

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**

**AMENDED MERIT BRIEF OF APPELLANT SHAWN E. FORD
VOLUME I**

Sherri Bevan Walsh
Summit County Prosecutor

Richard S. Kasay #0013952
Counsel of Record
Assistant Prosecuting Attorney
Summit County Safety Building
53 University Avenue
Akron, OH 44308
Telephone: 330.643.2800
Facsimile: 330.643.2137
kasay@prosecutor.summitoh.net

Counsel for Appellee

Kathleen McGarry*, #0038707
*Counsel of Record
McGarry Law Office
P.O. Box 310
Glorieta, New Mexico 87535
505.757.3989 (voice)
888-470-6313 (facsimile)
kate@kmcgarrylaw.com

Lynn A. Maro, # 0052146
Maro & Schoenike Co.
7081 West Blvd. Suite 4
Boardman, OH 44512
330.758.7700 (voice)
Schoejlka@aol.com

*Counsel for Appellant,
Shawn E. Ford*

TABLE OF CONTENTS

TABLE OF CONTENTS	I
TABLE OF AUTHORITIES	IX
STATEMENT OF THE CASE.....	1
A. STATEMENT OF THE FACTS:	1
B. PROCEDURAL HISTORY:.....	10
ARGUMENT.....	38
PROPOSITION OF LAW NO. I	38
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.....	38
<i>There was No Valid Waiver of Rights by Mr. Ford</i>	40
<i>Ford’s Statement was Involuntary</i>	45
<i>Violation of the Confrontation Clause</i>	62
PROPOSITION OF LAW NO. II.....	67
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.....	67
PROPOSITION OF LAW NO. III.....	79
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).....	79
<i>What Lead to an Atkins Hearing for Mr. Ford?</i>	82
<i>What Atkins Determinations did the Trial Court Have to Make</i>	86
1. Significant Limitations in Intellectual Functioning is Measured Clinically by an IQ Score that Takes Into Consideration the Test’s SEM	86
2. Significant Limitations in Adaptive Behavior Are Based on Objective Measurements, That Include Consideration of Anecdotal Evidence Prior to an Inmate’s Incarceration	91
3. Onset Before Age 18	93
<i>The Evaluations in this Case</i>	94
The Defense Expert-Dr. James Karpawich.....	95

The State’s Expert: Dr. Sylvia O’Bradovich, Psy.D.....	98
The Court’s Expert: Katie E. Connell, Ph.D.....	101
<i>The Trial Court’s Findings</i>	102
<i>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</i>	103
PROPOSITION OF LAW NO. IV	111
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.	111
<i>The Trial Judge’s Explanation</i>	111
<i>The Voir Dire Procedure</i>	113
<i>Attempted Voir Dire of Jurors</i>	115
<i>The Applicable Law</i>	120
PROPOSITION OF LAW NO. V.....	125
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.	125
<i>Misstatements by the Trial Court</i>	125
<i>Misstatements by the Prosecuting Attorneys</i>	127
PROPOSITION OF LAW NO. VI	138
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.	138
<i>The Biased Jurors</i>	138
Juror No. 25 (Vol. 5, Voir Dire, pp. 1012-1051).....	139
Juror No. 36 (Vol. 5, Voir Dire, pp. 1058-1102).....	140
Juror No. 39 (Vol. 6, Voir Dire, pp. 1137-1197).....	141
Juror No. 45 (Vol. 5, Voir Dire, pp. 928-969).....	141
Juror No. 72 (Vol. 10, Voir Dire, pp. 1914-1972).....	143
Juror No. 103 (Vol. 9, Voir Dire, pp. 1822-1848).....	144
Juror No. 106 (Vol. 14, Voir Dire, pp. 2802-2846).....	145
Juror No. 134 (Vol. 17, Voir dire, pp. 3367-3406).....	146
<i>Analysis</i>	147

PROPOSITION OF LAW NO. VII	154
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.	154
PROPOSITION OF LAW NO. VIII.....	166
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.	166
<i>Voir Dire of Juror No. 19</i>	166
<i>Juror 19 During Trial</i>	168
<i>Trial Phase Deliberations</i>	171
<i>The Motion for Mistrial</i>	175
<i>Legal Analysis</i>	178
PROPOSITION OF LAW NO. IX	188
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.	188
<i>Background Facts</i>	188
<i>Juror No. 19</i>	190
<i>Juror No. 46</i>	193
<i>Trial Court’s Decision</i>	195
<i>Application of Law to the Facts of this Case</i>	196
<i>The Aliunde Rule</i>	198
PROPOSITION OF LAW NO. X.....	202
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.	202
PROPOSITION OF LAW NO. XI	213
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.	213
<i>Crime Scene Photographs</i>	213

<i>Autopsy Photographs</i>	216
<i>These were Gruesome and Graphic Photographs</i>	217
<i>Legal Analysis</i>	217
PROPOSITION OF LAW NO. XII	222
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.	222
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	222
PROPOSITION OF LAW NO. XIII.....	234
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.....	234
PROPOSITION OF LAW NO. XIV.....	251
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.	251
PROPOSITION OF LAW NO XV	263
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.	263
PROPOSITION OF LAW NO. XVI.....	272
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.	272
PROPOSITION OF LAW NO. XVII	280

