offender. Here, the closing arguments made by the State reflect the State presented the case under the belief the evidence supported Ford was the principal offender. Nor can the Court by independent review discount the two offending specifications and re-weigh the Specification 1 to Count 4 against the mitigation evidence. To do so and to render a sentence of death thereon would trample up the Sixth Amendment and Section 10 of our own Constitution, as *Apprendi* and its progeny tell us, and would make a mockery of

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[6] *Penix, supra*, 32 Ohio St3d, at 371 See, also, *State v. Jenkins*, 15 Ohio St.3d 164, 173, 473 N.E.2d 264 (1984), *cert. denied, Jenkins v. Ohio*, 472 U.S. 1032, 105 S.Ct. 3514, 87 L.Ed.2d 643 (1985).

Justice Potter Stewart's concern that the death penalty cannot be imposed with the freakishness and predictability of a strike of lightning. See, *Furman v. Georgia*, 408 U.S. 238, 309, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (STEWART, J., concurring).

There is simply no basis for concluding anything other than what this Court has concluded previously in *Johnson, supra,* and *Penix, supra*: "[p]resenting the jury with specifications not permitted by statute impermissibly tips the scales in favor of death, and essentially undermines the required reliability in the jury's determination." Accordingly, Shawn Ford's sentences of death must be vacated.

PROPOSITION OF LAW NO. III

IT IS A VIOLATION OF THE FEDERAL CONSTITUTION TO EXECUTE A PERSON WHO IS SUFFERING FROM INTELLECTUAL DISABILITIES. THE TRIAL COURT'S DETERMINATION THAT SHAWN FORD IS NOT INTELLECTUALLY DISABLED VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE COURT'S DECISION IN ATKINS V. VIRGINIA, 536 U.S.304 (2002).

The Supreme Court in *Atkins* held as follows:

> Our independent evaluation of the issue reveals no reason to disagree with the judgment of "the legislatures that have recently addressed the matter" and concluded that death is not a suitable punishment for a mentally retarded criminal. We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. *Construing and applying the Eighth Amendment in the light of our "evolving standards of decency," we therefore conclude that such punishment is excessive and that the Constitution "places a substantive restriction on the State's power to take the life" of a mentally retarded offender.*[7]

Atkins v. Virginia, 536 U.S. 304, 321(2002) (Emphasis added, citation omitted). After concluding that the Eighth Amendment categorically forbids the execution of people who are [intellectually disabled], the Supreme Court observed: "To the

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[7] When *Atkins* was issued, the term "mentally retarded" was used to identify persons with certain intellectual disabilities. *Atkins* itself uses that term. However, a person who meets that criteria is now referred to as intellectually disabled. (ID) *Hall v. Florida*, ---U.S. ---, 134 S.Ct. 1986 (2014); *State v. Jackson*, 141 Ohio St.3d 171, 2014-Ohio-3707 at ¶ 307. If possible, this proposition will use that term, rather than mentally retarded.

extent there is serious disagreement about the execution of [intellectually disabled] offenders, it is in determining which offenders are in fact [intellectually disabled]." *Id*. at 317. Rather than prescribing specific guidelines for determining which offenders in fact have [intellectual disability], however, the Court decided to "'leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.'" *Id.* (quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 416-417 (1986)).

In directing the states to develop "'appropriate ways'" to enforce *Atkins*, the Court plainly intended that the states' *Atkins* procedures reliably implement its holding in *Atkins*, and that any procedures that interjected unreliability into the *Atkins* determination would be subject to constitutional challenge. Accordingly, any state measure for adjudicating claims of intellectual disability that creates a substantial risk that people who are intellectually disabled will be excluded from the protection of *Atkins* is a measure that is subject to constitutional challenge under *Atkins*.

As in *Ford v. Wainwright*, 477 U.S. 399 (1986), the determination of which persons are exempt from execution on the basis of mental disorder or disability must be made "with the high regard for truth that befits a decision affecting the life or death of a human being...." *Id.* at 411. Because the determination of which

people facing the death penalty have intellectual disability is similar in its consequences and character to the determination of which people are incompetent to be executed, the *Ford* Court's requirement of heightened reliability for those whose death sentences have been imposed and upheld as constitutionally sound, arguably applies with even more force to those who are intellectually disabled, which would categorically prevent such person from even being eligible for execution in the first instance.

Because the life or death of a human being facing the death penalty depends on the determination whether he or she has intellectual disability, there is "a particularly acute need for guarding against error," in making this determination. *Id.*

Seeking to implement the mandate of *Atkins*, this Court in *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002), recognized that clinical definitions should form the basis for the legal definition of intellectual disability in Ohio. The court reasoned:

> Clinical definitions of [intellectual disability], cited with approval in Atkins, provide a standard for evaluating an individual's claim of [intellectual disability]. Id. at fn. 3, citing definitions from the American Association of Mental Retardation and the American Psychiatric Association. These definitions require (1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18. Most

> state statutes prohibiting the execution of the mentally retarded require evidence that the individual has an IQ of 70 or below. See Ky. Rev. Stat. 532.130 and 532.140; Neb. Rev. Stat. 28-105.01(2); N.M. Stat. 31-20A-2.1; N.C. Stat. 15A-2005; S.D. Codified Laws 23A-27A-26.2; Tenn. Code 39-13-203(b); and Wash. Rev. Code 10.95.030(2). While IQ tests are one of the many factors that need to be considered, they alone are not sufficient to make a final determination on this issue. *Murphy v. State*, 54 P.3d at 568, 2002 OK CR 32, at ¶ 29. We hold that there is a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70.

Lott, 779 N.E.2d at 1014. *Atkins* and *Lott* do not **require** an IQ score below 70 for a diagnosis of intellectual disability. Rather, *Atkins* and *Lott* look to the clinical definitions propounded by the American Psychological Association in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) and American Association on Intellectual and Developmental Disabilities formerly known as American Association on Mental Retardation.

With these ideas in mind, the question of whether the trial court erred in finding that Mr. Ford was not intellectually disabled must be examined.

What Lead to an Atkins Hearing for Mr. Ford?

After Mr. Ford was arrested for these offenses, defense counsel became concerned about his mental health and requested a competency and sanity evaluation. (Defense Motion No. 5, Doc.# 37) The defense later requested that Robert Byrnes, PhD, a psychologist be appointed to conduct an independent

competency and sanity evaluation. (Defense Motion No. 8, Doc.# 45). Defense counsel stated in the motion that Dr. Byrnes was qualified to undertake a competency and sanity evaluation.

The trial court granted the request, but as part of the order included the following: "If the examiner's opinion is that the Defendant is incapable of understanding the nature and objective of the proceedings against him or of assisting in his defense, the report shall also include the examiner's opinion as to whether the defendant is presently mentally ill or mentally retarded (sic)." Id. The order further stated: "If the examiner's opinion is that the defendant is presently mentally retarded, the report shall include the examiner's opinion as to whether the Defendant appears to be a mentally retarded (sic) person subject to institutionalization." (Id.)

The defense did not request that Dr. Byrnes examine Mr. Ford to determine if he had an intellectual disability, nor was there any indication that Dr. Byrnes was qualified to make such a diagnosis.

The State also requested that an evaluation be done and requested the Criminal Court's Psycho Diagnostic Clinic be appointed. A similar order to that state above was filed. (Doc. #109)

On October 28, 2013 the court held a hearing on competency. After the hearing, the court found that Mr. Ford was competent, "is capable of understanding the nature and objectives of the proceedings against him, *is not mentally retarded (sic)*, has no mental disease or defect that would impair his ability to understand the proceedings, and that the defendant is capable of presently assisting in his defense." (Doc. # 126) The issue of sanity at the time of the offense was held in abeyance, and the defense did not pursue it during the trial.

It was during the testimony of the mitigation expert, Dr. Joy Stankowski, a medical doctor specializing in psychiatry and forensic psychiatry, that the prospect that Mr. Ford may be intellectually disabled was introduced. (Vol. 4, Mitigation, p. 476, 491.) Dr. Stankowski had reviewed records concerning Mr. Ford, provided by the Ohio Department of Youth Services and indicated that he had been diagnosed with a learning disability and a low IQ and he needed extra support. (Id., at 491) Dr. Stankowski addressed his IQ issues:

> Well, I saw that Shawn had been diagnosed with learning disabilities at a young age, and then I saw that that had been backed up by some IQ testing over the years that showed that he consistently is below average. So what this means to me is that Shawn was born with, right out of the gate, fewer skills and resources than the average person.
>
> So an average IQ is 100. Shawn's IQ over the years tested to be anywhere between 62 and 80.

> And if 100 is average, we consider anything below 85 to be below average or borderline. If you are below 70, you are what we used to call "mentally retarded." We don't use that term any more; we now say "developmentally disabled."
>
> So sometimes Shawn's tests showed that he was actually disabled; other times, his IQ tested to be merely below average. But, really, the best case scenario is that this is a person that was born with a lower IQ, lower skills than the average person.

(Id., at pp. 496-497)

After Dr. Stankowski finished her testimony, the defense moved to dismiss the death penalty based on her testimony concerning Mr. Ford's IQ. (Id. at p. 624) The court denied the motion but indicated he would welcome briefing on the issue.

The jury deliberated, and the jury recommended a life sentence on Count Two, but the death sentence on Count Four.

The Court then addressed whether to hold an *Atkins/Lott* hearing as requested by the defense. It was eventually decided that three evaluations would be conducted, one by the defense, one by the State and one by the Court.

Once the reports were prepared, a two-day hearing was held at which the three experts testified. (Vol. 1 and 2, Atkins Hearing)

What *Atkins* Determinations did the Trial Court Have to Make

1. **Significant Limitations in Intellectual Functioning is Measured Clinically by an IQ Score that Takes Into Consideration the Test's SEM**

A clinical determination of "significant limitations in intellectual functioning" involves (1) intellectual "[p]erformance that is at least two standard deviations below the mean of an appropriate assessment instrument," i.e., a standardized IQ test, (2) "considering the standard error of measurement for the specific assessment instruments used and the instruments' strengths and limitations." AAIDD, User's Guide: Mental Retardation Definition, Classification And Systems Of Supports 12 (11th ed. 2010) [hereafter AAIDD, User's Guide]. Reflecting a broad consensus in the field, IQ scores necessarily need be assessed using a standardized instrument that accounts for a standard error of measurement.

In diagnosing intellectual disability, a clinician first selects from among various options the standardized intelligence test best suited to the particular circumstances of the test-taker. If a properly administered test produces a score of approximately 70 or below, the person may be found to have significant limitations in intellectual functioning, although evidence of adaptive deficits and age of onset must also then be assessed to be present for a diagnosis of intellectual disability. Because individuals in the 65-75 IQ range have similar intellectual functioning to each other, mental health professionals do not fixate on an exact cutoff when

making diagnoses. Instead, mental health professionals emphasize that individualized consideration and clinical judgment is critical to assessing intellectual functioning accurately. *See, e.g.,* AAIDD at 86-87, n.21. And, as reflected in the AAIDD User's Guide, when analyzing an IQ score, accepted clinical practice requires considering the test's Standard Error of Measurement (SEM) to adjust for inevitable testing errors. All measurement has some potential for error. *See generally* Alan S. Kaufman & Elizabeth O. Lichtenberger, *Assessing Adolescent and Adult Intelligence* 197 (3d ed. 2006). Error may also be introduced by the subject's mood, general health, or other intangible factors. *See, e.g.,* James R. Flynn, *Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect*, 12 Psychol. Pub. Pol'y & L. 170, 171 (2006) (hereafter "Flynn 2006"); AAMR 2002 at 57.

The SEM is a statistical concept that adjusts for the fact that a precise IQ score is always an unknown because no measuring tool is so perfect it can be said to be completely devoid of error. The SEM helps to address the inevitable errors in intelligence testing, thereby facilitating a more accurate understanding of obtained scores. AAMR 2002 at 58. Both the AAIDD/AAMR's and the APA's definitions of intellectual disability stress the necessity and importance of the SEM when considering IQ scores. AAIDD at 36; *DSM-IV-TR* at 41-42. The AAIDD

summarizes the scientific consensus regarding the importance of the SEM in assessing IQ scores as follows:

> . . . limitations in intellectual functioning are generally thought to be present if an individual has an IQ test score of *approximately* 70 or below. IQ scores must *always* be considered in light of the standard error of measurement, appropriateness, and consistency with administration guidelines. ***Since the standard error of measurement for most IQ tests is approximately 5, the ceiling may go up to 75. This represents a score approximately 2 standard deviations below the mean, considering the standard error of measurement.***

The American Association on Intellectual and Developmental Disabilities, Frequently Asked Questions on Intellectual Disability and the AAIDD Definition, http://www.aaidd.org/Policies/faq_mental_retardation.shtml (emphasis added).

Taking the SEM into account when interpreting an IQ score is neither new nor speculative. It constitutes long-standing clinical practice. *See, e.g.,* AAMD, *Mental Retardation Definition, Classification, and Systems of Supports* 11 (8th ed. 1983) (explaining that IQ testing is merely "a guideline [that] could be extended upward through IQ 75 or more, depending on the reliability of the intelligence test used"). Failing to take the SEM into account constitutes a clear departure from accepted professional practice in scoring and interpreting any kind of psychological test, including IQ tests.

The importance of the SEM is so well established and so recognized as standard operating procedure within the psychological community that it would be superfluous for states to need to direct experts to take it into account in a statute governing *Atkins* evaluations and adjudications. Thus, it is not surprising that no state's statutory definition expressly refers to the SEM. *See also Lott*, 779 N.E.2d at 1014 (remanding for an evidentiary hearing to resolve disputed factual issues based in part upon submission of 72 IQ test and acknowledging the argument "that an IQ of 72 places him within the mentally retarded range of intellectual functioning since there is a five-point margin of error on any IQ test score.").

Atkins itself notes that "an IQ between 70 and 75" is considered to reflect the upper range of intellectual functioning in the most widely accepted clinical definitions of intellectual disability. 536 U.S. at 309 n.5 (*citing* 2 *Kaplan & Sadock's Comprehensive Textbook of Psychiatry* 2952 (B. Sadock & V. Sadock eds., 7th ed. 2000)). *See also Lott*, 779 N.E.2d at 1014 (remanding for an evidentiary hearing to resolve disputed factual issues based in part upon submission of mitigation phase test results indicating that 'Lott's intelligence quotient ranged in the low average categories with I.Q. tests yielding results of 77-81, 83-91, and 87-97." (Citation omitted); *also id.* (same, noting that state had

submitted a sixth grade IQ test "showing that Lott's IQ was in a reported range of 87-97, and a 1984 test showing a full scale IQ of 86).

In short, while mental health experts employ only individualized tests of intelligence to diagnose the presence of "significantly subaverage general intellectual functioning," the experts also accept that there is no "fixed cutoff point for making the diagnosis of intellectual disability," and no score can be properly assessed in a vacuum. AAMR 2002 at 58. If, after taking the SEM into account an IQ score is in the 70-75 range, and if there is evidence of adaptive deficits and onset before age 18, then an assessment of intellectual disability is warranted.

Additionally, an IQ test score may not be considered concrete based on the Flynn Effect, which describes the phenomenon in which IQ scores tend to rise over time, requiring tests to be re-normed. Generally, individuals gain about .33 point per year on IQ tests, so the longer a particular test has been in existence, the more the score on the test becomes inflated. According to the AAIDD, "best practices require recognition of a potential Flynn Effect when older editions of an intelligence test (with corresponding older norms) are used in the assessment or interpretation of an IQ score. AAIDD at 37. *See also Brumfield v. Cain*, 854 F. Supp. 366, 391 (M.D. La. 2012) ("The court gives great weight to the AAIDD's

clinical standards, which tip the balance in favor of at least considering the Flynn Effect . . . “)

2. Significant Limitations in Adaptive Behavior Are Based on Objective Measurements, That Include Consideration of Anecdotal Evidence Prior to an Inmate’s Incarceration

The second prong of the clinical definition requires that an individual have significant limitations in adaptive behavior. This requirement is designed to ensure that an IQ score reflects a real-world disability, not merely a testing anomaly. This aspect of the clinical inquiry focuses on whether there are skills that the individual cannot do that someone without the disability can do. Like everyone else, individuals who have intellectual disability differ substantially from one another in terms of strengths and weaknesses. Indeed, a fundamental precept in the field of intellectual disability is that “[w]ithin an individual, limitations often coexist with strengths.” AAMR 2010 at 7. From a definitional perspective, an individual’s particular strengths are only relevant to assess corresponding weaknesses. DSM IV-TR at 47. That is, weighing strengths against weaknesses is an improper approach to diagnosing intellectual disability.

There is no clinically accepted list of strengths or abilities that preclude a diagnosis of intellectual disability. See DSM-IV-TR (“The diagnostic criteria for [intellectual disability] do not include an exclusion criterion”). Instead, clinicians

consider evidence of deficits in three discernible skill sets: (1) conceptual skills, which include cognitive abilities, communication, academic skills, the use of money, and self-direction; (2) social skills, which include interpersonal relationships, self-esteem, lack of gullibility, and the ability to follow rules; and (3) practical skills, which are independent living skills such as personal hygiene, eating, housekeeping, transportation, and occupational skills. AAMR 2010 at 44.

Limitations in adaptive behavior may result from not knowing how to perform a skill (acquisition deficit) or not knowing when to use a learned skill (performance deficit). AAMR at 2002. Significant deficits *in at least one of these three domains* indicates intellectual disability, regardless of strengths in other areas. Id. at 76.

The AAIDD recommends that adaptive behavior be assessed primarily through the use of standardized instruments. *See* AAMR 2002 at 76. These tests generally involve interviews with third-parties, such as parents or teachers, who have significant experience interacting with the individual being evaluated. *Id.* at 88-90 (describing three common standardized tests). The AAIDD also advises that the results of standardized tests should be considered in tandem with a social history because best scientific practice recognizes that "different sources of data" enable "more informed professional judgment by providing a context" to achieve a

comprehensive evaluation of the person's functioning. AAIDD, *User's Guide* at 18, 22, 86. *See also Lott*, 779 N.E.2d at 1014 (remanding for an evidentiary hearing to resolve disputed factual issues based in part upon Lott's submission of "five affidavits from family and friends showing personality problems and behavioral indicators of early-life- trauma."); *also id.* (Ruling that "[w]hile IQ tests are one of the many factors that need to be considered, they alone are not sufficient to make a final determination on this issue.").

Stereotypes and lay assumptions about people with intellectual disability can cloud or distort individual assessment. Moreover, many of the skills in the clinical definition of adaptive behavior are not relevant in prisons, such as self-direction, community resources, and leisure skills. And, notably, a person with intellectual disability is likely to ***appear*** to have stronger adaptive behavior in the structured environment of a correctional facility than in society, thus possibly inflating scores that would have been indicative of intellectual disability in the community environment. For this reason, experts conducting *Atkins* evaluations must include consideration of information relating to the defendant's adaptive skills ***before*** incarceration.

3. Onset Before Age 18

The third criterion, onset before eighteen, is the most straightforward of the three, although it is important to note that the definitions do not require a qualifying standardized test score before the age of eighteen, which might depend upon the school system the defendant attended, but only that the disability has *manifested* before that age. It also does not require that at some point before the defendant turned 18, he would have had to have an actual diagnosis of intellectual disability.

The Evaluations in this Case

The *Atkins* hearing itself focused on the three evaluators that examined Mr. Ford, with the actual purpose of determining if he met the definition of being intellectually disabled. However, those efforts were hampered by Mr. Ford himself, who had had numerous evaluations performed throughout the course of the trial, and was trying to deal with the aftermath of the jury's verdict stating he should die for the murder of Margaret Schobert. If defense counsel had pursued this line of inquiry prior to the start of trial, a more favorable decision might have resulted, since his frame of mind would be somewhat different. In addition, it was clear through the questioning by defense counsel that they were almost clueless concerning an intellectual disability diagnosis, what was needed and what

questions should be asked of the various experts. (See, Proposition of Law, No. XX)

The Defense Expert-Dr. James Karpawich

Dr. Karpawich was appointed as a defense expert, after the trial court had already engaged Dr. Katie Connell to examine Mr. Ford. Dr. Karpawich's one page resume/cv fails to mention any specialty in the field of intellectual disability, or any specialty in that field.

Dr. Karpawich was hampered in his evaluations, since Mr. Ford refused to leave his cell the first time that the examiner tried to meet with him, and when he finally came out a week later, he told the examiner he did not want to participate in another psychological evaluation, so the diagnosis by the expert, was made on records only. (Vol. 1, Atkins Hrg., p. 16)

Dr. Karpawich indicated that in spite of Mr. Ford's young age, there was quite a quantity of records available, this was due to the fact that Mr. Ford had been involved in special education classes throughout his schooling. (Id., p. 19) Mr. Ford showed signs of a learning disability as early as age 5. (Id., p. 20) Upon his initial IQ test, he received a score of 78, but Dr. Karpawich noted the school psychologist did not think he met the criteria for intellectual disability. It is important to note, that various "labels" relating to children in school result in

different obligations by the school itself to provide services for children classified with certain disabilities, so there is a reluctance to place that label on a child.

In his second IQ test, taken when he was in third grade, resulted in a score of 62. However, the examiner at the time thought that it might have underestimated (he did not say by how much) his ability due to problems with attention and impulsivity. (Id., at 24) He also indicated that later that year he was given his first Vineland Adaptive Behavior Skills test and scored a 73, which is the cutoff between mild mental retardation and borderline intelligence. He had problems with communication, daily living skills and socialization. He had poor adaptive skills. (Id., at 24-25)

The next time Mr. Ford was tested was in November of 2006, where his IQ was 75, which is the borderline range. (Id., at 26) Mr. Ford then began experiencing behavioral problems in school, often the result of frustrations with the learning process. He had difficulty staying on task, began to have disciplinary problems and continued to qualify for special education classes. (Id., at 27.)

Dr. Karpawich addressed the 75 IQ result. He explained that when you take into account, the standard error of measurement, his actual IQ is between 69 and 83.

It was noted that 8th grade was the last year of school that Mr. Ford completed. He was in the 9th grade for the rest of his school years, never advancing. (Id., at 30) He dropped out of school in October of 2011.

Dr. Karpawich noted that based on the Adaptive Behavior Skill - Residential and Community: Second Edition, Mr. Ford always had significant issues in the area of what we call social behavior. These include things like being impulsive; not assuming responsibility; poor social judgment; not considering long-term consequences of his actions; reacting poorly when he becomes frustrated; not able to cope with stress; disrupting other people; acting out in the community. (Id., at pp. 41-42) These were all "adaptive behavior" deficits. (Id.)

Dr. Karpawich concluded that all of his IQ scores were below average, he has problems with his adaptive behavior and that existed before he was the age of 18. (Id., p. 45)

In his report, (Sealed Defense Ex. A-2, Doc. # 692) Dr. Karpawich discussed his interview with Kelly Ford, Mr. Ford's mother:

> Ms. Ford indicated that Shawn has lived with her or with other family members throughout his life. She said that he has never lived on his own. Ms. Ford was asked about Shawn's ability to care for himself. She stated that he has never paid rent or bills. She reported that he never had a bank account, he never wrote checks, he never had a credit card, and he did not have a driver's license. She recalled that he did work at a neighborhood

> store for a couple hours each day after school when he was a young teenager, but he never had any other job. She stated that Shawn often needed to ask her for money. She indicated that Shawn was able to cook simple meals with a microwave, but she was concerned about him using a stove.

(Id., p. 13) Of particular note, Dr. Karpawich notes in his report that the third criteria of an intellectual disability diagnosis requires that an individual be given a diagnosis of intellectual disability prior to the age of 18. This is simply not true. The standards of the American Association of Intellectual and Developmental Disability states that the "onset before the age of 18" it does not require that at some point in time before the age of 18 someone, somewhere would have had to diagnose the person with intellectual disability. See, Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revised (DSM-IV-TR) (2000), pp. 41, 47, American Psychiatric Association.

The State's Expert: Dr. Sylvia O'Bradovich, Psy.D

Dr. O'Bradovich just obtained her Doctor of Psychology in 2010. (Sealed State's Exhibit SA-2, Doc. # 690) and her license in August, 2014. Her work experience was mainly in the Summit Psychological Associates, in Akron, Ohio. Her Curriculum Vitae failed to indicate any specialization or research in the field of intellectual disability. (Id.) She was engaged to be an expert in one other *Atkins* hearing, but had not testified.

The defense would only agree to her academic credentials, not to the State's request that she be deemed "an expert in the field of clinical psychology, specifically for the purpose of determining adaptive functioning and specifically intellectual disabilities." (Vol. 2, Atkins Hrg., p. 92) The court determined her qualified to render an expert opinion. (Id.)

Dr. O'Bradovich[8] was able to interview Mr. Ford and administer testing, specifically the Wechsler Adult Intelligence Scale (WAIS-IV) and the Vineland Adaptive Behavior Scales, Second Edition (Vineland-II). The numerical values of her testing were not included in the report.

Once the State introduced her CV and her report, they asked her for her opinion and she indicated that her opinion was that "he does not have an intellectual disability." The State concluded its examination.

The trial court, troubled by the lack of quantitative results, asked the State if they were going to address that, leading to the expert's opinion that she does not include numerical values because people put too much stock in a number. (Id., at p. 99)

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[8] It would seem that Mr. Ford was more likely to co-operate with a female evaluator than a male evaluator. This certainly seemed clear in Social History section of Dr. O'Bradovich's report, that was filled with grandiose stories and bravado attitude. (Vol. 2, Atkins Hrg., p. 115, 117)

Defense counsel cross-examined her on her failure to include the numerical values, but she held her ground stating that the only thing people rely on is the numbers, and you do not need a psychologist to interpret them. (Id., at 111)

Through the questioning by the defense, Dr. O'Bradovich indicated that Mr. Ford's IQ has always been below average.

The trial court then questioned the witness and she finally opined that Mr. Ford had a full scale IQ of 79, with a "95 percentage confidence interval that his true IQ is between 75 and 83." (Id., p. 126)

Upon re-cross, defense counsel finally brought up the "the Flynn effect" by asking if the doctor was familiar with it. She stated: "Basically the Flynn effect is the theory or belief that over time somebody's IQ score will naturally increase by about two points. There's, again, a lot of I guess you could say controversy or disagreement within the field about when and how that applies to people. But like I said, the general idea is that IQ will increase over time, depending on what test was given. If it's an outdated test, then it is a point that you need to add the Flynn score effect. So -- yeah."[9]

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[9] The WAIS-R was re-normed in 2006, the test was given to Mr. Ford in 2013 and 2015, so 7 and 9 years, respectively, after it was normed.

The Court's Expert: Katie E. Connell, Ph.D

Dr. Connell had actually spent some time working with persons with intellectual disabilities at the Cuyahoga County Board of Developmental Disabilities. (Vol. 2, Atkins Hrg., P. 145) She was recognized as an expert by the trial court. (Id., p. 149)

Dr. Connell was able to conduct two interviews with Mr. Ford as well as an interview with his mother, Kelly Ford and his sister, Patricia Ford.

Dr. Connell correctly set forth the three prongs that are looked at to make a diagnosis of intellectual disability: 1) significantly subaverage intellectual functioning. So typically an IQ of 70 or below is looked at; but that is also looked at during the standard measure on an instrument that would be used; (2) adaptive functioning deficits. And, again, that is considering where a normative range would be, this would be significant deficit. So, again, generally 70 or below; and (3) this happens in the developmental period. So prior to the age of 18, you would have to see both of these deficits present to offer a diagnosis of intellectual disability. (Id., at p. 154)

Dr. Connell summarized her findings as follows:

> Overall it's my opinion that Mr. Ford does not meet diagnostic criteria for an intellectual disability. I did not find that he had – that he met either prong. I did not find that he had deficits in intellectual functioning that meet the criteria of an intellectual disability.

> That doesn't mean he can't have below average of some functioning in IQ; that doesn't mean that he could not have scored in the borderline. But you have to have significantly subaverage deficits in that area, and I did not find that.
>
> I also did not find that he had deficits in adaptive behavior that would be required for a diagnosis of intellectual disability.

(Id., p. 156-157)

Upon cross-examination by the defense, Dr. Connell admitted that all Mr. Ford's IQ scores were in the low average range.

The Trial Court's Findings

The trial court issued his journal entry on June 23, 2015 "Resolving Intellectual Disability Claim of Defendant." (Doc. # 375)

The trial court examined the competency and sanity evaluations, as well as the report of the mitigation expert Dr. Stankowski. The only value the court found in these reports was that none of them found Mr. Ford to be intellectually disabled. (Id., at p. 17)

The trial court found that Mr. Ford could not be characterized as having "significant limitations in two or more adaptive skills", but as set out below, that is the wrong test. The trial court's final conclusion was:

> Based on the evidence contained in the trial record, in the pretrial proceedings, and introduced at the *Atkins* hearing, the court finds that defendant has not met his

> burden of proving that he had significantly subaverage intellectual functioning, or significant limitations in two or more adaptive skills, at any time before the age of 18 or thereafter.

(Id., at p. 17)

Mr. Ford Meets the Criteria set out in *Atkins*, *Hall* and *Lott*, by a Preponderance of the Evidence, therefore the State of Ohio cannot Execute Him

There is no "magic number" when it comes to determining if a person is intellectually disabled. This of course makes it more difficult to make a determination, whether someone fits the criteria.

There is no question that Mr. Ford's IQ is sub-average. While the testing had variable scores, it is disconcerting that the evaluators were so willing to discount the two scores in the 60's stating that Mr. Ford may not have given his best effort. Of course neither evaluator could say how much the score should be discounted.

In looking at the remaining scores, (Doc. # 375, p. 7) the numbers themselves are not determinative. There is a SEM attached to each sore, which puts Mr. Ford very close to or within the sub-average intelligence range. Giving the benefit of the doubt to the defendant, which we must do in a question of this import, that means that the 2001 score would be 71, the 2006 score would be 69, the 2013 score would be 76 and the 2015 score would be 75. Then, the 2013 and

2015 scores would need to have the Flynn effect added to the scores. The WAIS-IV was re-normed in 2006, which means that a person taking it in 2013 or 2015 would score higher than a person taking it in 2006. This brings the scores either under, or very near the 70 "cutoff."

Then the adaptive behavior skills need to be examined. The trial court indicated that Mr. Ford did not have significant deficient in two or more adaptive skills. However, this is an old test. When *Atkins* was decided, the requirement was that there must be deficits in at least 2 of the 10 skill areas recognized at that time. (Mental Retardation, Definitions, Classification, and Systems of Supports, 10th Edition, AAMR, p. 81) However, even the AAMR questioned that analysis, adopting instead three areas, labeled Conceptual, Social, and Practical Adaptive Skills. In order to meet the "adaptive skills" prong, a person must have deficits in **one** of the three areas.

Examples of each were set out in Table 3.1, of the Mental Retardation, Definitions, Classification, and Systems of Supports, 10th Edition, AAMR, p. 42.

Conceptual	Social	Practical

• Languuage (receptive and expressive)
• Reading and Writing
• Money
	• Interpersonal
	• Responsibility
	• Self-esteem
	• Gullibility (likelihood of being tricked or
		• Activities of daily living
		  o Eating
		  o Transfer/mobility
		  o Toileting
		  o Dressing
		• Instrumental activities of

concepts • Self-direction	manipulated) • Naiveté • Follow Rules • Obeys Laws • Avoids victimization	daily living o Meal preparation o Housekeeping o Transportation o Taking medication o Money management o Telephone use • Occupational skills • Maintains safe environments

An examination of the categories indicates that Mr. Ford had many deficits fitting these categories. As Dr. Karpawich discussed his interview with Kelly Ford, Mr. Ford's mother:

> Ms. Ford indicated that Shawn has lived with her or with other family members throughout his life. She said that **he has never lived on his own**. Ms. Ford was asked about Shawn's ability to care for himself. She stated that he has **never paid rent or bills**. She reported that he **never had a bank account, he never wrote checks, he never had a credit card, and he did not have a driver's license.** She recalled that he did work at a neighborhood store for a couple hours each day after school when he was a young teenager, but he never had any other job. She stated that Shawn often needed to ask her for money. She indicated that Shawn was able to cook simple meals with a microwave, but **she was concerned about him using a stove**.

(Sealed Defense Ex. A-2, Doc. # 692)

And then there is the onset by age 18. This was clearly established. Mr. Ford was just past his 18th birthday when this crime was committed and the records and some of the testing all took place before he turned 18.

The standard of proof is a preponderance of the evidence, not beyond a reasonable doubt. Mr. Ford met his burden.

This Court has not had many occasions to review trial court decisions on *Atkins* claims. Both *State v. Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625, and *State v. White*, 118 Ohio St. 3d 12, 2008-Ohio-1623, arose in the post-conviction context. In *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, at ¶125, the Court found that the *Atkins* claim had been waived, and in *State v. Jeremiah Jackson*, ---Ohio St.3d---, 2014-Ohio-3707, ¶¶100-101, the Court found that the trial court did not abuse its discretion in holding an *Atkins* hearing when the defense chose not to.

Mr. Ford's case presents the Court its first opportunity to review an *Atkins* determination after a hearing was held in the trial court, although the facts of this case still do not present the "normal" procedural aspects of an *Atkins* case, since the determination was made after the death verdict was returned, rather than prior to the start of the trial.

As set forth above, *State v. Lott* set out the procedure to be followed in determining whether a defendant is intellectually disabled. Unfortunately, after

Lott, the focus has oftentimes been on the IQ number, rather than on the IQ number and the adaptive behaviors together. The United States Supreme Court addressed this concern in *Hall v. Florida*, 134 S.Ct. 1986 (2014). The Court specifically found that the threshold requirement in Florida's statute was unconstitutional. In Florida, if a capital defendant's IQ score was more than 70, further exploration was foreclosed. This Court, in *Jackson* acknowledged that we do not have that issue in Ohio, even though Lott set forth a rebuttal presumption that an IQ score over 70 does not present an intellectual disability. (*Jackson*, 141 Ohio St.3d at ¶306) The Court stated "that the offender is not prohibited from presenting additional evidence of [intellectual disability], including deficits in adaptive functioning."

Unfortunately, that "number" still carries a great deal of weight and it is often hard to get beyond it. The Court recognized in *Hall*, that in the context of a formal assessment, "[t]he existence of concurrent deficits in intellectual and adaptive functioning has long been the defining characteristic of intellectual disability." *Id*[10]., at 11. The Hall court recognized:

> The professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test

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[10] Brief for American Psychological Association et al. as *Amici Curiae* 12–13 (hereinafter APA Brief) submitted in *Hall v. Florida*.

> scores should be read not as a single fixed number but as a range. See D. Wechsler, The Measurement of Adult Intelligence 133 (3d ed. 1944) (reporting the range of error on an early IQ test). Each IQ test has a "standard error of measurement," *ibid.,* often referred to by the abbreviation "SEM." A test's SEM is a statistical fact, a reflection of the inherent imprecision of the test itself. See R. Furr & V. Bacharach, Psychometrics 118 (2d ed. 2014) (identifying the SEM as "one of the most important concepts in measurement theory"). An individual's IQ test score on any given exam may fluctuate for a variety of reasons. These include the test-taker's health; practice from earlier tests; the environment or location of the test; the examiner's demeanor; the subjective judgment involved in scoring certain questions on the exam; and simple lucky guessing. See American Association on Intellectual and Developmental Disabilities, R. Schalock et al., User's Guide To Accompany the 11th Edition of Intellectual Disability: Definition, Classification, and Systems of Supports 22 (2012) (hereinafter AAIDD Manual); A. Kaufman, IQ Testing 101, pp. 138–139 (2009).

Hall, at 1995.

The Court further explained the Standard Error of Measurement and its importance in examining the IQ score:

> The SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score. For purposes of most IQ tests, the SEM means that an individual's score is best understood as a range of scores on either side of the recorded score. The SEM allows clinicians to calculate a range within which one may say an individual's true IQ score lies. See APA Brief 23 ("SEM is a unit of measurement: 1 SEM equates to a confidence of 68% that the measured score falls within a given score range, while 2 SEM provides a 95%

> confidence level that the measured score is within a broader range"). A score of 71, for instance, is generally considered to reflect a range between 66 and 76 with 95% confidence and a range of 68.5 and 73.5 with a 68% confidence. See DSM–5, at 37

Id. The concern in this case is that it does not appear that the trial court took into account the standard error of measurement when considering Mr. Ford's IQ scores. And he certainly did not factor in the Flynn effect on the score.

Finally, the *Hall* Court recognized that:

> Intellectual disability is a condition, not a number. See DSM–5, at 37. Courts must recognize, as does the medical community, that the IQ test is imprecise. This is not to say that an IQ test score is unhelpful. It is of considerable significance, as the medical community recognizes. But in using these scores to assess a defendant's eligibility for the death penalty, a State must afford these test scores the same studied skepticism that those who design and use the tests do, and understand that an IQ test score represents a range rather than a fixed number. A State that ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability. See APA Brief 17 ("Under the universally accepted clinical standards for diagnosing intellectual disability, the court's determination that Mr. Hall is not intellectually disabled cannot be considered valid").

Id., at 2001.

The trial court's determination that Mr. Ford is not intellectually disabled, must be reversed. No legitimate penological purpose is served by executing a person with intellectual disability. *Atkins,* at 317, 320, 122 S.Ct. 2242. To do so

contravenes the Eighth Amendment, for to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being.

PROPOSITION OF LAW NO. IV

THE LIMITATION OF VOIR DIRE QUESTIONING REGARDING POSSIBLE MITIGATING FACTORS DENIES A CAPITALLY CHARGED DEFENDANT A FAIR AND IMPARTIAL JURY AND A JURY THAT WILL BE WILLING TO CONSIDER MITIGATING EVIDENCE, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Trial Judge's Explanation

During individual voir dire, when trying to ascertain the prospective juror's views on the death penalty the judge would try to explain to the jurors how the case is going to proceed. However, it was a lot of reading the process to the jury. On the afternoon of the first day of individual voir dire, defense counsel brought their concerns to the trial judge:

> MR. HICKS: Judge, I would like to put on the record that I am aware that the Court is working off a script that has likely been approved by the Supreme Court and other case law. However, I believe that it is fundamentally flawed. And the nature of the questioning is such that it -- it seems to imply to these jurors that they have – they have no other option.
>
> I understand that we are working with words, which is part of the English language in which we are all trained. But the manner of it is fundamentally flawed, and it puts – these jurors, we are overwhelming them with too much information and making them come to a question -- or come to an answer that they -- they do not understand the process.
>
> And we would -- I know you are working off a script and you are following the same script with every

potential juror, but there is -- there is just a systemic flaw in the process.

MR. SINN: And I would say to that -- I have a position on this as well. I don't think that I can believe that these folks actually understand what you are saying to them when you are saying it to them. You are asking them to -- whether or not they can weigh aggravating circumstances against mitigating factors. And when they give you an assurance that they can, we deem them eligible.

But you don't tell them what aggravating circumstances are; you don't tell them what mitigating factors are. And they are agreeing with you to be compliant because they want to -- they want to be good people; they want to be good jurors. But they don't -- I don't believe they have any understanding of what you are asking of them.

And I don't think they could when you are not defining what an aggravating circumstance or a mitigating factor is; they are supposed to know that coming in. And I am trying to bring that in myself, but I think by the time I have brought it in, they are already conditioned that they need to -- they need to comply and be fair and impartial. And I think their views are already skewered.

Because folks who come in with these very pro capital punishment questionnaires, when we are done questioning them from -- from the working notes you are working off of, no longer should have those beliefs. And by that time, they have -- they are saying the things that allow them to mask whatever feelings they have. And the result is, we keep having folks coming in with pro capital punishment -- I mean, I don't know any way to explain it -- but we have got a stack of questionnaires this morning of folks who were pro capital punishment that were walking out -- who are -- who are staying on this jury after the initial questioning because they are able to espouse that they can follow the law and weigh

> aggravating circumstances versus mitigating factors, when we don't even tell them what that is.
>
> On the contrary, we are losing folks who will come in here and say that they are against capital punishment. We just had a woman who said that she could give capital punishment consideration, she could consider death. I mean, we -- for whatever reason, it didn't work for her. We didn't get to the point where she was able to stay on this jury.
>
> THE COURT: Counsel, I understand your position. You made the record. Let's move on.

(Vol. 4, Voir Dire, pp. 790-793) The point made by counsel was a valid one, the process is designed to allow automatic death penalty jurors to slip onto the jury, while jurors with scruples against the death penalty are removed.

After the defense made their argument, the trial court did start to tell the prospective jurors what the aggravating circumstances in the case were, but still would not let defense counsel inquire about certain mitigating factors that he expected to present. This process resulted in a jury that was prone to impose the death sentence.

The Voir Dire Procedure

The trial court allowed the parties to question the jurors in individual voir dire concerning their views on the death penalty. This required the jurors to be questioned regarding their views on capital punishment with the goal of excluding jurors who could not ever, under any circumstances impose a sentence of death, as

well as those jurors that would not be willing to consider mitigating evidence and automatically impose a sentence of death if an aggravated murder was committed.

However, the procedures employed to uncover bias in the prospective jury panel were inconsistently applied. The trial court's limitations of voir dire, as it related to mitigating factors, did not allow defense counsel to make an adequate determination of the juror's views.

One such limitation occurred when defense counsel would attempt to discuss what mitigating evidence is. If the jury does not understand what mitigating evidence is, they cannot honestly answer the question of whether they could consider it. When asked by the trial court what the word mitigating meant, the jurors universally indicated that they did not know, and the trial court would give them a definition of mitigating, ie. evidence that weighs in favor of something less than a death sentence. But this explanation really failed to give them a sense of mitigating evidence.

The lack of information on mitigating evidence was in stark contrast to the explanation of what aggravating circumstances they would be considering. Every juror knew what the aggravating circumstances were, ie. a course of conduct in which two or more persons were killed, and whether the aggravated murder was committed during the course of an aggravated robbery or aggravated burglary.

So why shouldn't the defense be able to tell the jurors what mitigating evidence was anticipated and inquire if they would consider it? Not asking them if they would assign it weight, and what weight would be assigned, but if they could consider it. This was particularly important in this case when the defense knew, with absolute certainty that one of the mitigating factors that would be present was the youth of the offender. Shawn Ford was just weeks past his eighteenth birthday when this offense was committed. But in the limited circumstances in which defense counsel was allowed to mention age as a possible mitigating factor, it was never allowed to determine if the juror would consider it, even when it appeared to defense counsel during questioning that the jury was not going to consider age.

As will be shown below, defense counsel was very frustrated by the objections of the prosecuting attorney that were sustained by the trial court when he tried to find out the juror's views on various mitigating factors.

Attempted Voir Dire of Jurors

Prior to the start of voir dire, defense counsel filed a motion to exclude persons who could not fairly consider mitigation, (Motion No. 24, Doc.# 63) and to allow defense counsel to thoroughly examine venire persons. (Motion No. 20, Doc. #49). The trial court denied Motion #24, "as it is phrased" and "will conduct voir dire in accordance with the Criminal Rules and applicable law." (Journal

Entry, Doc. #177) The trial court granted Motion #20, with the caveat that the state's attorneys will not be precluded from raising objections to specific questions. (Journal Entry, Doc. # 180). The State certainly made objections during the voir dire process, and in spite of the trial court's ruling, the trial court sustained the vast majority of the state's objections.

In order to make a determination that they could follow the law, the jurors should have been told what mitigating evidence would be available. For example, when examining Juror 19, the following took place:

> So assuming that you have heard those disturbing facts, assuming you have found Shawn guilty of those disturbing facts, now you have to make a decision what to do with him.
>
> What weight would you give that mitigation that we present, and how would you -- how would you consider that mitigation?
>
> What effect would that mitigation have on you in making your determination with respect to those four things?
>
> JUROR NUMBER 19: What mitigation?
>
> MR. SINN: Let's say we introduced evidence that Shawn is a young guy, he was 18 when this happened. Does that have any effect on you?
>
> MR. GESSNER: Objection, Your Honor.
>
> THE COURT: Sustain the objection.
>
> The juror cannot be asked to engage in the process, at this point not having heard any evidence, or make commitments based on hypotheticals.
>
> MR. SINN: Well, the mitigation that we would be introducing would be evidence of – it can be anything; but it could be Shawn's age, mental health –

> MR. GESSNER: Objection.
> THE COURT: Sustained.
> MR. SINN: What information would be important to you in trying to make this decision? Would you want to know more about Shawn?
> MR. GESSNER: Objection.
> THE COURT: I am going to sustain the objection.
> The question at hand is whether the juror would meaningfully consider any mitigating evidence, whatever that may be. That's the question. That's the legal standard. The objection is sustained.
> MR. SINN: I guess that is the question I am going to ask you. Would you be able to listen to the mitigation evidence as presented by the defense and weigh it in determining whether or not death is appropriate or one of those three other options?
> JUROR NUMBER 19: Yes.

(Vol. 4, Voir Dire, pp. 712-714) Defense counsel was clearly frustrated after this exchange, and his question illustrated this frustration:

> MR. SINN: Well, I am unclear how -- how am I to inquire as to whether or not they are open to mitigation when I am not able to inquire as to what the mitigation evidence is -- I can't tell them what mitigation evidence is.
> THE COURT: I believe that the law allows you to give examples of what mitigation evidence would be. But what you have been doing is asking jurors to commit that they would consider these mitigating factors, and then you name them. There may or may not be evidence of those.
> Secondly, you are asking the juror to, in essence, from their own experience or background identify for themselves what factors they may think as mitigating; which also is inappropriate.

Mitigating evidence that the defense presents is whatever it is that you choose to present. At this stage of the case, I don't even know what those factors will be, other than potentially the young age of the defendant.

So you are certainly willing -- or able, in my view, to identify things that could be considered to be mitigating evidence, if it is submitted.

MR. SINN: Then I can't ask them whether or not they would be able to consider that mitigating evidence?

THE COURT: I think you are perfectly entitled to ask them whether they would meaningfully consider those items.

MR. SINN: Okay. THE COURT: But you are going far beyond that.

MR. SINN: Well, help me with that, because I am engaged in -- I am engaged in thinking on my feet here, and it is probably difficult to get what you are getting at.

THE COURT: I can't help you with that other than to say as I have sustained objections, I am hoping that you get the idea that there is some things you cannot ask the jury to commit to. You are asking these individuals to commit or you are giving them hypotheticals -- If the facts are this, how would you rule -- and that's not appropriate.

MR. SINN: Well, I am asking -- okay. I appreciate that.

I am asking them what type of evidence -- what type of information they would think would be important to them in making a decision.

THE COURT: That is -- that is not proper.

MR. SINN: Okay.

(Vol. 4, Voir Dire, pp. 721-724)

The next day the defense counsel tried to apply the court's ruling:

JUROR NUMBER 47: So it would -- it would really just depend on what extra information was brought

> up, though. I can't say that -- you know, for certain, no, I wouldn't, because I don't know what other information there is without hearing it first.
>
> MR. SINN: Would you be willing to give meaningful consideration to things such as age? JUROR NUMBER 47: I don't think age should just be the only factor, but –
>
> MR. SINN: No.
>
> MR. GESSNER: Objection to –
>
> THE COURT: Sustained.
>
> MR. GESSNER: -- this line of questions.
>
> THE COURT: Sustained.

Vol. 5, Voir Dire, p. 994) There was nothing erroneous with the line of questioning that the defense counsel was engaging in, he was not asking the juror how much weight she would give the factor of youth, but whether she would consider it. This was very important in this case when the defendant was just past his 18th birthday and it is a statutory factor for consideration.

The defense tried again with another juror:

> MR. SINN: Are -- can I assume that if you find in a case that someone did a cold-blooded killing –
>
> JUROR NUMBER 25: Okay.
>
> MR. SINN: -- it wasn't an accident; they did it, they intended to do it, they meant to do it -- that you are not going to be able to sit back and give meaningful consideration to their upbringing and to their –
>
> MR. LOPRINZI: Objection.
>
> THE COURT: Sustained.
>
> You need not answer that question.

(Vol. 5, Voir Dire, pp. 1043)[11] This was a reasonable question of a juror that defense counsel felt might be an automatic death penalty juror. Defense counsel was not asking how much weight the juror would give to the evidence, just whether he would meaningfully consider it. The constant barrage of objections by the prosecuting attorney made it almost impossible to question the jurors. The prosecutor argued to the court that defense counsel was indoctrinating the juror, even though the questioning was limited by their numerous objections. (Vol. 13, Voir Dire, pp. 2576-2577).

The limitations set out by the court denied the defense an opportunity to conduct a meaningful voir dire in order to obtain a fair and impartial jury.

The Applicable Law

In *Lockett v. Ohio*, 438 U.S. 586 (1978), the Court ruled that for a capital sentencing procedure to pass constitutional muster, the death penalty statute must not preclude consideration of relevant mitigating circumstances. In *Eddings v. Oklahoma*, 455 U.S I 04, 144 (1982), the Court stated that "just as the state may not by statute preclude the sentencer from considering any mitigating factor,

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[11] See also Vol. 7, Voir Dire, pp. 1544; Vol. 10, Voir Dire, pp. 2002-2003, 2007-2008; p. 2046; Vol. 12, Voir Dire, pp. 2323-2324; 2533; Vol. 13, Voir Dire, pp2566-2567, 2569-2570, 2603; Vol. 14, Voir Dire, pp. 2757, 2786, 2788, 2822, 2830, 2832, Vol. 15, Voir Dire, pp. 3051, 3060

neither may the sentencer refuse to consider, as a matter of law, any mitigating evidence".

In *Adams v. Texas*, 448 U.S. 38 (1980), the United States Supreme Court created the following standard for granting excusal for cause in death penalty cases:

> (A) juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance. With his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

Id. at 45 (emphasis added). The application of this minimum constitutional standard was affirmed by the Court in *Wainwright v. Witt*, 469 U.S. 412 (1985).

In *Morgan v. Illinois*, 504 U.S. 719, 729 (1992), the Court held that a juror who will fail to in good faith consider mitigating evidence must be excluded for cause. The Supreme Court reasoned that such a juror has already formed an opinion on the merits so mitigating evidence would be irrelevant to that juror. Id. The Supreme Court also held that if even one such juror sits in a capital case and a death sentence is imposed, the State "is disentitled to execute the sentence." Id. Therefore, pursuant to *Morgan*, defense counsels questioning was appropriate.

A trial court has discretion to determine the method by which voir dire examination will be conducted. *State v. Mapes*, 19 Ohio St.3d 108 (1985); R.C. §2945.27; Ohio Crim.R. 24. However, the exercise of this discretion is limited by the constitutional dictates of due process and the right to be tried by an unbiased jury. *Morgan v. Illinois, supra*. The stakes are never higher in litigation than they are in capital litigation, and efforts to fashion remedies best designed to grant a defendant a fair and impartial trial must begin with voir dire. A capital defendant must be given sufficient latitude to voir dire prospective jurors. *State v. Jenkins*, 15 Ohio St. 3d 164, 186, 473 N.E.2d 264 (1984). "Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *Rosales-Lopez v. United States*, 451 U.S. 182, 189, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981). The ability to make informed challenges during jury selection ensures the right to an impartial jury and such informed decisions can be made only through the use of probing voir dire. Justice Harlan emphasized the importance of the voir dire process noting that the right to challenge is "one of the most important of the rights secured to the accused" and "[a]ny system for the empanelling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned." *Pointer v. United States*, 151 U.S. 396, 14 S.Ct. 410, 38 L.Ed. 208 (1894).

This Court's decisions applying the United States Supreme Court caselaw has not always been clear. In *State v. Pickens*, 141 Ohio St..3d 462, 2014-Ohio-5445, ¶60 the Court summed up it rulings on this issue:

> We have repeatedly held that a trial court is under no obligation to allow counsel to question prospective jurors about specific mitigating factors. *See, e.g., State v. Cunningham,* 105 Ohio St.3d 197, 2004-Ohio-7007, 824 N.E.2d 504, ¶ 24; *Wilson; see State v. Jones,* 91 Ohio St.3d 335, 338, 744 N.E.2d 1163 (2001). Neither the prosecutor nor defense counsel, however, is prohibited from mentioning or asking questions about specific mitigating factors. *See State v. Jackson,* 107 Ohio St.3d 300, 2006-Ohio-1, 839 N.E.2d 362, ¶ 131 (court may allow counsel to refer to specific mitigating evidence as examples of mitigating factors during voir dire).

It was clear from the trial court's rulings in this case that the court was under the impression that defense counsel could not question a juror about specific mitigating factors. The trial court's application of the contradictory caselaw resulted in an overly restrictive voir dire process. It was not clear from the State's objections and the court's ruling sustaining the objection, why the question that the defense was asking was objectionable, particularly under *State v. Jackson,* 107 Ohio St.3d 300, 2006-Ohio-1, 839 N.E.2d 362, ¶ 131.

The defense was unable to ask the questions that *Morgan v. Illinois* clearly allows in order to determine if the juror would consider the mitigating evidence in the case. The failure resulted in an impartial jury in violation of the Sixth, Eighth

and Fourteenth Amendments to the United States Constitution. Appellant Ford is entitled to a new trial with an impartial jury.

PROPOSITION OF LAW NO. V

A MISSTATEMENT OF THE WEIGHING PROCESS BY THE STATE AND THE TRIAL COURT, AND ATTEMPTS TO DIMINISH MITIGATING EVIDENCE BY THE PROSECUTING ATTORNEY, RESULTED IN A VERDICT THAT IS NOT RELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH, AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, ¶¶ 5, 9, AND 16 OF THE OHIO CONSTITUTION.

Voir dire examination of prospective jurors is a crucial part of the trial process in a capital trial. It is the parties first opportunity to discuss the case with the jurors and uncover bias and prejudice the jurors may have. It should not be used as an opportunity to misstate the law or diminish the importance of mitigating evidence, as the prosecuting attorneys did in this case.

Misstatements by the Trial Court

The Court has found that the jury need not be unanimous in finding death was inappropriate before considering the life sentences. *State v. Brooks* 75 Ohio St. 3d 148, 159-160 (1996). The Court found that an instruction telling the jury "[y]ou are not required to determine unanimously that the death sentence is inappropriate before you consider the life sentences" is desirable. *State v. Taylor*, 78 Ohio St.3d 15, 29 (1997).

Yet, during the course of voir dire, the trial court led the prospective jurors to believe that they would be unanimously finding the aggravated circumstances

did not outweigh the mitigating factors before moving on to a life sentence. When voir dire began, the trial court would explain to the jury:

> THE COURT: If in the mitigation phase, however, the jury did not unanimously find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors, the jury would not be permitted to render a verdict for a death penalty, but the jury would be required to consider one of three other options.

(See, Vol. 5, Voir Dire, p. 1023-1024, 1071 as an example). But then the trial court, in its explanation to each prospective juror, began to state it a bit differently:

> Now, if at the end of the mitigation part, the second trial, the jury decides beyond a reasonable doubt unanimously that the aggravating circumstances outweighed the mitigating factors or evidence, then the jury would be required to sign the verdict for the death penalty.
>
> JUROR NUMBER 39: Okay.
>
> THE COURT: All right.
>
> Now, on the other hand, if -- if in the second phase of the trial the jury decides that the mitigating -- pardon me -- that the aggravating circumstances do not outweigh beyond a reasonable doubt the mitigating factors, then the jury could not impose or require a death penalty.

(Voir Dire, pp. **1156**, 1259, 1297, 1367-1368, 1477, 1518-1519, 1573, **1641**, 1716, **1755-1756**, **1792**, 1834-1835, 1874, 1933, 1986-1987, **2032**, 2096, **2148-2149**, 2229, **2311**, **2373**, 2418, 2467, 2503, 2547, **2595**, 2643, 2687, 2731, **2772**, 2862,

2932, 3043, 3091, 3139, 3187, 3289, 3336, 3488-3489, 3538[12]) The wording in the second half of the explanation would lead a juror to believe that the jury would have to unanimously find that the aggravating circumstances do not outweigh the mitigating factors, before moving onto consideration one of the life sentences. Under the statute, and *Brooks*, this is not correct. The "jury" does not have to decide that the aggravating circumstances do not outweigh the mitigating factors, if just one juror makes that decision, no death sentence can be imposed.

Misstatements by the Prosecuting Attorneys

The prosecuting attorneys, through their questioning of the prospective jurors engaged in conduct that either misstated the law, or attempted to diminish mitigation. The first day of individual voir dire the prosecuting attorney was questioning Juror No. 6:

> MR. LOPRINZI: There are some people that are okay with the death penalty, the concept; but when it comes to that moment, if you decide -- if you get in there and all 12 of you go, those mitigating factors, *"Man, they just don't do much for me,"* and you have to sign that verdict for death, you essentially are going to sign a piece of paper that are going to end that man's life. Can you be the one to sign that paper?

(Vol. 3, Voir Dire, p. 467)(emphasis added)

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[12] The numbers in bold are jurors that were seated on the jury.

This is not a correct statement of how the jury is to weigh mitigating evidence. The mitigating factors should be considered, and the fact that they "do not do much for me" is not the correct weighing process.

The prosecuting attorney, with the next juror, decided to give his own definition aggravating circumstances:

> So then we go to this second phase where, again, you have heard the specifications, the aggravating circumstances -- *the bad facts* -- and that -- you then get to hear any reasons -- mitigation -- any reasons why the death penalty shouldn't be imposed. Okay. Would you be willing to listen to both there?

(Vol. 3, Voir Dire, p. 492-493)(emphasis added) The prosecuting attorney then compounded the error by using his erroneous definition in the weighing process:

> MR. GESSNER: Okay. And then, only after that, and after been given the instructions on how to apply the law from the Judge, you go back in the jury room and you weigh them, and you determine that those aggravating circumstances -- *those bad facts* -- outweigh the mitigating factors, or the reasons not to give death, and they outweigh them beyond a reasonable doubt, then your sentence has to be death *if the bad facts* outweigh any mitigating factors beyond a reasonable doubt. Could you accept that?

