

**IN THE SUPREME COURT OF OHIO**

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

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

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

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***PROPOSITION OF LAW NO. XVI***

***IMPROPER LIMITATIONS UPON DEFENSE CLOSING ARGUMENTS DEPRIVES A DEFENDANT OF DUE PROCESS OF LAW AND A FAIR TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION 10 AND 16 OF THE OHIO CONSTITUTION.***

During closing arguments, a series of objections were made by the State which the trial court sustained. The efforts of defense counsel during closing arguments in the trial phase were to call into question issues regarding the scope of the investigation, and call to question witnesses not called to testify. The first issue arose as defense counsel called into question the scope and extent of the investigation:

And, again, when you make decisions here, you have a right to have the investigation that you need to make the decisions to let you know what happened. You don't have to put the pieces together. You are not supposed to put the pieces together when there is a question in your mind. That the – job of the New Franklin Police Department. And if they are not up to doing it, then they need to get somebody else out there.

Mr. Loprinzi: Objection.

The Court: Sustained.

(Vol. 28, Trial, p.5261-5262.) Detective Morrison had been an integral part of the investigation into Chelsea Schobert's felonious assault. In fact, Detective

Hitchings testified that he contacted Detective Morrison because when he arrived at the Schobert's home, the morning they were murdered, he found Detective Morrison's business card on the Schobert's dresser. (Vol. 26, Trial, p. 4952.) Detective Morrison did not testify at the trial, and defense counsel questioned why the jury did not hear from Detective Morrison. The State objected, and the trial court sustained the objection. (Vol. 28, trial, p. 5267.) Next, defense counsel, continuing to question the scope of the investigation, contending there were unanswered questions and that the investigation seemingly ceased simply because Detective Hitchings got a statement from Shawn Ford, that he did it.

Great. Case solved.

What else did he say? I mean, really, what else did he say? You have got him saying—you have got him now opened up, confessing. What else did Shawn say? If you finally got him to a point where you are not worried about him shutting up or changing his story because he's finally telling you the truth. Where is the rest of the information?

Where are the cell phones? Where are Jeff and Pegs cell phones? That's important. We don't know where those phones went. Why don't we know that?

I mean, if according to Hitchings, Shawn has now come clean and telling the truth of the story, that's when you ask him all those questions you want to ask. That's when you get all the answers out.

Loprinzi: Objection. May we approach?

(Vol. 28, Trial, p. 5267-5268.) The Prosecutor argued during the side-bar that there were things the State “decided not to bring them out at the trial for strategic reasons. But to suggest that they were never asked is improper.” (Vol. 28, Trial, p.5269.) The Prosecutor then asked that the defense be precluded from arguing or further commenting “about witnesses that did not appear, like James Jordan—who was subpoenaed and just failed to appear; we tried to get him to appear—or other people—the rule indicates that they can’t comment on those things and so we would ask that they also be instructed.” (Vol. 28, Trial, p.5269.) The Court sustained the Prosecutor’s objections and instructed the defense that they could not continue making comments about witnesses who did not testify. (Vol. 28, Trial, p.5269-5270.)

The trial court improperly limited and restricted defense counsel during closing arguments. Crim.R. 16(I) specifically provides that each party shall provide opposing counsel “a written witness list, including names and addresses of any witness it intends to call at its case-in-chief, or reasonably anticipates calling in rebuttal or surrebuttal.

The content of the witness list may not be commented upon or discussed to the jury by opposing counsel, but during argument, the presence or absence of the witness may be commented upon.” To be sure, Crim.R. 16 used to prohibit the

parties from commenting upon any witness that was on a witness list, and not called at trial. See, *State v. Hannah*, 54 Ohio St.2d 84, 374 N.E.2d 1359 (1978) interpreting former version of Crim.R. 16. Crim.R. 16( C)(3) used to provide “the fact that a witnesses name is on a list furnished under subsection ( C)(1)( C), and that the witnesses not called shall not be commented upon at trial.” However, Crim.R. 16 was amended in 2010, and now specifically provides that a party may comment upon “the absence or presence of a witness relevant to the proceedings.” See, Crim.R. 16, Staff Notes, 7-1-10 Amendments. According, under the 2010 Amendments to Crim.R. 16, the trial court erred in sustaining the State’s objections to defense counsel arguing witnesses who were not called. Detective Morrison was relevant to the proceedings. He was investigating the felonious assault charges involving Chelsea Schobert. When called by Detective Hitchings the morning of the murder, Morrison came out to the Schobert house and Morrison was involved in the several interrogations of Ford. Morrison was relevant and his absence from trial was fair commentary.

In *State v. Herring*, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975) the Court explained the import of closing arguments in a capital case:

There can be no doubt, the closing argument for the defense is a basic element of the adversary fact-finding process in a criminal trial. Accordingly, it has universally been held that counsel for the defense has a

right to make a closing summation to the jury, no matter how strong the case for the prosecution may appear to the presiding judge. The issue has been considered less often in the context of a so called bench trial. But the overwhelming weight of authority in both Federal and State Constitutions hold that a denial of the opportunity for final argument in a non-jury criminal trial is a denial of the basic right of the accused to make his defense.

One of the many cases so holding was *Yopps v. State*, 228 Md.204, 178(A).2d 879 (1962). The defendant in that case, indicted for burglary, was tried by the court without jury. The defendant, in his testimony, admitted being in the vicinity of the offense, but denied any involvement in the crime. At the conclusion of the testimony, the trial judge announced a verdict of guilty. Defense counsel objected, stating that he wished to present arguments on the fact, but the trial judge refused to hear any arguments on the grounds that only a question of credibility was involved, and, therefore, counsel's arguments would not change his mind. The Maryland Court of Appeals held that the trial court's refusal to permit defense counsel to make a final summation violated the defendant's right to the assistance of counsel, under the State and Federal Constitutions:

The constitutional right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor, however simple, clear, unimpeached, and conclusive the evidence may seem, unless he has waived his right to make such argument, or unless the argument is not within the issues in the case, and the trial court has no discretion to deny the accused such right." *Id.* at 207, 1782d at 881.

The wide-spread recognition of the right of the defense to make a closing summary of the evidence to the trier-of-fact, whether judge or jury, finds solid support in history. In the Sixteenth and Seventeenth century, when notions of compulsory process, confrontation, and counsel were in their infancy, the essence of the English criminal trial was argument between the defendant and counsel for the crown. Whatever other procedural protections may have been lacking, there was no absence of debate of the factual and legal issues raised in a criminal case. As the right of compulsory process, to confrontation, and to counsel developed, the adversary system commitment procedure had the effect of shifting the primary function of argument to summation of the evidence at the close of trial, in contrast to the “fragmented” factual argument that had been typical of the earlier common law.

*It can hardly be questioned that closing arguments serve to sharpen and clarify the issues for resolution by the trier-of-fact in a criminal case. For it is only after all of the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversary's position. And for the defense, closing argument is the last clear chance to persuade the trier-of-fact that there may be reasonable doubt of the defendant's guilt. See, In re: Winship, 397 U.S. 358.*

\* \* \* This is not to say that closing arguments in a criminal case must be uncontrolled or even unrestrained. The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations. He may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant. He may insure that argument

does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial. In all of these respects he must have broad discretion. See, generally, 5 R. Anderson, Wharton's Crim. Law and Proc. §2077 (1957). Cf. American Bar Assoc. Project on Standards for Crim. Justice, the Prosecution Function, §5.8, pp.126-129, and the Def. Function, §7.8, pp.277-282. *Id.* at 861-862.

*Id.* at. 862. *Herring* outlined the importance of closing argument, and wide latitude that should be given so that counsel can argue their perspective of the case and flaws in their opponent's case. Defense counsel attempted to argue about the lack of evidence regarding certain areas for which there was testimony. The lack of evidence or the failure to call certain witnesses, when pointed out to the jury may in fact create doubt.

In every criminal case, the mosaic of evidence that comprises the record before a jury includes both the evidence and the lack of evidence on material matters. Indeed, it is the absence of evidence upon such matters that may provide the reasonable doubt that moves a jury to acquit." *United States v. Poindexter*, 942 F.2d 354, 360 (6th Cir. 1991) (reversing trial court's decision to prevent defense counsel from commenting on prosecution's failure to introduce fingerprint test results that did not reveal defendant's prints on contraband). In this instance, Kevin's counsel cannot be faulted for attempting to leverage the absence of testimony from a person that was repeatedly referred to by Defendants' testifying employees into a jury finding of reasonable doubt.

*United States v. Young*, 470 U.S. 1, 12, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985).

While a defendant has no burden of proof at trial, the United States Supreme Court suggested in *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) that the practical burden of a criminal defendant, if any, is to create reasonable doubt about guilt. *Young* and *Poindexter* recognized one appropriate way to do so is to be able to comment upon the absence of evidence or witnesses in trial. Closing argument is just one tool to assist in the creation doubt and the trial court improperly limited counsel's arguments.

At its core, the Due Process Clause of the Fourteenth Amendment guarantees that one charged with a crime has a fair opportunity to defend against the charges. *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The trial court improperly limited the closing arguments.

## **PROPOSITION OF LAW NO. XVII**

**A CAPITAL DEFENDANT'S RIGHT TO A RELIABLE SENTENCE IS VIOLATED WHEN THE TRIAL JUDGE FAILS TO PROPERLY WEIGH AGGRAVATING CIRCUMSTANCES AND MITIGATING FACTORS IN IMPOSING A SENTENCE OF DEATH. U.S. CONST. AMENDS. VIII, XIV; OHIO CONST. ART. I §§9,16.**

R.C. § 2929.03(F) requires the court or panel of three judges, when it imposes sentence of death, to state in a separate opinion its specific findings as to the existence of any mitigating factors set forth in division (B) of O.R.C. § 2929.04, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. *State v. Maurer*, 15 Ohio St. 3d 239, 473 N.E.2d 768 (1984). The trial court issued a twenty-two (22) page opinion in this case. (Doc. # 378) The trial court opinion in this case contains errors that render the death sentences arbitrary and unreliable.

### **The Trial Court's Introduction**

In this section, the trial court attempted to lay out the history of the case and what occurred during the course of proceedings. Mr. Ford had been charged with three separate capital specifications, attached to each of five aggravated murder

counts in the Indictment: (1) the Aggravated Murder was part of a course of conduct involving the purposeful killing or attempt to kill two or more persons by the offender, in violation of O.R.C. §2929.04(A)(5); (2) the Aggravated Murder was committed while Shawn Ford, Jr. was committing, attempting to commit, or fleeing immediately after committing or attempting to commit Aggravated Robbery, and (a) Shawn Ford, Jr. was the principal offender in the commission of the Aggravated Murder or, (b) if not the principal offender, committed the Aggravated Murder with prior calculation and design, in violation of O.R.C. §Section 2929.04(A)(7); and (3) the Aggravated Murder was committed while Shawn Ford, Jr. was committing, attempting to commit, or fleeing immediately after committing or attempting to commit Aggravated Burglary, and (a) Shawn Ford, Jr. was the principal offender in the commission of the Aggravated Murder or, (b) if not the principal offender, committed the Aggravated Murder with prior calculation and design, in violation of O.R.C. §Section 2929.04(A)(7). (Doc. #3)

In reviewing the jury's verdict, the trial court referred to the O.R.C. §2929.04(A)(5) as the "multiple murder specification." (Doc. # 378, p. 2) This is not correct. In a similar circumstance, this Court found that it was wrong for a prosecuting attorney to refer to the O.R.C. §2929.04(A)(5) specification as the "mass murder" specification. *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971

at ¶ 177. There the court instructed that it should be referred to as the “course of conduct” specification. And the reason is obvious, in this case, two people were killed, the minimum number to qualify for the course of conduct specification. However, by referring to it as the mass murder specification or the multiple murder specification it raises the specter of a crime much more egregious than the one before the court.

Later in the introduction, the court states:

Defendant Ford was found guilty of Specifications Two and Three to Counts Four and Five, with the determination that he committed the aggravated murder of Margaret J. Schobert with prior calculation and design while committing, fleeing immediately after committing or attempting to commit aggravated robbery.

(Doc. # 378, pp. 2-3). This may be true as it relates to the second capital specification but the third specification charged that he committed the aggravated murder during the course of an aggravated burglary.

### **The Trial Court’s Analysis**

In this section the trial court goes into to an extensive description of things he has not considered in his independent deliberation. According to Black’s Law Dictionary, Fifth Edition, the word consider means “to fix the mind on, to examine.” In the courts list of what was not considered, he certainly examined the evidence. The court states it did not consider: letters sent to the court from Ford,

the presentence investigation report, the felonious assault on Chelsea Schobert,<sup>26</sup> victim impact evidence during the sentencing hearing, the aggravated murder itself, Ford's criminal record, "or any aggravating circumstances of which the defendant was found guilty that have been merged." (Doc. # 378, p. 5) The court further explain he did not consider any of the mitigating circumstance not raised by the defense, but later in the opinion will detail the ones "not considered."

Certainly the court examined these items, yet felt the need to specifically put down that he did "not consider them." If he examined them, he was aware of them and it is hard to somehow wipe that evidence from his mind in making his determination. It is like unringing his own bell. There does not seem to be much difference in an analysis that would "not consider" a piece of evidence and considering that same evidence and not giving it any weight.

It is also curious as to what the court is referring to when he states he did not consider "any aggravating circumstances of which the defendant was found guilty that have been merged." There were three aggravating circumstances attached to Count Four, and there were three mentioned later in the opinion. If the court is

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<sup>26</sup> As set forth in Proposition of Law No XIV the jury was permitted to consider the felonious assault of Chelsea Schobert as a result of the State's wholesale submission of "all testimony evidence" from the trial phase. The trial court's independent reweighing does not cure this defect as the jury's recommendation may have been different had they been given proper guidance as to the evidence that was to be properly consider in support of the aggravating circumstances.

referring to the aggravating circumstances in Count Three or Count Five, relating to Margaret Schobert, this would be totally inappropriate to consider those factors since those counts did not even go to the jury. Those should not have been examined at all, but the trial court did look at them in order to make such a determination.

### **The Trial Court's Examination of Mitigating Circumstances**

The trial court found the nature and circumstance of the offense to have no mitigating value. The trial court then examined the history, character and background of the offender. (Id., at pp. 9-14.) After the court detailed Mr. Ford's experiences growing up, the court gave "slight weight" to his background. In so finding, the court stated: "Moreover, many people grow up in circumstances similar to Defendant Ford's and do not resort to criminal conduct." This kind of analysis fails to acknowledge that everyone has different experiences in life, even if they are raised in the same house. The mental capacities of a person to deal with adversity in their lives is very different. That person who "grew up in the same circumstances" may have had mental health issues they had to deal with along with the hardships related to their background. No one knows if that person who "grew up in similar circumstances" may have had a mentor or important person in their life, outside the family environment, to help them along the way. No one person's

family circumstance are exactly the same as another's. That is why the penalty phase of a capital case is about making an INDIVIDUALIZED determination concerning the person on trial for their life. *Lockett vs. Ohio*, 438 U.S. 586 (1978). Ironically, later in the opinion, the court points out that Mr. Ford was bullied in school and beaten by his step-father. Factors that someone with a "similar circumstances" may not have endured.

It is also disturbing that the court felt compelled to examine all the statutory mitigating circumstances, in spite of the fact that Mr. Ford did not present evidence related to many factors. In *State vs. DePew*, 38 Ohio St.3d 275, 289; 528 N.E.2d 542 (1988), this court made it clear that if the defendant chooses to refrain from raising some of or all of the factors available to him, those factors not raised may not be referred to *or commented upon by the trial court* or the prosecution. Yet the court did exactly that, he went through each factor in the statute. The trial court should have limited his examination to the factors presented by Mr. Ford.

The defense expert, Dr. Joy Stankowski, testified concerning Mr. Ford's drug and alcohol abuse. She specifically noted the effect that alcohol has on a developing brain. The trial court gave this factor no weight, because "There was no evidence that Defendant Ford was under the influence of alcohol at the time of the murder of Margaret Schobert." (*Id.*, p. 17) However this court has previously

held that the fact that an offender may not have been under the influence at the time of the offense is an incorrect definition of mitigation. “. . .to the extent that the trial court's sentencing opinion may be susceptible of a reading that indicates no need to consider the factor (substance abuse) simply because appellant was not under the influence of drugs or alcohol at the time of the offense. The court's statement in that regard would be an incorrect definition of mitigation, one that relates directly to culpability, as opposed to those factors that are relevant to whether the offender should be sentenced to death. See *State v. Holloway*, 38 Ohio St.3d at 242.” *State v. Goff*, 82 Ohio St.3d 123, 133 (1998).

It is also troubling that the trial court acknowledged in his opinion, the issue related to the jury's finding that in the felony murder specifications attached to Count Four, relating to Margaret Schobert, the jury found he was not the principal offender, but instead found he had committed the aggravated murder with prior calculation and design. (*Id.*, p. 15) (See, Proposition of Law No. II) The trial court noted the inconsistencies between the verdicts when the jury found Ford guilty of both principal offender and prior calculation and design immediately after the verdict. (Vol. 28, Trial, p. 509.) The court failed to acknowledge the problems with this finding, that was exacerbated when the court went back to the course of conduct specification and found he was “the offender” who had killed two or more

persons. In essence what the Court did was to weigh both prongs of the O.R.C. 2929.05(A)(7) capital specification, principal offender and prior calculation and design, in violation of *State v. Penix*, 32 Ohio St.3d 369,371 (1987), *State v. Moore*, 81 Ohio St.3d 22, 40 (1998). See, Proposition of Law No. II.

The court engaged in the same erroneous reweighing in its reasons section, Doc. 378, pp. 18-19, where the court finds him the actual killer and prior calculation and design. In *State v. Johnson* 24 Ohio St.3d 87, 494 N.E. 2d 1061 (1986), this court held that “[p]resenting the jury with *specifications not permitted by statute* impermissibly tips the *scales in favor of death*, and essentially undermines the required reliability in the jury’s determination.” This reasoning is equally applicable when the trial court considers specifications not permitted by law. To have acknowledge the dilemma created by the jury’s verdicts in Count 4 and Count 5 and then to have relied upon both findings in clear violation of the statutory language mandating either the principal offender, or if not the principal offender then with prior calculation and design undermined the reliability of the sentence and tipped the scales in favor of death.

In addition, if the court was going to accept the jury’s finding that Mr. Ford was not the principal offender in the aggravated murder of Margaret Schobert, then he should have given weight to the O.R.C. 2929.04(B)(6) mitigating factor.

## Conclusion

Ohio's statutory scheme for imposition of the death penalty is a response to United States Supreme Court decisions requiring that the death penalty be imposed in a rational, consistent manner. *Eddings v. Oklahoma*, 455 U.S. 104, 111 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978). A state that allows the death penalty "has a constitutional obligation to tailor and *apply* its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (emphasis added); *see also, Barclay v. Florida*, 463 U.S. 939, 958-59 (1983) ("Since *Furman v. Georgia*, 408 U.S. 238 (1972), this Court's decisions have made clear that States may impose this ultimate sentence *only if they follow procedures that are designed to assure reliability in sentencing determinations.*" (Stevens, J., concurring) (citation omitted in original, emphasis added)).

To that end, discretion in sentencing by a jury or three judge panel is channeled so as to limit the possibility that a death sentence will be imposed without thorough, proper consideration. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). In Ohio, that consideration is defined as a weighing of only the aggravating circumstances present against the mitigating factors with a requirement that the jury and judge find, beyond a reasonable doubt, that the statutory aggravating

circumstance outweighs all of the mitigating factors. O.R.C. § 2929.03. In this case, the court allowed improper considerations to tilt the balance in favor of death.

The trial court's error in the opinion was violative of the Fifth, Eighth and Fourteenth Amendments guarantees firmly established in *Lockett vs. Ohio*, 438 U.S. 586 (1978); *Eddings vs. Oklahoma*, 455 U.S. 104 (1982); *Hitchcock vs. Dugger*, 481 U.S. 393 (1987); and *Penry vs. Lynaugh*, 492 U.S. 302 (1989) and similar guarantees made in Sections 9 and 16, Article 1 of the Ohio Constitution. Mr. Ford's death sentence must be reversed.

**PROPOSITION OF LAW NO. XVIII**

***IT IS A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND OHIO CONSTITUTION, ARTICLE 1, SECTIONS 1, 2, 9, AND 16, TO UPHOLD A SENTENCE OF DEATH WHEN AN INDEPENDENT WEIGHING OF THE AGGRAVATING CIRCUMSTANCES VERSUS THE MITIGATING FACTORS DEMONSTRATE THAT THE AGGRAVATING CIRCUMSTANCES DO NOT OUTWEIGH THE MITIGATING FACTORS BEYOND ANY REASONABLE DOUBT, AND THE DEATH SENTENCE IS NOT APPROPRIATE.***

Shawn Ford should not be on death row. Had the crime been committed six months earlier, he would not have been eligible for the death penalty. To presume that because he was 18, he had the maturity and mental development to overcome the vulnerability or susceptibility to negative influences is “blinking reality.” His low average IQ, coupled with his general immaturity and family upbringing combined to produce someone who committed terrible crimes. But all aggravated murders that warrant capital specifications are terrible crimes, and Ford had been diagnosed with a learning disability and a low IQ at an early age. Ford poses no threat to society in the event of a 25 or 30 actual incarceration or even a life without parole sentence. To be sure the murders were brutal in character, Ford’s history explains much of that. Furthermore, the trial court appears to have weighed non-statutory aggravating circumstances into the death decision.

In ruling capital punishment unconstitutional for juveniles under the age of eighteen (18), the United States Supreme Court emphasized that rules have been implemented to ensure that the death penalty is reserved for “a narrow category of crimes and offenders.” *Roper v. Simmons*, 543 U.S. 551, 569, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). *Roper* held that because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force. Capital punishment must be limited to those offenders who commit “a narrow category of the most serious crimes” and whose extreme culpability makes them “the most deserving of execution.” In *Roper*, the Court recognized differences between juveniles cannot with reliability be classified among the worst of the offenders. *Roper* relied upon three basic realities to conclude the death penalty can not be imposed for juveniles: 1) a lack of maturity and under developed sense of responsibility are found in youth more often than in adults and often result in impetuous and ill considered actions and decisions; 2) juveniles are more vulnerable or susceptible to negative influences and outside pressures, caused in part by the prevailing circumstances that juveniles have less control, or less experience with control, over their own environment; 3) the character of a juvenile is not as well formed as that of an adult. The personality traits of a juvenile are more transitory, less fixed.

These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immaturity and irresponsible behavior means “their irresponsible conduct is not as morally reprehensible as that of an adult.” Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievability of irretrievable depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.

*Id.* at 568-570. Going to sleep on the eve of one’s eighteenth (18<sup>th</sup>) birthday, and waking up the next morning eighteen (18) years old does not overnight change the characteristics of a juvenile. Shawn Ford was barely eighteen (18) when he was arrested and charged with the aggravated murder of Jeffrey and Margaret Schobert, and the felonious assault of Chelsea Schobert. The overwhelming evidence presented supported a portrait of a young man who was immature, irresponsible, vulnerable and impulsive. Shawn was not just a young kid who didn’t want to grow up, a review of his life’s circumstances places him squarely in the category of a juvenile whose vulnerability and comparative lack of control over his immediate surroundings rendered him ill-equipped to deal with the turmoil and challenges he

faced. To be sure, he was 18 years old, not what we consider a juvenile under the law. But to actually implement and carry out the individualized sentencing constitutionally mandate, the decision in this case cannot be made by looking at the date on the birth certificate. *Lockett v. Ohio* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Individualized sentencing means looking at the entire package that brought Shawn Ford to where he was in life on April 1, 2013.

And as I said before, development, there is no magic age at which things start or stop, and the age varies on the individual. Some people's brains might be more fully developed and their characters and personalities might be more mature at age 17. Some people might not be mature until 19, 20. And a lot of that depends on how supportive their environment was, it depends on how many extra resources they might have had. It depends on other things they were born with, how high or low their IQ was.

(Vol. 4, Mitigation, p.499-500). The environment Shawn Ford grew up in, coupled with low IQ of 80 or below compels the conclusion that Shawn, like juveniles under 18, fails to fall among the worst offenders or evidence of the “irretrievability of irretrievable depraved character.”

Before he was three years old, his baby sister died. Some may say he was too young for it to have any impact. The fact that he stopped talking after her death suggests otherwise. Even when beat with a belt, he would not cry and when “whoopings” weren’t effective, he was punished by having to stand holding 25

pound weights above his head. Before he was five, Shawn was witness to violence and physical fights between his parents 2 to 3 times a week, one time, intervening and crawling on his father's back begging him to stop beating his mother. By eight years old he had twice been removed from his house and the people with whom he had bonded. He was bullied at school because of his high pitched voice. When he returned to his mother, he was again faced with witnessing and enduring physical abuse; this time involving his step-father. Tracy Wooden. His step father sold drugs and ended up in prison. He longed to spend time with his father who made little to know effort to be a part of Shawn's life. To be sure, faced with all of these challenges as a juvenile, Shawn Ford found himself on the street and making the wrong choices.

It is no surprise that he ended up in juvenile court and no surprise that the counseling through juvenile court, it was "evident" Shawn had emotional and psychological problems. When released from juvenile detention, he met Chelsea, whom by all accounts he truly loved. His step-father was not happy Shawn wasn't sharing the money he got from Chelsea and so his step-father went after him with a baseball bat and during the struggle bit him and then, kicked him out of the house. One week later, as Chelsea sat in the hospital, Shawn faced losing what he thought was the love of his life. Two weeks later he stood charged with capital murder.

These were the mitigating factors present. Not all fit neatly within one of the factors enumerated in 2929.04(B). On his 18th birthday he did not miraculously develop the skills to deal with his vulnerabilities, susceptibility to negative influences and outside pressures or develop the ability to “escape negative influences” in his whole environment.

But for the difference of six (6) months, Shawn would not be eligible for the death penalty. This is a fact that cannot be easily dismissed. Though he was six (6) months past his eighteenth (18<sup>th</sup>) birthday when this crime occurred, the chronological age does not reflect the mental development as recognized in *Roper, supra*, “juvenile offenders cannot with reliability be classified among the worst of the offenders.” We recognize that juveniles have not had full opportunity to develop, that their “immature and irresponsible behavior” means that as a matter of law “their irresponsible conduct is not as morally reprehensible as that of an adult.”

The trial court issued a separate opinion weighing the aggravating circumstances against the mitigating factors. The trial court found that the aggravating circumstances outweighed the mitigating factors beyond any reasonable doubt and imposed a death sentence. But the trial court did not conduct the individualized sentencing. Had the trial court looked at the individual, a different result would have obtained. The trial court weighed the aggravating

circumstances, to include the fact that the murder was committed with prior calculation and design, even though the jury had found Shawn Ford to be the principal offender, and therefore, that factor should not have been considered as an aggravating circumstance.

Here, the mitigating factors overwhelmingly supported the conclusion that Shawn Ford, though eighteen (18) in chronological age, possessed all of the characteristics of a juvenile, for which we recognize death is not appropriate.

To be sure, capital sentencing requires individualized consideration of the offender. This means that by definition a statute cannot be drafted to cover every possible mitigating factor. Listing all of the statutory mitigating factors when Ford's evidence, though considerable, fits into only a few of the statutory pigeonholes, has the subconscious effect of leading a jury, and perhaps a judge, to believe that Shawn Ford's mitigation is not substantial because it fits into only a few of the several enumerated categories. In fact, there is a United States Supreme Court case that stands for the idea that mitigation cannot be limited by statutory criteria, "ruling, other otherwise." See, *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

R.C. 2929.05 charges this Court with the obligation to “review on appeal the sentence of death at the same time that they review the other issues of the case.”

The Court:

shall review the judgment in the case and the sentence of death imposed by the court or panel of three (3) judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case, and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals...shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They also shall review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury, or the panel of three (3) judges, found the offender of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing, and the mitigating factors.

A review of the indictment and the aggravating circumstances renders it impossible for this Court to independently weigh and make a determination of the appropriateness. This is because Shawn Ford was found guilty of the principal offender and despite that, the jury was permitted to consider and found him guilty of committing the crime with prior calculation and design.

As a matter of federal constitutional law, a proportionality review is not required. See, e.g., *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984) Whether by accidental or designed implementation of the doctrine of “new federalism” Ohio does require a proportionality review. See, Ohio Rev. Code Ann. §2929.05.

Just about anyone who has weighed in on the subject has drawn the same conclusion: in order to determine whether a death sentence is proportional, the death sentence and the offender’s conduct must be compared to similar crimes not only in which the death penalty was actually imposed, but in which the death penalty could have been imposed and indeed could have been charged.<sup>27</sup>

The United States Supreme Court outlawed the death penalty for rape in *Coker v. Georgia* 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). The Court did so, because it found that the death penalty for rape was not generally being imposed throughout the nation, and it therefore violated the Constitution to do so in *Coker’s* case. The Supreme Court did not compare other rape cases in Georgia where the defendant had been sentenced to death for rape in order to determine

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<sup>27</sup> While the last of these is sometimes debatable among those who debate such things, its inclusion in the pool of cases is unquestionably proper. This is due, if for no other reason, to the fact that the unbridled charging discretion of Ohio prosecutors is such that many people who could be charged with the death penalty are not. Moreover, the *Coker* standard, described herein, makes such inclusion undeniably proper.

whether Coker's death sentence was valid. Instead, the Court looked to whether the death penalty was being imposed generally across the country for the crime of rape. Concluding that it was not, the Court invalidated Coker's death sentence.