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.....	280
<i>The Trial Court's Introduction</i>	280
<i>The Trial Court's Analysis</i>	282
<i>The Trial Court's Examination of Mitigating Circumstances</i>	284
<i>Conclusion</i>	288
PROPOSITION OF LAW NO. XVIII.....	290
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.	290
PROPOSITION OF LAW NO. XIX.....	305
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.	305
PROPOSITION OF LAW NO. XX.....	313
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.	313
<i>Standards for Ineffective Assistance of Counsel Claim</i>	313
<i>Ineffective Assistance of Counsel at Pretrial Proceedings</i>	315
<i>Grand Jury Proceedings</i>	315
<i>Failed to Adequately Challenge the Defendant's Statements</i>	319
<i>Failed to Request a Hearing on the Need to Shackle their Client</i>	323
<i>Ineffectiveness of Counsel at Voir Dire</i>	326
<i>Counsel Failed to Object to Misstatements of the Weighing Process</i>	326
<i>Failed to File a Motion for Change of Venue or Object to Jurors exposed to Pretrial Publicity</i>	335
<i>Failed to Exercise all their Peremptory Challenges</i>	341
<i>Counsel Ineffectiveness at Trial</i>	343
<i>Introduced Victim Character Evidence into the Trial</i>	344
<i>Acquiesced in the Removal of Juror No. 19</i>	348
<i>Failed to Know the Correct Law as it related to Crim R. 16</i>	349
<i>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</i>	353
<i>Prosecutorial Misconduct</i>	354

<i>Counsel Ineffectiveness in Penalty Phase</i>	358
<i>Requested a Presentence Investigation Report</i>	359
<i>Prosecuting Attorney Closing Argument</i>	362
<i>Counsel Ineffectiveness at the Atkins Hearing</i>	366
<i>Conclusion</i>	369
<i>Cumulative ineffective assistance</i>	369
PROPOSITION OF LAW NO. XXI	371
CUMULATIVE ERRORS DEPRIVED FORD OF A FAIR TRIAL AND A RELIABLE SENTENCING HEARING.....	371
PROPOSITION OF LAW NO. XXII	374
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.....	374
PROPOSITION OF LAW NO. XXIII.....	390
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.	390
<i>Arbitrary And Unequal Punishment</i>	391
<i>Unreliable Sentencing Procedures</i>	392
<i>Defendant’s Right to a Jury is Burdened</i>	394
<i>Mandatory Submission of Reports and Evaluations</i>	395
<i>R.C. § 2929.03(D)(1) and 2929.04 are Unconstitutionally Vague.</i>	395
<i>Proportionality and Appropriateness Review</i>	396
<i>Ohio’s Statutory Death Penalty Scheme Violates International Law.</i>	399
<i>International Law Binds Ohio.</i>	399
<i>Conclusion</i>	407
CONCLUSION	408
CERTIFICATES OF SERVICE	<u>271.1, 410</u>

APPENDIX TO BRIEF

NOTICE OF APPEAL	A-1
TRIAL COURT OPINION	A-4

JUDGEMENT ENTRY	A-26
ATKINS JOURNAL ENTRY	A-33
CONSTITUTIONAL PROVISIONS	
U.S. Const. art. II, Sec. 2	A-51
U.S. Const. art. VI.....	A-51
U.S. Const. amend V.....	A-52
U.S. Const. amend VI.....	A-52
U.S. Const. amend VIII.....	A-52
U.S. Const. amend XIV	A-52
Ohio Const. art. I, § 2.....	A-54
Ohio Const. art. I, § 5.....	A-54
Ohio Const. art.I, § 9.....	A-54
Ohio Const. art. I, §10.....	A-54
Ohio Const. art. I, §16.....	A-55
STATUTES	
R.C. § 2313.17	A-56
R.C. § 2901.04	A-57
R.C. § 2903.11	A-57
R.C. § 2909.01	A-59
R.C. § 2911.01	A-61
R.C. § 2911.11.....	A-61
R.C. § 2913.12.....	A-62
R.C. §2929.024	A-65
R.C. § 2929.03	A-65
R.C. § 2929.04	A-72
R.C. § 2929.05	A-74
R.C. § 2929.06	A-76
R.C. § 2929.11	A-78
R.C. §2941.14	A-78
R.C. §2947.06.....	A-79

RULES

Crim.R. 8.....	A-80
Crim. R. 11.....	A-80
Crim.R. 14.....	A-82
Crim.R. 16.....	A-83
Crim. R. 24.....	A-88
Crim.R. 29.....	A-92
Evid. R. 403	A-94
Evid. R. 404	A-94
Evid. R. 606	A-95
Evid. R. 607	A-95
Evid.R. 612	A-95
Evid.R. 803	A-97

References to the Record

The transcript in the case is divided into separate transcripts based on the date of the Hearing.

Pretrial Hearings are referred to as Pretrial, Date, p. ____

Voir Dire and Trial are numbered sequentially and are referenced as: Vol. 1, Voir Dire, p. ____, or Vol. 21, Trial, p. ____.

The Penalty Phase of the Trial was numbered sequentially, starting at Number One again. It is referenced as Vol. 1, Mitigation, p. ____.

The Atkins Hearing is in two separate volumes numbered sequentially and referenced as Vol. 1, Atkins, p. ____.

The Original Papers are referenced by their Docket Number, Doc. # ____.