(Id.)(Emphasis added)

The prosecuting attorney's description of the aggravating circumstances as "bad facts" is an incorrect statement of the law. Ohio Rev. Code, Section 2941.14

clearly states "The aggravating circumstances that may be considered in imposing the death penalty are those specifically enumerated in R.C. §2929.04(A) and set forth in the indictment." There is nothing in R.C. § 2929.04(A) that lists "bad facts." There were many "bad facts" in this case, but not all of them were aggravating circumstances. To tell the juror that the aggravating circumstances are "bad facts" created the situation where the "bad facts" become non-statutory aggravating circumstances. State v. *Penix,* 32 Ohio St.3d 369, 370-372, 513 N.E.2d 744. *See, also*, *State v. Johnson* , 24 Ohio St.3d 87, 92-94, 494 N.E.2d 1061 (1986). It is also akin to telling the jurors that the nature and circumstances of the offense are aggravating circumstances. *State v. Ketterer,* 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 165–166.

Defense counsel picked up on the misstatement in his questioning:

> MR. SINN: The question is not whether or not you are going to give the death penalty. It is whether or not you could do what the Judge asks you to do and consider the aggravating circumstances -- all the bad stuff the State is going to put out –
>
> JUROR NUMBER 4: Uh-huh.
>
> MR. SINN: -- against the mitigating evidence -- all the stuff that the defense is going to put out -- and make a determination about whether or not death is the right thing to do. You may decide death isn't the thing to do.

(Id., at p. 550)

While defense counsel slipped and used this description, (See, Proposition of Law, No. XX) it was the prosecuting attorney who used this definition throughout the voir dire process. See, Voir Dire, pp. 656, 607; **702-703**; 828-829; 943, **1007**, 1092-1093, **1122**, **1217**, 1527-1529, **1646, 1762**, 1839-1840, 1884-1885, 1887, 1993, 2121-2123, 2206, **2316-2317**, 2245, **2384-2385, 2387**, 2472, 3066, 3196, 3299, 3387, and 3446-3447[13].

The prosecuting attorney also decided to come with his own way to describe the weighing process:

> MR. LOPRINZI: It is an odd thing to weigh, but we are going to ask you to do that. Basically, what we are going to ask you to do is give how much, maybe -- instead of saying what it would weigh -- *how much do thingsmatter to you, okay?*
>
> So if the aggravating circumstances *matter a lot to you, you give it a lot of weight.* And if the things that they want to present to you in mitigation you feel aren't -- *that doesn't matter much,* that's okay, too.
>
> Conversely, if aggravating circumstances that the State presents *don't matter much to you*, you give them little weight, or no weight; you can give them no weight.
>
> All you have to do -- and the same with theirs. If they give you mitigating factors -- or present mitigating factors and you go, "*That matters a lot*; that's important to me," you give it a lot of weight. If they present mitigating factors and you say, "Hmm, that doesn't mean anything to me," you can give it little weight or no weight. It is all up to you, okay?

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[13] The page citation in bold refer to jurors that were seated in the case.

> *Are you okay with making those kind of weighing decisions, deciding how much things matter to you?*

(Vol. 5, Voir Dire, pp. 1031-1032)(emphasis added)

This is an incorrect description of the weighing process and a process in which the defendant will almost always be sentenced to death, because how is a juror every going to say it does not matter that two people were killed. Again, this was not an isolated incident. See, Voir Dire, p. 1031-1032, **1186-1187**, 1495, **1958-1959**, **1966-1967**, 2245, 2438, 2648, 2740-2741, **2798**, 2951-2952, 2974, 3004, 3056, 3067, 3100, 3163-3164, 3167, 3269-3270.[14]

The prosecutor total skewed the weighing process:

> How do you weigh killing two or more people versus his age? How does that weigh, right?
>
> So the question becomes is -- and I kind of change it a little bit -- how much does it matter to you? Does the killing of or attempting to kill two or more people, or the killing of someone during the commission of an aggravated robbery/burglary, weigh -- if that matters more to you than something like age –

(Vol. 16, Voir Dire, p. 3162-3163)

The prosecutors also described the weighing process to Juror No. 70, who sat on the case as follows:

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[14] Pages in bold are jurors who sat on jury.

> MR. GESSNER: Okay. Well, those mitigating factors that the defense brings in –
>
> JUROR NUMBER 70: Uh-huh.
>
> MR. GESSNER: -- you understand, you can look at them, you weigh each one. You can look at one and say, "That doesn't mean a thing to me."
>
> JUROR NUMBER 70: Yes, yes.
>
> MR. GESSNER: Or you can say, "I like that one" –
>
> JUROR NUMBER 70: Yes.

(Vol. 9, Voir Dire, pp. 1764-1765)

This is not correct, it is not a matter of liking or not liking the mitigation, or whether it means something to you. Mr. Ford was on trial for his life and deserved to have a juror that took the correct weighing process seriously, not like they were picking out a melon.

With Juror 48, also a seated juror, the prosecutor told the juror: "If you do not think that that *age and background stuff* is not as significant, it doesn't weigh as much meaning as the other things, you are going to have to find for death. (Id., p. 1816)(emphasis added) Mitigation is not "stuff" to characterize it as such only diminishes any value that it may have to a juror.

And in front of seated Juror 72, the following took place:

> At that point in time, defense will have the opportunity to present and also argue about mitigating -- mitigating circumstances, okay? And what they will do -- or factors, mitigating factors. And what they are going to -- now, Mr. Sinn has said they are not excuses. You can

call them whatever you want. They are not legal excuses like it was an accident; that's a legal excuse.

MR. SINN: Objection.

THE COURT: Basis?

MR. SINN: Implying that mitigation somehow is not excuses but you can call it whatever you want.

THE COURT: I agree with that objection. I will sustain it.

Please rephrase.

MR. LOPRINZI: I am sorry. I didn't understand.

THE COURT: I am sustaining the objection. The juror -- no member of the jury is free to call things whatever they want.

MR. LOPRINZI: Oh.

THE COURT: They have to use the legal instructions provided by the Court.

MR. LOPRINZI: Okay.

They are not legal excuses, but they are excuses. They are reasons why a death penalty would not be appropriate.

MR. SINN: Objection. They are not excuses. Mitigation evidence is not an excuse.

THE COURT: Counsel said they are not legal excuses. Is that what you are objecting to?

MR. SINN: Yes. He said -- he said they are excuses. Mitigations are excuses.

They are not excuses.

THE COURT: He said they are not legal excuses.

MR. SINN: There is followup to that, Your Honor.

MR. HICKS: Judge, he has followup.

THE COURT: Well, let's make sure we have got it correctly.

MR. SINN: Okay.

THE COURT: Let's start over.

MR. LOPRINZI: Okay.

THE COURT: And make sure we are clear on the record.

> I will sustain that objection.
>
> MR. LOPRINZI: They are not legal excuses like accident or self-defense. Those things would be in the first part, the trial portion, the not guilty and guilty portion, okay.
>
> These are nonlegal excuses. They are reasons why the death penalty –
>
> MR. SINN: Objection. They are not excuses.
>
> THE COURT: I will sustain the objection.
>
> A nonlegal excuse would be an excuse.
>
> MR. LOPRINZI: Correct.
>
> THE COURT: Right. But they are not excuses.

(Vol. 10, Voir Dire, pp. 1954-1957)

The defense became so concerned about the Prosecutor's tactic's, he requested that Juror No. 72 be excused for cause:

> THE COURT: Does the defense wish to take a position with respect to Juror Number 72?
>
> MR. SINN: We do, Your Honor. We would challenge for cause.
>
> Your Honor, throughout the course of the questioning, we had a series of objections, and there is both sides back and forth. But there was an objectionable statement made by the prosecutor more than once, and it was that mitigation are excuses. And it was said in several different ways, but it boiled down to telling this juror that whatever mitigation evidence we have is going to be some type of excuse for murder. And it tended to minimize our mitigation. It almost criticized it and make fun of our mitigation as if it is going to be somehow weak or not have meaning. I think she has been irreparably harmed.
>
> I think she has been irreparably harmed to the point that she now has an idea that mitigation evidence is somehow some kind of defense tactic or some kind of

> legal maneuver and she doesn't trust it. And I am concerned that's not going to be something she can overcome. And that's why I don't think that she is -- I don't know how she is going to react to it. I just know she has heard this information, it has been put in her head on several occasions by the State of Ohio, and at this point in time I don't think you can unring that bell. I move to challenge her for cause.

(Id. p. 1969-1970) The trial court denied the challenge for cause and this juror was seated on the panel that decided the case.

The Supreme Court has clearly established that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954 (quoting *Woodson v. North Carolina,* 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976)). This means that "the Eighth and Fourteenth Amendments require that the sentencer ... not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*

This consideration of mitigating factors--required by the Eighth Amendment--is necessary to allow the required individualized determination of

whether a defendant should be sentenced to death. *Tuilaepa v. California,* 512 U.S. 967, 971-73, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994); *Zant v. Stephens,* 462 U.S. 862, 878-79, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). The Supreme Court's "consistent concern has been that restrictions on the jury's sentencing determination not preclude the jury from being able to give effect to mitigating evidence." *Buchanan v. Angelone,* 522 U.S. 269, 276, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998).

The Eighth Amendment mitigation requirement also applies to the actions of prosecutors. *See Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) (a prosecutor's comments that led the jury to believe that later an appellate court could mitigate the death sentence violates the Eighth Amendment because it misleads the jury as to its responsibility). When a prosecutor's actions are so egregious that they effectively "foreclose the jury's consideration of ... mitigating evidence," the jury is unable to make a fair, individualized determination as required by the Eighth Amendment. *Buchanan,* 522 U.S. at 277, 118 S.Ct. 757. As a result, a prosecutor's comments violate the Eighth Amendment when they are so prejudicial as to "constrain the manner in which the jury was able to give effect" to mitigating evidence. *Id.*

The prosecutor's behavior in voir dire, by his erroneous definition of aggravating circumstances as "bad facts;" by skewing the weighing process by asking jurors to determine which "matters more;" by demeaning mitigating evidence by referring to it as whatever "stuff" they want to present; or determine whether it "does something for me," was able convey to the prospective jurors that mitigation was nothing compared to the lives of the two people who were killed. His definitions and erroneous description of the weighing process constrained the manner in which the jury was able to give effect to mitigating evidence.

The prosecutor's actions in voir dire, resulted in a jury that could not properly consider the mitigation in the case and engage in the appropriate weighing process. The death sentence must be reversed, as the imposition of the death sentence violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

PROPOSITION OF LAW NO. VI

THE TRIAL COURT SHOULD INSURE THAT THE JURY EMPANELED TO DETERMINE A DEFENDANT'S FATE CAN BE FAIR AND IMPARTIAL; WHEN THE TRIAL COURT REFUSES TO REMOVE BIASED JURORS AT THE DEFENSE REQUEST, THE RESULTANT JURY VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 5 AND 16 OF THE OHIO CONSTITUTION.

The process of voir dire in a capital case is designed to uncover bias in prospective jurors so that jurors who are predisposed to impose the death sentence are excluded from the jury pool, as well as to rid the jury pool of jurors who could never under any circumstances follow the law. The jurors are called ADP or automatic death penalty jurors.

In Mr. Ford's case, the trial court allowed eight jurors to remain in the jury pool that should have been excused. The trial court's failure to excuse for cause jurors who were obviously biased denied Mr. Ford his constitutional rights as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Sections 5 and 16, Article I of the Ohio Constitution.

The Biased Jurors

Defense counsel requested that the following eight jurors be removed for cause. (Voir Dire, Jurors No. 25, 36, 39, 45, 72, 103, 106, 134). The trial court overruled the objection and the jurors remained in the jury pool. Defense counsel

used three peremptory challenges to remove three of these jurors (Nos. 25, 36, and 45) and two of these jurors actually sat as members of the jury that decided the case. (Nos. 39 and 72).

Juror No. 25 (Vol. 5, Voir Dire, pp. 1012-1051)

When this juror was asked their views on the death penalty he stated: "Well, as I put on here, [jury questionnaire] but not too -- too detailed; but, you know, I -- I look at it as depending on what the crime is, you know, the circumstances that surround it, you know. I mean that's my feeling. You know, it is like when Jeffrey Dahmer was -- you know, I mean, obviously, I think the death penalty fits, you know. But it -- that's my beliefs –" (Id., p. 1024-1025)

When defense counsel questioned him he again emphasized that the 'severity of the crime, like how it is committed" would be important in making his decision. (Id., p. 1035) Defense counsel brought up Jeffrey Dahmer and the juror indicated that everyone in the room would have to agree he deserved the death penalty. He returned to his theme that depending on how vicious the crime was or how it was committed needs to be weighed. (Id.) When defense counsel suggested that perhaps Jeffrey Dahmer came from a broken home, the juror's response was "I came from a broken home. It doesn't make me like that, so I don't think." (Id. at p. 1036)

Defense counsel moved for cause, he argued that the juror is not open to a verdict other than death when there is a conviction for aggravated murder and his feelings on the death penalty were directly related to the heinousness of the crime. (Id., p. 1050-1051) The court overruled the challenge. The defense used a peremptory challenge to remove the juror from the jury pool.

Juror No. 36 (Vol. 5, Voir Dire, pp. 1058-1102)

When this juror was asked about their views of the death penalty, the juror responded: "I believe it is -- the circumstances of the crime should possibly dictate whether or not a death penalty sentence has occurred. For example, if it is a police officer, I think that's automatic. Whether or not -- whether or not malicious intent is proved." (Id., p. 1067) This juror also believed in the majority rule, if everyone else in the room was voting one way she would have to vote with the majority. (Id. p. 1088)

Defense counsel challenged for cause. The defense was concerned about whether the juror had the capacity to do the job. "I just don't think that he is able to give careful consideration to – meaningful consideration to mitigation evidence when he is unable to actually follow along with the process. The trial court overruled the challenge. (Id., pp. 1101-1102) This was contrary to the actions he

took the previous day when he removed a juror because he did not feel she had the intellectual capacity to follow the proceedings. (Vol. 3, Voir Dire, p. 559)

Defense counsel used a peremptory challenge to remove this juror.

Juror No. 39 (Vol. 6, Voir Dire, pp. 1137-1197)

When this juror was asked her views on the death penalty, she indicated: "I agree with it. I feel like if you are found guilty of a crime and that's an option, then I agree with it. That's all I can really say. If you are found guilty and that's an option, then you have to face the consequences." (Id., p. 1151) She then indicated that her spouse was in prison, serving time for aggravated murder. (Id., p. 1165) Defense counsel specifically challenged her for cause on the basis of her husband being in prison and it would be difficult for her to be fair and impartial. (Id., p. 1196) The trial court overruled the challenged and this juror sat on the jury that decided Mr. Ford's fate.

Juror No. 45 (Vol. 5, Voir Dire, pp. 928-969)

The trial court asked Juror No. 45 what his views were on the death penalty. This set the tone for the remaining of his questioning:

> JUROR NUMBER 45: The death penalty is a -- first of all, is one of the greatest deterrents to crime. If an individual is sentenced to death, those other criminals out there, if they do the same thing, they think in their mind, "Wow, if I get caught, it is all over but the shouting." So it is a good deterrent.

> . . . I believe if a man is found guilty, and beyond a shadow of a doubt, that he committed that crime with the intent to cause bodily harm or death, then the death penalty should be considered because he had no regard for human life. And that kind of an attitude and that kind of a character should not be allowed to be released on the public.

(Id., pp. 935-936). The trial court then went on to explain the process in the penalty phase of the case, and to allow counsel to question the juror. At the end of the questioning, the defense moved to excuse the juror for cause. He stated as his reason:

> The only real time that this gentleman would not think that death is appropriate -- this was a recurring theme with him, and I tried to work through with him. But his theme is: Death would not be an appropriate penalty for anyone who is not 100 percent guilty.
>
> Even in his jury questionnaire, if you go over his jury questionnaire, he talks about times when the proper punishment in some case is not the proper punishment in other cases. And he explains his answer with: "In a case of pure self-defense, the death penalty would not be justified if self-defense was proven."
>
> So he has got a proof problem. He has got a burden of proof problem. And he has got -- the only time that death is not going to be an appropriate punishment for him is when there is a problem with the State's case in chief in whether or not the person is guilty.

(Id., at pp. 968-969) The trial court overruled the challenge for cause. The defense used a peremptory challenge to remove this juror.

Juror No. 72 (Vol. 10, Voir Dire, pp. 1914-1972)

In response to the court's question, this juror indicated that she believed in the death penalty. (Id., p. 1929) When questioned further by the defense, she stated that "I think that there are some very sick individuals that can't be rehabilitated and I don't need to be around to be influencing other people to be - - that they are a lost cause." (Id., p. 1937) Defense counsel questioned her further concerning her views that the death penalty may be more warranted in cases where there are certain sick individuals who do depraved things. (Id., p. 1940). When defense counsel suggested that she would not be open to mitigation, she responded "So what, is there a question there?" (Id.)

The other problem with this juror arose during the questioning by the state, where the state engaged in questioning seeking to diminish the value of mitigating evidence by calling it excuses. Defense counsel challenged this juror for cause on that basis:

> Your Honor, throughout the course of the questioning, we had a series of objections, and there is both sides back and forth. But there was an objectionable statement made by the prosecutor more than once, and it was that mitigation are excuses. And it was said in several different ways, but it boiled down to telling this juror that whatever mitigation evidence we have is going to be some type of excuse for murder. And it tended to minimize our mitigation. It almost criticized it and make fun of our mitigation as if it is going to be somehow

> weak or not have meaning. I think she has been irreparably harmed.
>
> I think she has been irreparably harmed to the point that she now has an idea that mitigation evidence is somehow some kind of defense tactic or some kind of legal maneuver and she doesn't trust it. And I am concerned that's not going to be something she can overcome. And that's why I don't think that she is -- I don't know how she is going to react to it. I just know she has heard this information, it has been put in her head on several occasions by the State of Ohio, and at this point in time I don't think you can unring that bell. I move to challenge her for cause.

(Id., at pp. 1969-1970) (See, also Proposition of Law No. V)

This juror was seated as a juror in the case that decided Mr. Ford's fate.

Juror No. 103 (Vol. 9, Voir Dire, pp. 1822-1848)

When this juror was asked his views on the death penalty, he simply said "Well, I am for it, if convicted. I have no problem with it." (Id., p. 1831) When the court asked the juror if he was in favor of the death penalty in every case where a murder has been committed, he asked "In every case?" The court said yes, and he said yes, he was in favor of the death penalty in every case in which a murder has been committed. (Id., p. 1836)

When he was questioned by defense counsel about how he came to have his views, he stated: "I have lost a few friends. And I believe you take a life, then

take your own life." (Id., p. 1841) When asked if he stood by his answers in the jury questionnaire, he said yes.

Defense counsel moved for cause:

> MR. SINN: I would challenge for cause, Your Honor. This individual has a penalty specific bias. He answered every question truthfully; he is a very honest man. If you take him at his word, as I will, he believes the death penalty should be imposed on all capital murder cases, he believes it's the proper punishment in all cases someone is convicted of aggravated murder. He believes an eye for an eye; take a life, lose a life. And he has lost some friends to murder. I believe that he has one logical position when it comes to somebody who is convicted of aggravated murder, and that is they should forfeit their life.

(Id., p. 1844) The trial court overruled the challenge. (Id., p. 1846).

Juror No. 106 (Vol. 14, Voir Dire, pp. 2802-2846)

This juror told the court that he was for the death penalty, "if you do something wrong, you have to pay the consequences. I believe, like, an eye for an eye." (Id., p. 2811) In his questionnaire, he indicated an eye for an eye, unless you can prove otherwise." (Docs. # 724-726, Jury Questionnaires, PDF p. 426)

When questioned by defense counsel, he indicated that he would opt for the death penalty if he were sure the person committed the crime. Even after the process was explained, he indicated: "If we find him guilty, . . . why even have the mitigation phase if you don't- -if it is not about self-defense and all that stuff, what

is it about?" (Id., p. 2828) If they got to the mitigation phase, the defense would have to prove to him why he should get a penalty less than death. (Id., p. 2830)

Defense counsel moved to remove the juror for cause. He had two basis, he could not give meaningful consideration to mitigating circumstances and he would burden shift on the life or death issue, voting for death unless presented compelling evidence otherwise. (Id., p. 2843). The trial court found him qualified to serve.

Juror No. 134 (Vol. 17, Voir dire, pp. 3367-3406)

This juror indicated that the death penalty would depend on the situation. She used as an example that if a child was raped, and the parent went out and found the person who did it and killed that person, they should not get the death penalty. (Id., p. 3378-3379)

When defense counsel inquired, he asked the juror if there was a situation in which she was 100% positive the person was guilty, would she go for the death penalty every time, and she said yes. (Id., p. 3392) "The more horrific the crime, the more automatic you are going to go to the death penalty." The juror responded "right." (Id., p. 3394)

Defense counsel challenged for cause. He argued that she had a case specific penalty bias, she is going to vote for the death penalty based on the

heinousness of the crime. (Id., p. 3404) The trial court overruled the motion for cause and found the juror qualified to serve.

Analysis

Pursuant to the Sixth and Fourteenth Amendments, a criminal defendant is guaranteed the right to an impartial and unbiased jury. *Morgan v. Illinois,* 504 U.S. 719, 727, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). "Among the most essential responsibilities of defense counsel is to protect his client's constitutional right to a fair and impartial jury by using *voir dire* to identify and ferret out jurors who are biased against the defense." *Miller v. Francis,* 269 F.3d 609, 615 (6th Cir.2001); *see United States v. Blount,* 479 F.2d 650, 651 (6th Cir.1973) ("The primary purpose of the voir dire of jurors is to make possible the empaneling of an impartial jury through questions that permit the intelligent exercise of challenges by counsel."); *see also Mu'Min v. Virginia,* 500 U.S. 415, 431, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991) (stating that *voir dire* "serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges"); *Rosales-Lopez v. United States,* 451 U.S. 182, 188, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981) ("*Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored."). See, *Miller v. Webb*, 385 F.3d 666, 672 (6th Cir. 2004).

In *Morgan v. Illinois*, 504 U.S., at 724, the court held:

> A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because if the juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the due process clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the state is disentitled to execute the sentence.

(Emphasis added.) Here, two such jurors were empaneled Juror 39 and 72. The State is disentitled to execute Ford. *Morgan* allows the defendant the same rights, and imposes the same limitations to challenges for cause, for those persons who *always* impose death following conviction in a capital case as for those who will *never* impose death.

Significantly, *Morgan* recognized that jurors who have already stated a strong preference for imposition of death should a defendant be found guilty "cannot perform their duties in accordance with law, their protestations to the contrary notwithstanding." Justice Byron White's opinion acknowledged that such jurors could truthfully respond that they could follow the law, unaware that their dogmatic views are not fair or impartial. The Court also noted that "more

importantly, however, the belief that death should be imposed *ipso facto* upon conviction of a capital offense reflects directly on the individual's inability to follow the law." *Id.*

With regard to juror 72, all the trial court needed to hear was that the juror "expressed that she would be willing to follow the law." (Vol. 10, Voir Dire, p. 1971.) But Morgan recognized that jurors can say and even believe that they can follow the law but in reality can not:

> It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so. A defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective jurors function under such misconception. The *risk* that such jurors *may have been empaneled* in this case and "infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized." *Id*., at 36

Morgan, 504 U.S., at 736. Defense counsel was not permitted to engage in the meaningful process because. When defense counsel attempted to ask if the juror if she was one who believed if you "took a life you lose a life" the State objected. The trial court interrupted and told the juror " the question is whether you can give meaningful consideration to any and all mitigation." (Id. at 1943-44.) The defense was precluded from ascertaining whether Juror 72's dogmatic views about sick

depraved people who are “lost causes” would trump meaningful consideration of mitigation.

R.C. §2313.17(B)(9) establishes when a prospective juror should be removed for cause: when "he *discloses by his answers* that he cannot be a fair and impartial juror or will not follow the law as given to him by the Court." R.C. 2313.17(D) further states that a prospective juror should be excused "***if the court has any doubt as to the juror's being *entirely unbiased*." (Emphasis added.), See also Crim. R. 24(B)(9).

This standard has existed in Ohio since 1885, when this Court held that a prospective juror who shows himself not to be impartial is not competent to sit at trial simply because the prospective juror "believes" himself able to render an impartial verdict. *Palmer v. State*, 42 Ohio St. 596 (1885).

“A juror whose views on capital punishment are such that they would prevent or substantially impair his ability to consider mitigating factors, as the law requires, is disqualified.” *State v. Murphy*, 91 Ohio St.3d 516, 526, 747 N.E.2d 765 (2001). Thus, “[a] capital defendant may challenge for cause any prospective juror who, regardless of evidence of aggravating and mitigating circumstances and in disregard to jury instructions, will automatically vote for the death penalty in every case.” *State v. Stojetz*, 84 Ohio St.3d 452, 456, 705 N.E.2d 329 (1999), *State*

v. Group, 98 Ohio St.3d 248, 2002-Ohio-7247, at ¶62. See *Morgan v. Illinois*, 504 U.S. 719, 729, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992)(A juror who would automatically vote for the imposition of the death penalty without weighing the aggravating and mitigating evidence presented must be removed for cause, and a failure of trial court to do so rises to the level of constitutional error sufficient to grant habeas relief.)

When a prospective juror makes what appear to be contradictory statements on voir dire, as the jurors did here, it is for the trial court to decide which statements to believe. The issue is not conclusively determined by whatever the prospective juror happens to say last. See, e.g., *State v. Scott* (1986), 26 Ohio St.3d 92, 97-98, 26 OBR 79, 83-84, 497 N.E.2d 55, 60-61. *State v. Clifton White* (1999), 85 Ohio St.3d 433, 439.

In addressing a similar issue in *White v. Mitchell*, 431 F.3d 517, 537 (6th Cir, 2005) the Sixth Circuit stated that:

> The right to jury trial guaranteed by the Sixth Amendment to the United States Constitution "guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin,* 366 U.S. at 722, 81 S.Ct. 1639.[15] The right to an impartial jury does not entitle a defendant to a panel of jurors who are entirely ignorant of the existence of his case. *Id.*

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[15] *Irvin v. Dowd*, 366 U.S. 717 (1961)

> However, it is imperative that a juror be able to "lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* at 723, 81 S.Ct. 1639. As noted above, it is not uncommon for jurors to express themselves in contradictory and ambiguous ways, both due to unfamiliarity with courtroom proceedings and cross-examination tactics and because the jury pool runs the spectrum in terms of education and experience. *Patton,* 467 U.S. at 1039, 104 S.Ct. 2885.[16]

These prospective jurors's opinions on the death penalty were so strong that it is not likely that they could have put them aside and decided the issue of sentence fairly and it was unlikely either of these jurors would have voted for a life sentence in violation of their instructions and oath. As in *Wolfe v. Brigano*, 232 F3d 499 (6th. Cir. 2000): "it appears that the trial judge based his findings of impartiality exclusively upon each juror's tentative statements that they would try to decide this case on the evidence presented at trial. Such statements, without more, are insufficient. *See Goins v. McKeen,* 605 F.2d 947, 953 (6th Cir.1979). The Sixth Amendment guarantees the right to a jury that will hear his case impartially, not one that tentatively promises to try. Failure to remove biased jurors taints the entire trial. Taken as a whole, the record permits the Court to find that the trial judge abused his discretion when he overruled Ford's challenges for cause.

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[16] *Patton v Yount*, 467 U.S. 1025 (1984)

The State will most certainly point out that the defense did not use all their peremptory challenging, passing on the last challenge. However, since there were two jurors that sat on the jury, that even if the defense had used the last challenge to exclude Juror No. 39, he would have still been out of challenges to exclude Juror No. 72.

The failure to excuse these jurors for cause denied Shawn Ford a fair and impartial jury in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the analogous provisions of the Ohio Constitution. Therefore, his conviction and death sentence must be overturned.

PROPOSITION OF LAW NO. VII

A DEFENDANT IS DENIED A FAIR TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND OHIO CONSTITUTION, ARTICLE I §§1, 9, 10, AND 16 WHEN TWO SEPARATE INCIDENTS ARE TRIED TOGETHER.

On the evening of March 23, 2013 Chelsea Schobert went to celebrate her birthday with Mr. Ford and friends at the house of Zach Keys. (Vol. 22, Trial, p. 4066.) Though Chelsea denied any drugs were involved, Zach Keys testified that he, Chelsea, Mr. Ford and Josh Greathouse hung out drinking and smoking weed. (Vol. 21, Trial, p.3938.) Chelsea Schobert testified that Mr. Ford assaulted her when he became frustrated because she declined his sexual advances because she was too drunk. (Vol. 22, trial, 4074, 4145.) However, when police questioned Mr. Ford and Zach Keys they told the police Chelsea was assaulted in Kent, Ohio during a drug transaction. (Vol. 21, Trial, p. 3953; Vol. 23, Trial, p. 4216)

Mr. Ford and Zach Keys were shown photographic arrays and each picked the same person, not Mr. Ford, from the arrays. (Vol. 23, Trial, p. 4238.) A photographic array was then presented to Chelsea Schobert while she was still in the hospital and she picked the same person the others had picked. (Vol. 23, Trial, p. 4239.) Chelsea's parent then informed police they had placed a GPS tracking device on her vehicle. (Vol. 23, trial, p. 4220.) The GPS confirmed Chelsea was

in Akron, not in Kent, the evening she was assaulted. (Vol. 23, Trial, p. 4220.) Chelsea remained hospitalized during the investigation. On the morning of April 2, 2013 Chelsea's parents were murdered. A single, eleven count indictment was issued against Mr. Ford charging him with the aggravated murders of the Schoberts and the felonious assault of Chelsea Schobert.

Mr. Ford filed a Motion to Sever Count Eleven (11), felonious assault involving Chelsea Schobert, from the remaining Counts within the indictment. (Defense Motion 81, Doc. #219.) This Motion was renewed at the commencement of trial and during the trial. (Vol. 21, Trial, p. 3873; Vol. 23., Trial, p. 4225) As set forth in the indictment, the allegations surrounding Chelsea Schobert occurred on March 23, 2013. The remaining counts addressed conduct and activity that occurred on April 2, 2013. Though Chelsea Schobert was the daughter of the victims in the aggravated murder counts, the criminal conduct for each incident was separate and distinct.

The incident ten days after the assault involving Chelsea's parents was only connected to the first incident because the State alleged Mr. Ford committed both crimes. In fact, Heather Greathouse, the sister of Mr. Ford's friend, spoke to Mr. Ford the night before the Schobert's were murdered. (Vol. 25, Trial, p. 4764.) There was no information from her conversations with Mr. Ford connecting the

two incidents together. In fact, she testified that she told Mr. Ford not to go over to the Schobert's to kill them and Mr. Ford told her he was going to "hit a lick." (Vol. 25, Trial, p.4764.) Each incident could have and should have been tried separately, without reference to the other case.

If the offenses charged are of the same or similar character, the law generally favors joining multiple criminal offenses together in a single trial under Crim.R. 8(A). *State v. Sapp* 105 Ohio St.3d 104, 2004 Ohio 7008, 822 N.E.2d 1239, citing *State v. Lott*, 51 Ohio St.3d 160, 163, 555 N.E.2d 293 (1990). If, however, the defendant can establish prejudice by joinder of multiple counts, the mandatory language of Ohio Crim.R.14 requires severance. Rule 14 required the allegations from the March 23, 2013 incident be tried separately from the allegations involving the April 2, 2013 incident.

> If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in a indictment, information, or complaint, or by such joinder for trial together of indictments, information, or complaints, the Court shall order an election or separate trial of counts, grant a severance of Defendants, or provide such other relief as justice requires. In ruling on a motion by a Defendant for severance, the Court shall order the Prosecuting Attorney to deliver to the Court for inspection pursuant to Rule 16(B)(1)(a) any statements or confessions made by the Defendants which the State intends to introduce in evidence at trial

Crim.R. 14. A violation of the constitutional liberties essential to any fair trial is more than a sufficient showing of prejudice. When, as in this case, a defendant claims that he was prejudiced by the joinder of multiple offenses, the court must determine (1) whether evidence of the other crimes would be admissible even if the counts were severed, and (2) if not, whether the evidence of each crime is simple and distinct. *State v. Hamblin*, 37 Ohio St.3d 153, 158-159, 524 N.E.2d 476 (1988). In *State v. Atkinson*, 4 Ohio St.2d 19, 211 N.E.2d 665, (1965), the Court held that offenses may be joined if they fall into one of three general categories. Those categories are: (1) two or more offenses connected together in their commission; (2) different statements of the same offense, *i.e.*, the same criminal conduct which may satisfy the elements of two or more offenses; and, (3) two or more different offenses of the same class of crime or offenses. Using that criteria, the Court held that two offenses concerning negotiable instruments were improperly joined for trial with a count alleging that the defendant carried a concealed weapon. In this case, evidence regarding the felonious assault of Chelsea Schobert would not have been admissible in the trial of the aggravated murder charges regarding Jeffrey and Margaret Schobert and vis versa. There was no overlap of evidence or witnesses between the two cases and each case could have been tried without reference to the other case. By trying the two incidents

together, the jury was provided information and evidence of other acts of wrong doing which undermined fact finding process.

In *State v. Minneker* 27 Ohio St.2d 155, 271 N.E.2d 821 (1971), the Court found that the facts justified overruling a requested severance. While, the offenses were clearly of different classes, the Court found that they were related to each other in their commission. That is not the case here. The Court further found that the State could not have tried any one of the counts separately without in each of those separate trials introducing evidence as to the commission of the other offenses. That also is not the case here. The government could have easily tried each incident without making any reference to the other incident.

Trial courts always have an obligation to ensure that the proceedings are fair,[17] but that duty reaches a heightened level in death penalty cases because "death is different." *See*, *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).[18] *Accord*, *Burger* v. *Kemp*, 483 U.S. 776, 107 S.Ct. 3114,

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[17] See, the Fourteen Amendment to the United States Constitution; Ohio Constitution., Article I, §§1, 2, and 16; and, more generally, *Chambers* v. *Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *State* v. *Lane*, 60 Ohio St.2d 112, 397 N.E.2d 1338 (1979), and the authorities cited therein.

[18] Though there are those who criticize the "death is different holding, *see, e.g., Morgan* v. *Illinois, post*, (SCALIA, J., joined by REHNQUIST, Ch.J. and THOMAS, J., dissenting), the precept is firmly entrenched in Eighth Amendment jurisprudence. The proposition was adopted by the Court from law professor Anthony Amsterdam. Arguing the second round of major capital cases which resulted in the holdings in *Gregg* v. *Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) and *Woodson* v. *North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), in response to being pressed by Justice Potter Stewart that Amsterdam's argument "proved too much," Amsterdam replied:

97 L.Ed.2d 638 (1987). Thus, because this was a capital case, the trial court had a heightened obligation to ensure the proceedings were fair and to insulate the proceedings from anything which would undermine the presumption of innocence. It is impossible to say that Mr. Ford, tried for two separate incidents, which occurred ten (10) days apart, had a "fair trial." Protection of the constitutional liberties of a fair trial required severance. *See, e.g.*, *State v. Williams*, Cuyahoga App. No. 72659, 1999 Ohio App. LEXIS 1446. Severance is logically required because an accused cannot be convicted of one crime by proving he committed other crimes or is a bad person. *State v. Jamison*, 49 Ohio St.3d. 182, 184, 552 N.E.2d. 180 (1990).

This Court recently recognized a defendant is entitled to severance under Crim.R. 14 if he can affirmatively show prejudice. *State v. McKelton*, 2016 Ohio 5735, P299, 2016 Ohio LEXIS 2291 (2016) To overcome the showing of prejudice, the State must show "either that (1) it could have introduced evidence of

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> Now, why do we say death is different? Our legal system as a whole has always treated death differently. We allow more peremptory challenges; we allow automatic appeals; we have different rules of harmless error; we have indictment requirements; unanimous verdict requirements in some jurisdictions, because death is different.

Death is factually different. Death is final. Death is irremediable. Death is unknowable; it goes beyond this world. It is a legislative decision to do something, and we know not what we do. Death is different because even if exactly the same discretionary procedures are used to decide issues of five years versus ten years, or life versus death, the result will be more arbitrary on the life or death choice.

Oral arguments held March 30-31, 1976. *See*, Peter Irons and Stephanie Guitton, ed., *May It Please the Court* (New York: New Press, 1993), 233.

either of the offenses, if they had been severed for trial, as "other acts" under Evid.R. 404(B) or (2) the "evidence of each crime joined at trial is simple and direct." *Id.* In *McKelton*, the defendant challenged trial counsel's failure to file a motion to sever felonious assault and domestic violence charges from aggravated murder charges. This Court rejected the argument finding it unlikely that the trial court would have severed the domestic violence and felonious assault charges from prior incident because McKelton committed the same offenses against the same victim on two different occasions and the evidence of each offense was "not rendered more complex or confusing by joining the two counts of domestic violence." Id at ¶ 300. Here the incidents did not involve the same victims and joining the two counts resulted in improper admission of other acts evidence.

Trying the two cases together permitted the State to introduce evidence of other acts of wrong doing against Mr. Ford. Evid. R. 404(B) governs introduction of "other acts" evidence and strictly prohibits evidence of "other crimes, wrongs or acts" because of its prejudicial affect. Rule 404 of the Ohio Rules of Evidence specifically prohibits introduction of "other act" evidence and prior criminal conduct evidence as follows:

> (A)Character evidence generally
>
> (1)Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that

> he acted in conformity therewith on a particular occasion, subject to the following exceptions:* * *
>
> (B) Other crimes, wrongs or acts
>
> (2) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Permitting the State to try the separate incidents from March 23, 2013 and April 2, 2013 allowed the government to use "other acts" evidence outside the normal legal parameters for using that type of evidence. Under Ohio law the admissibility of other acts evidence is carefully limited. See, *State v. Curry*, 43 Ohio St.2d 66, 330 N.E.2d 720 (1975). In *Curry* this Court affirmed the appellate court's reversal of Curry's conviction for statutory rape because the State had introduced evidence of prior similar convictions:

> A hallmark of the American criminal justice system is the principle that proof that the accused committed a crime other than the one for which he is on trial is not admissible when its sole purpose is to show the accused's propensity or inclination to commit crime. 1 Underhill's Criminal Evidence (6 Ed.), 595, Section 205. Although such evidence may, in some cases, logically tend to establish that a criminal defendant committed the act for which he stands accused, the evidence is considered legally irrelevant for the reasons enumerated in *Whitty v. State* (1967), 34 Wis. 2d 278, 292, 149 N. W. 2d 557:

> "* * * (1) The overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated; and (4) the confusion of issues which might result from bringing in evidence of other crimes."
>
> Therefore, evidence which tends to show that an accused has committed another crime wholly independent of the offense for which he is on trial is generally inadmissible. *State v. Burson* (1974), 38 Ohio St. 2d 157, 311 N. E. 2d 526; *State v. Hector* (1969), 19 Ohio St. 2d 167, 249 N. E. 2d 912; *Whiteman v. State* (1928), 119 Ohio St. 285, 164 N. E. 51; 1 Underhill's Criminal Evidence, supra; 1 Wharton's Criminal Evidence (13 Ed.) 528, Section 240.

State v. Curry, 43 Ohio St.2d 66, 68-69, 330 N.E.2d 720 (1975). This Court found introduction of the prior criminal conduct of Curry prejudicial warranting a new trial. The evidence regarding the assault of Chelsea Schobert was legally irrelevant to the aggravated murder, aggravated robbery, aggravated burglary and theft charges and, had the cases been tried separately, would not have been admissible.

Introduction of "other acts" is prohibited by the Ohio Rules of Evidence because "other acts" evidence undermines the integrity and fairness of the entire proceedings, calling into question the verdict itself. In this case, introduction of the other acts evidence undermined the presumption of innocence and denied Mr. Ford

a fair trial, one in which the results are reliably achieved. Indeed, this Court has held that any reference to prior contacts with law enforcement undermines the reliability of the entire process. In *State v. Breedlove*, 26 Ohio St.2d 178, 271 N.E.2d 238 (1971), this Court reversed a conviction where the suggestion to the jury that the defendant had possible prior contacts with the law raised the issue of whether the defendant's conviction was based not on the evidence in the case, but instead upon *Breedlove*'s prior contact with the law.

The State cannot legitimately claim the felonious assault evidence was admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident pursuant to Evid.R. 404(B). The evidence offered regarding the felonious assault simply did not provide a connection to the April 2, 2013 death of Jeffrey and Margaret Schobert. While the State may claim Mr. Ford was upset that he could not see Chelsea Schobert in the hospital and that is why he killed her parents, there was no evidence to support that theory. In fact, the evidence offered by the State was that Mr. Ford went to the Schobert's residence to "hit a lick." Even if other bad acts evidence might be admissible under Evid. R. 404, it must still pass the test forth in Evid. R. 403, namely, that the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice, or the danger of confusing or

misleading the jury. *State v. Myers*, 97 Ohio St.3d 335, 2002 Ohio 6658, 780 N.E.2d 186. Here there was no probative value to the felonious assault charges in the murder case. Nothing about the felonious assault case, Mr. Ford becoming angry when Chelsea rebuked his efforts to have sex, tended to prove any element of any of the offenses from the April 2, 2013 incident.

The United States Supreme Court has long recognized that the introduction of evidence of a defendant's prior crimes risks significant prejudice. See, *e.g.*, *Spencer* v. *Texas*, 385 U.S. 554, 560, 17 L.Ed.2d 606, 87 S.Ct. 648 (1967) (evidence of prior crimes "is generally recognized to have potentiality for prejudice"). The prejudice results from the improper inference a jury draws once they hear of other criminal acts. The risk is that the jury will convict simply because they believe the defendant is a bad guy, prone to committing criminal offenses. Such presumptions and inferences undermine the presumption of innocence and diminish the State's burden to prove each charge by proof beyond a reasonable doubt.

The presumption of innocence of the accused in a criminal prosecution is a basic component of a fair trial in the criminal justice system. *Coffin v. United States* (1895), 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481. Trial courts, the jury system, and judges all are utilized to ensure protection of basic personal liberties.

State v. Lane, 60 Ohio St.2d 112, 397 N.E.2d. 1338 (1979). In *Lane*, the Court cautioned that the presumption of innocence must not be undermined:

> It is the duty of our Courts to guard against factors which may undermine the fairness of the fact finding process and, thereby, delete the right to the presumption of innocence. To implement the presumption, Courts must be alert to factors that may undermine the fairness of the fact finding process. *Estelle v. Williams* 1976 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d. 126.

What could be more unfair about the fact-finding process of determining guilt concerning a charge of carrying aggravated murder than to have the jurors hear evidence suggesting Mr. Ford also committed felonious assault because his girlfriend would not have sex with him. Conversely, how can anyone expect the jury to fairly analyze the evidence regarding the felonious assault when the jury is also considering evidence that ten days later Mr. Ford killed his girlfriend's parents. The evidence regarding the felonious assault was filled with contradictory statements and accounts of what happened. Had the jury been permitted to review each incident separately, the taint from the impression that Mr. Ford was prone to violence would have been eliminated. Crim.R. 14 was designed to ensure a fair trial on separate charges to avoid prejudice. The trial court erred when it denied the motion to sever. Mr. Ford's convictions must be vacated and the case remanded for a new trial.

PROPOSITION OF LAW NO. VIII

OHIO CONSTITUTION, ARTICLE I, §10 AND THE SIXTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION MANDATE A TRIAL BY A FAIR AND IMPARTIAL JURY AND REQUIRE A COURT TO EITHER CONDUCT AN INVESTIGATION OR PERMIT AN INVESTIGATION TO BE CONDUCTED WHEN THERE APPEARS ANY INDICIA OF JUROR MISCONDUCT.

Juror 19[19], who was seated as Juror No. 5 in the jury box, was the subject of much discussion, side bars and as it turned out, misconduct during the course of this case.

Voir Dire of Juror No. 19

During individual voir dire, Juror No. 19, an African-American juror, informed the Court she was a paralegal. (Vol. IV, Voir Dire, p. 686) She went on to tell the court that she had interned in the Summit County Prosecutor's Office in 2011. (Id., p. 690). She was in the child support division. After being questioned on pretrial publicity and her views on the death penalty, she was deemed qualified to serve as a juror. (Id, p. 720).

The voir dire process then moved into the general voir dire session. When the court entertained challenges for cause, the defense moved to remove Juror 19 for cause and the following discussion took place:

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[19] Mr. Ford will refer to seated juror 5 as Juror No. 19 throughout this Proposition of Law.

Yes, Your Honor. Juror Number 19. This was something we covered in individual voir dire with her and maybe in the previous sessions, but we didn't cover it today; but she is a former employee of Summit County Prosecutor's Office. For that reason, we would ask that she be discharged based on her relationship to the State. She is a trained paralegal, and she utilized that in her job with the Prosecutor's Office. I don't know exactly what that job was.

THE COURT: I think she said that she worked there as an intern for a period of time and now is a paralegal -- or has paralegal training, if not currently employed as such.

Does the State have a response in regard to Juror 19?

MR. LOPRINZI: Well, first of all, this is for cause. She hasn't expressed any opinion that she would be biased in any way. There was never any questions asked of her here in that regard.

I think she was an unpaid intern who didn't recognize us. And I thought she said she worked at Child Support. I am not even --I don't even remember where she said she worked for us. But there was never any expression that that was going to be any problem.

And the fact that she is a paralegal shouldn't have any bearing on this case; we have a lawyer sitting in the jury pool. I don't think that excludes her for cause for any reason.

THE COURT: I agree.

The challenge for cause with respect to Juror 19 will be overruled. She has not given any response to any question which indicates that she could not be a fair and impartial juror.

(Vol. 20, Voir Dire, p. 3769-3770) The trial court's failure to excuse this juror the first time defense counsel requested the excusal allowed her to become a part of the prospective juror pool and eventually seated as a juror. (Vol. 20, Voir Dire, p. 3769-3770).

Juror 19 During Trial

The trial court's failure to excuse the juror the second time defense counsel requested it, allowed the juror to take part in deliberations. (Vol. 23, Trial, pp. 4202-4306) Once the trial began, the State called Detective Bertina King as a witness. As soon as the detective took the stand, Juror 19 requested to talk to the court at sidebar. She told the court that she attended church with the Detective. (Vol. 23, Trial, p. 4194-4195). Juror 19 indicated she did not know her name, but recognized her when she walked in. Detective King was a bodyguard for the Pastor's wife. (Id. at p. 4196) After discussion Juror 19 stated she would not let this influence her determination of credibility in the case. After the juror was excused from sidebar, the defense moved to exclude this juror and have an alternate brought in. The following discussion took place:

> I think the fact that the State's main detective -- really, the first police officer we have heard from in this case -- Ms. Bertina King, is in a position at this lady's church -- and the position she is in, I have never – I confess I didn't -- my church doesn't operate that way -- but it seems that Bertina is the protector of the first lady

of the church; the first lady being -- I assume it is like a presidential thing and that the pastor is comparable to the president and the first lady is the first lady. But it is an exalted position, and Bertina is the bodyguard to her. I think that puts this lady in a really awkward position.

And I think it also gives – the authority that the church gives to Bertina on a Sunday is the same authority this lady is going to give her here in the courtroom today. And I think that it puts us at a real disadvantage in trying to have a fair jury, that Bertina King, the main detective in this case, is somehow ordained or blessed by this woman's actual church home. We just think it is just too much.

MR. HICKS: Judge, if I could. If I could indicate further. This -- as Mr. Sinn points out, Detective King is in a position of authority at the church. She is in a position of authority here in this courtroom by virtue of her role as a police officer. She is, in some respects, even in a higher position of authority than perhaps a patrolman-level officer by virtue of the fact that she is a detective.

We also can recall that this juror has interned with the Summit County Prosecutor's Office at some level.

THE COURT: We are not going to go back to that issue at this point.

MR. SINN: Judge, I believe there is –

THE COURT: Unless it is relevant.

MR. HICKS: -- connections between all of that. That this is a prosecution witness, this is a former intern at the Prosecutor's Office, that she knows the -- at least the authority of this detective. And, as Mr. Sinn indicates, I believe it would be appropriate to have her excused and an alternate put in her place.

THE COURT: Does the State wish to respond?

MR. LOPRINZI: She has indicated in every circumstance that she doesn't care what people think; she is going to do what she wants to do. And she is pretty

clear, not only by what she said, but by her demeanor. She is a very outspoken individual. She has no qualms raising her hand and getting the Court's attention. This is the second time she has done it now. If she feels that there is some issue that she needs to bring to the Court's attention, she does it.

And I just can't imagine that somebody who she has seen and never -- I don't even think she has ever said she has spoken to her. Didn't know her name, said she doesn't probably know her name, and probably only saw her because she is an African-American with blond hair that sits in the front row of the church.

That may be the only reason she knows who she is.

THE COURT: Well, the first lady of that church is an African-American woman who also has blond hair.

MR. LOPRINZI: Oh, okay. Well –

THE COURT: I happen to know from personal knowledge.

The issue at hand is whether the juror's acquaintance, if you can call it that, with this individual, or her awareness of the witness's position of authority with the police department, or her apparent position at the church of providing some kind of security service to the pastor's wife, would impact her ability to judge the credibility of the evidence and be a fair and impartial juror.

For me to grant the defense motion would require me to discredit everything that the person just said on the record. I am standing here at sidebar with her, I am looking at her in the face. I am considering not only the words she said but the demeanor in which she said them. She is an outspoken individual. She made that apparent during her individual voir dire.

When we were on the bus the other day for the jury view and there was a moment when the driver was uncertain which way to turn, it was this person who spoke up from the back of the bus and said: We know this neighborhood, take a left here, take a right there;

> quickly got the person back on track. So this is not what anyone would characterize as a shrinking violet.
>
> It is my conclusion that she is not affected by her minimal awareness of this witness, and so I am going to overrule the defense motion to exclude her for cause.

(Id., pp. 4202-4206) The juror continued to serve during the remainder of the trial phase.

Trial Phase Deliberations

The jury began its deliberations on October 20, 2014 at 1:00pm. (Vol. 20, Trial, p. 5315) The jury deliberated until 9:08pm. On the second day of jury deliberations, the jury submitted two written questions. (Doc. #675). One question was as follow:

> For which of the 11 counts do we not have to all 12 agree on?
>
> If we can't come to an agreement (unanimous) EX: 11-1 Do we consider not guilty

(Doc. #675.) The second question was as follows:

> One of us feel that aggravated burglary is only about taking something when something someone is present other than an accomplice. The rest of us think it is committing any criminal offense, trespassed by force, stealth or deception when another person is present other than an accomplice. Which is right ? Most of us take the definition literally whereas the one girl's training makes her insist something had to be taken.

(Doc. # 675.) The bailiff then notified the prosecutor that there was "an issue with the juror":

> Mr. Gessner: You honor, earlier today, your bailiff called to advise that there was a question; there was an issue with the juror that we needed to come over for.
>
> And when he advised of the question that said- - I think- - I don't know it verbatim, but the Court made a comment earlier, with one of the jurors saying based upon her experience and her training.
>
> And I asked the bailiff then, I said what is that juror's name? He gave me the name.

(p. 5367-5368.) Prosecutor Gessner went back and asked around his office as to whether anyone remembered Juror No. 19, and one of the prosecutors indicated that she was Facebook friends with her. (Id.) While Prosecutor Gessner was there, she pulled up her Facebook page and discovered that Juror 19 was also Facebook friends with Prosecutor Sherri Bevan Walsh, the chief county prosecutor and another assistant prosecuting attorney. (Id.)

The Court questioned Prosecuting Gessner:

> THE COURT: What prompted you to want to pursue that issue at that point after the question had come in?
>
> MR. GESSNER: I made an assumption that that -- that question there about someone's training, that this was this paralegal.
>
> THE COURT: Okay.
>
> MR. GESSNER: And I just asked Margaret if she knew her.

> THE COURT: So what the defense is raising as an issue here is that, having learned of a concern on the part of the jury, and one juror, apparently based on their training, taking one view of things, and 11 others, based on their status as lay people, perhaps taking a different view of things, the defense is suggesting that the content of the question is what prompted the inquiry to find out who this person was. And it seems that that is accurate.

(Id. 5369-5370)

As the two questions were presented to the bailiff, an issue regarding a family emergency with Juror 28 seated as Juror number 7 arose, causing Juror 28 to be excused and alternate number was seated. (Vol. 28, Trial, p. 5335-5336.) The trial court instructed the jury to begin their deliberations anew after the lunchtime break. (Vol. 28, Trial, p. 5337, 5342.) The trial court acknowledged the questions from the jury and reminded them that all eleven counts of the indictment must be decided unanimously. (Vol. 28, Trial, p. 5337.) The jurors were then sent to lunch.

The trial court then turned its attention to the issues regarding Juror No. 19 and the prosecutor's revelation that Juror 19 was Facebook friends with employees of the prosecutor's office.

> THE COURT: All right. When we were on a break previously, the State of Ohio brought some information to the attention of the course and defense counsel regarding the individual who is currently seated in jury seat number 5. This is the person who had told us during

> voir dire that she formerly, I believe, had been an intern in the Summit County Prosecutor's Office. The State has, upon making further inquiry of someone in the office, gained some additional information about Juror Number 5.
>
> MR. GESSNER: Yes, Your Honor. We found out, actually, about ten minutes before coming back to court today that she is -- Juror Number 5 is a Facebook friend of Prosecutor Walsh, Chief Deputy Prosecutor John Galonski, Chief Deputy Prosecutor Margaret Scott, and Assistant Prosecutor Kevin Mayer. She did indicate originally that she was an intern for Kevin Mayer. He was, I believe, one of her teachers at the University. And she did advise us that she interned at our Child Support Division, but nothing of the Facebook was made. So I -- when I came over to court, prior to even speaking with the court, I addressed it with Mr. Hicks, and I believe he addressed it with Mr. Sinn.

(Vol. 28, Trial, p. 5339.) Ultimately, after discussions with counsel for the State and the Defense, the Court called Juror 19 into the courtroom and asked her about her Facebook friend status with members of the prosecutor's office. (Vol. 28, Trial, p.5353-5355.) The inquiry from the trial court focused solely upon the Facebook friends issue and whether or not Juror 19 disclosed that information to other jurors. Faced with newly disclosed information, revealed during jury deliberations, that Juror number 19 was Facebook friends with several employees of the prosecutor's office, the defense requested Juror 19 be removed for cause. (Vol. 28, Trial, p. 5350.) The trial court removed Juror 19 and seated the second

alternate., Juror number 83. Appellant moved for a mistrial as a result of the issues surrounding Juror 19. (Vol. 28, trial, p. 5360.)

The Motion for Mistrial

Appellant raised several issues in support of the requested mistrial: 1) the fact that Juror 19 had been deliberating and tainted the entire jury pool; 2) the issues surrounding how the prosecutor obtain the additional information regarding Juror 19; and, 3) the defense was concerned about the message the removal of the juror was sending the remaining jurors, a message that told the jurors if they hold out they will be removed from jury service so they better go along. (Vol. 28, Trial, p. 5360-5365, 5375-5376.)

> We had a question, that if you have been following this case -- and I don't mean you; you have certainly been following this case. But if you were following this case and reading the record, we have known that this juror that we just excused was a paralegal and she talked a lot about her training. And when the question came from the jury that it is 11 to 1 on -- it's 11 to 1, and one person, because of her training, doesn't agree with the rest of us, it is a not guilty verdict.

(Vol. 28, Trial, p. 5362.) The trial court honed in on the critical issue, there was no way to know if Juror number 5 was the juror referenced in either of the two questions:

> THE COURT: You are conflating two separate questions that we got from the jury. One question sought

> clarification on the meaning of the burglary instruction, and the question indicated that one member of the jury thought that a person, in order to be charged or convicted of burglary had to enter an occupied structure for the purpose of committing a theft offense. And the note indicated that the other jurors took the instruction literally, which said one needed only to enter the premises for the purpose of committing a criminal offense. And then it went on to indicate that one person, because of her training, felt otherwise. That could have been this juror, we don't know.
>
> MR. SINN: Well --
>
> THE COURT: We specifically indicated to the panel members that they should not disclose the status of their deliberations. It is a reasonable inference that that's the one. But that's a completely separate issue from the issue that got raised in a different note which asked which of the 11 counts do we not have to all 12 agree on. And there was an indication: If we can't come to an agreement unanimous -- example, 11 to 1 -- do we consider it not guilty? Now, I have no information to suggest that that relates to the same count or a different count, the same person or a different person. So I think what you have done is conflated the content of two separate notes.

(Vol. 28, Trial, p. 5362-5363.) (Emphasis added.) Armed with the knowledge that there was no way to know if Juror 19, who had just been discharged, was the juror interjecting personal interpretation of the law into deliberations, the trial court did nothing to determine the source of the misconduct, nor did the trial court take any actions to correct the misconduct. In fact, in response to the second question about the definition of burglary and one jury

interjecting her personal interpretation of the law, the trial court answered the question by instructing the jury to read the jury instruction. (Doc. #675.) At a minimum, faced with an indicia of juror misconduct, the trial court was required to inquire into the source of the misconduct and to provide a curative instruction reminding the jury that they may only apply the law as provided by the court.

In addition, armed with knowledge that the bailiff told the prosecutor "there was an issue with a juror" and that the prosecutor then asked for the juror name and the bailiff disclosed to the prosecutor the juror name, the trial court was required to disclosure of the information. Had the bailiff not told the prosecutor there was a problem with a juror and disclosed the name of the juror, there would have been no basis to seek out additional information about the juror. The prosecutor knew during voir dire that Juror number 19 had been an intern. Ostensibly the prosecutor did nothing with that information until the bailiff advised him there was "a problem with a juror" and the prosecutor believed the juror was the hold out.

Without any effort to investigate or inquire into either issue, the trial court denied the motion for mistrial.