*Coker* at the very least warrants the inclusion of all other capital murder cases where death could have been imposed as part of the proportionality pool. Thus, just based upon the *Coker* analysis, Ohio's review is fatally flawed. Instead of looking at capital indictments involving the same acts, charges, and/or specifications, this Court looks only at similar cases where the death penalty was actually imposed. Under this analysis, had the United States Supreme Court compared Coker's death sentence for rape only with other sentences of death imposed in Georgia for rape, and without regard to the rape cases where death was not imposed in Georgia and other states, Coker would have by now surely been executed.

Ohio law requires a reviewing court to review a defendant's capital sentence for proportionality and appropriateness. But this Court will be unable to do that—it will be unable to perform any sort of a proportionality review that is anything other than lip service to the concept. And the reason, of course, is because there are no statistics; there is no data, which would enable the Court to perform a *true* proportionality review.

In September of 2007, the *American Bar Association* published, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Ohio Death Penalty Assessment Report: An Analysis of Ohio's Death Penalty Laws, Procedures, and Practices*. Four years later a task force was appointed to review capital punishment in Ohio. The 2007 ABA Report addressed two issues relevant to this Court's obligation regarding proportionality review in Ohio 1) race as a factor in death penalty sentenced; and, 2) Ohio lacks meaningful proportionality review.

The Ohio Public Defender's proportionality statistics, found at <http://opd.ohio.gov/Portals/0/PDF/DP/Proportionality.pdf>, show that among those executed and those awaiting execution, a case in which there is a white victim or victims is far more likely to draw a death sentence. The 2007 ABA Study found:

In 1987, the United States Supreme Court held in *McCleskey v. Kemp*, [481 U.S. 279, (1987)] that even if statistical evidence revealed systemic racial disparity in capital cases, this would not amount to a federal constitutional violation in and of itself. At the same time, the Court invited legislative bodies to adopt legislation to deal with situations in which there were systematic racial disparities in death penalty implementation.

The pattern of racial discrimination reflected in *McCleskey* persists today in many jurisdictions, in part, because courts often tolerate actions by prosecutors, defense lawyers, trial judges, and juries that can improperly inject race into capital trials. These include intentional or unintentional prosecutorial bias when selecting cases in which to seek the death penalty;

ineffective defense counsel who fail to object to systemic discrimination or to pursue discrimination claims; and discriminatory use of peremptory challenges to obtain all-white or largely all-white juries.

There is little dispute about the need to eliminate race as a factor in the administration of the death penalty. To accomplish that, however, requires that states identify the various ways in which race infects the administration of the death penalty and that they devise solutions to eliminate discriminatory practices.

Race in Ohio today is what race was in *McCleskey*: not that blacks receive the death penalty in greater proportions than whites, but that killing a white person or persons, regardless of the defendant's race, is far more likely to draw a death sentence, exactly what happened here.

The shortcomings regarding the current proportionality review in Ohio identified in the ABA study are substantial rather than inconsequential. The study recommended, *inter alia*, that the following improvements be made:

➤ In order to protect against arbitrariness in capital sentencing, the State of Ohio should ensure proportionality in capital cases. Presently, that protection is lacking, as evidenced by the documented racial and geographic disparities in Ohio's capital system. Because proportionality is better achieved at the front end rather than the back end, the State of Ohio should develop laws and procedures to eliminate these disparities and to ensure proportionality.

➤ The courts in the State of Ohio should more vigorously enforce the rule requiring prosecutors to disclose to the defense all evidence or information known

to the prosecutor that tends to negate the guilt of the accused or mitigates punishment.

➤ The State of Ohio should engage in a more thorough review of the issues presented to the court(s) in capital appeals, relax the application of waiver standards, and decrease the use of the harmless error standard of review.

➤ The State of Ohio should create a publicly accessible database on all potentially death-eligible murder cases. Relevant information on all death-eligible cases should be included in the database and specifically provided to prosecutors to assist them in making informed charging decisions and the Ohio Supreme Court for use in ensuring proportionality.

➤ To ensure that death is imposed only for the very worst offenses and upon the very worst offenders, the Ohio Supreme Court should employ a more searching sentencing review in capital cases. This review should consider not only other death penalty cases, but also those cases in which the death penalty could have been sought or was sought and not imposed.

In its 2014 report, the Joint Task Force recommended that the legislature enact legislation to require a prospective proportionality review in death penalty cases to include cases where the death penalty was charged in the indictment or information but was not imposed. The cure lies not in another statute but in implementing the extant statute.

Since 1981 the Ohio legislature has required consideration of whether “the sentence is excessive or disproportionate to the penalty imposed in similar cases.” *Id.* The current practice of the Ohio Supreme Court is to compare only cases in which a death sentence was

imposed. This appears inconsistent with the intent of the Ohio legislature and the initial practice of the Court.

See, Joint Task Force to Review the Administration of Ohio's Death Penalty, *Final Report & Recommendations*, April, 2014, at 5.

In *State v. Simko*, 71 Ohio St.3d 483, 501, 1994 Ohio 350, 644 N.E.2d 345, Justice Pfeifer dissented from the imposition of death. Joining him were Chief Justice Moyer and Justice Craig Wright. The dissent probed the heart of Ohio's lack of meaningful proportionality review.

The focus in most death-penalty cases has been on issues other than proportionality. Typically, the court locates previous cases with similar statutory aggravating circumstances where the death penalty has been imposed, and thus finds proportionality to the case at issue. However, murders with the same statutorily defined aggravating circumstance are not necessarily crimes of the same character. In the present case, for example, the majority cites three cases in its proportionality review.

The Court should review its entire data base, so that it can determine in a meaningful way whether the death sentence imposed upon Ford can be explained by a logical distinction between the case where death is imposed from those of similar character where it is not. Only that type of true proportionality review will guarantee that Ford's death sentence was not imposed with the freakishness and predictability of a strike of lightning that the Eighth Amendment prohibits. See,

*Furman v. Georgia*, 408 U.S. 238, 309, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)

(STEWART, J., concurring).

## ***PROPOSITION OF LAW NO. XIX***

### ***IT VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION TO NOT INSTRUCT THE JURY THAT MERCY CAN BE CONSIDERED DURING ITS PENALTY PHASE DELIBERATIONS.***

Prior to the start of the penalty phase, the defense filed a motion requesting the jury be instructed to consider mercy in its deliberations. (Defense Motion No. 63, Doc. #100) The trial court never ruled on the motion.

The fundamental issue in a capital sentencing proceeding involves the determination of the appropriate punishment to be imposed on an individual. *Spaziano v. Florida*, 468 U.S. 447 (1984). The sentencer must rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not. *Id.* at 460. Appropriateness of the penalty is the indispensable element of a constitutionally valid sentencing scheme.

The United States Supreme Court's opinion in *Lockett v. Ohio*, 438 U.S. 586 (1978), established a defendant's right to permit the sentencer to use any factors it sees fit in deciding whether a defendant merits leniency. Chief Justice Burger explained that nothing prevented the sentencer from considering any aspect of a defendant's character or record or any circumstances of the offense as an independent mitigating factor. *Id.* at 607. This principle permits the jury to

consider sympathy or mercy in its sentencing decision. In *Gregg v. Georgia*, 428 U.S. 153, 190 (1976), the Supreme Court endorsed the propriety of permitting the jury to consider mercy for the defendant.

In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Court declared that the sentencer may not be precluded from considering any relevant mitigating factors offered by the defendant. *Eddings* noted that the Eighth Amendment prohibited not only legislative exclusion of mitigating evidence but also exclusion of any relevant mitigating evidence by the sentencing body. The Supreme Court admonished all lower courts not to deny consideration of any relevant mitigating evidence. "Mercy" fits within the definition of relevant mitigating factors under *Eddings*, therefore, must be considered by the sentencer.

Principles of due process and the prohibition of cruel and unusual punishment require that the jury make an individualized sentencing determination. *Zant v. Stephens*, 462 U.S. 862 (1983); *Barclay v. Florida*, 463 U.S. 939 (1983). An individualized sentencing decision requires that the jury be given a vehicle for expressing the view that the defendant "does not deserve to be sentenced to death," that "he was not sufficiently culpable to deserve the death penalty." *Penry v. Lynaugh*, 492 U.S. 302 (1989). In *Penry* the Court approved a procedure and that allows a jury to recommend mercy based on the mitigation evidence introduced by

a defendant. Indeed, the jury must be free to determine what punishment is appropriate and to give a "reasoned moral response to [the] mitigating evidence." *Id.* at 323. Compare *California v. Brown*, 479 U.S. 538 (1987) (In Justice O'Connor's concurrence, which gave the opinion of four other Justices the force of law, there is language and an analysis consistent with the notion that "mercy" merits independent consideration as a mitigating factor inasmuch as it relates to a "reasonable moral response" to the defendant's background and character.)

In *State v. Rogers*, 28 Ohio St. 3d 427, 434, 504 N.E.2d 52, 58 (1986), this Court said "defense counsel certainly has the right to plead for mercy and, indeed, has the very duty to cause the jury to 'confront both the gravity and the responsibility of calling for another's death" (emphasis added; citation omitted). In *State v. Zuern*, 32 Ohio St. 3d 56, 63-64, 512 N.E.2d 585, 593 (1987), the Court rejected the argument that "the imposition process does not permit the extension of mercy," saying "a jury is not precluded from extending mercy to defendant."

The Court then went a different direction in *State v. Lorraine*, 66 Ohio St.3d 414, 417 (1993), finding that a capital defendant is not entitled to an instruction that mercy is a mitigating factor. It is time to re-examine that ruling in light of more recent United States Supreme Court cases, or to at least limit its application.

There are not many things which are unwavering in the law today, especially in capital litigation. One thing that is unwavering, however, is a virtually unbroken line of cases that say that the Constitution does not permit limitations on mitigation. Ohio learned this lesson the hard way in its post-*Gregg* statutory scheme, see, *Gregg v. Georgia*, 428 U.S. 153 (1976), a scheme that was struck down by the Court in *Lockett v. Ohio*, *supra*. The infirmity with the law was that it listed only three statutory mitigators. If the defendant was found guilty of capital murder and at least one aggravator, but did not satisfy one of the three statutory mitigating circumstances, then the death penalty was the result. The Court struck that down, holding that the Constitution does not permit such limitations on mitigation. *Lockett* said that, given that the imposition of death by a public authority is so profoundly different from all other penalties, an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases, where a variety of flexible techniques, such as probation, parole, and furloughs may be available to modify an initial sentence of confinement. *Lockett* said that the nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores

the need for individualized consideration as a constitutional requirement in imposing the death sentence.

The epitome of this principle is the Court's decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987). In that case, Hitchcock's lawyer referred to various considerations, some of which were the subject of factual dispute, that would make a death sentence inappropriate. Hitchcock's youth (20 at the time of the murder), his lack of significant prior criminal activity or violent behavior, the difficult circumstances of his upbringing, his potential for rehabilitation, and his voluntary surrender to authorities. Although counsel stressed the first two considerations, which related to mitigating circumstances specifically enumerated in the statute, he told the jury that in reaching its sentencing decision, it was to "look at the overall picture ... consider everything together ... consider the whole picture, the whole ball of wax." In contrast, the prosecutor told the jury that it was "to consider the mitigating circumstances and consider those by number," and then went down the statutory list, item by item, arguing that only one (Hitchcock's youth) was applicable. The trial judge instructed the jurors "on the factors in aggravation and mitigation that you may consider under our law." He then instructed them that "the mitigating circumstances which you may consider shall be the following" and then the judge listed the *statutory* mitigating circumstances.

A unanimous Supreme Court reversed the limitations placed by the trial judge, and the Court's opinion, written by Justice Antonin Scalia, who fancies himself a constitutional "originalist," held that Hitchcock's right to relief under the Constitution "could not be clearer."

We think it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of *Skipper v. South Carolina*, 476 U.S. 1 (1986), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion). Respondent has made no attempt to argue that this, or that it had no effect on the jury or the sentencing judge. In the absence of a showing that the error was harmless, the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid.

*Hitchcock v. Dugger*, 481 U.S., at 398-399.

This Court's decision in *State v. Lorraine*, virtually ended mercy instructions because mercy is not one of the mitigating factors set forth in R.C. §2929.04(B). Prior to *Lorraine*, this Court held that an Ohio jury *is not precluded* from extending mercy to a defendant. *See, State v. Zuern*, supra How can a jury consider something that they are not told they can consider.

The rational in *Kansas v. Marsh*, 548 U.S. 163, 126 S. Ct. 2516 (2006), also supported the motion for a jury instruction. Justice Thomas writing for the majority

in a decision about whether the Constitution permits Kansas to allow a death sentence when aggravating and mitigating factors are in equipoise, quoted with approval the Kansas jury instruction on mercy:

The appropriateness of the exercise of mercy can itself be a mitigating factor you may consider in determining whether the State has proved beyond a reasonable doubt that the death penalty is warranted.”

In footnote 3, Justice Thomas explained that mercy as a mitigating factor is important “because it ‘alone forecloses the possibility of *Furman*-type error as it eliminate[s] the risk that a death sentence will be imposed in spite of facts calling for a lesser penalty.’”

*Marsh* held that a "mercy" instruction saved Kansas's statute from a constitutional challenge. Addressing the dissenters' concern that the "equipoise" rule allowed unconstitutional weighing of evidence in favor of death, the majority said: "The 'mercy' jury instruction alone forecloses the possibility of *Furman*-type error as it 'eliminate[ s] the risk that a death sentence will be imposed in spite of facts calling for a lesser penalty.' *Marsh*, at 4 (Souter, J., dissenting)." *Id.* at footnote 3. The Court once again endorsed the concept of a capital jury's consideration of mercy just this term in *Kansas v. Carr*, 577 U.S. ---, 136 S.Ct. 633 (2016).

Ohio, like Kansas, is a "weighing" state, therefore a mercy instruction is required to foreclose constitutional error. *Marsh* also compels the conclusion that the State may not argue that "mercy" cannot be considered by jurors during mitigation phase deliberations.

This Court's consideration of a jury instruction regarding mercy in *State v. Jackson*, 141 Ohio St. 3d 171, 2014-Ohio-3707, ¶ 238-240 is distinguishable. There, the defendant was asking that the jury be instructed that mercy is a mitigating factor. The Court found no requirement that the jury be instructed mercy is a mitigating factor. Here the request was that the jury be instructed that they could consider mercy in their deliberations. That instruction should have been allowed.

The failure to allow the instruction that the jury could consider mercy violates Mr. Ford's State and Federal constitutional rights to effective assistance of counsel, due process of law, equal protection of the law, confrontation of the State's evidence against him, and freedom from cruel and unusual punishment. U.S. Const. amends. V, VI, VIII, IX and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16 and 20. Mr. Ford has a Federal constitutional due process and Eighth Amendment right to have "mercy" considered as a mitigating factor in Ohio. The failure to allow the instruction requires a new sentencing phase be conducted.

**PROPOSITION OF LAW NO. XX**

**THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IS VIOLATED WHEN COUNSEL'S DEFICIENT PERFORMANCE RESULTS IN PREJUDICE TO THE DEFENDANT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 5, 9, 10, AND 16 OF THE OHIO CONSTITUTION.**

Shawn Ford's Sixth Amendment right to effective counsel was violated by the cumulative effect of errors and omissions by his trial counsel. While Appellant Ford believes that counsel's ineffective assistance is present in the record of this case, if this Court were to determine that this issue or a sub-part of this issue cannot be decided without information **that is not in the record of the case**, the Court should defer any ruling on the issue or sub-issue and allow it to be addressed in post-conviction proceedings. *State v. Madrigal*, 87 Ohio St.3d 378, 390-391 (2000).

**Standards for Ineffective Assistance of Counsel Claim.**

The standard for assessing attorney performance found in *Strickland v. Washington*, 466 U.S. 668 (1984) applies to this claim. Under *Strickland*, this Court must determine if counsel's performance was deficient in view of "prevailing professional norms." 466 U.S. at 687, 689.

Counsel's actions are presumed reasonable. But *Strickland* also establishes that a reasonable investigation of both law and facts is required before a choice by counsel may be deemed strategic or tactical. *Id.* at 691. “[S]trategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation. ... A decision not to investigate thus must be directly assessed for reasonableness in all the circumstances.” *Wiggins v. Smith*, 539 U.S. 510, 533 (2003) (citations and internal quotation marks omitted). Therefore, oftentimes a claim of ineffective assistance of counsel cannot be fully reviewed on direct appeal, even though the error seems to be apparent in the record of the case.

When assessing the performance prong in a capital case, this Court is informed or guided by the American Bar Association Guidelines for the Appointment of Counsel in Death Penalty Cases (ABA Guidelines). *See Wiggins*, 539 U.S. at 524. “The ABA Guidelines provide that investigations into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence ...” *Id.* (citation and internal quotation marks omitted with emphasis in original). If counsel's performance is deficient, this Court must determine whether Ford suffered prejudice resulting from counsel's error. *Strickland*, 466 U.S. at 687. Prejudice results when this Court's confidence in the result of Ford's

trial is undermined by counsel's error. *Id.* at 694. Ford has no requirement to demonstrate that counsel's error was outcome determinative under the *Strickland* prejudice prong. *Id.* at 693.

### **Ineffective Assistance of Counsel at Pretrial Proceedings**

Counsel's duty to their client begins at the moment they are appointed. Not only does counsel need to start investigating the case against their client, they need to file the appropriate pretrial motions to ensure that the client's rights are protected. Counsel filed some of the motions, but they failed to follow up on them and to renew the motions when the court failed to rule.

#### ***Grand Jury Proceedings***

Trial counsel filed three separate motions relating to the Grand Jury proceedings: Motion No. 31, Defendant's Motion to Disclose the Names of the Grand Jury Witnesses (Doc. # 70); Motion No. 32, Defendant's Motion to Transcribe the Grand Jury Proceedings Prior to Trial (Doc. # 71); and, Motion No. 33, Defendant's Motion for a Pretrial Copy of the Grand Jury Proceedings (Doc. 72). The motions were heard at the November 26, 2013 pretrial hearing.

The State opposed the motions (orally, not in writing) stating only there was "no particularized need." (Pretrial, 11-26-13, pp. 33-34) The court acknowledged that he is authorized to disclose the information if defense makes a threshold

showing, and asked defense counsel if they wanted to argue in support of the motion. (Id.)

In response to the court's request, defense counsel argued that the standard for obtaining grand jury transcripts should be more relaxed in death penalty cases. In addition, the defense argued that there could be a violation of the confrontation clause in that the testimony could change between the grand jury proceedings and the trial. Defense counsel requested that the court review the proceedings in camera. (Id.) The court took the motion under advisement. (Id., at p. 36) The court entered a journal entry to that effect, and indicated he would rule prior to trial. (Doc. # 140).

On September 24, 2014 prior to the start of voir dire, the trial court again addressed the subject of the grand jury transcripts. The court indicated that it had "directed counsel for the defense to advise the court whether any of the previously undisposed of motions that had been filed by the defense still presented viable issues. *I had not heard from the defense pursuant to the Court's directions.* The Court is prepared to dispose of those issues." (Vol. 1, Trial, 9-24-14, p. 2)<sup>28</sup>(emphasis added).

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<sup>28</sup> In an order issued on Oct. 17, 2014, the trial court states "on September 19, 2014, the court reminded counsel that some of defendant's motions had previously been held in abeyance." This

As counsel is aware, there is a heavy burden that must be met in order to -- for the Court to authorize the disclosure of those kinds of materials. That burden has not been met in this case. There has been no showing to me for the disclosure of any of the Grand Jury materials referred to in those three motions; therefore, those motions will be overruled.

(Id., at pp. 4-5) The Court then put on an order denying the motions. (Doc. # 253)

The defense was negligent in failing to follow-up on this issue with the court. The “lay witnesses” in this case were not consistent in their statements in court, there were inconsistencies between Chelsea Schobert, Zach Keyes, and Joshua Greathouse as to what occurred at the Zach’s house the night Chelsea was assaulted. The defense never knew who testified at the grand jury so as to know whether he could meet the standard of “particularized need” to obtain the transcripts. Detective Morrison did not testify at the trial and that was very curious, if he did testify at the grand jury it would have shed some light on that decision by the state, and perhaps the defense might have called him as a witness.

Article I, Section 10 of the Ohio Constitution and the Fifth Amendment of the federal constitution require capital cases to be instituted by grand jury proceedings. The grand jury has served the dual function of determining if there is

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conversation must have taken place off the record as there was no hearing or docket entries on that day.

probable cause that a crime has been committed and of protecting citizens against unfounded criminal prosecutions. *Branzburg v. Hayes* 408 U.S. 665, 686-687 (1972); *Wood v. Georgia*, 370 U.S. 375, 390 (1962). The grand jury is to assess whether there is an adequate basis for bringing a criminal charge. *United States v. Williams*, 504 U.S. 36, 56 (1992); *United States v. Calandra*, 414 U.S. 338, 343 (1974).

The standard for inspection of Grand Jury testimony prior to trial is whether the ends of justice require it and there is a particularized need for disclosure which outweighs the need for secrecy. *State v. Grewell*, 45 Ohio St. 3d 4, at 9 (1989), 545 N.E.2d at 98. In *State v. Laskey*, 21 Ohio St. 2d 187, 191, 257 N.E.2d 65, 67-68 (1970), the Ohio Supreme Court held that an accused may inspect Grand Jury transcripts either before or during trial when the ends of justice require it and there is a particularized need for disclosure which outweighs the need for secrecy. In *State v. White*, 15 Ohio St. 2d 146, 239 N.E.2d 65 (1968), the court acknowledged that a defendant's rights to inspection and due process may, in certain instances, outweigh the interest in keeping Grand Jury proceedings secret:

The reasons for the right of a defendant in a criminal case to inspect a statement of the prosecuting witness vary from the recognition that it is a procedural safeguard against the suppression of evidence material and capable of exculpating the accused to the idea that it

provides additional material for impeaching the credibility of the prosecuting witness.

Id. at 155, 239 N.E.2d at 72. The United States Supreme Court has determined that to “impeach a witness, to refresh his recollection, to test his credibility and the like . . . are cases of particularized need where the secrecy of the proceedings is lifted discreetly and limitedly.” *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 683 (1958).

The defense had ample reason to obtain the grand jury proceedings in this case, and it was ineffective not to follow-up on their initial request to obtain them.

### ***Failed to Adequately Challenge the Defendant's Statements***

Shawn Ford gave multiple statements to various police agencies between April 1, 2013 and April 3, 2014. Defense counsel filed a motion to suppress Ford's statements and supplemented the Motion before the hearing. (Doc.# 201, 203.) The Motion to Suppress raised multiple issues to include notification and waiver of Miranda rights, use of a jail house snitch to obtain statements from Ford and coercion in obtaining the statements. On September 15, 2013, and resumed September 19, 2013, a hearing was held on the Motion. Given the fact that there were so many statements from Ford, at the commencement of the hearing the trial court discussed how the hearing would proceed “ It would help the Court if as we enter into receiving evidence that we can be very specific about when and where

and how each statement from Mr. Ford was obtained.” (Suppression hearing, 9-15-13, p. 7.) The trial court then advised that the court reporter would not transcribe portions of the tape as they were played in court, that the tape would be received in evidence and made part of the record. So that the record would be clear, the State and defense agreed to note the time from the recording of any portions played in court. (Id., p. 19.)

A review of the hearing transcript reveals defense counsel focusing upon the lack of any effort by law enforcement to obtain a valid waiver of Miranda rights before questioning Ford. The trial court’s failure to grant the motion to suppress on this basis was error and was addressed in Proposition of Law No I. Also addressed in that same Proposition of Law was the fact that the statements obtained from Ford on April 3, 2013 while he was in the Portage County jail were clearly coerced. The police engaged in improper threats, promises, deception and manipulation such that it cannot be said Ford’s choice to speak was the unfettered exercise of his own free will. Though coercion was raised in the Motion to Suppress, specific from the recorded conversation of April 3<sup>rd</sup> were not included in the motion and defense counsel did nothing at the hearing to elicit any testimony regarding the improper police tactics or otherwise argue the issue or draw the court’s attention to the issue. A review of the tape present compelling evidence

that the tactics employed by the police were improper and defense counsel's failure to fully develop that issue at the hearing deprived Ford of the effective assistance of counsel. Failure to file a motion to suppress when valid grounds for the motion are present amounts to ineffective assistance counsel because the failure deprived the trial court of the opportunity to determine the issue. *State v. Garrett*, 76 Ohio App.3d 57, 600 N.E.2d 1130 (1983). Here, defense counsel's failure to elicit any testimony or otherwise develop the facts from the video reflecting the coercive police tactics deprived the trial court of the opportunity to decide the issue. Though the video statement was introduced into evidence, only 18 seconds of the DVD, showing the reading of Miranda rights, was played at the hearing. (Suppression, 9-15-13, p. 54.) The interview lasted over an hour during which the police told Ford that, very soon, the case would be presented to the grand jury and the police officers would be called upon to render an opinion as to whether Ford had been "cooperative."

The police represented to this young and unlettered man that his cooperation or lack of cooperation would be the difference between life and death, between non-capital murder and charges that carried an "automatic" death penalty. The officers portrayed it as "agg murders" if Ford cooperated and told them the truth, and the "automatic" death penalty if he did not. (See, State Ex. B, Doc. # 388, at

16:25:23) Further, when Ford talked about spending the rest of his life in jail for the murders, the detective told Ford that he needed to quit looking at the situation as if there was no possibility for him short of life in prison. Because, the detective said, the possibility “is here for you, but it’s not going to be here for you if you sit here and lie.” (See, State Ex. B, Doc. # 388, at 16:31:19). Seven DVD were entered into evidence and provided to the trial court at the suppression hearing. None of the specific statements were played or otherwise brought to the court’s attention. Failure to develop these issues deprived the trial court of the opportunity to determine the issue.

In *Smith v. Mitchell*, 567 F.3d 246, 256 (6th Cir. 2009) the Court concluded Smith met the first prong of *Strickland* by showing his counsel’s performance was deficient when counsel failed to develop at the suppression hearing whether Smith’s waive of rights was voluntary. The court there did not find prejudice because Smith did not show the outcome of the hearing would have been different.

A review of the tape and the arguments set forth in Proposition of Law No. I compel a different conclusion in this case. The failure to develop at the suppression hearing or otherwise bring to the attention of the trial court the blatant coercion was ineffective assistance of counsel that was prejudicial.

***Failed to Request a Hearing on the Need to Shackle their Client***

Defense counsel filed a motion prior to the start of trial requesting that Mr. Ford appear at all proceedings without restraints. (Defense Motion 38, Doc. # 77) The motion was heard at a pretrial hearing. (Pretrial, 7-23-13, p. 13). The Court overruled the motion stating:

The Court obviously will take steps to ensure that Mr. Ford's rights are protected at all times. And there is nothing in the case law that I am aware of that would suggest that he has a statutory or constitutional right to appear without restraints when the trier of fact is not present.

(Id.) The court put on a journal entry to that effect on July 26, 2013. (Doc. # 107)

The court addressed the issue again at another pretrial hearing:

THE COURT: The Court, at its -- at our conference on July 23rd, indicated that the Court was going to overrule Motion Number 38.

That was a motion requesting for Mr. Ford to be able to appear at all proceedings without restraints. I believe back on July 23rd, we indicated a journal entry would be filed in that respect. I am not certain whether we have followed that up with a journal entry, but we will do so at this time.

Obviously, at the time of trial or at any point where Mr. Ford could be seen by any member of a jury, he will be seen only in street clothes in accordance with the normal procedures. There will be restraints underneath those clothes, again, consistent with normal procedures.

(Pretrial, 11-26-13, pp. 41-42) Appellant Ford appeared during the trial phase in civilian clothing but with restraints, including during voir dire, when counsel the court and the prospective juror were all sitting around a table.

On October 9, 2014, the first day of the trial, the court put on a second order regarding the use of restraints. (Doc. # 235) It is unclear as to what prompted the court to put on a second order, there is nothing in the record to support an additional action by the court. An actual hearing on whether the use of restraints was needed, was never held.

In the second order, the trial court cited to the fact that the case “involves the alleged brutal and violent attacks by defendant on three different individuals, two of whom died as a result of the attacks.” However, in an aggravated murder death penalty case, there is always a crime that was violent, and in which people had died. However, without more, that does not give rise to the need for restraints during the course of the trial. In fact, the need to safe guard against inferences that the defendant is a violent, bad, dangerous person who must be restrained for everyone’s safety, thereby undermining the presumption of innocence is perhaps more important when the nature of the charges are so violent. Seeing a defendant in shackles in any case is inappropriate. The harm in a case where the defendant is

charged with felony 5 possession of drugs may not have as dramatic an impact on the jury as when the defendant is charged with aggravated murder.

In the second order, the trial court placed his reliance on the fact that during the time preceding trial, there was some information that Mr. Ford wanted to commit suicide. (Doc. #235). There was no formal testimony from any jail personnel to this effect, nor did defense counsel state that they had any concerns about Mr. Ford's safety, or their own. There was no indication that Mr. Ford behaved in any threatening matter at any time prior to the start of trial. This would include the numerous pretrial conferences held in the year and a half prior to the start of trial, attorney-client visits, and examinations by psychologist and psychiatrists.

Restraints are only to be used as a last resort, absent highly unusual circumstances. *Holbrook vs. Flynn*, 475 U.S. 560, 567 (1986); *Illinois vs. Allen*, 397 U.S. 337, 344 (1970); *State vs. Richey*, 64 Ohio St.3d 353, 358 (1992). The United States Supreme Court has given close scrutiny to the potentially prejudicial practice of stationing additional security personnel in the vicinity of a criminal defendant during trial. *Holbrook*, 475 U.S. at 569.