TABLE OF AUTHORITIES

Cases

Adams v. Texas, 448 U.S. 38 (1980).....	121, 266, 334
Andres v. United States, 333 U.S. 740, 752, 92 L. Ed. 1055, 68 S. Ct. 880 (1948).....	249
Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)	passim
Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).....	57, 58, 59, 337
Atkins v. Virginia, 536 U.S. 304, 321(2002).....	passim
Barber v. Page, 390 U.S. 719, 725, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968)	62
Barclay v. Florida, 463 U.S. 939 (1983).....	288, 306
Beck v. Alabama, 447 U.S. 625, 630 (1980)	219, 372
Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314	235, 242
Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)	375
Blakemore v. Blakemore, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).....	211
Branzburg v. Hayes 408 U.S. 665, 686-687 (1972).....	318
Brecht v. Abrahamson, 507 U.S. 619, 641, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993).....	249
Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977)	50
Brumfield v. Cain, 854 F. Supp. 366, 391 (M.D. La. 2012).....	90
Bruton v. United States, 391 U.S. 123, at 139-140, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (White, J., dissenting)	58
Buchanan v. Angelone, 522 U.S. 269, 276, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998)	136
Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987).....	159
Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)	136, 249
California v. Brown, 479 U.S. 538 (1987).....	307
California v.Ramos, 463 U.S. 992, 998-99, 77 L. Ed. 2d 1171, 103 S. Ct. 3446 (1983)	249
Chambers v. Florida, 309 U.S. 227, 237, 60 S.Ct. 472, 84 L.Ed. 716 (1940)	61
Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) 158, 268, 279, 372	
Chapman v. California, 386 U.S. 18, 26 (1967)	220, 271, 391
Clinton v. City of New York, 524 U.S. 417, 438 (1998).....	404
Coffin v. United States (1895), 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481	164, 268

Coker v. Georgia 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977)	298, 299, 390
Colorado v. Connelly, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986)	48
Commonwealth v. O'Neal, 339 N.E.2d 676, 678 (Mass. 1975) (Tauro, C.J., concurring).....	392
Craw v. Washington, 541 U.S. 36, at 57, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)	63
Darden v. Wainwright 477 U.S. 168, 181, 91 L.Ed.2d 144, 106 S.Ct. 2464 (1986)	236
Davis v. Alaska, 415 U.S. 308, 319 (1974)	201
Delo v. Lashley, 507 U.S. 272 (1993)	393
DePew v. Anderson, 311 F.3d 742 (6th Cir. 2002)	248, 366
Dickerson v. United States, 530 U.S. 428, 439, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000)	45, 49
Drope v. Missouri, 420 U.S. 162, 172 (1975).....	268
Eddings v. Oklahoma, 455 U.S. 104, 144 (1982).....	passim
Enmund v. Florida, 458 U.S. 782 (1982).....	393
Estelle v. Williams 1976 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d. 126	165, 268
Evitts v. Lucey, 469 U.S. 387, 401 (1985)	398
Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).....	399
Ford v. Wainwright, 477 U.S. 399, 405, 416-417 (1986).....	80
Forsythe v. State, 12 Ohio Misc. 99, 106, 230 N.E.2d 681, 686 (1967).....	340
Forti v. Suarez-Mason, 672 F.Supp. 1531 (N.D. Cal. 1987)	399
Free v. Peters, 12 F.3d 700 (7th Cir. 1993).....	394
Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370 (7th Cir. 1985).....	405
Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).....	passim
Gaito v. Brierley, 485 F.2d 86, (3rd Cir. 1973)	270
Gallegos v. Colorado, 370 U.S. 49, 51, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962).....	61
Glenn v. Tate (C.A.6, 1995), 71 Ohio St.3d 1204, 1209	360
Godfrey v. Georgia 446 U.S.420, 428 100 S.Ct. 1759, 64 L.Ed.2d.398	252, 288
Goins v. McKeen, 605 F.2d 947, 953 (6th Cir.1979)	152
Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)	passim
Hall v. Florida, ---U.S. ---, 134 S.Ct. 1986 (2014)	passim
Haynes v. Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963).....	50, 52
Hernandez v. Beto, 443 F.2d 634 (5th Cir. 1971).....	270

Herring v. New York, 422 U.S. 853, 862, 45 L.Ed.2d 593, 95 S.Ct. 2550 (1975).....	240
Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989)	378
Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987)	passim
Holbrook vs. Flynn, 475 U.S. 560, 567 (1986).....	265, 325
Hurley v. State, 46 Ohio St. 320, 21 N.E. 645 (1888)	209
Hurst v. Florida, ___ U.S. ___, 136 S.Ct. 616 (2016)	passim
Illinois v. Allen, 397 U.S. 337, 344 (1970)	267, 325
In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955.).....	179
In re Oliver, 333 U.S. 257.....	179
In re Winship, 397 U.S. 358 (1970).....	passim
In re: K.S., 8th Dist. No. 97343, 2012 Ohio 2388	210
Irvin v. Dowd, 366 U.S. 717 (1961)	passim
Johnson v. Texas, 509 U.S. 350 (1993)	394
Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)	51
Kansas v. Carr, 577 U.S. ---, 136 S.Ct. 633 (2016).....	311
Kansas v. Marsh, 548 U.S. 163, 126 S. Ct. 2516 (2006).....	310, 311, 312
Kennedy vs. Cardwell, 487 F.2d 101, 107 (6th Cir., 1973).....	265
Kotteakos v. United States, 328 U.S. 750, 765, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946)	249
Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).....	279
Lego v. Twomey, 404 U.S. 477, 487-488, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972)	42
Lewis v. Jeffers, 497 U.S. 764, 774 (1990)	396
Lisenba v. California, 314 U.S. 219, 236-237, 62 S.Ct. 280, 86 L.Ed. 166 (1941).....	47
Lockett v. Ohio, 438 U.S. 586 (1978).....	passim
Lynumn v. Illinois, 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963).....	50, 52
Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).....	40, 52, 55
Marbury v. Madison, 5 U.S. 137 (1803).....	405
Mattox v. United States, 156 U.S. 237, 244, 15 S.Ct. 337, 39 L.Ed. 409 (1895).....	62
Maynard v. Cartwright, 486 U.S. 356, 362 (1988).....	396
McCall v. Dutton, 863 F.2d 454 (6th Cir. 1988)	49
McCleskey v. Kemp, 481 U.S. 279, (1987).....	300, 301