Legal Analysis

Due process of law under the 14th Amendment to the United States Constitution requires that an accused receive a fair trial by an impartial jury free from outside influences. Likewise, the Sixth Amendment to the United States Constitution guarantees the right to trial by jury designed to ensure criminal defendants a fair trial by a "panel of impartial, 'indifferent' jurors." *Irvin v. Dowd,* 366 U.S. 717, 722, 6 L.Ed.2d 751, 81 S.Ct. 1639 (1961). The Ohio Constitution, Article I, §10, 16 provides similar protections ensuring a fair trial by a jury that and promises that anyone in this State shall have justice administered without denial, and shall have a remedy in the courts by due course of law. The due process clause of the Ohio Constitution guarantees a defendant a fair trial by a fair and impartial jury. See, Ohio Constitution, Article I, §§5 and 10 which assure trial by an impartial jury, a right which is "inviolate."

Turner v. Louisiana, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965), made the promise of a fair trial through the Sixth Amendment applicable to state trials and further found that the Fourteenth Amendment independently demands the impartiality of any jury "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the

probability of unfairness." *In re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955.) In this case, the impact from outside influence can not be fully assessed because there was no effort to explore the source or take steps to insure the integrity of the process.

Writing for the Court in *Irvin v. Dowd, supra*, Justice Tom Clark observed that England, from whom America has borrowed many concepts of individual liberty, bequeathed to us the most priceless of safeguards, trial by jury.

> In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver*, 333 U.S. 257; *Tumey v. Ohio*, 273 U.S. 510. "A fair trial in a fair tribunal is a basic requirement of due process. " *In re Murchison*, 349 U.S. 133, 136. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as "indifferent as he stands unsworne." Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. Thompson v. City of Louisville, 362 U.S. 199. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807). 3 "The theory of the law is that a juror who has formed an opinion cannot be impartial." *Reynolds v. United States*, 98 U.S. 145, 155.

366 U.S., at 721-722. Likewise, a juror who has brought into the jury room their own personal legal definitions and then attempt to influence other jurors to

disregard the trial court's instructions and apply the law as the juror determines it to be, undermines the requirement of "indifference" necessary for a fair and impartial tribunal. During voir dire, jurors were asked if they could follow the law as given to them by the trial court. Jurors were instructed that they must apply the law as given by the trial court. This court in *State v. Tyler,* 50 Ohio St. 3d 24, 553 N.E.2d 576 (1990), stated that a prospective juror must be willing to follow the applicable law as given by the trial judge in the jury instructions. Here, there was evidence from the jury question that a juror was not following the applicable law as given by the trial judge.

A presumption of prejudice arises whenever juror misconduct is discovered. *State v. Phillips*, 74 Ohio St. 3d 72, 88, 656 N.E.2d 643 (1995), citing *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982), and *Remmer v. United States* 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954). In *State v. Phillips*, when faced with potential outside contact with a juror, the trial court inquired of the jurors to determine if there was any prejudicial impact. Finding the trial court took appropriate step to investigate and finding no prejudice discovered, this Court affirmed the conviction.

The United State Supreme Court in *Smith v. Philips* noted that outside influences upon the jury strike to the very heart of a fair trial:

> due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as voir dire and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in *Remmer* and held in this case

Smith v. Phillips, 455 U.S. at 217. A note was received from the jury, it is not clear if the foreperson wrote the note because of the different hand writing on each of the notes sent out to the bailiff. (Doc. # 674, 675.) The question could have been presented from another juror or the foreperson inaccurately characterizing the other juror's views because of bias or dislike of the juror, or, the note could have accurately reflected that one jury was trying to use her "training" to influence deliberations. In either instance, the focus should have been on ferreting out information regarding the outside influence. Instead, the court focused upon Juror number 19 and the relationship with the prosecutor's office. While the contacts between Juror 19 and the prosecutor's office were important to explore, it did not address the full scope of potential misconduct before the court.

When an allegation of juror misconduct arises, a court is required to investigate the claim in order to determine whether the misconduct tainted the trial. *United States v. Wheaton*, 517 F.3d 350, 361 (6th Cir. 2008). In *Wheaton*, a juror utilized a laptop computer during deliberations. The trial court promptly undertook an investigation of the alleged misconduct. There the court immediately called counsel into chambers for detailed questioning of the juror in question. The court then addressed the entire jury in open court and specifically asked the other jurors whether the use of the laptop had impacted their decision making. The court then provided a curative instruction reminding the jury that they were required to decide the case based upon the evidence presented in the court room.

Here, the trial court made no inquiry into one juror utilizing personal views on the law during deliberations. The question presented from the jury, that one juror, "based upon her training" was providing her own definition of the law required the trial court to take some action to investigate and insure the outside influence ceased. One juror was interjecting outside information, inconsistent with the law provided. It would be easy to assume that the juror who was excused was the responsible party. But as the trial court aptly noted in response to Mr. Ford's motion for a mistrial, "we do not know" which juror was involved. (Vol. 28, Trial, p. 5363.) Given the facts and circumstances, it is impossible to know if

the responsible juror remained on the panel and continued to interject personal views of the law into the deliberations. The trial court should have conducted some investigation and should have instructed the entire panel that the case must be decided from the evidence presented in the courtroom and the law provided from the court.

Once misconduct is discovered, prejudice is presumed and some inquiry must be conducted to confirm or rebut the presumption. In *State v. King*, 10 Ohio App.3d 161, 460 N.E.2d 1383 (1983) a juror made efforts to contact a friend who was a local attorney to determine legal definitions. Once the attorney found out the friend was in the middle of jury deliberation, the attorney refused to answer questions and reported the information to the court. Contacting outside sources for information was clearly inappropriate juror misconduct. Upon learning of this, the trial court immediately held a hearing to determine the effect of the juror's statement on the deliberations. The court of appeals concluded that the trial court took appropriate steps to overcome the presumption of prejudice. Id at 166.

In *United States v. Lara-Ramirez*, 519 F.3d 76 (1st Cir.2008) the United States Court of Appeals for the First District summarized the trial court's duties to investigate and why an investigation is necessary:

> '[When] a colorable claim of jury taint surfaces during jury deliberations, the trial court has a duty to

> investigate the allegation promptly.' [U.S. v.] Bradshaw, 281 F.3d at 289 (footnote omitted); see also United States v. Corbin, 590 F.2d 398, 400 (1st Cir.1979). The investigation must 'ascertain whether some taint-producing event actually occurred,' and then 'assess the magnitude of the event and the extent of any resultant prejudice.' Bradshaw, 281 F.3d at 289. Even if both a taint-producing event and a significant potential for prejudice are found through the investigation, a mistrial is still a remedy of last resort. See id . The court must first consider 'the extent to which prophylactic measures (such as the discharge of particular jurors or the pronouncement of curative instructions) will suffice to alleviate prejudice.' Id. This painstaking investigatory process protects the defendant's constitutional right to an unbiased jury, id. at 289-90, as well as his ['']valued right to have his trial completed by a particular tribunal,['''] [U.S. v.] Jorn, 400 U.S. at 484, 91 S.Ct. 547, 27 L.Ed.2d 543 (plurality opinion) (quoting Wade [v. Hunter], 336 U.S. at 689, 69 S.Ct. 834, 93 L.Ed. 974). The investigation is also critical in creating a sufficient record to permit meaningful appellate review of the [trial] court's manifest necessity determination."

Id at 86. A "painstaking investigatory process" was required to determine the scope and extent of the outside influence and to determine whether there was prejudice and the extent of such prejudice. Only after such an inquiry could the court make sure that Appellant's Constitutional right to a fair trial with an unbiased jury was fully protected.

A second issue of misconduct was likewise not properly addressed by the trial court. Defense counsel questioned how the prosecutor obtained information

regarding Juror 19 and the prosecutor explained that the bailiff had called to say there was a problem with a juror. The prosecutor asked for the juror's name and the bailiff provided the information. How the juror knew of a problem with one juror is unknown. Why the bailiff told the prosecutor there was a problem with one juror is also unknown. Why the bailiff believed there was a problem with Juror number 19 is also unknown. We do know from the record that the bailiff provided the name to the prosecutor. This was not a case where the jury had a question and counsel was simply informed of the pending questions. The bailiff took the extra step when calling the prosecutor to the courtroom of expressing an opinion that there was a problem. This communication led directly to the prosecutor investigating the juror

The bailiff's communications to the prosecutor violated the "cardinal principle that jury deliberations shall remain private and secret." *United States v. Olano*, 507 U.S. 725, 737, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993.) The purpose of protecting the privacy of the jury room is to "protect deliberations from improper influence." Id. As a result of the bailiff conveying information the prosecutor took the information and began investigating the juror. Had the bailiff not conveyed the information and the name to the prosecutor, the information from the question regarding one juror's personal view on legal definitions may have

been properly investigated. When the defense questioned how the prosecutor obtained such information, the trial court did little to ferret out why his bailiff conveyed the information to the prosecutor and not directly to the trial court.

Generally, a trial court's decision regarding the measures necessary to assess juror misconduct is reviewed for abuse of discretion." *United States v. Lloyd*, 462 F.3d 510, 518 (6th Cir. 2006). Although a trial judge's determination of juror bias is entitled to great deference

State v. Gunnell, 132 Ohio St.3d 442, 2012 Ohio 3236, 973 N.E.2d 243 (2012) that deference is not without limit and the trial court's conduct must be reviewed to determine if appropriate steps were taken to assess the issue of misconduct before the court. In *Gunnell*, the Supreme Court considered whether a juror's outside research, a handwritten definition of the word "perverse" and an instruction on "involuntary manslaughter" which the juror had printed off the internet, constituted grounds for a mistrial. Id. at ¶ 9-10. After learning of the juror's possession of this information, the trial court conducted a brief hearing during which the court informed the parties of the issue that had developed regarding the juror's outside research. Unlike the court in this case, the trial court in *Gunnell* proceeded to question the juror regarding her research, including what information she had found, why she had looked for it, and whether she had shared

that information with any other jurors. Id . at ¶ 11. The trial court did not question the juror to determine whether any prejudice or bias was created by the information or whether the juror could disregard it. Id. at ¶ 14, 32. Nevertheless, the trial court found that the juror was "irreparably tainted" and declared a mistrial. Id. at ¶ 34. This court concluded that the trial court's inquiry was "limited and ineffective" and did nothing to unearth bias. Accordingly, this court found the trial court had improperly declared a mistrial.

In this case nothing was done to ascertain the source or scope of outside influence on the deliberations. Nothing was done to determine whether the juror's own definition of the law created prejudice. In addition, nothing was done to resolve what "problem with a juror" the bailiff discussed with the prosecutor or why the bailiff provided any juror name to the prosecutor. The trial court abused its discretion in failing to conduct reasonable inquiry into issues of misconduct and should have declared a mistrial. Appellant is entitled to a new trial.

PROPOSITION OF LAW NO. IX

JUROR MISCONDUCT IN THE JURY DELIBERATION PROCESS CANNOT BE TOLERATED SINCE IT DENIES A CAPITAL DEFENDANT A FAIR TRIAL AND A FAIR DETERMINATION OF SENTENCE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 2, 9, 10 AND 16 OF THE OHIO CONSTITUTION.

When a verdict is reached in a case, the expectation is that the deliberative process worked, and the verdict is a result of thoughtful and meaningful discussions among the jury members. It is not expected that jurors will brow-beat other jurors to change their minds and vote the way of the majority, but that is what happened in this case.

Background Facts

The jury selection process in this case was painstaking. Individual jury selection comprised approximately 3842 pages of transcript and an additional 1500 pages of jury questionnaires. During the defense voir dire, defense counsel asked every single juror about issues related to *State v. Brooks,* 75 Ohio St. 3d 148, 159-160 (1996). Defense counsel did this by analogy, asking prospective jurors if they spanked their children, and whether they would respect the views of those that did

not. (See, for example: Vol. 6, Voir Dire, pp. 1134, 1175, 1236, 1335)[20] He also asked prospective jurors if they were church-going people, again asking if they respect people with an opposite viewpoint. (See for example: Vol. 6, Voir Dire, pp. 1235, 1313, 1334; Vol. 7, Voir Dire, pp. 1377,1382, 1491)[21] These inquiries related to whether the prospective juror would respect the other juror's thoughts and views during deliberations and whether, if they were the only juror that thought the aggravating circumstances did not outweigh the mitigating factors, they could hold their ground. The jurors all assured the court and counsel that they would respect everyone's viewpoints and if they were the only juror that was the "holdout" they would stand their ground.

Unfortunately, that is not what transpired in the jury deliberation process.

After the end of the penalty phase, defense counsel filed a motion for a *Remmer v. United States*, 347 U.S. 227 (1954) hearing, based on interviews of two jurors that appeared in the Akron Beacon Journal. (Doc. # 321). The attachments to the motion illustrate a much different picture of the deliberative process. The State never filed a response.

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[20] This is just a sampling. The questioning took place with virtually every juror, unless they did not have children, in which case defense counsel reverted to the question on church.

[21] As in the previous footnote, this is a sampling of the questioning that took place with virtually every juror.

Juror No. 19

The first article was an interview with Maria Lloyd, Juror No. 19, an African-American woman that was seated as Juror No. 5. Juror No. 19 had been removed from the jury during the deliberations in the trial phase of the case. (See, Proposition of Law No. VIII). In direct violation of the instructions from the judge, she gave an interview detailing her experience as a jury in the jury deliberations. (Doc. # 321, Att. A) Juror No. 19 discussed how she was the lone holdout during the trial phase deliberations on a number of the counts, she detailed her experience as follows:

> - Based on the early stages of deliberations, Lloyd said fellow jurors appeared to have made up their minds of Ford's guilt before the testimony was completed. One talked of the need to reach the verdicts in time for an upcoming birthday party.
> - The jury chose its foreman because he was the only black male on the panel. Ford is black; the Schoberts were white.
> - Some jurors, despite instructions to the contrary, talked about potential penalties, including how Ford would likely never get out of prison, if convicted of aggravated murder, or not face execution any time soon, if the panel voted for the death penalty.
> - Fellow jurors relied on Lloyd's legal education and experience — she has dual associate degrees from the University of Akron in criminal justice and paralegal studies — to ask basic questions, but then

some pressured her to convict Ford, calling her position "crazy" and not worthy of debate.

- "I told them, my priority is not how quick you get back to your kids. That's not an option for me. That's not a priority," she said. "My priority is not how quick you get back to your husbands, your cats, your dogs, whatever. We are back here to decide about this man's life. And that was causing a blowup.
- "Somebody had a birthday party planned. Other people, were, like, 'I'm just going to vote guilty.' And I said, 'If you just sit back here and vote guilty, I'm going to hold everybody up and we will be back here until we all talk about it.' "
- Lloyd, 49, said that at the end of the first day of deliberations, the panel voted to convict Ford of felonious assault for his attack on the Schoberts' daughter, Chelsea, during a date in March 2013.
- The panel also decided — after several votes — to convict Ford in the murder of Jeffrey Schobert. They had yet to agree on the verdicts for Margaret Schobert's death.
- To Lloyd, the process seemed to be moving too quickly when so much was at stake, for Ford as well as the Schobert family. She had doubts, she said. "Not everybody, I think it was a select few back there, that before the trial was ever over, had their mind made up that they were going to no matter what, for lack of a better word, [pretend] like they're deliberating and they probably wanted everything to be over in an hour."
- When jurors returned after a night of being sequestered in a hotel, Lloyd said she had

changed her mind and wanted her signature removed from the verdict convicting Ford of aggravated murder. She didn't believe Ford went to the Schobert home on April 2, 2013, with the intention to kill, as alleged in the indictment. Rather, she believes the evidence showed Ford went to the home to steal, but was surprised to find Jeffrey Schobert there.

- A second juror, Lloyd said, appeared to be agreeing with her. As a result, Lloyd was preparing for a drawn-out process of more debates over Ford's guilt or innocence, at least in the slaying of Jeffrey Schobert. She was convinced Ford killed Margaret Schobert when she came home later that morning.
- "It was shouting at times," she recalled. "There were choice words at times. People were not agreeing. There were times when me and another juror got into a real blowup because she was making snide remarks about me being a paralegal.
- "It was me and [a second juror] and they kept saying are we crazy. I had to tell them, 'Don't call me crazy because I don't want to agree with you. Don't tell me I don't have common sense.' "That's when one of the jurors said, 'Well, I'm not going to vote him not guilty.' And I said, 'Well, I'm not going to vote him guilty. So, I guess we're just stuck.' "

(Id.)

On the second day of deliberations, the court received word that the mother of one of the jurors was dying and that juror was excused and replaced with an

alternate. Unbeknownst to Juror No. 19, the jury foreman sent a note to the court asking if the panel's decision had to be unanimous. It referenced as an example, an 11-1 vote. Another note referenced a burglary charge and mentioned input from a certain juror's legal training.

Everyone — prosecutors and defenses attorneys — said in court that they believed it was likely Juror No. 19 who was mentioned as the juror with legal training. This led prosecutors to search her Facebook page and discover her being "friends" with high-ranking members of the prosecutor's office. She was excused from jury service. (See, Proposition of Law No. VIII)

Juror No. 46

The second article attached to the motion detailed the experiences of Jessica Deering, Juror No. 46, seated as Juror No. 1. (Doc. # 321, Att. B) This juror's experiences were even more disturbing. Juror No. 46 identified herself as the lone holdout in the sentencing determination related to the death of Jeffrey Schobert. The verdict recommended that the sentence of life without parole be imposed.

She further indicated that she was holding out as the only juror that thought the aggravating circumstances did not outweigh the mitigating factors relating to the death of Margaret Schobert, but eventually relented and signed the death

penalty verdict to end what she described as bullying from other jurors. In the interview she states as follows:

> I didn't want the death penalty at all, I fought for hours. I had one juror get in my face saying, "I can't believe you wouldn't give this kid the death penalty. What's wrong with you, something's wrong with you."
>
> Yes, I was intimidated. It was rough. It was hard. And I'm still not at peace that a death sentence was handed down. . . .I don't feel a death sentence is right for Shawn. He needs help, not a needle in the arm.

(Id.) Juror 46 indicated that after the rest of the jury agreed to the verdict form for life without parole regarding Jeffrey Schobert, with her being the holdout, the voting for the appropriate sentence related to Margaret Schobert took place and the pressure from others to vote for a death sentence intensified.

The jurors put pressure on Juror No. 46 to engage in a quid-pro-quo, they would agree to a life sentence for the Jeffrey Schobert count if she agreed to a death sentence for the Margaret Schobert count. She was the last person to sign the verdict form for a death sentence and indicated that she just sat there and cried for 20 minutes, "I didn't want to sign it, and I think now I'm going to have to live with that guilt. . .I don't feel it was the right thing to do." (Id.) She stated she surrendered her position "because of how awful they were." "They were screaming at me. It wasn't pleasant behind the scenes with these people." (Id.)

Juror No. 46 also addressed the trial phase deliberations. She indicated that most of the jurors were convinced of Ford's guilt and had no interest in deliberating.

In the penalty phase some of the jurors argued for death because of a concern that he may one-day escape, like the Chardon school shooter had recently done. Jurors were disgusted by what Ford did to the couple.

But in her own weighing process, Juror 46 felt the aggravating circumstances did not outweigh the mitigating evidence presented. This is exactly what the *Brooks* case was about, the idea that one juror could prevent a death sentence, but it the remaining juror pressure the lone juror to give out her honestly held convictions, *Brooks* is just an empty promise.

Trial Court's Decision

The trial court did not grant a hearing, instead, the court issued a journal entry on December 9, 2014 "resolving" the motion. (Doc. # 330). The trial court relied almost exclusively on *State v. Hessler*, 90 Ohio St. 3d 108, 120, 2000-Ohio-30 and the lack of *aliunde* evidence to deny the motion. The trial court did not seem concerned about the actions of the jury, nor the failure of the jury to follow the *Brooks* instruction.

Application of Law to the Facts of this Case.

In denying the motion, the trial court relied on *Hessler* in making its decision, however, while at first blush the cases seem similar, the facts in *Hessler* are significantly different than the facts of this case. In *Hessler*, the jury was deliberating in the penalty phase, and indicated that a sentencing recommendation had been reached. As the courtroom was being prepared for the jury's return, the bailiff indicated to the judge that there was a problem, one of the jurors was in the hallway, crying and distraught. She indicated that she would not go back into the courtroom and would not go back into the jury room "with those people." *Hessler*, at 116.

The judge went back into the courtroom and explained the situation to the attorneys and it was decided that the judge would question the juror, with the court reporter making a record. After the first inquiry, the juror was still refusing to return to the courtroom. The judge talked to the attorneys, and again talked to the juror privately and on the record. A fairly long colloquy was held, and the judge explained to the juror what would happen in the courtroom, and that when asked if it was her verdict, she need to tell the truth. The court further explained that no one else can make that decision for her. *Hessler*, at pp. 117-120. A review of the

colloquy indicates that the court's inference was that if she did not agree with the verdict, she must indicate that in her answer to the question.

In contrast, there was no such questioning of Juror 46 in Mr. Ford's case. This is in spite of the fact that the juror described her own behavior when the jury was polled. She said she considered changing her vote as the judge formally polled the jury to confirm their verdicts. "I hesitated to say yes, I wanted to say no, but I couldn't. I was looking down. I was shaking. I couldn't even control myself. But I said yes." (Doc. #321, Attachment B)

The trial court cannot close its eyes to a juror who is obviously in distress, just to get the case over with. If Juror 46 had had the same kind of colloquy with the judge that the *Hessler* juror had with the trial court there, there is certainly a high probability that she would have stated no, instead of yes when asked if it was her verdict. In addition, the prejudice is very clear. This juror had held out on the Jeffrey Schobert count, insuring a life verdict on that count. Had she not been coerced and threatened by the other juror as it related to Margaret Schobert, a life sentence, not a death sentence would have been recommended.

While there was a colloquy with the Juror 19, it surrounded her contact with the prosecuting attorney's office, and not the jury deliberations. Juror 19 indicated that she had changed her mind on the Jeffrey Schobert murder count and was

questioning the remaining counts when she was removed from jury service. As explained in Proposition of Law No. VIII, the removal of the juror was orchestrated by the prosecuting attorney's office, which would constitute an outside influence.

The *Aliunde* Rule

The trial court also relied on the fact that there was no evidence to indicate that the jury had been influenced by anything or anyone *outside* the jury. This is based on Evid. R. 606(B), known as the *aliunde* rule. This rule, which is entitled "Competency of juror as witness" provides:

> **(B) Inquiry Into Validity of Verdict or Indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror, only after some outside evidence of that act or event has been presented. However a juror may testify without the presentation of any outside evidence concerning any threat, any bribe, any attempted threat or bribe, or any improprieties of any officer of the court. A juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be

> precluded from testifying will not be received for these purposes.

This rule is often used to insulate the jury and to preserve the integrity of the jury process and the privacy of deliberations, to protect the finality of the verdict, and to insulate jurors from harassment by dissatisfied or defeated parties by prohibiting a court from questioning a juror about what occurred during deliberations.

However, the other side of the coin should be examined. Members of a jury should not have to be harassed and berated by other members of the jury in trying to reach a verdict. As set out above, each of the jurors seated on the jury indicated to the court they would respect another juror's decision in the case. The characterizations by Jurors 19 and 46 illustrated that at least some of the remaining jurors must have lied to the court when they said that, because they did not behave that way in the jury room.

The trial court's decision stated that "presumably, the jury followed the instructions given to it, including the instruction to "not surrender honest convictions in order to be congenial or to reach a verdict solely because of the opinion of others." (Doc. # 330, p. 8) Clearly, the jury did not follow those instructions. First of all, both Jurors 19 and 46 characterized some of the jurors as bullies and that they were bullied by the jurors. That is not congeniality. When a

citizen signs on to be a juror in a case, there is not an expectation that they will have be harassed and disrespected by their fellow jurors if they do not agree with them.

The United States Supreme Court is poised to examine the *aliunde* rule this coming term in *Pena Rodriguez v. Colorado*, 350 P.3d 287 (CO, 2015), *cert. granted,* 136 S.Ct 1513 (U.S. April 4, 2016)(No. 15-606). In that case the Court will examine whether the Sixth Amendment's right to an impartial jury requires courts to consider juror testimony offered to prove that racial bias infected jury deliberations.

An evidentiary rule must yield when it seriously infringes a constitutional right without sufficient justification. Here, applying Rule 606(b) to bar evidence that two jurors were harassed and bullied during jury deliberations thus infecting jury deliberations, seriously infringes on a defendant's Sixth Amendment right to an impartial jury, and no state interest justifies that infringement.

The United States Supreme Court, has always been careful to stress that the Constitution's tolerance for "no impeachment" rules is limited. "[I]n the gravest and most important cases," the Court has explained, there may be instances in which juror testimony of juror misconduct "could not be excluded without 'violating the plainest principles of justice.'" *McDonald v. Pless*, 238 U.S. 264,

268-69 (1915) (quoting *United States v. Reid*, 53 U.S. (12 How.) 361, 366 (1851)). Therefore, the Court reaffirmed in *Warger v. Shauers*, 135 S. Ct. 521 (2014) that "[t]here may be cases of juror bias so extreme" that applying Rule 606(b) to bar juror testimony proving such bias would run afoul of the Sixth Amendment. 135 S. Ct. at 529 n.3.

When faced, as in this case, with a claim that applying an evidentiary rule would infringe a constitutional guarantee, this Court must determine whether the defendant's constitutional right "outweigh[s]" state interests purportedly advanced by the rule. *Davis v. Alaska*, 415 U.S. 308, 319 (1974). Here, Mr. Ford's right to a fair and impartial determination of his sentence overrides the evidence rule that is prohibiting consideration of the information to support the claim.

The trial court erred in denying the defense motion for a hearing, and the verdict in this case which resulted in the death penalty cannot stand.

The behavior of certain jurors denied Mr. Ford his Sixth Amendment right to a fair trial and impartial jury as well as a fair and unbiased determination as to sentence as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, § 2, 9, 10 and 16 of the Ohio Constitution.

PROPOSITION OF LAW NO. X

WHEN THE STATE CALLS A WITNESS TO TESTIFY ON THEIR BEHALF AND THE WITNESS DOES NOT REMEMBER MAKING A STATEMENT, THE PROPER PROCEDURE IS TO ALLOW THE WITNESS TO REFRESH THEIR RECOLLECTION, NOT TO ALLOW THE STATE TO IMPEACH ITS OWN WITNESS WITH AN AUDIO TAPE OF A PRIOR STATEMENT, WHICH INCLUDES PREJUDICIAL HEARSAY.

On the evening of March 23, 2013, Mr. Ford, Zach Keys, Josh Greathouse and Chelsea Schobert were celebrating Chelsea's 18th birthday at Zach Keys home. (Vol.22, Trial, p. 4066.) Around that same time Mr. Ford had been staying with Josh Greathouse and his family. (Vol. 25, Trial, p. 4716.)

Heather Greathouse, the sister of Josh Greathouse was called to testify at trial. In April of 2013 she had given a statement to the police. (Vol. 25, Trial, p.4724). Ms. Greathouse was called and asked questions about statements Shawn Ford had made to her the day before the Schobert's were murdered. (Vol. 25, Trial, p.4725.) When asked about the conversations Ms. Greathouse indicated that she was nervous and could not recall the conversations. (Vol. 25, Trial, p.4724-4725.)

A side bar was held outside the presence of the jury, and the prosecutor claimed he was "surprised" by Ms. Greathouse' s failure to recall the conversations, and claimed her testimony was material to the case. (Vol. 25, Trial,

P. 4726.) Rather than taking the normal steps to refresh a witness's recollection, the prosecutor stated he wanted to impeach his own witness, Ms. Greathouse. (Vol. 25, Trial, p.4726.) Defense counsel objected to the impeachment, noting there is a distinction between changing testimony and a witness stating they do not remember what they said:

> We would object to improper impeachment in this case. She said she doesn't remember. She hasn't said she didn't make the statement; she says she doesn't remember making the statement. That's not grounds to get it turned into a hostile witness.

(Vol. 25, Trial, p.7727.) Over defense objection, the trial court permitted the State to impeach Ms. Greathouse. (Vol. 25, Trial, P. 4727.) The prosecutor did not have a transcript of the statement, and only had a recorded version of Ms. Greathouse's April, 2013 statement.

A recess was taken so that the prosecutor could find the portion of the interview he intended to utilize to impeach Ms. Greathouse. (Vol. 25, Trial, p.4729.) However, during the recess, the witness remained in the courtroom on the stand, and the State played the recorded statement. (Vol. 25, Trial, p.4729-4730.) Again the defense objected, indicating this was not the proper way to impeach the witness and requested that the witness be excused and not permitted to provide

further testimony. (Vol. 25, Trial, p.4730, 4732.) The trial court overruled the objection. (Vol. 25, Trial, p.4732.)

The trial court then inquired of Ms. Greathouse, outside the presence of the jury. (Vol. 25, Trial, p.4745.) The witness claimed that she did not hear the entire statement, just "bits and pieces," and denied that her memory had been refreshed. (Vol. 25, Trial, p.4145-4746.) The prosecutor resumed questioning and a portion of the tape was then played during Ms. Greathouse's direct testimony. (Vol. 25, Trial, p.4746-4747.) Again, defense counsel objected to the improper impeachment and hearsay. (Vol. 25, Trial, p.4747, 4748.) The prosecutor continued playing portions of the DVD. (Vol. 25, Trial, p.4747-4748.) Defense counsel objected because the entire tape was being played without questions being asked, and the trial court overruled those objections as well. (Vol. 25, Trial, p.4749.)

The prosecutor improperly impeached his own witness and improperly played the hearsay statements contained within the interview before the jury. This was not an incident where the witness was denying what was said previously, or denying that she had previously spoken to detectives. In fact, when specifically asked after the recording was played, why she did not remember her statements, Ms. Greathouse responded "because my memory stinks" and that she had little sleep and was pregnant. (Vol. 25, Trial, p.4750.)

When a witness testifies that they cannot recall or remember something, and the witness has given a prior statement, the witnesses recollection may be refreshed by utilizing the prior statement. Evid.R. 612 governs and provides that recollection may be refreshed by showing the witness the prior written statement while testifying.

> Under the doctrine of present recollection refreshed, "the witness looks at the memorandum to refresh his memory of the events, but then proceeds to testify upon the basis of his present independent knowledge." *State v. Scott*, 31 Ohio St.2d 1, 5-6, 285 N.E.2d 344 (1972). The testimony of the witness whose recollection has been refreshed is the evidence, not the contents of the writing. See 1 Giannelli, Evidence, Section 612.3, at 578 (3d Ed.2010). Thus, "a party may not read the statement aloud, have the witness read it aloud, or otherwise place it before the jury." *State v. Ballew*, 76 Ohio St.3d 244, 254, 1996 Ohio 81, 667 N.E.2d 369 (1996).

State v. Powell, 132 Ohio St.3d 233, 2012 Ohio 2577, 971 N.E.2d 865, ¶ 57. When the prior statement involves a videotape, the correct procedure is to allow the witness to "view the recording outside the presence of the jury, thereby having his recollection refreshed; the witness may then testify based upon his or her own present knowledge." *State v. Fair*, 2nd Dist. No. 24388, 2011 Ohio 4454, P59.

Although Evid.R. 612 refers specifically to writings, anything can be used to refresh a witness's recollection, including audio recordings. See 1 Gianelli &

Snyder, Evidence (2001) 512, Section 612.4. When a recording is used, the same procedures should be used. "The witness should review the material for refreshing of recollection out of the hearing of the jury." *State v. Bankston*, 2nd Dist No. 24388, 2011 Ohio 6486, P14. In *Bankston,* the court found reversible error resulting from playing recorded conversations under the guise of refreshing recollection. The recordings were conversations from the jail which were "clearly hearsay."

Here the State claimed a right to impeach their own witness when she clearly said she could not recall what she had said. The procedure used was improper.

Evid. R. 607(A) authorizes a party to impeach a witness when an inconsistent statement is made:

> A. Who May Impeach.
>
> The credibility of a witness may be attacked by any party except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage. This exception does not apply to statements admitted pursuant to Evid. R. 801(D)(1)(A), 507(D)(2) or 803.
>
> B. Impeachment; Reasonable Basis.
>
> The questioner must have reasonable basis for asking any question pertaining to impeachment that implies the existence of an impeaching fact.

In this case the witness testified she could not remember, and the defense objected to the procedures employed by the prosecution. Evid. R. 607 requires that before a party can impeach its own witness with a prior inconsistent statement, there must be a showing of surprise and affirmative damages. *State v. Davie*, 80 Ohio St.3d 311, 323, 1997 Ohio 341, 686 N.E.2d 245. First, there were no inconsistent statements that occurred. The witness stated she could not recall or remember. While the State may have been surprised that she could not remember, given the fact that her statement had been played to her the night before with detectives, the State did not have inconsistent statements to impeach. In addition, there was no showing of "affirmative damage." In *Davie*, the prosecution showed both surprise, because the witness gave inconsistent testimony at the trial, and affirmative damage because the testimony at trial implied someone else had cause the death, not the defendant, as the witness had previously indicated. *Id.* at 323. However, even when a prior recorded statement is used to impeach a witness, the recording should not be played in front of the jury. *State v. Fair, supra*. Here, there were no such inconsistencies. It was not until after playing several portions of the tape that the prosecutor then asked:

> If I were to play the tape for you, of that interview, or the portion of the interview where you discuss that with the detective, do you think that might refresh your recollection as to your conversation, if any, with—or

> whether you had a conversation with Mr. Ford about what happened to Chelsea?

(Vol. 25, Trial, P. 4752.) The witness then stated "yes" at which time the jury was excused and the witness was shown her entire statement. By that point-in-time portions of the recording had already been played in front of the jury. Contained within the DVD of Ms. Greathouse's interview, (State Ex. 260) the prosecution was able to introduce information and evidence from "Jordan" at the trial, and Jordan did not testify. Several times during the recorded interview, the detective asked Ms. Greathouse about whether or not "Jordan" had told her specific information about the murders, thefts, and whether or not Ford had provided specific information to Jordan that was then conveyed to Ms Greathouse.

In *State v. Kennan*, 66 Ohio St.3d 402, 613 N.E.2d 203 (1993) this Court found that the prosecutor had improperly impeached its own witness because there was no showing of affirmative damage. In *Keenan*, the Prosecutor called Mr. Flanik to testify. The prosecutor asked Mr. Flanik if another individual, who as present on the night of the murders, was crying, to which Flanik responded "it seemed like it, but I really couldn't tell." The Prosecutor then showed the witness his written statement, at which time the prosecutor proceeded to impeach his own witness. This Court found the prosecutor used improper procedures because the witness had provided a "neutral answer" that he "couldn't tell" if the individual

had been crying. In *Keenan*, given the cumulative errors involved, the court found prejudice through the violation of Evid. R. 601.

Had a proper foundation for impeachment been laid, the Prosecutor could have asked leading questions, the proper mechanism to impeach the witness. Here, the prosecutor did not do that and proceeded to play the recording which contained clearly hearsay statements.

A prior statement, if inconsistent, is admissible under Evid. R. 607 for impeachment, and not as substantive evidence offered to prove the truth of the matter asserted. *State v. Dick*, 27 Ohio St.2d 162, 165, 271 N.E.2d 797 (1971). In *Dick*, this court recognized the "long adhered to principle" that the State, if surprised by a witness's inconsistent statement may "interrogate such witness concerning his prior inconsistent…statement…for the purpose of refreshing the recollection of the witness but not for purpose of offering substantive evidence against the accused." *Id.* at 165. citing *State v. Duffy*, 134 Ohio St. 16, 17, 15 N.E.2d 535 (1938), and *Hurley v. State*, 46 Ohio St. 320, 21 N.E. 645 (1888). In *Dick*, the Court held it was improper to utilize a previous statement of the witness as evidence. *Id.* at 164.

In *Dick*, as in this case, the State marked as an exhibit the prior statement and offered that statement in evidence before the jury. Moreover, the State's

claimed of surprise is not supported by the record. The prosecutor readily conceded that they had detectives go out and talk to Ms. Greathouse the night before she was to testify, and "she has been very reluctant to testify, she has asked not to testify; she is obviously scared, and – but I'm surprised, based on the interviews that the detective had last night that she – that she acknowledged that that's what she told them back in April. But the problem is that I have the tape, and I would have to cue it up. I guess I didn't anticipate her saying today what she said, so – ." (Vol. 23, Trial, p. 4726-4727). The State was well aware they had a witness who was reluctant to testify and who asked not to testify, and said she was scared. Their claim of being surprised is belied by those facts.

The out-of-court statement was utilized and played before the jury. As recognized in *Dick, supra*, and *In re: K.S.*, 8th Dist. No. 97343, 2012 Ohio 2388, use of the out-of-court statement was hearsay, for which there is no hearsay exception which would permit it to be played before the jury. *Id.* at P. 22-25. In *In re: K.S.* the court reversed the delinquency adjudication after the State impeached its own witness and read the witnesses prior statement into the record. The court found the state's claim of surprise without merit. "Surprise exists when the party calling the witness demonstrates that the witness's testimony on the stand "is materially inconsistent with the prior written or oral statements [of that witness]

and counsel did not have reason to believe the witness would recant when called to testify." *Id* at para. 18.

> Pursuant to Evid.R. 607(A), the trial court erred in allowing the prosecutor to read Taylor's prior statement into the record. Though the prosecutor was free to question Taylor by way of leading questions due to his status as an adverse witness, the prosecutor could not circumvent the constrictions of Evid.R. 607(A) and read the statement into evidence under the guise of leading an adverse witness to develop testimony consistent with the witness's prior statement.

Id at para. 20. Here the state did the equivalent by playing the recording before the jury under the guise of impeaching Greathouse. Once Greathouse was shown the entire recording outside the presence of the jury, she readily remembered her prior statement and answered consistent with the prior statement.

Generally, evidentiary rulings made at trial rest within the sound discretion of the trial court. *State v. Graham*, 58 Ohio St.2d 350, 390 N.E.2d 805 (1979). The term "abuse of discretion" connotes more than an error of law or judgment. It implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). The trial court abused its discretion in permitting the State to impeach its own witness through playing an out-of-court statement before the jury. Mr. Ford was prejudiced by the State's actions, which has denied him a fair trial and due process

of law, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article 1, §16 of the Ohio Constitution. A new trial must be granted.

PROPOSITION OF LAW NO. XI

THE ADMISSION OF GRUESOME PHOTOGRAPHS INTO A DEATH PENALTY CASE, WHEN THE PROBATIVE VALUE OF THE EVIDENCE IS OUTWEIGHED BY THE PREJUDICE THAT WILL RESULT, DENIES THE DEFENDANT DUE PROCESS AND A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, §§ 2, 9, 10, AND 16 OF THE OHIO CONSTITUTION.

The victims in this case were beat to death with a sledgehammer and stabbed with a knife. From the start of the case, the defense was concerned about the graphic photographs and evidence that may be used by the prosecution.[22]

Crime Scene Photographs

Defense counsel filed a motion in limine to exclude photographs of the deceased. (Defense Motion 42, Doc. # 81). The court first heard the motion on February 4, 2014. The court seemed predisposed to admit the photographs, without ever seeing them. "Obviously, since the State has the burden to prove beyond a reasonable doubt the cause of death in this case, some display of such photographs is going to be required." (Pretrial, 2-4-14, p.31). Yes, the State had the burden of proof, but there are other ways to prove the cause of death without the introduction of repetitive and cumulative prejudicial photographs.

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[22] Defense counsel at trial objected to many more photographs than are the basis of this proposition of law. This proposition focuses on the most egregious of the admitted photos.

The State acknowledged that the photos were very disturbing:

> But, as the Court has pointed out, this is a -- kind of a unique case. This is not a bullet hole. And there are some aspects of photographs that are extremely disturbing based on what the State has alleged that the defendant has done. And part of that goes to intent, you know, motive, and all those things.
>
> And so there are going to be photos that are completely disturbing that we are going to intend to admit for those reasons and other reasons.

(Id., at p. 32) The court overruled the motion in limine at that time, but indicated it would be addressed at another hearing.

The issue of the photographs was again address on October 9, 2014, just prior to opening statements when the prosecuting attorney indicated that he wanted to use five photographs during his opening statement. (Vol. 43, Trial, p. 3843) Defense counsel objecting, indicated that the photos were more prejudicial than probative. (Id., p. 3844) Three of the photographs depicted the victims taken at the scene of the crime, two were of Chelsea Schobert, taken at the hospital.[23]

In allowing the prosecuting attorney to use the photographs, the court stated:

> THE COURT: The Court has reviewed those photographs. Certainly they have a graphic element to them, but having seen them, I do not believe that they

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[23] Appellant Ford had requested that the felonious assault of Chelsea Schobert be severed from the capital trial and the trial court denied that request, allowing the prosecuting attorney to introduce those prejudicial photographs in the capital trial. See, Proposition of Law, No. VII.

> should be excluded from evidence. The probative value is not outweighed by the alleged prejudicial effect. So the Court will allow those photographs to be utilized in opening statement.

(Id., at p. 3845) From the very start of the trial, the state was allowed to inject the graphic and prejudicial evidence into the case.

The prejudicial nature of the photographs became more vivid after the opening statements when the defense made the record as follows:

> During the State's opening statement, we had a member of the press -- and I got to sit here and watch it -- a member of the press that -- the person working the pool camera in the courtroom for the -- for the United Press that's here for all the -- the press that is here; I don't know what channel that person is with or whatnot -- I watched her -- and I think the Court had an opportunity to observe this as well -- I watched her as she became ill during the presentation of the pictures during the State's opening statement. She became ill. What I saw was I saw her kneel down, then I saw her put her head down. And then as it appeared like she was going to pass out, I saw her duck, walk over to the side of the court, where the Court has informed us at sidebar that she instructed you she had to get out of here before she passed out. That illustrates the problem with these photographs.

(Vol. 21, Trial, pp. 3922-3923) The state was allowed to use State's Ex. 80 and 84 during the testimony of Nicholas Gerring, the construction worker that discovered the bodies. State's Ex. 80 had been one of the photos used during the opening statements. Defense counsel again objected. (Vol. 23, Trial, pp. 4303-4304)

State's exhibit 80 depicted Mrs. Schobert lying on the floor with a large blood stain around her head. State's Ex. 84 depicted both victims, Mr. Schobert lying on the bed with the sledgehammer next to him and blood on his body and the bedding and Mrs. Schobert's head, battered, with a large blood stain. The trial court allowed both photos to be used. (Id., at p. 4304)

The trial court examined the remainder of the photographs that the State intended to introduce prior to the afternoon session on October 10, 2014. After examining the photographs and over defense objection, the court allowed the admission of State's Ex. 82, 91, 93, 97 and 124, which depicted Mrs. Schobert at the crime scene. The court also allowed State's Ex. 98, 99, 106, 112, 113, 115, 125, and 138 which depicted Mr. Schobert at the crime scene. All of these photos were graphic and gruesome.

Autopsy Photographs

The state was also allowed to admit an excessive number of photographs from the autopsy of the victims. State's Ex. 3, 4, 5, 6, 7, 8, 9, 10, 13, 22, and 24 all depicted the beaten and battered head of Mrs. Schobert, many with dried blood. In addition, State's Ex. 17, 18, and 19 were also graphic photos of Mrs. Schobert. The trial court also allowed admission of the autopsy photos related to Jeffrey

Schobert. State's Ex. 34, 37, 38, 39, 40, 41, 42 and 44 all depicted the beaten and battered head of Mr. Schobert.

These were Gruesome and Graphic Photographs

The nature of these photographs cannot be denied. Before the trial court brought the jury back to the courtroom after examining the photographs, the trial court admonished the people in the gallery:

> Before we bring in the jury, let me indicate to the members of the gallery that the photographs that the Court has just dealt with in its evidentiary rulings are quite graphic in nature. And while everyone who is here has a right to be here, if someone feels they cannot deal with what's in the photographs, the Court will let you leave the room. But if you do leave the room, I am not going to permit you to come back in.
>
> If you do feel like you must leave the room, please do so quietly and with as little disturbance as possible. If you find that you can't take the photographs, you also could close your eyes. But given the number of photographs that exist, it is going to take a while to get through them. And I am just forewarning the gallery that the pictures are very graphic.

(Vol. 23, Trial, p. 4354)

Legal Analysis

The standard used to determine whether gruesome photographic evidence is admissible in a capital case is stricter than the standard used in noncapital cases under Evidence Rule 403. *State v. Morales*, 32 Ohio St. 3d 252,258, 513 N.E.2d

267,274 (1987). Under the Ohio Rules of Evidence the opponent of the evidence carries the burden to demonstrate that the probative value of the photographic evidence is "substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Ohio R. Evid. 403(A). Additionally, photographs may be excluded under the Rules of Evidence if the opponent of the photographs persuades the Court that the "probative value [of the photographs] is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence." Ohio R. Evid. 403(B).

In capital cases, however, the burden shifts to the proponent of the evidence to demonstrate that the probative value of "each photograph" outweighs the "danger of prejudice" to the defendant. *Morales*, 32 Ohio St.3d at 258. In addition to that burden, the proponent of the gruesome photographs must also establish that the photographs are neither repetitive nor cumulative. Id. at 259. See also *State v. DePew*, 38 Ohio St. 3d 275,281, 528 N.E.2d 542, 549 (1988); *State v. Maurer*, 15 Ohio St. 3d 239,473 N.E.2d 768 (1984).

As the standard in *Maurer* and *Morales* is designed to protect the capital defendant from the danger of prejudice, the defendant need not establish actual prejudice. *Morales*, 32 Ohio St.3d at 258. Thus, the *Maurer* and *Morales* standard is in concert with capital jurisprudence from the United States Supreme Court that

strives to make the trial phase in the capital case as sound and reliable as possible. See *Beck v. Alabama*, 447 U.S. 625, 630 (1980).

In analyzing the photographs in this case, the trial court was under the misapprehension that this Court had "modified" the standard of admission of gruesome photographs in *State v. Mammone*, 139 Ohio St. 3d 1051, 2014-Ohio-1942, ¶¶ 94-106. (Vol. 23, Trial, p. 4349) But a reading of *Mammone* indicates that this standard was not modified, and the number of photographs admitted in *Mammone* are very different than plethora of photographs admitted in Shawn Ford's case. In *Mammone*, there was one crime scene photo of each victim admitted. Contrast that with six gruesome photographs of Mrs. Schobert and eight gruesome photographs of Mr. Schobert.

Likewise, the admission of the autopsy photographs, fourteen of Mrs. Schobert and eight of Mr. Schobert were more than allowed in *Mammone*. In addition, this Court cited to Mr. Mammone's own statement thanking the court for not admitting more photographs as "notable." There was no such statement by Mr. Ford in this case.

The other distinction is that the photographs admitted in *Mammone*, at least from the court's description, were not repetitive or cumulative, as the photographs in this case were.

Under the *Maurer* and *Morales* standard, the exhibits should have been excluded from evidence as cumulative. See 32 Ohio St. at 259, 513 N.E.2d at 274.

The jury must have felt "horror and outrage" when they viewed the photographs at the trial phase. See *State v. Thompson*, 33 Ohio St. 3d 1, 15, 514 N.E.2d 407, 420 (1987). Those photographs were inflammatory and they appealed to the juror's emotions. They created an unacceptable risk that the jurors would convict Ford out of their feelings of anger and revulsion. Moreover, unlike *DePew* in which the photographs were kept to an "absolute minimum of two for each victim." *DePew*, 38 Ohio St.3d at 282, 528 N.E.2d at 551. As set forth above, the State admitted many more photographs in this case.

Nevertheless, the admission of gruesome photographs may be harmless error at the trial phase when the evidence of guilt is overwhelming as to each element of the offense. See *Thompson*, 33 Ohio St.3d 15, 514 N.E.2d at 420. See also, *In re Winship*, 397 U.S. 358 (1970). Here the evidence was not overwhelming. (See, Proposition of Law No. XII.)

On direct appeal, constitutional error is harmless only if **the State** proves it to be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 26 (1967). Even when the admission of gruesome photographs is harmless at trial, the use of improper photographs by the State at trial may have a prejudicial "carry

over" effect on the jury's penalty phase determinations. See *Thompson*, 33 Ohio St.3d at 15, 514 N.E.2d at 421.

Last, the State's use of "unduly prejudicial" evidence in a capital case violates the defendant's right to due process. See *Payne v. Tennessee*, 501 U.S. 808, 825, 111 S.Ct. 2597,2608 (1991).

The photographs of the beaten, battered and bloody heads of the two victim's and the numerous autopsy photos were irrelevant, unnecessary, cumulative, repetitive, and they created a danger to Shawn Ford. Their admission at the trial phase violated Ford's right to due process and had a "carry over" prejudicial effect on the mitigation phase. U.S. Const. amend. XIV. Mr. Ford is therefore entitled to a new trial. Alternatively, his death sentence must be vacated under O.R.C. § 2929.06(B).

PROPOSITION OF LAW NO. XII

A CONVICTION WHICH IS NOT BASED UPON SUFFICIENT EVIDENCE DEPRIVES A DEFENDANT OF DUE PROCESS OF LAW AND THE RIGHTS AND LIBERTIES SECURED BY THE UNITED STATES CONSTITUTION AND OHIO CONSTITUTION ARTICLE I SECTION 1, 2, 10 AND 16.

A CONVICTION WHICH IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE DEPRIVES A DEFENDANT OF DUE PROCESS OF LAW AND THE RIGHTS AND LIBERTIES SECURED BY THE UNITED STATES CONSTITUTION AND OHIO CONSTITUTION ARTICLE I SECTION 1, 2, 10 AND 16

At the close of the State's case, the Ford moved, pursuant to Ohio Crim.R. 29, for judgment of acquittal as to all counts. (Vol.27, Trial, p.5148.) The trial court overruled the motion. (*Id,* p.5150) Though no defense witnesses were called to testify, the motion was renewed and overruled when the defense rested. (*Id* p.5151)

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

> Moreover, use of the reasonable doubt standard is indispensible to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going

> about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty.
>
> Less there be any doubt about the Constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

Id at 364

In *State v. Thompkins*, 78 Ohio St.3d 380, 1997 Ohio 52, 678 N.E.2d 541 this Court delineated the standard for a sufficiency of the evidence challenge noting that sufficiency of the evidence is "a turn of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." *Id* at 386.

When determining whether the evidence is sufficient to support the verdict the reviewing court must determine whether, "after viewing the evidence in light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* 61 Ohio St.3d. 259, 574 N.E.2d. 492 (1981) syll. para. 2. While it is easy in a case like this, with statements from Ford, gruesome photographs of two people

murdered and the highest possible penalty at stake, to dismiss a sufficiency challenge without critically analyzing the evidence presented, critical analysis must be conducted. Based upon the evidence presented at trial, the jury could not find the essential elements necessary for the offenses as set forth below.

A challenge the weight of the evidence, on the other hand, deals with the inclination of the greater amount of credible evidence to support one side of the issue over the other. *State v. Thompkins*, 78 Ohio St.3d at 387.

Sufficiency of the evidence and weight of the evidence are governed by different standards. *State v. Thompkins*, 78 Ohio St. 3d at 380. Sufficiency is a question of law regarding the adequacy of the evidence. Id.

Weight of the evidence deals with "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." Id. at 387. To reverse the jury's verdict as against the manifest weight of the evidence and order a new trial, this court must act unanimously as a "thirteenth juror" who disagrees with the jury's decision on testimony conflicts. More specifically, this Court has stated that:

> the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial

> ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.

Id., citing *State v. Martin*, 20 Ohio App. 3d 172, 175, 485 N.E.2d 717 (1983). When there is a challenge to the weight of the evidence, the focus is upon "the evidence's effect of inducing belief." *State v. Wilson*, 113 Ohio St.3d 382, 2007 Ohio 2202, 865 N.E.2d 1264 ¶25, citing *State v. Thompkins, supra.* This Court has provided guidance for a weight of the evidence challenge recognizing that when viewing a weight of the evidence challenge, a reviewing court asks, "whose evidence is more persuasive — the state's or the defendant's?" *State v. Wilson, supra.*

In this case, the State presented evidence that it believed Ford and Jamal Vaugh walked from Akron to the Schobert home, approximately 9 miles. There was evidence that there was a Blazer with flashing lights in the Schobert neighborhood the evening of the murder which was never located. (Vol. 27, trial, p. 5050.)

The State presented testimony that Ford told Heather Greathouse he was going to "hit a lick." (Vol. 25, Trial, p. 4764.) She did not see Ford the next morning. Found in her home were a pair of jeans with blood "splatters" on them. These jeans belonged to her boyfriend, Jordan James. (Id. at p. 4775.) Heather Greathouse told Jordan James to burn the pants. (Id., at 4763.) In addition to the

pants, the police also located a ring and money at her house. (Id., at 4762.) . It was Heather Greathouse who had her aunt throw Margaret Schobert's ring in the dumpster (Vol.25 trial p.4767)

While Chelsea Schobert was in the hospital, her parents were with her constantly. (Vol. 22, Trial, p. 4081.)

Jamal Vaughn lived on Fried Street on Akron with his child and girlfriend. (Vol. 27, Trial, p. 5037.) Jeffrey Schobert's vehicle was found ½ block from Vaughn's house. (Id., at 5036.) Mr. Schobert's watch was on the floor of Vaughn's room. (Id., at 5037.)

Ford was charged in counts 1 and 4 of the indictment with the commission of an aggravated murder with prior calculation and design. In addition, the second and third capital specifications appended to each aggravated murder count alleged prior calculation and design and Ford was found guilty of that specification in count 4. (But See, Proposition of Law No. II)

While there is no bright line test to distinguish between the presence or absence of prior calculation and design, each case turns upon the particular facts and evidence presented at trial. *State v. Taylor* 78 OhioSt.3d 15, 20, 1997 Ohio 243, 676N.E.2d.82. In this case the government presented insufficient evidence of prior calculation and design. It is just as likely that Ford went to the Schobert home

to “hit a lick” thinking Chelsea’s parents were at the hospital. While the State argued the Ford walked from Akron to New Franklin and wore 5 pairs of gloves because this is what he planned to do, that simply does not comport with the evidence. Mr. and Mrs. Schobert were killed with a sledgehammer that was found in their garage and stabbed with a knife that was found in their home. No weapon was brought to the house.

This Court has declined to find sufficient evidence of prior calculation and design in explosive situations of short duration. *State v. Reed* 65OhioSt.2d.117, 418N.E.2d.1359(1981). In *Reed*, this Court recognized that the phrase “prior calculation and design” in the aggravated murder statute reflected an intent of the general assembly to require evidence of a scheme “designed to implement the calculated decision to kill.” *Id* at p.121. There was insufficient evidence of any plan or decision to kill. There was insufficient evidence to support convictions for aggravated murder as alleged in Counts 1 and 4 or the specifications based upon prior calculation and design.

With regard to the commission of the murder during an aggravated robbery and the aggravated robbery contained within Counts 2 and 5, specification 2 to each aggravated murder count and Counts 6 and 7, the aggravated robbery counts themselves, the evidence did not support a finding that Ford committed a theft.

R.C. §2911.01 defines aggravated robbery as follows:

> (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.

All the personal property of the Schobert's was found with Jamal Vaughn and Heather Greathouse. There was no evidence that Ford took any items or knew any items were taken. The government's evidence was that there was more than one person at the Schobert home and there was no evidence that Ford knew any items were taken. See, *State v. Shorter*, 7th Dist., No. 12MA55, 2014 Ohio 581, 2014 Ohio App. LEXIS 560, Discretionary appeal not allowed by *State v. Shorter*, 139 Ohio St. 3d 1428, 2014 Ohio 2725, 2014 Ohio LEXIS 1567, 11 N.E.3d 284 (2014) where the court vacate an aggravated robbery conviction finding insufficient evidence Shorter personally robbed the victim.

There was insufficient evidence to convict Ford as a matter of the aggravated murder as alleged in Counts 2 and 5, specification 2 to each aggravated murder count and Counts 6 and 7, the aggravated robbery counts themselves.

With regard to counts 3 and 6, Ford was charged with the aggravated murder while committing an aggravated burglary. Ford was charged separately with aggravated burglary in count 8.

R.C. §2911.11 defines aggravated burglary as follows:

> (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;

In order to obtain a conviction, the State was required to prove someone was likely to be home. R.C. §2909.01 defining "occupied structure." The fact that a residential dwelling has been burglarized does not lead to the presumption that someone was present or likely to be present in the structure. *State v. Fowler,* 4 Ohio St.3d 16, 17, 445 N.E.2d 1119, 1119-1120 (1983). It must be shown that another person was present or likely to be present. The question becomes whether it was "likely" someone would be home. *State v. Holt,* 17 Ohio St. 2d 81, 246 N.E.2d 365 (1969). While "likely" does not require reasonable certainty or probability, it does require some evidence that someone would be home. In *State v.*

Green, 18 Ohio App.3d 69, 72, 480 N.E.2d 1128 (1984) the Tenth District found that a person "is likely to be present when a consideration of all the circumstances would seem to justify a legal expectation that a person could be present." Id., at 72. In the case of *State v. Fowler*, 4 Ohio St. 3d 16, 445 N.E.2d 1119 (1983), this Court held that when evidence was presented that the occupants of the burglarized dwelling were home on the day of the crime, that both husband and wife occasionally worked at different locations, and that they were likely to come home at varying times, a permissive inference could be drawn by the jury regarding the likelihood of the occupants being present in the residence at the time of the burglary. Id. at 19. That is not the case here. The only testimony presented regarding the Schobert's schedule was from Chelsea Schobert who testified that she and Ford would often go to her house to hang out because her sister was away at college, her father was a lawyer who "always" traveled and her mom was a paralegal that would often times be at work. (Vol. 22, Trial, p. 4059-4061.) The evidence regarding their likelihood of being home on April 1 was further impacted by the fact that the family was supposed to leave for Florida on April 1, 2013. (Id., at 4082.) Ford and Chelsea spent "everyday" together and most certainly would have known of the families scheduled vacation. The family did not go because Chelsea was still in the hospital. There was no evidence that Ford knew she was

still in the hospital on April 1 or that the family canceled their vacation plans. However, there still was insufficient evidence that anyone was likely to be home because Chelsea testified that her parents were at the hospital "constantly"

In *State v. Broyles,* 5th Dist. No. 2009 CA 72, 2010 Ohio 1837, 2010 Ohio App. LEXIS 1525, discr. appeal not allowed by *State v. Broyles*, 126 Ohio St.3d 1582, 2010 Ohio 4542, 934 N.E.2d 3552010) the Court found that the evidence was insufficient to support a burglary conviction under R.C. §2911.12(A)(2) as the proof did not show that a person was likely to be present when defendant trespassed in the victim's home, in that the victim testified that she was not normally home at the time that the burglary. See, also, See *State v. Lockhart* 115 Ohio App.3d 370, 373, 685 N.E.2d 564 (8th Dist. 1996), and *State v. McCoy*, Franklin App. No. 07AP-769, 2008 Ohio 3293 reversing convictions for aggravated burglary based upon insufficient evidence when the evidence confirmed the homeowners were not generally home at the time of the trespass.