The trial court did not conduct an "evidentiary hearing" on the need for restraints and instead simply summarily ordered that Mr. Ford wear the restraints.

Defense counsel failed to request a hearing on the issue of restraints, or to challenge the court's orders regarding their use. Trial counsel was ineffective for failing to request a hearing and order regarding restraints.

### **Ineffectiveness of Counsel at Voir Dire.**

Voir dire is a crucial part of a capital trial. It is the job of defense counsel to ensure that the persons who will decide the fate and life of their client be fair and impartial jurors. So counsel must always be on alert to comments made by jurors that would indicate a bias, particularly in a case that received so much pre-trial publicity. Trial counsel must make sure the prosecuting attorney does not step over the line and try indoctrinate the jurors to be predisposed to impose a death sentence. Trial counsel must make sure that the trial court correctly states the law for the jurors and that the jurors understand the law. Trial counsel must make the appropriate motions to use jurors for cause, and use their peremptory challenges wisely. Counsel did not fulfill their responsibilities in this case.

### ***Counsel Failed to Object to Misstatements of the Weighing Process.***

The trial court was charged with the responsibility of explain the process to the jurors that would be used to determine a life or death sentence. But then the trial court, in its explanation to each prospective juror, stated the process as follows:

Now, if at the end of the mitigation part, the second trial, the jury decides beyond a reasonable doubt unanimously that the aggravating circumstances outweighed the mitigating factors or evidence, then the jury would be required to sign the verdict for the death penalty.

JUROR NUMBER 39: Okay.

THE COURT: All right. Now, on the other hand, if -- if in the second phase of the trial the jury decides that the mitigating -- pardon me -- that the aggravating circumstances do not outweigh beyond a reasonable doubt the mitigating factors, then the jury could not impose or require a death penalty.

(Voir Dire, pp. **1156**, 1259, 1297, 1367-1368, 1477, 1518-1519, 1573, **1641**, 1716, **1755-1756**, **1792**, 1834-1835, 1874, 1933, 1986-1987, **2032**, 2096, **2148-2149**, 2229, **2311**, **2373**, 2418, 2467, 2503, 2547, **2595**, 2643, 2687, 2731, **2772**, 2862, 2932, 3043, 3091, 3139, 3187, 3289, 3336, 3488-3489, 3538<sup>29</sup>) The wording in the second half of the explanation would lead a juror to believe that the jury would have to unanimously find that the aggravating circumstances do not outweigh the mitigating factors, before moving onto consideration one of the life sentences. Under the statute, and *State v. Brooks* 75 Ohio St. 3d 148, 159-160 (1996), this is not correct. The “jury” does not have to decide that the aggravating circumstances do not outweigh the mitigating factors, if just one juror makes that

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<sup>29</sup> The numbers in bold are jurors that were seated on the jury.

decision, no death sentence can be imposed. Defense counsel failed to object to the courts mischaracterization of the weighing process.

The statements or indoctrination by the prosecuting attorney were even more egregious.

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

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

(Vol. 3, Voir Dire, p. 467)(emphasis added) This is not a correct statement of how the jury is to weigh mitigating evidence. The mitigating factors should be considered, and the fact that they "do not do much for me" is not the correct weighing process.

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

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

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

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

(Id.)(Emphasis added) The prosecuting attorney's description of the aggravating circumstances as "bad facts" is an incorrect statement of the law. Ohio Rev. Code, Section 2941.14 clearly states "The aggravating circumstances that may be considered in imposing the death penalty are those specifically enumerated in R.C. §2929.04(A) and set forth in the indictment." There is nothing in R.C. § 2929.04(A) that lists "bad facts." There were many "bad facts" in this case, but not all of them were aggravating circumstances. To tell the juror that the

aggravating circumstances are “bad facts” created the situation where the “bad facts” become non-statutory aggravating circumstances. *State v. Penix*, 32 Ohio St.3d 369, 370-372, 513 N.E.2d 744. *See, also, State v. Johnson*, 24 Ohio St.3d 87, 92-94, 494 N.E.2d 1061 (1986). It is also akin to telling the jurors that the nature and circumstances of the offense are aggravating circumstances. *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 165–166.

Not only did defense counsel not object to this misstatement of the law, he actually picked up on it and used it:

MR. SINN: The question is not whether or not you are going to give the death penalty. It is whether or not you could do what the Judge asks you to do and consider the aggravating circumstances -- all the bad stuff the State is going to put out –

JUROR NUMBER 4: Uh-huh.

MR. SINN: -- against the mitigating evidence -- all the stuff that the defense is going to put out -- and make a determination about whether or not death is the right thing to do. You may decide death isn't the thing to do.

(*Id.*, at p. 550) While defense counsel slipped and used this description, it was the prosecuting attorney who used this definition throughout the voir dire process. *See, Voir Dire*, pp. 656, 607; **702-703**; 828-829; 943, **1007**, 1092-1093, **1122**, **1217**, 1527-1529, **1646**, **1762**, 1839-1840, 1884-1885, 1887, 1993, 2121-

2123, 2206, **2316-2317**, 2245, **2384-2385**, **2387**, 2472, 3066, 3196, 3299, 3387, and 3446-3447<sup>30</sup>.

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

MR. LOPRINZI: It is an odd thing to weigh, but we are going to ask you to do that. Basically, what we are going to ask you to do is give how much, maybe -- instead of saying what it would weigh -- *how much do things matter to you, okay?*

So if the aggravating circumstances *matter a lot to you, you give it a lot of weight*. And if the things that they want to present to you in mitigation you feel aren't -- *that doesn't matter much*, that's okay, too.

Conversely, if aggravating circumstances that the State presents *don't matter much to you*, you give them little weight, or no weight; you can give them no weight. All you have to do -- and the same with theirs. If they give you mitigating factors --or present mitigating factors and you go, "*That matters a lot*; that's important to me," you give it a lot of weight. If they present mitigating factors and you say, "Hmm, that doesn't mean anything to me," you can give it little weight or no weight. It is all up to you, okay?

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

(Vol. 5, Voir Dire, pp. 1031-1032)(emphasis added) This is an incorrect description of the weighing process and a process in which the defendant will

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<sup>30</sup> The page citation in bold refer to jurors that were seated in the case.

almost always be sentenced to death, because how is a juror every going to say it does not matter that two people were killed. Again, this was not an isolated incident. See, Voir Dire, p. 1031-1032, **1186-1187**, 1495, **1958-1959**, **1966-1967**, 2245, 2438, 2648, 2740-2741, **2798**, 2951-2952, 2974, 3004, 3056, 3067, 3100, 3163-3164, 3167, 3269-3270.<sup>31</sup> Defense counsel did not object.

The prosecutor total skewed the weighing process:

How do you weigh killing two or more people versus his age? How does that weigh, right?

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

(Vol. 16, Voir Dire, p. 3162-3163) The prosecutors also described the weighing process to Juror No. 70, who sat on the case as follows:

MR. GESSNER: Okay. Well, those mitigating factors that the defense brings in --

JUROR NUMBER 70: Uh-huh.

MR. GESSNER: -- you understand, you can look at them, you weigh each one. You can look at one and say, "That doesn't mean a thing to me."

JUROR NUMBER 70: Yes, yes.

MR. GESSNER: Or you can say, "I like that one"

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JUROR NUMBER 70: Yes.

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<sup>31</sup> Pages in bold are jurors who sat on jury.

(Vol. 9, Voir Dire, pp. 1764-1765) This is not correct, it is not a matter of liking or not liking the mitigation, or whether it means something to you, Mr. Ford was on trial for his life and deserved to have a juror that took the correct weighing process seriously, not like they were picking out a melon. Defense counsel should have been vigilant and objected to these misstatements.

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

The Sixth and Fourteenth Amendments of the United States Constitution guarantee a capital defendant the right to a fair trial before a panel of impartial and indifferent jurors. *Morgan v. Illinois*, 504 U.S. 719, 728 (1992); *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988); *Duncan v. Louisiana*, 391 U.S. 145, 147-158 (1968); *Turner v. Louisiana*, 379 U.S. 466, 471-473 (1965); *Irwin v. Dowd*, 366 U.S. 717, 722-723 (1961).

In *Morgan v. Illinois*, the Supreme Court confirmed, as it had previously suggested in *Ross v. Oklahoma*, that, in order to protect a capital defendant’s right to a fair trial, a juror is properly removed for cause (life qualified) if it becomes

clear that the juror's views in favor of the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* at 728-729 (quoting *Wainwright v. Witt*, 469 U.S. 412, 424 (1985); *Adams v. Texas*, 448 U.S. 38, 45 (1980)). In *Morgan*, the Court "reiterate[d]" that a juror, for example, who would "automatically" impose a death sentence following conviction for murder is properly excluded under this standard. *Morgan*, 504 U.S. at 729, 736. Such "automatic death penalty" (ADP) jurors are properly excused because they "obviously deem mitigating evidence to be irrelevant to their decision to impose the death penalty; they not only refuse to give such evidence any weight but are also plainly saying that mitigating evidence is not worth their consideration and that they will not consider it." *Id.* at 736.

The *Morgan* mandate of life qualification, however, encompasses more than the class of ADP jurors who would "automatically" impose death for any defendant convicted of murder. Pursuant to *Morgan*, "[a]ny juror to whom mitigating factors are . . . irrelevant should be disqualified for cause, for [they have] formed an opinion concerning the merits of the case without basis in the evidence developed at trial." *Morgan*, 504 U.S. at 738-39. *Morgan* teaches therefore, that any juror whose ability to follow the trial court's instruction to consider the defendant's mitigating evidence is substantially impaired must be

excused for cause. *Id.* In other words, if a juror is “mitigation impaired” – meaning he or she cannot or will not meaningfully consider and give effect to any mitigation evidence relevant to the defendant’s case, that juror is not qualified.

Trial counsel’s failure to object to the prosecutor’s indoctrination of the jurors, thus making them mitigation impaired, was both unreasonable and prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984). One of counsel’s “most essential responsibilities” was to protect Ford “constitutional right to a fair and impartial jury by using voir dire to identify and ferret out jurors who are biased against the defense.” *Miller v. Francis*, 269 F.3d 609, 615 (6th Cir. 2001). Counsel failed in this endeavor. Mr. Ford was prejudiced by this performance.

***Failed to File a Motion for Change of Venue or Object to Jurors exposed to Pretrial Publicity***

The premium on impartiality is nowhere greater than in a capital case where a jury must choose between life imprisonment and death if they find the accused guilty of capital murder. See *Morgan v. Illinois*, 504 U.S. 719, 726-28 (1992) (Jurors must be impartial with respect to culpability and punishment in a death penalty case). A biased juror is unable to apply the facts to the law and deliberate under the constitutionally required burden of proof. See *In re Winship*, 397 U.S. 358 (1970).

In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), the Supreme Court recognized that pretrial publicity may result in a denial of a defendant's right to due process of law. The Court held that where: "[T]here is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity." *Id.* at 363. This Court has adopted the *Sheppard* standard and ruled that a showing of a "mere likelihood" of prejudice will support a venue change. *State v. Fairbanks*, 32 Ohio St. 2d 34, 37, 289 N.E.2d 352, 355 (1972). Although the court in *Fairbanks* pointed out that news reports that are factual and without distortion, or which are non-inflammatory in character, do not establish the impossibility of a fair and impartial trial where the jurors are uninformed or undecided, the court mandated that the rigid *Sheppard* standard of mere likelihood be applied. *Id.*

When faced with trial in a county that has been subjected to extensive publicity about the case such that there is present a likelihood of prejudice, the trial court should transfer the case to another county. See *State ex rel, Dayton Newspapers, Inc. v. Phillips* 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976). The trial judge has a "duty to protect [the accused] from [this type of] inherently prejudicial publicity ..." that renders the jury unfair in its deliberations. *Sheppard*, 384 U.S. at 363. Whether it is or is not likely that the Defendant would be convicted in another

venue is irrelevant. The right to a fair and impartial jury is fundamental. The denial of that right is a structural error that is never harmless. *Arizona v. Fulminante*, 499 U.S. 279, 290 (1991).

Jeffrey Schobert an Akron attorney, and his wife Margaret spent considerable time volunteering in the community and were well known and respected in Summit County. Recognizing that their murders caused a great deal of media coverage in Summit County, at the initial pre-trial the Court entered an Order addressing pre-trial publicity and decorum. (Pretrial. 5-17-13, p.18.) The Order restricted public comment about the case by the lawyers and court staff, citing concern over pretrial publicity potentially tainting the jury pool. (Order, Doc. # 9.) Though the defense filed a motion to permit individual voir dire on pretrial publicity, (Defense Motion 19, 22, Doc.#61) and a Motion requesting special procedures to insulate the venire from prejudice once jurors arrived at the court. (Defense Motion 18, Doc. #51), no motion requesting a change of venue was filed. Since no motion was filed, there is no record concerning the amount of publicity in the community.

That there was extensive pretrial publicity regarding the case was evidence from the juror questionnaires (Doc. #724) and from juror responses to questions regarding pretrial publicity. Of the twelve jurors selected to decide Ford's fate,

four had been exposed to media reports with details of the offenses. In his jury questionnaire, Juror number 72 said the names sounded familiar but he did not know specifics. (Doc.# 724.) In voir dire it was revealed Juror number 72 knew the murder centered around the couple's daughter, that two guys were involved in the homicide, an older one and younger one and the older one "coerced" the younger one to participate in the murders. (Vol. 10, Voir Dire, p. 1917-1919.) Juror 72 sat on the jury that recommended death.

Juror number 39 knew the case involved two people being beat to death in their home with a sledgehammer. After assuring the trial court that she had not formed any opinions and could decide the case based upon the evidence in the courtroom, defense counsel made no inquiry of Juror number 39. (Vol. 6, Voir Dire, p.1145.) When subsequently asked by the State if she had formed any opinions about the crime after reading the paper, Juror 39 stated she thought it was "kind of harsh." (Vol. 6, Voire Dire, p. 1146.) Defense counsel again made no inquiry. Juror 39 sat on the jury recommended death.

Juror 48 also saw news reports. After receiving the summons for jury duty and appearing for orientation, Juror 48 received a text from a co-worker with a link to a newspaper article and saw an article in the break room at work. (Vol. 9, Voir Dire, p. 1779.) She testified she had not read the article. No one asked her what

the text message said and when asked if she remembered details from what she had seen her response was “not from the newspaper.” (Vol. 9, Voir Dire, p. 1782.) The defense asked no questions on pretrial publicity. (Volume 9, Voir Dire, p.1783) Juror 48 sat on the jury that recommended death.

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

In *Irvin v. Dowd*, 366 U.S. 717 (1961), the Court held that the Defendant's right to an impartial jury was denied by a presumption of prejudice arising from extensive pretrial publicity. The Court found a presumption of prejudice despite the sincerity of the jurors who stated that they could be "fair and impartial" to the defendant. *Id.* at 728. In *Irvin*, the viewpoint of the community was revealed by the media's pretrial coverage, in which the Court found that the "force of this continued adverse publicity caused a sustained excitement and fostered a strong

prejudice among the people of Gibson County." *Id.* at 726. See also *Rideau v. Louisiana*, 373 U.S. 723-27 (1963) (defendant denied due process without change of venue after confession was televised).

Questions requiring jurors' subjective evaluation of their ability to be fair and impartial, however, have consistently been held to be an inadequate basis upon which to assess jurors' qualification. *Murphy v. Florida*, 421 U.S. 794, 800 (1975); *Irvin*, 366 U.S. at 728. "[W]hether a juror can render a verdict solely on evidence adduced in the courtroom should not be adjudged on that jurors' own assessment of self-righteousness **without something more.**" *Silverthorne v. United States*, 400 F.2d 627, 639 (9th Cir. 1968) (emphasis in original).

As the court in *Forsythe v. State*, 12 Ohio Misc. 99, 106, 230 N.E.2d 681, 686 (1967) noted, an assumption by the trial judge that a jury could disregard pretrial publicity after being instructed to do so, was a "triumph of faith over experience." In *United States v. Aaron Burr*, 25 F. Case 30, Case No. 14 (1807), (1789-1880), Chief Justice Marshall stated:

Why do personal prejudices constitute a just cause of challenge? Solely because the individual who is under their influence is presumed to have a bias on his mind which will prevent an impartial decision on the case according to the testimony. He made it clear that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him \* \* \* he will listen with more favor to

that testimony which confirms, than to that which would change his opinion.

Ford's constitutional guarantees under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 5 and 16 of the Ohio Constitution were violated by the defense counsel's failure to ensure an impartial jury.

***Failed to Exercise all their Peremptory Challenges***

This Court has found that error in denial of challenge of juror for cause not grounds for reversal when defendant did not exhaust his peremptory challenges. *State v. Poindexter*, 36 Ohio St.3d 1, 5 (1988); *State v. Getsy*, 84 Ohio St.3d 180, 191 (1998). This rule should be reexamined.

The defense in this case did not use all their peremptory challenges. (Vol. 20, Voir Dire, p. 3805) Defense counsel passed on the last challenge they had in seating the jury and the last challenge in seating the alternates. The decision to pass on a juror creates a Catch 22 situation for the defense, particularly when faced with using the last peremptory challenge will then seat a juror that may be worse than the juror you are preempting.

If defense counsel used their last challenge, Juror No. 75 would have been seated on the jury, and there would have been nothing the defense could have done. The defense used their first peremptory challenge to the alternate jurors on

Juror No. 75. So obviously he did not want that juror on the panel of the case. A defendant should not have to run the risk of losing an issue on appeal for failing to use all their peremptory challenges, versus being forced to seat a juror that may be worse than the juror you are preempting.

Defense counsel requested that the following eight jurors be removed for cause. (Voir Dire, Jurors No. 25, 36, 39, 45, 72, 103, 106, 134). The trial court overruled the objection and the jurors remained in the jury pool. Defense counsel used three peremptory challenges to remove three of these jurors (Nos. 25, 36, and 45) and two of these jurors actually sat as members of the jury that decided the case. (Nos. 39 and 72).

Defense counsel was left with *two* (2) jurors that should have been excused for cause as automatic death penalty jurors based on the questioning and the defense motion to remove for cause. (Nos. 39 and 72). They had used three of their challenges to remove other jurors that should have been excused for cause, so even if the defense had used the very last peremptory challenge to remove Juror 39 or Juror No. 72, one ADP juror would have still sat that jury. (See., Proposition of Law No. VI)

Clearly the defense was in the midst of a conundrum. As a matter of state law, the Court has "recognized that where the defense exhausts its peremptory

challenges before the full jury is seated, the erroneous denial of a challenge for cause in a criminal case may be prejudicial." *State v. Cornwell*, 86 Ohio St.3d 560, 564, 1999 Ohio 125, 715 N.E.2d 1144. However, "[a] defendant in a criminal case cannot complain of prejudicial error in the overruling of a challenge for cause if it does **not** force him to exhaust his peremptory challenges." (Emphasis added.) *State v. Eaton*, 19 Ohio St.2d 145, 249 N.E.2d 897, paragraph one of the syllabus (1969), vacated in part by *Eaton v. Ohio*, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 750 (1972). Thus, "[i]f the trial court erroneously overrules a challenge for cause, the error is prejudicial only if the accused eliminates the challenged venireman with a peremptory challenge and exhausts his peremptory challenges before the full jury is seated." (Emphasis added.) *State v. Tyler*, 50 Ohio St.3d 24, 30-31, 553 N.E.2d 576 (1990)." *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶87.

The failure to use all of his peremptory challenges was prejudicial to Mr. Ford and ineffective assistance of counsel.

### **Counsel Ineffectiveness at Trial.**

Counsel failed in several ways to provide a basic defense for Ford. Counsel breached their duty to Ford with the following errors and omissions. *See* ABA Guidelines 10.7, 10.10.1.

### ***Introduced Victim Character Evidence into the Trial***

Victim impact evidence is not permitted trial phase. *State v. Tyler*, 50 Ohio St.3d 24, 35 (1990). But under *State v. Fautenberry*, 72 Ohio St.3d 435, 440 (1995), evidence which may be characterized as victim impact evidence is clearly admissible if it relates to facts attendant to the offense. In the usual capital case, defense counsel and appellate counsel criticize and object to victim impact statement and victim character evidence raised by the state. In fact, the defense filed a motion to preclude the State from introducing victim impact evidence at trial. (Defense Motion 46, Doc.# 85.) Here it was defense counsel themselves that injected this evidence into the trial. Starting with his opening statement, it was the defense that sang the praises of the Schoberts:

As Prosecutor LoPrinzi indicated, Jeffrey Schobert was an attorney in this community, and he was an exceptional attorney. He had cases which were argued before the Ohio Supreme Court. He was well-known and highly regarded.

You know, there is a poem that John Donne, an English poet, wrote in the 1600s which says: "No man is an island, and any man's death diminishes me.

Attorney Jon Sinn and myself, although we have been attorneys in this community -- myself for more than 30 years, and Mr. Sinn certainly far in excess of 20 -- we never knew Attorney Schobert. We, of course, have learned much about him. His death diminishes us, and certainly it diminishes all of us.

Attorney Schobert practiced in different areas than Mr. Sinn and ourselves, but he was part of our brotherhood; he was part of our legal community.

In addition to being an upstanding attorney, he was a husband, he was a father, he was a brother, he was a son.

As the prosecution indicated, Attorney Schobert and his wife had been married for many, many years. They adopted two daughters. You know, there is a saying about children of adoption, that God blesses them because they get to choose those children. And by every measure, the Schoberts were remarkable parents and they chose their daughters.

As indicated by Prosecutor LoPrinzi, Jessica, the older daughter, graduated from college and was pursuing a legal education like her father.

The Schoberts were well-known in this community for their good works. Attorney Schobert mentored the Hoban mock trial team for years. He touched the lives of dozens of students. You may or may not know of the mock trial competitions which go on within this courthouse every year, but we see -- we see teenagers from different high schools come together. They have been given a script, they argue a case, they put on mock trials in this courtroom and virtually every other courtroom in this courthouse. And the Hoban High School team has been one of the most victorious year after year after year.

To see these kids in action is -- it is uplifting. You can only believe that our state, our county, our country is in good hands, because you can see that you have young lawyers who have never even begun college. These are people of great ability.

You know, Mrs. Schobert, she has been referred to as a den mother. She prepared food for the Hoban mock trial team. She could straighten a tie on a 15- or 16-year-old gentleman. She was the perfect counterpart to Mr. Schobert. And her dedication to her daughters, her love of this community, her work in various social organizations unparalleled.

(Vol. 21, Trial, pp. 3899-3901) In an ironic twist, it was the Prosecuting Attorney that tried to limit this evidence;

MR. LOPRINZI: At this point in time, we would like to request -- obviously, you know this is a death penalty case; you obviously know that mitigation is an issue in this case.

Victim impact is something that we are not allowed to bring into mitigation. And we can't bring it in -- sympathy impact, victim impact in the trial phase, either.

Mr. Hicks, who I know knows how to do this, has basically put the victims on a pedestal, and I am assuming it is a strategic move for strategic reasons. And so for the future, in case we are successful on this case, that we would like to know and have put on the record whether that was a strategic move or not to -- to basically putting in victim impact evidence.

THE COURT: Well, it is clear to the Court, and I am assuming it is clear to counsel for both sides, that what has just been stated about the relevance or admissibility of victim impact evidence is clear. We cannot be trying this case on that issue. Because the jury, if it gets to a mitigation phase, will be required to weigh aggravating circumstances against mitigating factors.

Victim impact information isn't even allowed to be submitted to the Court before the Court, if called on to do so, makes a final sentencing determination. So it obviously cannot be admitted by either side at this stage.

Both sides in opening statement have attempted to characterize the family somewhat.

There was no objection made to victim impact information within the defense opening statement. At this point, there should be no more information about the character of the Schoberts or their -- the loss that their family will have sustained or that the community will have sustained by virtue of their deaths from either side.

I assume that's clear. Is that not so?

(Id., at pp. 3908-3909)

Undaunted, the defense continued with this theme during Chelsea Schobert's testimony, prompting the trial judge to call a side bar to ask the defense where he was going with all the questions about how wonderful the Schobert's were. It appeared to the judge that the *defense* had "crossed the line into victim impact information. . ." (Id. at p. 4153.)

The defense himself returned to this theme at sentencing:

The Schoberts were highly regarded in this community. Myself, throughout the course of this case, I've encountered people who knew the Schoberts. They would tell me about Mr. Schobert's intellect, his landscaping business when he was young.

THE COURT: Mr. Hicks, I do want to caution you to not yourself –

MR. HICKS: Thank you, Judge. I will be cautious.

THE COURT: -- engage in providing victim impact information. I understand what you're saying, and the information has come out in various ways throughout the trial. I will urge you to be cautious in your remarks.

MR. HICKS: Judge, I will simply indicate that they were loved and that they were exemplary people.

(Sentencing, 6-29-15, p. 11-12)

The defense should not have introduced the victim character evidence he did, when this type of evidence is clearly inadmissible. Defense counsel injected prejudicial evidence into the trial and violated his client's right to a fair trial.

***Acquiesced in the Removal of Juror No. 19***

The State induced the ineffective assistance of counsel relating to Juror No. 19. (See, Proposition of Law No. VIII, incorporated herein by reference.) The defense opted to have Juror 19 excused from the jury. (Vol. 28, Trial, p. 5360) Again they were faced with a Catch 22 situation. Defense counsel had attempted to remove Juror No. 19 on two different occasions. (Vol. 20, Voir Dire, p. 3769-3770, Vol. 23, Trial, p. 4194-4195, 4202-4206) The trial court denied both requests. However, when the jury foreman sent out a note indicating that one juror had a different definition of burglary than the rest of the juror and another note that the jury was deadlocked 11-1, the prosecutor asked the bailiff who the problem juror was and the bailiff told the prosecutor it was Juror 19. This prompted the prosecuting attorney, who had been previously unphased by this juror, or her prior contacts with the prosecutor's office, to investigate any connection with their office, and he uncovered that Juror 19 was Facebook friends with prosecuting attorneys in the office. (Vol. 28, Trial, 5353-5370) Of course he immediately told defense counsel about the Juror's contact with the Prosecuting Attorney's Office and left it up to them as to what to do.

So the defense was left to decide whether they should leave on a juror that was most likely a holdout juror, who they had moved for cause to excuse during

voir dire, or remove the juror due to contacts with the prosecutor's office, they chose to exclude the juror. This was error by the defense.

***Failed to Know the Correct Law as it related to Crim R. 16***

During closing arguments, a series of objections were made by the State which the trial court sustained. (See, Proposition of Law. No. XVI, incorporated by reference) The efforts of defense counsel during closing arguments in the trial phase were to call into question issues regarding the scope of the investigation, and call to question witnesses not called to testify. The first issue arose as defense counsel called into question the scope and extent of the investigation:

And, again, when you make decisions here, you have a right to have the investigation that you need to make the decisions to let you know what happened. You don't have to put the pieces together. You are not supposed to put the pieces together when there is a question in your mind. That the – job of the New Franklin Police Department. And if they are not up to doing it, then they need to get somebody else out there.

Mr. Loprinzi: Objection.

The Court: Sustained.

(Vol. 28, Trial, p.5261-5262.) Detective Morrison had been an integral part of the investigation into Chelsea Schobert's felonious assault. In fact, Detective Hitchings testified that he contacted Detective Morrison because when he arrived at the Schobert's home, the morning they were murdered, he found Detective

Morrison's business card on the Schobert's dresser. (Vol. 26, Trial, p. 4952.) Detective Morrison did not testify at the trial, and defense counsel questioned why the jury did not hear from Detective Morrison. The State objected, and the trial court sustained the objection. (Vol. 28, trial, p. 5267.) Next, defense counsel, continuing to question the scope of the investigation, contending there were unanswered questions and that the investigation seemingly ceased simply because Detective Hitchings got a statement from Shawn Ford, that he did it.

Great. Case solved.

What else did he say? I mean, really, what else did he say? You have got him saying—you have got him now opened up, confessing. What else did Shawn say? If you finally got him to a point where you are not worried about him shutting up or changing his story because he's finally telling you the truth. Where is the rest of the information?

Where are the cell phones? Where are Jeff and Pegs cell phones? That's important. We don't know where those phones went. Why don't we know that?

I mean, if according to Hitchings, Shawn has now come clean and telling the truth of the story, that's when you ask him all those questions you want to ask. That's when you get all the answers out.

Loprinzi: Objection. May we approach?

(Vol. 28, Trial, p. 5267-5268.) The Prosecutor argued during the side-bar that there were things the State "decided not to bring them out at the trial for

strategic reasons. But to suggest that they were never asked is improper.” (Vol. 28, Trial, p.5269.) The Prosecutor then asked that the defense be precluded from arguing or further commenting “about witnesses that did not appear, like James Jordan—who was subpoenaed and just failed to appear; we tried to get him to appear—or other people—the rule indicates that they can’t comment on those things and so we would ask that they also be instructed.” (Vol. 28, Trial, p.5269.) The Court sustained the Prosecutor’s objections and instructed the defense that they could not continue making comments about witnesses who did not testify. (Vol. 28, Trial, p.5269-5270.)

The trial court improperly limited and restricted defense counsel during closing arguments. Crim.R. 16(I) specifically provides that each party shall provide opposing counsel “a written witness list, including names and addresses of any witness it intends to call at its case-in-chief, or reasonably anticipates calling in rebuttal or surrebuttal.