McDonald v. Pless, 238 U.S. 264, 268-69 (1915)	201
Medeiros v. Shimoda, 889 F.2d 819, 823 (9th Cir. 1989)	48
Miller v. Fenton, 474 U.S. 104, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985).....	61
Miller v. Francis, 269 F.3d 609, 615 (6th Cir. 2001).....	335
Miller v. Francis, 269 F.3d 609, 615 (6th Cir.2001).....	147
Miller v. Webb, 385 F.3d 666, 672 (6th Cir. 2004).....	147
Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978).....	50, 53
Miranda v. Arizona, 284 U.S. 436 (1966)	passim
Morgan v. Illinois, 504 U.S. 719, 729 (1992).....	passim
Mu'Min v. Virginia, 500 U.S. 415, 431, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991).....	147
Murphy v. Florida, 421 U.S. 794, 800 (1975)	340
Murphy v. State, 54 P.3d at 568, 2002 OK CR 32	82
North Carolina v. Butler, 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979).....	41, 47
O'Neal v. McAninch. 513 U.S. 432, 130 L. Ed. 2d 947, 115 S. Ct. 992 (1995).....	249
Palmer v. State, 42 Ohio St. 596 (1885)	150
Patton v Yount, 467 U.S. 1025 (1984)	152
Payne v. Tennessee, 501 U.S. 808, 825, 111 S.Ct. 2597,2608 (1991)	221
Pena Rodriguez v. Colorado, 350 P.3d 287 (CO, 2015), cert. granted, 136 S.Ct 1513 (U.S. April 4, 2016)(No. 15-606)	200
Penry vs. Lynaugh, 492 U.S. 302 (1989).....	289, 306
Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).....	62, 122
Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984).....	298, 397
Quercia v. United States, 297 U.S. 466, 469, 77 L.Ed. 1321, 53 S.Ct. 698 (1933).....	240
Reid v. Covert, 354 U.S. 1, 45-46, 1 L. Ed. 2d 1148, 77 S. Ct. 1222 (1957)	249
Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954).....	35, 180, 181, 189
Reynolds v. United States, 98 U.S. 145, 155.....	179
Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)	passim
Robinson v. California, 370 U.S. 660 (1962)	390
Rodriguez v. Hoke, 928 F.2d 534, 538 (2d Cir. 1991)	370
Roper v. Simmons, 543 U.S. 551, 569, 125 S.Ct.1183, 161 L.Ed.2d.1(2005).....	251, 291, 295

Rosales-Lopez v. United States, 451 U.S. 182, 189, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981).....	122, 147
Ross v. Oklahoma, 487 U.S. 81, 85 (1988)	333
Satterwhite v. Texas; 486 U.S. 249 (1988).....	371
Scott v. State, 107 Ohio St. 475, 491, 141 N.E. 19 (1923).....	241
Shelton v. Tucker, 364 U.S. 479, 488 (1960)	392
Sheppard v. Maxwell, 384 U.S. 333 (1966)	336
Silverthorne v. United States, 400 F.2d 627, 639 (9th Cir. 1968)	340
Skipper v. South Carolina, 476 U.S. 1 (1986)	310
Smith v. Cain, 565 U.S. 73, 132 S.Ct. 627, 181 L.Ed.2d 571 (2012).....	60
Smith v. Mitchell, 567 F.3d 246, 256 (6th Cir. 2009)	322
Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982)	180
Smith v. Phillips, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982)	235
Spano v. New York, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959).....	50, 53
Spaziano v. Florida, 468 U.S. 447 (1984).....	305, 379, 398
Spencer v. Texas, 385 U.S. 554, 560, 17 L.Ed.2d 606, 87 S.Ct. 648 (1967)	164
State ex rel, Dayton Newspapers, Inc. v. Phillips 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976).....	336
State of Ohio v. Mason, Marion County Court of Common Pleas Case No. 93 CR 153	384
State v. Atkinson, 4 Ohio St.2d 19, 211 N.E.2d 665, (1965).....	157
State v. Ballew, 76 Ohio St.3d 244, 254, 1996 Ohio 81, 667 N.E.2d 369 (1996).....	205
State v. Bankston, 2nd Dist No. 24388, 2011 Ohio 6486.....	206
State v. Belton, 2016 Ohio 1581, 2016 Ohio LEXIS 958 (Ohio Apr. 20, 2016).....	385
State v. Breedlove, 26 Ohio St.2d 178, 271 N.E.2d 238 (1971).....	163
State v. Brewer, 48 Ohio St.3d 50, 58, 549 N.E.2d 491 (1990)	47
State v. Brooks 75 Ohio St. 3d 148, 159-160 (1996).....	passim
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)	231
State v. Bryan, 101 Ohio St.3d 272, 2004-Ohio-971	281