Under the facts presented, there is no evidence that Ford knew anyone would be home or that it was likely anyone would be home and given the testimony that the Schoberts were staying at the hospital with their daughter, it was likely no one would be home and Ford thought the house would be vacant. This is particularly true given the fact that he told Greathouse he was going to hit a lick and had no

weapon with him. There was no evidence that Ford expected to encounter anyone that evening. There was insufficient evidence to convict Ford of Counts 3 and 6, aggravated murder while committing an aggravated burglary or the aggravated burglary in count 8.

In count 9 of the indictment, Ford was charged with grand theft. The State failed to present any evidence that Ford exerted control over the vehicle. *State v. Talley*, 18 Ohio St.3d 152, 155, 480 N.E.2d 439 (1985) Given the testimony of the presence of other people, and the location where the vehicle was found, a half block from where Jamal Vaughn was staying, it cannot be said that the State proved beyond a reasonable doubt that it was in fact Ford who took or drove Mr. Schobert's vehicle. There was insufficient evidence to convict Ford of Count 9.

Ford was charged in Count 11 of the indictment with felonious assault of Chelsea Schobert on March 23, 2013. The State presented evidence the called into question how Chelsea Schobert was injured. Josh Greathouse, Zach Keys and even Chelsea Schobert picked someone else out of the photo lineup for being responsible for her injuries. That they were able to independently pick the same person is improbable. Even after changing their story and implicating Ford, Zach Keys and Josh Greathouse presented inconsistent accounts of what happened. Keys testified Chelsea Schobert was half off the bed with a gash in her head and

Ford left to get a knife. (Vol. 21, Trial, p. 3949) Yet Keys admitted his mom did not have a brick in the bedroom- the object purportedly used to hit Chelsea. (Id., at 3984.) Greathouse testified he saw Ford stab Chelsea Schobert and then left to get something to hit her with. (Vol. 22, Trial, p. 4021.) Greathouse saw Chelsea, not on the bed, but laying on the floor when Ford came back to hit her in the head. Keys claimed they were doing drugs and were all high. (Vol. 21, Trial, p.3945.) Greathouse denied any drugs were involved. (Vol. 22, Trial, p. 4035.) Chelsea said she was too drunk to have sex and that is what upset Shawn. Keys testified he recorded Ford and Chelsea engaged in sex in the living room. (Vol. 21, Trial, p. 3986.) Ford's conviction for felonious assault was against the manifest weight of the evidence.

The trial court erred in denying the Motion for acquittal and Ford's convictions must be vacated.

PROPOSITION OF LAW NO. XIII

INFLAMMATORY REMARKS DURING CLOSING ARGUMENTS IN THE TRIAL AND PENALTY PHASE DISPARAGING DEFENSE COUNSEL UNDERMINE THE ABILITY OF A JURY TO DECIDE A CASE OBJECTIVELY IN VIOLATION OF MR. FORD'S RIGHT TO A FAIR TRIAL GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND ARTICLE 1, §1, 2 AND 16 OF THE OHIO CONSTITUTION.

The State's closing arguments in both the trial phase and penalty phase of the trial were replete with disparaging comments regarding defense counsel. A review of the closing arguments from both phases of the trial reveal that the prosecutor was not attacking the evidence but was, in fact, trying to disparage and undermine defense counsel. Defense counsel failed to object to the comments. (See, Proposition of Law No. XX) The comments rise to the level of plain error.

The United States Supreme Court has addressed the issue of personal attacks by counsel during trial, and the impact it has upon the trial:

> The prohibition of personal attacks on the prosecutor is but a part of the larger duty of counsel to avoid acrimony in relations with opposing counsel during trial, and confine argument to record evidence. It is firmly established that the lawyer should abstain from any allusions to the personal peculiarities and idiosyncrasies of opposing counsel. A personal attack by the prosecutor on defense counsel is improper, and the duty to abstain from such attacks is obviously reciprocal.

United States v. Young, 470 U.S. 1, 10, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985).

When improper comments are made, and improper arguments submitted, the relevant inquiry a reviewing court must apply in assessing the validity of a claim of prosecutorial misconduct is: 1.) whether the prosecutor's remarks were improper; and, 2.) if so, whether a substantial right of the accused was adversely effected. *State v. Williams*, 73 Ohio St.3d, 153, 168-169, 652 N.E.2d 721 (1995); *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). The analysis requires a focus upon "the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982).

In *State v. Lott*, 51 Ohio St.3d 160, 555 N.E.2d 293 (1990), this Court acknowledged the unique role of the prosecuting attorney and specifically held that a prosecuting attorney may not express personal beliefs, quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314

> …[H]e is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that the guilt shall not escape or innocence suffer. He may prosecute with earnest and vigor – indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much a duty to refrain from improper methods, calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Lott at 165-166. A review of the rebuttal closing arguments in both phases of the case reflects that prosecutor here did indeed strike foul blows by improperly

demeaning defense counsel, and did so when defense counsel would not have a chance to rebut his comments.

In order for prosecutorial misconduct to warrant reversal, the comments must have "so infected the trial with fairness as to make the resulting conviction a denial of due process." See, *United States v. Moreno*, 899 F.2d 465, 468 (6th Cir. 1990), cert. denied, 503 U.S. 948, 112 S.Ct. 1504, 117 L.Ed.2d 643; *Darden v. Wainwright* 477 U.S. 168, 181, 91 L.Ed.2d 144, 106 S.Ct. 2464 (1986).

This was clearly the case presented in closing arguments at both phases of this trial. The Prosecutor's comments can hardly be considered harmless. Only one conclusion can be drawn from the Prosecutor's repeated comments about defense counsel, and that was an intent to poison the jury. Within the first page of closing arguments, the Prosecutor told the jury that he could "guarantee you the defense will suggest to you at points in their argument that you should not consider someone because of their background, and that you would not rely on those people in the most important of your affairs." (Vol. 28, Trial, p.5225.) The Prosecutor continued by telling the jury that that was not the law. The insinuation to the jury was that the defense will try to get them to do things the law does not permit.

The rebuttal to the defense closing argument, the State repeatedly attacked defense counsel.

> One of the things I want to point out at the beginning of this thing is: Mr. Sinn has done what I consider to be, you know, the Jedi mind trick. It is, you know: look over here, don't look at the evidence.
>
> Because his great hope probably is, is that if you go, "I'm so confused about everything he just said," he wins, right?

(Vol. 28, Trial, p.5283.) This was not an effort to counter arguments made by the defense in their closing arguments, this was an effort to disparage defense counsel and to convey to the jury that the defense counsel was simply trying to confuse and mislead the jury. The closing rebuttal continued with the prosecution addressing defense counsel, not the evidence.

> So what does Mr. Sinn do? Mr. Sinn came up here and told you: if you can't feel it, put your hands on it – if it is important, you should be able to put your hands on it, right?
>
> Why is he saying that? Because he knows that there are certain things that you cannot put your hands on.
>
> Mr. Sinn complains because we did not give you the letters that Detective Hitchings talked about that said "I love you to death" in it. You can imagine that letter is probably just full of self-serving things the Defendant said, and we didn't feel that was important to our case.
>
> If Mr. Sinn does, he has the letter, he has all the discovery, he has those things, he has all those interviews.

(Vol. 28, Trial, p.5284.) Again, the State was not attacking the nature of the evidence, he was attacking the manner in which the defense counsel addressed the evidence.

During closing arguments, the defense questioned the possibility of another individual, Zach Keyes, being present. In response, during closing arguments, the Prosecutor offered the following:

> If Mr. Sinn had some additional evidence about Zach Keyes, I will charge him, too."

(Vol. 28, Trial, p.5287.) Again the Prosecutor focused not upon the evidence but upon defense counsel.

The Prosecutor continued:

> One of the other things I thought was really funny is - - or interesting is, is that they said you don't know the rest of the story. I don't hear anybody tell us the rest of the story.
>
> Mr. Sinn: Objection.
>
> The Court: Overruled.
>
> Mr. Loprizi: Mr. Sinn said "you don't know the rest of the story" and left it hanging there as though there is a rest of the story.

(Vol. 28, Trial, p.5289.) This was an effort to tell the jury what the defense argued was "really funny". He continued through innuendo to disparage what the defense counsel did as an attorney not the evidence:

> The other thing is, he puts that – we call it planting a seed, right? He says, "there is more to this case than you think you know." What does that mean? It means nothing…
>
> Because if he can get you thinking along the wrong trail of something – trying to figure something out that's not there, than you lose you way.
>
> And that's not what we want you to do. We want you to stay focused.

(Vol. 28, Trial, p.5289-5299.) Again, the State is attacking Mr. Sinn and not the evidence. This becomes apparent when he specifically argues how the defense "approaches the case".

> One of the things that I always, you know, think is interesting is how a defense approaches the case. And that's fine; they have the right to do that however they want.

(Vol. 28, Trial, p.5291.) Then, the Prosecutor continues two pages later, "Mr. Sinn is right about one thing, I can tell you that." The Prosecutor then concedes that the text messages which were sent from Jeffrey Schobert's phone did not appear to lure Mrs. Schobert home but, what they do appear to do is suggest that he waiting for her." Certainly the Prosecutor has a right to comment on the evidence, and he

could have made those comments without disparaging defense counsel and suggesting he was right about "one thing". The Prosecutor's closing rebuttal mentioned defense counsel's name more than it mentioned the Defendant's name. There was a concerted effort to undermine defense counsel so that the jury would not consider the remarks made by defense counsel.

Trial counsel should have objected to these prejudicial comments, but whether he did or not, the trial judge has an obligation that stems from the due process clause to see to it that proceedings are not infected with unfairness. See, e.g., *State v. Lane*, 60 Ohio St.2d 112, 397 N.E.2d 1338 (1979). In *United States v. Young, supra*, the court emphasized the importance of the trial court's role in addressing prejudicial issues as they arise:

> We emphasize that the trial judge has the responsibility to maintain decorum in keeping with the nature of the proceedings; "the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct." *Quercia v. United States,* 297 U.S. 466, 469, 77 L.Ed. 1321, 53 S.Ct. 698 (1933). The judge "must meet situations as they arise and [be able] to cope with…the contingencies inherent in the adversary process". *Geders v. United States, supra,* at 86. Of course "hard blows" cannot be avoided in criminal trials, both the prosecutor and defense counsel must be kept within the appropriate bounds. See, *Herring v. New York,* 422 U.S. 853, 862, 45 L.Ed.2d 593, 95 S.Ct. 2550 (1975).

Here Mr. Ford was denied a fair trial and the effectiveness of counsel when the Prosecutor engaged in repeated improper comments which were not objected to and which were not addressed by the trial court. As such, Mr. Ford's conviction must be vacated.

Improper statements by the prosecuting attorney, if not objected to at the time, are not grounds for reversal unless so flagrantly improper as to prevent a fair trial. *Scott v. State*, 107 Ohio St. 475, 491, 141 N.E. 19 (1923). See also, *State v. Morris*, 100 Ohio Appellate 307-313, 136 N.E.2d 653 (1954) where the Court, citing the *Scott* decision concluded that "if in a given instance no objection was made, and it was apparent on the record that the debasing characterizations directed toward the accused were wholly without support and so clearly flagrant as to prevent a fair trial, nevertheless, error may be grounded thereon." The prosecutor undertook repeated efforts to convey to the jury that defense counsel was not credible and inputted insincerity to defense counsel because he was playing "Jedi mind games" with the jury and trying to "planting the seed."

In *State v. Keenan*, 66 Ohio St.3d 402, 613 N.E.2d 203 (1993), the prosecutor argued during the trial phase that defense counsel's conduct in the case showed "they were 'not looking at this objectively. They are paid to do that. They are paid to get him off the hook.'" This Court found that such comments imputed

insincerity to defense counsel, and were therefore improper. The court in *Keenan* recognized the impact of comments a prosecutor makes, and how the jury is likely to be influenced more by comments from the prosecutor:

> Moreover, the jury is likely to believe a prosecutor's suggestion that defense counsel are mere "hired guns." The prosecutor carries into the court the prestige of "the representative…of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest *** is not that it shall win a case, but that justice shall be done. … Consequently, improper suggestions, insinuations, and, especially, ascertains of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Berger v. United States*, 1935 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed.2d 1314, 1321.

Id. at 506. In *State v. Smith*, the first Appellate District addressed an issue of improper arguments by the prosecutor and concluded that a prosecutor denigrate the role of the defense. There the Court found that the prosecutor:

> may argue and argue ardently that the evidence does not support the conclusions postulated by defense counsel. A prosecutor may not, however, denigrate the rule of defense counsel by interjecting his personal frustration with defense tactics…. The Prosecutor was not entitled to employ…arguments to denigrate the role of defense counsel and insinuate to the jury that [the defendant] and his counsel, by excising their right to suggest what conclusions may or may not be drawn from the evidence found at trial, were seeking to hide the truth.

State v. Smith, 103 Ohio App.3d 360, 369, 720 N.E.2d 149 (1st Dis. 1998). In *Smith*, the Court of Appeals vacated the conviction and sentence of the defendant because of the prosecutor's comments had the effectively denigrated defense counsel. *Id. syllabus*, para. 1.

The prosecutor continued in closing argument during the mitigation phase with the same attacks on defense counsel, not the arguments or evidence. In rebuttal during mitigation, the State began its rebuttal closing argument with the following:

> Now, the past few days may have seemed to drag out longer than you thought they were, but these are the witnesses you heard: Kathleen Kovach. She is from the Ohio Parole Board. Kathleen Kovach's testimony is that individuals who receive sentences other than death and other than life without parole are eligible for parole at some time. Compare the value of that as a mitigating factor to the aggravating circumstances.

(Vol. 6, Mitigation, p.900.) These initial comments had a twofold effect; disparage the defense for how long the mitigation phase was and undermine consideration of mitigation presented.

Yes, the jury was supposed to consider the testimony presented by Kovach and decide what weight to give her testimony. The prosecutor's sarcasm and call for the jury to "compare the value of that as a mitigating factor" was inappropriate. It is not the "value" of mitigating evidence that the jury is to consider, it is the

weight. The prosecutor's arguments suggested there was no value to the testimony and was not a proper commentary of the evidence. Next the prosecutor argued the defense was not about the law, but the State was:

> Ladies and gentlemen, what you just heard was not about the law, it wasn't about the facts, it wasn't about mitigation, it wasn't about aggravating circumstances. What you just heard is a plea.
>
> See, when you don't have the facts on your side you pound the law. When you don't have the law on your side you pound the facts. And when you got neither on your side, you beg and interject race. That's what you just heard.

(Vol. 6, Mitigation, p. 931). Again, this argument was focused more on attacking how the defense attorney argued the case and disparaging defense counsel and not specific issues argued by defense counsel. Rebuttal continued:

> It always makes me laugh, because when defense gets up and they talk with great emotion and softly, emotionally, trying to appeal to your purant interest, to your sympathies. I understand that. I get that.
>
> And then: these two are us. You know, they always call us "the government" and I always go home and tell my wife, "hey, guess who you're sleeping with tonight, the government."
>
> I am human. Do you think I don't feel bad when Mrs. Ford gets up there and asks you to save her son's life? Are you kidding me? There wasn't a dry eye in here.

(Vol. 6, Mitigation, p.932-933). Then, rather than addressing the evidence which was presented in mitigation the prosecutor attacked what defense counsel's choice to call Mr. Ford's mother to testify in mitigation. In commenting upon Mr. Ford's mother testifying and crying and begging for her son's life, the prosecutor responded "that's mitigation? To me, that's cruel." (Vol. 6, Mitigation, p.933).

In attacking an argument made by the defense counsel, the prosecutor again directed the focus on defense counsel: "I know Mr. Sinn would not intentionally do this, but he kept talking to you about the aggravating circumstances and, okay, Mr. Gessner had his hand up here when he said aggravating circumstances." (Vol. 6, Mitigation, p.936). Again, the inference was that the jury should not trust the credibility of defense counsel. Rather than attacking the specific arguments made, the prosecutor continued to disparage defense counsel. "He talks about hate. He is trying to appeal to your sympathies, trying to make you feel like bad people if you were to find the aggravating circumstances outweigh the mitigating factors. *Please do not fall for that one."* (Vol. 6, Mitigation, p.940.) In fact, the prosecutor continued that defense counsel was trying to "imply somehow that if you do your job, and if you are firmly convinced that the aggravating circumstances outweigh the mitigating factors in this case, that somehow you are a bad person, and make you feel guilty and bad for following the law. Please, do not do that." (Vol. 6,

Mitigation, p. 940). Again the Prosecutor argued that the defense counsel in closing argument, "was simply trying to make the jury feel bad". (Vol. 6, Mitigation, p.943).

In an effort to indicate defense counsel was not concerned with the law, the prosecutor stated: "we are here to honor the law, not great speeches, racist speeches – or speeches about racism, speeches about slavery. I am not sure how yet that applies to this other than to interject into the jury room some awkwardness between the jurors here that are of other color. I mean, I can't imagine going back there after hearing that history of slavery in this country and not feeling a little awkward, maybe pandered to. I don't know. I don't know how that makes you feel." (Vol. 6, Mitigation, p.943-944). "Pander" is an "immoral or distasteful desire, need, or habit or a person with such a desire." Oxford Dictionaries · © Oxford University Press.

> And I want to bring up another thing before I close here. They talk about his low IQ and they talk about his deficits. You heard, there are -- and he says about these two, you know, months to be killed or, you know -- and I forget how he said it; it was really well done. He must have stayed up all night writing it.

(Vol. 6, Mitigation, p. 944) This was not a commentary on the evidence, but an effort to undermine the defense attorney.

In *State v. Davis*, 116 Ohio St.3d 404, 2008 Ohio 2, 880 N.E.2d 31, this Court recognized that it is improper for the prosecutor to denigrate defense counsel in closing arguments. *Id.* at 444. Moreover, this Court recognized there is a line between properly responding to arguments and attacking evidence and comments which attack the defense attorney.

> During closing argument, trial counsel challenged expert testimony that the odds were in the quadrillions that another person shared the same DNA profile as Davis. Counsel argued that the odds were really one in 6.5 billion because that is how many people live in the world. During rebuttal, the prosecutor stated:
>
> "And Mr. Sanderson wants to talk about * * * there's only six and a half billion people in the world, why isn't there only six and a half billion DNA strands. * * * [A]ccording to his argument, nobody else could be born tomorrow, because we wouldn't have enough DNA to go around. Maybe some day in a distant future, long after I'm gone, we'll populate other worlds and there will be 97 quadrillion humans, and maybe then * * * we might have a second person in this world that will have the same DNA pattern. Maybe. * * * There's two people that could have done this, * * * Roland Davis and that loose primate we just quite haven't found yet that's running around Newark."
>
> The prosecutor could properly respond to defense argument attacking DNA statistics. However, the prosecutor's sarcastic remarks about the "loose primate" running around Newark improperly denigrated trial counsel in front of the jury.

Id at 444. This court did not find plain error in *Davis* concluding the "denigrating comments did not pervade the closing argument, let alone the entire trial." The exact opposite is present in this case. The denigrating comments, sarcasm and attacks on defense counsel permeated the rebuttal arguments in the trial phase and the penalty phase. The comments were not isolated. A review of the entire rebuttal reflects the purpose was to disparage and undermine counsel, not the evidence or arguments of counsel.

The prejudice is compounded in the mitigation phase because the trial court instructed the jury that although opening statements and final argument are not evidence "the law permits you to consider the arguments of counsel to the extent they are relevant to the sentence that should be imposed upon Shawn E. Ford Jr." (Vol. 6, Mitigation, p. 961.) The rebuttal closing arguments of the prosecutor effectively undermined defense counsel's credibility and integrity.

In *DePew v. Anderson*, 311 F.3d 742 (6th Cir. 2002) the Sixth Circuit affirmed the District Court's granting a conditional writ as a result of prosecutorial misconduct in the mitigation phase of DePew's trial. The Court recognized that a stricter standard is to be applied when determining if arguments from the prosecutor were prejudicial.

> Members of the Supreme Court have advised us to remember that "death is different" -- that "the taking of

life is irrevocable," so that "it is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights," *Reid v. Covert*, 354 U.S. 1, 45-46, 1 L. Ed. 2d 1148, 77 S. Ct. 1222 (1957) (Frankfurter , J., concurring), and that "in death cases doubts . . . should be resolved in favor of the accused." *Andres v. United States*, 333 U.S. 740, 752, 92 L. Ed. 1055, 68 S. Ct. 880 (1948). In *Caldwell v. Mississippi,* 472 U.S. 320, 329, 86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985), the Court decided that a prosecutor's prejudicial statements in closing argument rendered the death sentence invalid. It applied a stricter standard in assessing the validity of closing argument in death cases relying on the Court's admonition in *California v.Ramos*, 463 U.S. 992, 998-99, 77 L. Ed. 2d 1171, 103 S. Ct. 3446 (1983), that under the Eighth Amendment "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny in capital sentencing determinations."

Cumulatively, it is clear that these errors are not harmless. As adopted by Justice Stevens in his authoritative concurrence in *Brecht v. Abrahamson*, 507 U.S. 619, 641, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993); see also *O'Neal v. McAninch*. 513 U.S. 432, 130 L. Ed. 2d 947, 115 S. Ct. 992 (1995), the applicable standard of harmless error requires that if "one cannot say, with fair assurance, . . . that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." *Kotteakos v. United States*, 328 U.S. 750, 765, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946). Because we have "grave doubt" that the statements by the prosecutor did not have an effect on the sentencing of the defendant, we find that the constitutional errors in this case are not harmless, and accordingly, we grant defendant a new penalty phase on the above stated grounds.

Id at 751. Given the number of disparaging comments, sarcastic comments and comments denigrating defense counsel, it is impossible to say that the comments did not have an effect on the sentencing. Accordingly, Mr. Ford's conviction and sentence must be vacated.

PROPOSITION OF LAW NO. XIV

WHEN THE STATE IS PERMITTED TO PROFFER ALL EVIDENCE FROM THE TRIAL PHASE AS EVIDENCE IN THE SENTENCING PHASE, IS PERMITTED TO ADMIT IMPROPER AND PREJUDICIAL EXHIBITS FROM THE TRIAL PHASE, AND IS PERMITTED TO ARGUE IMPROPER AGGRAVATING CIRCUMSTANCES, A DEATH SENTENCE IMPOSED AS A RESULT OF THESE ACTIONS VIOLATES THE EIGHT AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, 9 AND 16 OF THE OHIO CONSTITUTION.

In ruling capital punishment unconstitutional for juveniles under the age of 18, the United States Supreme Court emphasized that rules have been implemented to ensure that the death penalty is reserved for "a narrow category of crimes and offenders." *Roper v. Simmons*, 543 U.S. 551, 569, 125 S.Ct.1183, 161 L.Ed.2d.1(2005). One such rule that helps ensure that the death penalty is reserved for a narrow category of offenders is that the State is limited to presenting "the death-eligible statutory aggravating circumstances set forth in R.C.2929.04(A)1-8." *State v. Wogenstahl*, 75 OhioSt.3d.344, 62 N.E.2d.311 (1996) syl.1. R.C. §2929.04(B) limits the evidence which may presented by the government at the mitigation phase to the aggravating circumstances which have been proven beyond a reasonable doubt. That was not done in this case.

To ensure that only a narrow category of crimes and offenders are eligible for the death penalty, the United States Supreme Court has consistently held that

states' statutory death penalty schemes must narrow the class of offenders who are eligible for the death penalty. For a statutory scheme to be constitutionally valid, the jury is required to be given "specific and detailed guidance," and the jury must be provided with "clear and objective standards" in determining the appropriate sentence. *See*, *Godfrey v. Georgia* 446 U.S.420, 428 100 S.Ct. 1759, 64 L.Ed.2d.398.

Zant v. Stephens recognized that the "finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion [to impose the death penalty], apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." *Zant v. Stephens* 462 U.S.862, 874 103 S.Ct. 2733, 77 L.Ed.2d. 235 (1983).

The facts and circumstances of the offenses are *not* statutory aggravating circumstances specified in the statute. In this case, there was no effort to narrow, channel, or guide the jury in its weighing of the aggravating circumstances against the mitigating factors.

At the commencement of the mitigation hearing the State offered into evidence a series of exhibits that had been utilized in the trial phase. The defense objected to many of the exhibits as follows:

- Exhibit 75 and 76 were the jewelry from Margaret and Jeffrey Schobert. Margaret

Schobert's jewelry was found in a dumpster and trash from the dumpster remained with them. The defense objected, contending that the items as packed were prejudicial and not relevant to the mitigation hearing (Vol.1, Mitigation, p.6).

- The State offered Exhibit 234, a black stocking cap with Ford's DNA on it. The defense objected, contending that the item would re-ignite passion and was prejudicial.

- State Exhibit 235, was the gloves which has been found and were purportedly worn by Ford on the night of the homicide. (*Id* at p.12-13.)

- State Exhibit 164 was a photograph of the Schobert's home with blood splatters.

- State Exhibit 137 was a bloody envelope from the Schobert home.

- State Exhibit 209 was a photograph of the inside of Jeff Schobert's vehicle with blood on the console.

- State Exhibit 226 was a photograph of the gloves which were admitted into evidence.

- State Exhibit 233 was a photograph of the hat, the hat having already been admitted.

- State Exhibit 280 and 281 were photographs of the location where Mrs. Schobert's ring was found. Exhibit 280 was a photograph of the Family Dollar and 281 was a photograph

of the dumpster behind the Family Dollar. Again, the Defense objected that these items were prejudicial and not appropriate for the mitigation hearing and the actual items had been admitted.

- State Exhibit 84 was a photograph of Margaret Schobert's bludgeoned head. The defense objected, suggested admission of State Exhibit 80, a photograph which reflected Mrs. Schobert's injuries, but which was less gruesome. (Vol. 1, Mitigation, p. 27.) The trial over ruled the defense objection and admitted State Exhibit 84. (Id.)

- Lastly, the State offered Exhibits 1A and 2A and the autopsy report and coroner's investigative protocols. The defense objected noting the reports contained prejudicial information. This objection was overruled. (Id. p. 29.)

All of the above items were admitted over objection of the Defendant (Vol.1, mitigation p.78-80). Defense counsel objected to the above exhibits, arguing the State was merely re-trying the trial phase over in mitigation (*Id* at p.23.) That is what the State was doing. The State did not present any witnesses relating to the aggravating circumstances at the mitigation hearing and instead simply offered all evidence and testimony from the first phase of the trial.

> At this point in time, the State would ask the Court to incorporate the evidence from the first phase of the trial and ask that the jury be allowed to consider those—

> all the evidence in that portion of the trial for purpose of deliberating on the relevant portion of that case in regards to making their decision regarding the aggravating circumstances in the mitigation phase.
>
> THE COURT: When you say the evidence you are speaking of the testimonial evidence?
>
> MR. LOPRINZI: Testimonial evidence: that is correct, yes.

Id at p.81. Reviewing the State's Exhibits in their entirety, a pattern is clearly reflected. The State was trying to get as many photographs with blood in them as they could. What relevance would blood on a light switch, blood splatters on the wall, a bloody envelope, blood on the console of Mr. Schobert's vehicle have to proving that the aggravating circumstances outweighed the mitigating factors? The answer is clear, none. But by utilizing as many photographs with blood in them, the State was able to create an atmosphere where the jury focused more on the gruesomeness of the event than the statutory criteria.

It is the trial court's responsibility, not the jury's, to determine what evidence is relevant. *State v. Getsy*, 84 Ohio St.3d 180, 201 (1998); *State v. Lindsey*, 87 Ohio St.3d 479, 484-485 (2000).

Despite the trial court advising the jury that the "underlying aggravated murder itself is not an aggravating circumstance" (*Id* at p.50) the government argued and submitted evidence regarding the facts and circumstances of the aggravated murders, robbery, burglary, theft, grand theft, and even the felonious

assault. Instead of outlining, delineating or otherwise specifying what evidence and testimony was relevant to the aggravating circumstances that was offer in the trial phase, the State simply moved for admission of the above exhibits and proffered *all* testimonial evidence from the trial phase. Exactly how the jury was supposed to know what the State meant by submitting "all the evidence in that portion of the trial [the trial phase] for purposes of deliberating on the relevant portion of that case in regard to making their decision regarding the aggravating circumstances in the mitigating phase," is beyond comprehension. (*Id* at p.81.) The jury was never instructed to disregard the evidence and testimony that did not bear upon the aggravating circumstances regarding the counts from the indictment for which Ford was found guilty of that were not aggravating circumstances. The jury was never instructed to disregard the evidence and testimony that did not bear upon the aggravating circumstances regarding the merged counts. The jury was never instructed to disregard the evidence and testimony that simply did not bear upon the aggravating circumstances. All testimonial evidence regarding the felonious assault of Chelsea Schobert was submitted for consideration. While this Court has found that the facts surrounding an aggravating circumstance are irrelevant in the weighing process, *See*, *State v. Newton* 108 Ohio St.3d.13, 2006 Ohio 81, 840

N.E.2d.593, all factual evidence and information surrounding all of the *crimes* for which Ford was charged were not relevant or appropriately submitted.

This Court has specifically recognized that the "aggravating circumstances against which the mitigating evidence is to be weighed are limited to the specifications of the aggravating circumstances set forth in R.C. 2929.04(B) that have been alleged in the indictment and proved beyond a reasonable doubt." *State v. Newton*, 108 Ohio St.3d. at 23. Exhibits showing bloody switch plates in the Schobert's home (State Ex.164) a bloody envelope found within the house (State Ex. 137), Mrs. Schobert's ring found the dumpster with the trash (State Ex. 75) all bore no relevance to the aggravating circumstances presented to the jury in mitigation. By submitting photographs of items for which the actual item was introduced, the State improperly submitted items that should not have been presented in mitigation and which were cumulative.

The trial court specifically instructed the jury that the aggravated murders are not aggravating circumstances. (Vol.1, Mitigation, p.50) Despite that instruction and over the objection of Ford, the trial court admitted into evidence the autopsy report and investigative protocol from the autopsy of Jeffrey and Margaret Schobert (State Ex. 1, 2; Vol.1, Mitigation, p.28.) The autopsy documents were not submitted to prove the deaths; a death certificate would have sufficed. The

autopsy records were submitted to get before the jury the gory details reflected in the reports.

The testimony presented from Chelsea Schobert, Zachary Keys, Joshua Greathouse and Detective King all offered testimony regarding the March 23, 2013 felonious assault of Chelsea Schobert. Likewise, as the aggravated murders themselves are not aggravating circumstances, Dorothy Dean, the coroner's testimony, would not have been relevant to the aggravating circumstances. The jury was never instructed not to consider this testimony or, given the state's proffer, to disregard this testimony.

The lack of limitation upon what the jury in this case was directed to consider and the lack of guidance for the jury was compounded. The State argued:

> The aggravating circumstances, the course of conduct that Shawn Ford engaged in that resulted in the death of the two individuals. The aggravated burglary into the home, the aggravated robbery, stealing, the serious physical harm and death caused to those victims, those are the aggravating circumstances.

(Vol. 6 mitigation, p.899) The arguments submitted clearly directed the jury to consider "serious physical harm" an element only relevant to the felonious assault charges that were not proper aggravating circumstances. Again in rebuttal, the State proceeded to argue facts regarding the crimes and not the aggravating circumstances.

> Aggravating circumstances: the killing—the killing or attempting to kill two or more people, doing it during the commission of a robbery, doing it during the commission of burglary

Id at 947 Those were the appropriate aggravating circumstances. The prosecutor however, went on to argue that Shawn Ford was "able to lure people to where he wanted them to be so that he could do what he—what he—wanted to do." Id at p.946 The prosecutor then argued "the aggravating circumstances of going to their home, going through the window, breaking in, enough to know to wear five sets of gloves, to wear a hat, to get rid of these items;" Id at p.949.

By presenting all evidence from the first phase, the purpose and intent of Ohio's death penalty statutory structure was violated. The very purpose of having two trials is to limit what the jury can consider when deciding to impose whether to impose death. Here there was not limit as to what evidence the jury could consider. By proffering all of the testimonial evidence and the exhibits referenced above in the mitigation phase, the government failed to limit the jury's consideration to the aggravating factors delineated in R.C. 2929.04.

Anyone who has ever conducted voir dire in a death penalty case can attest to the difficulties jurors have understanding the concepts of aggravating circumstances and mitigating factors. The statutes may provide definitions, but a

lay person encountering the concepts for the first time as a potential juror often times display "the deer in the head light look" while it is explained. Conveying that the capital specifications become the aggravating circumstances, but the murder itself is not to be considered stretches the bounds of comprehension to anyone but lawyers. The jury's discretion must be properly guided in order to ensure its sentencing determination is reliable, rather than arbitrary and capricious, *Gregg v. Georgia*, 428 U.S. 153, 49 L.Ed. 2d 859, 96 S.Ct. 2909 (1976).

The Court recognized that even with efforts at guided discretion, juries may misapply sentencing procedures, and may impose the death sentence for someone outside the narrowly defined class of those who truly deserve consideration of the death sentence. There the Court:

> But the provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if sentencing is performed by a jury. Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given.

Id. at 192.

Approaching the mitigation phase evidence the way the State did in this case did nothing to help this jury properly consider only that which the law permits. In *State v. Johnson*, 24 Ohio St.3d 87 494 N.E. 2d 1061 (1986) this court held that

"[p]resenting the jury with specifications not permitted by statute impermissibly tips the scales in favor of death, and essentially undermines the required reliability in the jury's determination." Likewise, presenting the jury with all testimonial evidence from the trial phase, and numerous exhibits not pertinent to the aggravating circumstances, improperly tipped the scales in favor of the death penalty.

In *State v. Thompson,* 33 Ohio St.3d 1, 514 N.E.2d 407 this Court vacated the death sentence concluding that the penalty phase of the trial was fundamentally flawed and prejudicially unfair, finding the use of improper exhibits, coupled with the improper comments in State's closing argument "created a climate in which the jury herein was unable to dispassionately weigh the aggravating circumstances against the mitigating factors." The same can be found here. See, Proposition of Law XIII addressing the improper arguments of the State in rebuttal closing arguments in the penalty phase. The State's Exhibits in this case were nothing more than the State's efforts to get bloody evidence before the jury to influence their passions and prejudice.

Utilization of exhibits irrelevant to the aggravating circumstances along with the whole sale submission of testimonial evidence from the trial phase undermines

the reliability of the death verdict in this case. Shawn Ford's death sentence must be vacated.

PROPOSITION OF LAW NO XV

REQUIRING A CRIMINAL DEFENDANT TO APPEAR AT TRIAL IN SHACKLES WITHOUT CONDUCTING A HEARING TO ADDRESS THE NECESSITY OF SUCH RESTRAINTS UNDERMINES THE PRESUMPTION OF INNOCENCE AND VIOLATES THE DEFENDANT'S RIGHT TO A FAIR TRIAL IN A VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND OHIO CONSTITUTION, ARTICLE I, SECTIONS 10 AND 16.

Appellant Ford filed a motion prior to the start of trial requesting that he appear at all proceedings without restraints. (Defense Motion 38, Doc. # 77) The motion was heard at a pretrial hearing. (Pretrial, 7-23-13, p. 13). The Court overruled the motion stating:

> The Court obviously will take steps to ensure that Mr. Ford's rights are protected at all times. And there is nothing in the case law that I am aware of that would suggest that he has a statutory or constitutional right to appear without restraints when the trier of fact is not present.

(Id.) The court put on a journal entry to that effect on July 26, 2013. (Doc. # 107)

The court addressed the issue again at another pretrial hearing:

> THE COURT: The Court, at its -- at our conference on July 23rd, indicated that the Court was going to overrule Motion Number 38.
>
> That was a motion requesting for Mr. Ford to be able to appear at all proceedings without restraints. I believe back on July 23rd, we indicated a journal entry would be filed in that respect. I am not certain whether

> we have followed that up with a journal entry, but we will do so at this time.
>
> Obviously, at the time of trial or at any point where Mr. Ford could be seen by any member of a jury, he will be seen only in street clothes in accordance with the normal procedures. There will be restraints underneath those clothes, again, consistent with normal procedures.

(Pretrial, 11-26-13, pp. 41-42) Appellant Ford appeared during the trial phase in civilian clothing but with restraints, including during voir dire, when counsel the court and the prospective juror were all sitting around a table.

On October 9, 2014, the first day of the trial, the court put on a second order regarding the use of restraints. (Doc. # 235) An actual hearing on whether the use of restraints was needed, was never held.

In the second order, the trial court cited to the fact that the case "involves the alleged brutal and violent attacks by defendant on three different individuals, two of whom died as a result of the attacks." However, in an aggravated murder death penalty case, there is always a crime that was violent, and in which people had died. However, without more, that does not give rise to the need for restraints during the course of the trial.

In the second order, the trial court placed his reliance on the fact that during the time preceding trial, there was some information that Mr. Ford wanted to commit suicide. (Doc. #235). There was no formal testimony from any jail

personnel to this effect, nor did defense counsel state that they had any concerns about Mr. Ford's safety, or their own. There was no indication that Mr. Ford behaved in any threatening matter at any time prior to the start of trial. This would include the numerous pretrial conferences held in the year and a half prior to the start of trial, attorney-client visits, and examinations by psychologist and psychiatrists.

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

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

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

This Court addressed the use of stun belts in *State vs. Adams,* 103 Ohio St.508, 2004-Ohio-5845. The rationale for the use of a stun belt or restraints is the same. Although with the use of the stun belts it is less likely that there will be any outward manifestation of the device.

In this case it is not clear what kind of restraints were used or any limitations that Mr. Ford had on his ability to interact with counsel during the trial.

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

In *State v. Neyland*, 139 Ohio St. 3d 353, 2014-Ohio-1914, ¶ 105, the court examined the use of leg restraints on the defendant. The Court found that the trial court should have considered whether there were lesser alternatives to provide

courtroom security. Leg irons or shackles always present a risk that jurors will inadvertently discover the restraints and possibly be influenced in deliberations. See, e.g., *Illinois v. Allen*, 397 U.S. 337, 344 (1970). Because the trial court in Ford failed to have a hearing, no lesser options were discussed or offered.

In *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, ¶247 the Court held that a trial court errs when it orders a defendant to wear a stun belt without sufficient justification in the record. And in *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, ¶92, the Court found: "[t]he trial court granted the state's request on shackling without first conducting a hearing to consider whether evidence showed that shackling was necessary. We continue to emphasize that prior to ordering a defendant to wear restraints, the trial court should hold a hearing on the matter. *State v. Franklin,* 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, at ¶ 82. *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, ¶92."

Both the Ohio Constitution and the United States Constitution[24] guarantee every criminal defendant a fair trial.[25] A fair trial necessarily requires the trial court

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[24] See, the Sixth Amendment to the United States Constitution, which provides in part that 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 …", and the Fourteenth Amendment which provides, *inter alia*, that no "State shall … 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." The Sixth Amendment "right" is "incorporated" into this state court criminal prosecution under the doctrine of selective incorporation.

to conduct the trial in a fashion which does not appear to indicate to the jury that a particular outcome of the trial is either expected or likely. In *Estelle* v. *Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), the United States Supreme Court held:

> The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. *Drope* v. *Missouri*, 420 U.S. 162, 172 (1975). The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice. Long ago this Court stated:
>
> "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895).
>
> To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970).
>
> The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of

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[25] In *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) the United States Supreme Court held that the "right of an accused in a criminal trial to due process is, in essence, the right to a *fair opportunity to defend* against the State's accusations." (Emphasis added.)

> deleterious effects on fundamental rights calls for close judicial scrutiny. *Estes v. Texas*, 381 U.S. 532 (1965); *In re Murchison*, 349 U.S. 133 (1955). Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience.
>
> The potential effects of presenting an accused before the jury in prison garb need not, however, be measured in the abstract. Courts have, with few exceptions, [footnote omitted] determined that an accused should not be compelled to go to trial in prison or jail clothing because of the possible impairment of the presumption so basic to the adversary system.… The American Bar Association's Standards for Criminal Justice also disapprove the practice. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *Trial by Jury*, §4.1(b), p. 91 (App. Draft 1968). This is a recognition that the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment. The defendant's clothing is so likely to be a continuing influence throughout the trial that, not unlike placing a jury in the custody of deputy sheriffs who were also witnesses for the prosecution, an unacceptable risk is presented of impermissible factors coming into play. *Turner v. Louisiana*, 379 U.S. 466, 473 (1965).

Id., at 503-505. The presumption of innocence is a basic component of the fundamental ability to have a fair trial, uninhibited by government interference or undermining. In this case the constitutional presumption was undermined when Mr. Ford required to stand trial in shackles. Accordingly, as set forth above, courts have consistently held that such a procedure is improper. See, also., *Gaito* v.

Brierley, 485 F.2d 86, (3rd Cir. 1973); *Hernandez* v. *Beto*, 443 F.2d 634 (5th Cir. 1971).

In *Franklin, supra*, this Court recognized that the presence of restraints erodes the presumption of innocence, citing *State v. Carter*, 53 Ohio App.2d 125, 372 N.E.2d 622 (4th Dist. 1977), leave to appeal overruled, September 9, 1977. In *Carter* the court of appeals reversed convictions of two men for attempted escape. The pertinent part of the court's syllabus is:

> 2. A defendant in a criminal case has the right to appear at trial without shackles or other physical restraint except when the court, in the exercise of a sound discretion, determines such restraint is necessary for a safe and orderly progress of the trial.
>
> 3. When the court determines a defendant should be placed under physical restraints during trial, the factors upon which the court bases its determination are required to be set forth in the record to assure effective appellate review.

The Court in *Carter* emphasized the import of the necessity for a hearing on the issue on the record, for purposes of appellate review, reflects the basis for the decision to shackle a defendant, something which did not occur here.

> For an effective appellate review of the exercise of its discretion, it logically follows that the record should reflect those factors upon which the court exercised its discretion. *See* A. B. A. STANDARDS FOR CRIMINAL JUSTICE (Trial By Jury) Part IV, Section 4.1(C) and commentary; *People v. Duran, supra; State v. Roberts, supra*.

> Since the right to appear in a courtroom free of restraint is of federal constitutional dimensions, we may hold it harmless only if the error was harmless beyond a reasonable doubt. *Chapman v. California* (1967), 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705. We are not persuaded, even though the prospective jurors were examined upon the question, that the error can be considered harmless by the requisite degree.

53 Ohio App.2d, at 33.

The trial court's failure to conduct an evidentiary hearing and to place Mr. Ford in restraints violated his right to a fair trial and his right to counsel as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sec. 16 of the Ohio Constitution. A new trial must be granted.

PROPOSITION OF LAW NO. XVI

IMPROPER LIMITATIONS UPON DEFENSE CLOSING ARGUMENTS DEPRIVES A DEFENDANT OF DUE PROCESS OF LAW AND A FAIR TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION 10 AND 16 OF THE OHIO CONSTITUTION.

During closing arguments, a series of objections were made by the State which the trial court sustained. The efforts of defense counsel during closing arguments in the trial phase were to call into question issues regarding the scope of the investigation, and call to question witnesses not called to testify. The first issue arose as defense counsel called into question the scope and extent of the investigation:

> And, again, when you make decisions here, you have a right to have the investigation that you need to make the decisions to let you know what happened. You don't have to put the pieces together. You are not supposed to put the pieces together when there is a question in your mind. That the – job of the New Franklin Police Department. And if they are not up to doing it, then they need to get somebody else out there.
>
> Mr. Loprinzi: Objection.
>
> The Court: Sustained.

(Vol. 28, Trial, p.5261-5262.) Detective Morrison had been an integral part of the investigation into Chelsea Schobert's felonious assault. In fact, Detective

Hitchings testified that he contacted Detective Morrison because when he arrived at the Schobert's home, the morning they were murdered, he found Detective Morrison's business card on the Schobert's dresser. (Vol. 26, Trial, p. 4952.) Detective Morrison did not testify at the trial, and defense counsel questioned why the jury did not hear from Detective Morrison. The State objected, and the trial court sustained the objection. (Vol. 28, trial, p. 5267.) Next, defense counsel, continuing to question the scope of the investigation, contending there were unanswered questions and that the investigation seemingly ceased simply because Detective Hitchings got a statement from Shawn Ford, that he did it.

> Great. Case solved.
>
> What else did he say? I mean, really, what else did he say? You have got him saying—you have got him now opened up, confessing. What else did Shawn say? If you finally got him to a point where you are not worried about him shutting up or changing his story because he's finally telling you the truth. Where is the rest of the information?
>
> Where are the cell phones? Where are Jeff and Pegs cell phones? That's important. We don't know where those phones went. Why don't we know that?
>
> I mean, if according to Hitchings, Shawn has now come clean and telling the truth of the story, that's when you ask him all those questions you want to ask. That's when you get all the answers out.
>
> Loprinzi: Objection. May we approach?

(Vol. 28, Trial, p. 5267-5268.) The Prosecutor argued during the side-bar that there were things the State "decided not to bring them out at the trial for strategic reasons. But to suggest that they were never asked is improper." (Vol. 28, Trial, p.5269.) The Prosecutor then asked that the defense be precluded from arguing or further commenting "about witnesses that did not appear, like James Jordan—who was subpoenaed and just failed to appear; we tried to get him to appear—or other people—the rule indicates that they can't comment on those things and so we would ask that they also be instructed." (Vol. 28, Trial, p.5269.) The Court sustained the Prosecutor's objections and instructed the defense that they could not continue making comments about witnesses who did not testify. (Vol. 28, Trial, p.5269-5270.)

The trial court improperly limited and restricted defense counsel during closing arguments. Crim.R. 16(I) specifically provides that each party shall provide opposing counsel "a written witness list, including names and addresses of any witness it intends to call at its case-in-chief, or reasonably anticipates calling in rebuttal or surrebuttal.

The content of the witness list may not be commented upon or discussed to the jury by opposing counsel, but during argument, the presence or absence of the witness may be commented upon." To be sure, Crim.R. 16 used to prohibit the

parties from commenting upon any witness that was on a witness list, and not called at trial. See, *State v. Hannah,* 54 Ohio St.2d 84, 374 N.E.2d 1359 (1978) interpreting former version of Crim.R. 16. Crim.R. 16(C)(3) used to provide "the fact that a witnesses name is on a list furnished under subsection (C)(1)(C), and that the witnesses not called shall not be commented upon at trial." However, Crim.R. 16 was amended in 2010, and now specifically provides that a party may comment upon "the absence or presence of a witness relevant to the proceedings." See, Crim.R. 16, Staff Notes, 7-1-10 Amendments. According, under the 2010 Amendments to Crim.R. 16, the trial court erred in sustaining the State's objections to defense counsel arguing witnesses who were not called. Detective Morrison was relevant to the proceedings. He was investigating the felonious assault charges involving Chelsea Schobert. When called by Detective Hitchings the morning of the murder, Morrison came out to the Schobert house and Morrison was involved in the several interrogations of Ford. Morrison was relevant and his absence from trial was fair commentary.

In *State v. Herring*, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975) the Court explained the import of closing arguments in a capital case:

> There can be no doubt, the closing argument for the defense is a basic element of the adversary fact-finding process in a criminal trial. Accordingly, it has universally been held that counsel for the defense has a

right to make a closing summation to the jury, no matter how strong the case for the prosecution may appear to the presiding judge. The issue has been considered less often in the context of a so called bench trial. But the overwhelming weight of authority in both Federal and State Constitutions hold that a denial of the opportunity for final argument in a non-jury criminal trial is a denial of the basic right of the accused to make his defense.

One of the many cases so holding was *Yopps v. State*, 228 Md.204, 178(A).2d 879 (1962). The defendant in that case, indicted for burglary, was tried by the court without jury. The defendant, in his testimony, admitted being in the vicinity of the offense, but denied any involvement in the crime. At the conclusion of the testimony, the trial judge announced a verdict of guilty. Defense counsel objected, stating that he wished to present arguments on the fact, but the trial judge refused to hear any arguments on the grounds that only a question of credibility was involved, and, therefore, counsel's arguments would not change his mind. The Maryland Court of Appeals held that the trial court's refusal to permit defense counsel to make a final summation violated the defendant's right to the assistance of counsel, under the State and Federal Constitutions:

The constitutional right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor, however simple, clear, unimpeached, and conclusive the evidence may seem, unless he has waived his right to make such argument, or unless the argument is not within the issues in the case, and the trial court has no discretion to deny the accused such right." *Id.* at 207, 1782d at 881.

The wide-spread recognition of the right of the defense to make a closing summary of the evidence to the trier-of-fact, whether judge or jury, finds solid support in history. In the Sixteenth and Seventeenth century, when notions of compulsory process, confrontation, and counsel were in their infancy, the essence of the English criminal trial was argument between the defendant and counsel for the crown. Whatever other procedural protections may have been lacking, there was no absence of debate of the factual and legal issues raised in a criminal case. As the right of compulsory process, to confrontation, and to counsel developed, the adversary system commitment procedure had the effect of shifting the primary function of argument to summation of the evidence at the close of trial, in contrast to the "fragmented" factual argument that had been typical of the earlier common law.

It can hardly be questioned that closing arguments serve to sharpen and clarify the issues for resolution by the trier-of-fact in a criminal case. For it is only after all of the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversary's position. And for the defense, closing argument is the last clear chance to persuade the trier-of-fact that there may be reasonable doubt of the defendant's guilt. See, In re: Winship, 397 U.S. 358.

* * * This is not to say that closing arguments in a criminal case must be uncontrolled or even unrestrained. The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations. He may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant. He may insure that argument

> does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial. In all of these respects he must have broad discretion. See, generally, 5 R.Anderson, Wharton's Crim. Law and Proc. §2077 (1957). Cf. American Bar Assoc. Project on Standards for Crim. Justice, the Prosecution Function, §5.8, pp.126-129, and the Def. Function, §7.8, pp.277-282. *Id.* at 861-862.

Id at. 862. *Herring* outlined the importance of closing argument, and wide latitude that should be given so that counsel can argue their perspective of the case and flaws in their opponent's case. Defense counsel attempted to argue about the lack of evidence regarding certain areas for which there was testimony. The lack of evidence or the failure to call certain witnesses, when pointed out to the jury may in fact create doubt.

> In every criminal case, the mosaic of evidence that comprises the record before a jury includes both the evidence and the lack of evidence on material matters. Indeed, it is the absence of evidence upon such matters that may provide the reasonable doubt that moves a jury to acquit." United *States v. Poindexter,* 942 F.2d 354, 360 (6th Cir. 1991) (reversing trial court's decision to prevent defense counsel from commenting on prosecution's failure to introduce fingerprint test results that did not reveal defendant's prints on contraband). In this instance, Kevin's counsel cannot be faulted for attempting to leverage the absence of testimony from a person that was repeatedly referred to by Defendants' testifying employees into a jury finding of reasonable doubt.

United States v. Young, 470 U.S. 1, 12, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985).

While a defendant has no burden of proof at trial, the United States Supreme Court suggested in *Kyles* v. *Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) that the practical burden of a criminal defendant, if any, is to create reasonable doubt about guilt. *Young* and *Poindexter* recognized one appropriate way to do so is to be able to comment upon the absence of evidence or witnesses in trial Closing argument is just one tool to assist in the creation doubt and the trial court improperly limited counsel's arguments.

At its core, the Due Process Clause of the Fourteenth Amendment guarantees that one charged with a crime has a fair opportunity to defend against the charges. *Chambers* v. *Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The trial court improperly limited the closing arguments.

PROPOSITION OF LAW NO. XVII

A CAPITAL DEFENDANT'S RIGHT TO A RELIABLE SENTENCE IS VIOLATED WHEN THE TRIAL JUDGE FAILS TO PROPERLY WEIGH AGGRAVATING CIRCUMSTANCES AND MITIGATING FACTORS IN IMPOSING A SENTENCE OF DEATH. U.S. CONST. AMENDS. VIII, XIV; OHIO CONST. ART. I §§9,16.

R.C. § 2929.03(F) requires the court or panel of three judges, when it imposes sentence of death, to state in a separate opinion its specific findings as to the existence of any mitigating factors set forth in division (B) of O.R.C. § 2929.04, 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. *State v. Maurer,* 15 Ohio St. 3d 239, 473 N.E.2d 768 (1984). The trial court issued a twenty-two (22) page opinion in this case. (Doc. # 378) The trial court opinion in this case contains errors that render the death sentences arbitrary and unreliable.

The Trial Court's Introduction

In this section, the trial court attempted to lay out the history of the case and what occurred during the course of proceedings. Mr. Ford had been charged with three separate capital specifications, attached to each of five aggravated murder

counts in the Indictment: (1) the Aggravated Murder was part of a course of conduct involving the purposeful killing or attempt to kill two or more persons by the offender, in violation of O.R.C. §2929.04(A)(5); (2) the Aggravated Murder was committed while Shawn Ford, Jr. was committing, attempting to commit, or fleeing immediately after committing or attempting to commit Aggravated Robbery, and (a) Shawn Ford, Jr. was the principal offender in the commission of the Aggravated Murder or, (b) if not the principal offender, committed the Aggravated Murder with prior calculation and design, in violation of O.R.C. §Section 2929.04(A)(7); and (3) the Aggravated Murder was committed while Shawn Ford, Jr. was committing, attempting to commit, or fleeing immediately after committing or attempting to commit Aggravated Burglary, and (a) Shawn Ford, Jr. was the principal offender in the commission of the Aggravated Murder or, (b) if not the principal offender, committed the Aggravated Murder with prior calculation and design, in violation of O.R.C. §Section 2929.04(A)(7). (Doc. #3)

In reviewing the jury's verdict, the trial court referred to the O.R.C. §2929.04(A)(5) as the "multiple murder specification." (Doc. # 378, p. 2) This is not correct. In a similar circumstance, this Court found that it was wrong for a prosecuting attorney to refer to the O.R.C. §2929.04(A)(5) specification as the "mass murder" specification. *State v. Bryan,* 101 Ohio St.3d 272, 2004-Ohio-971

at ¶ 177. There the court instructed that it should be referred to as the "course of conduct" specification. And the reason is obvious, in this case, two people were killed, the minimum number to qualify for the course of conduct specification. However, by referring to it as the mass murder specification or the multiple murder specification it raises the specter of a crime much more egregious than the one before the court.

Later in the introduction, the court states:

> Defendant Ford was found guilty of Specifications Two and Three to Counts Four and Five, with the determination that he committed the aggravated murder of Margaret J. Schobert with prior calculation and design while committing, fleeing immediately after committing or attempting to commit aggravated robbery.

(Doc. # 378, pp. 2-3). This may be true as it relates to the second capital specification but the third specification charged that he committed the aggravated murder during the course of an aggravated burglary.

The Trial Court's Analysis

In this section the trial court goes into to an extensive description of things he has not considered in his independent deliberation. According to Black's Law Dictionary, Fifth Edition, the word consider means "to fix the mind on, to examine." In the courts list of what was not considered, he certainly examined the evidence. The court states it did not consider: letters sent to the court from Ford,

the presentence investigation report, the felonious assault on Chelsea Schobert,[26] victim impact evidence during the sentencing hearing, the aggravated murder itself, Ford's criminal record, "or any aggravating circumstances of which the defendant was found guilty that have been merged." (Doc. # 378, p. 5) The court further explain he did not consider any of the mitigating circumstance not raised by the defense, but later in the opinion will detail the ones "not considered."

Certainly the court examined these items, yet felt the need to specifically put down that he did "not consider them." If he examined them, he was aware of them and it is hard to somehow wipe that evidence from his mind in making his determination. It is like unringing his own bell. There does not seem to be much difference in an analysis that would "not consider" a piece of evidence and considering that same evidence and not giving it any weight.

It is also curious as to what the court is referring to when he states he did not consider "any aggravating circumstances of which the defendant was found guilty that have been merged." There were three aggravating circumstances attached to Count Four, and there were three mentioned later in the opinion. If the court is

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[26] As set forth in Proposition of Law No XIV the jury was permitted to consider the felonious assault of Chelsea Schobert as a result of the State's wholesale submission of "all testimony evidence" from the trial phase. The trial court's independent reweighing does not cure this defect as the jury's recommendation may have been different had they been given proper guidance as to the evidence that was to be properly consider in support of the aggravating circumstances.

referring to the aggravating circumstances in Count Three or Count Five, relating to Margaret Schobert, this would be totally inappropriate to consider those factors since those counts did not even go to the jury. Those should not have been examined at all, but the trial court did look at them in order to make such a determination.

The Trial Court's Examination of Mitigating Circumstances

The trial court found the nature and circumstance of the offense to have no mitigating value. The trial court then examined the history, character and background of the offender. (Id., at pp. 9-14.) After the court detailed Mr. Ford's experiences growing up, the court gave "slight weight" to his background. In so finding, the court stated: "Moreover, many people grow up in circumstances similar to Defendant Ford's and do not resort to criminal conduct." This kind of analysis fails to acknowledge that everyone has different experiences in life, even if they are raised in the same house. The mental capacities of a person to deal with adversity in their lives is very different. That person who "grew up in the same circumstances" may have had mental health issues they had to deal with along with the hardships related to their background. No one knows if that person who "grew up in similar circumstances" may have had a mentor or important person in their life, outside the family environment, to help them along the way. No one person's

family circumstance are exactly the same as another's. That is why the penalty phase of a capital case is about making an INDIVIDUALIZED determination concerning the person on trial for their life. *Lockett vs. Ohio,* 438 U.S. 586 (1978). Ironically, later in the opinion, the court points out that Mr. Ford was bullied in school and beaten by his step-father. Factors that someone with a "similar circumstances" may not have endured.