The content of the witness list may not be commented upon or discussed to the jury by opposing counsel, but during argument, the presence or absence of the witness may be commented upon.” To be sure, Crim.R. 16 used to prohibit the parties from commenting upon any witness that was on a witness list, and not called at trial. See, *State v. Hannah*, 54 Ohio St.2d 84, 374 N.E.2d 1359 (1978)

interpreting former version of Crim.R. 16. Crim.R. 16( C)(3) used to provide “the fact that a witnesses name is on a list furnished under subsection ( C)(1)( C), and that the witnesses not called shall not be commented upon at trial.” However, Crim.R. 16 was amended in 2010, and now specifically provides that a party may comment upon “the absence or presence of a witness relevant to the proceedings.” See, Crim.R. 16, Staff Notes, 7-1-10 Amendments. Accordingly, under the 2010 Amendments to Crim.R. 16, the trial court erred in sustaining the State’s objections to defense counsel arguing witnesses who were not called. Detective Morrison was relevant to the proceedings. He was investigating the felonious assault charges involving Chelsea Schobert. When called by Detective Hitchings the morning of the murder, Morrison came out to the Schobert house and Morrison was involved in the several interrogations of Ford. Morrison was relevant and his absence from trial was fair commentary.

Had defense counsel known the law, he could have apprised the court that he was well within his right to make the arguments he was making. The failure to know the law, prejudiced his argument in closing and denied Mr. Ford a fair trial.

***Failed to Force the State to Choose Theory Relating to R.C. 2929.04(A)(7) and to Object to Verdict Finding Prior Calculation and Design***

In this case the State was obviously pursuing a theory that Mr. Ford was the principal offender, ie., the actual killer. He was charged with two separate aggravating circumstances pursuant to R.C. 2929.04(A)(7):

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

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

(Emphasis added.) Ford cannot have been lawfully convicted of the specification that charged, and which the jury found, that the aggravated murder of Margaret Schobert was committed with prior calculation and design because the jury found Ford was guilty as the principal offender of Margaret Schobert. That portion of the R.C. 2929.04(A)(7) specification should not have been charged, and should not have been submitted to the jury for its consideration, as prior calculation and design is an aggravating circumstance **only** in the case of an

offender who did not personally kill the victims. Thus, it was clear constitutional error, a violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article One, Sections 9 and 16 of the Constitution of Ohio to allow the indictment to remain as drafted, and to submit the “prior calculation and design” specifications to the jury in a case where the State claimed that the offender did personally kill the victims.

Defense counsel failed to force the State to limit the capital specification to the principal offender alternative. Defense counsel failed to ensure the verdict forms were correct. Defense counsel failed to object when the jury returned a guilty verdict on the prior calculation and design alternative. And defense counsel erred in letting the jury consider these erroneous capital specifications which were used to sentence Mr. Ford to death. Counsel was ineffective for failing to make appropriate objections to these errors.

### ***Prosecutorial Misconduct***

The State’s closing arguments in the trial phase were replete with disparaging comments regarding defense counsel. A review of the closing arguments from the trial reveals that the prosecutor was not attacking the evidence but was, in fact, trying to disparage and undermine defense counsel. The trial

counsel failed to object to the comments. (See, Proposition of Law, No. XIII, incorporated by reference).

The United States Supreme Court has addressed the issue of personal attacks by counsel during trial, and the impact it has upon the trial:

The prohibition of personal attacks on the prosecutor is but a part of the larger duty of counsel to avoid acrimony in relations with opposing counsel during trial, and confine argument to record evidence. It is firmly established that the lawyer should abstain from any allusions to the personal peculiarities and idiosyncrasies of opposing counsel. A personal attack by the prosecutor on defense counsel is improper, and the duty to abstain from such attacks is obviously reciprocal.

*United States v. Young*, 470 U.S. 1, 10, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985).

During the rebuttal to the defense closing argument, the State repeatedly attacked defense counsel.

One of the things I want to point out at the beginning of this thing is: Mr. Sinn has done what I consider to be, you know, the Jedi mind trick. It is, you know: look over here, don't look at the evidence.

Because his great hope probably is, is that if you go, "I'm so confused about everything he just said," he wins, right?

(Vol. 28, Trial, p.5283.) This was not an effort to counter arguments made by the defense in their closing arguments, this was an effort to disparage defense counsel and to convey to the jury that the defense counsel was simply trying to

confuse and mislead the jury. The closing rebuttal continued with the prosecution addressing defense counsel, not the evidence.

So what does Mr. Sinn do? Mr. Sinn came up here and told you: if you can't feel it, put your hands on it – if it is important, you should be able to put your hands on it, right?

Why is he saying that? Because he knows that there are certain things that you cannot put your hands on.

...Mr. Sinn complains because we did not give you the letters that Detective Hitchings talked about that said "I love you to death" in it. You can imagine that letter is probably just full of self-serving things the Defendant said, and we didn't feel that was important to our case.

If Mr. Sinn does, he has the letter, he has all the discovery, he has those things, he has all those interviews.

(Vol. 28, Trial, p.5284.) Again, the State was not attacking the nature of the evidence, he was attacking the manner in which the defense counsel addressed the evidence.

During closing arguments, the defense questioned the possibility of another individual, Zach Keyes, being present. In response, during closing arguments, the Prosecutor offered the following:

If Mr. Sinn had some additional evidence about Zach Keyes, I will charge him, too."

(Vol. 28, Trial, p.5287.) Again the Prosecutor focused not upon the evidence but upon defense counsel.

The Prosecutor continued:

Mr. Loprizi: Mr. Sinn said “you don’t know the rest of the story” and left it hanging there as though there is a rest of the story.

(Vol. 28, Trial, p.5289.) He continued through innuendo to disparage what the defense counsel did as an attorney not the evidence:

The other thing is, he puts that – we call it planting a seed, right? He says, “there is more to this case than you think you know.” What does that mean? It means nothing...

Because if he can get you thinking along the wrong trail of something – trying to figure something out that’s not there, than you lose your way.

And that’s not what we want you to do. We want you to stay focused.

(Vol. 28, Trial, p.5289-5299.) Again, the State is attacking Mr. Sinn and not the evidence. This becomes apparent when he specifically argues how the defense “approaches the case”.

One of the things that I always, you know, think is interesting is how a defense approaches the case. And that’s fine; they have the right to do that however they want.

(Vol. 28, Trial, p.5291.) Then, the Prosecutor continues two pages later, “Mr. Sinn is right about one thing, I can tell you that.” The Prosecutor then concedes that the text messages which were sent from Jeffrey Schobert’s phone did not appear to lure Mrs. Schobert home but, what they do appear to do is suggest that he is waiting for her.” (Vol. 28, Trial, p. 5294) Certainly, the Prosecutor has a right to comment on the evidence, and he could have made those comments without disparaging defense counsel and suggesting he was right about “one thing”. The Prosecutor’s closing rebuttal mentioned defense counsel’s name more than it mentioned the Defendant’s name. There was a concerted effort to undermine defense counsel so that the jury would not consider the remarks made by defense counsel.

Trial counsel should have objected to these prejudicial comments. Here Appellant Ford was denied a fair trial and the effectiveness of counsel when the Prosecutor engaged in repeated improper comments which were not objected to and which were not addressed by the trial court.

### **Counsel Ineffectiveness in Penalty Phase.**

The Penalty Phase of capital case is crucial. Defense counsel should be preparing for this phase from the time they get appointed to the case. It is at this

phase that the jury determines if your client will live or die, so it is important that counsel investigate, prepare, and know the law.

***Requested a Presentence Investigation Report***

It is virtually unheard of for a defense attorney in a capital case in Ohio to request a presentence investigation and/or mental health examination pursuant to R.C. 2929.03(D)(1). Yet in this case the defense requested both! (Vol. 6, Mitigation, p. 978) This request came to light while the jury was deliberating in the penalty phase. (Id.) Evidently prior discussion had been off the record concerning this request.

The statute (R.C.2929.03) and caselaw specify that the trial court does not order a presentence investigative report (PSI) or a mental health examination without a request by the defense. A trial court should apprise a defendant of his right to have either a-PSI or mental exam. However, there is a difference between the request for an expert under R.C. §2929.024 and one made pursuant to R.C. §2929.03. "It is clear that the services provided for by Sec. 2929.024 are available to the indigent capital defendant `for his own purposes. . . .' *State v. Esparza*, 39 Ohio St.3d 8, 9 (1988). When the expert is retained under Sec. 2929.024, the defendant can decide for himself whether he wants to put the expert's findings

before the jury." *Glenn v. Tate* (C.A.6, 1995), 71 Ohio St.3d 1204, 1209, fn.2. A report prepared pursuant to R.C. §2929.03, will go before the jurors.

R.C. 2929.024 and 2929.03(D)(1) are wholly independent provisions. A court, when requested by a defendant to order a presentence investigation or to appoint a psychologist or psychiatrist to conduct a mental examination pursuant to R.C. 2929.03(D)(1) and 2947.06, is not required by the Constitution or the provisions of R.C. 2929.024 to appoint a psychiatrist or psychologist of the defendant's own choosing. Rather, additional expert services must be provided to an indigent defendant only if the court determines, within its sound discretion, that such services "are reasonably necessary for the proper representation of a defendant" at the sentencing hearing, pursuant to R.C. 2929.024. *State v. Esparza* (1988), 39 Ohio St.3d 8, syllabus.

The trial court was somewhat confused as to which statute Dr. Stankowski was appointed under. But clearly the defense had requested that she be appointed under R.C. 2929.024. (Defense Motion 69, Doc. # 131) So the comment by the trial court that 'The Court has considered that the report prepared by Dr. Stankowski was the mental health report that's being referred to in this document. (Vol. 6, Mitigation, p. 979)

The trial court was poised to send both documents to the jury, in spite of the fact that defense counsel considered the PSI to be prejudicial. (Id., p. 980)

Defense counsel argued to the court that the report of the expert should go to the jury, but the PSI should not because “it had an effect we didn’t intend.” (Id., 981)

The trial court gave the defense a way out, “is the defense withdrawing its request for a PSI? (Id.) The defense decided to withdraw the PSI, but wanted Dr. Stankowski’s report to go to the jury. They then indicated if that was not an option, they requested that neither would go. (Id., at p. 984-985)

After hearing argument from the state, the trial court reversed himself and indicated both documents would go to the jury. (Id., at 992) When the court went back on the record in open court, the court reversed itself again:

Taking into consideration the arguments of counsel, the Court has concluded that neither document will go to the jury. I do so because I am not satisfied that the presentence report was prepared in a manner that I would have expected it to be prepared, in which counsel would have been given the opportunity to speak with Mr. Ford before the report was prepared. And I am not going to submit the Stankowski report, because I concur with the State's argument that the State would suffer prejudice if the document were to be submitted without the State having had the full opportunity to submit further rebuttal evidence.

(Id., p. 996) Once again the defense counsel did not know the law. Defense counsel requested a PSI which could have been devastating to the case if it had gone to the jury. Further, the defense did not understand the difference in requesting an expert under R.C. 2929.024 and R.C. 2929.03. In this circumstance, defense counsel had requested the expert under R.C. 2929.024 and were within their right to send the report to the jury. However, since defense counsel did not understand the difference in the statute, they were forced into an all or nothing situation and neither were sent to the jury.

The failure of the defense to know and understand the statutes relating to the case prejudiced the defense.

### ***Prosecuting Attorney Closing Argument***

The prosecutor continued in closing argument during the mitigation phase with the same attacks on defense counsel, not the arguments or evidence. (Proposition of Law, No. XIII, incorporated by reference). In rebuttal during mitigation, the State began its rebuttal closing argument with the following:

Ladies and gentlemen, what you just heard was not about the law, it wasn't about the facts, it wasn't about mitigation, it wasn't about aggravating circumstances. What you just heard is a plea.

See, when you don't have the facts on your side you pound the law. When you don't have the law on your side you pound the facts. And when you got neither

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

(Vol. 6, Mitigation, p. 931). Again, this argument was focused more on attacking how the defense attorney argued the case and disparaging defense counsel and not specific issues argued by defense counsel. Rebuttal continued:

It always makes me laugh, because when defense gets up and they talk with great emotion and softly, emotionally, trying to appeal to your purant interest, to your sympathies. I understand that. I get that.

And then: These two are us. You know, they always call us "the government" and I always go home and tell my wife, "hey, guess who you're sleeping with tonight, the government."

I am human. Do you think I don't feel bad when Mrs. Ford gets up there and asks you to save her son's life? Are you kidding me? There wasn't a dry eye in here.

(Vol. 6, Mitigation, p.932-933). Then, rather than addressing the evidence which was presented in mitigation the prosecutor attacked what defense counsel's choice to call Mr. Ford's mother to testify in mitigation. In commenting upon Mr. Ford's mother testifying and crying and begging for her son's life, the prosecutor responded "that's mitigation? To me, that's cruel." (Vol. 6, Mitigation, p.933). In attacking an argument made by the defense counsel, the prosecutor again directed the focus on defense counsel: "I know Mr. Sinn would not intentionally do this, but

he kept talking to you about the aggravating circumstances and, okay, Mr. Gessner had his hand up here when he said aggravating circumstances.” (Vol. 6, Mitigation, p.936). Again, the inference was that the jury should not trust the credibility of defense counsel. Rather than attacking the specific arguments made, the prosecutor continued to disparage defense counsel. “He talks about hate. He is trying to appeal to your sympathies, trying to make you feel like bad people if you were to find the aggravating circumstances outweigh the mitigating factors. *Please do not fall for that one.*” (Vol. 6, Mitigation, p.940.) In fact, the prosecutor continued that defense counsel was trying to “imply somehow that if you do your job, and if you are firmly convinced that the aggravating circumstances outweigh the mitigating factors in this case, that somehow you are a bad person, and make you feel guilty and bad for following the law. Please, do not do that.” (Vol. 6, Mitigation, p. 940).

Again the Prosecutor argued that the defense counsel in closing argument, “was simply trying to make the jury feel bad”. (Vol. 6, Mitigation, p.943). In an effort to indicate defense counsel was not concerned with the law, the prosecutor stated: “we are here to honor the law, not great speeches, racist speeches – or speeches about racism, speeches about slavery. I am not sure how yet that applies to this other than to interject into the jury room some awkwardness between the

jurors here that are of other colors. I mean, I can't imagine going back there after hearing that history of slavery in this country and not feeling a little awkward, maybe pandered to. I don't know. I don't know how that makes you feel." (Vol. 6, Mitigation, p.943-944). "Pander" is an "immoral or distasteful desire, need, or habit or a person with such a desire." Oxford Dictionaries · © Oxford University Press.

In *State v. Davis*, 116 Ohio St.3d 404, 2008 Ohio 2, 880 N.E.2d 31, this Court recognized that it is improper for the prosecutor to denigrate defense counsel in closing arguments. *Id.* at 444. Moreover, this Court recognized that there is a line between properly responding to arguments and attacking evidence and comments which attack the defense attorney. This court did not find plain error in *Davis* concluding the "denigrating comments did not pervade the closing argument, let alone the entire trial." The exact opposite is present in this case. The denigrating comments, sarcasm and attacks on defense counsel permeated the rebuttal arguments in the trial phase and the penalty phase. The comments were not isolated. A review of the entire rebuttal reflects the purpose was to disparage and undermine counsel, not the evidence or arguments of counsel.

The prejudice is compounded in the mitigation phase because the trial court instructed the jury that although opening statements and final argument are not

evidence “the law permits you to consider the arguments of counsel to the extent they are relevant to the sentence that should be imposed upon Shawn E. Ford Jr.” (Vol. 6, Mitigation, p. 961.) The rebuttal closing arguments of the prosecutor effectively undermined defense counsel’s credibility and integrity.

In *DePew v. Anderson*, 311 F.3d 742 (6th Cir. 2002) the Sixth Circuit affirmed the District Court’s granting a conditional writ as a result of prosecutorial misconduct in the mitigation phase of DePew’s trial. The Court recognized that a stricter standard is to be applied when determining if arguments from the prosecutor were prejudicial.

Given the number of disparaging comments, sarcastic comments and comments denigrating defense counsel, it is impossible to say that the comments did not have an effect on the sentencing. Defense counsel’s failure to object to the comments, deprived Mr. Ford the effective assistance of counsel.

### **Counsel Ineffectiveness at the Atkins Hearing**

As set out in Proposition of Law No. III, incorporated herein by reference, defense counsel failed to pursue an *Atkins* claim on behalf of Mr. Ford, until the 11<sup>th</sup> hour of the case.

The defense had requested that the trial court appoint a mitigation investigator and a mitigation expert, (Defense Motions # 1, 69, Doc. # 26, 131) The trial court granted the requests. (Journal Entry, Doc. # 28, 155)

At some point, prior to the presentation of the evidence in the penalty phase, defense counsel should have realized that the question of whether Mr. Ford was intellectually disabled was present in the case, and should have pursued it at that time. Certainly the school records called his IQ into question.

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

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

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

And if 100 is average, we consider anything below 85 to be below average or borderline. If you are below 70, you are what we used to call "mentally retarded." We don't use that term any more; we now say "developmentally disabled."

So sometimes Shawn's tests showed that he was actually disabled; other times, his IQ tested to be merely below average. But, really, the best case scenario is that this is a person that was born with a lower IQ, lower skills than the average person.

(Id., at pp. 496-497)

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

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

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

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

Because the defense waited until AFTER the death recommendation was made, the defense was prejudiced in its *Atkins* presentation. First and foremost, Mr. Ford was not in a good frame of mind. He had already been found guilty and

sentenced to death. This did not present an ideal situation in which to them be subjected to three additional psychological evaluations, and in fact, he did not cooperate with the defense examiner, refusing to meet with him or undergo any testing. (Vol. 1, Atkins Hrg., p. 16)

It was also clear that the defense counsel did not understand the issues surrounding a determination of intellectual disabilities and were not prepared to question the experts, either on direct or cross to present the evidence in the most favorable light.

Defense counsel did not present an effective presentation at the Atkins hearing, and this resulted in Mr. Ford being eligible for the death penalty and ultimately sentenced to death.

## **Conclusion.**

### ***Cumulative ineffective assistance***

Assuming for the sake of argument that none of the myriad failures outlined above individually constitutes ineffective assistance of counsel, the accumulation of errors over the course of trial and sentencing deprived Mr. Ford of his right to counsel, freedom from cruel and unusual punishment, a fair trial, and due process.

Errors that might not be so prejudicial as to amount to a constitutional violation when considered alone, may cumulatively produce a trial setting that is

fundamentally unfair thereby violating the defendant's constitutional rights. *Walker v. Engle*, 703 F.2d 959, 963 (6th Cir. 1983) (the "cumulative effect" of misconduct committed by state in prosecuting case against petitioner constituted denial of fundamental fairness). *Cooper v. Sowders*, 837 F.2d 284 (6th Cir. 1988) (various trial errors, considered cumulatively, produced a trial setting that was fundamentally unfair). It has been held that such cumulative effect analysis applies to ineffective assistance of counsel claims. *Rodriguez v. Hoke*, 928 F.2d 534, 538 (2d Cir. 1991).

The “cumulative effect” of counsel’s errors and omissions violated Shawn Ford’s Sixth Amendment right to effective counsel. *See State v. Gondor*, 112 Ohio St. 3d 377, 392, 860 N.E.2d 77, 90 (2006) (citing *State v. DeMarco*, 31 Ohio St. 3d 191, 196, 509 N.E.2d 1256, 1261 (1987); *Stouffer v. Reynolds*, 168 F.3d 1155, 1163-64 (10th Cir. 1999)).

The above claims of ineffective assistance of counsel throughout the trial, considered cumulatively establish that Mr. Ford's constitutional rights were violated under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Mr. Ford is entitled to a new trial or alternatively a new penalty phase under R.C. § 2929.06(B).

***PROPOSITION OF LAW NO. XXI***

***CUMULATIVE ERRORS DEPRIVED FORD OF A FAIR TRIAL AND A RELIABLE SENTENCING HEARING.***

Shawn Ford raised numerous errors worthy of this Court granting relief both from his convictions and his death sentence. Each error, standing alone, is sufficient to warrant a reversal. However, by viewing the many errors together, it is apparent that their cumulative impact rendered Ford's trial fundamentally unfair. See *Walker v. Engle*, 703 F.2d 959, 963 (6th Cir. 1983). This Court must reverse Ford's convictions and sentence.

The adequacy of the legally admitted evidence is only one factor for this Court to consider in determining the influence that an error has on a jury. The Supreme Court made clear in *Satterwhite v. Texas*; 486 U.S. 249 (1988), that it "is not whether the legally admitted evidence was sufficient to support" the verdict, but rather "whether the [prosecution] has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* at 258-59. Review must also determine whether the cumulative effect of the errors rendered the trial fundamentally unfair. See *Walker*, 703 F.2d at 963. "We must reverse any conviction obtained in a proceeding in which the cumulative impact of irregularities is so prejudicial to a defendant that he is deprived of his fundamental

right to a fair trial. Fourteenth Amendment, United States Constitution." *State v. Wilson*, 787 P.2d 821, 821 (N.M. 1990); *United States v. Wallace*, 848 F.2d 1464, 1475 (9th Cir. 1988); *State v. DeMarco*, 31 Ohio St. 3d 191 (1987).

Perhaps the most telling example of the prejudice resulting from the cumulative impact of the errors at Ford's trial are the trial court evidentiary rulings, ineffective assistance of counsel, and misconduct that combined to deprive Ford of the opportunity to fully and fairly present his claims of self-defense or for a lesser-included offense instruction. See *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Beck v. Alabama*, 447 U.S. 625, 627 (1980).

Ford incorporates the other Propositions of Law into this issue. What these issues show is that from the beginning Ford was destined to receive the penalty of death. That is so because the jury was indoctrinated to impose death by the prosecuting attorney, defense counsel failed to fully understand the capital sentencing scheme in Ohio in order to make the objections necessary and to preserve the errors in the case or keep them from occurring.

The result of cumulative error entitles Ford to a new trial. His convictions based upon cumulative error denied him a fair trial and his right to due process. U.S. Const. amends. VI, XIV; Ohio Const. Art. I, § 5, 16. Additionally, these same

errors render Ford's death sentence unreliable and arbitrary. U.S. Const. amends. VIII, XIV; Ohio Const. art. I, §§ 9, 16.

**PROPOSITION OF LAW NO. XXII**

**OHIO'S CAPITAL SENTENCING STATUTES ARE UNCONSTITUTIONAL UNDER THE RECENT DECISION IN HURST V. FLORIDA, \_\_\_ U.S. \_\_\_, 136 S. CT. 616 (2016), WHICH HELD THAT FLORIDA'S CAPITAL SENTENCING LAWS VIOLATED THE SIXTH AMENDMENT RIGHT TO TRIAL BY JURY BECAUSE IT REQUIRED THE JUDGE, NOT A JURY, TO MAKE THE FACTUAL DETERMINATIONS NECESSARY TO SUPPORT A SENTENCE OF DEATH.**

During the Court's last term, the United States Supreme Court issued its decision in *Hurst v. Florida*, \_\_\_ U.S. \_\_\_, 136 S.Ct. 616 (2016), which held that Florida's capital sentencing laws violated the Sixth Amendment right to trial by jury because it required the judge, not a jury, to make the factual determinations necessary to support a sentence of death. Due to the similarities between Florida's capital sentencing laws and Ohio's, Ford submits that pursuant to *Hurst*, this Court should find Ohio's capital sentencing unconstitutional and therefore dismiss the capital components of this case.

In *Walton v. Arizona*, 497 U.S. 639, 111 L.Ed.2d 511, 110 S.Ct. 3047 (1990), the Supreme Court held that Arizona's sentencing scheme was compatible with the Sixth Amendment because the additional facts found by the judge qualified as sentencing considerations, not "elements of the offense of capital murder." *Id.*, at 649. Within ten years, the analysis of Sixth Amendment right to

jury trial and jury findings shifted. In a line of cases which resulted in much of Ohio's felony sentencing statutes to be ruled unconstitutional, the Supreme Court focused upon the impact of judicial fact finding in sentencing and how in many instances current protocols were contrary to the Sixth Amendment. See, *Apprendi v. New Jersey*, 530 U.S. 466, 147 L.Ed.2d 435, 120 S.Ct. 2348 (2000); *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). In *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) the Court held that State sentencing statute procedure which permitted the judge to make factual findings to impose a sentence higher than the statutory maximum did not comply with the Sixth Amendment. The following term, the Court held in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) that the *Apprendi* and *Blakely* decisions applied to the United States Sentencing Guidelines; under the Sixth Amendment, any fact other than a prior conviction that was necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict had to be admitted by a defendant or proved to a jury beyond a reasonable doubt.

In this case, the statutory maximum sentence for aggravated murder is life in prison. Death can only be imposed upon specific factual findings, which under Ohio's capital punishment statutory scheme are facts determined by the judge.

Accordingly, Ohio's capital punishment statutory scheme violates the Sixth Amendment. *Hurst v. Florida*, \_\_\_ U.S. \_\_\_, 136 S.Ct. 616 (2016).

In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the Court held that the Sixth Amendment does not permit a defendant to be "exposed . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.*, at 483. *Apprendi* held that this prescription controlled even if the State characterizes the additional findings made by the judge as "sentencing factors." *Id.*, at 492. Thus, *Apprendi*, made clear that any fact that expose the defendant "to a greater punishment than that authorized by the jury's guilty verdict" must be submitted to a jury. In *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) the Court addressed the issue in the context of capital punishment and held that the Sixth Amendment's jury trial guarantee, made applicable to the states by the Fourteenth Amendment, required that the aggravating factor determination be entrusted to the jury. The Court concluded that the *Walton* decision and the *Apprendi* decision were irreconcilable because a capital defendant was entitled to the same Sixth Amendment protections extended to defendants generally. Because Arizona's enumerated aggravating factors operated as the functional equivalent of an element of a greater offense, an enhancement above the standard sentence for the offense,

the Sixth Amendment required that they be found by a jury. The Court overruled *Walton* to the extent that it allowed a sentencing judge to find an aggravating circumstance necessary for imposition of the death penalty.

This past term, the United States Supreme Court issued *Hurst v. Florida*, \_\_\_ U.S. \_\_\_, 136 S.Ct. 616 (2016), which held that Florida’s capital sentencing laws violated the Sixth Amendment right to trial by jury because it required the judge, not a jury, to make the factual determinations necessary to support a sentence of death. Like Ohio’s capital punishment structure, in Florida a jury provided a recommendation to the judge with regard to punishment, but notwithstanding the recommendation, Florida law required the judge to determine whether sufficient aggravating circumstances existed. Due to the similarities between Florida’s capital sentencing laws and Ohio’s, Ford submits that pursuant to *Hurst*, this Court should find Ohio’s capital sentencing unconstitutional and therefore dismiss the capital components of this case.

In Florida, first-degree murder is a capital felony, but the maximum sentence a capital defendant may receive based solely on that conviction is life imprisonment. Fla. Stat. §775.082(1). The defendant will receive the death penalty only after an additional sentencing proceeding “results in findings by the court that

such person shall be punished by death.” *Id.* Otherwise, the defendant is punished by life imprisonment without parole. *Id.*

Accordingly, after Hurst was found guilty of first-degree murder, the judge conducted an evidentiary hearing before the jury. *Hurst*, 136 S.Ct. at 620. At the conclusion of the evidentiary hearing, the jury rendered an “advisory sentence” of death without specifying the factual basis of its recommendation. *Id.* Under Florida law, the trial court must give the jury’s recommendation “great weight,” but must independently weigh the aggravated and mitigating circumstances before entering a sentence of life imprisonment or death. *Id.* The trial court in *Hurst* did this, and imposed a death sentence. *Id.*

On post-conviction review, the Florida Supreme Court vacated the sentence for reasons that are not relevant here. *Id.* At Hurst’s re-sentencing hearing, a jury again recommended death and the judge so sentenced, basing its decision on the independent findings of aggravating circumstances as well as the jury’s recommendation. *Id.*

The United States Supreme Court accepted certiorari of Hurst’s appeal to resolve the tension between *Ring v. Arizona*, *supra* and its earlier decisions, *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) concluding that the Sixth Amendment does not require that the specific findings

authorizing the imposition of the sentence of death be made by the jury, and *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) which held that Florida's sentencing structure did not violate the Sixth or Eighth Amendment concluding that the jury's sentencing recommendation in a capital case is only advisory and that the trial court is to conduct its own weighing of the aggravating and mitigating circumstances notwithstanding the recommendation the jury. Just a few years later, in *Ring*, the Supreme Court held that the Sixth Amendment requires a jury to find any fact necessary to qualify a capital defendant for a death sentence. *Hurst*, 136 S. Ct. at 621. Although *Ring* had not expressly overruled the *Hildwin* and *Spaziano*, cases which approved the constitutionality of Florida's capital sentencing scheme, *Ring*'s holding seemed to compel such an outcome. *Hurst* laid the confusion to rest, holding that Florida's law "violates the Sixth Amendment in light of *Ring*." *Id.* at 620.

Justice Sotomayor explained in her 8-1 majority opinion that like Arizona, the state whose sentencing scheme was at issue in *Ring*, "Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts." *Id.* at 622. Justice Sotomayor continued: "Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial." *Id.*

Because “the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole,” and because “a judge increased Hurst’s authorized punishment based on her own factfinding,” the Court held that “Hurst’s sentence violates the Sixth Amendment.” *Id.*

In so holding, the Court rejected Florida’s argument that the jury’s recommendation necessitated the finding of an aggravating circumstance, noting “the Florida sentencing statute does not make a defendant eligible for death until ‘findings *by the court* that such person shall be punished by death.’” *Id.* (quoting Fla. Stat. § 775.082(1)) (emphasis in opinion). Because “[t]he trial court *alone* must find ‘the facts . . . [t]hat sufficient aggravating circumstances exist’ and ‘[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances,’” the Court found that a Florida jury’s function is solely advisory and does not satisfy the constitutional standard outlined by *Ring*. *Id.* (quoting § 921.141(3)) (emphasis in original).