State v. Burson (1974), 38 Ohio St. 2d 157, 311 N. E. 2d 526.....	162
State v. Cassano, 96 Ohio St.3d 94 (2002)	266
State v. Carter, 53 Ohio App.2d 125, 372 N.E.2d 622 (4th Dist. 1977).....	270
State v. Clifton White (1999), 85 Ohio St.3d 433, 439.	151
State v. Cornwell, 86 Ohio St.3d 560, 564, 1999 Ohio 125, 715 N.E.2d 1144.....	343
State v. Cunningham, 105 Ohio St.3d 197, 2004-Ohio-7007, 824 N.E.2d 504	123
State v. Curry, 43 Ohio St.2d 66, 330 N.E.2d 720 (1975).....	161, 162
State v. Davie, 80 Ohio St.3d 311, 323, 1997 Ohio 341, 686 N.E.2d 245	207
State v. Davis, 116 Ohio St.3d 404, 2008 Ohio 2, 880 N.E.2d 31.....	247, 365
State v. DeMarco, 31 Ohio St. 3d 191, 196, 509 N.E.2d 1256, 1261 (1987).....	370, 372
State v. DePew, 38 Ohio St. 3d 275,281, 528 N.E.2d 542, 549 (1988).....	218, 220, 285
State v. Dick, 27 Ohio St.2d 162, 165, 271 N.E.2d 797 (1971)	209
State v. Dixon, 101 Ohio St.3d 328, 2004 Ohio 1585, 805 N.E.2d 1042.....	73
State v. Duffy, 134 Ohio St. 16, 17, 15 N.E.2d 535 (1938).....	209
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)343	
State v. Esparza, 39 Ohio St.3d 8, 9 (1988).....	359, 360
State v. Fair, 2nd Dist. No. 24388, 2011 Ohio 4454.....	205
State v. Fairbanks, 32 Ohio St. 2d 34, 37, 289 N.E.2d 352, 355 (1972)	336
State v. Fautenberry, 72 Ohio St.3d 435, 440 (1995)	344
State v. Fowler, 4 Ohio St.3d 16, 17, 445 N.E.2d 1119, 1119-1120 (1983)	229, 230
State v. Fox, 69 Ohio St. 3d 183, 193, 631 N.E.2d 124, 132 (1994).....	393
State v. Franklin, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26.....	266, 267, 270
State v. Frazier, 115 Ohio St.3d 139, 2007-Ohio-5048	106
State v. Garrett, 76 Ohio App.3d 57, 600 N.E.2d 1130 (1983)	321
State v. Getsy, 84 Ohio St.3d 180, 201 (1998)	255, 341
State v. Goff, 82 Ohio St.3d 123, 133 (1998).....	286
State v. Gondor, 112 Ohio St. 3d 377, 392, 860 N.E.2d 77, 90 (2006).....	370
State v. Graham, 58 Ohio St.2d 350, 390 N.E.2d 805 (1979)	211
State v. Green, 18 Ohio App.3d 69, 72, 480 N.E.2d 1128 (1984).....	230

State v. Grewell, 45 Ohio St. 3d 4, at 9 (1989), 545 N.E.2d at 98.....	318
State v. Group, 98 Ohio St.3d 248, 2002-Ohio-7247	151
State v. Gunnell, 132 Ohio St.3d 442, 2012 Ohio 3236, 973 N.E.2d 243 (2012)	186
State v. Hale, 119 Ohio St.3d 118, 2008-Ohio-3426	343
State v. Hamblin, 37 Ohio St.3d 153, 158-159, 524 N.E.2d 476 (1988).....	157
State v. Hannah, 54 Ohio St.2d 84, 374 N.E.2d 1359 (1978).....	275
State v. Hector (1969), 19 Ohio St. 2d 167, 249 N. E. 2d 912	162
State v. Herring, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975)	275
State v. Hessler, 90 Ohio St. 3d 108, 120, 2000-Ohio-30	195, 196, 197
State v. Holloway (1988), 38 Ohio St.3d 239, 244, 527 N.E.2d 831	74, 286
State v. Holt, 17 Ohio St. 2d 81, 246 N.E.2d 365 (1969).....	229
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.....	62
State v. Jackson, 141 Ohio St.3d 171, 2014-Ohio-3707.....	passim
State v. Jamison, 49 Ohio St.3d. 182, 184, 552 N.E.2d. 180 (1990).....	159
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).....	77, 122, 390
State v. Jenks 61 Ohio St.3d. 259, 574 N.E.2d. 492 (1981)	223
State v. Johnson (1986), 24 Ohio St.3d 87, 94, 494 N.E. 2d 1061, 1067	passim
State v. Johnson, 112 Ohio St.3d 210, 2006-Ohio-6404	267
State v. Jones, 91 Ohio St.3d 335, 338, 744 N.E.2d 1163 (2001)	123
State v. Keairns, 9 Ohio St.3d 228, 460 N.E.2d 245 (1984).....	63, 65
State v. Kennan, 66 Ohio St.3d 402, 613 N.E.2d 203 (1993).....	208, 241
State v. Ketterer, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48	129, 330
State v. King, 10 Ohio App.3d 161, 460 N.E.2d 1383 (1983).....	183
State v. Lane, 60 Ohio St.2d 112, 397 N.E.2d 1338 (1979).....	158, 165, 240
State v. Laskey, 21 Ohio St. 2d 187, 191, 257 N.E.2d 65, 67-68 (1970)	318
State v. Lindsey, 87 Ohio St.3d 479, 484-485 (2000)	255
State v. Lockhart 115 Ohio App.3d 370, 373, 685 N.E.2d 564 (8th Dist. 1996)	231