It is also disturbing that the court felt compelled to examine all the statutory mitigating circumstances, in spite of the fact that Mr. Ford did not present evidence related to many factors. In *State vs. DePew,* 38 Ohio St.3d 275, 289; 528 N.E.2d 542 (1988), this court made it clear that if the defendant chooses to refrain from raising some of or all of the factors available to him, those factors not raised may not be referred to *or commented upon by the trial court* or the prosecution. Yet the court did exactly that, he went through each factor in the statute. The trial court should have limited his examination to the factors presented by Mr. Ford.

The defense expert, Dr. Joy Stankowski, testified concerning Mr. Ford's drug and alcohol abuse. She specifically noted the effect that alcohol has on a developing brain. The trial court gave this factor no weight, because "There was no evidence that Defendant Ford was under the influence of alcohol at the time of the murder of Margaret Schobert." (Id., p. 17) However this court has previously

held that the fact that an offender may not have been under the influence at the time of the offense is an incorrect definition of mitigation. ". . .to the extent that the trial court's sentencing opinion may be susceptible of a reading that indicates no need to consider the factor (substance abuse) simply because appellant was not under the influence of drugs or alcohol at the time of the offense. The court's statement in that regard would be an incorrect definition of mitigation, one that relates directly to culpability, as opposed to those factors that are relevant to whether the offender should be sentenced to death. *See State v. Holloway*, 38 Ohio St.3d at 242." *State v. Goff*, 82 Ohio St.3d 123, 133 (1998).

It is also troubling that the trial court acknowledged in his opinion, the issue related to the jury's finding that in the felony murder specifications attached to Count Four, relating to Margaret Schobert, the jury found he was not the principal offender, but instead found he had committed the aggravated murder with prior calculation and design. (Id., p. 15) (See, Proposition of Law No. II) The trial court noted the inconsistencies between the verdicts when the jury found Ford guilty of both principal offender and prior calculation and design immediately after the verdict. (Vol. 28, Trial, p. 509.) The court failed to acknowledge the problems with this finding, that was exacerbated when the court went back to the course of conduct specification and found he was "the offender" who had killed two or more

persons. In essence what the Court did was to weigh both prongs of the O.R.C. 2929.05(A)(7) capital specification, principal offender and prior calculation and design, in violation of *State v. Penix*, 32 Ohio St.3d 369,371 (1987), *State v. Moore*, 81 Ohio St.3d 22, 40 (1998). See, Proposition of Law No. II.

The court engaged in the same erroneous reweighing in its reasons section, Doc. 378, pp. 18-19, where the court finds him the actual killer and prior calculation and design. In *State v. Johnson* 24 Ohio St.3d 87, 494 N.E. 2d 1061 (1986), this court held that "[p]resenting the jury with *specifications not permitted by statute* impermissibly tips the *scales in favor of death*, and essentially undermines the required reliability in the jury's determination." This reasoning is equally applicable when the trial court considers specifications not permitted by law. To have acknowledge the dilemma created by the jury's verdicts in Count 4 and Count 5 and then to have relied upon both findings in clear violation of the statutory language mandating either the principal offender, or if not the principal offender then with prior calculation and design undermined the reliability of the sentence and tipped the scales in favor of death.

In addition, if the court was going to accept the jury's finding that Mr. Ford was not the principal offender in the aggravated murder of Margaret Schobert, then he should have given weight to the O.R.C. 2929.04(B)(6) mitigating factor.

Conclusion

Ohio's statutory scheme for imposition of the death penalty is a response to United States Supreme Court decisions requiring that the death penalty be imposed in a rational, consistent manner. *Eddings v. Oklahoma,* 455 U.S. 104, 111 (1982); *Lockett v. Ohio,* 438 U.S. 586 (1978). A state that allows the death penalty "has a constitutional obligation to tailor and *apply* its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia,* 446 U.S. 420, 428 (1980) (emphasis added); *see also, Barclay v. Florida,* 463 U.S. 939, 958-59 (1983) ("Since *Furman v. Georgia,* 408 U.S. 238 (1972), this Court's decisions have made clear that States may impose this ultimate sentence *only if they follow procedures that are designed to assure reliability in sentencing determinations.'* (Stevens, J., concurring) (citation omitted in original, emphasis added).

To that end, discretion in sentencing by a jury or three judge panel is channeled so as to limit the possibility that a death sentence will be imposed without thorough, proper consideration. *Gregg v. Georgia,* 428 U.S. 153, 189 (1976). In Ohio, that consideration is defined as a weighing of only the aggravating circumstances present against the mitigating factors with a requirement that the jury and judge find, beyond a reasonable doubt, that the statutory aggravating

circumstance outweighs all of the mitigating factors. O.R.C. § 2929.03. In this case, the court allowed improper considerations to tilt the balance in favor of death.

The trial court's error in the opinion was violative of the Fifth, Eighth and Fourteenth Amendments guarantees firmly established in *Lockett vs. Ohio,* 438 U.S. 586 (1978); *Eddings vs. Oklahoma,* 455 U.S. 104 (1982); *Hitchcock vs. Dugger,* 481 U.S. 393 (1987); and *Penry vs. Lynaugh,* 492 U.S. 302 (1989) and similar guarantees made in Sections 9 and 16, Article 1 of the Ohio Constitution. Mr. Ford's death sentence must be reversed.

PROPOSITION OF LAW NO. XVIII

IT IS A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND OHIO CONSTITUTION, ARTICLE 1, SECTIONS 1, 2, 9, AND 16, TO UPHOLD A SENTENCE OF DEATH WHEN AN INDEPENDENT WEIGHING OF THE AGGRAVATING CIRCUMSTANCES VERSUS THE MITIGATING FACTORS DEMONSTRATE THAT THE AGGRAVATING CIRCUMSTANCES DO NOT OUTWEIGH THE MITIGATING FACTORS BEYOND ANY REASONABLE DOUBT, AND THE DEATH SENTENCE IS NOT APPROPRIATE.

Shawn Ford should not be on death row. Had the crime been committed six months earlier, he would not have been eligible for the death penalty. To presume that because he was 18, he had the maturity and mental development to overcome the vulnerability or susceptibility to negative influences is "blinking reality." His low average IQ, coupled with his general immaturity and family upbringing combined to produce someone who committed terrible crimes. But all aggravated murders that warrant capital specifications are terrible crimes, and Ford had been diagnosed with a learning disability and a low IQ at an early age. Ford poses no threat to society in the event of a 25 or 30 actual incarceration or even a life without parole sentence. To be sure the murders were brutal in character, Ford's history explains much of that. Furthermore, the trial court appears to have weighed non-statutory aggravating circumstances into the death decision.

In ruling capital punishment unconstitutional for juveniles under the age of eighteen (18), the United States Supreme Court emphasized that rules have been implemented to ensure that the death penalty is reserved for "a narrow category of crimes and offenders." *Roper v. Simmons*, 543 U.S. 551, 569, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). *Roper* held that because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force. Capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." In *Roper*, the Court recognized differences between juveniles cannot with reliability be classified among the worst of the offenders. Roper relied upon three basic realities to conclude the death penalty can not be imposed for juveniles: 1) a lack of maturity and under developed sense of responsibility are found in youth more often than in adults and often result in impetuous and ill considered actions and decisions; 2) juveniles are more vulnerable or susceptible to negative influences and outside pressures, caused in part by the prevailing circumstances that juveniles have less control, or less experience with control, over their own environment; 3) the character of a juvenile is not as well formed as that of an adult. The personality traits of a juvenile are more transitory, less fixed.

> These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immaturity and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identify means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievability of irretrievable depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.

Id. at 568-570. Going to sleep on the eve of one's eighteenth (18th) birthday, and waking up the next morning eighteen (18) years old does not overnight change the characteristics of a juvenile. Shawn Ford was barely eighteen (18) when he was arrested and charged with the aggravated murder of Jeffrey and Margaret Schobert, and the felonious assault of Chelsea Schobert. The overwhelming evidence presented supported a portrait of a young man who was immature, irresponsible, vulnerable and impulsive. Shawn was not just a young kid who didn't want to grow up, a review of his life's circumstances places him squarely in the category of a juvenile whose vulnerability and comparative lack of control over his immediate surroundings rendered him ill-equipped to deal with the turmoil and challenges he

faced. To be sure, he was 18 years old, not what we consider a juvenile under the law. But to actually implement and carry out the individualized sentencing constitutionally mandate, the decision in this case cannot be made by looking at the date on the birth certificate. *Lockett v. Ohio* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Individualized sentencing means looking at the entire package that brought Shawn Ford to where he was in life on April 1, 2013.

> And as I said before, development, there is no magic age at which things start or stop, and the age varies on the individual. Some people's brains might be more fully developed and their characters and personalities might be more mature at age 17. Some people might not be mature until 19, 20. And a lot of that depends on how supportive their environment was, it depends on how many extra resources they might have had. It depends on other things they were born with, how high or low their IQ was.

(Vol. 4, Mitigation, p.499-500). The environment Shawn Ford grew up in, coupled with low IQ of 80 or below compels the conclusion that Shawn, like juveniles under 18, fails to fall among the worst offenders or evidence of the "irretrievability of irretrievable depraved character."

Before he was three years old, his baby sister died. Some may say he was too young for it to have any impact. The fact that he stopped talking after her death suggests otherwise. Even when beat with a belt, he would not cry and when "whoopings" weren't effective, he was punished by having to stand holding 25

pound weights above his head. Before he was five, Shawn was witness to violence and physical fights between his parents 2 to 3 times a week, one time, intervening and crawling on his father's back begging him to stop beating his mother. By eight years old he had twice been removed from his house and the people with whom he had bonded. He was bullied at school because of his high pitched voice. When he returned to his mother, he was again faced with witnessing and enduring physical abuse; this time involving his step-father. Tracy Wooden. His step father sold drugs and ended up in prison. He longed to spend time with his father who made little to know effort to be a part of Shawn's life. To be sure, faced with all of these challenges as a juvenile, Shawn Ford found himself on the street and making the wrong choices.

It is no surprise that he ended up in juvenile court and no surprise that the counseling through juvenile court, it was "evident" Shawn had emotional and psychological problems. When released form juvenile detention, he met Chelsea, whom by all accounts he truly loved. His step-father was not happy Shawn wasn't sharing the money he got from Chelsea and so his step-father went after him with a baseball bat and during the struggle bit him and then, kicked him out of the house. One week later, as Chelsea sat in the hospital, Shawn faced losing what he thought was the love of his life. Two weeks later he stood charged with capital murder.

These were the mitigating factors present. Not all fit neatly within one of the factors enumerated in 2929.04(B). On his 18th birthday he did not miraculously develop the skills to deal with his vulnerabilities, susceptibility to negative influences and outside pressures or develop the ability to "escape negative influences" in his whole environment.

But for the difference of six (6) months, Shawn would not be eligible for the death penalty. This is a fact that cannot be easily dismissed. Though he was six (6) months past his eighteenth (18th) birthday when this crime occurred, the chronological age does not reflect the mental development as recognized in *Roper, supra*, "juvenile offenders cannot with reliability be classified among the worst of the offenders." We recognize that juveniles have not had full opportunity to develop, that their "immature and irresponsible behavior" means that as a matter of law "their irresponsible conduct is not as morally reprehensible as that of an adult."

The trial court issued a separate opinion weighing the aggravating circumstances against the mitigating factors. The trial court found that the aggravating circumstances outweighed the mitigating factors beyond any reasonable doubt and imposed a death sentence. But the trial court did not conduct the individualized sentencing. Had the trial court looked at the individual, a different result would have obtained. The trial court weighed the aggravating

circumstances, to include the fact that the murder was committed with prior calculation and design, even though the jury had found Shawn Ford to be the principal offender, and therefore, that factor should not have been considered as an aggravating circumstance.

Here, the mitigating factors overwhelmingly supported the conclusion that Shawn Ford, though eighteen (18) in chronological age, possessed all of the characteristics of a juvenile, for which we recognize death is not appropriate.

To be sure, capital sentencing requires individualized consideration of the offender. This means that by definition a statute cannot be drafted to cover every possible mitigating factor. Listing all of the statutory mitigating factors when Ford's evidence, though considerable, fits into only a few of the statutory pigeon-holes, has the subconscious effect of leading a jury, and perhaps a judge, to believe that Shawn Ford's mitigation is not substantial because it fits into only a few of the several enumerated categories. In fact, there is a United States Supreme Court case that stands for the idea that mitigation cannot be limited by statutory criteria, "ruling, other otherwise." See, *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

R.C. 2929.05 charges this Court with the obligation to "review on appeal the sentence of death at the same time that they review the other issues of the case." The Court:

> shall review the judgment in the case and the sentence of death imposed by the court or panel of three (3) 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…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 (3) judges, found the offender 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.

A review of the indictment and the aggravating circumstances renders it impossible for this Court to independently weigh and make a determination of the appropriateness. This is because Shawn Ford was found guilty of the principal offender and despite that, the jury was permitted to consider and found him guilty of committing the crime with prior calculation and design.

As a matter of federal constitutional law, a proportionality review is not required. See, *e.g., Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984) Whether by accidental or designed implementation of the doctrine of "new federalism" Ohio does require a proportionality review. See, Ohio Rev. Code Ann. §2929.05.

Just about anyone who has weighed in on the subject has drawn the same conclusion: in order to determine whether a death sentence is proportional, the death sentence and the offender's conduct must be compared to similar crimes not only in which the death penalty was actually imposed, but in which the death penalty could have been imposed and indeed could have been charged.[27]

The United States Supreme Court outlawed the death penalty for rape in *Coker v. Georgia* 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). The Court did so, because it found that the death penalty for rape was not generally being imposed throughout the nation, and it therefore violated the Constitution to do so in Coker's case. The Supreme Court did not compare other rape cases in Georgia where the defendant had been sentenced to death for rape in order to determine

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[27] While the last of these is sometimes debatable among those who debate such things, its inclusion in the pool of cases is unquestionably proper. This is due, if for no other reason, to the fact that the unbridled charging discretion of Ohio prosecutors is such that many people who could be charged with the death penalty are not. Moreover, the *Coker* standard, described herein, makes such inclusion undeniably proper.

whether Coker's death sentence was valid. Instead, the Court looked to whether the death penalty was being imposed generally across the country for the crime of rape. Concluding that it was not, the Court invalidated Coker's death sentence.

Coker at the very least warrants the inclusion of all other capital murder cases where death could have been imposed as part of the proportionality pool. Thus, just based upon the *Coker* analysis, Ohio's review is fatally flawed. Instead of looking at capital indictments involving the same acts, charges, and/or specifications, this Court looks only at similar cases where the death penalty was actually imposed. Under this analysis, had the United States Supreme Court compared Coker's death sentence for rape only with other sentences of death imposed in Georgia for rape, and without regard to the rape cases where death was not imposed in Georgia and other states, Coker would have by now surely been executed.

Ohio law requires a reviewing court to review a defendant's capital sentence for proportionality and appropriateness. But this Court will be unable to do that—it will be unable to perform any sort of a proportionality review that is anything other than lip service to the concept. And the reason, of course, is because there are no statistics; there is no data, which would enable the Court to perform a *true* proportionality review.

In September of 2007, the *American Bar Association published, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Ohio Death Penalty Assessment Report: An Analysis of Ohio's Death Penalty Laws, Procedures, and Practices*. Four years later a task force was appointed to review capital punishment in Ohio. The 2007 ABA Report addressed two issues relevant to this Court's obligation regarding proportionality review in Ohio 1) race as a factor in death penalty sentenced; and, 2) Ohio lacks meaningful proportionality review.

The Ohio Public Defender's proportionality statistics, found at http://opd.ohio.gov/Portals/0/PDF/DP/Proportionality.pdf, show that among those executed and those awaiting execution, a case in which there is a white victim or victims is far more likely to draw a death sentence. The 2007 ABA Study found:

> In 1987, the United States Supreme Court held in *McCleskey v. Kemp, [481 U.S. 279, (1987)]* that even if statistical evidence revealed systemic racial disparity in capital cases, this would not amount to a federal constitutional violation in and of itself. At the same time, the Court invited legislative bodies to adopt legislation to deal with situations in which there were systematic racial disparities in death penalty implementation.
>
> The pattern of racial discrimination reflected in *McCleskey* persists today in many jurisdictions, in part, because courts often tolerate actions by prosecutors, defense lawyers, trial judges, and juries that can improperly inject race into capital trials. These include intentional or unintentional prosecutorial bias when selecting cases in which to seek the death penalty;

> ineffective defense counsel who fail to object to systemic discrimination or to pursue discrimination claims; and discriminatory use of peremptory challenges to obtain all-white or largely all-white juries.
>
> There is little dispute about the need to eliminate race as a factor in the administration of the death penalty. To accomplish that, however, requires that states identify the various ways in which race infects the administration of the death penalty and that they devise solutions to eliminate discriminatory practices.

Race in Ohio today is what race was in *McCleskey*: not that blacks receive the death penalty in greater proportions than whites, but that killing a white person or persons, regardless of the defendant's race, is far more likely to draw a death sentence, exactly what happened here.

The shortcomings regarding the current proportionality review in Ohio identified in the ABA study are substantial rather than inconsequential. The study recommended, *inter alia*, that the following improvements be made:

> ➢In order to protect against arbitrariness in capital sentencing, the State of Ohio should ensure proportionality in capital cases. Presently, that protection is lacking, as evidenced by the documented racial and geographic disparities in Ohio's capital system. Because proportionality is better achieved at the front end rather than the back end, the State of Ohio should develop laws and procedures to eliminate these disparities and to ensure proportionality.
>
> ➢The courts in the State of Ohio should more vigorously enforce the rule requiring prosecutors to disclose to the defense all evidence or information known

> to the prosecutor that tends to negate the guilt of the accused or mitigates punishment.
>
> ➤The State of Ohio should engage in a more thorough review of the issues presented to the court(s) in capital appeals, relax the application of waiver standards, and decrease the use of the harmless error standard of review.
>
> ➤The State of Ohio should create a publicly accessible database on all potentially death-eligible murder cases. Relevant information on all death-eligible cases should be included in the database and specifically provided to prosecutors to assist them in making informed charging decisions and the Ohio Supreme Court for use in ensuring proportionality.
>
> ➤ To ensure that death is imposed only for the very worst offenses and upon the very worst offenders, the Ohio Supreme Court should employ a more searching sentencing review in capital cases. This review should consider not only other death penalty cases, but also those cases in which the death penalty could have been sought or was sought and not imposed.

In its 2014 report, the Joint Task Force recommended that the legislature enact legislation to require a prospective proportionality review in death penalty cases to include cases where the death penalty was charged in the indictment or information but was not imposed. The cure lies not in another statute but in implementing the extant statute.

> Since 1981 the Ohio legislature has required consideration of whether "the sentence is excessive or disproportionate to the penalty imposed in similar cases." Id. The current practice of the Ohio Supreme Court is to compare only cases in which a death sentence was

> imposed. This appears inconsistent with the intent of the Ohio legislature and the initial practice of the Court.

See, Joint Task Force to Review the Administration of Ohio's Death Penalty, *Final Report & Recommendations*, April, 2014, at 5.

In *State v. Simko*, 71 Ohio St.3d 483, 501, 1994 Ohio 350, 644 N.E.2d 345, Justice Pfeifer dissented from the imposition of death. Joining him were Chief Justice Moyer and Justice Craig Wright. The dissent probed the heart of Ohio's lack of meaningful proportionality review.

> The focus in most death-penalty cases has been on issues other than proportionality. Typically, the court locates previous cases with similar statutory aggravating circumstances where the death penalty has been imposed, and thus finds proportionality to the case at issue. However, murders with the same statutorily defined aggravating circumstance are not necessarily crimes of the same character. In the present case, for example, the majority cites three cases in its proportionality review.

The Court should review its entire data base, so that it can determine in a meaningful way whether the death sentence imposed upon Ford can be explained by a logical distinction between the case where death is imposed from those of similar character where it is not. Only that type of true proportionality review will guarantee that Ford's death sentence was not imposed with the freakishness and predictability of a strike of lightning that the Eighth Amendment prohibits. See,

Furman v. Georgia, 408 U.S. 238, 309, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (STEWART, J., concurring).

PROPOSITION OF LAW NO. XIX

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

Prior to the start of the penalty phase, the defense filed a motion requesting the jury be instructed to consider mercy in its deliberations. (Defense Motion No. 63, Doc. #100) The trial court never ruled on the motion.

The fundamental issue in a capital sentencing proceeding involves the determination of the appropriate punishment to be imposed on an individual. Spaziano v. Florida, 468 U.S. 447 (1984). The sentencer must rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not. Id. at 460. Appropriateness of the penalty is the indispensable element of a constitutionally valid sentencing scheme.

The United States Supreme Court's opinion in *Lockett v. Ohio*, 438 U.S. 586 (1978), established a defendant's right to permit the sentencer to use any factors it sees fit in deciding whether a defendant merits leniency. Chief Justice Burger explained that nothing prevented the sentencer from considering any aspect of a defendant's character or record or any circumstances of the offense as an independent mitigating factor. Id. at 607. This principle permits the jury to

consider sympathy or mercy in its sentencing decision. In *Gregg v. Georgia*, 428 U.S. 153, 190 (1976), the Supreme Court endorsed the propriety of permitting the jury to consider mercy for the defendant.

In *Eddings v. Oklahoma*, 455 U.S. I 04 (1982), the Court declared that the sentencer may not be precluded from considering any relevant mitigating factors offered by the defendant. *Eddings* noted that the Eighth Amendment prohibited not only legislative exclusion of mitigating evidence but also exclusion of any relevant mitigating evidence by the sentencing body. The Supreme Court admonished all lower courts not to deny consideration of any relevant mitigating evidence. "Mercy" fits within the definition of relevant mitigating factors under *Eddings*, therefore, must be considered by the sentencer.

Principles of due process and the prohibition of cruel and unusual punishment require that the jury make an individualized sentencing determination. *Zant v. Stephens*, 462 U.S. 862 (1983); *Barclay v. Florida*, 463 U.S. 939 (1983). An individualized sentencing decision requires that the jury be given a vehicle for expressing the view that the defendant "does not deserve to be sentenced to death," that "he was not sufficiently culpable to deserve the death penalty." *Penry v. Lynaugh*, 492 U.S. 302 (1989). In *Penry* the Court approved a procedure and that allows a jury to recommend mercy based on the mitigation evidence introduced by

a defendant. Indeed, the jury must be free to determine what punishment is appropriate and to give a "reasoned moral response to [the] mitigating evidence." *Id.* at 323. Compare *California v. Brown*, 479 U.S. 538 (1987) (In Justice O'Conner's concurrence, which gave the opinion of four other Justices the force of law, there is language and an analysis consistent with the notion that "mercy" merits independent consideration as a mitigating factor inasmuch as it relates to a "reasonable moral response" to the defendant's background and character.)

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

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

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

the need for individualized consideration as a constitutional requirement in imposing the death sentence.

The epitome of this principle is the Court's decision in *Hitchcock* v. *Dugger*, 481 U.S. 393 (1987). In that case, Hitchcock's lawyer referred to various considerations, some of which were the subject of factual dispute, that would make a death sentence inappropriate. Hitchcock's youth (20 at the time of the murder), his lack of significant prior criminal activity or violent behavior, the difficult circumstances of his upbringing, his potential for rehabilitation, and his voluntary surrender to authorities. Although counsel stressed the first two considerations, which related to mitigating circumstances specifically enumerated in the statute, he told the jury that in reaching its sentencing decision, it was to "look at the overall picture … consider everything together … consider the whole picture, the whole ball of wax." In contrast, the prosecutor told the jury that it was "to consider the mitigating circumstances and consider those by number," and then went down the statutory list, item by item, arguing that only one (Hitchcock's youth) was applicable. The trial judge instructed the jurors "on the factors in aggravation and mitigation that you may consider under our law." He then instructed them that "the mitigating circumstances which you may consider shall be the following" and then the judge listed the *statutory* mitigating circumstances.

A unanimous Supreme Court reversed the limitations placed by the trial judge, and the Court's opinion, written by Justice Antonin Scalia, who fancies himself a constitutional "originalist," held that Hitchcock's right to relief under the Constitution "could not be clearer."

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

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

This Court's decision in *State* v. *Lorraine*, virtually ended mercy instructions because mercy is not one of the mitigating factors set forth in R.C. §2929.04(B). Prior to *Lorraine*, this Court held that an Ohio jury *is not precluded* from extending mercy to a defendant. *See, State v. Zuern*, supra How can a jury consider something that they are not told they can consider.

The rational in *Kansas v. Marsh*, 548 U.S. 163, 126 S. Ct. 2516 (2006), also supported the motion for a jury instruction. Justice Thomas writing for the majority

in a decision about whether the Constitution permits Kansas to allow a death sentence when aggravating and mitigating factors are in equipoise, quoted with approval the Kansas jury instruction on mercy:

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

In footnote 3, Justice Thomas explained that mercy as a mitigating factor is important "because it 'alone forecloses the possibility of *Furman*-type error as it' eliminate[s] the risk that a death sentence will be imposed in spite of facts calling for a lesser penalty."

Marsh held that a "mercy" instruction saved Kansas's statute from a constitutional challenge. Addressing the dissenters' concern that the "equipoise" rule allowed unconstitutional weighing of evidence in favor of death, the majority said: "The 'mercy' jury instruction alone forecloses the possibility of Furman-type error as it 'eliminate[s] the risk that a death sentence will be imposed in spite of facts calling for a lesser penalty.' *Marsh*, at 4 (Souter, J., dissenting)." Id. at footnote 3. The Court once again endorsed the concept of a capital jury's consideration of mercy just this term in *Kansas v. Carr*, 577 U.S. ---, 136 S.Ct. 633 (2016).

Ohio, like Kansas, is a "weighing" state, therefore a mercy instruction is required to foreclose constitutional error. *Marsh* also compels the conclusion that the State may not argue that "mercy" cannot be considered by jurors during mitigation phase deliberations.

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

The failure to allow the instruction that the jury could consider mercy violates Mr. Ford's State and Federal constitutional rights to effective assistance of counsel, due process of law, equal protection of the law, confrontation of the State's evidence against him, and freedom from cruel and unusual punishment. U.S. Const. amends. V, VI, VIII, IX and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16 and 20. Mr. Ford has a Federal constitutional due process and Eighth Amendment right to have "mercy" considered as a mitigating factor in Ohio. The failure to allow the instruction requires a new sentencing phase be conducted.

PROPOSITION OF LAW NO. XX

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

Shawn Ford's Sixth Amendment right to effective counsel was violated by the cumulative effect of errors and omissions by his trial counsel. While Appellant Ford believes that counsel's ineffective assistance is present in the record of this case, if this Court were to determine that this issue or a sub-part of this issue cannot be decided without information **that is not in the record of the case**, the Court should defer any ruling on the issue or sub-issue and allow it to be addressed in post-conviction proceedings. *State v. Madrigal*, 87 Ohio St.3d 378, 390-391 (2000).

Standards for Ineffective Assistance of Counsel Claim.

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

Counsel's actions are presumed reasonable. But *Strickland* also establishes that a reasonable investigation of both law and facts is required before a choice by counsel may be deemed strategic or tactical. *Id*. at 691. "[S]trategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation. … A decision not to investigate thus must be directly assessed for reasonableness in all the circumstances." *Wiggins v. Smith*, 539 U.S. 510, 533 (2003) (citations and internal quotation marks omitted). Therefore, oftentimes a claim of ineffective assistance of counsel cannot be fully reviewed on direct appeal, even though the error seems to be apparent in the record of the case.

When assessing the performance prong in a capital case, this Court is informed or guided by the American Bar Association Guidelines for the Appointment of Counsel in Death Penalty Cases (ABA Guidelines). *See Wiggins*, 539 U.S. at 524. "The ABA Guidelines provide that investigations into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence …" *Id*. (citation and internal quotation marks omitted with emphasis in original). If counsel's performance is deficient, this Court must determine whether Ford suffered prejudice resulting from counsel's error. *Strickland*, 466 U.S. at 687. Prejudice results when this Court's confidence in the result of Ford's

trial is undermined by counsel's error. *Id*. at 694. Ford has no requirement to demonstrate that counsel's error was outcome determinative under the *Strickland* prejudice prong. *Id*. at 693.

Ineffective Assistance of Counsel at Pretrial Proceedings

Counsel's duty to their client begins at the moment they are appointed. Not only does counsel need to start investigating the case against their client, they need to file the appropriate pretrial motions to ensure that the client's rights are protected. Counsel filed some of the motions, but they failed to follow up on them and to renew the motions when the court failed to rule.

Grand Jury Proceedings

Trial counsel filed three separate motions relating to the Grand Jury proceedings: Motion No. 31, Defendant's Motion to Disclose the Names of the Grand Jury Witnesses (Doc. # 70); Motion No. 32, Defendant's Motion to Transcribe the Grand Jury Proceedings Prior to Trial (Doc. # 71); and, Motion No. 33, Defendant's Motion for a Pretrial Copy of the Grand Jury Proceedings (Doc. 72). The motions were heard at the November 26, 2013 pretrial hearing.

The State opposed the motions (orally, not in writing) stating only there was "no particularized need." (Pretrial, 11-26-13, pp. 33-34) The court acknowledged that he is authorized to disclose the information if defense makes a threshold

showing, and asked defense counsel if they wanted to argue in support of the motion. (Id.)

In response to the court's request, defense counsel argued that the standard for obtaining grand jury transcripts should be more relaxed in death penalty cases. In addition, the defense argued that there could be a violation of the confrontation clause in that the testimony could change between the grand jury proceedings and the trial. Defense counsel requested that the court review the proceedings in camera. (Id.) The court took the motion under advisement. (Id., at p. 36) The court entered a journal entry to that effect, and indicated he would rule prior to trial. (Doc. # 140).

On September 24, 2014 prior to the start of voir dire, the trial court again addressed the subject of the grand jury transcripts. The court indicated that it had "directed counsel for the defense to advise the court whether any of the previously undisposed of motions that had been filed by the defense still presented viable issues. *I had not heard from the defense pursuant to the Court's directions.* The Court is prepared to dispose of those issues." (Vol. 1, Trial, 9-24-14, p. 2)[28](emphasis added).

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[28] In an order issued on Oct. 17, 2014, the trial court states "on September 19, 2014, the court reminded counsel that some of defendant's motions had previously been held in abeyance." This

> As counsel is aware, there is a heavy burden that must be met in order to -- for the Court to authorize the disclosure of those kinds of materials. That burden has not been met in this case. There has been no showing to me for the disclosure of any of the Grand Jury materials referred to in those three motions; therefore, those motions will be overruled.

(Id., at pp. 4-5) The Court then put on an order denying the motions. (Doc. # 253)

The defense was negligent in failing to follow-up on this issue with the court. The "lay witnesses" in this case were not consistent in their statements in court, there were inconsistencies between Chelsea Schobert, Zach Keyes, and Joshua Greathouse as to what occurred at the Zach's house the night Chelsea was assaulted. The defense never knew who testified at the grand jury so as to know whether he could meet the standard of "particularized need" to obtain the transcripts. Detective Morrison did not testify at the trial and that was very curious, if he did testify at the grand jury it would have shed some light on that decision by the state, and perhaps the defense might have called him as a witness.

Article I, Section 10 of the Ohio Constitution and the Fifth Amendment of the federal constitution require capital cases to be instituted by grand jury proceedings. The grand jury has served the dual function of determining if there is

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conversation must have taken place off the record as there was no hearing or docket entries on that day.

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

The standard for inspection of Grand Jury testimony prior to trial is whether the ends of justice require it and there is a particularized need for disclosure which outweighs the need for secrecy. *State v. Grewell*, 45 Ohio St. 3d 4, at 9 (1989), 545 N.E.2d at 98. In *State v. Laskey*, 21 Ohio St. 2d 187, 191, 257 N.E.2d 65, 67-68 (1970), the Ohio Supreme Court held that an accused may inspect Grand Jury transcripts either before or during trial when the ends of justice require it and there is a particularized need for disclosure which outweighs the need for secrecy. In *State v. White,* 15 Ohio St. 2d 146, 239 N.E.2d 65 (1968), the court acknowledged that a defendant's rights to inspection and due process may, in certain instances, outweigh the interest in keeping Grand Jury proceedings secret:

> The reasons for the right of a defendant in a criminal case to inspect a statement of the prosecuting witness vary from the recognition that it is a procedural safeguard against the suppression of evidence material and capable of exculpating the accused to the idea that it

> provides additional material for impeaching the credibility of the prosecuting witness.

Id. at 155, 239 N.E.2d at 72. The United States Supreme Court has determined that to "impeach a witness, to refresh his recollection, to test his credibility and the like . . . are cases of particularized need where the secrecy of the proceedings is lifted discreetly and limitedly." *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 683 (1958).

The defense had ample reason to obtain the grand jury proceedings in this case, and it was ineffective not to follow-up on their initial request to obtain them.

Failed to Adequately Challenge the Defendant's Statements

Shawn Ford gave multiple statements to various police agencies between April 1, 203 and April 3, 2014. Defense counsel filed a motion to suppress Ford's statements and supplemented the Motion before the hearing. (Doc.# 201, 203.) The Motion to Suppress raised multiple issues to include notification and waiver of Miranda rights, use of a jail house snitch to obtain statements from Ford and coercion in obtaining the statements. On September 15, 2013, and resumed September 19, 2013, a hearing was held on the Motion. Given the fact that there were so many statements from Ford, at the commencement of the hearing the trial court discussed how the hearing would proceed " It would help the Court if as we enter into receiving evidence that we can be very specific about when and where

and how each statement from Mr. Ford was obtained." (Suppression hearing, 9-15-13, p. 7.) The trial court then advised that the court reporter would not transcribe portions of the tape as they were played in court, that the tape would be received in evidence and made part of the record. So that the record would be clear, the State and defense agreed to note the time from the recording of any portions played in court. (Id., p. 19.)

A review of the hearing transcript reveals defense counsel focusing upon the lack of any effort by law enforcement to obtain a valid waiver of Miranda rights before questioning Ford. The trial court's failure to grant the motion to suppress on this basis was error and was addressed in Proposition of Law No I. Also addressed in that same Proposition of Law was the fact that the statements obtained from Ford on April 3, 2013 while he was in the Portage County jail were clearly coerced. The police engaged in improper threats, promises, deception and manipulation such that it cannot be said Ford's choice to speak was the unfettered exercise of his own free will. Though coercion was raised in the Motion to Suppress, specific from the recorded conversation of April 3rd were not included in the motion and defense counsel did nothing at the hearing to elicit any testimony regarding the improper police tactics or otherwise argue the issue or draw the court's attention to the issue. A review of the tape present compelling evidence

that the tactics employed by the police were improper and defense counsel's failure to fully develop that issue at the hearing deprived Ford of the effective assistance of counsel. Failure to file a motion to suppress when valid grounds for the motion are present amounts to ineffective assistance counsel because the failure deprived the trial court of the opportunity to determine the issue. *State v. Garrett*, 76 Ohio App.3d 57, 600 N.E.2d 1130 (1983). Here, defense counsel's failure to elicit any testimony or otherwise develop the facts from the video reflecting the coercive police tactics deprived the trial court of the opportunity to decide the issue. Though the video statement was introduced into evidence, only 18 seconds of the DVD, showing the reading of Miranda rights, was played at the hearing. (Suppression, 9-15-13, p. 54.) The interview lasted over an hour during which the police told Ford that, very soon, the case would be presented to the grand jury and the police officers would be called upon to render an opinion as to whether Ford had been "cooperative."

The police represented to this young and unlettered man that his cooperation or lack of cooperation would be the difference between life and death, between non-capital murder and charges that carried an "automatic" death penalty. The officers portrayed it as "agg murders" if Ford cooperated and told them the truth, and the "automatic" death penalty if he did not. (See, State Ex. B, Doc. # 388, at

16:25:23) Further, when Ford talked about spending the rest of his life in jail for the murders, the detective told Ford that he needed to quit looking at the situation as if there was no possibility for him short of life in prison. Because, the detective said, the possibility "is here for you, but it's not going to be here for you if you sit here and lie." (See, State Ex. B, Doc. # 388, at 16:31:19). Seven DVD were entered into evidence and provided to the trial court at the suppression hearing. None of the specific statements were played or otherwise brought to the court's attention. Failure to develop these issues deprived the trial court of the opportunity to determine the issue.

In *Smith v. Mitchell*, 567 F.3d 246, 256 (6th Cir. 2009) the Court concluded Smith met the first prong of *Strickland* by showing his counsel's performance was deficient when counsel failed to develop at the suppression hearing whether Smith's waive of rights was voluntary. The court there did not find prejudice because Smith did not show the outcome of the hearing would have been different.

A review of the tape and the arguments set forth in Proposition of Law No. I compel a different conclusion in this case. The failure to develop at the suppression hearing or otherwise bring to the attention of the trial court the blatant coercion was ineffective assistance of counsel that was prejudicial.

Failed to Request a Hearing on the Need to Shackle their Client

Defense counsel filed a motion prior to the start of trial requesting that Mr. Ford appear at all proceedings without restraints. (Defense Motion 38, Doc. # 77) The motion was heard at a pretrial hearing. (Pretrial, 7-23-13, p. 13). The Court overruled the motion stating:

> The Court obviously will take steps to ensure that Mr. Ford's rights are protected at all times. And there is nothing in the case law that I am aware of that would suggest that he has a statutory or constitutional right to appear without restraints when the trier of fact is not present.

(Id.) The court put on a journal entry to that effect on July 26, 2013. (Doc. # 107)

The court addressed the issue again at another pretrial hearing:

> THE COURT: The Court, at its -- at our conference on July 23rd, indicated that the Court was going to overrule Motion Number 38.
>
> That was a motion requesting for Mr. Ford to be able to appear at all proceedings without restraints. I believe back on July 23rd, we indicated a journal entry would be filed in that respect. I am not certain whether we have followed that up with a journal entry, but we will do so at this time.
>
> Obviously, at the time of trial or at any point where Mr. Ford could be seen by any member of a jury, he will be seen only in street clothes in accordance with the normal procedures. There will be restraints underneath those clothes, again, consistent with normal procedures.

(Pretrial, 11-26-13, pp. 41-42) Appellant Ford appeared during the trial phase in civilian clothing but with restraints, including during voir dire, when counsel the court and the prospective juror were all sitting around a table.

On October 9, 2014, the first day of the trial, the court put on a second order regarding the use of restraints. (Doc. # 235) It is unclear as to what prompted the court to put on a second order, there is nothing in the record to support an additional action by the court. An actual hearing on whether the use of restraints was needed, was never held.

In the second order, the trial court cited to the fact that the case "involves the alleged brutal and violent attacks by defendant on three different individuals, two of whom died as a result of the attacks." However, in an aggravated murder death penalty case, there is always a crime that was violent, and in which people had died. However, without more, that does not give rise to the need for restraints during the course of the trial. In fact, the need to safe guard against inferences that the defendant is a violent, bad, dangerous person who must be restrained for everyone's safety, thereby undermining the presumption of innocence is perhaps more important when the nature of the charges are so violent. Seeing a defendant in shackles in any case is inappropriate. The harm in a case where the defendant is

charged with felony 5 possession of drugs may not have as dramatic an impact on the jury as when the defendant is charged with aggravated murder.

In the second order, the trial court placed his reliance on the fact that during the time preceding trial, there was some information that Mr. Ford wanted to commit suicide. (Doc. #235). There was no formal testimony from any jail personnel to this effect, nor did defense counsel state that they had any concerns about Mr. Ford's safety, or their own. There was no indication that Mr. Ford behaved in any threatening matter at any time prior to the start of trial. This would include the numerous pretrial conferences held in the year and a half prior to the start of trial, attorney-client visits, and examinations by psychologist and psychiatrists.

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

The trial court did not conduct an "evidentiary hearing" on the need for restraints and instead simply summarily ordered that Mr. Ford wear the restraints.

Defense counsel failed to request a hearing on the issue of restraints, or to challenge the court's orders regarding their use. Trial counsel was ineffective for failing to request a hearing and order regarding restraints.

Ineffectiveness of Counsel at Voir Dire.

Voir dire is a crucial part of a capital trial. It is the job of defense counsel to ensure that the persons who will decide the fate and life of their client be fair and impartial jurors. So counsel must always be on alert to comments made by jurors that would indicate a bias, particularly in a case that received so much pre-trial publicity. Trial counsel must make sure the prosecuting attorney does not step over the line and try indoctrinate the jurors to be predisposed to impose a death sentence. Trial counsel must make sure that the trial court correctly states the law for the jurors and that the jurors understand the law. Trial counsel must make the appropriate motions to use jurors for cause, and use their peremptory challenges wisely. Counsel did not fulfill their responsibilities in this case.

Counsel Failed to Object to Misstatements of the Weighing Process.

The trial court was charged with the responsibility of explain the process to the jurors that would be used to determine a life or death sentence. But then the trial court, in its explanation to each prospective juror, stated the process as follows:

> Now, if at the end of the mitigation part, the second trial, the jury decides beyond a reasonable doubt unanimously that the aggravating circumstances outweighed the mitigating factors or evidence, then the jury would be required to sign the verdict for the death penalty.
>
> JUROR NUMBER 39: Okay.
>
> THE COURT: All right. Now, on the other hand, if -- if in the second phase of the trial the jury decides that the mitigating -- pardon me -- that the aggravating circumstances do not outweigh beyond a reasonable doubt the mitigating factors, then the jury could not impose or require a death penalty.

(Voir Dire, pp. **1156**, 1259, 1297, 1367-1368, 1477, 1518-1519, 1573, **1641**, 1716, **1755-1756**, **1792**, 1834-1835, 1874, 1933, 1986-1987, **2032**, 2096, **2148-2149**, 2229, **2311**, **2373**, 2418, 2467, 2503, 2547, **2595**, 2643, 2687, 2731, **2772**, 2862, 2932, 3043, 3091, 3139, 3187, 3289, 3336, 3488-3489, 3538[29]) The wording in the second half of the explanation would lead a juror to believe that the jury would have to unanimously find that the aggravating circumstances do not outweigh the mitigating factors, before moving onto consideration one of the life sentences. Under the statute, and *State v. Brooks* 75 Ohio St. 3d 148, 159-160 (1996), this is not correct. The "jury" does not have to decide that the aggravating circumstances do not outweigh the mitigating factors, if just one juror makes that

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[29] The numbers in bold are jurors that were seated on the jury.

decision, no death sentence can be imposed. Defense counsel failed to object to the courts mischaracterization of the weighing process.

The statements or indoctrination by the prosecuting attorney were even more egregious.

The prosecuting attorneys, through their questioning of the prospective jurors engaged in conduct that either misstated the law, or attempted to diminish mitigation. The first day of individual voir dire the prosecuting attorney was questioning Juror No. 6:

> MR. LOPRINZI: There are some people that are okay with the death penalty, the concept; but when it comes to that moment, if you decide -- if you get in there and all 12 of you go, those mitigating factors, *"Man, they just don't do much for me,"* and you have to sign that verdict for death, you essentially are going to sign a piece of paper that are going to end that man's life. Can you be the one to sign that paper?

(Vol. 3, Voir Dire, p. 467)(emphasis added) This is not a correct statement of how the jury is to weigh mitigating evidence. The mitigating factors should be considered, and the fact that they "do not do much for me" is not the correct weighing process.

The prosecuting attorney, with the next juror, decided to give his own definition aggravating circumstances:

> So then we go to this second phase where, again, you have heard the specifications, the aggravating circumstances -- *the bad facts* -- and that -- you then get to hear any reasons -- mitigation -- any reasons why the death penalty shouldn't be imposed. Okay. Would you be willing to listen to both there?

(Vol. 3, Voir Dire, p. 492-493)(emphasis added) The prosecuting attorney then compounded the error by using his erroneous definition in the weighing process:

> MR. GESSNER: Okay. And then, only after that, and after been given the instructions on how to apply the law from the Judge, you go back in the jury room and you weigh them, and you determine that those aggravating circumstances -- *those bad facts* – outweigh the mitigating factors, or the reasons not to give death, and they outweigh them beyond a reasonable doubt, then your sentence has to be death *if the bad facts* outweigh any mitigating factors beyond a reasonable doubt. Could you accept that?

(Id.)(Emphasis added) The prosecuting attorney's description of the aggravating circumstances as "bad facts" is an incorrect statement of the law. Ohio Rev. Code, Section 2941.14 clearly states "The aggravating circumstances that may be considered in imposing the death penalty are those specifically enumerated in R.C. §2929.04(A) and set forth in the indictment." There is nothing in R.C. § 2929.04(A) that lists "bad facts." There were many "bad facts" in this case, but not all of them were aggravating circumstances. To tell the juror that the

aggravating circumstances are "bad facts" created the situation where the "bad facts" become non-statutory aggravating circumstances. State v. *Penix,* 32 Ohio St.3d 369, 370-372, 513 N.E.2d 744. *See, also*, *State v. Johnson*, 24 Ohio St.3d 87, 92-94, 494 N.E.2d 1061 (1986). It is also akin to telling the jurors that the nature and circumstances of the offense are aggravating circumstances. *State v. Ketterer,* 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 165–166.

Not only did defense counsel not object to this misstatement of the law, he actually picked up on it and used it:

> MR. SINN: The question is not whether or not you are going to give the death penalty. It is whether or not you could do what the Judge asks you to do and consider the aggravating circumstances -- all the bad stuff the State is going to put out –
>
> JUROR NUMBER 4: Uh-huh.
>
> MR. SINN: -- against the mitigating evidence -- all the stuff that the defense is going to put out -- and make a determination about whether or not death is the right thing to do. You may decide death isn't the thing to do.

(Id., at p. 550) While defense counsel slipped and used this description, it was the prosecuting attorney who used this definition throughout the voir dire process. See, Voir Dire, pp. 656, 607; **702-703**; 828-829; 943, **1007**, 1092-1093, **1122**, **1217**, 1527-1529, **1646, 1762**, 1839-1840, 1884-1885, 1887, 1993, 2121-

2123, 2206, **2316-2317**, 2245, **2384-2385, 2387**, 2472, 3066, 3196, 3299, 3387, and 3446-3447[30].

The prosecuting attorney also decided to come with his own way to describe the weighing process:

> MR. LOPRINZI: It is an odd thing to weigh, but we are going to ask you to do that. Basically, what we are going to ask you to do is give how much, maybe -- instead of saying what it would weigh -- *how much do things matter to you, okay?*
>
> So if the aggravating circumstances *matter a lot to you, you give it a lot of weight.* And if the things that they want to present to you in mitigation you feel aren't -- *that doesn't matter much,* that's okay, too.
>
> Conversely, if aggravating circumstances that the State presents *don't matter much to you*, you give them little weight, or no weight; you can give them no weight. All you have to do -- and the same with theirs. If they give you mitigating factors --or present mitigating factors and you go, "*That matters a lot*; that's important to me," you give it a lot of weight. If they present mitigating factors and you say, "Hmm, that doesn't mean anything to me," you can give it little weight or no weight. It is all up to you, okay?
>
> Are you okay with making those kind of weighing decisions, deciding how much things matter to you?

(Vol. 5, Voir Dire, pp. 1031-1032)(emphasis added) This is an incorrect description of the weighing process and a process in which the defendant will

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[30] The page citation in bold refer to jurors that were seated in the case.

almost always be sentenced to death, because how is a juror every going to say it does not matter that two people were killed. Again, this was not an isolated incident. See, Voir Dire, p. 1031-1032, **1186-1187**, 1495, **1958-1959**, **1966-1967**, 2245, 2438, 2648, 2740-2741, **2798**, 2951-2952, 2974, 3004, 3056, 3067, 3100, 3163-3164, 3167, 3269-3270.[31] Defense counsel did not object.

The prosecutor total skewed the weighing process:

> How do you weigh killing two or more people versus his age? How does that weigh, right?
>
> So the question becomes is -- and *I kind of change it a little bit* -- how much does it matter to you? Does the killing of or attempting to kill two or more people, or the killing of someone during the commission of an aggravated robbery/burglary, weigh -- if that matters more to you than something like age –

(Vol. 16, Voir Dire, p. 3162-3163) The prosecutors also described the weighing process to Juror No. 70, who sat on the case as follows:

> MR. GESSNER: Okay. Well, those mitigating factors that the defense brings in –
>
> JUROR NUMBER 70: Uh-huh.
>
> MR. GESSNER: -- you understand, you can look at them, you weigh each one. You can look at one and say, "That doesn't mean a thing to me."
>
> JUROR NUMBER 70: Yes, yes.
>
> MR. GESSNER: Or you can say, "I like that one" --
>
> JUROR NUMBER 70: Yes.

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[31] Pages in bold are jurors who sat on jury.

(Vol. 9, Voir Dire, pp. 1764-1765) This is not correct, it is not a matter of liking or not liking the mitigation, or whether it means something to you, Mr. Ford was on trial for his life and deserved to have a juror that took the correct weighing process seriously, not like they were picking out a melon. Defense counsel should have been vigilant and objected to these misstatements.

With Juror 48, also a seated juror, the prosecutor told the juror: "If you do not think that that *age and background stuff* is not as significant, it doesn't weigh as much meaning as the other things, you are going to have to find for death. (Id., p. 1816)(emphasis added) Mitigation is not "stuff" to characterize it as such only diminishes any value that it may have to a juror.

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

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

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

The *Morgan* mandate of life qualification, however, encompasses more than the class of ADP jurors who would "automatically" impose death for any defendant convicted of murder. Pursuant to *Morgan*, "[a]ny juror to whom mitigating factors are . . . irrelevant should be disqualified for cause, for [they have] formed an opinion concerning the merits of the case without basis in the evidence developed at trial." *Morgan*, 504 U.S. at 738-39. *Morgan* teaches therefore, that any juror whose ability to follow the trial court's instruction to consider the defendant's mitigating evidence is substantially impaired must be

excused for cause. *Id*. In other words, if a juror is "mitigation impaired" – meaning he or she cannot or will not meaningfully consider and give effect to any mitigation evidence relevant to the defendant's case, that juror is not qualified.

Trial counsel's failure to object to the prosecutor's indoctrination of the jurors, thus making them mitigation impaired, was both unreasonable and prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984). One of counsel's "most essential responsibilities" was to protect Ford "constitutional right to a fair and impartial jury by using voir dire to identify and ferret out jurors who are biased against the defense." *Miller v. Francis*, 269 F.3d 609, 615 (6th Cir. 2001). Counsel failed in this endeavor. Mr. Ford was prejudiced by this performance.

Failed to File a Motion for Change of Venue or Object to Jurors exposed to Pretrial Publicity

The premium on impartiality is nowhere greater than in a capital case where a jury must choose between life imprisonment and death if they find the accused guilty of capital murder. See *Morgan v. Illinois*, 504 U.S. 719, 726-28 (1992) Jurors must be impartial with respect to culpability and punishment in a death penalty case). A biased juror is unable to apply the facts to the law and deliberate under the constitutionally required burden of proof. See *In re Winship*, 397 U.S. 358 (1970).

In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), the Supreme Court recognized that pretrial publicity may result in a denial of a defendant's right to due process of law. The Court held that where: "[T]here is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity." Id. at 363. This Court has adopted the *Sheppard* standard and ruled that a showing of a "mere likelihood" of prejudice will support a venue change. *State v. Fairbanks*, 32 Ohio St. 2d 34, 37, 289 N.E.2d 352, 355 (1972). Although the court in *Fairbanks* pointed out that news reports that are factual and without distortion, or which are non-inflammatory in character, do not establish the impossibility of a fair and impartial trial where the jurors are uninformed or undecided, the court mandated that the rigid *Sheppard* standard of mere likelihood be applied. Id.

When faced with trial in a county that has been subjected to extensive publicity about the case such that there is present a likelihood of prejudice, the trial court should transfer the case to another county. See *State ex rel, Dayton Newspapers, Inc. v. Phillips* 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976). The trial judge has a "duty to protect [the accused] from [this type of] inherently prejudicial publicity ..." that renders the jury unfair in its deliberations. *Sheppard*, 384 U.S. at 363. Whether it is or is not likely that the Defendant would be convicted in another

venue is irrelevant. The right to a fair and impartial jury is fundamental. The denial of that right is a structural error that is never harmless. *Arizona v. Fulminante*, 499 U.S. 279, 290 (1991).

Jeffrey Schobert an Akron attorney, and his wife Margaret spent considerable time volunteering in the community and were well known and respected in Summit County. Recognizing that their murders caused a great deal of media coverage in Summit County, at the initial pre-trial the Court entered an Order addressing pre-trial publicity and decorum. (Pretrial. 5-17-13, p.18.) The Order restricted public comment about the case by the lawyers and court staff, citing concern over pretrial publicity potentially tainting the jury pool. (Order, Doc. # 9.) Though the defense filed a motion to permit individual voir dire on pretrial publicity, (Defense Motion 19, 22, Doc.#61) and a Motion requesting special procedures to insulate the venire from prejudice once jurors arrived at the court. (Defense Motion 18, Doc. #51), no motion requesting a change of venue was filed. Since no motion was filed, there is no record concerning the amount of publicity in the community.

That there was extensive pretrial publicity regarding the case was evidence from the juror questionnaires (Doc. #724) and from juror responses to questions regarding pretrial publicity. Of the twelve jurors selected to decide Ford's fate,

four had been exposed to media reports with details of the offenses. In his jury questionnaire, Juror number 72 said the names sounded familiar but he did not know specifics. (Doc.# 724.) In voir dire it was revealed Juror number 72 knew the murder centered around the couple's daughter, that two guys were involved in the homicide, an older one and younger one and the older one "coerced" the younger one to participate in the murders. (Vol. 10, Voir Dire, p. 1917-1919.) Juror 72 sat on the jury that recommended death.

Juror number 39 knew the case involved two people being beat to death in their home with a sledgehammer. After assuring the trial court that she had not formed any opinions and could decide the case based upon the evidence in the courtroom, defense counsel made no inquiry of Juror number 39. (Vol. 6, Voir Dire, p.1145.) When subsequently asked by the State if she had formed any opinions about the crime after reading the paper, Juror 39 stated she thought it was "kind of harsh." (Vol. 6, Voire Dire, p. 1146.) Defense counsel again made no inquiry. Juror 39 sat on the jury recommended death.

Juror 48 also saw news reports. After receiving the summons for jury duty and appearing for orientation, Juror 48 received a text from a co-worker with a link to a newspaper article and saw an article in the break room at work. (Vol. 9, Voir Dire, p. 1779.) She testified she had not read the article. No one asked her what

the text message said and when asked if she remembered details from what she had seen her response was “not from the newspaper.” (Vol. 9, Voir Dire, p. 1782.) The defense asked no questions on pretrial publicity. (Volume 9, Voir Dire, p.1783) Juror 48 sat on the jury that recommended death.

Juror 78 was from New Franklin Township. (Vol. 12, Voir Dire, p.2299.) Juror number 78 did not know the Schobert’s but he did know the case involved a “prominent couple” from New Franklin, that they had an adopted daughter. (Vol. 12, Voir Dire, p. 2300-2301.) Juror number 78 also knew they were killed in their bedroom, there was a bludgeoning involved and Ford was “accused. Someone believes he did it.” (Vol. 12, Voir Dire, p. 2301.) Again, the defense made no inquiry regarding pretrial publicity. (Vol. 12, Voir Dire, p. 2302.) Juror 48 sat on the jury that recommended death.

In *Irvin v. Dowd,* 366 U.S. 717 (1961), the Court held that the Defendant's right to an impartial jury was denied by a presumption of prejudice arising from extensive pretrial publicity. The Court found a presumption of prejudice despite the sincerity of the jurors who stated that they could be "fair and impartial" to the defendant. Id. at 728. In *Irvin*, the viewpoint of the community was revealed by the media's pretrial coverage, in which the Court found that the "force of this continued adverse publicity caused a sustained excitement and fostered a strong

prejudice among the people of Gibson County." Id. at 726. See also *Rideau v. Louisiana*, 373 U.S. 723-27 (1963) (defendant denied due process without change of venue after confession was televised).

Questions requiring jurors' subjective evaluation of their ability to be fair and impartial, however, have consistently been held to be an inadequate basis upon which to assess jurors' qualification. *Murphy v. Florida*, 421 U.S. 794, 800 (1975); Irvin, 366 U.S. at 728. "[W]hether a juror can render a verdict solely on evidence adduced in the courtroom should not be adjudged on that jurors' own assessment of self-righteousness **without something more."** *Silverthorne v. United States*, 400 F.2d 627, 639 (9th Cir. 1968) (emphasis in original).

As the court in *Forsythe v. State*, 12 Ohio Misc. 99, 106, 230 N.E.2d 681, 686 (1967) noted, an assumption by the trial judge that a jury could disregard pretrial publicity after being instructed to do so, was a "triumph of faith over experience." In *United States v. Aaron Burr*, 25 F. Case 30, Case No. 14 (1807), (1789-1880), Chief Justice Marshall stated:

> Why do personal prejudices constitute a just cause of challenge? Solely because the individual who is under their influence is presumed to have a bias on his mind which will prevent an impartial decision on the case according to the testimony. He made it clear that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him * * * he will listen with more favor to

> that testimony which confirms, than to that which would change his opinion.

Ford's constitutional guarantees under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 5 and 16 of the Ohio Constitution were violated by the defense counsel's failure to ensure an impartial jury.

Failed to Exercise all their Peremptory Challenges

This Court has found that error in denial of challenge of juror for cause not grounds for reversal when defendant did not exhaust his peremptory challenges. *State v. Poindexter*, 36 Ohio St.3d 1, 5 (1988); *State v. Getsy*, 84 Ohio St.3d 180, 191 (1998). This rule should be reexamined.