Ohio’s death-penalty sentencing scheme is similar to Florida’s in several significant ways. Pursuant to R.C. 2929.03(B), a jury in an Ohio capital case must find the defendant guilty or not guilty of the principal charge and then it must also determine “whether the offender is guilty or not guilty of each specification.” The

jury is instructed that each aggravating circumstance “shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification.” *Id.*

If the jury finds a defendant guilty of both the charge and one or more of the specifications, then, like in Florida, a sentencing hearing is conducted where:

The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender.

R.C. 2929.03(D)(1). During this sentencing hearing, the defendant has the burden of introducing evidence of any mitigating factors, but the prosecution has the ultimate burden of “proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are

sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.” *Id.*

At the conclusion of the sentencing hearing, if the jury unanimously finds that the prosecutor has met this burden, “the jury shall *recommend* to the court that the sentence of death be imposed on the offender.” R.C. 2929.03(D)(2) (Emphasis added). This finding is not required to be rendered in writing and does not set forth the factual findings underlying the jury’s recommendation.<sup>32</sup> Once an Ohio jury makes a death-sentence recommendation, then, like in Florida, the Ohio trial court must independently consider “the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section.” R.C. 2929.03(D)(3). The trial court can then sentence a defendant to death if it finds “by proof beyond a reasonable doubt . . . that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors.” *Id.* As in Florida, the Ohio trial court, when it imposes a death sentence, shall:

state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code,

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<sup>32</sup> In Florida, the jury’s recommendation does not need to be unanimous. *Hurst*, 136 S. Ct. at 620. Nevertheless, the point is that, like in Florida, Ohio juries make a recommendation to the trial court for imposing a death sentence without any specific factual findings.

the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors.

R.C. 2929.03(F). In sum, a jury in Ohio has the responsibility of finding that one or more aggravating circumstances exist as part of the verdict at the capital defendant's trial; however, that is not the completion of the capital sentencing process. Rather, under Ohio law, the jury must then conduct a weighing process after the sentencing hearing. Once the weighing process is complete, the jury may make a death-sentence *recommendation* to the trial court. Because the Court in *Hurst* emphasized the language in the Florida statute that defined the jury's decision as advisory in nature, Ohio's scheme that similarly classifies a jury's decision as a recommendation violates the Sixth Amendment right to trial by jury. Like *Hurst*, the judge makes the final decision after obtaining the jury's non-specific recommendation. In *Hurst*, the Court broadly criticized the Florida scheme because the jury "does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Hurst*, 136 S.Ct. at 622 (quoting *Walton v. Arizona*, 497 U.S. 639, 648 (1990)). The Court's opinion not only pointed out the absence

of factual findings about the existence of mitigating or aggravating factors, but also the absence of any findings about the weighing of those factors. *Id.* Similarly, the Ohio statute does not require the jury to make any specific findings of fact about mitigating factors, nor does it ask the jury to make any specific findings about their balancing of the mitigating and aggravating factors. Therefore, the judge must implement a sentence without those critical findings which the Sixth Amendment mandates are within the province of the jury alone. Absent those factual findings, and given the advisory nature of the jury's sentencing determination, the Ohio death penalty scheme suffers from the same constitutional deficiencies as the scheme in Florida and should be invalidated.

On June 20, 2016, Judge William R. Finnegan, relying on the *Hurst* decision, ruled Ohio's death penalty unconstitutional. *State of Ohio v. Mason*, Marion County Court of Common Pleas Case No. 93 CR 153.

In the Hurst case, the United States Supreme Court held the Florida statute to be unconstitutional because the Florida statute required not the jury but the judge to make the critical findings necessary to impose the death penalty. The fact that Florida provided an advisory jury is immaterial. The court found that the maximum penalty that could be imposed was unconstitutionally increased by the judge's own fact-finding. *Hurst v. Florida, Id.*, at 619.

\* \* \*

Hurst vs. Florida makes clear that the Sixth Amendment requires that the specific finding authorizing the imposition of the death penalty be made by the jury. The Ohio death penalty statute applicable in this case has no provision for the jury to make specific findings relating to the weighing of aggravating and mitigating factors. As a result, the Ohio death penalty statute applicable in this case violates the Sixth Amendment as interpreted in Hurst vs. Florida.

*Id.* at 21, 49. Thus under Ohio's current death penalty statute, death may not be imposed as a penalty because the judge and not a jury makes the findings necessary for imposition of the death in violation of the Sixth Amendment.

In *State v. Belton*, 2016 Ohio 1581, 2016 Ohio LEXIS 958 (Ohio Apr. 20, 2016) this Court considered the implications of the *Hurst* decision on Ohio's death penalty.

[\*P58] More recently, the Supreme Court applied *Apprendi* and *Ring* to invalidate Florida's capital-sentencing scheme in *Hurst v. Florida*, 577 U.S. , 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). The Florida law at issue in *Hurst* limited the jury's role in capital sentencing to making an advisory recommendation; a trial court was then free to impose a death sentence even if the jury recommended against it. *Id.* at 620. And even when a jury did recommend a death sentence, a trial court was not permitted to follow that recommendation until the judge found the existence of an aggravating circumstance. *Id.* at 620, 622. Thus, "Florida [did] not require the jury to make the critical findings necessary to impose the death penalty." *Id.* at 622. Instead, the trial judge in *Hurst* "increased [the defendant's] authorized punishment based on her own factfinding" when she

sentenced him to death. *Id.* The Supreme Court held that Florida's capital-sentencing law, like the Arizona law in *Ring*, violated the Sixth Amendment. *Id.*

[\*P59] Ohio's capital-sentencing scheme is unlike the laws at issue in *Ring* and *Hurst*. In Ohio, a capital case does not proceed to the sentencing phase until after the fact-finder has found a defendant guilty of one or more aggravating circumstances. See R.C. 2929.03(D); R.C. 2929.04(B) and (C); *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, ¶ 147. Because the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence, it is not possible to make a factual finding during the sentencing phase that will expose a defendant to greater punishment. Moreover, in Ohio, if a defendant is tried by a jury, then the judge cannot impose a sentence of death unless the jury has entered a unanimous verdict for a death sentence. R.C. 2929.03(D)(2).

[\*P60] Federal and state courts have upheld laws similar to Ohio's, explaining that if a defendant has already been found to be death-penalty eligible, then subsequent weighing processes for sentencing purposes do not implicate *Apprendi* and *Ring*. Weighing is not a fact-finding process subject to the Sixth Amendment, because "[t]hese determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination." *State v. Gales*, 265 Neb. 598, 628, 658 N.W.2d 604 (2003); see, e.g., *State v. Fry*, 2006 - NMSC 001, 2006 NMSC 1, 138 N.M. 700, 718, 126 P.3d 516 (2005); *Ortiz v. State*, 869 A.2d 285, 303-305 (Del.2005); *Ritchie v. State*, 809 N.E.2d 258, 268 (Ind.2004). Instead, the weighing process amounts to "a complex moral judgment" about what penalty to impose upon a defendant who is already death-penalty eligible. *United States v. Runyon*, 707 F.3d

475, 515-516 (4th Cir.2013) (citing cases from other federal appeals courts).

[\*P61] For these reasons, we hold that a capital defendant in Ohio elects to waive his or her right to have a jury determine guilt, the Sixth Amendment does not guarantee the defendant a jury at the sentencing phase of trial.

Unlike *Belton*, here Ford did not waive his right to a jury trial. While the Florida statute does permit the trial court to impose death even if the jury does not recommend death, and Ohio only permits the trial court to impose death if the jury recommends it, Ohio, like Florida, requires the trial court judge to make findings of fact before imposing the sentence. It is true, the jury decides whether or not a defendant is eligible for imposition of the death penalty by rendering verdicts on the capital specifications. But the guilty verdicts on the capital specifications, standing alone, do not provide the trial court with the authority to impose death. In Ohio death can only be imposed after the jury determines whether the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. The jury does not make findings of fact when providing a recommendation and there is no way to know what factual findings the jury relied upon in concluding the aggravating circumstances outweigh the mitigating factors. It is the failure of the jury to make such factual findings that renders Ohio's death penalty unconstitutional. The jury does not issue factual findings for the trial court to then

weigh and make an independent determination. It is not the weighing process which implicates the Sixth Amendment, it is the trial court making its own findings which the trial court then uses to conduct the independent weighing.

The sentencing entry confirms the trial court “independent deliberation.” (Doc. #378, p. 4.) The trial court proceeds to make specific findings with regard to the aggravating circumstances for the aggravated murder of Margaret Schobert (Doc. #378, p. 6-8.) The findings detail the aggravating circumstances the trial court relied upon. The jury may have relied upon some of the same facts and the jury may not have. The only specific facts which the record confirms were found to support the aggravating circumstances are the facts found by the trial court. Likewise, the trial court made specific factual findings regarding the mitigating factors. (Doc.# 378, p.8-18.) Here the trial court specifically found “no mitigating factors found” in the aggravating circumstances. (Doc. #378, p.9.) The jury may or may not have made that factual finding. The ten pages of factual findings of the trial court regarding mitigating factors are filled with facts which the jury may have agreed with and utilized in making the recommendation of death, or they may not have. Death was imposed upon the trial court’s independent factual determinations as set forth in the sentencing memorandum. These factual findings were not made the jury. The Sixth Amendment requires that the specific findings

authorizing the imposition of the death penalty be made by the jury. Accordingly, Fords death sentence must be vacated.

**PROPOSITION OF LAW NO. XXIII**

**OHIO'S DEATH PENALTY LAW IS UNCONSTITUTIONAL. OHIO REV. CODE ANN. §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, AND 2929.05 DO NOT MEET THE PRESCRIBED CONSTITUTIONAL REQUIREMENTS AND ARE UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED TO SHAWN E FORD. U.S. CONST. AMENDS. V, VI, VIII, AND XIV; OHIO CONST. ART. I, §§ 2, 9, 10, AND 16. FURTHER, OHIO'S DEATH PENALTY STATUTE VIOLATES THE UNITED STATES' OBLIGATIONS UNDER INTERNATIONAL LAW.<sup>33</sup>**

The Eighth Amendment to the Constitution and Article I, § 9 of the Ohio Constitution prohibit the infliction of cruel and unusual punishment. The Eighth Amendment's protections are applicable to the states through the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660 (1962). Punishment that is "excessive" constitutes cruel and unusual punishment. *Coker v. Georgia*, 433 U.S. 584 (1977). The underlying principle of governmental respect for human dignity is the Court's guideline to determine whether this statute is constitutional. *See Furman v. Georgia*, 408 U.S. 238 (1972) (Brennan, J., concurring); *Rhodes v.*

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<sup>33</sup> In *State v. Jenkins*, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984), this Court upheld this death penalty statute and this Court may, therefore, reject this claim on its merits if it disagrees with Appellant's federal constitutional arguments. *State v. Poindexter*, 36 Ohio St. 3d 1, 520 N.E.2d 568 (1988).

*Chapman*, 452 U.S. 337, 361 (1981); *Trop v. Dulles*, 356 U.S. 86 (1958). The Ohio scheme offends this bedrock principle in the following ways:

### **Arbitrary And Unequal Punishment**

The Fourteenth Amendment's guarantee of equal protection requires similar treatment of similarly situated persons. This right extends to the protection against cruel and unusual punishment. *Furman*, 408 U.S. at 249 (Douglas, J., concurring). A death penalty imposed in violation of the Equal Protection guarantee is a cruel and unusual punishment. *See id.* Any arbitrary use of the death penalty also offends the Eighth Amendment. *Id.*

Ohio's capital punishment scheme allows the death penalty to be imposed in an arbitrary and discriminatory manner in violation of *Furman* and its progeny. Prosecutors' virtually uncontrolled indictment discretion allows arbitrary and discriminatory imposition of the death penalty. Mandatory death penalty statutes were deemed fatally flawed because they lacked standards for imposition of a death sentence and were therefore removed from judicial review. *Woodson v. North Carolina*, 428 U.S. 280 (1976). Prosecutors' uncontrolled discretion violates this requirement.

Due process prohibits the taking of life unless the state can show a legitimate and compelling state interest. *Commonwealth v. O'Neal*, 339 N.E.2d 676, 678

(Mass. 1975) (Tauro, C.J., concurring); *State v. Pierre*, 572 P.2d 1338 (Utah 1977) (Maughan, J., concurring and dissenting). Moreover, where fundamental rights are involved personal liberties cannot be broadly stifled “when the end can be more narrowly achieved.” *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). To take a life by mandate, the State must show that it is the “least restrictive means” to a “compelling governmental end.” *O’Neal II*, 339 N.E.2d at 678.

The death penalty is neither the least restrictive nor an effective means of deterrence. Both isolation of the offender and retribution can be effectively served by less restrictive means. Society’s interests do not justify the death penalty.

### **Unreliable Sentencing Procedures**

The Due Process and Equal Protection Clauses prohibit arbitrary and capricious procedures in the State’s application of capital punishment. *Gregg v. Georgia*, 428 U.S. 153, 188, 193-95 (1976); *Furman*, 408 U.S. at 255, 274. Ohio’s scheme does not meet those requirements. The statute does not require the State to prove the absence of any mitigating factors or that death is the only appropriate penalty.

The statutory scheme is unconstitutionally vague, which leads to the arbitrary imposition of the death penalty. The language “that the aggravating circumstances ... outweigh the mitigating factors” invites arbitrary and capricious jury decisions.

“Outweigh” preserves reliance on the lesser standard of proof by a preponderance of the evidence. The statute requires only that the sentencing body be convinced beyond a reasonable doubt that the aggravating circumstances were marginally greater than the mitigating factors. This creates an unacceptable risk of arbitrary or capricious sentencing.

Additionally, the mitigating circumstances are vague. The jury must be given “specific and detailed guidance” and be provided with “clear and objective standards” for their sentencing discretion to be adequately channeled. *Gregg; Godfrey v. Georgia*, 446 U.S. 420 (1980).

Ohio courts continually hold that the weighing process and the weight to be assigned to a given factor are within the individual decision-maker’s discretion. *State v. Fox*, 69 Ohio St. 3d 183, 193, 631 N.E.2d 124, 132 (1994). Giving so much discretion to juries inevitably leads to arbitrary and capricious judgments. The Ohio open discretion scheme further risks that constitutionally relevant mitigating factors that must be considered as mitigating [youth or childhood abuse (*Eddings v. Oklahoma*, 455 U.S. 104 (1982)), mental disease or defect (*Penry v. Lynaugh*, 492 U.S. 302 (1989) *rev’d on other grounds Penry v. Johnson*, 532 U.S. 782 (2001)), level of involvement in the crime (*Enmund v. Florida*, 458 U.S. 782 (1982)), or lack of criminal history (*Delo v. Lashley*, 507 U.S. 272 (1993))] will

not be factored into the sentencer's decision. While the federal constitution may allow states to shape consideration of mitigation, *see Johnson v. Texas*, 509 U.S. 350 (1993), Ohio's capital scheme fails to provide adequate guidelines to sentencers, and fails to assure against arbitrary, capricious, and discriminatory results.

Empirical evidence is developing in Ohio and around the country that, under commonly used penalty phase jury instructions, juries do not understand their responsibilities and apply inaccurate standards for decision. *See Cho*, Capital Confusion: The Effect of Jury Instructions on the Decision To Impose Death, 85 J. Crim. L. & Criminology 532, 549-557 (1994), and findings of Zeisel discussed in *Free v. Peters*, 12 F.3d 700 (7th Cir. 1993). This confusion violates the federal and state constitutions. Because of these deficiencies, Ohio's statutory scheme does not meet the requirements of *Furman* and its progeny.

### **Defendant's Right to a Jury is Burdened**

The Ohio scheme is unconstitutional because it imposes an impermissible risk of death on capital defendants who choose to exercise their right to a jury trial. A defendant who pleads guilty or no contest benefits from a trial judge's discretion to dismiss the specifications "in the interest of justice." Ohio Crim. R. 11(C)(3). Accordingly, the capital indictment may be dismissed regardless of mitigating

circumstances. There is no corresponding provision for a capital defendant who elects to proceed to trial before a jury.

Justice Blackmun found this discrepancy to be constitutional error. *Lockett v. Ohio*, 438 U.S. 586, 617 (1978) (Blackmun, J., concurring). This disparity violated *United States v. Jackson*, 390 U.S. 570 (1968), and needlessly burdened the defendant's exercise of his right to a trial by jury. Since *Lockett*, this infirmity has not been cured and Ohio's statute remains unconstitutional.

### **Mandatory Submission of Reports and Evaluations**

Ohio's capital statutes are unconstitutional because they require submission of the pre-sentence investigation report and the mental evaluation to the jury or judge once requested by a capital defendant. R.C. § 2929.03(D)(1). This mandatory submission prevents defense counsel from giving effective assistance and prevents the defendant from effectively presenting his case in mitigation.

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

R.C. § 2929.03(D)(1)'s reference to "the nature and circumstances of the aggravating circumstance" incorporates the nature and circumstances of the offense into the factors to be weighed in favor of death. The nature and circumstances of an offense are, however, statutory mitigating factors under R.C. § 2929.04(B). R.C. § 2929.03(D)(1) makes Ohio's death penalty weighing scheme

unconstitutionally vague because it gives the sentencer unfettered discretion to weigh a statutory mitigating factor as an aggravator.

To avoid arbitrariness in capital sentencing, states must limit and channel the sentencer's discretion with clear and specific guidance. *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990); *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988). A vague aggravating circumstance fails to give that guidance. *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *vacated on other grounds Ring v. Arizona*, 536 U.S. 584 (2002); *Godfrey*, 446 U.S. at 428. Moreover, a vague aggravating circumstance is unconstitutional whether it is an eligibility or a selection factor. *Tuilaepa v. California*, 512 U.S. 967 (1994). The aggravating circumstances in R.C. § 2929.04(A)(1)-(8) are both.

### **Proportionality and Appropriateness Review**

Ohio Revised Code § 2929.021 and 2929.03 require data be reported to the courts of appeals and to the Ohio Supreme Court. There are substantial doubts as to the adequacy of the information received after guilty pleas to lesser offenses or after charge reductions at trial. R.C. § 2929.021 requires only minimal information on these cases. Additional data is necessary to make an adequate comparison in these cases. This prohibits adequate appellate review.

Adequate appellate review is a precondition to the constitutionality of a state death penalty system. *Zant v. Stephens*, 462 U.S. 862, 879 (1983); *Pulley v. Harris*, 465 U.S. 37 (1984). The standard for review is one of careful scrutiny. *Zant*, 462 U.S. at 884-85. Review must be based on a comparison of similar cases and ultimately must focus on the character of the individual and the circumstances of the crime. *Id.*

Ohio's statutes' failure to require the jury or three-judge panel recommending life imprisonment to identify the mitigating factors undercuts adequate appellate review. Without this information, no significant comparison of cases is possible. Absent a significant comparison of cases, there can be no meaningful appellate review. *See State v. Murphy*, 91 Ohio St. 3d 516, 562, 747 N.E.2d 765, 813 (2001) (Pfeifer, J., dissenting) ("When we compare a case in which the death penalty was imposed only to other cases in which the death penalty was imposed, we continually lower the bar of proportionality. The lowest common denominator becomes the standard.")

The comparison method is also constitutionally flawed. Review of cases where the death penalty was imposed satisfies the proportionality review required by O.R.C. § 2929.05(A). *State v. Steffen*, 31 Ohio St. 3d 111, 509 N.E.2d 383, syl. 1 (1987). However, this prevents a fair proportionality review. There is no

meaningful manner to distinguish capital defendants who deserve the death penalty from those who do not.

This Court's appropriateness analysis is also constitutionally infirm. R.C. § 2929.05(A) requires appellate courts to determine the appropriateness of the death penalty in each case. The statute directs affirmance only where the court is persuaded that the aggravating circumstances outweigh the mitigating factors and that death is the appropriate sentence. *Id.* This Court has not followed these dictates. The appropriateness review conducted is very cursory. It does not "rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano v. Florida*, 468 U.S. 447, 460 (1984).

The cursory appropriateness review also violates the capital defendant's due process rights as guaranteed by the Fifth and Fourteenth Amendments to the Constitution. The General Assembly provided capital appellants with the statutory right of proportionality review. When a state acts with significant discretion, it must act in accordance with the Due Process Clause. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). The review currently used violates this constitutional mandate. An insufficient proportionality review violates Shawn E. Ford due process and liberty interest in R.C. § 2929.05.

## **Ohio's Statutory Death Penalty Scheme Violates International Law.**

International law binds each of the states that comprise the United States. Ohio is bound by international law whether found in treaty or in custom. Because the Ohio death penalty scheme violates international law, Shawn E. Ford' capital convictions and sentences cannot stand.

### ***International Law Binds Ohio.***

“International law is a part of our law[.]” *The Paquete Habana*, 175 U.S. 677, 700 (1900). A treaty made by the United States is the supreme law of the land. Article VI, United States Constitution. Where state law conflicts with international law, it is the state law that must yield. *See Zschernig v. Miller*, 389 U.S. 429, 440 (1968). In fact, international law creates remediable rights for United States citizens. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Forti v. Suarez-Mason*, 672 F.Supp. 1531 (N.D. Cal. 1987).

### ***Ohio's Obligations Under International Charters, Treaties, and Conventions***

The United States' membership and participation in the United Nations (U.N.) and the Organization of American States (OAS) creates obligations in all fifty states. Through the U.N. Charter, the United States committed itself to promote and encourage respect for human rights and fundamental freedoms. Art. 1(3). The United States bound itself to promote human rights in cooperation with the U.N. Art. 55-56. The United States again proclaimed the fundamental rights of the individual when it became a member of the OAS. OAS Charter, Art. 3.

The U.N. has sought to achieve its goal of promoting human rights and fundamental freedoms through the creation of numerous treaties and conventions. The United States has ratified several of these including: the International Covenant on Civil and Political Rights (ICCPR) ratified in 1992, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) ratified in 1994, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) ratified in 1994. Ratification of these treaties by the United States expressed its willingness to be bound by these treaties. Pursuant to the Supremacy Clause, the ICCPR, the ICERD, and the CAT are the supreme laws of the land.

Ohio is not fulfilling the United States' obligations under these conventions. Rather, Ohio's death penalty scheme violates each convention's requirements and thus must yield to the requirements of international law. (*See discussion infra*).

**a. Ohio's statutory scheme violates the ICCPR's and ICERD's guarantees of equal protection and due process.**

Both the ICCPR, ratified in 1992, and the ICERD, ratified in 1994, guarantee equal protection of the law. ICCPR Art. 2(1), 3, 14, 26; ICERD Art. 5(a). The ICCPR further guarantees due process via Articles 9 and 14, which includes numerous considerations: a fair hearing (Art. 14(1)), an independent and impartial tribunal (Art. 14(1)), the presumption of innocence (Art. 14(2)), adequate time and facilities for the preparation of a defense (Art. 14(3)(a)), legal assistance (Art. 14(3)(d)), the opportunity to call and question witnesses (Art. 14(3)(e)), the protection against self-incrimination (Art. 14(3)(g)), and the protection against double jeopardy (Art. 14(7)). However, Ohio's statutory scheme fails to provide equal protection and due process to capital defendants as contemplated by the ICCPR and the ICERD.

**b. Ohio's Statutory Scheme Violates the ICCPR's Protection Against Arbitrary Execution.**

The ICCPR speaks explicitly to the use of the death penalty. The ICCPR guarantees the right to life and provides that there shall be no arbitrary deprivation

of life. Art. 6(1). It allows the imposition of the death penalty only for the most serious offenses. Art. 6(2). Juveniles and pregnant women are protected from the death penalty. Art. 6(5). Moreover, the ICCPR contemplates the abolition of the death penalty. Art. 6(6).

However, several aspects of Ohio's statutory scheme allow for the arbitrary deprivation of life. *See infra* Sections a–f.

**c. Ohio's Statutory Scheme Violates the  
ICERD's Protections Against Race  
Discrimination.**

The ICERD, speaking to racial discrimination, requires that each state take affirmative steps to end race discrimination at all levels. Art. 2. It requires specific action and does not allow states to sit idly by when confronted with practices that are racially discriminatory. However, Ohio's statutory scheme imposes the death penalty in a racially discriminatory manner. (*See infra*). A scheme that sentences blacks and those who kill white victims more frequently and which disproportionately places African-Americans on death row is in clear violation of the ICERD. Ohio's failure to rectify this discrimination is a direct violation of international law and of the Supremacy Clause of the United States Constitution.

**d. Ohio's Statutory Scheme Violates The ICCPR'S and the CAT'S Prohibitions Against Cruel, Inhuman or Degrading Punishment.**

The ICCPR prohibits subjecting any person to torture or to cruel, inhuman, or degrading treatment or punishment. Art. 7. Similarly, the CAT requires that states take action to prevent torture, which includes any act by which severe mental or physical pain is intentionally inflicted on a person for the purpose of punishing him for an act committed. *See* Art. 1-2. As administered, Ohio's death penalty inflicts unnecessary pain and suffering. Thus, there is a violation of international law and the Supremacy Clause.

**e. Ohio's Obligations Under the ICCPR, the ICERD, and the CAT Are Not Limited By The Reservations and Conditions Placed In These Conventions By the Senate.**

While conditions, reservations, and understandings accompanied the United States' ratification of the ICCPR, the ICERD, and the CAT, those conditions, reservations, and understandings cannot stand for two reasons. Article II, § 2 of the United States Constitution provides for the advice and consent of two-thirds of the Senate when a treaty is adopted. However, the Constitution makes no provision for the Senate to modify, condition, or make reservations to treaties. The Senate is not given the power to determine what aspects of a treaty the United States will and will not follow. Their role is to simply advise and consent.

Thus, the Senate's inclusion of conditions and reservations in treaties goes beyond that role of advice and consent. The Senate picks and chooses which items of a treaty will bind the United States and which will not. This is the equivalent of the line item veto, which is unconstitutional. *Clinton v. City of New York*, 524 U.S. 417, 438 (1998). The Supreme Court specifically spoke to the enumeration of the president's powers in the Constitution in finding that the president did not possess the power to issue line item vetoes. *Id.* If it is not listed, then the President lacks the power to do it. *See id.* Similarly, the Constitution does not give the power to the Senate to make conditions and reservations, picking and choosing what aspects of a treaty will become law. Thus the Senate lacks the power to do just that. Therefore, any conditions or reservations made by the Senate are unconstitutional. *See id.*

The Vienna Convention on the Law of Treaties further restricts the Senate's imposition of reservations. It allows reservations unless: they are prohibited by the treaty, the treaty provides that only specified reservations, not including the reservation in question, may be made, or the reservation is incompatible with the object and purpose of the treaty. Art. 19(a)-(c). The ICCPR specifically precludes derogation of Articles 6-8, 11, 15-16, and 18. Under the Vienna Convention, the United States' reservations to these articles are invalid under the language of the

treaty. *See id.* Further, the ICCPR's purpose is to protect the right to life and any reservation inconsistent with that purpose violates the Vienna Convention. Thus, United States reservations cannot stand under the Vienna Convention as well.

**f. Ohio's Obligations Under The ICCPR Are Not Limited By The Senate's Declaration That It Is Not Self-Executing.**

The Senate indicated that the ICCPR is not self-executing. However, the question of whether a treaty is self-executing is left to the judiciary. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370 (7th Cir. 1985) (Restatement (Second) of Foreign Relations Law of the United States, Sec. 154(1) (1965)). It is the function of the courts to say what the law is. *See Marbury v. Madison*, 5 U.S. 137 (1803).

Further, requiring the passage of legislation to implement a treaty necessarily implicates the participation of the House of Representatives. By requiring legislation to implement a treaty, the House can effectively veto a treaty by refusing to pass the necessary legislation. However, Article 2, § 2 excludes the House of Representatives from the treaty process. Therefore, declaring a treaty to be not self-executing gives power to the House of Representatives not contemplated by the United States Constitution. Thus, any declaration that a treaty is not self-executing is unconstitutional. *See Clinton*, 524 U.S. at 438.

## *Ohio's Obligations Under Customary International Law*

International law is not merely discerned in treaties, conventions and covenants. International law “may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law.” *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820). Regardless of the source “international law is a part of our law[.]” *The Paquete Habana*, 75 U.S. at 700.

The judiciary and commentators recognize the Universal Declaration of Human Rights (DHR) as binding international law. The DHR “no longer fits into the dichotomy of ‘binding treaty’ against ‘non-binding pronouncement,’ but is rather an authoritative statement of the international community.” *Filartiga*, 630 F.2d at 883 (internal citations omitted).

The DHR guarantees equal protection and due process (Art. 1, 2, 7, 11), recognizes the right to life (Art. 3), prohibits the use of torture or cruel, inhuman or degrading punishment (Art. 5) and is largely reminiscent of the ICCPR. Each of the guarantees found in the DHR are violated by Ohio’s statutory scheme. Thus, Ohio’s statutory scheme violates customary international law as codified in the DHR and cannot stand.

However, the DHR is not alone in its codification of customary international law. *Smith* directs courts to look to “the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law” in ascertaining international law. 18 U.S. (5 Wheat.) at 160-61. Ohio should be cognizant of the fact that its statutory scheme violates numerous declarations and conventions drafted and adopted by the United Nations and the OAS, which may, because of the sheer number of countries that subscribe to them, codify customary international law. *See id.*

Ohio’s statutory scheme is in violation of customary international law.