State v. Lorraine, 66 Ohio St.3d 414, 417 (1993).....	307
State v. Lott, 779 N.E.2d 1011 (Ohio 2002).....	passim
State v. Madrigal, 87 Ohio St.3d 378, 390-391 (2000).....	313
State v. Mammone, 139 Ohio St. 3d 1051, 2014-Ohio-1942	219
State v. Mapes, 19 Ohio St.3d 108 (1985).....	122
State v. Martin, 20 Ohio App. 3d 172, 175, 485 N.E.2d 717 (1983	225
State v. Maurer, 15 Ohio St. 3d 239,473 N.E.2d 768 (1984)	218, 220, 280
State v. McCoy, Franklin App. No. 07AP-769, 2008 Ohio 3293.....	231
State v. McKelton, 2016 Ohio 5735, P299, 2016 Ohio LEXIS 2291 (2016).....	159
State v. Minneker 27 Ohio St.2d 155, 271 N.E.2d 821 (1971).....	158
State v. Moore, 81 Ohio St.3d 22, 40, 1998 Ohio 441, 689 N.E.2d 1	76, 287
State v. Morales, 32 Ohio St. 3d 252,258, 513 N.E.2d 267,274 (1987).....	218, 220
State v. Morris, 100 Ohio Appellate 307-313, 136 N.E.2d 653 (1954).....	241
State v. Murphy, 91 Ohio St.3d 516, 526, 747 N.E.2d 765 (2001)	150, 397
State v. Myers, 97 Ohio St.3d 335, 2002 Ohio 6658, 780 N.E.2d 186.....	164
State v. Newton 108 Ohio St.3d.13, 2006 Ohio 81, 840 N.E.2d.593	257
State v. Neyland, 139 Ohio St. 3d 353, 2014-Ohio-1914.....	266, 267
State v. Penix, 32 Ohio St.3d 369, 371, 513 N.E.2d 744 (1987).....	passim
State v. Phillips, 74 Ohio St. 3d 72, 88, 656 N.E.2d 643 (1995).....	180
State v. Pickens, 141 Ohio St..3d 462, 2014-Ohio-5445	123
State v. Pierre, 572 P.2d 1338 (Utah 1977)	392
State v. Poindexter, 36 Ohio St.3d 1, 5 (1988)	341
State v. Powell, 132 Ohio St.3d 233, 2012 Ohio 2577, 971 N.E.2d 865.....	205
State v. Reed 65OhioSt.2d.117, 418N.E.2d.1359(1981).....	227
State v. Richey, 64 Ohio St.3d 353, 358 (1992).....	265, 325
State v. Rogers, 28 Ohio St. 3d 427, 434, 504 N.E.2d 52, 58 (1986).....	307
State v. Sapp 105 Ohio St.3d 104, 2004 Ohio 7008, 822 N.E.2d 1239.....	156
State v. Scott (1986), 26 Ohio St.3d 92, 97-98, 26 OBR 79, 83-84, 497 N.E.2d 55, 60-61.....	151
State v. Scott, 31 Ohio St.2d 1, 5-6, 285 N.E.2d 344 (1972).....	205
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).....	228
State v. Simko, 71 Ohio St.3d 483, 501, 1994 Ohio 350, 644 N.E.2d 345	303
State v. Smith, 103 Ohio App.3d 360, 369, 720 N.E.2d 149 (1st Dis. 1998).....	243
State v. Smith, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984).....	235
State v. Steffen, 31 Ohio St. 3d 111, 509 N.E.2d 383, syl. 1 (1987).....	397
State v. Stojetz, 84 Ohio St.3d 452, 456, 705 N.E.2d 329 (1999).....	150
State v. Storch, 66 Ohio St.3d 280, 292, 1993 Ohio 38, 612 N.E.2d 305.	65
State v. Tague, 372 So.2d 555, 558 (La. 1978) (Dennis, J., dissenting).....	44
State v. Talley, 18 Ohio St.3d 152, 155, 480 N.E.2d 439 (1985).....	232
State v. Taylor, 66 Ohio St.3d 295, 308, 612 N.E.2d 316 (1993)	passim
State v. Thompkins, 78 Ohio St.3d 380, 1997 Ohio 52, 678 N.E.2d 541.....	223, 224
State v. Thompson, 33 Ohio St. 3d 1, 15, 514 N.E.2d 407, 420 (1987).....	passim
State v. Tyler, 50 Ohio St. 3d 24, 553 N.E.2d 576 (1990).....	180, 343, 344
State v. White, 118 Ohio St. 3d 12, 2008-Ohio-1623	106
State v. White, 15 Ohio St. 2d 146, 239 N.E.2d 65 (1968)	318
State v. Williams, 73 Ohio St.3d, 153, 168-169, 652 N.E.2d 721 (1995)	235
State v. Wilson, 113 Ohio St.3d 382, 2007 Ohio 2202, 865 N.E.2d 1264	225
State v. Wilson, 787 P.2d 821, 821 (N.M. 1990).....	372
State v. Wogenstahl, 75 OhioSt.3d.344, 62 N.E.2d.311 (1996).....	251
State v. Zuern, 32 Ohio St. 3d 56, 63-64, 512 N.E.2d 585, 593 (1987)	307
Stein v. New York, 346 U.S. 156, 185, 97 L.Ed. 1522, 73 S.Ct. 1077 (1953).....	46
Stouffer v. Reynolds, 168 F.3d 1155, 1163-64 (10th Cir. 1999).....	370
Strickland v. Washington, 466 U.S. 668 (1984).....	313, 314, 322, 335
Tague v. Louisiana, 444 U.S. 469, 470-471, 100 S.Ct. 652, 62 L.Ed.2d 622 (1980) (per curiam).....	43, 44
The Paquete Habana, 175 U.S. 677, 700 (1900).....	399
Townsend v. Sain, 372 U.S. 293, 307, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963)	48
Trop v. Dulles, 356 U.S. 86, 99, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958).....	74, 391