The defense in this case did not use all their peremptory challenges. (Vol. 20, Voir Dire, p. 3805) Defense counsel passed on the last challenge they had in seating the jury and the last challenge in seating the alternates. The decision to pass on a juror creates a Catch 22 situation for the defense, particularly when faced with using the last peremptory challenge will then seat a juror that may be worse than the juror you are preempting.

If defense counsel used their last challenge, Juror No. 75 would have been seated on the jury, and there would have been nothing the defense could have done. The defense used their first peremptory challenge to the alternate jurors on

Juror No. 75. So obviously he did not want that juror on the panel of the case. A defendant should not have to run the risk of losing an issue on appeal for failing to use all their peremptory challenges, versus being forced to seat a juror that may be worse than the juror you are preempting.

Defense counsel requested that the following eight jurors be removed for cause. (Voir Dire, Jurors No. 25, 36, 39, 45, 72, 103, 106, 134). The trial court overruled the objection and the jurors remained in the jury pool. Defense counsel used three peremptory challenges to remove three of these jurors (Nos. 25, 36, and 45) and two of these jurors actually sat as members of the jury that decided the case. (Nos. 39 and 72).

Defense counsel was left with *two* (2) jurors that should have been excused for cause as automatic death penalty jurors based on the questioning and the defense motion to remove for cause. (Nos. 39 and 72). They had used three of their challenges to remove other jurors that should have been excused for cause, so even if the defense had used the very last peremptory challenge to remove Juror 39 or Juror No. 72, one ADP juror would have still sat that jury. (See., Proposition of Law No. VI)

Clearly the defense was in the midst of a conundrum. As a matter of state law, the Court has "recognized that where the defense exhausts its peremptory

challenges before the full jury is seated, the erroneous denial of a challenge for cause in a criminal case may be prejudicial." *State v. Cornwell*, 86 Ohio St.3d 560, 564, 1999 Ohio 125, 715 N.E.2d 1144. However, "[a] defendant in a criminal case cannot complain of prejudicial error in the overruling of a challenge for cause if it does **not** force him to exhaust his peremptory challenges." (Emphasis added.) *State v. Eaton*, 19 Ohio St.2d 145, 249 N.E.2d 897, paragraph one of the syllabus (1969), vacated in part by *Eaton v. Ohio*, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 750 (1972). Thus, "[i]f the trial court erroneously overrules a challenge for cause, the error is prejudicial only if the accused eliminates the challenged venireman with a peremptory challenge and exhausts his peremptory challenges before the full jury is seated." (Emphasis added.) *State v. Tyler*, 50 Ohio St.3d 24, 30-31, 553 N.E.2d 576 (1990)." *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶87.

The failure to use all of his peremptory challenges was prejudicial to Mr. Ford and ineffective assistance of counsel.

Counsel Ineffectiveness at Trial.

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

Introduced Victim Character Evidence into the Trial

Victim impact evidence is not permitted trial phase. *State v. Tyler*, 50 Ohio St.3d 24, 35 (1990). But under *State v. Fautenberry*, 72 Ohio St.3d 435, 440 (1995), evidence which may be characterized as victim impact evidence is clearly admissible if it relates to facts attendant to the offense. In the usual capital case, defense counsel and appellate counsel criticize and object to victim impact statement and victim character evidence raised by the state. In fact, the defense filed a motion to preclude the State from introducing victim impact evidence at trial. (Defense Motion 46, Doc.# 85.) Here it was defense counsel themselves that injected this evidence into the trial. Starting with his opening statement, it was the defense that sang the praises of the Schoberts:

> As Prosecutor LoPrinzi indicated, Jeffrey Schobert was an attorney in this community, and he was an exceptional attorney. He had cases which were argued before the Ohio Supreme Court. He was well-known and highly regarded.
>
> You know, there is a poem that John Donne, an English poet, wrote in the 1600s which says: "No man is an island, and any man's death diminishes me.
>
> Attorney Jon Sinn and myself, although we have been attorneys in this community -- myself for more than 30 years, and Mr. Sinn certainly far in excess of 20 -- we never knew Attorney Schobert. We, of course, have learned much about him. His death diminishes us, and certainly it diminishes all of us.
>
> Attorney Schobert practiced in different areas than Mr. Sinn and ourselves, but he was part of our brotherhood; he was part of our legal community.

In addition to being an upstanding attorney, he was a husband, he was a father, he was a brother, he was a son.

As the prosecution indicated, Attorney Schobert and his wife had been married for many, many years. They adopted two daughters. You know, there is a saying about children of adoption, that God blesses them because they get to choose those children. And by every measure, the Schoberts were remarkable parents and they chose their daughters.

As indicated by Prosecutor LoPrinzi, Jessica, the older daughter, graduated from college and was pursuing a legal education like her father.

The Schoberts were well-known in this community for their good works. Attorney Schobert mentored the Hoban mock trial team for years. He touched the lives of dozens of students. You may or may not know of the mock trial competitions which go on within this courthouse every year, but we see -- we see teenagers from different high schools come together. They have been given a script, they argue a case, they put on mock trials in this courtroom and virtually every other courtroom in this courthouse. And the Hoban High School team has been one of the most victorious year after year after year.

To see these kids in action is -- it is uplifting. You can only believe that our state, our county, our country is in good hands, because you can see that you have young lawyers who have never even begun college. These are people of great ability.

You know, Mrs. Schobert, she has been referred to as a den mother. She prepared food for the Hoban mock trial team. She could straighten a tie on a 15- or 16-year-old gentleman. She was the perfect counterpart to Mr. Schobert. And her dedication to her daughters, her love of this community, her work in various social organizations unparalleled.

(Vol. 21, Trial, pp. 3899-3901) In an ironic twist, it was the Prosecuting Attorney that tried to limit this evidence;

> MR. LOPRINZI: At this point in time, we would like to request -- obviously, you know this is a death penalty case; you obviously know that mitigation is an issue in this case.
>
> Victim impact is something that we are not allowed to bring into mitigation. And we can't bring it in -- sympathy impact, victim impact in the trial phase, either.
>
> Mr. Hicks, who I know knows how to do this, has basically put the victims on a pedestal, and I am assuming it is a strategic move for strategic reasons. And so for the future, in case we are successful on this case, that we would like to know and have put on the record whether that was a strategic move or not to -- to basically putting in victim impact evidence.
>
> THE COURT: Well, it is clear to the Court, and I am assuming it is clear to counsel for both sides, that what has just been stated about the relevance or admissibility of victim impact evidence is clear. We cannot be trying this case on that issue. Because the jury, if it gets to a mitigation phase, will be required to weigh aggravating circumstances against mitigating factors.
>
> Victim impact information isn't even allowed to be submitted to the Court before the Court, if called on to do so, makes a final sentencing determination. So it obviously cannot be admitted by either side at this stage.
>
> Both sides in opening statement have attempted to characterize the family somewhat.
>
> There was no objection made to victim impact information within the defense opening statement. At this point, there should be no more information about the character of the Schoberts or their -- the loss that their family will have sustained or that the community will have sustained by virtue of their deaths from either side.

I assume that's clear. Is that not so?

(Id., at pp. 3908-3909)

Undaunted, the defense continued with this theme during Chelsea Schobert's testimony, prompting the trial judge to call a side bar to ask the defense where he was going with all the questions about how wonderful the Schobert's were. It appeared to the judge that the *defense* had "crossed the line into victim impact information. . ." (Id. at p. 4153.)

The defense himself returned to this theme at sentencing:

> The Schoberts were highly regarded in this community. Myself, throughout the course of this case, I've encountered people who knew the Schoberts. They would tell me about Mr. Schobert's intellect, his landscaping business when he was young.
>
> THE COURT: Mr. Hicks, I do want to caution you to not yourself –
>
> MR. HICKS: Thank you, Judge. I will be cautious.
>
> THE COURT: -- engage in providing victim impact information. I understand what you're saying, and the information has come out in various ways throughout the trial. I will urge you to be cautious in your remarks.
>
> MR. HICKS: Judge, I will simply indicate that they were loved and that they were exemplary people.

(Sentencing, 6-29-15, p. 11-12)

The defense should not have introduced the victim character evidence he did, when this type of evidence is clearly inadmissible. Defense counsel injected prejudicial evidence into the trial and violated his client's right to a fair trial.

Acquiesced in the Removal of Juror No. 19

The State induced the ineffective assistance of counsel relating to Juror No. 19. (See, Proposition of Law No. VIII, incorporated herein by reference.) The defense opted to have Juror 19 excused from the jury. (Vol. 28, Trial, p. 5360) Again they were faced with a Catch 22 situation. Defense counsel had attempted to remove Juror No. 19 on two different occasions. (Vol. 20, Voir Dire, p. 3769-3770, Vol. 23, Trial, p. 4194-4195, 4202-4206) The trial court denied both requests. However, when the jury foreman sent out a note indicating that one juror had a different definition of burglary than the rest of the juror and another note that the jury was deadlocked 11-1, the prosecutor asked the bailiff who the problem juror was and the bailiff told the prosecutor it was Juror 19. This prompted the prosecuting attorney, who had been previously unphased by this juror, or her prior contacts with the prosecutor's office, to investigate any connection with their office, and he uncovered that Juror 19 was Facebook friends with prosecuting attorneys in the office. (Vol. 28, Trial, 5353-5370) Of course he immediately told defense counsel about the Juror's contact with the Prosecuting Attorney's Office and left it up to them as to what to do.

So the defense was left to decide whether they should leave on a juror that was most likely a holdout juror, who they had moved for cause to excuse during

voir dire, or remove the juror due to contacts with the prosecutor's office, they chose to exclude the juror. This was error by the defense.

Failed to Know the Correct Law as it related to Crim R. 16

During closing arguments, a series of objections were made by the State which the trial court sustained. (See, Proposition of Law. No. XVI, incorporated by reference) The efforts of defense counsel during closing arguments in the trial phase were to call into question issues regarding the scope of the investigation, and call to question witnesses not called to testify. The first issue arose as defense counsel called into question the scope and extent of the investigation:

> And, again, when you make decisions here, you have a right to have the investigation that you need to make the decisions to let you know what happened. You don't have to put the pieces together. You are not supposed to put the pieces together when there is a question in your mind. That the – job of the New Franklin Police Department. And if they are not up to doing it, then they need to get somebody else out there.
>
> Mr. Loprinzi: Objection.
>
> The Court: Sustained.

(Vol. 28, Trial, p.5261-5262.) Detective Morrison had been an integral part of the investigation into Chelsea Schobert's felonious assault. In fact, Detective Hitchings testified that he contacted Detective Morrison because when he arrived at the Schobert's home, the morning they were murdered, he found Detective

Morrison's business card on the Schobert's dresser. (Vol. 26, Trial, p. 4952.) Detective Morrison did not testify at the trial, and defense counsel questioned why the jury did not hear from Detective Morrison. The State objected, and the trial court sustained the objection. (Vol. 28, trial, p. 5267.) Next, defense counsel, continuing to question the scope of the investigation, contending there were unanswered questions and that the investigation seemingly ceased simply because Detective Hitchings got a statement from Shawn Ford, that he did it.

> Great. Case solved.
>
> What else did he say? I mean, really, what else did he say? You have got him saying—you have got him now opened up, confessing. What else did Shawn say? If you finally got him to a point where you are not worried about him shutting up or changing his story because he's finally telling you the truth. Where is the rest of the information?
>
> Where are the cell phones? Where are Jeff and Pegs cell phones? That's important. We don't know where those phones went. Why don't we know that?
>
> I mean, if according to Hitchings, Shawn has now come clean and telling the truth of the story, that's when you ask him all those questions you want to ask. That's when you get all the answers out.
>
> Loprinzi: Objection. May we approach?

(Vol. 28, Trial, p. 5267-5268.) The Prosecutor argued during the side-bar that there were things the State "decided not to bring them out at the trial for

strategic reasons. But to suggest that they were never asked is improper." (Vol. 28, Trial, p.5269.) The Prosecutor then asked that the defense be precluded from arguing or further commenting "about witnesses that did not appear, like James Jordan—who was subpoenaed and just failed to appear; we tried to get him to appear—or other people—the rule indicates that they can't comment on those things and so we would ask that they also be instructed." (Vol. 28, Trial, p.5269.) The Court sustained the Prosecutor's objections and instructed the defense that they could not continue making comments about witnesses who did not testify. (Vol. 28, Trial, p.5269-5270.)

The trial court improperly limited and restricted defense counsel during closing arguments. Crim.R. 16(I) specifically provides that each party shall provide opposing counsel "a written witness list, including names and addresses of any witness it intends to call at its case-in-chief, or reasonably anticipates calling in rebuttal or surrebuttal.

The content of the witness list may not be commented upon or discussed to the jury by opposing counsel, but during argument, the presence or absence of the witness may be commented upon." To be sure, Crim.R. 16 used to prohibit the parties from commenting upon any witness that was on a witness list, and not called at trial. See, *State v. Hannah,* 54 Ohio St.2d 84, 374 N.E.2d 1359 (1978)

interpreting former version of Crim.R. 16. Crim.R. 16(C)(3) used to provide "the fact that a witnesses name is on a list furnished under subsection (C)(1)(C), and that the witnesses not called shall not be commented upon at trial." However, Crim.R. 16 was amended in 2010, and now specifically provides that a party may comment upon "the absence or presence of a witness relevant to the proceedings." See, Crim.R. 16, Staff Notes, 7-1-10 Amendments. Accordingly, under the 2010 Amendments to Crim.R. 16, the trial court erred in sustaining the State's objections to defense counsel arguing witnesses who were not called. Detective Morrison was relevant to the proceedings. He was investigating the felonious assault charges involving Chelsea Schobert. When called by Detective Hitchings the morning of the murder, Morrison came out to the Schobert house and Morrison was involved in the several interrogations of Ford. Morrison was relevant and his absence from trial was fair commentary.

Had defense counsel known the law, he could have apprised the court that he was well within his right to make the arguments he was making. The failure to know the law, prejudiced his argument in closing and denied Mr. Ford a fair trial.

Failed to Force the State to Choose Theory Relating to R.C. 2929.04(A)(7) and to Object to Verdict Finding Prior Calculation and Design

In this case the State was obviously pursuing a theory that Mr. Ford was the principal offender, ie., the actual killer. He was charged with two separate aggravating circumstances pursuant to R.C. 2929.04(A)(7):

> 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
>
> (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*.

(Emphasis added.) Ford cannot have been lawfully convicted of the specification that charged, and which the jury found, that the aggravated murder of Margaret Schobert was committed with prior calculation and design because the jury found Ford was guilty as the principal offender of Margaret Schobert. That portion of the R.C. 2929.04(A)(7) specification should not have been charged, and should not have been submitted to the jury for its consideration, as prior calculation and design is an aggravating circumstance **only** in the case of an

offender who did not personally kill the victims. Thus, it was clear constitutional error, a violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article One, Sections 9 and 16 of the Constitution of Ohio to allow the indictment to remain as drafted, and to submit the "prior calculation and design" specifications to the jury in a case where the State claimed that the offender did personally kill the victims.

Defense counsel failed to force the State to limit the capital specification to the principal offender alternative. Defense counsel failed to ensure the verdict forms were correct. Defense counsel failed to object when the jury returned a guilty verdict on the prior calculation and design alternative. And defense counsel erred in letting the jury consider these erroneous capital specifications which were used to sentence Mr. Ford to death. Counsel was ineffective for failing to make appropriate objections to these errors.

Prosecutorial Misconduct

The State's closing arguments in the trial phase were replete with disparaging comments regarding defense counsel. A review of the closing arguments from the trial reveals that the prosecutor was not attacking the evidence but was, in fact, trying to disparage and undermine defense counsel. The trial

counsel failed to object to the comments. (See, Proposition of Law, No. XIII, incorporated by reference).

The United States Supreme Court has addressed the issue of personal attacks by counsel during trial, and the impact it has upon the trial:

> The prohibition of personal attacks on the prosecutor is but a part of the larger duty of counsel to avoid acrimony in relations with opposing counsel during trial, and confine argument to record evidence. It is firmly established that the lawyer should abstain from any allusions to the personal peculiarities and idiosyncrasies of opposing counsel. A personal attack by the prosecutor on defense counsel is improper, and the duty to abstain from such attacks is obviously reciprocal.

United States v. Young, 470 U.S. 1, 10, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985).

During the rebuttal to the defense closing argument, the State repeatedly attacked defense counsel.

> One of the things I want to point out at the beginning of this thing is: Mr. Sinn has done what I consider to be, you know, the Jedi mind trick. It is, you know: look over here, don't look at the evidence.
>
> Because his great hope probably is, is that if you go, "I'm so confused about everything he just said," he wins, right?

(Vol. 28, Trial, p.5283.) This was not an effort to counter arguments made by the defense in their closing arguments, this was an effort to disparage defense counsel and to convey to the jury that the defense counsel was simply trying to

confuse and mislead the jury. The closing rebuttal continued with the prosecution addressing defense counsel, not the evidence.

> So what does Mr. Sinn do? Mr. Sinn came up here and told you: if you can't feel it, put your hands on it – if it is important, you should be able to put your hands on it, right?
>
> Why is he saying that? Because he knows that there are certain things that you cannot put your hands on.
>
> …Mr. Sinn complains because we did not give you the letters that Detective Hitchings talked about that said "I love you to death" in it. You can imagine that letter is probably just full of self-serving things the Defendant said, and we didn't feel that was important to our case.
>
> If Mr. Sinn does, he has the letter, he has all the discovery, he has those things, he has all those interviews.

(Vol. 28, Trial, p.5284.) Again, the State was not attacking the nature of the evidence, he was attacking the manner in which the defense counsel addressed the evidence.

During closing arguments, the defense questioned the possibility of another individual, Zach Keyes, being present. In response, during closing arguments, the Prosecutor offered the following:

> If Mr. Sinn had some additional evidence about Zach Keyes, I will charge him, too."

(Vol. 28, Trial, p.5287.) Again the Prosecutor focused not upon the evidence but upon defense counsel.

The Prosecutor continued:

> Mr. Loprizi: Mr. Sinn said "you don't know the rest of the story" and left it hanging there as though there is a rest of the story.

(Vol. 28, Trial, p.5289.) He continued through innuendo to disparage what the defense counsel did as an attorney not the evidence:

> The other thing is, he puts that – we call it planting a seed, right? He says, "there is more to this case than you think you know." What does that mean? It means nothing…
>
> Because if he can get you thinking along the wrong trail of something – trying to figure something out that's not there, than you lose your way.
>
> And that's not what we want you to do. We want you to stay focused.

(Vol. 28, Trial, p.5289-5299.) Again, the State is attacking Mr. Sinn and not the evidence. This becomes apparent when he specifically argues how the defense "approaches the case".

> One of the things that I always, you know, think is interesting is how a defense approaches the case. And that's fine; they have the right to do that however they want.

(Vol. 28, Trial, p.5291.) Then, the Prosecutor continues two pages later, "Mr. Sinn is right about one thing, I can tell you that." The Prosecutor then concedes that the text messages which were sent from Jeffrey Schobert's phone did not appear to lure Mrs. Schobert home but, what they do appear to do is suggest that he is waiting for her." (Vol. 28, Trial, p. 5294) Certainly, the Prosecutor has a right to comment on the evidence, and he could have made those comments without disparaging defense counsel and suggesting he was right about "one thing". The Prosecutor's closing rebuttal mentioned defense counsel's name more than it mentioned the Defendant's name. There was a concerted effort to undermine defense counsel so that the jury would not consider the remarks made by defense counsel.

Trial counsel should have objected to these prejudicial comments. Here Appellant Ford was denied a fair trial and the effectiveness of counsel when the Prosecutor engaged in repeated improper comments which were not objected to and which were not addressed by the trial court.

Counsel Ineffectiveness in Penalty Phase.

The Penalty Phase of capital case is crucial. Defense counsel should be preparing for this phase from the time they get appointed to the case. It is at this

phase that the jury determines if your client will live or die, so it is important that counsel investigate, prepare, and know the law.

Requested a Presentence Investigation Report

It is virtually unheard of for a defense attorney in a capital case in Ohio to request a presentence investigation and/or mental health examination pursuant to R.C. 2929.03(D)(1). Yet in this case the defense requested both! (Vol. 6, Mitigation, p. 978) This request came to light while the jury was deliberating in the penalty phase. (Id.) Evidently prior discussion had been off the record concerning this request.

The statute (R.C.2929.03) and caselaw specify that the trial court does not order a presentence investigative report (PSI) or a mental health examination without a request by the defense. A trial court should apprise a defendant of his right to have either a-PSI or mental exam. However, there is a difference between the request for an expert under R.C. §2929.024 and one made pursuant to R.C. §2929.03. "It is clear that the services provided for by Sec. 2929.024 are available to the indigent capital defendant `for his own purposes. . . .' *State v. Esparza*, 39 Ohio St.3d 8, 9 (1988). When the expert is retained under Sec. 2929.024, the defendant can decide for himself whether he wants to put the expert's findings

before the jury." *Glenn v. Tate* (C.A.6, 1995), 71 Ohio St.3d 1204, 1209, fn.2. A report prepared pursuant to R.C. §2929.03, will go before the jurors.

R.C. 2929.024 and 2929.03(D)(l) are wholly independent provisions. A court, when requested by a defendant to order a presentence investigation or to appoint a psychologist or psychiatrist to conduct a mental examination pursuant to R.C. 2929.03(D)(1) and 2947.06, is not required by the Constitution or the provisions of R.C. 2929.024 to appoint a psychiatrist or psychologist of the defendant's own choosing. Rather, additional expert services must be provided to an indigent defendant only if the court determines, within its sound discretion, that such services "are reasonably necessary for the proper representation of a defendant" at the sentencing hearing, pursuant to R.C. 2929.024. *State v. Esparza* (1988), 39 Ohio St.3d 8, syllabus.

The trial court was somewhat confused as to which statute Dr. Stankowski was appointed under. But clearly the defense had requested that she be appointed under R.C. 2929.024. (Defense Motion 69, Doc. # 131) So the comment by the trial court that 'The Court has considered that the report prepared by Dr. Stankowski was the mental health report that's being referred to in this document. (Vol. 6, Mitigation, p. 979)

The trial court was poised to send both documents to the jury, in spite of the fact that defense counsel considered the PSI to be prejudicial. (Id., p. 980)

Defense counsel argued to the court that the report of the expert should go to the jury, but the PSI should not because "it had an effect we didn't intend." (Id., 981)

The trial court gave the defense a way out, "is the defense withdrawing its request for a PSI? (Id.) The defense decided to withdraw the PSI, but wanted Dr. Stankowski's report to go to the jury. They then indicated if that was not an option, they requested that neither would go. (Id., at p. 984-985)

After hearing argument from the state, the trial court reversed himself and indicated both documents would go to the jury. (Id., at 992) When the court went back on the record in open court, the court reversed itself again:

> Taking into consideration the arguments of counsel, the Court has concluded that neither document will go to the jury. I do so because I am not satisfied that the presentence report was prepared in a manner that I would have expected it to be prepared, in which counsel would have been given the opportunity to speak with Mr. Ford before the report was prepared. And I am not going to submit the Stankowski report, because I concur with the State's argument that the State would suffer prejudice if the document were to be submitted without the State having had the full opportunity to submit further rebuttal evidence.

(Id., p. 996) Once again the defense counsel did not know the law. Defense counsel requested a PSI which could have been devastating to the case if it had gone to the jury. Further, the defense did not understand the difference in requesting an expert under R.C. 2929.024 and R.C. 2929.03. In this circumstance, defense counsel had requested the expert under R.C. 2929.024 and were within their right to send the report to the jury. However, since defense counsel did not understand the difference in the statute, they were forced into an all or nothing situation and neither were sent to the jury.

The failure of the defense to know and understand the statutes relating to the case prejudiced the defense.

Prosecuting Attorney Closing Argument

The prosecutor continued in closing argument during the mitigation phase with the same attacks on defense counsel, not the arguments or evidence. (Proposition of Law, No. XIII, incorporated by reference). In rebuttal during mitigation, the State began its rebuttal closing argument with the following:

> Ladies and gentlemen, what you just heard was not about the law, it wasn't about the facts, it wasn't about mitigation, it wasn't about aggravating circumstances. What you just heard is a plea.
>
> See, when you don't have the facts on your side you pound the law. When you don't have the law on your side you pound the facts. And when you got neither

> on your side, you beg and interject race. That's what you just heard.

(Vol. 6, Mitigation, p. 931). Again, this argument was focused more on attacking how the defense attorney argued the case and disparaging defense counsel and not specific issues argued by defense counsel. Rebuttal continued:

> It always makes me laugh, because when defense gets up and they talk with great emotion and softly, emotionally, trying to appeal to your purant interest, to your sympathies. I understand that. I get that.
>
> And then: These two are us. You know, they always call us "the government" and I always go home and tell my wife, "hey, guess who you're sleeping with tonight, the government."
>
> I am human. Do you think I don't feel bad when Mrs. Ford gets up there and asks you to save her son's life? Are you kidding me? There wasn't a dry eye in here.

(Vol. 6, Mitigation, p.932-933). Then, rather than addressing the evidence which was presented in mitigation the prosecutor attacked what defense counsel's choice to call Mr. Ford's mother to testify in mitigation. In commenting upon Mr. Ford's mother testifying and crying and begging for her son's life, the prosecutor responded "that's mitigation? To me, that's cruel." (Vol. 6, Mitigation, p.933). In attacking an argument made by the defense counsel, the prosecutor again directed the focus on defense counsel: "I know Mr. Sinn would not intentionally do this, but

he kept talking to you about the aggravating circumstances and, okay, Mr. Gessner had his hand up here when he said aggravating circumstances." (Vol. 6, Mitigation, p.936). Again, the inference was that the jury should not trust the credibility of defense counsel. Rather than attacking the specific arguments made, the prosecutor continued to disparage defense counsel. "He talks about hate. He is trying to appeal to your sympathies, trying to make you feel like bad people if you were to find the aggravating circumstances outweigh the mitigating factors. *Please do not fall for that one."* (Vol. 6, Mitigation, p.940.) In fact, the prosecutor continued that defense counsel was trying to "imply somehow that if you do your job, and if you are firmly convinced that the aggravating circumstances outweigh the mitigating factors in this case, that somehow you are a bad person, and make you feel guilty and bad for following the law. Please, do not do that." (Vol. 6, Mitigation, p. 940).

Again the Prosecutor argued that the defense counsel in closing argument, "was simply trying to make the jury feel bad". (Vol. 6, Mitigation, p.943). In an effort to indicate defense counsel was not concerned with the law, the prosecutor stated: "we are here to honor the law, not great speeches, racist speeches – or speeches about racism, speeches about slavery. I am not sure how yet that applies to this other than to interject into the jury room some awkwardness between the

jurors here that are of other colors. I mean, I can't imagine going back there after hearing that history of slavery in this country and not feeling a little awkward, maybe pandered to. I don't know. I don't know how that makes you feel." (Vol. 6, Mitigation, p.943-944). "Pander" is an "immoral or distasteful desire, need, or habit or a person with such a desire." Oxford Dictionaries · © Oxford University Press.

In *State v. Davis*, 116 Ohio St.3d 404, 2008 Ohio 2, 880 N.E.2d 31, this Court recognized that it is improper for the prosecutor to denigrate defense counsel in closing arguments. *Id.* at 444. Moreover, this Court recognized that there is a line between properly responding to arguments and attacking evidence and comments which attack the defense attorney. This court did not find plain error in *Davis* concluding the "denigrating comments did not pervade the closing argument, let alone the entire trial." The exact opposite is present in this case. The denigrating comments, sarcasm and attacks on defense counsel permeated the rebuttal arguments in the trial phase and the penalty phase. The comments were not isolated. A review of the entire rebuttal reflects the purpose was to disparage and undermine counsel, not the evidence or arguments of counsel.

The prejudice is compounded in the mitigation phase because the trial court instructed the jury that although opening statements and final argument are not

evidence "the law permits you to consider the arguments of counsel to the extent they are relevant to the sentence that should be imposed upon Shawn E. Ford Jr." (Vol. 6, Mitigation, p. 961.) The rebuttal closing arguments of the prosecutor effectively undermined defense counsel's credibility and integrity.

In *DePew v. Anderson*, 311 F.3d 742 (6th Cir. 2002) the Sixth Circuit affirmed the District Court's granting a conditional writ as a result of prosecutorial misconduct in the mitigation phase of DePew's trial. The Court recognized that a stricter standard is to be applied when determining if arguments from the prosecutor were prejudicial.

Given the number of disparaging comments, sarcastic comments and comments denigrating defense counsel, it is impossible to say that the comments did not have an effect on the sentencing. Defense counsel's failure to object to the comments, deprived Mr. Ford the effective assistance of counsel.

Counsel Ineffectiveness at the Atkins Hearing

As set out in Proposition of Law No. III, incorporated herein by reference, defense counsel failed to pursue an *Atkins* claim on behalf of Mr. Ford, until the 11th hour of the case.

The defense had requested that the trial court appoint a mitigation investigator and a mitigation expert, (Defense Motions # 1, 69, Doc. # 26, 131) The trial court granted the requests. (Journal Entry, Doc. # 28, 155)

At some point, prior to the presentation of the evidence in the penalty phase, defense counsel should have realized that the question of whether Mr. Ford was intellectually disabled was present in the case, and should have pursued it at that time. Certainly the school records called his IQ into question.

It was during the testimony of the mitigation expert, Dr. Joy Stankowski, a medical doctor specializing in psychiatry and forensic psychiatry, that the prospect that Mr. Ford may be intellectually disabled was introduced. (Vol. 4, Mit. Hrg, p. 476, 491.) Dr. Stankowski had reviewed records concerning Mr. Ford, provided by the Ohio Department of Youth Services and indicated that he had been diagnosed with a learning disability and a low IQ and he needed extra support. (Id., at 491) Dr. Stankowski addressed his IQ issues:

> Well, I saw that Shawn had been diagnosed with learning disabilities at a young age, and then I saw that that had been backed up by some IQ testing over the years that showed that he consistently is below average. So what this means to me is that Shawn was born with, right out of the gate, fewer skills and resources than the average person.
>
> So an average IQ is 100. Shawn's IQ over the years tested to be anywhere between 62 and 80.

> And if 100 is average, we consider anything below 85 to be below average or borderline. If you are below 70, you are what we used to call "mentally retarded." We don't use that term any more; we now say "developmentally disabled."
>
> So sometimes Shawn's tests showed that he was actually disabled; other times, his IQ tested to be merely below average. But, really, the best case scenario is that this is a person that was born with a lower IQ, lower skills than the average person.

(Id., at pp. 496-497)

After Dr. Stankowski finished her testimony, the defense moved to dismiss the death penalty based on her testimony concerning Mr. Ford's IQ. (Id. at p. 624) The court denied the motion but indicated he would welcome briefing on the issue.

After the jury deliberated, the jury recommended a life sentence on Count Two, but the death sentence on Count Four.

The Court then addressed whether to hold an *Atkins/Lott* hearing as requested by the defense. It was eventually decided that three evaluations would be conducted, one by the defense, one by the State and one by the Court.

Once the reports were prepared, a two-day hearing was held at which the three experts testified. (Vol. 1 and 2, Atkins Hearing)

Because the defense waited until AFTER the death recommendation was made, the defense was prejudiced in its *Atkins* presentation. First and foremost, Mr. Ford was not in a good frame of mind. He had already been found guilty and

sentenced to death. This did not present an ideal situation in which to them be subjected to three additional psychological evaluations, and in fact, he did not cooperate with the defense examiner, refusing to meet with him or undergo any testing. (Vol. 1, Atkins Hrg., p. 16)

It was also clear that the defense counsel did not understand the issues surrounding a determination of intellectual disabilities and were not prepared to question the experts, either on direct or cross to present the evidence in the most favorable light.

Defense counsel did not present an effective presentation at the Atkins hearing, and this resulted in Mr. Ford being eligible for the death penalty and ultimately sentenced to death.

Conclusion.

Cumulative ineffective assistance

Assuming for the sake of argument that none of the myriad failures outlined above individually constitutes ineffective assistance of counsel, the accumulation of errors over the course of trial and sentencing deprived Mr. Ford of his right to counsel, freedom from cruel and unusual punishment, a fair trial, and due process.

Errors that might not be so prejudicial as to amount to a constitutional violation when considered alone, may cumulatively produce a trial setting that is

fundamentally unfair thereby violating the defendant's constitutional rights. *Walker v. Engle,* 703 F.2d 959, 963 (6th Cir. 1983) (the "cumulative effect" of misconduct committed by state in prosecuting case against petitioner constituted denial of fundamental fairness). *Cooper v. Sowders,* 837 F.2d 284 (6th Cir. 1988) (various trial errors, considered cumulatively, produced a trial setting that was fundamentally unfair). It has been held that such cumulative effect analysis applies to ineffective assistance of counsel claims. *Rodriguez v. Hoke,* 928 F.2d 534, 538 (2d Cir. 1991).

The "cumulative effect" of counsel's errors and omissions violated Shawn Ford's Sixth Amendment right to effective counsel. *See State v. Gondor*, 112 Ohio St. 3d 377, 392, 860 N.E.2d 77, 90 (2006) (citing *State v. DeMarco*, 31 Ohio St. 3d 191, 196, 509 N.E.2d 1256, 1261 (1987); *Stouffer v. Reynolds*, 168 F.3d 1155, 1163-64 (10th Cir. 1999)).

The above claims of ineffective assistance of counsel throughout the trial, considered cumulatively establish that Mr. Ford's constitutional rights were violated under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Mr. Ford is entitled to a new trial or alternatively a new penalty phase under R.C. § 2929.06(B).

PROPOSITION OF LAW NO. XXI

CUMULATIVE ERRORS DEPRIVED FORD OF A FAIR TRIAL AND A RELIABLE SENTENCING HEARING.

Shawn Ford raised numerous errors worthy of this Court granting relief both from his convictions and his death sentence. Each error, standing alone, is sufficient to warrant a reversal. However, by viewing the many errors together, it is apparent that their cumulative impact rendered Ford's trial fundamentally unfair. See *Walker v. Engle,* 703 F.2d 959, 963 (6th Cir. 1983). This Court must reverse Ford's convictions and sentence.

The adequacy of the legally admitted evidence is only one factor for this Court to consider in determining the influence that an error has on a jury. The Supreme Court made clear in *Satterwhite v. Texas;* 486 U.S. 249 (1988), that it "is not whether the legally admitted evidence was sufficient to support" the verdict, but rather "whether the [prosecution] has proved `beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* at 258-59. Review must also determine whether the cumulative effect of the errors rendered the trial fundamentally unfair. See *Walker,* 703 F.2d at 963. "We must reverse any conviction obtained in a proceeding in which the cumulative impact of irregularities is so prejudicial to a defendant that he is deprived of his fundamental

right to a fair trial. Fourteenth Amendment, United States Constitution." *State v. Wilson,* 787 P.2d 821, 821 (N.M. 1990); *United States v. Wallace,* 848 F.2d 1464, 1475 (9th Cir. 1988); *State v. DeMarco,* 31 Ohio St. 3d 191 (1987).

Perhaps the most telling example of the prejudice resulting from the cumulative impact of the errors at Ford's trial are the trial court evidentiary rulings, ineffective assistance of counsel, and misconduct that combined to deprive Ford of the opportunity to fully and fairly present his claims of self-defense or for a lesser-included offense instruction. See *Chambers v. Mississippi,* 410 U.S. 284, 295 (1973); *Beck v. Alabama,* 447 U.S. 625, 627 (1980).

Ford incorporates the other Propositions of Law into this issue. What these issues show is that from the beginning Ford was destined to receive the penalty of death. That is so because the jury was indoctrinated to impose death by the prosecuting attorney, defense counsel failed to fully understand the capital sentencing scheme in Ohio in order to make the objections necessary and to preserve the errors in the case or keep them from occurring.

The result of cumulative error entitles Ford to a new trial. His 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 Ford's death sentence unreliable and arbitrary. U.S. Const. amends. VIII, XIV; Ohio Const. art. I, §§ 9, 16.

PROPOSITION OF LAW NO. XXII

OHIO'S CAPITAL SENTENCING STATUTES ARE UNCONSTITUTIONAL UNDER THE RECENT DECISION IN HURST V. FLORIDA, ___ U.S. ___, 136 S. CT. 616 (2016), WHICH HELD THAT FLORIDA'S CAPITAL SENTENCING LAWS VIOLATED THE SIXTH AMENDMENT RIGHT TO TRIAL BY JURY BECAUSE IT REQUIRED THE JUDGE, NOT A JURY, TO MAKE THE FACTUAL DETERMINATIONS NECESSARY TO SUPPORT A SENTENCE OF DEATH.

During the Court's last term, the United States Supreme Court issued its decision in *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616 (2016), which held that Florida's capital sentencing laws violated the Sixth Amendment right to trial by jury because it required the judge, not a jury, to make the factual determinations necessary to support a sentence of death. Due to the similarities between Florida's capital sentencing laws and Ohio's, Ford submits that pursuant to *Hurst*, this Court should find Ohio's capital sentencing unconstitutional and therefore dismiss the capital components of this case.

In *Walton v. Arizona*, 497 U.S. 639, 111 L.Ed.2d 511, 110 S.Ct. 3047 (1990), the Supreme Court held that Arizona's sentencing scheme was compatible with the Sixth Amendment because the additional facts found by the judge qualified as sentencing considerations, not "elements of the offense of capital murder." *Id.*, at 649. Within ten years, the analysis of Sixth Amendment right to

jury trial and jury findings shifted. In a line of cases which resulted in much of Ohio's felony sentencing statutes to be ruled unconstitutional, the Supreme Court focused upon the impact of judicial fact finding in sentencing and how in many instances current protocols were contrary to the Sixth Amendment. See, *Apprendi v. New Jersey*, 530 U.S. 466, 147 L.Ed.2d 435, 120 S.Ct. 2348 (2000); *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). In *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) the Court held that State sentencing statute procedure which permitted the judge to make factual findings to impose a sentence higher than the statutory maximum did not comply with the Sixth Amendment. The following term, the Court held in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) that the *Apprendi* and *Blakely* decisions applied to the United States Sentencing Guidelines; under the Sixth Amendment, any fact other than a prior conviction that was necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict had to be admitted by a defendant or proved to a jury beyond a reasonable doubt.

In this case, the statutory maximum sentence for aggravated murder is life in prison. Death can only be imposed upon specific factual findings, which under Ohio's capital punishment statutory scheme are facts determined by the judge.

Accordingly, Ohio's capital punishment statutory scheme violates the Sixth Amendment. *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616 (2016).

In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the Court held that the Sixth Amendment does not permit a defendant to be "exposed . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.*, at 483. *Apprendi* held that this prescription controlled even if the State characterizes the additional findings made by the judge as "sentencing factors." *Id.*, at 492. Thus, *Apprendi*, made clear that any fact that expose the defendant "to a greater punishment than that authorized by the jury's guilty verdict" must be submitted to a jury. In *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) the Court addressed the issue in the context of capital punishment and held that the Sixth Amendment's jury trial guarantee, made applicable to the states by the Fourteenth Amendment, required that the aggravating factor determination be entrusted to the jury. The Court concluded that the *Walton* decision and the *Apprendi* decision were irreconcilable because a capital defendant was entitled to the same Sixth Amendment protections extended to defendants generally. Because Arizona's enumerated aggravating factors operated as the functional equivalent of an element of a greater offense, an enhancement above the standard sentence for the offense,

the Sixth Amendment required that they be found by a jury. The Court overruled *Walton* to the extent that it allowed a sentencing judge to find an aggravating circumstance necessary for imposition of the death penalty.

This past term, the United States Supreme Court issued *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616 (2016), which held that Florida's capital sentencing laws violated the Sixth Amendment right to trial by jury because it required the judge, not a jury, to make the factual determinations necessary to support a sentence of death. Like Ohio's capital punishment structure, in Florida a jury provided a recommendation to the judge with regard to punishment, but notwithstanding the recommendation, Florida law required the judge to determine whether sufficient aggravating circumstances existed. Due to the similarities between Florida's capital sentencing laws and Ohio's, Ford submits that pursuant to *Hurst*, this Court should find Ohio's capital sentencing unconstitutional and therefore dismiss the capital components of this case.

In Florida, first-degree murder is a capital felony, but the maximum sentence a capital defendant may receive based solely on that conviction is life imprisonment. Fla. Stat. §775.082(1). The defendant will receive the death penalty only after an additional sentencing proceeding "results in findings by the court that

such person shall be punished by death." *Id.* Otherwise, the defendant is punished by life imprisonment without parole. *Id.*

Accordingly, after Hurst was found guilty of first-degree murder, the judge conducted an evidentiary hearing before the jury. *Hurst*, 136 S.Ct. at 620. At the conclusion of the evidentiary hearing, the jury rendered an "advisory sentence" of death without specifying the factual basis of its recommendation. *Id.* Under Florida law, the trial court must give the jury's recommendation "great weight," but must independently weigh the aggravated and mitigating circumstances before entering a sentence of life imprisonment or death. *Id.* The trial court in *Hurst* did this, and imposed a death sentence. *Id.*

On post-conviction review, the Florida Supreme Court vacated the sentence for reasons that are not relevant here. *Id.* At Hurst's re-sentencing hearing, a jury again recommended death and the judge so sentenced, basing its decision on the independent findings of aggravating circumstances as well as the jury's recommendation. *Id.*

The United States Supreme Court accepted certiorari of Hurst's appeal to resolve the tension between *Ring v. Arizona*, *supra* and its earlier decisions, *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) concluding that the Sixth Amendment does not require that the specific findings

authorizing the imposition of the sentence of death be made by the jury, and *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) which held that Florida's sentencing structure did not violate the Sixth or Eighth Amendment concluding that the jury's sentencing recommendation in a capital case is only advisory and that the trial court is to conduct its own weighing of the aggravating and mitigating circumstances notwithstanding the recommendation the jury. Just a few years later, in *Ring*, the Supreme Court held that the Sixth Amendment requires a jury to find any fact necessary to qualify a capital defendant for a death sentence. *Hurst*, 136 S. Ct. at 621. Although *Ring* had not expressly overruled the *Hildwin* and *Spaziano*, cases which approved the constitutionality of Florida's capital sentencing scheme, *Ring*'s holding seemed to compel such an outcome. *Hurst* laid the confusion to rest, holding that Florida's law "violates the Sixth Amendment in light of *Ring*." *Id.* at 620.

Justice Sotomayor explained in her 8-1 majority opinion that like Arizona, the state whose sentencing scheme was at issue in *Ring*, "Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts." *Id.* at 622. Justice Sotomayor continued: "Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial." *Id.*

Because "the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole," and because "a judge increased Hurst's authorized punishment based on her own factfinding," the Court held that "Hurst's sentence violates the Sixth Amendment." *Id.*

In so holding, the Court rejected Florida's argument that the jury's recommendation necessitated the finding of an aggravating circumstance, noting "the Florida sentencing statute does not make a defendant eligible for death until 'findings *by the court* that such person shall be punished by death.'" *Id.* (quoting Fla. Stat. § 775.082(1)) (emphasis in opinion). Because "[t]he trial court *alone* must find 'the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances,'" the Court found that a Florida jury's function is solely advisory and does not satisfy the constitutional standard outlined by *Ring*. *Id.* (quoting § 921.141(3)) (emphasis in original).

Ohio's death-penalty sentencing scheme is similar to Florida's in several significant ways. Pursuant to R.C. 2929.03(B), a jury in an Ohio capital case must find the defendant guilty or not guilty of the principal charge and then it must also determine "whether the offender is guilty or not guilty of each specification." The

jury is instructed that each aggravating circumstance "shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification." *Id.*

If the jury finds a defendant guilty of both the charge and one or more of the specifications, then, like in Florida, a sentencing hearing is conducted where:

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.

R.C. 2929.03(D)(1). During this sentencing hearing, the defendant has the burden of introducing evidence of any mitigating factors, but the prosecution has the ultimate 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." *Id.*

At the conclusion of the sentencing hearing, if the jury unanimously finds that the prosecutor has met this burden, "the jury shall *recommend* to the court that the sentence of death be imposed on the offender." R.C. 2929.03(D)(2) (Emphasis added). This finding is not required to be rendered in writing and does not set forth the factual findings underlying the jury's recommendation.[32] Once an Ohio jury makes a death-sentence recommendation, then, like in Florida, the Ohio trial court must independently consider "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." R.C. 2929.03(D)(3). The trial court can then sentence a defendant to death if it finds "by proof beyond a reasonable doubt . . . that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors." *Id.* As in Florida, the Ohio trial court, when it imposes a death sentence, 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,

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[32] In Florida, the jury's recommendation does not need to be unanimous. *Hurst*, 136 S. Ct. at 620. Nevertheless, the point is that, like in Florida, Ohio juries make a recommendation to the trial court for imposing a death sentence without any specific factual findings.

> 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.

R.C. 2929.03(F). In sum, a jury in Ohio has the responsibility of finding that one or more aggravating circumstances exist as part of the verdict at the capital defendant's trial; however, that is not the completion of the capital sentencing process. Rather, under Ohio law, the jury must then conduct a weighing process after the sentencing hearing. Once the weighing process is complete, the jury may make a death-sentence *recommendation* to the trial court. Because the Court in *Hurst* emphasized the language in the Florida statute that defined the jury's decision as advisory in nature, Ohio's scheme that similarly classifies a jury's decision as a recommendation violates the Sixth Amendment right to trial by jury. Like *Hurst,* the judge makes the final decision after obtaining the jury's non-specific recommendation. In *Hurst*, the Court broadly criticized the Florida scheme because the jury "'does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.'" *Hurst*, 136 S.Ct. at 622 (quoting *Walton v. Arizona*, 497 U.S. 639, 648 (1990)). The Court's opinion not only pointed out the absence

of factual findings about the existence of mitigating or aggravating factors, but also the absence of any findings about the weighing of those factors. *Id.* Similarly, the Ohio statute does not require the jury to make any specific findings of fact about mitigating factors, nor does it ask the jury to make any specific findings about their balancing of the mitigating and aggravating factors. Therefore, the judge must implement a sentence without those critical findings which the Sixth Amendment mandates are within the province of the jury alone. Absent those factual findings, and given the advisory nature of the jury's sentencing determination, the Ohio death penalty scheme suffers from the same constitutional deficiencies as the scheme in Florida and should be invalidated.

On June 20, 2016, Judge William R. Finnegan, relying on the *Hurst* decision, ruled Ohio's death penalty unconstitutional. *State of Ohio v. Mason*, Marion County Court of Common Pleas Case No. 93 CR 153.

> In the Hurst case, the United States Supreme Court held the Florida statute to be unconstitutional because the Florida statute required not the jury but the judge to make the critical findings necessary to impose the death penalty. The fact that Florida provided an advisory jury is immaterial. The court found that the maximim penalty that could be imposed was unconstitutionally increased by the judge's own fact-finding. Hurst v. Florida, Id., at 619.
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> * * *

> Hurst vs. Florida makes clear that the Sixth Amendment requires that the specific finding authorizing the imposition of the death penalty be made by the jury. The Ohio death penalty statute applicable in this case has no provision for the jury to make specific findings relating to the weighing of aggravating and mitigating factors. As a result, the Ohio death penalty statute applicable in this case violates the Sixth Amendment as interpreted in Hurst vs. Florida.

Id at 21, 49. Thus under Ohio's current death penalty statute, death may not be imposed as a penalty because the judge and not a jury makes the findings necessary for imposition of the death in violation of the Sixth Amendment.

In *State v. Belton,* 2016 Ohio 1581, 2016 Ohio LEXIS 958 (Ohio Apr. 20, 2016) this Court considered the implications of the *Hurst* decision on Ohio's death penalty.

> [*P58] More recently, the Supreme Court applied *Apprendi* and *Ring* to invalidate Florida's capital-sentencing scheme in *Hurst v. Florida*, 577 U.S. , 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). The Florida law at issue in *Hurst* limited the jury's role in capital sentencing to making an advisory recommendation; a trial court was then free to impose a death sentence even if the jury recommended against it. *Id.* at 620. And even when a jury did recommend a death sentence, a trial court was not permitted to follow that recommendation until the judge found the existence of an aggravating circumstance. *Id.* at 620, 622. Thus, "Florida [did] not require the jury to make the critical findings necessary to impose the death penalty." *Id.* at 622. Instead, the trial judge in *Hurst* "increased [the defendant's] authorized punishment based on her own factfinding" when she

sentenced him to death. *Id.* The Supreme Court held that Florida's capital-sentencing law, like the Arizona law in *Ring*, violated the Sixth Amendment. *Id.*

[*P59] Ohio's capital-sentencing scheme is unlike the laws at issue in *Ring* and *Hurst*. In Ohio, a capital case does not proceed to the sentencing phase until after the fact-finder has found a defendant guilty of one or more aggravating circumstances. See R.C. 2929.03(D); R.C. 2929.04(B) and (C); *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, ¶ 147. Because the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence, it is not possible to make a factual finding during the sentencing phase that will expose a defendant to greater punishment. Moreover, in Ohio, if a defendant is tried by a jury, then the judge cannot impose a sentence of death unless the jury has entered a unanimous verdict for a death sentence. R.C. 2929.03(D)(2).

[*P60] Federal and state courts have upheld laws similar to Ohio's, explaining that if a defendant has already been found to be death-penalty eligible, then subsequent weighing processes for sentencing purposes do not implicate *Apprendi* and *Ring*. Weighing is not a fact-finding process subject to the Sixth Amendment, because "[t]hese determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination." *State v. Gales*, 265 Neb. 598, 628, 658 N.W.2d 604 (2003); see, e.g., *State v. Fry*, 2006 - NMSC 001, 2006 NMSC 1, 138 N.M. 700, 718, 126 P.3d 516 (2005); *Ortiz v. State*, 869 A.2d 285, 303-305 (Del.2005); *Ritchie v. State*, 809 N.E.2d 258, 268 (Ind.2004). Instead, the weighing process amounts to "a complex moral judgment" about what penalty to impose upon a defendant who is already death-penalty eligible. *United States v. Runyon*, 707 F.3d

> 475, 515-516 (4th Cir.2013) (citing cases from other federal appeals courts).
>
> [*P61] For these reasons, we hold that a capital defendant in Ohio elects to waive his or her right to have a jury determine guilt, the Sixth Amendment does not guarantee the defendant a jury at the sentencing phase of trial.

Unlike *Belton,* here Ford did not waive his right to a jury trial. While the Florida statute does permit the trial court to impose death even if the jury does not recommend death, and Ohio only permits the trial court to impose death if the jury recommends it, Ohio, like Florida, requires the trial court judge to make findings of fact before imposing the sentence. It is true, the jury decides whether or not a defendant is eligible for imposition of the death penalty by rendering verdicts on the capital specifications. But the guilty verdicts on the capital specifications, standing alone, do not provide the trial court with the authority to impose death. In Ohio death can only be imposed after the jury determines whether the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. The jury does not make findings of fact when providing a recommendation and there is no way to know what factual findings the jury relied upon in concluding the aggravating circumstances outweigh the mitigating factors. It is the failure of the jury to make such factual findings that renders Ohio's death penalty unconstitutional. The jury does not issue factual findings for the trial court to then

weigh and make an independent determination. It is not the weighing process which implicates the Sixth Amendment, it is the trial court making its own findings which the trial court then uses to conduct the independent weighing.

The sentencing entry confirms the trial court "independent deliberation." (Doc. #378, p. 4.) The trial court proceeds to make specific findings with regard to the aggravating circumstances for the aggravated murder of Margaret Schobert (Doc. #378, p. 6-8.) The findings detail the aggravating circumstances the trial court relied upon. The jury may have relied upon some of the same facts and the jury may not have. The only specific facts which the record confirms were found to support the aggravating circumstances are the facts found by the trial court. Likewise, the trial court made specific factual findings regarding the mitigating factors. (Doc.# 378, p.8-18.) Here the trial court specifically found "no mitigating factors found" in the aggravating circumstances. (Doc. #378, p.9.) The jury may or may not have made that factual finding. The ten pages of factual findings of the trial court regarding mitigating factors are filled with facts which the jury may have agreed with and utilized in making the recommendation of death, or they may not have. Death was imposed upon the trial court's independent factual determinations as set forth in the sentencing memorandum. These factual findings were not made the jury. The Sixth Amendment requires that the specific findings

authorizing the imposition of the death penalty be made by the jury. Accordingly, Fords death sentence must be vacated.

PROPOSITION OF LAW NO. XXIII

OHIO'S DEATH PENALTY LAW IS UNCONSTITUTIONAL. OHIO REV. CODE ANN. §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, AND 2929.05 DO NOT MEET THE PRESCRIBED CONSTITUTIONAL REQUIREMENTS AND ARE UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED TO SHAWN E FORD. U.S. CONST. AMENDS. V, VI, VIII, AND XIV; OHIO CONST. ART. I, §§ 2, 9, 10, AND 16. FURTHER, OHIO'S DEATH PENALTY STATUTE VIOLATES THE UNITED STATES' OBLIGATIONS UNDER INTERNATIONAL LAW.[33]

The Eighth Amendment to the Constitution and Article I, § 9 of the Ohio Constitution prohibit the infliction of cruel and unusual punishment. The Eighth Amendment's protections are applicable to the states through the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660 (1962). Punishment that is "excessive" constitutes cruel and unusual punishment. *Coker v. Georgia*, 433 U.S. 584 (1977). The underlying principle of governmental respect for human dignity is the Court's guideline to determine whether this statute is constitutional. *See Furman v. Georgia*, 408 U.S. 238 (1972) (Brennan, J., concurring); *Rhodes v.*

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[33] In *State v. Jenkins*, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984), this Court upheld this death penalty statute and this Court may, therefore, reject this claim on its merits if it disagrees with Appellant's federal constitutional arguments. *State v. Poindexter*, 36 Ohio St. 3d 1, 520 N.E.2d 568 (1988).

Chapman, 452 U.S. 337, 361 (1981); *Trop v. Dulles*, 356 U.S. 86 (1958). The Ohio scheme offends this bedrock principle in the following ways:

Arbitrary And Unequal Punishment

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

Ohio's capital punishment scheme allows the death penalty to be imposed in an arbitrary and discriminatory manner in violation of *Furman* and its progeny. Prosecutors' virtually uncontrolled indictment discretion allows arbitrary and discriminatory imposition of the death penalty. Mandatory death penalty statutes were deemed fatally flawed because they lacked standards for imposition of a death sentence and were therefore removed from judicial review. *Woodson v. North Carolina*, 428 U.S. 280 (1976). Prosecutors' uncontrolled discretion violates this requirement.

Due process prohibits the taking of life unless the state can show a legitimate and compelling state interest. *Commonwealth v. O'Neal*, 339 N.E.2d 676, 678

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

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

Unreliable Sentencing Procedures

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

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

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

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

Ohio courts continually hold that the weighing process and the weight to be assigned to a given factor are within the individual decision-maker's discretion. *State v. Fox*, 69 Ohio St. 3d 183, 193, 631 N.E.2d 124, 132 (1994). Giving so much discretion to juries inevitably leads to arbitrary and capricious judgments. The Ohio open discretion scheme further risks that constitutionally relevant mitigating factors that must be considered as mitigating [youth or childhood abuse (*Eddings v. Oklahoma*, 455 U.S. 104 (1982)), mental disease or defect (*Penry v. Lynaugh*, 492 U.S. 302 (1989) *rev'd on other grounds Penry v. Johnson*, 532 U.S. 782 (2001)), level of involvement in the crime (*Enmund v. Florida*, 458 U.S. 782 (1982)), or lack of criminal history (*Delo v. Lashley*, 507 U.S. 272 (1993))] will

not be factored into the sentencer's decision. While the federal constitution may allow states to shape consideration of mitigation, *see Johnson v. Texas*, 509 U.S. 350 (1993), Ohio's capital scheme fails to provide adequate guidelines to sentencers, and fails to assure against arbitrary, capricious, and discriminatory results.

Empirical evidence is developing in Ohio and around the country that, under commonly used penalty phase jury instructions, juries do not understand their responsibilities and apply inaccurate standards for decision. *See* Cho, Capital Confusion: The Effect of Jury Instructions on the Decision To Impose Death, 85 J. Crim. L. & Criminology 532, 549-557 (1994), and findings of Zeisel discussed in *Free v. Peters*, 12 F.3d 700 (7th Cir. 1993). This confusion violates the federal and state constitutions. Because of these deficiencies, Ohio's statutory scheme does not meet the requirements of *Furman* and its progeny.

Defendant's Right to a Jury is Burdened

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

circumstances. There is no corresponding provision for a capital defendant who elects to proceed to trial before a jury.

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

Mandatory Submission of Reports and Evaluations

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

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

R.C. § 2929.03(D)(1)'s reference to "the nature and circumstances of the aggravating circumstance" incorporates the nature and circumstances of the offense into the factors to be weighed in favor of death. The nature and circumstances of an offense are, however, statutory mitigating factors under R.C. § 2929.04(B). R.C. § 2929.03(D)(1) makes Ohio's death penalty weighing scheme

unconstitutionally vague because it gives the sentencer unfettered discretion to weigh a statutory mitigating factor as an aggravator.

To avoid arbitrariness in capital sentencing, states must limit and channel the sentencer's discretion with clear and specific guidance. *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990); *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988). A vague aggravating circumstance fails to give that guidance. *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *vacated on other grounds Ring v. Arizona*, 536 U.S. 584 (2002); *Godfrey*, 446 U.S. at 428. Moreover, a vague aggravating circumstance is unconstitutional whether it is an eligibility or a selection factor. *Tuilaepa v. California*, 512 U.S. 967 (1994). The aggravating circumstances in R.C. § 2929.04(A)(1)-(8) are both.

Proportionality and Appropriateness Review

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

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

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

The comparison method is also constitutionally flawed. Review of cases where the death penalty was imposed satisfies the proportionality review required by O.R.C. § 2929.05(A). *State v. Steffen*, 31 Ohio St. 3d 111, 509 N.E.2d 383, syl. 1 (1987). However, this prevents a fair proportionality review. There is no

meaningful manner to distinguish capital defendants who deserve the death penalty from those who do not.