## **Conclusion**

Ohio's death penalty scheme fails to ensure that arbitrary and discriminatory imposition of the death penalty will not occur. The procedures actually promote the imposition of the death penalty and, thus, are constitutionally intolerable. Ohio Revised Code §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution and Article I, §§ 2, 9, 10, and 16 of the Ohio Constitution and international law. Shawn E. Ford’ death sentence must be vacated.

## CONCLUSION

From the inception of voir dire, through closing arguments of the penalty phase, this case was fraught with errors that undermine the confidence in this verdict and death sentence. Recognizing that “death is different,” painstaking efforts should be taken to ensure that the outcome here was based upon procedures that comport with the heightened due process requirements expected in a death penalty case. That did not occur.

Voir dire resulted in a jury panel that was predisposed to convict and impose the death penalty. The trial court failed to remove those jurors who were automatic death jurors. The predisposition to convict was exacerbating by the trial court leading jurors to believe that they would be unanimously finding the aggravated circumstances did not outweigh the mitigating factors before moving on to a life sentence. Repeatedly in voir dire the prosecutor misstated the law and diminished mitigation and when defense counsel attempted to voir dire jurors regarding mitigation, they were shut down.

The trial proceeded with the State utilizing improperly compelled statements from Shawn Ford and with the prosecutor improperly impeaching their own witness. In the trial and penalty phases the prosecutor was permitted to use

gruesome photographs which were unduly prejudicial. Though the prosecutor pursued the case with the theory that Shawn Ford was the principal offender, the “actual killer” the jury was permitted to consider both the principal offender and prior calculation and design specifications. The impropriety of this can be seen in the verdicts which found both, and the jurors subsequent consideration of both in the penalty phase. Even the trial court relied upon both in sentencing Ford to death.

Ford, who was barely 18 when these crimes were committed, displayed diminished capacity from a young age. Despite this, trial counsel waited until mid-way through the mitigation hearing to raise an *Atkins* issue. Though the trial court held a hearing on this, the timing of when it was raised seriously impacted the development and presentation of evidence in support of the *Atkins* claim.

The scales were tipped in favor of death through every aspect of this case. This trial was not fair, this result and this death sentence were not reliably obtained. It is for these reasons that the conviction and sentence must be vacated.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that Appellant's Merit Brief-Volume II 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

**IN THE SUPREME COURT OF OHIO**

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

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**APPENDIX TO APPELLANT’S MERIT BRIEF**

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**IN THE SUPREME COURT OF OHIO**

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

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

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**SHAWN E. FORD'S NOTICE OF APPEAL**

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Notice of Appeal of Appellant Shawn E. Ford

Appellant Shawn E Ford, by and through counsel, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Summit County Court of Common Pleas, entered in Case No. CR 2013 04 1008 on June 30, 2015. A copy of the judgment entry and trial court opinion is attached.

This case involves the conviction of aggravated murder with capital specifications and the imposition of a sentence of death, and well as convictions for other felonies and sentences imposed.

Pursuant to S.Ct. Prac. Rule 5.01(A)(4), this is an appeal of right.

Respectfully submitted,

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*Counsel for Appellant, Shawn E. Ford*

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Notice of Appeal was forwarded by regular U.S. Mail to Brian LoPrinzi, Assistant Prosecuting Attorney, 53 University Ave., Akron, Ohio 44308, this 10<sup>th</sup>. day of August, 2015.

/s/ Kathleen McGarry  
Kathleen McGarry  
Counsel for Shawn E. Ford

2015 JUN 30 PM 1:52

SUMMIT COUNTY  
CLERK OF COURTS

**IN THE COURT OF COMMON PLEAS  
COUNTY OF SUMMIT**

**THE STATE OF OHIO**

**vs.**

**SHAWN E. FORD, JR.**

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**CASE NO. 2013 04 1008A**

**SENTENCING OPINION**

**Re: Count Four**

**(Pursuant to R.C. 2929.03(F))**

**I. INTRODUCTION**

On October 22, 2014 a jury returned verdicts of guilty on 11 counts of an 11count indictment filed against the defendant Shawn E. Ford, Jr.<sup>1</sup> Guilty verdicts were returned on five counts of aggravated murder, two counts of aggravated robbery, one count of aggravated burglary, one count of grand theft, one count of petty theft, and one count of felonious assault. All but the felonious assault charge arose from the events of April 2, 2013 when Jeffrey E. Schobert and Margaret J. Schobert were murdered in their home by the defendant.

Three specifications of aggravating circumstances asserted under Ohio Rev. Code sections 2929.04(A)(5) and 2929.04(A)(7) were attached to each of the five aggravated murder counts. Specification One to each of the five aggravated murder counts alleged that Defendant Ford engaged in a course of conduct involving the purposeful killing or attempt to kill two or more persons. Specification Two to each of the five murder counts alleged in the alternative that the aggravated murder was committed while Defendant Ford was committing, attempting to commit or fleeing immediately after committing or attempting to commit Aggravated Robbery and that Ford was the principal offender in the commission of the aggravated murder or, if not

<sup>1</sup> Two additional counts asserted charges against two co-defendants. A minor, J.V., was named in the same eleven counts as Defendant Ford as a co-defendant.

the principal offender, he committed the aggravated murder with prior calculation and design. Specification Three to each of the five murder counts alleged in the alternative that the aggravated murder was committed while Defendant Ford was committing, attempting to commit or fleeing immediately after committing or attempting to commit Aggravated Burglary and that Ford was the principal offender in the commission of the aggravated murder or, if not the principal offender, he committed the aggravated murder with prior calculation and design.

The murder charges and specifications in Counts One and Two related to the killing of Jeffrey E. Schobert on or about April 2, 2013. The murder charges and specifications in Counts Four and Five related to the killing of Margaret J. Schobert on or about the same date. And the murder charge and specifications in Count Three related to the killings of either Jeffrey E. Schobert or Margaret J. Schobert or both of them.

Defendant Ford was found guilty of the Specification One multiple killing specifications attached to each of the five aggravated murder counts.

Defendant Ford was found guilty of Specifications Two and Three to Counts One and Two with a determination that he was the principal offender in the commission of the aggravated murder of Jeffrey E. Schobert while committing, fleeing immediately after committing or attempting to commit aggravated robbery.

Defendant Ford was likewise found guilty of Specifications Two and Three to Count Three with the determination that he was the principal offender in the commission of the aggravated murder of Jeffrey E. Schobert and/or Margaret J. Schobert while committing, fleeing immediately after committing or attempting to commit aggravated burglary.

Defendant Ford was found guilty of Specifications Two and Three to Counts Four and Five, with the determination that he committed the aggravated murder of Margaret J. Schobert with

prior calculation and design while committing, fleeing immediately after committing or attempting to commit aggravated robbery.

Defendant filed a motion to merge certain of the offenses for sentencing prior to the mitigation trial. The court orally ruled on the motion at trial and later memorialized the rulings in a journal entry filed on June 4, 2015. The court concluded that the three murder charges pertaining to Jeffrey Schobert should be merged and the charges pertaining to the murder of Margaret Schobert should be merged separately. The state elected to have the defendant sentenced on Count Two, pertaining to Jeffrey E. Schobert and Count Four pertaining to Margaret J. Schobert. As a result, Count One and Three were merged with Count Two; and Counts Five and Three were merged with Count Four.

The court also merged the aggravated robbery charge in Count Six with the murder charge in Count Two; and the aggravated robbery charge in Count Seven was merged with the murder charge in Count Four. The aggravated burglary charge in Count Eight was merged with both Counts Two and Four. The grand theft charge in Count Nine and the petty theft charge in Count Ten were also merged with both Count Two and Count Four. The felonious assault charge in Count Eleven, pertaining to the assault on Chelsea Schobert, was not merged.

The mitigation phase trial commenced on October 27, 2014. The jury returned a verdict of life imprisonment without the possibility of parole on Count Two, involving the murder of Jeffrey E. Schobert. The jury returned a verdict recommending a death sentence on Count Four, pertaining to the murder of Margaret J. Schobert.

Section 2929.03 of the Ohio Revised Code specifies the law to be followed in imposing a sentence for aggravated murder. When, as was done on Count Four here, a jury finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors and mitigating evidence, the jury is required to

recommend to the court that the sentence of death be imposed on the offender. R.C. 2929.03(D)(2).

Upon receiving a jury's recommendation that the sentence of death be imposed, the court is required to determine independently whether the state has proven, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors and mitigating evidence. If the court finds they do, the court is required to accept the jury's recommendation and impose a sentence of death. If the court determines that the state has not proven, by proof beyond a reasonable doubt, that the aggravating circumstances of which the offender was found guilty of committing outweigh the mitigating factors evidence, the court is required to impose a sentence of one of three life sentence options: life imprisonment without the possibility of parole; life imprisonment with parole eligibility after serving twenty-five full years of imprisonment; or life imprisonment with parole eligibility after serving thirty full years of imprisonment. R.C. 2929.03(D)(3).

This Sentencing Opinion addresses only the sentence to be imposed with respect to Count Four; the sentences to be imposed with respect to Count Two and Count Eleven will be set forth in a separate judgment entry.

## **II. ANALYSIS**

### **A. Summary of Information Considered and Not Considered**

The information set forth below reflects the independent deliberations conducted by the court. Those deliberations have included a consideration of the relevant evidence pertaining to the aggravating circumstances and mitigating factors produced during the mitigation hearing and during the first phase of the trial, to the extent relevant to the current issue. The evidence that has been considered has included both testimonial and documentary evidence. Defendant Ford chose to allocute. The court gave full consideration to defendant's statement in allocution, and

the court did not make its decision on the sentence to be imposed until Defendant Ford made his statement.

Defendant Ford wrote two letters to the court after the trial. Those letters have been marked as court's exhibit C-7 and C-8, but they have not been considered in determining the sentence for Count Four. Likewise, the court has not considered the presentence investigation conducted in this matter after the trial; the reasons for not doing so have been separately addressed on the record. The court has not considered the felonious assault on Chelsea Schobert. The court received no victim impact evidence before announcing its sentence on Count Four; victim impact evidence received later in the June 29, 2015 sentencing hearing has not been considered in determining the sentence to be imposed on Count Four. The court is not permitted to consider and has not considered the aggravated murder of Margaret J. Schobert itself or any offenses merged into that offense. The court has likewise not considered the aggravated murder of Jeffrey E. Schobert, except to the extent necessary to consider Specification One to Count Four. The court has not considered Defendant Ford's criminal record, or any aggravating circumstances of which the defendant was found guilty that have been merged.

The court has considered the mitigating factors relied upon by the defense under R.C. 2929.04(B)(3), (4) and (7) and all other evidence in mitigation against a sentence of death in the trial record, including the "history, character and background" of Defendant Ford, as required by R.C. 2929.04(B). The court did not consider any mitigating factors under R.C. 2929.04 not raised by the defense (e.g., R.C. 2929.04(B)(1), (2), (5), or (6)) and has given no weight to the fact that the defense presented no evidence relating to those statutory factors.

Pursuant to R.C. 2929.03 and 2929.04, the court renders the following opinion.

**B. Aggravating Circumstances**

In Count Four, Defendant Shawn E. Ford, Jr., was found guilty beyond a reasonable doubt of the aggravated murder of Margaret J. Schobert with prior calculation and design. Defendant Ford was also found guilty beyond a reasonable doubt of the following specifications attached to Count Four:

**Specification One – Defendant Shawn E. Ford, Jr., committed Aggravated Murder as a part of a course of conduct involving the purposeful killing or attempt to kill two or more persons.**

Defendant was acquainted with Margaret J. Schobert and her husband Jeffrey E. Schobert because of his relationship with their daughter Chelsea Schobert. Chelsea Schobert was in an Akron area hospital on April 1, 2013. Margaret J. Schobert remained at the hospital overnight with her daughter. During the early morning hours of April 2, 2013 Defendant Ford and a minor accomplice, J.V., entered the Schobert residence on Rex Lake Drive in New Franklin, Summit County, Ohio by stealth. Defendant Ford and the accomplice murdered Jeffrey E. Schobert using a sledgehammer while he was in his bed. Thereafter, defendant Ford utilized the cell phone of Jeffrey Schobert to communicate with Margaret Schobert, urging her to return home, pretending to be Jeffrey Schobert. Certain of the text messages caused Margaret Schobert to doubt that Jeffrey Schobert was the person sending the messages. In one responsive message, she inquired whether the sender was actually Defendant Ford. Evidence indicated that several hours elapsed between the murder of Jeffrey Schobert and Margaret Schobert's return home. Defendant and his accomplice waited in the home in order to commit the murder of Ms. Schobert. Margaret J. Schobert was murdered with a sledgehammer.

DNA evidence connected Defendant Ford to the scene of the murders. In addition, Defendant Ford made statements to the police admitting his role in the murders. Other physical evidence, including some that had DNA of the victims and/or Defendant, was found in places

where Defendant Ford had indicated to an inmate in the Portage County jail that they could be found. One witness testified that Defendant Ford had said he was going to go to the Schobert home to kill them.

**Specification Two – Defendant Shawn E. Ford, Jr., committed Aggravated Murder while committing, attempting to commit or fleeing immediately after committing or attempting to commit Aggravated Robbery; and defendant committed the Aggravated Murder with prior calculation and design.**

Margaret J. Schobert was induced to return to her home, ostensibly by her husband, Jeffrey Schobert, through cell phone text messages sent by Defendant Ford using Mr. Schobert's cell phone. Certain of the text messages caused Margaret Schobert to doubt that Jeffrey Schobert was the person sending the messages. In one responsive message, she inquired whether the sender was actually Defendant Ford. Evidence indicated that several hours elapsed between the murder of Jeffrey Schobert and Margaret Schobert's return home. Defendant and his accomplice waited in the home in order to commit the murder of Ms. Schobert. Margaret J. Schobert was murdered with a sledgehammer.

DNA evidence connected Defendant Ford to the scene of the murders. In addition, Defendant Ford made statements to the police admitting his role in the murders, including his wait for Margaret Schobert to return home. Other physical evidence, including some that had DNA of the victims and/or Defendant, was found in places where Defendant Ford had told a Portage County jail inmate they could be found. One witness testified that Defendant Ford had said he was going to go to the Schobert home to kill them.

Personal property, including a watch belonging to Mr. and/or Ms. Schobert was found at the location where Defendant Ford's accomplice was arrested; and a vehicle belonging to Mr. Schobert was found in the same neighborhood. Other property, including a ring belonging to Margaret Schobert, was found in a trash dumpster on South Street in Akron, around the corner from houses where Defendant Ford had been residing.

**Specification Three – Defendant Shawn E. Ford, Jr., committed aggravated murder while committing, attempting to commit or fleeing immediately after committing or attempting to commit Aggravated Burglary; and defendant committed the Aggravated Murder with prior calculation and design.**

Evidence admitted at trial indicated defendant and his accomplice entered the Schobert residence by stealth in the early morning hours of April 2, 2013 by means of a bedroom window on the ground floor at the back of the house that was not visible from the street.

Margaret J. Schobert was induced to return to her home, ostensibly by her husband, Jeffrey Schobert, through cell phone text messages sent by Defendant Ford using Mr. Schobert's cell phone. Certain of the text messages caused Margaret Schobert to doubt that Jeffrey Schobert was the person sending the messages. In one responsive message, she inquired whether the sender was actually Defendant Ford. Evidence indicated that several hours elapsed between the murder of Jeffrey Schobert and Margaret Schobert's return home. Defendant and his accomplice waited in the home in order to commit the murder of Ms. Schobert. Margaret J. Schobert was murdered with a sledgehammer.

DNA evidence connected Defendant Ford to the scene of the murders. In addition, Defendant Ford made statements to the police admitting his role in the murders, including his wait for Margaret Schobert to return home. Other physical evidence, including some that had DNA of the victims and/or Defendant, was found in places where Defendant Ford had told a Portage County jail inmate they could be found. Again, one witness testified that Defendant Ford had said he was going to go to the Schobert home to kill them.

### **C. Mitigating Factors**

The court must determine whether the foregoing aggravating circumstances outweigh evidence that mitigates against the imposition of the sentence of death beyond a reasonable doubt. Revised Code 2929.04(B) sets forth a nonexclusive list of mitigating factors and other information that the court must consider. Although the court lists below each of the statutory

mitigating factors, certain of them are inapplicable and were not relied upon by the defendant. The listing of the factors not relied upon does not imply that the court has given any consideration to the absence of evidence to support them; they are simply listed to demonstrate the completeness of the court's analysis.

**1. The Nature and Circumstances of the Offense**

A review of the nature and circumstances of the offense involved in Count Four – the murder of Margaret J. Schobert – leads the court to find that no mitigating factors can be found therein. The court has not considered the absence of mitigating factors in the nature and circumstances of the offense in its weighing process.

**2. The History, Character and Background of Shawn E. Ford, Jr.**

Ohio Revised Code section 2929.04(B) requires the court to consider and weigh the “history, character and background” of the offender against the aggravating circumstances that have been proven.

According to testimony at trial, defendant was born to Kelly Ford and Shawn Eric Ford, Sr., a married couple, on September 30, 1994 in Minneapolis, MN. He has an older sister, Patricia Roberts, who is about two years older than he. His parents moved the family to Akron not long after he was born. He had a younger sister, Shantaya Ford, born on October 3, 1997, who died from crib death in December 1997. Defendant Ford appears to always have had a loving, close relationship with his sister Patricia. He also has enjoyed a close and loving relationship with his paternal grandparents, though he rarely saw them after he was about 6 or 7 years old. Defendant Ford's mother, Kelly, testified that she loved her son. She testified that she has always worked and sacrificed to provide for her children. She asked the jury to spare her son's life.

Several witnesses testified that defendant Ford felt unloved. Whether relating to his biological father, his stepfather, his mother or other family members, the consistent testimony was that he felt other children received preferential treatment and more affection.

The testimony of several witnesses established that the relationship between Kelly Ford and Shawn Ford, Sr. was tumultuous. Defendant observed his parents in many verbal and physical fights. On one occasion, when he was about 3 years old, he climbed on his father's back while the father was fighting the mother, urging his father to, "[L]eave my mommy alone." On one occasion when Defendant Ford was present in the home, Kelly Ford "accidentally" stabbed Shawn Ford, Sr. with a knife.

Sometime when Defendant Ford was between the ages of three and four, he and his sister were sent to Chicago to live with their paternal grandparents, Eddie Ford and Janice Ford. This was arranged by Kelly Ford because she knew her marriage with Shawn Ford, Sr. was likely to end and she needed help raising her kids. The move to Chicago was not presented to the children as a permanent move; according to Patricia Roberts, she and her brother both knew they would be back with their mother someday. As a result, she testified that neither she nor her brother felt abandoned. During the time in Chicago, Kelly Ford would occasionally speak to her children by phone.

Eddie Ford and Janice Ford both testified that Defendant Ford fit in well when he lived with them. He was in Chicago about two and a half years. They both testified about how much they loved their grandson. Janice Ford testified that Shawn Ford came to Chicago before his sister. When she picked him up, he lacked many of the basic things one would have expected a toddler to have. She testified that Kelly Ford visited him in Chicago one or two times while he was there. She indicated Kelly Ford provided "very little" parenting during the two and a half years her children lived with their grandparents. Defendant Ford and his grandmother had a very

close and loving relationship. Both of his grandparents taught him right from wrong and showed him what a hard working household looked like.

When Kelly Ford was ready, she arranged for her children to be returned from Chicago. She had worked two jobs until then and then let one of them go so that she would be available to the children. By that time Kelly Ford was in a relationship with Tracy Wooden. Wooden had two sons who were a couple of years younger than Defendant Ford. Tracy Wooden said Ford hardly spoke at all or to him in particular for six or seven months after he returned from Chicago. But Wooden testified that the family had new things in the house when Defendant Ford was young; and he stated that Ford was properly bathed and clothed. Tracy Wooden testified that he treated Defendant Ford like a son and Ford treated him like a father. Wooden stated Ford was treated just like he would treat his own sons. Patricia Roberts testified that her brother actually loved Wooden. ~~When Defendant Ford was 12 or 13 years old, Tracy Wooden was sent to prison~~ after being convicted of a drug offense. Although Wooden was a drug dealer in the neighborhood, Kelly Ford stated that Wooden never sold drugs from within their home. Several witnesses testified that Defendant Ford's behavior became wild when Tracy Wooden went to prison.

There was conflicting testimony about physical altercations between Defendant Ford and Tracy Wooden. Patricia Roberts remembered that her brother and Wooden had a lot of disagreements and used to have fights. Kelly Ford testified that her son was never severely beaten during his upbringing. On March 21, 2013, however, Defendant Ford and Wooden got into a fight in which each attempted to attack the other with a weapon (a shovel and a baseball bat). Wooden also bit Defendant Ford in that altercation. The police were called and Defendant Ford was treated and released at a hospital emergency room. The March 2013 incident apparently arose because Wooden was upset that Ford was unwilling to work in order to be able

to reimburse him for bond money he had posted to get Defendant Ford out of jail while dealing with an unrelated criminal case in which Defendant Ford had been charged.

Defendant Ford's family struggled financially during his developmental years. At one point, he was unable to participate in a basketball program at Joy Park in Akron because his mother and stepfather did not give him the \$55 needed for a registration fee. Several witnesses testified that the basic needs of the family were met but that there was little extra money to provide for more. At times, the family was homeless.

After living in Chicago, Defendant Ford hardly ever saw his father, Shawn Eric Ford, Sr. According to witnesses, they may have seen each other fewer than ten times in his developmental years. Kelly Ford stated that her son would ask to see his father. And she indicated there were times when Shawn Ford, Sr. would promise to pick up the kids and then fail to appear. Her perception was that her son felt abandoned by his father. Shawn Ford, Sr. acknowledged that he didn't see his children very much. But he stated that they didn't see him by their own choice. He indicated he would have been available if they had reached out to him. Ford, Sr. testified that he didn't even see his son after the return from Chicago until he was 11 or 12 years old. He stated if his son had ever asked him for money he would have given it to him. He recalled buying a few things for his son. Shawn Ford, Sr. testified that his son was too young to be affected by the crib death of his younger sister. Family members testified that Defendant Ford felt abandoned by his biological father.

Defendant Ford struggled in school. From the time he was 5 years old onward, he was diagnosed with a specific learning disability related to his speech. People found it hard to understand him, and he was placed in special education classes for a portion of his school days. Special services were provided for a number of years until they were no longer producing results. Throughout Defendant Ford's school career, he went to school on an IEP. IQ testing conducted

during defendant Ford's school years demonstrated that he was classified as being of borderline intelligence. The court has extensively addressed the IQ testing in its order overruling defendant's motion to dismiss the capital specifications on the ground that defendant is intellectually disabled. For purposes of the current analysis, the court notes that Mr. Ford has never been diagnosed as being intellectually disabled, though he quite apparently struggled in school and had an IQ that was in the low average to borderline range.

Defendant Ford also was bullied in school. Consistent testimony indicated that he had a high-pitched voice growing up, and was frequently teased and/or bullied as a result. According to the witnesses, he responded to that by fighting.

Defendant Ford began getting in trouble in his early teens. His mother found it difficult to deal with because he was rambunctious. As a result of various juvenile offenses, Defendant Ford was eventually committed to the Community Correctional Facility in Stark County, and, ultimately, to the Ohio Department of Youth Services in Columbus, Ohio. Partly as a result of an inability to drive, and partly as a result of Defendant Ford's own instructions that she should not visit, Kelly Ford never visited with him in Columbus, and only saw him on three occasions while he was in Canton. It was determined that defendant Ford abused marijuana and alcohol during his teen years.

In regard to the history, background and character of Defendant Ford, the court acknowledges that he had a difficult upbringing. He was essentially abandoned by his father after his mother moved him to Chicago when he was 3 or 4 years old. And although he may have felt abandonment from the Chicago move, family members testified that he fit in well and did well while there. He was exposed to violence in his household when a toddler and he was the subject of violence in his teen years. His stepfather dealt drugs and, apparently, got into physical altercations with the defendant. The family frequently faced financial hardship.

Because of intellectual limitations, a speech problem and a learning disability, Defendant Ford faced difficulties in school. He was teased or bullied because of a high-pitched voice.

Countering these negative issues were positive factors. Defendant Ford had loving relations with his sister and his grandparents. He had a stepfather who was in his life, albeit imperfectly. His basic needs were provided for. His mother, father and stepfather testified that they loved him. Moreover, many people grow up in circumstances similar to Defendant Ford's and do not resort to criminal conduct. Indeed, his own sister and two step brothers, who grew up in almost the exact same environment are examples of how people from challenging backgrounds can live law abiding lives. Balancing the negative and positive aspects of the defendant's upbringing, the court gives slight mitigating weight to the defendant's history, background and character.

The court now proceeds to evaluate the evidence concerning the statutory mitigating factors set forth in R.C. 2929.04(B)(1)-(7).

3. **2929.04(B)(1) – Whether the victim induced the offense.** This factor is inapplicable, and the absence of evidence on this issue has not been considered by the court.

4. **2929.04(B)(2) – Duress or provocation of the defendant.** This factor also is inapplicable, and the absence of evidence on this issue has not been considered by the court.

5. **2929.03(B)(3) – Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law.** Dr. Joy Stankowski testified on behalf of the defendant, offering the opinion that he suffered from antisocial personality disorder. Nothing in Dr. Stankowski's testimony supports the conclusion that defendant Ford suffered from a mental disease or defect.

Moreover, the rebuttal testimony of Dr. Arcangela Wood confirmed her earlier conclusion that Mr. Ford did not have such conditions. Defendant Ford's mother, stepfather and grandparents all indicated he was taught right from wrong. Thus, there is no evidence of record to support giving any weight to this mitigating factor.

6. **2929.04(B)(4) – Youth of the offender.** The murders of Jeffrey E. Schobert and Margaret J. Schobert occurred when Defendant Ford was 18½ years of age. He is now 20 years old. Dr. Stankowski testified that a person who has only recently turned 18 has not necessarily reached full intellectual and emotional maturity. In addition, Dr. Stankowski testified that Defendant Ford never had time or chance to move away from the effects of his difficult childhood and to become his own person and live his own life. She considered youth to be a very important consideration in the case. The court gives weight to this mitigating factor.

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7. ~~2929.04(B)(5) – The offender's lack of significant prior criminal or delinquency history.~~ This factor is inapplicable, and the absence of evidence on this issue has not been considered by the court.

8. **2929.04(B)(6) – The defendant was not the principal offender.** The defense presented no argument or mitigating evidence on this factor and did not request the jury to be instructed thereon. The evidence at trial, as noted above, included a summary of statements attributed to the defendant that he murdered Margaret Schobert with a sledgehammer. Although the jury chose to find on Specifications Two and Three to Count Four that defendant acted with prior calculation and design, implying that he was not the principal offender, it also found the defendant guilty on Specification One to that count, finding that he was a part of a course of conduct involving the purposeful killing of two or more persons *by the offender*. The court finds this factor to be inapplicable, and the absence of evidence on this issue has not been considered by the court.

9. **2929.04(B)(7) - Any other relevant factors.** In addition to the history background and character of the defendant, which have been set forth in detail above and will not be repeated here, Defendant Ford also offered other relevant factors. Specifically, Dr. Joy Stankowski, defendant's mitigation expert, identified several factors that she opined were mitigating.

a. **Antisocial personality disorder.** Dr. Stankowski diagnosed Defendant Ford with this disorder. She testified that a characteristic of the disorder is an inability to conform to societal norms for acceptable behavior. She opined it to be mitigating because a disorder is something shaped partly by a person's brain (which is beyond his control) and also by things that happened during development – such as parental abandonment (also beyond a person's control). She testified that this disorder suggests Defendant Ford was born with impaired ability to control his impulses. That impulsivity could have been exacerbated by Defendant Ford's early drug or alcohol use, which could have further delayed his development. These factors, when coupled with the expected impulsivity of a teenager, would serve to make Defendant Ford less able to control his impulses or behavior compared to someone who does not have the disorder. Dr. Stankowski testified that separation from parents and grandparents could also have contributed to the development of the disorder. She also testified that defendant Ford's lower IQ tended to make it more difficult for him to think things through, to react more impulsively, and to make worse decisions. Having considered the evidence, the court gives some weight to this factor.

b. **Alcohol use disorder.** Dr. Stankowski testified defendant Ford's history of alcohol abuse support the conclusion that he has alcohol use disorder. She indicated this would contribute to reckless or dangerous behavior. She also opined that this disorder would have a negative effect on a developing brain. Apart from the impact of alcohol use on Defendant

Ford's antisocial personality disorder, the court finds this factor to carry no weight. There was no evidence that Defendant Ford was under the influence of alcohol at the time of the murder of Margaret Schobert.

c. **Low IQ.** Dr. Stankowski testified Defendant Ford's low IQ would have caused difficulty in his ability to think things through and make reasoned decisions. The court has previously addressed some of the implications of defendant's low IQ; the court gives some weight to this factor.

d. **Family History and Environment.** Dr. Stankowski testified that Defendant Ford was shaped by having been: (i) abandoned, neglected and separated from his parents and caretakers; (ii) bullied at school because of a speech issue; (iii) beaten by his stepfather; (iv) the victim of poverty; and (v) having suffered the death of an infant sibling. She testified that all these things shaped who Defendant Ford is today and it should be considered mitigating. The court has already dealt with these factors above and has accorded them slight weight.