Tuilaepa v. California, 512 U.S. 967, 971-73, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994) ..	136, 396
Tumey v. Ohio, 273 U.S. 510	179
Turner v. Louisiana, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965)	178, 269, 333
United States v. Aaron Burr, 25 F. Case 30, Case No. 14 (1807)	340
United States v. Blount, 479 F.2d 650, 651 (6th Cir.1973)	147
United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).....	375
United States v. Calandra, 414 U.S. 338, 343 (1974).....	318
United States v. Corbin, 590 F.2d 398, 400 (1st Cir.1979)	184
United States v. Lara-Ramirez, 519 F.3d 76 (1st Cir.2008)	183
United States v. Lloyd, 462 F.3d 510, 518 (6th Cir. 2006)	186
United States v. Mahan, 190 F.3d 416, 422 (6th Cir. 1999).....	49
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.....	236
United States v. Olano, 507 U.S. 725, 737, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993.).....	185
United States v. Poindexter, 942 F.2d 354, 360 (6th Cir. 1991).....	278
United States v. Proctor & Gamble Co., 356 U.S. 677, 683 (1958).....	319
United States v. Reid, 53 U.S. (12 How.) 361, 366 (1851)	201
United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820)	406
United States v. Tingle, 658 F.2d 1332 (9th Cir. 1981).....	50, 51
United States v. Wallace, 848 F.2d 1464, 1475 (9th Cir. 1988).....	372
United States v. Wheaton, 517 F.3d 350, 361 (6th Cir. 2008).....	182
United States v. Williams, 504 U.S. 36, 56 (1992).....	318
United States v. Young, 470 U.S. 1, 10, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985).....	234, 278, 355
Wainwright v. Witt, 469 U.S. 412 (1985).....	121, 334
Walker v. Engle, 703 F.2d 959, 963 (6th Cir. 1983)	370, 371
Walton v. Arizona, 497 U.S. 639, 111 L.Ed.2d 511, 110 S.Ct. 3047 (1990)	374, 396
Warger v. Shauers, 135 S. Ct. 521 (2014)	201
Watts v. Indiana, 338 U.S. 49, 53, 69 S.Ct. 1347, 93 L.Ed. 1801 (1949).....	48
Wearry v. Cain, __ U.S. __, 136 S.Ct. 1002, 194 L.Ed.2d 78, 2016 U.S. LEXIS 1654 (2016) (per curiam).....	59

White v. Mitchell, 431 F.3d 517, 537 (6th Cir, 2005)	151
Whiteman v. State (1928), 119 Ohio St. 285, 164 N. E. 51.....	162
Wiggins v. Smith, 539 U.S. 510, 533 (2003).....	314
Williams v. Brewer, 375 F.Supp. 170 (S.D. Iowa 1974).....	50
Williams v. Brewer, 509 F.2d 227 (8th Cir. 1974).....	50
Wolfe v. Brigano, 232 F3d 499 (6th. Cir. 2000).....	152
Wood v. Georgia, 370 U.S. 375, 390 (1962)	318
Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).....	135, 158, 391
Yopps v. State, 228 Md.204, 178(A).2d 879 (1962)	276
Zant v. Stephens, 462 U.S. 862, 876, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)	passim
Zschernig v. Miller, 389 U.S. 429, 440 (1968).....	399

Constitutional Provisions

Ohio Const. art. I, § 2.....	201
Ohio Const. art. I, § 5.....	138, 341, 372
Ohio Const. art. I, § 9.....	passim
Ohio Const. art. I, §10.....	passim
Ohio Const. art. I, §16.....	passim
U.S. Const. amend VI	passim
U.S. Const. amend VIII.....	passim
U.S. Const. amend XIV	passim
U.S. Const. art. IV.....	399