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

The cursory appropriateness review also violates the capital defendant's due process rights as guaranteed by the Fifth and Fourteenth Amendments to the Constitution. The General Assembly provided capital appellants with the statutory right of proportionality review. When a state acts with significant discretion, it must act in accordance with the Due Process Clause. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). The review currently used violates this constitutional mandate. An insufficient proportionality review violates Shawn E. Ford due process and liberty interest in R.C. § 2929.05.

Ohio's Statutory Death Penalty Scheme Violates International Law.

International law binds each of the states that comprise the United States. Ohio is bound by international law whether found in treaty or in custom. Because the Ohio death penalty scheme violates international law, Shawn E. Ford' capital convictions and sentences cannot stand.

International Law Binds Ohio.

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

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

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

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

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

a. Ohio's statutory scheme violates the ICCPR's and ICERD's guarantees of equal protection and due process.

Both the ICCPR, ratified in 1992, and the ICERD, ratified in 1994, guarantee equal protection of the law. ICCPR Art. 2(1), 3, 14, 26; ICERD Art. 5(a). The ICCPR further guarantees due process via Articles 9 and 14, which includes numerous considerations: a fair hearing (Art. 14(1)), an independent and impartial tribunal (Art. 14(1)), the presumption of innocence (Art. 14(2)), adequate time and facilities for the preparation of a defense (Art. 14(3)(a)), legal assistance (Art. 14(3)(d)), the opportunity to call and question witnesses (Art. 14(3)(e)), the protection against self-incrimination (Art. 14(3)(g)), and the protection against double jeopardy (Art. 14(7)). However, Ohio's statutory scheme fails to provide equal protection and due process to capital defendants as contemplated by the ICCPR and the ICERD.

b. Ohio's Statutory Scheme Violates the ICCPR's Protection Against Arbitrary Execution.

The ICCPR speaks explicitly to the use of the death penalty. The ICCPR guarantees the right to life and provides that there shall be no arbitrary deprivation

of life. Art. 6(1). It allows the imposition of the death penalty only for the most serious offenses. Art. 6(2). Juveniles and pregnant women are protected from the death penalty. Art. 6(5). Moreover, the ICCPR contemplates the abolition of the death penalty. Art. 6(6).

However, several aspects of Ohio's statutory scheme allow for the arbitrary deprivation of life. *See infra* Sections a–f.

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

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

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

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

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

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

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

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

treaty. *See id.* Further, the ICCPR's purpose is to protect the right to life and any reservation inconsistent with that purpose violates the Vienna Convention. Thus, United States reservations cannot stand under the Vienna Convention as well.

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

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

Further, requiring the passage of legislation to implement a treaty necessarily implicates the participation of the House of Representatives. By requiring legislation to implement a treaty, the House can effectively veto a treaty by refusing to pass the necessary legislation. However, Article 2, § 2 excludes the House of Representatives from the treaty process. Therefore, declaring a treaty to be not self-executing gives power to the House of Representatives not contemplated by the United States Constitution. Thus, any declaration that a treaty is not self-executing is unconstitutional. *See Clinton*, 524 U.S. at 438.

Ohio's Obligations Under Customary International Law

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

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

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

However, the DHR is not alone in its codification of customary international law. *Smith* directs courts to look to "the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law" in ascertaining international law. 18 U.S. (5 Wheat.) at 160-61. Ohio should be cognizant of the fact that its statutory scheme violates numerous declarations and conventions drafted and adopted by the United Nations and the OAS, which may, because of the sheer number of countries that subscribe to them, codify customary international law. *See id*.

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

Conclusion

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

CONCLUSION

From the inception of voir dire, through closing arguments of the penalty phase, this case was fraught with errors that undermine the confidence in this verdict and death sentence. Recognizing that "death is different," painstaking efforts should be taken to ensure that the outcome here was based upon procedures that comport with the heightened due process requirements expected in a death penalty case. That did not occur.

Voir dire resulted in a jury panel that was predisposed to convict and impose the death penalty. The trial court failed to remove those jurors who were automatic death jurors. The predisposition to convict was exacerbating by the trial court leading jurors to believe that they would be unanimously finding the aggravated circumstances did not outweigh the mitigating factors before moving on to a life sentence. Repeatedly in voir dire the prosecutor misstated the law and diminished mitigation and when defense counsel attempted to voir dire jurors regarding mitigation, they were shut down.

The trial proceeded with the State utilizing improperly compelled statements form Shawn Ford and with the prosecutor improperly impeaching their own witness. In the trial and penalty phases the prosecutor was permitted to use

gruesome photographs which were unduly prejudicial. Though the prosecutor pursued the case with the theory that Shawn Ford was the principal offender, the "actual killer" the jury was permitted to consider both the principal offender and prior calculation and design specifications. The impropriety of this can be seen in the verdicts which found both, and the jurors subsequent consideration of both in the penalty phase. Even the trial court relied upon both in sentencing Ford to death.

Ford, who was barely 18 when these crimes were committed, displayed diminished capacity from a young age. Despite this, trial counsel waited until mid-way through the mitigation hearing to raise an *Atkins* issue. Though the trial court held a hearing on this, the timing of when it was raised seriously impacted the development and presentation of evidence in support of the *Atkins* claim.

The scales were tipped in favor of death through every aspect of this case. This trial was not fair, this result and this death sentence were not reliably obtained. It is for these reasons that the conviction and sentence must be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically on September 26, 2016 and that Richard S. Kasay, Assistant Prosecuting Attorney, was served electronically, with prior permission, through e-mail at kasay@prosecutor.summitoh.net.

*/s/ Kathleen McGarry*_____
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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Appellee,	:	Case No. 2015-1309
-vs-	:	***Death Penalty Case***
SHAWN E. FORD,	:	
Appellant	:	

APPENDIX TO APPELLANT'S MERIT BRIEF

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IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Appellee,	: :	
-vs-	:	Case No.
SHAWN E. FORD, Appellant	: :	***Death Penalty Case***

ON APPEAL FROM THE SUMMIT COUNTY
COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO, CASE NO. CR 2013 04 1008

SHAWN E. FORD'S NOTICE OF APPEAL

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Notice of Appeal of Appellant Shawn E. Ford

Appellant Shawn E Ford, by and through counsel, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Summit County Court of Common Pleas, entered in Case No. CR 2013 04 1008 on June 30, 2015. A copy of the judgment entry and trial court opinion is attached.

This case involves the conviction of aggravated murder with capital specifications and the imposition of a sentence of death, and well as convictions for other felonies and sentences imposed.

Pursuant to S.Ct. Prac. Rule 5.01(A)(4), this is an appeal of right.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Appeal was forwarded by regular U.S. Mail to Brian LoPrinzi, Assistant Prosecuting Attorney, 53 University Ave., Akron, Ohio 44308, this 10th. day of August, 2015.

/s/ Kathleen McGarry
Kathleen McGarry
Counsel for Shawn E. Ford

2015 JUN 30 PM 1:52
SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OFCOMMON PLEAS
COUNTY OF SUMMIT

THE STATE OF OHIO	)	**CASE NO. 2013 04 1008A**
	)	
vs.	)	
	)	**SENTENCING OPINION**
SHAWN E. FORD, JR.	)	**Re: Count Four**
Page 1 of 22	)	**(Pursuant to R.C. 2929.03(F))**

I. INTRODUCTION

On October 22, 2014 a jury returned verdicts of guilty on 11 counts of an 11count indictment filed against the defendant Shawn E. Ford, Jr.[1] Guilty verdicts were returned on five counts of aggravated murder, two counts of aggravated robbery, one count of aggravated burglary, one count of grand theft, one count of petty theft, and one count of felonious assault. All but the felonious assault charge arose from the events of April 2, 2013 when Jeffrey E. Schobert and Margaret J. Schobert were murdered in their home by the defendant.

Three specifications of aggravating circumstances asserted under Ohio Rev. Code sections 2929.04(A)(5) and 2929.04(A)(7) were attached to each of the five aggravated murder counts. Specification One to each of the five aggravated murder counts alleged that Defendant Ford engaged in a course of conduct involving the purposeful killing or attempt to kill two or more persons. Specification Two to each of the five murder counts alleged in the alternative that the aggravated murder was committed while Defendant Ford was committing, attempting to commit or fleeing immediately after committing or attempting to commit Aggravated Robbery and that Ford was the principal offender in the commission of the aggravated murder or, if not

[1] Two additional counts asserted charges against two co-defendants. A minor, J.V., was named in the same eleven counts as Defendant Ford as a co-defendant.

the principal offender, he committed the aggravated murder with prior calculation and design. Specification Three to each of the five murder counts alleged in the alternative that the aggravated murder was committed while Defendant Ford was committing, attempting to commit or fleeing immediately after committing or attempting to commit Aggravated Burglary and that Ford was the principal offender in the commission of the aggravated murder or, if not the principal offender, he committed the aggravated murder with prior calculation and design.

The murder charges and specifications in Counts One and Two related to the killing of Jeffrey E. Schobert on or about April 2, 2013. The murder charges and specifications in Counts Four and Five related to the killing of Margaret J. Schobert on or about the same date. And the murder charge and specifications in Count Three related to the killings of either Jeffrey E. Schobert or Margaret J. Schobert or both of them.

Defendant Ford was found guilty of the Specification One multiple killing specifications attached to each of the five aggravated murder counts.

Defendant Ford was found guilty of Specifications Two and Three to Counts One and Two with a determination that he was the principal offender in the commission of the aggravated murder of Jeffrey E. Schobert while committing, fleeing immediately after committing or attempting to commit aggravated robbery.

Defendant Ford was likewise found guilty of Specifications Two and Three to Count Three with the determination that he was the principal offender in the commission of the aggravated murder of Jeffrey E. Schobert and/or Margaret J. Schobert while committing, fleeing immediately after committing or attempting to commit aggravated burglary.

Defendant Ford was found guilty of Specifications Two and Three to Counts Four and Five, with the determination that he committed the aggravated murder of Margaret J. Schobert with

prior calculation and design while committing, fleeing immediately after committing or attempting to commit aggravated robbery.

Defendant filed a motion to merge certain of the offenses for sentencing prior to the mitigation trial. The court orally ruled on the motion at trial and later memorialized the rulings in a journal entry filed on June 4, 2015. The court concluded that the three murder charges pertaining to Jeffrey Schobert should be merged and the charges pertaining to the murder of Margaret Schobert should be merged separately. The state elected to have the defendant sentenced on Count Two, pertaining to Jeffrey E. Schobert and Count Four pertaining to Margaret J. Schobert. As a result, Count One and Three were merged with Count Two; and Counts Five and Three were merged with Count Four.

The court also merged the aggravated robbery charge in Count Six with the murder charge in Count Two; and the aggravated robbery charge in Count Seven was merged with the murder charge in Count Four. The aggravated burglary charge in Count Eight was merged with both Counts Two and Four. The grand theft charge in Count Nine and the petty theft charge in Count Ten were also merged with both Count Two and Count Four. The felonious assault charge in Count Eleven, pertaining to the assault on Chelsea Schobert, was not merged.

The mitigation phase trial commenced on October 27, 2014. The jury returned a verdict of life imprisonment without the possibility of parole on Count Two, involving the murder of Jeffrey E. Schobert. The jury returned a verdict recommending a death sentence on Count Four, pertaining to the murder of Margaret J. Schobert.

Section 2929.03 of the Ohio Revised Code specifies the law to be followed in imposing a sentence for aggravated murder. When, as was done on Count Four here, a jury finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors and mitigating evidence, the jury is required to

recommend to the court that the sentence of death be imposed on the offender. R.C. 2929.03(D)(2).

Upon receiving a jury's recommendation that the sentence of death be imposed, the court is required to determine independently whether the state has proven, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors and mitigating evidence. If the court finds they do, the court is required to accept the jury's recommendation and impose a sentence of death. If the court determines that the state has not proven, by proof beyond a reasonable doubt, that the aggravating circumstances of which the offender was found guilty of committing outweigh the mitigating factors evidence, the court is required to impose a sentence of one of three life sentence options: life imprisonment without the possibility of 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. R.C. 2929.03(D)(3).

This Sentencing Opinion addresses only the sentence to be imposed with respect to Count Four; the sentences to be imposed with respect to Count Two and Count Eleven will be set forth in a separate judgment entry.

II. ANALYSIS

A. Summary of Information Considered and Not Considered

The information set forth below reflects the independent deliberations conducted by the court. Those deliberations have included a consideration of the relevant evidence pertaining to the aggravating circumstances and mitigating factors produced during the mitigation hearing and during the first phase of the trial, to the extent relevant to the current issue. The evidence that has been considered has included both testimonial and documentary evidence. Defendant Ford chose to allocute. The court gave full consideration to defendant's statement in allocution, and

the court did not make its decision on the sentence to be imposed until Defendant Ford made his statement.

Defendant Ford wrote two letters to the court after the trial. Those letters have been marked as court's exhibit C-7 and C-8, but they have not been considered in determining the sentence for Count Four. Likewise, the court has not considered the presentence investigation conducted in this matter after the trial; the reasons for not doing so have been separately addressed on the record. The court has not considered the felonious assault on Chelsea Schobert. The court received no victim impact evidence before announcing its sentence on Count Four; victim impact evidence received later in the June 29, 2015 sentencing hearing has not been considered in determining the sentence to be imposed on Count Four. The court is not permitted to consider and has not considered the aggravated murder of Margaret J. Schobert itself or any offenses merged into that offense. The court has likewise not considered the aggravated murder of Jeffrey E. Schobert, except to the extent necessary to consider Specification One to Count Four. The court has not considered Defendant Ford's criminal record, or any aggravating circumstances of which the defendant was found guilty that have been merged.

The court has considered the mitigating factors relied upon by the defense under R.C. 2929.04(B)(3), (4) and (7) and all other evidence in mitigation against a sentence of death in the trial record, including the "history, character and background" of Defendant Ford, as required by R.C. 2929.04(B). The court did not consider any mitigating factors under R.C. 2929.04 not raised by the defense (e.g., R.C. 2929.04(B)(1), (2), (5), or (6)) and has given no weight to the fact that the defense presented no evidence relating to those statutory factors.

Pursuant to R.C. 2929.03 and 2929.04, the court renders the following opinion.

B. Aggravating Circumstances

In Count Four, Defendant Shawn E. Ford, Jr., was found guilty beyond a reasonable doubt of the aggravated murder of Margaret J. Schobert with prior calculation and design. Defendant Ford was also found guilty beyond a reasonable doubt of the following specifications attached to Count Four:

> **Specification One – Defendant Shawn E. Ford, Jr., committed Aggravated Murder as a part of a course of conduct involving the purposeful killing or attempt to kill two or more persons.**

Defendant was acquainted with Margaret J. Schobert and her husband Jeffrey E. Schobert because of his relationship with their daughter Chelsea Schobert. Chelsea Schobert was in an Akron area hospital on April 1, 2013. Margaret J. Schobert remained at the hospital overnight with her daughter. During the early morning hours of April 2, 2013 Defendant Ford and a minor accomplice, J.V., entered the Schobert residence on Rex Lake Drive in New Franklin, Summit County, Ohio by stealth. Defendant Ford and the accomplice murdered Jeffrey E. Schobert using a sledgehammer while he was in his bed. Thereafter, defendant Ford utilized the cell phone of Jeffrey Schobert to communicate with Margaret Schobert, urging her to return home, pretending to be Jeffrey Schobert. Certain of the text messages caused Margaret Schobert to doubt that Jeffrey Schobert was the person sending the messages. In one responsive message, she inquired whether the sender was actually Defendant Ford. Evidence indicated that several hours elapsed between the murder of Jeffrey Schobert and Margaret Schobert's return home. Defendant and his accomplice waited in the home in order to commit the murder of Ms. Schobert. Margaret J. Schobert was murdered with a sledgehammer.

DNA evidence connected Defendant Ford to the scene of the murders. In addition, Defendant Ford made statements to the police admitting his role in the murders. Other physical evidence, including some that had DNA of the victims and/or Defendant, was found in places

where Defendant Ford had indicated to an inmate in the Portage County jail that they could be found. One witness testified that Defendant Ford had said he was going to go to the Schobert home to kill them.

Specification Two – Defendant Shawn E. Ford, Jr., committed Aggravated Murder while committing, attempting to commit or fleeing immediately after committing or attempting to commit Aggravated Robbery; and defendant committed the Aggravated Murder with prior calculation and design.

Margaret J. Schobert was induced to return to her home, ostensibly by her husband, Jeffrey Schobert, through cell phone text messages sent by Defendant Ford using Mr. Schobert's cell phone. Certain of the text messages caused Margaret Schobert to doubt that Jeffrey Schobert was the person sending the messages. In one responsive message, she inquired whether the sender was actually Defendant Ford. Evidence indicated that several hours elapsed between the murder of Jeffrey Schobert and Margaret Schobert's return home. Defendant and his accomplice waited in the home in order to commit the murder of Ms. Schobert. Margaret J. Schobert was murdered with a sledgehammer.

DNA evidence connected Defendant Ford to the scene of the murders. In addition, Defendant Ford made statements to the police admitting his role in the murders, including his wait for Margaret Schobert to return home. Other physical evidence, including some that had DNA of the victims and/or Defendant, was found in places where Defendant Ford had told a Portage County jail inmate they could be found. One witness testified that Defendant Ford had said he was going to go to the Schobert home to kill them.

Personal property, including a watch belonging to Mr. and/or Ms. Schobert was found at the location where Defendant Ford's accomplice was arrested; and a vehicle belonging to Mr. Schobert was found in the same neighborhood. Other property, including a ring belonging to Margaret Schobert, was found in a trash dumpster on South Street in Akron, around the corner from houses where Defendant Ford had been residing.

Specification Three – Defendant Shawn E. Ford, Jr., committed aggravated murder while committing, attempting to commit or fleeing immediately after committing or attempting to commit Aggravated Burglary; and defendant committed the Aggravated Murder with prior calculation and design.

Evidence admitted at trial indicated defendant and his accomplice entered the Schobert residence by stealth in the early morning hours of April 2, 2013 by means of a bedroom window on the ground floor at the back of the house that was not visible from the street.

Margaret J. Schobert was induced to return to her home, ostensibly by her husband, Jeffrey Schobert, through cell phone text messages sent by Defendant Ford using Mr. Schobert's cell phone. Certain of the text messages caused Margaret Schobert to doubt that Jeffrey Schobert was the person sending the messages. In one responsive message, she inquired whether the sender was actually Defendant Ford. Evidence indicated that several hours elapsed between the murder of Jeffrey Schobert and Margaret Schobert's return home. Defendant and his accomplice waited in the home in order to commit the murder of Ms. Schobert. Margaret J. Schobert was murdered with a sledgehammer.

DNA evidence connected Defendant Ford to the scene of the murders. In addition, Defendant Ford made statements to the police admitting his role in the murders, including his wait for Margaret Schobert to return home. Other physical evidence, including some that had DNA of the victims and/or Defendant, was found in places where Defendant Ford had told a Portage County jail inmate they could be found. Again, one witness testified that Defendant Ford had said he was going to go to the Schobert home to kill them.

C. Mitigating Factors

The court must determine whether the foregoing aggravating circumstances outweigh evidence that mitigates against the imposition of the sentence of death beyond a reasonable doubt. Revised Code 2929.04(B) sets forth a nonexclusive list of mitigating factors and other information that the court must consider. Although the court lists below each of the statutory

mitigating factors, certain of them are inapplicable and were not relied upon by the defendant. The listing of the factors not relied upon does not imply that the court has given any consideration to the absence of evidence to support them; they are simply listed to demonstrate the completeness of the court's analysis.

1. The Nature and Circumstances of the Offense

A review of the nature and circumstances of the offense involved in Count Four – the murder of Margaret J. Schobert – leads the court to find that no mitigating factors can be found therein. The court has not considered the absence of mitigating factors in the nature and circumstances of the offense in its weighing process.

2. The History, Character and Background of Shawn E. Ford, Jr.

Ohio Revised Code section 2929.04(B) requires the court to consider and weigh the "history, character and background" of the offender against the aggravating circumstances that have been proven.

According to testimony at trial, defendant was born to Kelly Ford and Shawn Eric Ford, Sr., a married couple, on September 30, 1994 in Minneapolis, MN. He has an older sister, Patricia Roberts, who is about two years older than he. His parents moved the family to Akron not long after he was born. He had a younger sister, Shantaya Ford, born on October 3, 1997, who died from crib death in December 1997. Defendant Ford appears to always have had a loving, close relationship with his sister Patricia. He also has enjoyed a close and loving relationship with his paternal grandparents, though he rarely saw them after he was about 6 or 7 years old. Defendant Ford's mother, Kelly, testified that she loved her son. She testified that she has always worked and sacrificed to provide for her children. She asked the jury to spare her son's life.

Several witnesses testified that defendant Ford felt unloved. Whether relating to his biological father, his stepfather, his mother or other family members, the consistent testimony was that he felt other children received preferential treatment and more affection.

The testimony of several witnesses established that the relationship between Kelly Ford and Shawn Ford, Sr. was tumultuous. Defendant observed his parents in many verbal and physical fights. On one occasion, when he was about 3 years old, he climbed on his father's back while the father was fighting the mother, urging his father to, "[L]eave my mommy alone." On one occasion when Defendant Ford was present in the home, Kelly Ford "accidentally" stabbed Shawn Ford, Sr. with a knife.

Sometime when Defendant Ford was between the ages of three and four, he and his sister were sent to Chicago to live with their paternal grandparents, Eddie Ford and Janice Ford. This was arranged by Kelly Ford because she knew her marriage with Shawn Ford, Sr. was likely to end and she needed help raising her kids. The move to Chicago was not presented to the children as a permanent move; according to Patricia Roberts, she and her brother both knew they would be back with their mother someday. As a result, she testified that neither she nor her brother felt abandoned. During the time in Chicago, Kelly Ford would occasionally speak to her children by phone.

Eddie Ford and Janice Ford both testified that Defendant Ford fit in well when he lived with them. He was in Chicago about two and a half years. They both testified about how much they loved their grandson. Janice Ford testified that Shawn Ford came to Chicago before his sister. When she picked him up, he lacked many of the basic things one would have expected a toddler to have. She testified that Kelly Ford visited him in Chicago one or two times while he was there. She indicated Kelly Ford provided "very little" parenting during the two and a half years her children lived with their grandparents. Defendant Ford and his grandmother had a very

close and loving relationship. Both of his grandparents taught him right from wrong and showed him what a hard working household looked like.

When Kelly Ford was ready, she arranged for her children to be returned from Chicago. She had worked two jobs until then and then let one of them go so that she would be available to the children. By that time Kelly Ford was in a relationship with Tracy Wooden. Wooden had two sons who were a couple of years younger than Defendant Ford. Tracy Wooden said Ford hardly spoke at all or to him in particular for six or seven months after he returned from Chicago. But Wooden testified that the family had new things in the house when Defendant Ford was young; and he stated that Ford was properly bathed and clothed. Tracy Wooden testified that he treated Defendant Ford like a son and Ford treated him like a father. Wooden stated Ford was treated just like he would treat his own sons. Patricia Roberts testified that her brother actually loved Wooden. When Defendant Ford was 12 or 13 years old, Tracy Wooden was sent to prison after being convicted of a drug offense. Although Wooden was a drug dealer in the neighborhood, Kelly Ford stated that Wooden never sold drugs from within their home. Several witnesses testified that Defendant Ford's behavior became wild when Tracy Wooden went to prison.

There was conflicting testimony about physical altercations between Defendant Ford and Tracy Wooden. Patricia Roberts remembered that her brother and Wooden had a lot of disagreements and used to have fights. Kelly Ford testified that her son was never severely beaten during his upbringing. On March 21, 2013, however, Defendant Ford and Wooden got into a fight in which each attempted to attack the other with a weapon (a shovel and a baseball bat). Wooden also bit Defendant Ford in that altercation. The police were called and Defendant Ford was treated and released at a hospital emergency room. The March 2013 incident apparently arose because Wooden was upset that Ford was unwilling to work in order to be able

to reimburse him for bond money he had posted to get Defendant Ford out of jail while dealing with an unrelated criminal case in which Defendant Ford had been charged.

Defendant Ford's family struggled financially during his developmental years. At one point, he was unable to participate in a basketball program at Joy Park in Akron because his mother and stepfather did not give him the $55 needed for a registration fee. Several witnesses testified that the basic needs of the family were met but that there was little extra money to provide for more. At times, the family was homeless.

After living in Chicago, Defendant Ford hardly ever saw his father, Shawn Eric Ford, Sr. According to witnesses, they may have seen each other fewer than ten times in his developmental years. Kelly Ford stated that her son would ask to see his father. And she indicated there were times when Shawn Ford, Sr. would promise to pick up the kids and then fail to appear. Her perception was that her son felt abandoned by his father. Shawn Ford, Sr. acknowledged that he didn't see his children very much. But he stated that they didn't see him by their own choice. He indicated he would have been available if they had reached out to him. Ford, Sr. testified that he didn't even see his son after the return from Chicago until he was 11 or 12 years old. He stated if his son had ever asked him for money he would have given it to him. He recalled buying a few things for his son. Shawn Ford, Sr. testified that his son was too young to be affected by the crib death of his younger sister. Family members testified that Defendant Ford felt abandoned by his biological father.

Defendant Ford struggled in school. From the time he was 5 years old onward, he was diagnosed with a specific learning disability related to his speech. People found it hard to understand him, and he was placed in special education classes for a portion of his school days. Special services were provided for a number of years until they were no longer producing results. Throughout Defendant Ford's school career, he went to school on an IEP. IQ testing conducted

during defendant Ford's school years demonstrated that he was classified as being of borderline intelligence. The court has extensively addressed the IQ testing in its order overruling defendant's motion to dismiss the capital specifications on the ground that defendant is intellectually disabled. For purposes of the current analysis, the court notes that Mr. Ford has never been diagnosed as being intellectually disabled, though he quite apparently struggled in school and had an IQ that was in the low average to borderline range.

Defendant Ford also was bullied in school. Consistent testimony indicated that he had a high-pitched voice growing up, and was frequently teased and/or bullied as a result. According to the witnesses, he responded to that by fighting.

Defendant Ford began getting in trouble in his early teens. His mother found it difficult to deal with because he was rambunctious. As a result of various juvenile offenses, Defendant Ford was eventually committed to the Community Correctional Facility in Stark County, and, ultimately, to the Ohio Department of Youth Services in Columbus, Ohio. Partly as a result of an inability to drive, and partly as a result of Defendant Ford's own instructions that she should not visit, Kelly Ford never visited with him in Columbus, and only saw him on three occasions while he was in Canton. It was determined that defendant Ford abused marijuana and alcohol during his teen years.

In regard to the history, background and character of Defendant Ford, the court acknowledges that he had a difficult upbringing. He was essentially abandoned by his father after his mother moved him to Chicago when he was 3 or 4 years old. And although he may have felt abandonment from the Chicago move, family members testified that he fit in well and did well while there. He was exposed to violence in his household when a toddler and he was the subject of violence in his teen years. His stepfather dealt drugs and, apparently, got into physical altercations with the defendant. The family frequently faced financial hardship.

Because of intellectual limitations, a speech problem and a learning disability, Defendant Ford faced difficulties in school. He was teased or bullied because of a high-pitched voice.

Countering these negative issues were positive factors. Defendant Ford had loving relations with his sister and his grandparents. He had a stepfather who was in his life, albeit imperfectly. His basic needs were provided for. His mother, father and stepfather testified that they loved him. Moreover, many people grow up in circumstances similar to Defendant Ford's and do not resort to criminal conduct. Indeed, his own sister and two step brothers, who grew up in almost the exact same environment are examples of how people from challenging backgrounds can live law abiding lives. Balancing the negative and positive aspects of the defendant's upbringing, the court gives slight mitigating weight to the defendant's history, background and character.

The court now proceeds to evaluate the evidence concerning the statutory mitigating factors set forth in R.C. 2929.04(B)(1)-(7).

3. **2929.04(B)(1) – Whether the victim induced the offense.** This factor is inapplicable, and the absence of evidence on this issue has not been considered by the court.

4. **2929.04(B)(2) – Duress or provocation of the defendant.** This factor also is inapplicable, and the absence of evidence on this issue has not been considered by the court.

5. **2929.03(B)(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.** Dr. Joy Stankowski testified on behalf of the defendant, offering the opinion that he suffered from antisocial personality disorder. Nothing in Dr. Stankowski's testimony supports the conclusion that defendant Ford suffered from a mental disease or defect.

Moreover, the rebuttal testimony of Dr. Arcangela Wood confirmed her earlier conclusion that Mr. Ford did not have such conditions. Defendant Ford's mother, stepfather and grandparents all indicated he was taught right from wrong. Thus, there is no evidence of record to support giving any weight to this mitigating factor.

6. **2929.04(B)(4) – Youth of the offender.** The murders of Jeffrey E. Schobert and Margaret J. Schobert occurred when Defendant Ford was 18½ years of age. He is now 20 years old. Dr. Stankowski testified that a person who has only recently turned 18 has not necessarily reached full intellectual and emotional maturity. In addition, Dr. Stankowski testified that Defendant Ford never had time or chance to move away from the effects of his difficult childhood and to become his own person and live his own life. She considered youth to be a very important consideration in the case. The court gives weight to this mitigating factor.

7. **2929.04(B)(5) – The offender's lack of significant prior criminal or delinquency history.** This factor is inapplicable, and the absence of evidence on this issue has not been considered by the court.

8. **2929.04(B)(6) – The defendant was not the principal offender.** The defense presented no argument or mitigating evidence on this factor and did not request the jury to be instructed thereon. The evidence at trial, as noted above, included a summary of statements attributed to the defendant that he murdered Margaret Schobert with a sledgehammer. Although the jury chose to find on Specifications Two and Three to Count Four that defendant acted with prior calculation and design, implying that he was not the principal offender, it also found the defendant guilty on Specification One to that count, finding that he was a part of a course of conduct involving the purposeful killing of two or more persons *by the offender*. The court finds this factor to be inapplicable, and the absence of evidence on this issue has not been considered by the court.

9. **2929.04(B)(7) - Any other relevant factors.** In addition to the history background and character of the defendant, which have been set forth in detail above and will not be repeated here, Defendant Ford also offered other relevant factors. Specifically, Dr. Joy Stankowski, defendant's mitigation expert, identified several factors that she opined were mitigating.

a. **Antisocial personality disorder.** Dr. Stankowski diagnosed Defendant Ford with this disorder. She testified that a characteristic of the disorder is an inability to conform to societal norms for acceptable behavior. She opined it to be mitigating because a disorder is something shaped partly by a person's brain (which is beyond his control) and also by things that happened during development – such as parental abandonment (also beyond a person's control). She testified that this disorder suggests Defendant Ford was born with impaired ability to control his impulses. That impulsivity could have been exacerbated by Defendant Ford's early drug or alcohol use, which could have further delayed his development. These factors, when coupled with the expected impulsivity of a teenager, would serve to make Defendant Ford less able to control his impulses or behavior compared to someone who does not have the disorder. Dr. Stankowski testified that separation from parents and grandparents could also have contributed to the development of the disorder. She also testified that defendant Ford's lower IQ tended to make it more difficult for him to think things through, to react more impulsively, and to make worse decisions. Having considered the evidence, the court gives some weight to this factor.

b. **Alcohol use disorder.** Dr. Stankowski testified defendant Ford's history of alcohol abuse support the conclusion that he has alcohol use disorder. She indicated this would contribute to reckless or dangerous behavior. She also opined that this disorder would have a negative effect on a developing brain. Apart from the impact of alcohol use on Defendant

Ford's antisocial personality disorder, the court finds this factor to carry no weight. There was no evidence that Defendant Ford was under the influence of alcohol at the time of the murder of Margaret Schobert.

c. **Low IQ.** Dr. Stankowski testified Defendant Ford's low IQ would have caused difficulty in his ability to think things through and make reasoned decisions. The court has previously addressed some of the implications of defendant's low IQ; the court gives some weight to this factor.

d. **Family History and Environment.** Dr. Stankowski testified that Defendant Ford was shaped by having been: (i) abandoned, neglected and separated from his parents and caretakers; (ii) bullied at school because of a speech issue; (iii) beaten by his stepfather; (iv) the victim of poverty; and (v) having suffered the death of an infant sibling. She testified that all these things shaped who Defendant Ford is today and it should be considered mitigating. The court has already dealt with these factors above and has accorded them slight weight.

Defendant Ford raised various other issues purportedly in mitigation at trial. Except to the extent noted above, the court finds none of these other factors applicable or worthy of weight. The court has specifically not considered in this weighing process the defendant's criminal and juvenile record. Approximately three and one-half months before the Schobert murders, defendant pled guilty to having robbed a barber shop. In addition, on March 23, 2013, defendant committed felonious assault against Chelsea Schobert, his then girlfriend. The court has not considered these convictions or the facts relative thereto in any fashion, because it is not permitted to do so. The court mentions these incidents only because they are found as a part of the court record. But the court wishes to restate that these were not considered.

The court has also considered the statements of defense counsel at the sentencing hearing. In addition, the court has considered the statements of Defendant Ford at the hearing. The court has neither received nor considered any victim impact evidence in arriving at this decision. The court has not considered the aggravated murder of Margaret J. Schobert itself as an aggravating circumstance.

D. Weighing of Aggravating Circumstances against Mitigating Factors

Revised Code section 2929.03(F) requires the court to conduct a weighing of the evidence and to state the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors, if it reaches that conclusion. In the alternative, if the court finds that the aggravating circumstances do not outweigh the mitigating factors, it must state the reasons for reaching that conclusion. The court's analysis resulting from that weighing process is set forth below.

Defendant Ford purposely caused the death of Margaret J Schobert as a part of a course of conduct involving the purposeful killing of two or more persons by the defendant. In this case, Shawn Eric Ford, Jr., was the actual killer and, without provocation, purposely murdered Margaret J. Schobert and her husband Jeffrey E. Schobert. He did so after having confided in another person that he was going to go to the Schobert residence in order to kill them. Both people were killed when the defendant inflicted multiple sledgehammer blows to their heads. The defendant killed Margaret Schobert after inducing her to return home by pretending to be her husband. Several hours passed between the two deaths. The court must weigh the seriousness of a double homicide in which the second killing was committed with prior calculation and design.

The defendant also committed the Aggravated Murder of Margaret J. Schobert while committing or attempting to commit Aggravated Robbery and Aggravated Burglary. And he

committed the Aggravated Murder with prior calculation and design. The seriousness of these two additional aggravating circumstances must be weighed by the court.

Against these three specific aggravating circumstances, the court must weigh the mitigating factors and evidence. Mitigating factors are factors about Defendant Ford that weigh in favor of a decision that a life sentence rather than a death sentence is appropriate. Mitigating factors are factors that can be thought to potentially lessen the moral culpability of the defendant or diminish the appropriateness of a death sentence. The relevant mitigating factors to be considered by the court have been described in detail above.

The strongest mitigating factor presented by the defense is the age of Defendant Ford. At the time of the murders, he was 18½ years old, six months past the age when he would have been ineligible for a death sentence. The state legislature has established the youth of the defendant as a mitigating factor in recognition of the reality that young people are not as wise and do not have as much life experience as people who have lived longer. As a result, they may be less able to consider the long term consequences of their conduct. And they may not be very good at understanding how their conduct will affect others by putting themselves in the shoes of people they may hurt. Defendant has presented evidence from his mitigation expert indicating that his mitigating factor of youth was compounded by a psychological disorder that made him prone to impulsive, ill considered behavior. And she has offered the opinion that his difficult upbringing also likely made his disorder worse. She asserted that all these factors mitigate against a death sentence.

An example of impulsive, ill considered behavior would be to plan a burglary of a home (what witnesses said Defendant Ford referred to as a "lick") without taking time to find out if someone would be home; and then, when a homeowner was unexpectedly encountered, to murder that person before making a hurried exit. And that situation could be compounded when

two people were present in the home and both were impulsively killed. But even that example describes behavior that could be committed by someone far older than 18. This example differs from the case at hand because of the steps taken to induce the second person to come home in order to commit a second murder.

The court has searched the evidence to see if there is any support for the argument that Defendant Ford's conduct and thinking were the product of his youth or his psychological disorder, a conclusion that would mitigate against a sentence of death. The defense has argued that the very thought you could go into your girlfriend's parents house and kill them and get away with it is evidence of immature thinking. But modern history is replete with examples of people far older than 18 who have done similar things. Rather than finding evidence of youthful, impulsive thinking by the defendant, the court finds that he demonstrated a carefully thought out, calculated plan to kill Margaret and Jeffrey Schobert. The jury found that the aggravating circumstances relating to the murder of Jeffrey Schobert did not outweigh the mitigating factors. But the added evidence relating to Defendant Ford's inducement of Margaret Schobert to return home by pretending to be her husband, and the evidence that he waited several hours to be able to commit the second murder has caused this court to come to the same conclusion the jury did and find that the aggravating circumstances relating to the murder of Margaret J. Schobert outweigh the mitigating factors by proof beyond a reasonable doubt. On the morning of April 2, 2013, Defendant Ford did not think or act in a youthful manner. While the youth and immaturity of the defendant do mitigate – to a degree – against the imposition of a death sentence, the court finds that the factor of youth even when compounded by a psychological disorder is substantially outweighed by the aggravating circumstances proven in connection with Count Four.

The court has considered all of the evidence presented during both the trial and mitigation phases as it related to the three specific aggravating circumstances involving the aggravated

murder of Margaret J Schobert. The court has also considered all of the mitigating evidence and mitigating factors presented at both phases of the trial. The court has weighed these aggravating circumstances against all of the mitigating factors and mitigating evidence. The court has weighed the mitigating factors both individually and collectively. In weighing the aggravating circumstances against the mitigating factors, the court finds that the state of Ohio has proven, by proof beyond a reasonable doubt, that the specific aggravating circumstances that Defendant Ford was found guilty of committing outweigh the mitigating factors in regard to the aggravated murder of Margaret J. Schobert as alleged in Count Four of the indictment.

III. CONCLUSION

Given the court's conclusion that the aggravating circumstances Defendant Shawn Eric Ford, Jr. was found guilty of committing outweigh the mitigating factors and evidence, the court accepts the recommendation of the jury. The court hereby orders that the defendant, Shawn Eric Ford, Jr. be sentenced to death for the aggravated murder of Margaret J. Schobert as set forth in Count Four of the indictment. The court orders that the execution date of Shawn Eric Ford, Jr., shall be set for the 29th day of December, 2015 to be carried out by the State of Ohio. The execution date is subject to modification or further order by a court of competent jurisdiction. Shawn Eric Ford, Jr. shall be transferred into the custody of the Ohio Department of Rehabilitation and Correction and shall be housed in conformity with the sentence indicated in this order.

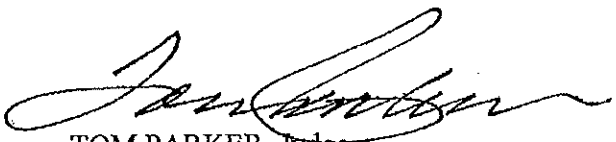
The court further orders that the Summit County Clerk of Courts shall forthwith deliver a copy of the entire case file to the Ohio Supreme Court pursuant to law. The court appoints as appellate counsel Kathleen McGarry and Lynn Ann Maro, each of whom is certified by the Ohio Supreme Court to handle capital-case appeals. The court further shall file a copy of this sentencing opinion with the Clerk of the Supreme Court of Ohio, as required by R.C. 2929.03(F)

along with the case disposition form required by the Supreme Court rule. Given the indigent status of the defendant, the court hereby waives the imposition of court costs.

IT IS SO ORDERED.

APPROVED:

June 29, 2015



TOM PARKER, Judge
Court of Common Pleas
Summit County, Ohio

/mjl
cc: Asst. Prosecutors Brad Gessner/Brian LoPrinzi
Attorney Donald R. Hicks
Attorney Jon Sinn
Court Operations/Criminal Division

Supreme Court of Ohio Clerk of Court - Filed August 10, 2015 - Case No. 2015-1309

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

2015 JUN 30 PM 1:51
SUMMIT COUNTY
CLERK OF COURTS

THE STATE OF OHIO

vs.

SHAWN E. FORD, JR.

Case No. CR 2013 04 1008 (A)

JOURNAL ENTRY

On June 29, 2015, now comes BRIAN LOPRINZI, the Assistant Prosecuting Attorney on behalf of the State of Ohio, the Defendant, SHAWN E. FORD, JR, being in Court with counsel, DONALD R. HICKS and JON SINN, for sentencing. On October 22, 2014, the jury returned verdicts, in writing, finding said Defendant SHAWN E. FORD, JR.:

1. GUILTY beyond a reasonable doubt of the crime of AGGRAVATED MURDER, as contained in Count 1 of the indictment, (victim Jeffrey E. Schobert) Ohio Revised Code 2903.01(A), a special felony, which offense occurred on April 2, 2013;

    a. AGGRAVATING CIRCUMSTANCES SPECIFICATION ONE TO COUNT ONE, (Criteria for Imposing Death or Imprisonment for a Capital Offense) Ohio Revised Code 2929.04(A)(5), Guilty beyond a reasonable doubt that the defendant engaged in a course of conduct involving the purposeful killing or attempt to kill two or more persons by him;

    b. AGGRAVATING CIRCUMSTANCES SPECIFICATION TWO TO COUNT ONE, (Criteria for Imposing Death or Imprisonment for a Capital Offense), Ohio Revised Code 2929.04(A)(7), guilty beyond a reasonable doubt that the defendant committed the offense while he was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery and was the principal offender in the aggravated murder;

    c. AGGRAVATING CIRCUMSTANCES SPECIFICATION THREE TO COUNT ONE, (Criteria for Imposing Death or Imprisonment for a Capital Offense), Ohio Revised Code 2929.04(A)(7), guilty beyond a reasonable doubt that the defendant committed the offense while he was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated burglary and was the principal offender in the offense.

2. GUILTY beyond a reasonable doubt of the crime of AGGRAVATED MURDER, as contained in Count 2 of the indictment, (victim Jeffrey E. Schobert), Ohio Revised Code 2903.01(B), a special felony, which offense occurred on April 2, 2013;

    a. AGGRAVATING CIRCUMSTANCES SPECIFICATION ONE TO COUNT TWO, (Criteria for Imposing Death or Imprisonment for a Capital Offense), Ohio Revised Code 2929.04(A)(5), Guilty beyond a reasonable doubt that the defendant engaged in a course of conduct involving the purposeful killing or attempt to kill two or more persons by him;

b. AGGRAVATING CIRCUMSTANCES SPECIFICATION TWO TO COUNT TWO, (Criteria for Imposing Death or Imprisonment for a Capital Offense), Ohio Revised Code 2929.04(A)(7), guilty beyond a reasonable doubt that the defendant committed the offense while he was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery and was the principal offender in the aggravated murder;

c. AGGRAVATING CIRCUMSTANCES SPECIFICATION THREE TO COUNT TWO, (Criteria for Imposing Death or Imprisonment for a Capital Offense), Ohio Revised Code 2929.04(A)(7), guilty beyond a reasonable doubt that the defendant committed the offense while he was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated burglary and was the principal offender in the offense.

3. GUILTY beyond a reasonable doubt of the crime of AGGRAVATED MURDER, as contained in Count 3 of the indictment, (victim Jeffrey E. Schobert) Ohio Revised Code 2903.01(B), a special felony, which offense occurred on April 2, 2013;

   a. AGGRAVATING CIRCUMSTANCES SPECIFICATION ONE TO COUNT THREE, (Criteria for Imposing Death or Imprisonment for a Capital Offense), Ohio Revised Code 2929.04(A)(5), Guilty beyond a reasonable doubt that the defendant engaged in a course of conduct involving the purposeful killing or attempt to kill two or more persons by him;

   b. AGGRAVATING CIRCUMSTANCES SPECIFICATION TWO TO COUNT THREE, (Criteria for Imposing Death or Imprisonment for a Capital Offense), Ohio Revised Code 2929.04(A)(7), guilty beyond a reasonable doubt that the defendant committed the offense while he was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery and was the principal offender in the aggravated murder;

   c. AGGRAVATING CIRCUMSTANCES SPECIFICATION THREE TO COUNT THREE, (Criteria for Imposing Death or Imprisonment for a Capital Offense), Ohio Revised Code 2929.04(A)(7), guilty beyond a reasonable doubt that the defendant committed the offense while he was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated burglary and was the principal offender in the offense.

4. GUILTY beyond a reasonable doubt of the crime of AGGRAVATED MURDER, as contained in Count 4 of the indictment, (victim Margaret J. Schobert), Ohio Revised Code 2903.01(A), a special felony, which offense occurred on April 2, 2013;

   a. AGGRAVATING CIRCUMSTANCES SPECIFICATION ONE TO COUNT FOUR, (Criteria for Imposing Death or Imprisonment for a Capital Offense), Ohio Revised Code 2929.04(A)(5), guilty beyond a reasonable doubt that the defendant engaged in a course of conduct involving the purposeful killing or attempt to kill two or more persons by him;

   b. AGGRAVATING CIRCUMSTANCES SPECIFICATION TWO TO COUNT FOUR, (Criteria for Imposing Death or Imprisonment for a Capital Offense), Ohio Revised Code 2929.04(A)(7), guilty beyond a reasonable doubt that the defendant committed the offense while he was

committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery and committed the aggravated murder with prior calculation and design;

c. AGGRAVATING CIRCUMSTANCES SPECIFICATION THREE TO COUNT FOUR, (Criteria for Imposing Death or Imprisonment for a Capital Offense), Ohio Revised Code 2929.04(A)(7), guilty beyond a reasonable doubt that the defendant committed the offense while he was committing, attempting to commit or fleeing immediately after committing or attempting to commit aggravated burglary and committed the aggravated murder with prior calculation and design.

5. GUILTY beyond a reasonable doubt of the crime of AGGRAVATED MURDER, as contained in Count 5 of the indictment, (victim Margaret J. Schobert), Ohio Revised Code 2903.01(B), a special felony, which offense occurred on April 2, 2013;

a. AGGRAVATING CIRCUMSTANCES SPECIFICATION ONE TO COUNT FIVE, (Criteria for Imposing Death or Imprisonment for a Capital Offense), Ohio Revised Code 2929.04(A)(5), guilty beyond a reasonable doubt that the defendant engaged in a course of conduct involving the purposeful killing or attempt to kill two or more persons by him;

b. AGGRAVATING CIRCUMSTANCES SPECIFICATION TWO TO COUNT FIVE, (Criteria for Imposing Death or Imprisonment for a Capital Offense), Ohio Revised Code 2929.04(A)(7), guilty beyond a reasonable doubt that the defendant committed the offense while he was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery and he was the principal offender in the aggravated murder.

c. AGGRAVATING CIRCUMSTANCES SPECIFICATIONTHREE TO COUNT FIVE, (Criteria for Imposing Death or Imprisonment for a Capital Offense), Ohio Revised Code 2929.04(A)(7), guilty beyond a reasonable doubt that the defendant committed the offense while he was committing, attempting to commit or fleeing immediately after committing or attempting to commit aggravated burglary and that he was the principal offender in the aggravated murder.

6. GUILTY beyond a reasonable doubt of the crime of AGGRAVATED ROBBERY, as contained in Count 6 of the indictment, (victim Jeffrey E. Schobert) Ohio Revised Code 2911.01(A)(1)/(A)(3), a felony of the first (1st) degree, which offense occurred on April 2, 2013;

7. GUILTY beyond a reasonable doubt of the crime of AGGRAVATED ROBBERY, as contained in Count 7 of the indictment, (victim Margaret J. Schobert), Ohio Revised Code 2911.01(A)(1)/(A)(3), a felony of the first (1st) degree, which offense occurred on April 2, 2013;

8. GUILTY beyond a reasonable doubt of the crime of AGGRAVATED BURGLARY, as contained in Count 8 of the indictment, (victims Jeffrey E. and/or Margaret J. Schobert) Ohio Revised Code 2911.11(A)(1)/(A)(2), a felony of the first (1st) degree, which offense occurred on April 2, 2013;

9. GUILTY beyond a reasonable doubt of the crime of GRAND THEFT, as contained in Count 9 of the indictment, Ohio Revised Code 2013.02(A)(1), a felony of the fourth (4th) degree, which offense occurred on April 2, 2013 and finding beyond a reasonable doubt that the property involved was a motor vehicle;

10. GUILTY beyond a reasonable doubt of the crime of PETTY THEFT, as contained in Count 10 of the indictment, Ohio Revised Code 2913.02(A)(1), a misdemeanor of the first (1st) degree, which offense occurred on April 2, 2013;

11. GUILTY beyond a reasonable doubt FELONIOUS ASSAULT, as contained in Count 11 of the indictment, (victim Chelsea Schobert), Ohio Revised Code 2903.11(A)(1)/(A)(2), a felony of the second (2nd) degree, which offense occurred on March 23, 2013.

The Court accepted the verdicts and found the Defendant guilty of said crimes. Those findings are restated as if fully rewritten herein.

On the record and in open court prior to the commencement of the mitigation phase trial, the court ruled as to the defendant's motion seeking merger of particular counts of the indictment for sentencing and the State's oral motion for merger of certain counts. Those rulings were journalized in the June 4, 2015 Order, in which the court indicated that Counts 1, 3, 5, 7, 8 9 and 10 would be merged for purposes of sentencing and that sentencing would proceed on Count 2, 4 and 11. Those rulings are restated as if fully rewritten herein.

The case proceeded to the mitigation phase trial on October 27, 2014. The jury returned a verdict of life imprisonment without the possibility of parole on Count 2, involving the murder of Jeffrey E. Schobert. The jury returned a verdict recommending a death sentence on Count 4, involving the murder of Margaret J. Schobert.

On June 19 and 22, 2015, the court conducted an *Atkins* hearing as requested by the defense. On June 25, 2015 the Court issued its ruling reaffirming the earlier denial of defendant's oral motion to dismiss the capital specifications and confirmed the sentencing hearing set for June 29, 2015.

The Defendant's sentencing hearing was held pursuant to O.R.C. 2929.19. The Defendant was afforded all rights pursuant to Crim. R. 32. The Court has considered the record, oral statements, as well as the

principles and purposes of sentencing under O.R.C. 2929.11, and the seriousness and recidivism factors under O.R.C. 2929.12.

The Court further finds the following pursuant to O.R.C. 2929.13(B): not to sentence the Defendant to the maximum period of incarceration would not adequately protect society from future crimes by the Defendant, and would demean the seriousness of the offense; and the Court further finds the Defendant is not amenable to community control and that prison is consistent with the purposes of O.R.C. 2929.11.

In the court's "Sentencing Opinion Re: Count Four, pursuant to ORC 2929.03(F)" separately filed in this case and incorporated herein by reference, the Court has carefully considered the need for incapacitating the Defendant and from deterring the Defendant from committing future crime, whether or not the Defendant can be rehabilitated and the making of restitution to the victim, the public, or both, under R.C. 2929.11 in deciding the appropriate sentence.

The court further finds, pursuant to Ohio Revised Code 2929.14(C)(4), that consecutive sentences are necessary to punish the offender; that consecutive sentences are not disproportionate to the seriousness of the offender's conduct; to the danger the offender poses to the public; and the court further finds the following:

(a) 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.

Thereupon, the Court inquired of the said Defendant and his counsel if they had anything to say why judgment should not be pronounced against the Defendant; and having nothing but what they had already said, and showing no good and sufficient cause why judgment should not be pronounced:

IT IS THEREFORE ORDERED AND ADJUDGED BY THIS COURT that the Defendant, SHAWN E. FORD, JR., for punishment of the crime of AGGRAVATED MURDER, as to the death of Margaret J. Schobert, as contained in Count 4 of the Indictment, Ohio Revised Code Section 2903.01(B), a special felony, which offense occurred on April 2, 2013, **the sentence is DEATH.**

IT IS FURTHER ORDERED that the Defendant is to be conveyed by the Sheriff of Summit County, Ohio, within Five (5) Days to the LORAIN CORRECTIONAL INSTITUTION at Grafton, Ohio, for immediate transport to the SOUTHERN OHIO CORRECTIONAL FACILITY as Lucasville, Ohio, and that he be there safely kept until the 29th day of December, A.D., 2015, on which day, within an enclosure, inside the walls of said SOUTHERN OHIO CORRECTIONAL FACILITY, prepared for that purpose, according to law, the said Defendant SHAWN E. FORD, JR., shall be administered a lethal injection by the Warden of the said SOUTHERN OHIO CORRECTIONAL FACILITY, or in the case of the Warden's death or inability, or absence, by a Deputy Warden of said Institution; that the said Warden or his duly authorized Deputy, shall administered a lethal injection until the Defendant, SHAWN E. FORD, JR., is **DEAD**.

When imposing a sentence in this case for the non-capital counts, the Defendant was afforded all rights pursuant to Crim. R. 32. The Court has considered the record, oral statements of counsel, the Defendant's statement, as well as the principles and purposes of sentencing under O.R.C. 2929.11, and the seriousness and recidivism factors under O.R.C. 2929.12 with regard to the non-capital offenses.

Thereafter, the Court proceeded with sentencing as to the remaining counts as follows:

1) AGGRAVATED MURDER, as to the death of JEFFREY E. SCHOBERT, as contained in Count 2 of the Indictment, Ohio Revised Code Section 2903.01(B), a special felony, which offense occurred on April 2, 2013; for LIFE IMPRISONMENT **with NO parole eligibility,** which is a mandatory term pursuant to O.R.C. 2929.13(F), 2929.14(D)(3), or 2925.01.
2) FELONIOUS ASSAULT, as contained in Count 11 of the indictment, Ohio Revised Code 2903.11(A)(1)/(A)(2), a felony of the second (2nd) degree which offense occurred on March 23, 2013, for the maximum allowable term of Eight (8) years, which is not a mandatory term pursuant to O.R.C. 2929.13(F), 2929.14(D)(3), or 2925.01.

IT IS FURTHER ORDERED that the sentences imposed in Counts 2, 4 and 11 be served CONSECUTIVELY to and not concurrently with each other and that the sentence imposed in this case be served CONSECUTIVELY to and not concurrently with the sentence imposed in case No. CR 2012 12 3584.

As part of the sentence on Count 11 in this case, the Defendant ***shall*** be supervised on post-release control by the Adult Parole Authority for a ***mandatory*** period of **3** ***years*** if ever released from prison. If the Defendant violates the terms and conditions of post-release control, the Adult Parole Authority may impose a residential sanction that may include a prison term of up to nine months, and the maximum cumulative prison term for all violations shall not exceed one-half of the stated prison term. If the Defendant pleads guilty to, or is

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residential sanction that may include a prison term of up to nine months, and the maximum cumulative prison term for all violations shall not exceed one-half of the stated prison term. If the Defendant pleads guilty to, or is convicted of, a new felony offense while on post-release control, the sentencing court may impose a prison term for the new felony offense as well as an additional consecutive prison term for the post-release control violation of twelve months or whatever time remains on the Defendant's post-release control period, whichever is greater.

The court waives the imposition of any fine and any additional court costs due to defendant's indigence, an appropriate Financial Disclosure/Affidavit of Indigence having been filed in this matter.

The Court informed the Defendant of his right to appeal pursuant to Rule 32A2, Criminal Rules of Procedure, Ohio Supreme Court. The Court appoints Kathleen McGarry and Lynn Ann Maro, Sup. R. 20 certified defense counsel, for purposes of appeal.

Further, the Official Shorthand Reporter shall produce a copy of all proceedings before this Court in the above-captioned case for purposes of appeal. A valid Affidavit of Indigence has been filed with the Clerk of Courts. The cost of the record, transcripts and appellate counsel herein shall be charged to the State of Ohio.

The Court finds that the Defendant is entitled to 816 days of jail time credit toward the sentence imposed herein. The Court is not responsible for calculating time served in the Summit County Jail after the date of sentencing. Any post-sentence time must be calculated by the Ohio Department of Rehabilitation and Corrections.

TOM PARKER, Judge
Court of Common Pleas
Summit County, Ohio

/mjl
cc: Asst. Prosecutor Brad Gessner/Brian Loprinzi
Attorney Donald R. Hicks
Attorney Jon Sinn
Court Operations/Criminal Division
Registrar's Office
Warrants/Court Convey
Kristie Gowens, Official Court Reporter
Court Executive Office
Bureau of Sentence Computation & Record Management

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IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

THE STATE OF OHIO **CASE NO.** CR 2013 04 1008A

vs.

SHAWN E. FORD, JR.

JOURNAL ENTRY
(Resolving Intellectual Disability Claim of Defendant)

I. INTRODUCTION

Defendant was charged in an eleven count indictment with five counts of aggravated murder with attached capital specifications. On October 22, 2014, a jury found defendant guilty of all the aggravated murder counts and of certain capital specifications attached to each count. The case proceeded to a sentencing phase trial on October 27, 2014. After defendant rested in his presentation of evidence in the mitigation phase trial, the defense moved to dismiss the capital specifications on the ground that defendant was intellectually disabled and, therefore, constitutionally ineligible for the death penalty. Defendant based his motion on the testimony given at the mitigation phase trial by Dr. Joy Stankowski, who opined that defendant's intellectual functioning was impaired. Dr. Stankowski supported that opinion by referencing historical and more recent IQ testing performed on the defendant and by pointing out that defendant had been described as learning disabled.

Initially, the court overruled the motion on the ground that defendant had failed to offer evidence that he was intellectually disabled. (Mitig. Hrg. Tr. pp. 624, 628-631.) However, the court also indicated a willingness to reconsider the issue given the mandates of *Atkins v.*

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Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) and *State v. Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625, 779 N.E.2d 1011, if the issue was properly raised.

The jury returned a death penalty verdict on Count 4 on October 31, 2014. Defendant filed a motion on November 4, 2104 entitled "Motion Requesting Atkins Hearing, Additional Expert Funding and Extension of Time to Conduct Hearing." By its order dated December 19, 2014 the court granted the request for an *Atkins* hearing, appointed an expert to evaluate defendant regarding the issue of intellectual disability, and denied the balance of the defense motion.