Defendant Ford raised various other issues purportedly in mitigation at trial. Except to the extent noted above, the court finds none of these other factors applicable or worthy of weight. The court has specifically not considered in this weighing process the defendant's criminal and juvenile record. Approximately three and one-half months before the Schobert murders, defendant pled guilty to having robbed a barber shop. In addition, on March 23, 2013, defendant committed felonious assault against Chelsea Schobert, his then girlfriend. The court has not considered these convictions or the facts relative thereto in any fashion, because it is not permitted to do so. The court mentions these incidents only because they are found as a part of the court record. But the court wishes to restate that these were not considered.

The court has also considered the statements of defense counsel at the sentencing hearing. In addition, the court has considered the statements of Defendant Ford at the hearing. The court has neither received nor considered any victim impact evidence in arriving at this decision. The court has not considered the aggravated murder of Margaret J. Schobert itself as an aggravating circumstance.

**D. Weighing of Aggravating Circumstances against Mitigating Factors**

Revised Code section 2929.03(F) requires the court to conduct a weighing of the evidence and to state the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors, if it reaches that conclusion. In the alternative, if the court finds that the aggravating circumstances do not outweigh the mitigating factors, it must state the reasons for reaching that conclusion. The court's analysis resulting from that weighing process is set forth below.

Defendant Ford purposely caused the death of Margaret J Schobert as a part of a course of conduct involving the purposeful killing of two or more persons by the defendant. In this case, Shawn Eric Ford, Jr., was the actual killer and, without provocation, purposely murdered Margaret J. Schobert and her husband Jeffrey E. Schobert. He did so after having confided in another person that he was going to go to the Schobert residence in order to kill them. Both people were killed when the defendant inflicted multiple sledgehammer blows to their heads. The defendant killed Margaret Schobert after inducing her to return home by pretending to be her husband. Several hours passed between the two deaths. The court must weigh the seriousness of a double homicide in which the second killing was committed with prior calculation and design.

The defendant also committed the Aggravated Murder of Margaret J. Schobert while committing or attempting to commit Aggravated Robbery and Aggravated Burglary. And he

committed the Aggravated Murder with prior calculation and design. The seriousness of these two additional aggravating circumstances must be weighed by the court.

Against these three specific aggravating circumstances, the court must weigh the mitigating factors and evidence. Mitigating factors are factors about Defendant Ford that weigh in favor of a decision that a life sentence rather than a death sentence is appropriate. Mitigating factors are factors that can be thought to potentially lessen the moral culpability of the defendant or diminish the appropriateness of a death sentence. The relevant mitigating factors to be considered by the court have been described in detail above.

The strongest mitigating factor presented by the defense is the age of Defendant Ford. At the time of the murders, he was 18½ years old, six months past the age when he would have been ineligible for a death sentence. The state legislature has established the youth of the defendant as a mitigating factor in recognition of the reality that young people are not as wise and do not have as much life experience as people who have lived longer. As a result, they may be less able to consider the long term consequences of their conduct. And they may not be very good at understanding how their conduct will affect others by putting themselves in the shoes of people they may hurt. Defendant has presented evidence from his mitigation expert indicating that his mitigating factor of youth was compounded by a psychological disorder that made him prone to impulsive, ill considered behavior. And she has offered the opinion that his difficult upbringing also likely made his disorder worse. She asserted that all these factors mitigate against a death sentence.

An example of impulsive, ill considered behavior would be to plan a burglary of a home (what witnesses said Defendant Ford referred to as a “lick”) without taking time to find out if someone would be home; and then, when a homeowner was unexpectedly encountered, to murder that person before making a hurried exit. And that situation could be compounded when

two people were present in the home and both were impulsively killed. But even that example describes behavior that could be committed by someone far older than 18. This example differs from the case at hand because of the steps taken to induce the second person to come home in order to commit a second murder.

The court has searched the evidence to see if there is any support for the argument that Defendant Ford's conduct and thinking were the product of his youth or his psychological disorder, a conclusion that would mitigate against a sentence of death. The defense has argued that the very thought you could go into your girlfriend's parents house and kill them and get away with it is evidence of immature thinking. But modern history is replete with examples of people far older than 18 who have done similar things. Rather than finding evidence of youthful, impulsive thinking by the defendant, the court finds that he demonstrated a carefully thought out, calculated plan to kill Margaret and Jeffrey Schobert. The jury found that the aggravating circumstances relating to the murder of Jeffrey Schobert did not outweigh the mitigating factors. But the added evidence relating to Defendant Ford's inducement of Margaret Schobert to return home by pretending to be her husband, and the evidence that he waited several hours to be able to commit the second murder has caused this court to come to the same conclusion the jury did and find that the aggravating circumstances relating to the murder of Margaret J. Schobert outweigh the mitigating factors by proof beyond a reasonable doubt. On the morning of April 2, 2013, Defendant Ford did not think or act in a youthful manner. While the youth and immaturity of the defendant do mitigate – to a degree – against the imposition of a death sentence, the court finds that the factor of youth even when compounded by a psychological disorder is substantially outweighed by the aggravating circumstances proven in connection with Count Four.

The court has considered all of the evidence presented during both the trial and mitigation phases as it related to the three specific aggravating circumstances involving the aggravated

murder of Margaret J Schobert. The court has also considered all of the mitigating evidence and mitigating factors presented at both phases of the trial. The court has weighed these aggravating circumstances against all of the mitigating factors and mitigating evidence. The court has weighed the mitigating factors both individually and collectively. In weighing the aggravating circumstances against the mitigating factors, the court finds that the state of Ohio has proven, by proof beyond a reasonable doubt, that the specific aggravating circumstances that Defendant Ford was found guilty of committing outweigh the mitigating factors in regard to the aggravated murder of Margaret J. Schobert as alleged in Count Four of the indictment.

### III. CONCLUSION

Given the court's conclusion that the aggravating circumstances Defendant Shawn Eric Ford, Jr. was found guilty of committing outweigh the mitigating factors and evidence, the court accepts the recommendation of the jury. The court hereby orders that the defendant, Shawn Eric Ford, Jr. be sentenced to death for the aggravated murder of Margaret J. Schobert as set forth in Count Four of the indictment. The court orders that the execution date of Shawn Eric Ford, Jr., shall be set for the 29<sup>th</sup> day of December, 2015 to be carried out by the State of Ohio. The execution date is subject to modification or further order by a court of competent jurisdiction. Shawn Eric Ford, Jr. shall be transferred into the custody of the Ohio Department of Rehabilitation and Correction and shall be housed in conformity with the sentence indicated in this order.

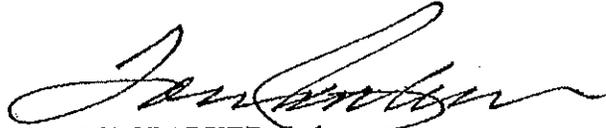
The court further orders that the Summit County Clerk of Courts shall forthwith deliver a copy of the entire case file to the Ohio Supreme Court pursuant to law. The court appoints as appellate counsel Kathleen McGarry and Lynn Ann Maro, each of whom is certified by the Ohio Supreme Court to handle capital-case appeals. The court further shall file a copy of this sentencing opinion with the Clerk of the Supreme Court of Ohio, as required by R.C. 2929.03(F)

along with the case disposition form required by the Supreme Court rule. Given the indigent status of the defendant, the court hereby waives the imposition of court costs.

IT IS SO ORDERED.

APPROVED:

June 29, 2015



TOM PARKER, Judge  
Court of Common Pleas  
Summit County, Ohio

/mjl

cc: Asst. Prosecutors Brad Gessner/Brian LoPrinzi  
Attorney Donald R. Hicks  
Attorney Jon Sinn  
Court Operations/Criminal Division

**IN THE COURT OF COMMON PLEAS  
COUNTY OF SUMMIT**

DECEMBER 17 2015 JUN 30 PM 1:51  
**THE STATE OF OHIO**

**Case No. CR 2013 04 1008 (A)**

**vs.**

**SHAWN E. FORD, JR.**

**JOURNAL ENTRY**

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On June 29, 2015, now comes BRIAN LOPRINZI, the Assistant Prosecuting Attorney on behalf of the State of Ohio, the Defendant, SHAWN E. FORD, JR, being in Court with counsel, DONALD R. HICKS and JON SINN, for sentencing. On October 22, 2014, the jury returned verdicts, in writing, finding said Defendant SHAWN E. FORD, JR.:

1. GUILTY beyond a reasonable doubt of the crime of AGGRAVATED MURDER, as contained in Count 1 of the indictment, (victim Jeffrey E. Schobert) Ohio Revised Code 2903.01(A), a special felony, which offense occurred on April 2, 2013;
  - a. AGGRAVATING CIRCUMSTANCES SPECIFICATION ONE TO COUNT ONE, (Criteria for Imposing Death or Imprisonment for a Capital Offense) Ohio Revised Code 2929.04(A)(5), Guilty beyond a reasonable doubt that the defendant engaged in a course of conduct involving the purposeful killing or attempt to kill two or more persons by him;
  - b. AGGRAVATING CIRCUMSTANCES SPECIFICATION TWO TO COUNT ONE, (Criteria for Imposing Death or Imprisonment for a Capital Offense), Ohio Revised Code 2929.04(A)(7), guilty beyond a reasonable doubt that the defendant committed the offense while he was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery and was the principal offender in the aggravated murder;
  - c. AGGRAVATING CIRCUMSTANCES SPECIFICATION THREE TO COUNT ONE, (Criteria for Imposing Death or Imprisonment for a Capital Offense), Ohio Revised Code 2929.04(A)(7), guilty beyond a reasonable doubt that the defendant committed the offense while he was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated burglary and was the principal offender in the offense.
2. GUILTY beyond a reasonable doubt of the crime of AGGRAVATED MURDER, as contained in Count 2 of the indictment, (victim Jeffrey E. Schobert), Ohio Revised Code 2903.01(B), a special felony, which offense occurred on April 2, 2013;
  - a. AGGRAVATING CIRCUMSTANCES SPECIFICATION ONE TO COUNT TWO, (Criteria for Imposing Death or Imprisonment for a Capital Offense), Ohio Revised Code 2929.04(A)(5), Guilty beyond a reasonable doubt that the defendant engaged in a course of conduct involving the purposeful killing or attempt to kill two or more persons by him;

- b. AGGRAVATING CIRCUMSTANCES SPECIFICATION TWO TO COUNT TWO, (Criteria for Imposing Death or Imprisonment for a Capital Offense), Ohio Revised Code 2929.04(A)(7), guilty beyond a reasonable doubt that the defendant committed the offense while he was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery and was the principal offender in the aggravated murder;
  - c. AGGRAVATING CIRCUMSTANCES SPECIFICATION THREE TO COUNT TWO, (Criteria for Imposing Death or Imprisonment for a Capital Offense), Ohio Revised Code 2929.04(A)(7), guilty beyond a reasonable doubt that the defendant committed the offense while he was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated burglary and was the principal offender in the offense.
3. GUILTY beyond a reasonable doubt of the crime of AGGRAVATED MURDER, as contained in Count 3 of the indictment, (victim Jeffrey E. Schobert) Ohio Revised Code 2903.01(B), a special felony, which offense occurred on April 2, 2013;
- a. AGGRAVATING CIRCUMSTANCES SPECIFICATION ONE TO COUNT THREE, (Criteria for Imposing Death or Imprisonment for a Capital Offense), Ohio Revised Code 2929.04(A)(5), Guilty beyond a reasonable doubt that the defendant engaged in a course of conduct involving the purposeful killing or attempt to kill two or more persons by him;
  - b. AGGRAVATING CIRCUMSTANCES SPECIFICATION TWO TO COUNT THREE, (Criteria for Imposing Death or Imprisonment for a Capital Offense), Ohio Revised Code 2929.04(A)(7), guilty beyond a reasonable doubt that the defendant committed the offense while he was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery and was the principal offender in the aggravated murder;
  - c. AGGRAVATING CIRCUMSTANCES SPECIFICATION THREE TO COUNT THREE, (Criteria for Imposing Death or Imprisonment for a Capital Offense), Ohio Revised Code 2929.04(A)(7), guilty beyond a reasonable doubt that the defendant committed the offense while he was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated burglary and was the principal offender in the offense.
4. GUILTY beyond a reasonable doubt of the crime of AGGRAVATED MURDER, as contained in Count 4 of the indictment, (victim Margaret J. Schobert), Ohio Revised Code 2903.01(A), a special felony, which offense occurred on April 2, 2013;
- a. AGGRAVATING CIRCUMSTANCES SPECIFICATION ONE TO COUNT FOUR, (Criteria for Imposing Death or Imprisonment for a Capital Offense), Ohio Revised Code 2929.04(A)(5), guilty beyond a reasonable doubt that the defendant engaged in a course of conduct involving the purposeful killing or attempt to kill two or more persons by him;
  - b. AGGRAVATING CIRCUMSTANCES SPECIFICATION TWO TO COUNT FOUR, (Criteria for Imposing Death or Imprisonment for a Capital Offense), Ohio Revised Code 2929.04(A)(7), guilty beyond a reasonable doubt that the defendant committed the offense while he was

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committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery and committed the aggravated murder with prior calculation and design;

- c. AGGRAVATING CIRCUMSTANCES SPECIFICATION THREE TO COUNT FOUR, (Criteria for Imposing Death or Imprisonment for a Capital Offense), Ohio Revised Code 2929.04(A)(7), guilty beyond a reasonable doubt that the defendant committed the offense while he was committing, attempting to commit or fleeing immediately after committing or attempting to commit aggravated burglary and committed the aggravated murder with prior calculation and design.

5. GUILTY beyond a reasonable doubt of the crime of AGGRAVATED MURDER, as contained in Count 5 of the indictment, (victim Margaret J. Schobert), Ohio Revised Code 2903.01(B), a special felony, which offense occurred on April 2, 2013;

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- a. AGGRAVATING CIRCUMSTANCES SPECIFICATION ONE TO COUNT FIVE, (Criteria for Imposing Death or Imprisonment for a Capital Offense), Ohio Revised Code 2929.04(A)(5), guilty beyond a reasonable doubt that the defendant engaged in a course of conduct involving the purposeful killing or attempt to kill two or more persons by him;
- b. AGGRAVATING CIRCUMSTANCES SPECIFICATION TWO TO COUNT FIVE, (Criteria for Imposing Death or Imprisonment for a Capital Offense), Ohio Revised Code 2929.04(A)(7), guilty beyond a reasonable doubt that the defendant committed the offense while he was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery and he was the principal offender in the aggravated murder.
- c. AGGRAVATING CIRCUMSTANCES SPECIFICATION THREE TO COUNT FIVE, (Criteria for Imposing Death or Imprisonment for a Capital Offense), Ohio Revised Code 2929.04(A)(7), guilty beyond a reasonable doubt that the defendant committed the offense while he was committing, attempting to commit or fleeing immediately after committing or attempting to commit aggravated burglary and that he was the principal offender in the aggravated murder.

6. GUILTY beyond a reasonable doubt of the crime of AGGRAVATED ROBBERY, as contained in Count 6 of the indictment, (victim Jeffrey E. Schobert) Ohio Revised Code 2911.01(A)(1)/(A)(3), a felony of the first (1st) degree, which offense occurred on April 2, 2013;

7. GUILTY beyond a reasonable doubt of the crime of AGGRAVATED ROBBERY, as contained in Count 7 of the indictment, (victim Margaret J. Schobert), Ohio Revised Code 2911.01(A)(1)/(A)(3), a felony of the first (1st) degree, which offense occurred on April 2, 2013;
8. GUILTY beyond a reasonable doubt of the crime of AGGRAVATED BURGLARY, as contained in Count 8 of the indictment, (victims Jeffrey E. and/or Margaret J. Schobert) Ohio Revised Code 2911.11(A)(1)/(A)(2), a felony of the first (1st) degree, which offense occurred on April 2, 2013;
9. GUILTY beyond a reasonable doubt of the crime of GRAND THEFT, as contained in Count 9 of the indictment, Ohio Revised Code 2913.02(A)(1), a felony of the fourth (4th) degree, which offense occurred on April 2, 2013 and finding beyond a reasonable doubt that the property involved was a motor vehicle;
10. GUILTY beyond a reasonable doubt of the crime of PETTY THEFT, as contained in Count 10 of the indictment, Ohio Revised Code 2913.02(A)(1), a misdemeanor of the first (1st) degree, which offense occurred on April 2, 2013;
11. GUILTY beyond a reasonable doubt FELONIOUS ASSAULT, as contained in Count 11 of the indictment, (victim Chelsea Schobert), Ohio Revised Code 2903.11(A)(1)/(A)(2), a felony of the second (2nd) degree, which offense occurred on March 23, 2013.

The Court accepted the verdicts and found the Defendant guilty of said crimes. Those findings are restated as if fully rewritten herein.

On the record and in open court prior to the commencement of the mitigation phase trial, the court ruled as to the defendant's motion seeking merger of particular counts of the indictment for sentencing and the State's oral motion for merger of certain counts. Those rulings were journalized in the June 4, 2015 Order, in which the court indicated that Counts 1, 3, 5, 7, 8 9 and 10 would be merged for purposes of sentencing and that sentencing would proceed on Count 2, 4 and 11. Those rulings are restated as if fully rewritten herein.

The case proceeded to the mitigation phase trial on October 27, 2014. The jury returned a verdict of life imprisonment without the possibility of parole on Count 2, involving the murder of Jeffrey E. Schobert. The jury returned a verdict recommending a death sentence on Count 4, involving the murder of Margaret J. Schobert.

On June 19 and 22, 2015, the court conducted an *Atkins* hearing as requested by the defense. On June 25, 2015 the Court issued its ruling reaffirming the earlier denial of defendant's oral motion to dismiss the capital specifications and confirmed the sentencing hearing set for June 29, 2015.

The Defendant's sentencing hearing was held pursuant to O.R.C. 2929.19. The Defendant was afforded all rights pursuant to Crim. R. 32. The Court has considered the record, oral statements, as well as the

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principles and purposes of sentencing under O.R.C. 2929.11, and the seriousness and recidivism factors under O.R.C. 2929.12.

The Court further finds the following pursuant to O.R.C. 2929.13(B): not to sentence the Defendant to the maximum period of incarceration would not adequately protect society from future crimes by the Defendant, and would demean the seriousness of the offense; and the Court further finds the Defendant is not amenable to community control and that prison is consistent with the purposes of O.R.C. 2929.11.

In the court's "Sentencing Opinion Re: Count Four, pursuant to ORC 2929.03(F)" separately filed in this case and incorporated herein by reference, the Court has carefully considered the need for incapacitating the Defendant and from deterring the Defendant from committing future crime, whether or not the Defendant can be rehabilitated and the making of restitution to the victim, the public, or both, under R.C. 2929.11 in deciding the appropriate sentence.

The court further finds, pursuant to Ohio Revised Code 2929.14(C)(4), that consecutive sentences are necessary to punish the offender; that consecutive sentences are not disproportionate to the seriousness of the offender's conduct; to the danger the offender poses to the public; and the court further finds the following:

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

Thereupon, the Court inquired of the said Defendant and his counsel if they had anything to say why judgment should not be pronounced against the Defendant; and having nothing but what they had already said, and showing no good and sufficient cause why judgment should not be pronounced:

IT IS THEREFORE ORDERED AND ADJUDGED BY THIS COURT that the Defendant, SHAWN E. FORD, JR., for punishment of the crime of AGGRAVATED MURDER, as to the death of Margaret J. Schobert, as contained in Count 4 of the Indictment, Ohio Revised Code Section 2903.01(B), a special felony, which offense occurred on April 2, 2013, the sentence is **DEATH**.

IT IS FURTHER ORDERED that the Defendant is to be conveyed by the Sheriff of Summit County, Ohio, within Five (5) Days to the LORAIN CORRECTIONAL INSTITUTION at Grafton, Ohio, for immediate transport to the SOUTHERN OHIO CORRECTIONAL FACILITY as Lucasville, Ohio, and that he be there safely kept until the 29<sup>th</sup> day of December, A.D., 2015, on which day, within an enclosure, inside the walls of said SOUTHERN OHIO CORRECTIONAL FACILITY, prepared for that purpose, according to law, the said Defendant SHAWN E. FORD, JR., shall be administered a lethal injection by the Warden of the said SOUTHERN OHIO CORRECTIONAL FACILITY, or in the case of the Warden's death or inability, or absence, by a Deputy Warden of said Institution; that the said Warden or his duly authorized Deputy, shall administered a lethal injection until the Defendant, SHAWN E. FORD, JR., is **DEAD**.

When imposing a sentence in this case for the non-capital counts, the Defendant was afforded all rights pursuant to Crim. R. 32. The Court has considered the record, oral statements of counsel, the Defendant's statement, as well as the principles and purposes of sentencing under O.R.C. 2929.11, and the seriousness and recidivism factors under O.R.C. 2929.12 with regard to the non-capital offenses.

Thereafter, the Court proceeded with sentencing as to the remaining counts as follows:

- 1) AGGRAVATED MURDER, as to the death of JEFFREY E. SCHOBERT, as contained in Count 2 of the Indictment, Ohio Revised Code Section 2903.01(B), a special felony, which offense occurred on April 2, 2013; for LIFE IMPRISONMENT with **NO parole eligibility**, which is a mandatory term pursuant to O.R.C. 2929.13(F), 2929.14(D)(3), or 2925.01.
- 2) FELONIOUS ASSAULT, as contained in Count 11 of the indictment, Ohio Revised Code 2903.11(A)(1)/(A)(2), a felony of the second (2nd) degree which offense occurred on March 23, 2013, for the maximum allowable term of Eight (8) years, which is not a mandatory term pursuant to O.R.C. 2929.13(F), 2929.14(D)(3), or 2925.01.

IT IS FURTHER ORDERED that the sentences imposed in Counts 2, 4 and 11 be served CONSECUTIVELY to and not concurrently with each other and that the sentence imposed in this case be served CONSECUTIVELY to and not concurrently with the sentence imposed in case No. CR 2012 12 3584.

As part of the sentence on Count 11 in this case, the Defendant *shall* be supervised on post-release control by the Adult Parole Authority for a *mandatory* period of *3 years* if ever released from prison. If the Defendant violates the terms and conditions of post-release control, the Adult Parole Authority may impose a residential sanction that may include a prison term of up to nine months, and the maximum cumulative prison term for all violations shall not exceed one-half of the stated prison term. If the Defendant pleads guilty to, or is

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residential sanction that may include a prison term of up to nine months, and the maximum cumulative prison term for all violations shall not exceed one-half of the stated prison term. If the Defendant pleads guilty to, or is convicted of, a new felony offense while on post-release control, the sentencing court may impose a prison term for the new felony offense as well as an additional consecutive prison term for the post-release control violation of twelve months or whatever time remains on the Defendant's post-release control period, whichever is greater.

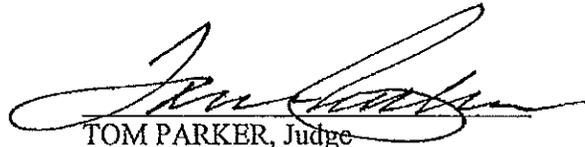
The court waives the imposition of any fine and any additional court costs due to defendant's indigence, an appropriate Financial Disclosure/Affidavit of Indigence having been filed in this matter.

The Court informed the Defendant of his right to appeal pursuant to Rule 32A2, Criminal Rules of Procedure, Ohio Supreme Court. The Court appoints Kathleen McGarry and Lynn Ann Maro, Sup. R. 20 certified defense counsel, for purposes of appeal.

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Further, the Official Shorthand Reporter shall produce a copy of all proceedings before this Court in the above-captioned case for purposes of appeal. A valid Affidavit of Indigence has been filed with the Clerk of Courts. The cost of the record, transcripts and appellate counsel herein shall be charged to the State of Ohio.

The Court finds that the Defendant is entitled to 816 days of jail time credit toward the sentence imposed herein. The Court is not responsible for calculating time served in the Summit County Jail after the date of sentencing. Any post-sentence time must be calculated by the Ohio Department of Rehabilitation and Corrections.



TOM PARKER, Judge  
Court of Common Pleas  
Summit County, Ohio

/mjl  
cc:

Asst. Prosecutor Brad Gessner/Brian Loprinzi  
Attorney Donald R. Hicks  
Attorney Jon Sinn  
Court Operations/Criminal Division  
Registrar's Office  
Warrants/Court Convey  
Kristie Gowens, Official Court Reporter  
Court Executive Office  
Bureau of Sentence Computation & Record Management

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JOURNAL ENTRY  
(Resolving Intellectual Disability  
Claim of Defendant)

I. INTRODUCTION

Defendant was charged in an eleven count indictment with five counts of aggravated murder with attached capital specifications. On October 22, 2014, a jury found defendant guilty of all the aggravated murder counts and of certain capital specifications attached to each count. The case proceeded to a sentencing phase trial on October 27, 2014. After defendant rested in his presentation of evidence in the mitigation phase trial, the defense moved to dismiss the capital specifications on the ground that defendant was intellectually disabled and, therefore, constitutionally ineligible for the death penalty. Defendant based his motion on the testimony given at the mitigation phase trial by Dr. Joy Stankowski, who opined that defendant's intellectual functioning was impaired. Dr. Stankowski supported that opinion by referencing historical and more recent IQ testing performed on the defendant and by pointing out that defendant had been described as learning disabled.

Initially, the court overruled the motion on the ground that defendant had failed to offer evidence that he was intellectually disabled, (Mitig. Hrg. Tr. pp. 624, 628-631.) However, the court also indicated a willingness to reconsider the issue given the mandates of *Atkins v.*

*Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) and *State v. Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625, 779 N.E.2d 1011, if the issue was properly raised.

The jury returned a death penalty verdict on Count 4 on October 31, 2014. Defendant filed a motion on November 4, 2014 entitled "Motion Requesting Atkins Hearing, Additional Expert Funding and Extension of Time to Conduct Hearing." By its order dated December 19, 2014 the court granted the request for an *Atkins* hearing, appointed an expert to evaluate defendant regarding the issue of intellectual disability, and denied the balance of the defense motion.

Subsequently, after reviewing extensive case law from the U.S. Supreme Court, the Ohio Supreme Court and other courts, the court *sua sponte* reconsidered the denial of the defense request for an expert in the December 19 order. The court summoned counsel for an in-chambers conference in February 2015 and advised the defense and state that each side would be permitted to engage an expert to address the issue of defendant's alleged intellectual disability.

The court conducted a status conference on March 3, 2015 at which the defense stated that it had not yet been able to retain an expert. The state advised that it had retained an expert and that the person was in the process of reviewing pertinent records in order to be able to form and express an expert opinion on that topic.

In an order dated March 16, 2015 the court recounted some of the foregoing history, and also directed the defense to retain an expert and engage in the required intellectual disability analysis without further delay. In a March 24, 2015 filing, the defense sought authorization to retain James J. Karpawich, Ph.D., to serve as the defense expert on intellectual disability and to authorize the appropriation of funds for his professional fees. The court issued an order on March 26, 2015 granting the defense motion to retain Dr. Karpawich and authorizing an initial

expenditure of up to \$5,000 for professional fees. On June 11, 2015 the court signed an order appropriating an additional sum of up to \$5,000 so that Dr. Karpawich could complete his work.

After conferring with counsel by court orders and status reports, the court scheduled the matter for an *Atkins* hearing, reserving the court dates of June 18, 19, 22 and 23, 2015 as necessary. The state and defense were directed to file lists of potential witnesses who might be called at the *Atkins* hearing. Each side filed its list on June 5, 2015. The state filed a "corrected" list on June 8, 2015. Defendant amended his witness list on June 17, 2015. Because defendant's amended witness list contained the names of only two potential witnesses, the court determined to cancel the June 18, 2015 hearing date and begin the hearing on June 19, 2015.

The *Atkins* hearing has now been conducted. The court received evidence on June 19 and 22, 2015. Dr. James Karpawich testified as an expert on behalf of Mr. Ford; and Sylvia O'Bradovich, Psy.D. testified as an expert on behalf of the state. Katie Connell, Ph.D., testified as the court-appointed expert. The defendant and the state elected only to call their respective expert witnesses, though each had filed witness lists containing various other persons who could have been called as lay witnesses. The court received Defense Exhibits A-1 (the curriculum vitae of Dr. Karpawich) and A-2 (the expert report of Doctor Karpawich dated June 12, 2015). The court received State Exhibits SA-1 (the June 9, 2015 report of Dr. O'Bradovich) and SA-2 (the curriculum vitae of Dr. O'Bradovich). The court also received Court Exhibits CA-1 the curriculum vitae of Dr. Connell and CA-2, Dr. Connell's report dated April 26, 2015. Finally, the court received court exhibits CA-3 and CA-4, two boxes containing the file materials assembled by Dr. Connell and reviewed by her in the formation of her opinions. The court ordered Dr. Connell to provide the records to counsel for the defense and the state so that each of the three experts would make their analysis based on the same materials. At the conclusion of

the hearing, Dr. O'Bradovich agreed to furnish test papers pertaining to the scoring and evaluation of Mr. Ford through the Vineland Adaptive Behavior Scales – Second Edition (“Vineland II”). Those documents were furnished to the court on June 24, 2015 and are included in the record as Court Exhibit CA-6.

There were some differences in what the experts had available at the time they conducted their analyses. Dr. Karpawich testified that the defendant was unwilling to cooperate in any further meetings with psychologists; on one occasion, he declined to leave his cell at the county jail in order to meet with Dr. Karpawich, and on the other occasion while he did leave his cell in order to meet with Dr. Karpawich and one of the defense attorneys, he declined to cooperate with a psychological assessment. Both Dr. O'Bradovich and Dr. Connell were able to meet with and interview Mr. Ford. Dr. O'Bradovich actually conducted IQ and adaptive functioning testing; neither Dr. Connell nor Dr. Karpawich did so.