Statutes

R.C. § 2313.17	150
R.C. § 2901.04	73
R.C. § 2903.01	407
R.C. §2909.01	229
R.C. § 2911.01	13, 228

R.C. § 2911.11.....	13, 229
R.C. § 2911.12.....	231
R.C. § 2929.02	vi, 390, 407
R.C. § 2929.021	vi, 390, 396, 407
R.C. §2929.024.....	359, 360, 36
R.C. § 2929.03	passim
R.C. § 2929.04	passim
R.C. § 2929.05	passim
R.C. § 2929.06	221, 370
R.C. §2941.14.....	passim
R.C. §2945.27	122
R.C. §2947.06.....	360

Rules

Crim.R. 8.....	156
Crim. R. 11.....	394
Crim.R. 14.....	156, 159, 165
Crim.R. 16.....	274, 351
Crim. R. 24.....	122, 150
Crim.R. 29.....	222
Evid. R. 403	163, 217
Evid. R. 404	160, 163
Evid. R. 606	198
Evid. R. 607	206, 207, 209, 211
Evid.R. 612	205
Evid.R. 804	65

Other Authorities

A. B. A. Standards For Criminal Justice (Trial By Jury) Part IV, Section 4.1	270
AAIDD, User’s Guide: Mental Retardation Definition, Classification And	

Systems Of Supports 12 (11th ed. 2010)	passim
AAIDD, <i>Mental Retardation Definition, Classification, and Systems of Supports</i> 11 (8th ed. 1983).....	88
ABA Project on Standards for Criminal Justice, Trial by Jury, §4.1(b), p. 91 (App. Draft 1968)	269
Alan S. Kaufman & Elizabeth O. Lichtenberger, <i>Assessing Adolescent and Adult Intelligence</i> 197 (3d ed. 2006)	87
American Bar Assoc. Project on Standards for Crim. Justice, the Prosecution Function, §5.8.....	278
American Bar Association Guidelines for the Appointment of Counsel in Death Penalty Cases.....	314, 343
American Bar Association published, <i>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</i>	300
American Psychological Association, <i>Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV)</i>	82, 87, 91, 98
Black’s Law Dictionary, Fifth Edition.....	282
Cho, <i>Capital Confusion: The Effect of Jury Instructions on the Decision To Impose Death</i> , 85 J. Crim. L. & Criminology 532, 549-557 (1994)	394
2 Kaplan & Sadock’s <i>Comprehensive Textbook of Psychiatry</i> 2952 (B. Sadock & V. Sadock eds., 7th ed. 2000)	89
James R. Flynn, <i>Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect</i> , 12 Psychol. Pub. Pol’y & L. 170, 171 (2006).....	87
Joint Task Force to Review the Administration of Ohio’s Death Penalty, Final Report & Recommendations, April, 2014	303
M. Hale, <i>History and Analysis of the Common Law of England</i> 258 (1713)	63
<i>Mental Retardation, Definitions, Classification, and Systems of Supports</i> , 10th Edition, AAMR,.....	104
OAS Charter, Art. 3	400
Oxford Dictionaries · © Oxford University Press	246, 365

Peter Irons and Stephanie Guitton, ed., *May It Please the Court*
(New York: New Press, 1993), 233..... 159
Restatement (Second) of Foreign Relations Law of the United States, Sec. 154(1) (1965)..... 405

Treatises

1 Gianelli & Snyder, *Evidence* (2001) 512, Section 612.4..... 206
1 Giannelli, *Evidence*, Section 612.3, at 578 (3d Ed.2010)..... 205

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 Chelsea 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, 2013, 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 Vaughn¹ 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.)

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, pp.2566-2567, 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 witnesses 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 excused, 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. 1

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.)

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.

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?

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); *Lynnum 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

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

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

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

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

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'Bradovich⁸ 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)

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

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 score, 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
<ul style="list-style-type: none"> • Language (receptive and expressive) • Reading and Writing • Money 	<ul style="list-style-type: none"> • Interpersonal • Responsibility • Self-esteem • Gullibility (likelihood of being tricked or 	<ul style="list-style-type: none"> • Activities of daily living <ul style="list-style-type: none"> ○ Eating ○ Transfer/mobility ○ Toileting ○ Dressing • Instrumental activities of

<p>concepts</p> <ul style="list-style-type: none"> • Self-direction 	<p>manipulated)</p> <ul style="list-style-type: none"> • Naiveté • Follow Rules • Obeys Laws • Avoids victimization 	<p>daily living</p> <ul style="list-style-type: none"> ○ Meal preparation ○ Housekeeping ○ Transportation ○ Taking medication ○ Money management ○ 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

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 skewed.

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. 104, 144 (1982), the Court stated that "just as the state may not by statute preclude the sentencer from considering any mitigating factor,

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, pp. 2566-2567, 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 its 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, 3538¹²) 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)

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 3446-3447¹³.

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?

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:

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 challenge 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.*

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.

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,

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

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 19¹⁹, 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:

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 "inviolable."

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 juror 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.

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.

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

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 indispensable 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 Vaughn 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 unfairness 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 Constitution²⁴ guarantee every criminal defendant a fair trial.²⁵ A fair trial necessarily requires the trial court

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

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.

CERTIFICATE OF SERVICE

I hereby certify that this Appellant's Merit Brief-Vol. I 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 _____
Kathleen McGarry
Counsel for Shawn E. Ford