Subsequently, after reviewing extensive case law from the U.S. Supreme Court, the Ohio Supreme Court and other courts, the court *sua sponte* reconsidered the denial of the defense request for an expert in the December 19 order. The court summoned counsel for an in-chambers conference in February 2015 and advised the defense and state that each side would be permitted to engage an expert to address the issue of defendant's alleged intellectual disability.

The court conducted a status conference on March 3, 2015 at which the defense stated that it had not yet been able to retain an expert. The state advised that it had retained an expert and that the person was in the process of reviewing pertinent records in order to be able to form and express an expert opinion on that topic.

In an order dated March 16, 2015 the court recounted some of the foregoing history, and also directed the defense to retain an expert and engage in the required intellectual disability analysis without further delay. In a March 24, 2015 filing, the defense sought authorization to retain James J. Karpawich, Ph.D., to serve as the defense expert on intellectual disability and to authorize the appropriation of funds for his professional fees. The court issued an order on March 26, 2015 granting the defense motion to retain Dr. Karpawich and authorizing an initial

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expenditure of up to $5,000 for professional fees. On June 11, 2015 the court signed an order appropriating an additional sum of up to $5,000 so that Dr. Karpawich could complete his work.

After conferring with counsel by court orders and status reports, the court scheduled the matter for an *Atkins* hearing, reserving the court dates of June 18, 19, 22 and 23, 2015 as necessary. The state and defense were directed to file lists of potential witnesses who might be called at the *Atkins* hearing. Each side filed its list on June 5, 2015. The state filed a "corrected" list on June 8, 2015. Defendant amended his witness list on June 17, 2015. Because defendant's amended witness list contained the names of only two potential witnesses, the court determined to cancel the June 18, 2015 hearing date and begin the hearing on June 19, 2015.

The *Atkins* hearing has now been conducted. The court received evidence on June 19 and 22, 2015. Dr. James Karpawich testified as an expert on behalf of Mr. Ford; and Sylvia O'Bradovich, Psy.D. testified as an expert on behalf of the state. Katie Connell, Ph.D., testified as the court-appointed expert. The defendant and the state elected only to call their respective expert witnesses, though each had filed witness lists containing various other persons who could have been called as lay witnesses. The court received Defense Exhibits A-1 (the curriculum vitae of Dr. Karpawich) and A-2 (the expert report of Doctor Karpawich dated June 12, 2015). The court received State Exhibits SA-1 (the June 9, 2015 report of Dr. O'Bradovich) and SA-2 (the curriculum vitae of Dr. O'Bradovich). The court also received Court Exhibits CA-1 the curriculum vitae of Dr. Connell and CA-2, Dr. Connell's report dated April 26, 2015. Finally, the court received court exhibits CA-3 and CA-4, two boxes containing the file materials assembled by Dr. Connell and reviewed by her in the formation of her opinions. The court ordered Dr. Connell to provide the records to counsel for the defense and the state so that each of the three experts would make their analysis based on the same materials. At the conclusion of

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the hearing, Dr. O'Bradovich agreed to furnish test papers pertaining to the scoring and evaluation of Mr. Ford through the Vineland Adaptive Behavior Scales – Second Edition ("Vineland II"). Those documents were furnished to the court on June 24, 2015 and are included in the record as Court Exhibit CA-6.

There were some differences in what the experts had available at the time they conducted their analyses. Dr. Karpawich testified that the defendant was unwilling to cooperate in any further meetings with psychologists; on one occasion, he declined to leave his cell at the county jail in order to meet with Dr. Karpawich, and on the other occasion while he did leave his cell in order to meet with Dr. Karpawich and one of the defense attorneys, he declined to cooperate with a psychological assessment. Both Dr. O'Bradovich and Dr. Connell were able to meet with and interview Mr. Ford. Dr. O'Bradovich actually conducted IQ and adaptive functioning testing; neither Dr. Connell nor Dr. Karpawich did so.

The court, having received all of the foregoing evidence, and considering any other evidence pertinent to the issue already in the trial record or which was already in the record as a result of the competency determination or in regard to the initial plea of not guilty by reason of insanity, is prepared to rule on the issue presented.

II. APPLICABLE LEGAL STANDARDS

The United State Supreme Court decided in *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002) that the execution of the intellectually disabled violates the cruel and unusual punishment clause of the Eight Amendment to the United States Constitution.[1]

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[1] Although Ohio statutes continue to refer to persons suffering from intellectual disabilities as "mentally retarded," this court will substitute the term "intellectually disabled" for "mentally retarded" to comport with current federal statutory law and with the practice adopted by the United States Supreme Court in *Hall v. Florida*, ___ U.S. ___, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), in which it was noted:

> Previous opinions of this Court have employed the term "mental retardation." This opinion uses the term "intellectual disability" to describe the identical phenomenon. See Rosa's Law, *124 Stat. 2643* (changing entries in the U.S. Code from "mental retardation" to "intellectual disability")....

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In *State v. Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625, the Ohio Supreme Court established the framework for dealing with intellectual disability issues in capital cases in light of the ruling in *Atkins*. *Lott* ruled that there is a rebuttable presumption that a defendant is not intellectually disabled if his or her IQ is above 70. 2002-Ohio-6625 at ¶ 12. The court also concluded that the issue of whether a defendant is intellectually disabled is a matter of law for determination by the court. Id. at ¶¶ 17-18. *Lott* also concluded that defendant bears the burden of proving intellectual disability by a preponderance of the evidence. Id. at ¶ 21.

Although *Atkins* barred the execution of the intellectually disabled, it did not establish procedures for determining whether an individual was intellectually disabled for the purpose of being excluded from execution. Id. at ¶ 10. Instead, the Supreme Court left it to the states "to develop 'appropriate ways to enforce the constitutional restrictions' on executing the [intellectually disabled] . . . ." Id.

In the absence of an Ohio statutory framework to determine intellectual disability, the Ohio Supreme Court held:

> Ohio courts should observe the following substantive standards and procedural guidelines in determining whether convicted defendants facing the death penalty are [intellectually disabled]. Standards for [intellectual disability] set forth in this opinion, as well as the requirement that the defendant raise and prove [intellectual disability], shall also apply to defense claims of [intellectual disability] raised at trial.
>
> Clinical definitions of [intellectual disability], cited with approval in *Atkins*, provide a standard for evaluating an individual's claim of [intellectual disability]. 536 U.S. 304, 308, fn. 3, citing definitions from the American Association of Mental Retardation and the American Psychiatric Association. These definitions require: (1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care and self direction, and (3) onset before the age of 18. Most state statutes prohibiting execution of the [intellectually disabled] require evidence that the individual has an IQ of 70 or below. [Citations omitted]. While IQ tests are one of the many factors that need to be considered, they alone are not sufficient to make a final determination on this issue. [Citation omitted]. We hold that there is a rebuttable

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> presumption that a defendant is not [intellectually disabled] if his or her IQ is above 70.

Id. at ¶¶ 11-12. The Ohio standard for determining whether a convicted defendant is intellectually disabled continues to be found in the holdings of *Lott*. *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 173.

In *Hall v. Florida*, ___ U.S. ___, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), the United States Supreme Court concluded that state statutes that only considered IQ test scores above a threshold figure, did not require consideration of the statistical underpinnings of such test scores, and did not require consideration of evidence of deficits in adaptive functioning were inadequate to protect the *Eighth Amendment* rights of potentially intellectually disabled defendants facing capital punishment. The court concluded:

> This Court agrees with the medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits.

134 S.Ct. at 2001. Given the Ohio standards articulated in *Lott* – requiring the court to consider adaptive skills and age of onset as well as other evidence bearing upon intellectual functioning – it is apparent that Ohio's rendition of the application of *Atkins* still satisfies the requirements recently enunciated by the United States Supreme Court in *Hall v. Florida*.

The issue for this court's determination is whether the preponderance of the evidence demonstrates that Defendant Ford had (1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, and (3) onset of these conditions before the age of 18. "The determination of whether capital defendant is, by the *Lott* court's definition, [intellectually disabled] presents a factual issue for the trial court. And an appellate court may

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not reverse the trial court's decision if it was supported by reliable, credible evidence." *State v. Gumm*, 169 Ohio App.3d 650, 2006-Ohio-6451, 864 N.E.2d 133.

The court's analysis of the evidence and conclusions are set forth below.

III. EVIDENCE PRESENTED

A. Historical and Recent IQ Test Data

The reports and testimony of the experts all reflect the IQ testing done on Mr. Ford both in his developmental years and as a result of the proceedings in this case:

Test Administered	Date	Age	Results
Kaufman Assessment Battery for Children (K-ABC)	2001	6 or 7	Sequential Processing = 81 Simultaneous Processing = 89 **Mental Processing Composite = 78 (±7)**[2]
Wechsler Intelligence Scale for Children, III (WISC-III)	2003	9	Verbal IQ = 63 Performance IQ = 66 **Full Scale IQ = 62**
Kaufman Brief Intelligence Test, Second Edition (K-Bit2)	2006	12	Verbal SS = 75 Nonverbal SS = 81 **IQ Composite = 75 (90% confidence interval range = 69-83)**[3]
Wechsler Abbreviated Scale of Intelligence (WASI)	2013	18	Verbal IQ = 71 Performance IQ = 62 **Full IQ = 64**
Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV)	2013	19	Verbal Comprehension = 83 Perceptual Reasoning = 77 Working Memory = 86/92[4] Processing Speed = 94 **Full Scale IQ = 80/82[5] (80; 95% confidence interval range = 76-84)**[6]
Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV) (administered as a part of study by Dr. Sylvia O'Bradovich)	2015	20	Verbal Comprehension = 74 Perceptual Reasoning = 75 Working Memory = 92 Processing Speed = 97 **Full Scale IQ = 79 (95% confidence interval range = 75-83)**

[2] Karpawich Report, p. 4 (Dr. Karpawich testified at the hearing that the standard error of measurement range for this test was ±7; he acknowledged his report had a typo where it indicated the range was "+7").
[3] Karpawich Report, p. 4.
[4] Dr. Connell noted this score should have been 92 if the test had been correctly scored; Connell Report, p. 31
[5] Dr. Connell noted this score should have been 82 (confidence interval range = 78-86) if the test had been correctly scored; Id.
[6] Karpawich Report, p. 11.

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B. Expert Witness Opinions

1. Dr. James J. Karpawich

Defendant's expert, Dr. James J. Karpawich, was recognized by the court to have the necessary qualifications, training and experience to be able to offer expert opinion testimony on the issues of clinical psychology and the determination of intellectual disability. Upon review of the historical and more recent IQ testing performed on Mr. Ford, defendant's expert, Dr. Karpawich, summarized his findings in his report:

> Mr. Ford has never been given the diagnosis of mental retardation/intellectual disability. Although his test results have been below average, most of the scores have been in the borderline range. On two occasions, his IQ was lower, but both examiners noted that these low scores underestimated his actual functioning. Although he was described as having a learning disability since he entered school, school officials never diagnosed him with mental retardation (intellectual disability). Although he has shown long-standing deficits with his social behavior and social adjustment, his other adaptive behaviors are in the average range or above. He is able to function independently, and his self-care and self-direction skills are intact. Therefore, Shawn Ford is a 20-year-old individual who has had intellectual limitations since early childhood. He was consistently diagnosed with a "specific learning disability" in school. All his IQ test results placed his intellectual functioning below average. However, he was not given the diagnosis of mental retardation/intellectual disability prior to the age of 18.
>
> * * *
>
> Based upon the available information, it is my opinion, with reasonable scientific certainty, that there is insufficient information to conclude that the defendant fulfills the criteria for mental retardation/intellectual disability.

Karpawich Report at 18-19. Dr. Karpawich testified that Mr. Ford suffered from speech difficulties from childhood, which affected his ability to communicate. He noted that the defendant's difficulty in communication caused him to express himself physically because he was limited in his ability to do so verbally. Dr. Karpawich also testified that Mr. Ford had limits in his ability to think abstractly. This caused him to have difficulty in comprehension, and in learning from his experiences.

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Dr. Karpawich noted that although all of Mr. Ford's IQ tests generated below average scores,[7] his tests had never placed him in the intellectually disabled range. He also acknowledged that although Mr. Ford had been evaluated many times, no evaluator had ever diagnosed him as being intellectually disabled.

Dr. Karpawich testified that Mr. Ford's mother completed the Adaptive Behavior Scale – Residential and Community: 2nd Edition (ABS-RC:2).[8] This instrument was administered to Kelly Ford in part because of Mr. Ford's unwillingness to meet with the evaluator. Dr. Karpawich testified that Mr. Ford did not have problems in his ability to care for himself, his ability to feed himself, or his ability to dress. He noted, however, that he's always had "significant issues" in the area of social behavior. He indicated this area includes things like "being impulsive, not assuming responsibility, poor social judgment, not considering long-term consequences of his actions, reacting poorly when he becomes frustrated, not able to cope with stress, disrupting other people, acting out in the community. All these things have been increasingly evident over the years with Shawn, and these would all be considered adaptive behaviors."

Dr. Karpawich testified: "All of [Mr. Ford's] IQ scores are below average. He does have problems with his adaptive behavior, and these have existed before he was the age of 18." He also testified: "it's my opinion, with reasonable scientific certainty that Shawn does not meet the criteria for mental retardation or intellectual disability, and that's based on the records that I reviewed."

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[7] The testimony of Dr. Karpawich on this point is significant. He noted that with an IQ of 75 and taking into consideration the standard error of measurement, at a 90% confidence interval, the actual IQ of an individual would be between 69 and 83. He acknowledged that the IQ, therefore, would be within a range and not simply the IQ score itself.

[8] Karpawich Report, p. 14

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2. Dr. Sylvia O'Bradovich

Sylvia O'Bradovich, Psy.D., testified on June 22, 2015. Based upon her description of her licensure, education, training and experience, the court recognized her to be qualified to render expert opinion testimony on issues related to clinical psychology and the evaluation of intellectual disability. In doing so, the court recognizes that Dr. O'Bradovich's experience is limited compared to the experience of Dr. Karpawich and Dr. Connell. Nevertheless, she has the amount of experience required by Ohio Evid. R. 702: her testimony relates to matters beyond the knowledge or experience possessed by laypersons; she is qualified as an expert by specialized knowledge, skill, experience, training or education regarding the subject matter of her testimony; and her testimony is based upon reliable scientific, technical, or other specialized information. To the extent her testimony reports the result of IQ and adaptive functioning testing, the court finds the testimony to be reliable because the theories upon which the tests were based have been objectively verified and are validly derived from widely accepted knowledge, facts, or principles, and the design of the tests reliably implement the theory. Indeed, each of the other experts who have evaluated Mr. Ford utilized similar testing, when they determined to conduct testing. Finally, the testing done by Dr. O'Bradovich was conducted in a way that yielded an accurate result; her test results were consistent with the results generated by every other examiner.[9]

Dr. O'Bradovich's report summarizes her opinion as follows:

> With regard to the specific referral in question, it is our opinion, based on reasonable scientific certainty, that Mr. Ford does not have an Intellectual Disability, formally known as Mental Retardation. Indeed, of the available historical records, Mr. Ford has never been diagnosed with an Intellectual

[9] The court found Dr. O'Bradovich's decision not to include the quantitative results of her intelligence and adaptive functioning tests in her report to be odd. She indicated that inclusion of quantitative data is against the policy of her employer, Summit Psychological Associates, Inc.; and she testified that she opposes including such data in reports because of her expressed fear that people will seize upon the data and not examine the underlying issues the data represents. In the context of the intellectual disability evaluation the court must make, and given that every other expert included quantitative results in their descriptions of the evaluations of Mr. Ford, the court finds Dr. O'Bradovich is position regarding the inclusion of data unwarranted and unhelpful.

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> Disability or Mental Retardation and he has been assessed and treated by various professional since 2001 in multiple settings, including academic, legal, and treatment settings. Although he previously obtained intelligence testing scores that were suggestive of intellectual deficits, previous evaluators have opined that the resulting test scores underestimated Mr. Ford's actual intelligence. Furthermore, previous adaptive functioning testing did not reveal significant adaptive functioning deficits nor suggest the presence of an Intellectual Disability. Mr. Ford received an IEP throughout his academic history, but the qualifying disabilities were limited to Specific Learning Disability and Speech/Language Impairment. During the course of the current evaluation, Mr. Ford did not demonstrate any indication of having an Intellectual Disability or adaptive functioning deficits. Indeed, intelligence testing and an adaptive functioning assessment did not support the presence of Intellectual Disability. In addition, during the evaluation, interviews, Mr. Ford displayed adequate verbal comprehension, communication, memory skills and social skills. Furthermore, the problematic patterns that were exhibited by Mr. Ford were limited to his deeply ingrained antisocial personality traits. In Summary, it is our opinion, based on reasonable scientific certainty, that Mr. Ford does not have an Intellectual Disability as outlined in *Atkins v. Virginia* and *State v. Lott.*

Dr. O'Bradovich's testimony supplied the quantitative data resulting from her intelligence testing.[10] She testified that Mr. Ford's overall IQ score was 79 with a 95% confidence interval that his actual score would be in a range between 75 and 83. His Verbal Comprehension score was 74 with a 95% confidence interval that the actual score would be in a range between 69 and 81. Mr. Ford's Perceptual Reasoning score was 75, with a 95% confidence interval that the actual score would be in a range between 70 and 82. His Working Memory score was 92, with a 95% confidence interval that the actual score would be in a range between 86 and 99. His Processing Speed score was 97, with a 95% confidence interval that the actual score would be in a range between 89 and 106. She testified that Mr. Ford's intellectual functioning, based upon testing, placed him in the low average range; and she acknowledged that Mr. Ford's IQ has always been below average.

Dr. O'Bradovich also supplied the quantitative data regarding adaptive functioning testing performed utilizing the Vineland II instrument. She testified that his Communication

[10] That data has been included in the chart on page 7, *supra.*

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score was 91, with a 95% confidence interval that his actual score would be in a range between 84 and 98. She indicated that would place him in the "Adequate" range. Dr. O'Bradovich testified that Mr. Ford's Daily Living score was 81, with a 95% confidence interval that his actual score would be in a range between 71 and 91. She stated that this would place him in the "Moderately Low" range. Dr. O'Bradovich testified that Mr. Ford's Socialization score was 101, with a 95% confidence interval that his actual score would be in a range between 92 and 110. She stated this would place him in the "Adequate" range. Finally, Dr. O'Bradovich testified that Mr. Ford's Overall Adaptive Functioning score was 87, with a 95% confidence interval that his actual score would be in a range between 81 and 93. She stated this would place him in the "Adequate" range. Dr. O'Bradovich testified that "Low" is the range in adaptive functioning that would place someone into a classification of Intellectually Disabled. She testified that Mr. Ford's adaptive functioning test results were all above that range.

Upon cross examination, Dr. O'Bradovich acknowledged that a male mind does not reach full maturity until the early 20s. She also stated that, without the input of a neurology expert, she cannot opine where Mr. Ford is physiologically in terms of brain development either now or at the time of the offenses.

3. Dr. Katie E. Connell

Dr. Katie Connell was appointed as an expert by the court. She testified that she is one of only five hundred board-certified forensic psychologists in the United States and has performed analytical work on more than five hundred prior cases. She has been recognized as an expert witness in the courts of Ohio. Based upon her qualifications, education, licensure, training, and prior experience, the court recognized that she had the expertise necessary to offer expert opinion testimony on the subjects of clinical psychology and the determination of intellectual disability.

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Dr. Connell authored a forty-one page report that exhaustively described the history of testing and evaluations conducted with respect to the defendant. Dr. Connell summarized her evaluation of the prior analyses of Mr. Ford as follows: "A review of all prior records by multiple professionals and multiple schools, who had the opportunity to know Mr. Ford over several years in several settings, provides compelling evidence that his difficulties and limitations were best explained by a specific learning disability. None of these professionals found evidence to support a diagnosis of intellectual disability, which is consistent with my current opinions."

Dr. Connell's report expressed the following summarized opinions:

> **Significantly Subaverage Intellectual Functioning:** In sum, it is my professional opinion that there is no reliable, valid or compelling data to support Mr. Ford has intellectual impairments. Of the prior tests that were deemed to be reliable, his results included a K-ABC Mental Composite score of 78, a K-BIT2 score of 75 and a WAIS-IV corrected score of 82. All of these scores fall in the borderline [to] low average range of intellectual functioning and are not consistent with a diagnosis of intellectual disability.
>
> **Deficits in Adaptive Behavior:** In sum, it is my professional opinion that there is not compelling subjective or objective evidence to support Mr. Ford has deficits in adaptive behavior. Although there are some early references in school records to deficits in adaptive behavior, these are always [attributed] to a number of other factors, such as his speech difficulties, motivation difficulties, and behavior, and not [attributed] to stemming from intellectual deficits. Furthermore, deficits in adaptive behavior are not supported by interviews with family members, assessments by prior professionals, my own clinical interview with Mr. Ford or results from the Vineland-II. Limitations in functioning he does have are directly related to his learning disability.
>
> **Onset before age 18:** because of Mr. Ford's young age, there was a plethora of information to assess his intellectual and adaptive behavior in the developmental period. Such assessment does not support deficits in either domain were present prior to age 18.
>
> **SUMMARY OPINION:** Overall, as summarized thoroughly above, after considering all available information, it is my professional opinion, with a reasonable degree of psychological certainty, that Mr. Ford does not meet diagnostic criteria for an intellectual disability, formally mental retardation.

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Dr. Connell's testimony at the hearing was consistent with the findings expressed in her report. She testified that she uses the analytical standards expressed in the DSM-5, issued by the American Psychiatric Association and the standards for determining intellectual disability established by the American Association on Intellectual and Developmental Disabilities. She also acknowledged that the three-pronged standards for determining intellectual disability recognized by APA and AAIDD are consistent with the standards established in *Atkins* and *Lott*. Based upon an application of those standards, she acknowledged that Mr. Ford's intelligence has always been considered to be in the Low Average range.

IV. ANALYSIS AND FINDINGS

The issue of assessing intellectual disability is challenging for any court. In *State v. Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625, 779 N.E.2d 1011, the Ohio Supreme Court set forth a three part test for examining the issue. In order to be declared intellectually disabled and, therefore, ineligible for capital punishment, a defendant must demonstrate by a preponderance of the evidence that he has had (1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care and self direction, and (3) onset before the age of 18. Id. at ¶12.

> In considering an *Atkins* claim, the trial court shall conduct its own de novo review of the evidence. In determining whether the defendant is [intellectually disabled]. The trial court should rely on professional evaluations of [the defendant's] mental status, and consider expert testimony, appointing experts, if necessary, in deciding this matter. The trial court shall make written findings and set forth its rationale for finding the defendant [intellectually disabled or not intellectually disabled].

Id. at ¶18.

Defendant Ford has been examined eight times since the inception of this case. First, he was evaluated for his competency to stand trial by psychologists Dr. Robert Byrnes and Dr.

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Arcangela Wood. Next, he was examined by Drs. Byrnes and Wood to determine whether he was legally sane at the time of the commission of the offenses. The competency and sanity evaluations of those individuals are contained within Court Exhibits CA-3 and CA-4. Later, he consulted with Dr. Joy Stankowski, the defense mitigation expert. Finally, he was examined or his case was reviewed by Drs. Connell, O'Bradovich and Karpawich as a part of the *Atkins* proceedings.

While the focus of the competency and sanity evaluations was not to determine whether Mr. Ford was intellectually disabled, each examiner noted that Mr. Ford had never been diagnosed with intellectual disability at any point in his life. Dr. Byrnes' August 12, 2013 sanity evaluation report contained the following statement of his opinion:

> Based on the findings of the history and examination, it is my opinion that Mr. Ford did not meet DSM-IV criteria for [intellectual disability] at the time of the offenses. He was not diagnosed with [intellectual disability] before age 18. The history did not support the diagnosis of [intellectual disability]. Current testing did not support the diagnosis of [intellectual disability]. In my opinion, the available evidence does not support the conclusion that Mr. Ford had a mental defect, at the time of the alleged offenses, which would impair his ability to understand the wrongfulness of the alleged acts in this case.

Id. at 11.

In addition, during the mitigation trial, Dr. Wood testified[11] that she did not conduct an evaluation of Mr. Ford's adaptive functioning capabilities because her testing had determined his IQ to be 80, above the threshold that she considered to be the minimum for an intellectual disability determination, and she saw nothing to suggest he had deficits in his adaptive functioning.[12]

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[11] Mitig. Hrg. Tr. at 849-852.

[12] As noted above, Dr. Wood made a scoring error in calculating Mr. Ford's test results. According to Dr. Connell, the correct overall IQ score should have been 82.

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As noted above, Dr. Joy Stankowski opined at the mitigation trial that Mr. Ford has impaired intellectual functioning. She noted that there is evidence from both school records and testing of Mr. Ford's intellectual functioning impairment and learning disabilities. She noted further that lower intellectual functioning can interfere with a person's ability to weigh consequences and make rational and organized decisions. In expressing that opinion, Dr. Stankowski made reference to Mr. Ford's low IQ, "ranging from Borderline (in the 60s) to Low Average (80)."[13] Upon cross examination, Dr. Stankowski acknowledged that there were reliability concerns respecting Mr. Ford's two IQ scores in the 60s. She did not express the opinion that he was intellectually disabled.

All of the evidence adduced at the *Atkins* hearing was consistent. None of the three experts was of the opinion that Mr. Ford has ever been intellectually disabled within the standards recognized by the American Psychiatric Association, the American Association on Intellectual and Developmental Disabilities, or *State v. Lott.*

Defendant's cross examination of the three testifying expert witnesses at the hearing consistently pointed out that Mr. Ford's IQ test results were subaverage. The essence of the cross examination was to establish Mr. Ford's test results placed his IQ in a "subaverage" range. Each of the three testifying witnesses agreed that his tests were indeed below "Average."

What becomes apparent in evaluating defendant's implicit position is that there is a difference between scoring "below average," "subaverage," or "borderline" on IQ testing and being characterized as having "significantly subaverage intellectual functioning." Something more than a lay interpretation of the terms "subaverage" or "below average" is required. That is why the Supreme Court in *Lott* required the trial court to consider professional examinations and expert testimony.

[13] Defendant's Exhibit G, at 7-8.

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An important issue in the court's evaluation is how to interpret the IQ scores of 62 and 64 resulting from the 2003 and first 2013 studies. In both instances, the evaluators raised questions about the results. In 2003, the evaluator wrote, "[T[hese results may underestimate Mr. Ford's ability because of his "poor attention and impulsive behavior during testing."[14] In 2013, the evaluator, Robert Byrnes, Ph.D., wrote, "[T]hese results [Full IQ = 64] probably underestimate Mr. Ford's intellectual ability because of variable attention and impulsive behavior during the testing."[15] None of the experts involved in the current proceedings[16] has expressed in his or her report that the 62 and 64 IQ tests should be considered reliable measures of the defendant's intellectual functioning. The court concurs with Dr. Connell's assessment that the IQ tests that resulted in scores of 62 and 64 were not reliable indicators of the defendant's intellectual functioning.[17] Whatever other value those studies may have had when conducted, they did not lead either evaluator at the time – or anyone since – to conclude that Mr. Ford was intellectually disabled.

All three experts who specifically evaluated defendant's adaptive skills and functioning testified that while Mr. Ford had limits in certain areas of adaptive skills, he could not be characterized as having "significant limitations in two or more adaptive skills."

Based on the evidence contained in the trial record, in the pretrial proceedings, and introduced at the *Atkins* hearing, the court finds that defendant has not met his burden of proving that he had significantly subaverage intellectual functioning, or significant limitations in two or more adaptive skills, at any time before the age of 18 or thereafter.

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[14] Karpawich Report, p. 4; Connell Report, p. 30; O'Bradovich Report, p. 17.
[15] Karpawich Report, p. 9; Connell Report, p. 30; O'Bradovich Report, p. 18.
[16] The court notes that Doctor Joy Stankowski included the 62 and 64 IQ tests in her description of Mr. Ford's IQ range in her report and her direct examination at the mitigation trial without acknowledging the issues concerning reliability. (Defendant's Mitigation Hearing Exhibit G, p. 8; Mitig. Hrg. Tr., p. 495-496.) She acknowledged, however, the reliability issue upon cross examination (Mitig. Hrg. Tr., p. 566)
[17] Connell Report, p. 31.

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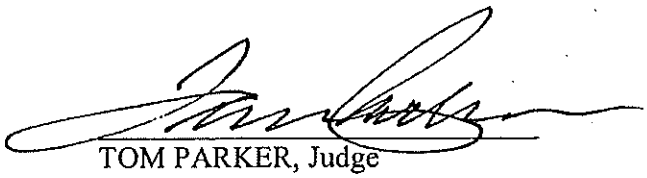
V. CONCLUSION

Based upon the findings above, the court reaffirms its earlier denial of defendant's oral motion to dismiss the capital specifications. The court shall proceed with defendant's sentencing hearing on June 29, 2015 at 10:00 A.M.

APPROVED:
June 25, 2015



TOM PARKER, Judge
Court of Common Pleas
Summit County, Ohio

/mjl
cc: Asst. Prosecutors Brad Gessner/Brian LoPrinzi
Attorney Donald R. Hicks
Attorney Jon Sinn
Psycho Diagnostic Clinic

Appendix

United States Constitution

Article II, Section 2.

The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

Article VI

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

Amendment V

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

Amendment VI

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

Amendment VIII

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

Amendment XIV

Section 1.

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

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.

Ohio Constitution

OHIO CONST., art. I, §1: 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.

OHIO CONST., art. I, §2: 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.

OHIO CONST., art. I, §5: 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.

OHIO CONST., art. I, §9: 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 determineat 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.

OHIO CONST., art. I, §10: 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.

OHIO CONST., art. I, §16: All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

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

Ohio Revised Code

OHIO REV. CODE §2313.17

(A) Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to the person's qualifications. A person is qualified to serve as a juror if the person is eighteen years of age or older, is a resident of the county, and is an elector or would be an elector if the person were registered to vote, regardless of whether the person actually is registered to vote.

(B) The following are good causes for challenge to any person called as a juror:

(1) That the person has been convicted of a crime that by law renders the person disqualified to serve on a jury;

(2) That the person has an interest in the cause;

(3) That the person has an action pending between the person and either party;

(4) That the person formerly was a juror in the same cause;

(5) That the person is the employer, the employee, or the spouse, parent, son, or daughter of the employer or employee, counselor, agent, steward, or attorney of either party;

(6) That the person is subpoenaed in good faith as a witness in the cause;

(7) That the person is akin by consanguinity or affinity within the fourth degree to either party or to the attorney of either party;

(8) That the person or the person's spouse, parent, son, or daughter is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against any such party to another such action;

(9) That the person discloses by the person's answers that the person cannot be a fair and impartial juror or will not follow the law as given to the person by the court.

(C) Each challenge listed in division (B) of this section shall be considered as a principal challenge, and its validity tried by the court.

(D) In addition to the causes listed in division (B) of this section, any petit juror may be challenged on suspicion of prejudice against or partiality for either party, or for want of a competent knowledge of the English language, or other cause that may render the juror at the time an unsuitable juror. The validity of the challenge shall be determined by the court and be sustained if the court has any doubt as to the juror's being entirely unbiased.

OHIO REV. CODE §2901.04

(A) Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

(B) Rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice.

(C) Any provision of a section of the Revised Code that refers to a previous conviction of or plea of guilty to a violation of a section of the Revised Code or of a division of a section of the Revised Code shall be construed to also refer to a previous conviction of or plea of guilty to a substantially equivalent offense under an existing or former law of this state, another state, or the United States or under an existing or former municipal ordinance.

(D) Any provision of the Revised Code that refers to a section, or to a division of a section, of the Revised Code that defines or specifies a criminal offense shall be construed to also refer to an existing or former law of this state, another state, or the United States, to an existing or former municipal ordinance, or to an existing or former division of any such existing or former law or ordinance that defines or specifies, or that defined or specified, a substantially equivalent offense.

OHIO REV. CODE §2903.11

(A) No person shall knowingly do either of the following:

(1) Cause serious physical harm to another or to another's unborn;

(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly do any of the following:

(1) Engage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct;

(2) Engage in sexual conduct with a person whom the offender knows or has reasonable cause to believe lacks the mental capacity to appreciate the significance of the knowledge that the offender has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome;

(3) Engage in sexual conduct with a person under eighteen years of age who is not the spouse of the offender.

(C) The prosecution of a person under this section does not preclude prosecution of that person under section 2907.02 of the Revised Code.

(D) (1) (a) Whoever violates this section is guilty of felonious assault. Except as otherwise provided in this division or division (D)(1)(b) of this section, felonious assault is a felony of the second degree. If the victim of a violation of division (A) of this section is a peace officer or an investigator of the bureau of criminal identification and investigation, felonious assault is a felony of the first degree.

(b) Regardless of whether the felonious assault is a felony of the first or second degree under division (D)(1)(a) of this section, if the offender also is convicted of or pleads guilty to a specification as described in section 2941.1423 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, except as otherwise provided in this division or unless a longer prison term is required under any other provision of law, the court shall sentence the offender to a mandatory prison term as provided in division (B)(8) of section 2929.14 of the Revised Code. If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation, and if the victim suffered serious physical harm as a result of the commission of the offense, felonious assault is a felony of the first degree, and the court, pursuant to division (F) of section 2929.13 of the Revised Code, shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(2) In addition to any other sanctions imposed pursuant to division (D)(1) of this section for felonious assault committed in violation of division (A)(2) of this section, if the deadly weapon used in the commission of the violation is a motor vehicle, 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.

(E) 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) "Motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

(3) "Peace officer" has the same meaning as in section 2935.01 of the Revised Code.

(4) "Sexual conduct" has the same meaning as in section 2907.01 of the Revised Code, except that, as used in this section, it does not include the insertion of an instrument, apparatus, or other object that is not a part of the body into the vaginal or anal opening of another, unless the offender knew at the time of the insertion that the instrument, apparatus, or other object carried the offender's bodily fluid.

(5) "Investigator of the bureau of criminal identification and investigation" means an investigator of the bureau of criminal identification and investigation who is commissioned by the superintendent of the bureau as a special agent for the purpose of assisting law enforcement officers or providing emergency assistance to peace officers pursuant to authority granted under section 109.541 of the Revised Code.

(6) "Investigator" has the same meaning as in section 109.541 of the Revised Code.

OHIO REV. CODE §2909.01
Definitions

(A) To "create a substantial risk of serious physical harm to any person" includes the creation of a substantial risk of serious physical harm to any emergency personnel.

(B) "Emergency personnel" means any of the following persons:

(1) A peace officer, as defined in section 2935.01 of the Revised Code;

(2) A member of a fire department or other firefighting agency of a municipal corporation, township, township fire district, joint fire district, other political subdivision, or combination of political subdivisions;

(3) A member of a private fire company, as defined in section 9.60 of the Revised Code, or a volunteer firefighter;

(4) A member of a joint ambulance district or joint emergency medical services district;

(5) An emergency medical technician-basic, emergency medical technician-intermediate, emergency medical technician-paramedic, ambulance operator, or other member of an emergency medical service that is owned or operated by a political subdivision or a private entity;

(6) The state fire marshal, the chief deputy state fire marshal, or an assistant state fire marshal;

(7) A fire prevention officer of a political subdivision or an arson, fire, or similar investigator of a political subdivision.

(C) "Occupied structure" means any house, building, outbuilding, watercraft, aircraft, railroad car, truck, trailer, tent, or other structure, vehicle, or shelter, or any portion thereof, to which any of the following applies:

(1) It is maintained as a permanent or temporary dwelling, even though it is temporarily unoccupied and whether or not any person is actually present.

(2) At the time, it is occupied as the permanent or temporary habitation of any person, whether or not any person is actually present.

(3) At the time, it is specially adapted for the overnight accommodation of any person, whether or not any person is actually present.

(4) At the time, any person is present or likely to be present in it.

(D) "Political subdivision" and "state" have the same meanings as in section 2744.01 of the Revised Code.

(E) "Computer," "computer hacking," "computer network," "computer program," "computer software," "computer system," "data," and "telecommunications device" have the same meanings as in section 2913.01 of the Revised Code.

(F) "Computer contaminant" means a computer program that is designed to modify, damage, destroy, disable, deny or degrade access to, allow unauthorized access to, functionally impair, record, or transmit information within a computer, computer system, or computer network without the express or implied consent of the owner or other person authorized to give consent and that is of a type or kind described in divisions (F)(1) to (4) of this section or of a type or kind similar to a type or kind described in divisions (F)(1) to (4) of this section:

(1) A group of computer programs commonly known as "viruses" and "worms" that are self-replicating or self-propagating and that are designed to contaminate other computer programs, compromise computer security, consume computer resources, modify, destroy, record, or transmit data, or disrupt the normal operation of the computer, computer system, or computer network;

(2) A group of computer programs commonly known as "Trojans" or "Trojan horses" that are not self-replicating or self-propagating and that are designed to compromise computer security, consume computer resources, modify, destroy, record, or transmit data, or disrupt the normal operation of the computer, computer system, or computer network;

(3) A group of computer programs commonly known as "zombies" that are designed to use a computer without the knowledge and consent of the owner, or other person authorized to give consent, and that are designed to send large quantities of data to a targeted computer network for the purpose of degrading the targeted computer's or network's performance, or denying access through the network to the targeted computer or network, resulting in what is commonly known as "Denial of Service" or "Distributed Denial of Service" attacks;

(4) A group of computer programs commonly know as "trap doors," "back doors," or "root kits" that are designed to bypass standard authentication software and that are designed to allow access to or use of a computer without the knowledge or consent of the owner, or other person authorized to give consent.

(G) "Internet" has the same meaning as in section 341.42 of the Revised Code.

OHIO REV. CODE 2911.01

(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.

OHIO REV. CODE 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.

OHIO REV. CODE §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.

OHIO REV. CODE §2929.024

Investigation services and experts for indigent.

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.

OHIO REV. CODE §2929.03

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

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

(a) Life imprisonment without parole;

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

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

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

(e) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or

information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (A)(1)(a) of this section, the trial court shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that shall be served pursuant to that section.

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

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

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

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

(i) Life imprisonment without parole;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If the trial jury recommends that the offender be sentenced to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, life imprisonment with parole eligibility after serving thirty full years of imprisonment, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code, the court shall impose the sentence recommended by the jury

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

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

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

(i) Life imprisonment without parole;

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

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

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

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

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code, was convicted of aggravated murder and one or

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

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

(a) Life imprisonment without parole;

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

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

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

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

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to

outweigh the mitigating factors. For cases in which a sentence of death is imposed for an offense committed before January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. For cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

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

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

OHIO REV. CODE §2929.04

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

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

(2) The offense was committed for hire.

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

(4) The offense was committed while the offender was under detention or while the offender was at large after having broken detention. As used in division (A)(4) of this section, "detention" has the same meaning as in section

2921.01 of the Revised Code, except that detention does not include hospitalization, institutionalization, or confinement in a mental health facility or mental retardation and developmentally disabled facility unless at the time of the commission of the offense either of the following circumstances apply:

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

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

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

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

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

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

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

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

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and

proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

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

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

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

(4) The youth of the offender;

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

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

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

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

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

OHIO REV. CODE §2929.05

(A) Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall 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.

OHIO REV. CODE §2929.06

(A) If a sentence of death imposed upon an offender is set aside, nullified, or vacated because the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, or the supreme court, in cases in which the supreme court reviews the sentence upon appeal, could not affirm the sentence of death under the standards imposed by section 2929.05 of the Revised Code, is set aside, nullified, or vacated for the sole reason that the statutory procedure for imposing the sentence of death that is set forth in sections 2929.03 and 2929.04 of the Revised Code is unconstitutional, is set aside, nullified, or vacated pursuant to division (C) of section 2929.05 of the Revised Code, or is set aside, nullified, or vacated because a court has determined that the offender is mentally retarded under standards set forth in decisions of the supreme court of this state or the United States supreme court, the trial court that sentenced the offender shall conduct a hearing to resentence the offender. At the resentencing hearing, the court shall impose upon the offender a sentence of life imprisonment or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that is determined as specified in this division. If division (D) of section 2929.03 of the Revised Code, at the time the offender committed the aggravated murder for which the sentence of death was imposed, required the imposition when a sentence of death was not imposed of a sentence of life imprisonment without parole or a sentence of an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (A) or (B)(3) of section 2971.03 of the Revised Code and served pursuant to that section, the court shall impose the sentence so required. In all other cases, the sentences of life imprisonment that are available at the hearing, and from which the court shall impose sentence, shall be the same sentences of life imprisonment that were available under division (D) of section 2929.03 or under section 2909.24 of the Revised Code at the time the offender committed the offense for which the sentence of death was imposed. Nothing in this division regarding the resentencing of an offender shall affect the operation of section 2971.03 of the Revised Code.

(B) Whenever any court of this state or any federal court sets aside, nullifies, or vacates a sentence of death imposed upon an offender because of error that occurred in the sentencing phase of the trial and if division (A) of this section does not apply, the trial court that sentenced the offender shall conduct a new hearing to resentence the offender. If the offender was tried by a jury, the trial court shall impanel a new jury for the hearing. If the offender was tried by a panel of three judges, that panel or, if necessary, a new panel of three judges shall conduct the hearing. At the hearing, the court or panel shall follow the procedure set forth in division (D) of section 2929.03 of the Revised Code in determining whether to impose upon the offender a sentence of death, a sentence of life imprisonment, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment. If, pursuant to that procedure, the court or panel determines that it will impose a sentence other than a sentence of death, the court or panel shall impose upon the offender one of the sentences of life imprisonment that could have been imposed at the time the offender committed the offense for which the sentence of death was imposed, determined as specified in this division, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that is determined as specified in this division. If division (D) of section 2929.03 of the Revised Code, at the time the offender committed the aggravated murder for which the sentence of death was imposed, required the imposition when a sentence of death was not imposed of a sentence of life imprisonment without parole or a sentence of an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (A) or (B)(3) of section 2971.03 of the Revised Code and served pursuant to that section, the court or panel shall impose the sentence so required. In all other cases, the sentences of life imprisonment that are available at the hearing, and from which the court or panel shall impose sentence, shall be the same sentences of life imprisonment that were available under division (D) of section 2929.03 or under section 2909.24 of the Revised Code at the time the offender committed the offense for which the sentence of death was imposed.

(C) If a sentence of life imprisonment without parole imposed upon an offender pursuant to section 2929.021 or 2929.03 of the Revised Code is set aside, nullified, or vacated for the sole reason that the statutory procedure for imposing the sentence of life imprisonment without parole that is set forth in sections 2929.03 and 2929.04 of the Revised Code is unconstitutional, the trial court that sentenced the offender shall conduct a hearing to resentence the offender to life imprisonment with parole eligibility after serving twenty-five full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(D) Nothing in this section limits or restricts the rights of the state to appeal any order setting aside, nullifying, or vacating a conviction or sentence of death, when an appeal of that nature otherwise would be available.

(E) This section, as amended by H.B. 184 of the 125th general assembly, shall apply to all offenders who have been sentenced to death for an aggravated murder that was committed on or after October 19, 1981, or for terrorism that was committed on or after May 15, 2002. This section, as amended by H.B. 184 of the 125th general assembly, shall apply equally to all such offenders sentenced to death prior to, on, or after March 23, 2005, including offenders who, on March 23, 2005, are challenging their sentence of death and offenders whose sentence of death has been set aside, nullified, or vacated by any court of this state or any federal court but who, as of March 23, 2005, have not yet been resentenced.

OHIO REV. CODE §2929.11

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.

OHIO REV. CODE §2941.14

(A) In an indictment for aggravated murder, murder, or voluntary or involuntary manslaughter, the manner in which, or the means by which the death was caused need not be set forth.

(B) Imposition of the death penalty for aggravated murder is precluded unless the indictment or count in the indictment charging the offense specifies one or more of the aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code. If more than one aggravating circumstance is

specified to an indictment or count, each shall be in a separately numbered specification, and if an aggravating circumstance is specified to a count in an indictment containing more than one count, such specification shall be identified as to the count to which it applies.

(C) A specification to an indictment or count in an indictment charging aggravated murder shall be stated at the end of the body of the indictment or count, and may be in substantially the following form:

SPECIFICATION (or, SPECIFICATION 1, SPECIFICATION TO THE FIRST COUNT, or SPECIFICATION 1 TO THE FIRST COUNT). The Grand Jurors further find and specify that (set forth the applicable aggravating circumstance listed in divisions (A)(1) to (10) of section 2929.04 of the Revised Code. The aggravating circumstance may be stated in the words of the subdivision in which it appears, or in words sufficient to give the accused notice of the same)

OHIO REV. CODE §2947.06

Testimony in mitigation of sentence; presentence investigation report; psychological reports.

(A)(1) The trial court may hear testimony in mitigation of a sentence at the term of conviction or plea or at the next term. The prosecuting attorney may offer testimony on behalf of the state to give the court a true understanding of the case. The court shall determine whether sentence should immediately be imposed. The court on its own motion may direct the department of probation of the county in which the defendant resides, or its own regular probation officer, to make any inquiries and presentence investigation reports that the court requires concerning the defendant.

(2) The provisions of section 2951.03 of the Revised Code shall govern the preparation of, the provision, receipt, and retention of copies of, the use of, and the confidentiality, nonpublic record character, and sealing of a presentence investigation report prepared pursuant to division (A) (1) of this section.

(B) The court may appoint not more than two psychologists or psychiatrists to make any reports concerning the defendant that the court requires for the purpose of determining the disposition of the case. Each psychologist or psychiatrist shall receive a fee to be fixed by the court and taxed in the costs of the case. The psychologist's or psychiatrist's reports shall be made in writing, in open court, and in the presence of the defendant, except in misdemeanor cases in which sentence may be pronounced in the absence of the defendant. A copy of each report of a psychologist or psychiatrist may be furnished to the defendant, if present, who may examine the persons making the report, under oath, as to any matter or thing contained in the report.

Rules

OHIO CRIM.R. 8

(A) Joinder of offenses.

Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct.

(B) Joinder of defendants.

Two or more defendants may be charged in the same indictment, information or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses, or in the same course of criminal conduct. Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count.

OHIO CRIM.R. 11

(A) Pleas.

A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or 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.

(H) Defense of insanity.

The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial.

OHIO CRIM.R. 14

If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires. In ruling on a motion by a defendant for severance, the court shall order the prosecuting attorney to deliver to the court for inspection pursuant to Rule 16(B)(1) any statements or confessions made by the defendants which the state intends to introduce in evidence at the trial.

When two or more persons are jointly indicted for a capital offense, each of such persons shall be tried separately, unless the court orders the defendants to be tried jointly, upon application by the prosecuting attorney or one or more of the defendants, and for good cause shown.

OHIO CRIM.R. 16

(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) Any evidence favorable to the defendant and material to guilt or punishment;

(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. A public records request made by the defendant, directly or indirectly, shall be treated as a demand for discovery in a criminal case if, and only if, the request is made to an agency involved in the prosecution or investigation of that case. 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) Results of physical or mental examinations, experiments or scientific tests;

(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) All investigative reports, except as provided in division (J) of this rule;

(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.

OHIO CRIM.R. 24
Rule 24. Trial jurors

(A) Brief introduction of case.

To assist prospective jurors in understanding the general nature of the case, the court, in consultation with the parties, may give jurors a brief introduction to the case.

(B) Examination of prospective jurors.

Any person called as a prospective juror for the trial of any cause shall be examined under oath or upon affirmation as to the prospective juror's qualifications. The court may permit the attorney for the defendant, or the defendant if appearing pro se, and the attorney for the state to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the state and defense to supplement the examination by further inquiry. Nothing in this rule shall limit the court's discretion, with timely notice to the parties at anytime prior to trial, to allow the examination of all prospective jurors in the array or, in the alternative, to permit individual examination or each prospective juror seated on a panel, prior to any challenges for cause or peremptory challenges.

(C) Challenge for cause.

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

(1) That the juror has been convicted of a crime which by law renders the juror disqualified to serve on a jury.

(2) That the juror is a chronic alcoholic, or drug dependent person.

(3) That the juror was a member of the grand jury that found the indictment in the case.

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

(5) That the juror served as a juror in a civil case brought against the defendant for the same act.

(6) That the juror has an action pending between him or her and the State of Ohio or the defendant.

(7) That the juror or the juror's spouse is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against the juror.

(8) That the juror has been subpoenaed in good faith as a witness in the case.

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

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

(11) That the juror is the person alleged to be injured or attempted to be injured by the offense charged, or the person on whose complaint the prosecution was instituted, or the defendant.

(12) That the juror is the employer or employee, or the spouse, parent, son, or daughter of the employer or employee, or the counselor, agent, or attorney, of any person included in division (B)(11) of this rule.

(13) That English is not the juror's native language, and the juror's knowledge of English is insufficient to permit the juror to understand the facts and the law in the case.

(14) That the juror is otherwise unsuitable for any other cause to serve as a juror.

The validity of each challenge listed in division (B) of this rule shall be determined by the court.

(D) Peremptory challenges.

In addition to challenges provided in division (C) of this rule, if there is one defendant, each party peremptorily may challenge three prospective jurors in misdemeanor cases, four prospective jurors in felony cases other than capital cases, and six prospective jurors in capital cases. If there is more than one defendant, each defendant peremptorily may challenge the same number of prospective jurors as if the defendant was the sole defendant.

In any case where there are multiple defendants, the prosecuting attorney peremptorily may challenge a number of prospective jurors equal to the total peremptory challenges allowed all defendants. In case of the consolidation of any indictments, informations, or complaints for trial, the consolidated cases shall be considered, for purposes of exercising peremptory challenges, as though the defendants or offenses had been joined in the same indictment, information, or complaint.

(E) Manner of exercising peremptory challenges.

Peremptory challenges shall be exercised alternately, with the first challenge exercised by the state. The failure of a party to exercise a peremptory challenge constitutes a waiver of that challenge, but does not constitute a waiver of any subsequent challenge. However, if all parties, alternately and in sequence, fail to exercise a peremptory challenge, the joint failure constitutes a waiver of all peremptory challenges.

A prospective juror peremptorily challenged by either party shall be excused.

Nothing in this rule shall limit the court's discretion to allow challenges under this division or division (D) of this rule to be made outside the hearing of prospective jurors.

(F) Challenge to array.

The prosecuting attorney or the attorney for the defendant may challenge the array of petit jurors on the ground that it was not selected, drawn or summoned in accordance with law. A challenge to the array shall be made before the examination of the jurors pursuant to division (A) of this rule and shall be tried by the court.

No array of petit jurors shall be set aside, nor shall any verdict in any case be set aside because the jury commissioners have returned such jury or any juror in any informal or irregular manner, if in the opinion of the court the irregularity is unimportant and insufficient to vitiate the return.

(G) Alternate jurors.

(1) Non-capital cases.

The court may direct that not more than six jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same oath, and have the same functions, powers, facilities, and privileges as the regular jurors. The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew. Each party is entitled to one peremptory challenge in addition to those otherwise allowed if one or two alternate jurors are to be impaneled, two peremptory challenges if three or four alternate jurors are to be impaneled, and three peremptory challenges if five or six alternative jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and the

other peremptory challenges allowed by this rule may not be used against an alternate juror.

(2) Capital cases.

The procedure designated in division (G)(1) of this rule shall be the same in capital cases, except that any alternate juror shall continue to serve if more than one deliberation is required. If an alternate juror replaces a regular juror after a guilty verdict, the court shall instruct the alternate juror that the juror is bound by that verdict.

(H) Control of juries.

(1) Before submission of case to jury.

Before submission of a case to the jury, the court, upon its own motion or the motion of a party, may restrict the separation of jurors or may sequester the jury.

(2) After submission of case to jury.

(a) Misdemeanor cases.

After submission of a misdemeanor case to the jury, the court, after giving cautionary instructions, may permit the separation of jurors.

(b) Non-capital felony cases.

After submission of a non-capital felony case to the jury, the court, after giving cautionary instructions, may permit the separation of jurors during any period of court adjournment or may require the jury to remain under the supervision of an officer of the court.

(c) Capital cases.

After submission of a capital case to the jury, the jury shall remain under the supervision of an officer of the court until a verdict is rendered or the jury is discharged by the court.

(3) Separation in emergency.

Where the jury is sequestered or after a capital case is submitted to the jury, the court may, in an emergency and upon giving cautionary instructions, allow temporary separation of jurors.

(4) Duties of supervising officer.

Where jurors are required to remain under the supervision of an officer of the court, the court shall make arrangements for their care, maintenance and comfort.

When the jury is in the care of an officer of the court and until the jury is discharged by the court, the officer may inquire whether the jury has reached a verdict, but shall not:

(a) Communicate any matter concerning jury conduct to anyone except the judge or;

(b) Communicate with the jurors or permit communications with jurors, except as allowed by court order.

(I) Taking of notes by jurors.

The court, after providing appropriate cautionary instructions, may permit jurors who wish to do so to take notes during a trial. If the court permits the taking of notes, notes taken by a juror may be carried into deliberations by that juror. The court shall require that all juror notes be collected and destroyed promptly after the jury renders a verdict.

(J) Juror questions to witnesses.

The court may permit jurors to propose questions for the court to ask of the witnesses. If the court permits jurors to propose questions, the court shall use procedures that minimize the risk of prejudice, including all of the following:

(1) Require jurors to propose any questions to the court in writing;

(2) Retain a copy of each proposed question for the record;

(3) Instruct the jurors that they shall not display or discuss a proposed question with other jurors;

(4) Before reading a question to a witness, provide counsel with an opportunity to object to each question on the record and outside the hearing of the jury;

(5) Read the question, either as proposed or rephrased, to the witness;

(6) Permit counsel to reexamine the witness regarding a matter addressed by a juror question;

(7) If a question proposed by a juror is not asked, instruct the jurors that they should not draw any adverse inference from the court's refusal to ask any question proposed by a juror.

OHIO CRIM.R. 29

Motion for acquittal

(A) Motion for judgment of acquittal.

The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

(B) Reservation of decision on motion.

If a motion for a judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict, or after it returns a verdict of guilty, or after it is discharged without having returned a verdict.

(C) Motion after verdict or discharge of jury.

If a jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within fourteen days after the jury is discharged or within such further time as the court may fix during the fourteen day period. If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal. It shall not be a prerequisite to the making of such motion that a similar motion has been made prior to the submission of the case to the jury.

RULES OF EVIDENCE

OHIO EVID.R. 403

(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

OHIO EVID.R. 404

(A) Character evidence generally.

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, subject to the following exceptions:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable.

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable.

(3) Character of witness. Evidence of the character of a witness on the issue of credibility is admissible as provided in Rules 607, 608, and 609.

(B) Other crimes, wrongs or acts.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this rule shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

OHIO EVID.R. 606

(A) At the trial.

A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(B) Inquiry into validity of verdict or indictment.

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror, only after some outside evidence of that act or event has been presented. However a juror may testify without the presentation of any outside evidence concerning any threat, any bribe, any attempted threat or bribe, or any improprieties of any officer of the court. A juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying will not be received for these purposes.

OHIO EVID.R. 607

(A) Who May Impeach.

The credibility of a witness may be attacked by any party except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage. This exception does not apply to statements admitted pursuant to Evid.R. 801(D)(1)(a), 801(D)(2), or 803.

(B) Impeachment; reasonable basis.

A questioner must have a reasonable basis for asking any question pertaining to impeachment that implies the existence of an impeaching fact.

OHIO EVID.R. 612

If a witness uses a writing to refresh memory for the purpose of testifying, either: (1) while testifying; or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing. The adverse party is also entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony

the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

OHIO EVID.R. 801

The following definitions apply under this article:

(A) Statement.

A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(B) Declarant.

A "declarant" is a person who makes a statement.

(C) Hearsay.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(D) Statements which are not hearsay.

A statement is not hearsay if:

(1) Prior statement by witness.

The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is (a) inconsistent with declarant's testimony, and was given under oath subject to cross-examination by the party against whom the statement is offered and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive, or (c) one of identification of a person soon after perceiving the person, if the circumstances demonstrate the reliability of the prior identification.

(2) Admission by party-opponent.

The statement is offered against a party and is (a) the party's own statement, in either an individual or a representative capacity, or (b) a statement of which the party has manifested an adoption or belief in its truth, or (c) a statement by a person authorized by the party to make a statement concerning the subject, or (d) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made

during the existence of the relationship, or (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy.

OHIO EVID.R. 803

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) Present sense impression.

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness.

(2) Excited utterance.

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing, mental, emotional, or physical condition.

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment.

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection.

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown by the testimony of the witness to have been made or adopted when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity.

A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or

circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in record kept in accordance with the provisions of paragraph (6).

Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports.

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics.

Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirement of law.

(10) Absence of public record.

Testimony--or a certification under Evid.R. 901(B)(10)--that a diligent search failed to disclose a public record or statement if:

(a) the testimony or certification is admitted to prove that

(i) the record or statement does not exist; or

(ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(b) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice --unless the court sets a different time for the notice or the objection.

(11) Records of religious organizations.

Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates.

Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family Records.

Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property.

The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property.

A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents.

Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications.

Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned Treatises.

To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history.

Reputation among members of the declarant's family by blood, adoption, or marriage or among the declarant's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy,

relationship by blood, adoption or marriage, ancestry, or other similar fact of the declarant's personal or family history.

(20) Reputation concerning boundaries or general history.

Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character.

Reputation of a person's character among the person's associates or in the community.

(22) Judgment of previous conviction.

Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of no contest or the equivalent plea from another jurisdiction), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family, or general history, or boundaries.

Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

Other Authorities

United Nations Charter
Chapter I
Article 1

The Purposes of the United Nations are:

1. * * *

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

International Convention on the Elimination of All Forms of Racial Discrimination
Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to en sure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall

in no case en tail as a con sequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

International Covenant on Civil and Political Rights

Article 2.

1. Each State Party to the present Covenant undertakes to respect to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.