The court, having received all of the foregoing evidence, and considering any other evidence pertinent to the issue already in the trial record or which was already in the record as a result of the competency determination or in regard to the initial plea of not guilty by reason of insanity, is prepared to rule on the issue presented.

## II. APPLICABLE LEGAL STANDARDS

The United State Supreme Court decided in *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002) that the execution of the intellectually disabled violates the cruel and unusual punishment clause of the Eight Amendment to the United States Constitution.<sup>1</sup>

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<sup>1</sup> Although Ohio statutes continue to refer to persons suffering from intellectual disabilities as “mentally retarded,” this court will substitute the term “intellectually disabled” for “mentally retarded” to comport with current federal statutory law and with the practice adopted by the United States Supreme Court in *Hall v. Florida*, \_\_\_ U.S. \_\_\_, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), in which it was noted:

Previous opinions of this Court have employed the term “mental retardation.” This opinion uses the term “intellectual disability” to describe the identical phenomenon. See Rosa’s Law, 124 Stat. 2643 (changing entries in the U.S. Code from “mental retardation” to “intellectual disability”)....

In *State v. Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625, the Ohio Supreme Court established the framework for dealing with intellectual disability issues in capital cases in light of the ruling in *Atkins*. *Lott* ruled that there is a rebuttable presumption that a defendant is not intellectually disabled if his or her IQ is above 70. 2002-Ohio-6625 at ¶ 12. The court also concluded that the issue of whether a defendant is intellectually disabled is a matter of law for determination by the court. *Id.* at ¶¶ 17-18. *Lott* also concluded that defendant bears the burden of proving intellectual disability by a preponderance of the evidence. *Id.* at ¶ 21.

Although *Atkins* barred the execution of the intellectually disabled, it did not establish procedures for determining whether an individual was intellectually disabled for the purpose of being excluded from execution. *Id.* at ¶ 10. Instead, the Supreme Court left it to the states “to develop ‘appropriate ways to enforce the constitutional restrictions’ on executing the [intellectually disabled] . . . .” *Id.*

In the absence of an Ohio statutory framework to determine intellectual disability, the Ohio Supreme Court held:

Ohio courts should observe the following substantive standards and procedural guidelines in determining whether convicted defendants facing the death penalty are [intellectually disabled]. Standards for [intellectual disability] set forth in this opinion, as well as the requirement that the defendant raise and prove [intellectual disability], shall also apply to defense claims of [intellectual disability] raised at trial.

Clinical definitions of [intellectual disability], cited with approval in *Atkins*, provide a standard for evaluating an individual’s claim of [intellectual disability]. 536 U.S. 304, 308, fn. 3, citing definitions from the American Association of Mental Retardation and the American Psychiatric Association. These definitions require: (1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care and self direction, and (3) onset before the age of 18. Most state statutes prohibiting execution of the [intellectually disabled] require evidence that the individual has an IQ of 70 or below. [Citations omitted]. While IQ tests are one of the many factors that need to be considered, they alone are not sufficient to make a final determination on this issue. [Citation omitted]. We hold that there is a rebuttable

presumption that a defendant is not [intellectually disabled] if his or her IQ is above 70.

Id. at ¶¶ 11-12. The Ohio standard for determining whether a convicted defendant is intellectually disabled continues to be found in the holdings of *Lott*. *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 173.

In *Hall v. Florida*, \_\_\_ U.S. \_\_\_, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), the United States Supreme Court concluded that state statutes that only considered IQ test scores above a threshold figure, did not require consideration of the statistical underpinnings of such test scores, and did not require consideration of evidence of deficits in adaptive functioning were inadequate to protect the *Eighth Amendment* rights of potentially intellectually disabled defendants facing capital punishment. The court concluded:

This Court agrees with the medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits.

134 S.Ct. at 2001. Given the Ohio standards articulated in *Lott* – requiring the court to consider adaptive skills and age of onset as well as other evidence bearing upon intellectual functioning – it is apparent that Ohio's rendition of the application of *Atkins* still satisfies the requirements recently enunciated by the United States Supreme Court in *Hall v. Florida*.

The issue for this court's determination is whether the preponderance of the evidence demonstrates that Defendant Ford had (1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, and (3) onset of these conditions before the age of 18. "The determination of whether capital defendant is, by the *Lott* court's definition, [intellectually disabled] presents a factual issue for the trial court. And an appellate court may

not reverse the trial court’s decision if it was supported by reliable, credible evidence.” *State v. Gumm*, 169 Ohio App.3d 650, 2006-Ohio-6451, 864 N.E.2d 133.

The court’s analysis of the evidence and conclusions are set forth below.

**III. EVIDENCE PRESENTED**

**A. Historical and Recent IQ Test Data**

The reports and testimony of the experts all reflect the IQ testing done on Mr. Ford both in his developmental years and as a result of the proceedings in this case:

Test Administered	Date	Age	Results
Kaufman Assessment Battery for Children (K-ABC)	2001	6 or 7	Sequential Processing = 81 Simultaneous Processing = 89 <b>Mental Processing Composite = 78 (±7)<sup>2</sup></b>
Wechsler Intelligence Scale for Children, III (WISC-III)	2003	9	Verbal IQ = 63 Performance IQ = 66 <b>Full Scale IQ = 62</b>
Kaufman Brief Intelligence Test, Second Edition (K-BIT2)	2006	12	Verbal SS = 75 Nonverbal SS = 81 <b>IQ Composite = 75 (90% confidence interval range = 69-83)<sup>3</sup></b>
Wechsler Abbreviated Scale of Intelligence (WASI)	2013	18	Verbal IQ = 71 Performance IQ = 62 <b>Full IQ = 64</b>
Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV)	2013	19	Verbal Comprehension = 83 Perceptual Reasoning = 77 Working Memory = 86/92 <sup>4</sup> Processing Speed = 94 <b>Full Scale IQ = 80/82<sup>5</sup> (80-95% confidence interval range = 76-84)<sup>6</sup></b>
Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV) (administered as a part of study by Dr. Sylvia O’Bradovich)	2015	20	Verbal Comprehension = 74 Perceptual Reasoning = 75 Working Memory = 92 Processing Speed = 97 <b>Full Scale IQ = 79 (95% confidence interval range = 75-83)</b>

<sup>2</sup> Karpawich Report, p. 4 (Dr. Karpawich testified at the hearing that the standard error of measurement range for this test was ±7; he acknowledged his report had a typo where it indicated the range was “+7”).

<sup>3</sup> Karpawich Report, p. 4.

<sup>4</sup> Dr. Connell noted this score should have been 92 if the test had been correctly scored; Connell Report, p. 31

<sup>5</sup> Dr. Connell noted this score should have been 82 (confidence interval range = 78-86) if the test had been correctly scored; Id.

<sup>6</sup> Karpawich Report, p. 11.

B. Expert Witness Opinions

1. Dr. James J. Karpawich

Defendant's expert, Dr. James J. Karpawich, was recognized by the court to have the necessary qualifications, training and experience to be able to offer expert opinion testimony on the issues of clinical psychology and the determination of intellectual disability. Upon review of the historical and more recent IQ testing performed on Mr. Ford, defendant's expert, Dr. Karpawich, summarized his findings in his report:

Mr. Ford has never been given the diagnosis of mental retardation/intellectual disability. Although his test results have been below average, most of the scores have been in the borderline range. On two occasions, his IQ was lower, but both examiners noted that these low scores underestimated his actual functioning. Although he was described as having a learning disability since he entered school, school officials never diagnosed him with mental retardation (intellectual disability). Although he has shown long-standing deficits with his social behavior and social adjustment, his other adaptive behaviors are in the average range or above. He is able to function independently, and his self-care and self-direction skills are intact. Therefore, Shawn Ford is a 20-year-old individual who has had intellectual limitations since early childhood. He was consistently diagnosed with a "specific learning disability" in school. All his IQ test results placed his intellectual functioning below average. However, he was not given the diagnosis of mental retardation/intellectual disability prior to the age of 18.

\* \* \*

Based upon the available information, it is my opinion, with reasonable scientific certainty, that there is insufficient information to conclude that the defendant fulfills the criteria for mental retardation/intellectual disability.

Karpawich Report at 18-19. Dr. Karpawich testified that Mr. Ford suffered from speech difficulties from childhood, which affected his ability to communicate. He noted that the defendant's difficulty in communication caused him to express himself physically because he was limited in his ability to do so verbally. Dr. Karpawich also testified that Mr. Ford had limits in his ability to think abstractly. This caused him to have difficulty in comprehension, and in learning from his experiences.

Dr. Karpawich noted that although all of Mr. Ford's IQ tests generated below average scores,<sup>7</sup> his tests had never placed him in the intellectually disabled range. He also acknowledged that although Mr. Ford had been evaluated many times, no evaluator had ever diagnosed him as being intellectually disabled.

Dr. Karpawich testified that Mr. Ford's mother completed the Adaptive Behavior Scale – Residential and Community: 2<sup>nd</sup> Edition (ABS-RC:2).<sup>8</sup> This instrument was administered to Kelly Ford in part because of Mr. Ford's unwillingness to meet with the evaluator. Dr. Karpawich testified that Mr. Ford did not have problems in his ability to care for himself, his ability to feed himself, or his ability to dress. He noted, however, that he's always had "significant issues" in the area of social behavior. He indicated this area includes things like "being impulsive, not assuming responsibility, poor social judgment, not considering long-term consequences of his actions, reacting poorly when he becomes frustrated, not able to cope with stress, disrupting other people, acting out in the community. All these things have been increasingly evident over the years with Shawn, and these would all be considered adaptive behaviors."

Dr. Karpawich testified: "All of [Mr. Ford's] IQ scores are below average. He does have problems with his adaptive behavior, and these have existed before he was the age of 18." He also testified: "it's my opinion, with reasonable scientific certainty that Shawn does not meet the criteria for mental retardation or intellectual disability, and that's based on the records that I reviewed."

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<sup>7</sup> The testimony of Dr. Karpawich on this point is significant. He noted that with an IQ of 75 and taking into consideration the standard error of measurement, at a 90% confidence interval, the actual IQ of an individual would be between 69 and 83. He acknowledged that the IQ, therefore, would be within a range and not simply the IQ score itself.

<sup>8</sup> Karpawich Report, p. 14

## 2. Dr. Sylvia O'Bradovich

Sylvia O'Bradovich, Psy.D., testified on June 22, 2015. Based upon her description of her licensure, education, training and experience, the court recognized her to be qualified to render expert opinion testimony on issues related to clinical psychology and the evaluation of intellectual disability. In doing so, the court recognizes that Dr. O'Bradovich's experience is limited compared to the experience of Dr. Karpawich and Dr. Connell. Nevertheless, she has the amount of experience required by Ohio Evid. R. 702: her testimony relates to matters beyond the knowledge or experience possessed by laypersons; she is qualified as an expert by specialized knowledge, skill, experience, training or education regarding the subject matter of her testimony; and her testimony is based upon reliable scientific, technical, or other specialized information. To the extent her testimony reports the result of IQ and adaptive functioning testing, the court finds the testimony to be reliable because the theories upon which the tests were based have been objectively verified and are validly derived from widely accepted knowledge, facts, or principles, and the design of the tests reliably implement the theory. Indeed, each of the other experts who have evaluated Mr. Ford utilized similar testing, when they determined to conduct testing. Finally, the testing done by Dr. O'Bradovich was conducted in a way that yielded an accurate result; her test results were consistent with the results generated by every other examiner.<sup>9</sup>

Dr. O'Bradovich's report summarizes her opinion as follows:

With regard to the specific referral in question, it is our opinion, based on reasonable scientific certainty, that Mr. Ford does not have an Intellectual Disability, formally known as Mental Retardation. Indeed, of the available historical records, Mr. Ford has never been diagnosed with an Intellectual

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<sup>9</sup> The court found Dr. O'Bradovich's decision not to include the quantitative results of her intelligence and adaptive functioning tests in her report to be odd. She indicated that inclusion of quantitative data is against the policy of her employer, Summit Psychological Associates, Inc.; and she testified that she opposes including such data in reports because of her expressed fear that people will seize upon the data and not examine the underlying issues the data represents. In the context of the intellectual disability evaluation the court must make, and given that every other expert included quantitative results in their descriptions of the evaluations of Mr. Ford, the court finds Dr. O'Bradovich is position regarding the inclusion of data unwarranted and unhelpful.

Disability or Mental Retardation and he has been assessed and treated by various professionals since 2001 in multiple settings, including academic, legal, and treatment settings. Although he previously obtained intelligence testing scores that were suggestive of intellectual deficits, previous evaluators have opined that the resulting test scores underestimated Mr. Ford's actual intelligence. Furthermore, previous adaptive functioning testing did not reveal significant adaptive functioning deficits nor suggest the presence of an Intellectual Disability. Mr. Ford received an IEP throughout his academic history, but the qualifying disabilities were limited to Specific Learning Disability and Speech/Language Impairment. During the course of the current evaluation, Mr. Ford did not demonstrate any indication of having an Intellectual Disability or adaptive functioning deficits. Indeed, intelligence testing and an adaptive functioning assessment did not support the presence of Intellectual Disability. In addition, during the evaluation, interviews, Mr. Ford displayed adequate verbal comprehension, communication, memory skills and social skills. Furthermore, the problematic patterns that were exhibited by Mr. Ford were limited to his deeply ingrained antisocial personality traits. In Summary, it is our opinion, based on reasonable scientific certainty, that Mr. Ford does not have an Intellectual Disability as outlined in *Atkins v. Virginia* and *State v. Lott*.

Dr. O'Bradovich's testimony supplied the quantitative data resulting from her intelligence testing.<sup>10</sup> She testified that Mr. Ford's overall IQ score was 79 with a 95% confidence interval that his actual score would be in a range between 75 and 83. His Verbal Comprehension score was 74 with a 95% confidence interval that the actual score would be in a range between 69 and 81. Mr. Ford's Perceptual Reasoning score was 75, with a 95% confidence interval that the actual score would be in a range between 70 and 82. His Working Memory score was 92, with a 95% confidence interval that the actual score would be in a range between 86 and 99. His Processing Speed score was 97, with a 95% confidence interval that the actual score would be in a range between 89 and 106. She testified that Mr. Ford's intellectual functioning, based upon testing, placed him in the low average range; and she acknowledged that Mr. Ford's IQ has always been below average.

Dr. O'Bradovich also supplied the quantitative data regarding adaptive functioning testing performed utilizing the Vineland II instrument. She testified that his Communication

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<sup>10</sup> That data has been included in the chart on page 7, *supra*.

score was 91, with a 95% confidence interval that his actual score would be in a range between 84 and 98. She indicated that would place him in the "Adequate" range. Dr. O'Bradovich testified that Mr. Ford's Daily Living score was 81, with a 95% confidence interval that his actual score would be in a range between 71 and 91. She stated that this would place him in the "Moderately Low" range. Dr. O'Bradovich testified that Mr. Ford's Socialization score was 101, with a 95% confidence interval that his actual score would be in a range between 92 and 110. She stated this would place him in the "Adequate" range. Finally, Dr. O'Bradovich testified that Mr. Ford's Overall Adaptive Functioning score was 87, with a 95% confidence interval that his actual score would be in a range between 81 and 93. She stated this would place him in the "Adequate" range. Dr. O'Bradovich testified that "Low" is the range in adaptive functioning that would place someone into a classification of Intellectually Disabled. She testified that Mr. Ford's adaptive functioning test results were all above that range.

Upon cross examination, Dr. O'Bradovich acknowledged that a male mind does not reach full maturity until the early 20s. She also stated that, without the input of a neurology expert, she cannot opine where Mr. Ford is physiologically in terms of brain development either now or at the time of the offenses.

3. Dr. Katie E. Connell

Dr. Katie Connell was appointed as an expert by the court. She testified that she is one of only five hundred board-certified forensic psychologists in the United States and has performed analytical work on more than five hundred prior cases. She has been recognized as an expert witness in the courts of Ohio. Based upon her qualifications, education, licensure, training, and prior experience, the court recognized that she had the expertise necessary to offer expert opinion testimony on the subjects of clinical psychology and the determination of intellectual disability.

Dr. Connell authored a forty-one page report that exhaustively described the history of testing and evaluations conducted with respect to the defendant. Dr. Connell summarized her evaluation of the prior analyses of Mr. Ford as follows: "A review of all prior records by multiple professionals and multiple schools, who had the opportunity to know Mr. Ford over several years in several settings, provides compelling evidence that his difficulties and limitations were best explained by a specific learning disability. None of these professionals found evidence to support a diagnosis of intellectual disability, which is consistent with my current opinions."

Dr. Connell's report expressed the following summarized opinions:

**Significantly Subaverage Intellectual Functioning:** In sum, it is my professional opinion that there is no reliable, valid or compelling data to support Mr. Ford has intellectual impairments. Of the prior tests that were deemed to be reliable, his results included a K-ABC Mental Composite score of 78, a K-BIT2 score of 75 and a WAIS-IV corrected score of 82. All of these scores fall in the borderline [to] low average range of intellectual functioning and are not consistent with a diagnosis of intellectual disability.

**Deficits in Adaptive Behavior:** In sum, it is my professional opinion that there is not compelling subjective or objective evidence to support Mr. Ford has deficits in adaptive behavior. Although there are some early references in school records to deficits in adaptive behavior, these are always [attributed] to a number of other factors, such as his speech difficulties, motivation difficulties, and behavior, and not [attributed] to stemming from intellectual deficits. Furthermore, deficits in adaptive behavior are not supported by interviews with family members, assessments by prior professionals, my own clinical interview with Mr. Ford or results from the Vineland-II. Limitations in functioning he does have are directly related to his learning disability.

**Onset before age 18:** because of Mr. Ford's young age, there was a plethora of information to assess his intellectual and adaptive behavior in the developmental period. Such assessment does not support deficits in either domain were present prior to age 18.

**SUMMARY OPINION:** Overall, as summarized thoroughly above, after considering all available information, it is my professional opinion, with a reasonable degree of psychological certainty, that Mr. Ford does not meet diagnostic criteria for an intellectual disability, formally mental retardation.

Dr. Connell's testimony at the hearing was consistent with the findings expressed in her report. She testified that she uses the analytical standards expressed in the DSM-5, issued by the American Psychiatric Association and the standards for determining intellectual disability established by the American Association on Intellectual and Developmental Disabilities. She also acknowledged that the three-pronged standards for determining intellectual disability recognized by APA and AAIDD are consistent with the standards established in *Atkins* and *Lott*. Based upon an application of those standards, she acknowledged that Mr. Ford's intelligence has always been considered to be in the Low Average range.

#### IV. ANALYSIS AND FINDINGS

The issue of assessing intellectual disability is challenging for any court. In *State v. Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625, 779 N.E.2d 1011, the Ohio Supreme Court set forth a three part test for examining the issue. In order to be declared intellectually disabled and, therefore, ineligible for capital punishment, a defendant must demonstrate by a preponderance of the evidence that he has had (1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care and self direction, and (3) onset before the age of 18. *Id.* at ¶12.

In considering an *Atkins* claim, the trial court shall conduct its own de novo review of the evidence. In determining whether the defendant is [intellectually disabled]. The trial court should rely on professional evaluations of [the defendant's] mental status, and consider expert testimony, appointing experts, if necessary, in deciding this matter. The trial court shall make written findings and set forth its rationale for finding the defendant [intellectually disabled or not intellectually disabled].

*Id.* at ¶18.

Defendant Ford has been examined eight times since the inception of this case. First, he was evaluated for his competency to stand trial by psychologists Dr. Robert Byrnes and Dr.

Arcangela Wood. Next, he was examined by Drs. Byrnes and Wood to determine whether he was legally sane at the time of the commission of the offenses. The competency and sanity evaluations of those individuals are contained within Court Exhibits CA-3 and CA-4. Later, he consulted with Dr. Joy Stankowski, the defense mitigation expert. Finally, he was examined or his case was reviewed by Drs. Connell, O'Bradovich and Karpawich as a part of the *Atkins* proceedings.

While the focus of the competency and sanity evaluations was not to determine whether Mr. Ford was intellectually disabled, each examiner noted that Mr. Ford had never been diagnosed with intellectual disability at any point in his life. Dr. Byrnes' August 12, 2013 sanity evaluation report contained the following statement of his opinion:

Based on the findings of the history and examination, it is my opinion that Mr. Ford did not meet DSM-IV criteria for [intellectual disability] at the time of the offenses. He was not diagnosed with [intellectual disability] before age 18. The history did not support the diagnosis of [intellectual disability]. Current testing did not support the diagnosis of [intellectual disability]. In my opinion, the available evidence does not support the conclusion that Mr. Ford had a mental defect, at the time of the alleged offenses, which would impair his ability to understand the wrongfulness of the alleged acts in this case.

Id. at 11.

In addition, during the mitigation trial, Dr. Wood testified<sup>11</sup> that she did not conduct an evaluation of Mr. Ford's adaptive functioning capabilities because her testing had determined his IQ to be 80, above the threshold that she considered to be the minimum for an intellectual disability determination, and she saw nothing to suggest he had deficits in his adaptive functioning.<sup>12</sup>

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<sup>11</sup> Mitig. Hrg. Tr. at 849-852.

<sup>12</sup> As noted above, Dr. Wood made a scoring error in calculating Mr. Ford's test results. According to Dr. Connell, the correct overall IQ score should have been 82.

As noted above, Dr. Joy Stankowski opined at the mitigation trial that Mr. Ford has impaired intellectual functioning. She noted that there is evidence from both school records and testing of Mr. Ford's intellectual functioning impairment and learning disabilities. She noted further that lower intellectual functioning can interfere with a person's ability to weigh consequences and make rational and organized decisions. In expressing that opinion, Dr. Stankowski made reference to Mr. Ford's low IQ, "ranging from Borderline (in the 60s) to Low Average (80)."<sup>13</sup> Upon cross examination, Dr. Stankowski acknowledged that there were reliability concerns respecting Mr. Ford's two IQ scores in the 60s. She did not express the opinion that he was intellectually disabled.

All of the evidence adduced at the *Atkins* hearing was consistent. None of the three experts was of the opinion that Mr. Ford has ever been intellectually disabled within the standards recognized by the American Psychiatric Association, the American Association on Intellectual and Developmental Disabilities, or *State v. Lott*.

Defendant's cross examination of the three testifying expert witnesses at the hearing consistently pointed out that Mr. Ford's IQ test results were subaverage. The essence of the cross examination was to establish Mr. Ford's test results placed his IQ in a "subaverage" range. Each of the three testifying witnesses agreed that his tests were indeed below "Average."

What becomes apparent in evaluating defendant's implicit position is that there is a difference between scoring "below average," "subaverage," or "borderline" on IQ testing and being characterized as having "significantly subaverage intellectual functioning." Something more than a lay interpretation of the terms "subaverage" or "below average" is required. That is why the Supreme Court in *Lott* required the trial court to consider professional examinations and expert testimony.

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<sup>13</sup> Defendant's Exhibit G, at 7-8.

An important issue in the court's evaluation is how to interpret the IQ scores of 62 and 64 resulting from the 2003 and first 2013 studies. In both instances, the evaluators raised questions about the results. In 2003, the evaluator wrote, "[T]hese results may underestimate Mr. Ford's ability because of his 'poor attention and impulsive behavior during testing.'"<sup>14</sup> In 2013, the evaluator, Robert Byrnes, Ph.D., wrote, "[T]hese results [Full IQ = 64] probably underestimate Mr. Ford's intellectual ability because of variable attention and impulsive behavior during the testing."<sup>15</sup> None of the experts involved in the current proceedings<sup>16</sup> has expressed in his or her report that the 62 and 64 IQ tests should be considered reliable measures of the defendant's intellectual functioning. The court concurs with Dr. Connell's assessment that the IQ tests that resulted in scores of 62 and 64 were not reliable indicators of the defendant's intellectual functioning.<sup>17</sup> Whatever other value those studies may have had when conducted, they did not lead either evaluator at the time – or anyone since – to conclude that Mr. Ford was intellectually disabled.

All three experts who specifically evaluated defendant's adaptive skills and functioning testified that while Mr. Ford had limits in certain areas of adaptive skills, he could not be characterized as having "significant limitations in two or more adaptive skills."

Based on the evidence contained in the trial record, in the pretrial proceedings, and introduced at the *Atkins* hearing, the court finds that defendant has not met his burden of proving that he had significantly subaverage intellectual functioning, or significant limitations in two or more adaptive skills, at any time before the age of 18 or thereafter.

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<sup>14</sup> Karpawich Report, p. 4; Connell Report, p. 30; O'Bradovich Report, p. 17.

<sup>15</sup> Karpawich Report, p. 9; Connell Report, p. 30; O'Bradovich Report, p. 18.

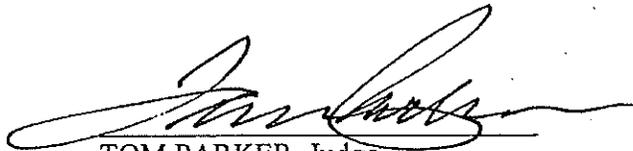
<sup>16</sup> The court notes that Doctor Joy Stankowski included the 62 and 64 IQ tests in her description of Mr. Ford's IQ range in her report and her direct examination at the mitigation trial without acknowledging the issues concerning reliability. (Defendant's Mitigation Hearing Exhibit G, p. 8; Mitig. Hrg. Tr., p. 495-496.) She acknowledged, however, the reliability issue upon cross examination (Mitig. Hrg. Tr., p. 566)

<sup>17</sup> Connell Report, p. 31.

V. CONCLUSION

Based upon the findings above, the court reaffirms its earlier denial of defendant's oral motion to dismiss the capital specifications. The court shall proceed with defendant's sentencing hearing on June 29, 2015 at 10:00 A.M.

APPROVED:  
June 25, 2015



TOM PARKER, Judge  
Court of Common Pleas  
Summit County, Ohio

/mjl

cc: Asst. Prosecutors Brad Gessner/Brian LoPrinzi  
Attorney Donald R. Hicks  
Attorney Jon Sinn  
Psycho Diagnostic Clinic

## Appendix

### United States Constitution

#### Article II, Section 2.

The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

#### Article VI

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

#### Amendment V

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

#### Amendment VI

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

#### Amendment VIII

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

#### Amendment XIV

##### Section 1.

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

##### Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the

basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

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

Section 4.

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

Section 5.

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

## Ohio Constitution

OHIO CONST., art. I, §1: All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

OHIO CONST., art. I, §2: All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.

OHIO CONST., art. I, §5: The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

OHIO CONST., art. I, §9: All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great, and except for a person who is charged with a felony where the proof is evident or the presumption great and where the person poses a substantial risk of serious physical harm to any person or to the community. Where a person is charged with any offense for which the person may be incarcerated, the court may determine at any time the type, amount, and conditions of bail. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

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

OHIO CONST., art. I, §10: Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed

to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

OHIO CONST., art. I, §16: All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

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

## Ohio Revised Code

### OHIO REV. CODE §2313.17

(A) Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to the person's qualifications. A person is qualified to serve as a juror if the person is eighteen years of age or older, is a resident of the county, and is an elector or would be an elector if the person were registered to vote, regardless of whether the person actually is registered to vote.

(B) The following are good causes for challenge to any person called as a juror:

(1) That the person has been convicted of a crime that by law renders the person disqualified to serve on a jury;

(2) That the person has an interest in the cause;

(3) That the person has an action pending between the person and either party;

(4) That the person formerly was a juror in the same cause;

(5) That the person is the employer, the employee, or the spouse, parent, son, or daughter of the employer or employee, counselor, agent, steward, or attorney of either party;

(6) That the person is subpoenaed in good faith as a witness in the cause;

(7) That the person is akin by consanguinity or affinity within the fourth degree to either party or to the attorney of either party;

(8) That the person or the person's spouse, parent, son, or daughter is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against any such party to another such action;

(9) That the person discloses by the person's answers that the person cannot be a fair and impartial juror or will not follow the law as given to the person by the court.

(C) Each challenge listed in division (B) of this section shall be considered as a principal challenge, and its validity tried by the court.

(D) In addition to the causes listed in division (B) of this section, any petit juror may be challenged on suspicion of prejudice against or partiality for either party, or for want of a competent knowledge of the English language, or other cause that may render the juror at the time an unsuitable juror. The validity of the challenge shall be determined by the court and be sustained if the court has any doubt as to the juror's being entirely unbiased.

OHIO REV. CODE §2901.04

(A) Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

(B) Rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice.

(C) Any provision of a section of the Revised Code that refers to a previous conviction of or plea of guilty to a violation of a section of the Revised Code or of a division of a section of the Revised Code shall be construed to also refer to a previous conviction of or plea of guilty to a substantially equivalent offense under an existing or former law of this state, another state, or the United States or under an existing or former municipal ordinance.

(D) Any provision of the Revised Code that refers to a section, or to a division of a section, of the Revised Code that defines or specifies a criminal offense shall be construed to also refer to an existing or former law of this state, another state, or the United States, to an existing or former municipal ordinance, or to an existing or former division of any such existing or former law or ordinance that defines or specifies, or that defined or specified, a substantially equivalent offense.

OHIO REV. CODE §2903.11

(A) No person shall knowingly do either of the following:

- (1) Cause serious physical harm to another or to another's unborn;
- (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly do any of the following:

(1) Engage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct;

(2) Engage in sexual conduct with a person whom the offender knows or has reasonable cause to believe lacks the mental capacity to appreciate the significance of the knowledge that the offender has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome;

(3) Engage in sexual conduct with a person under eighteen years of age who is not the spouse of the offender.

(C) The prosecution of a person under this section does not preclude prosecution of that person under section 2907.02 of the Revised Code.

(D) (1) (a) Whoever violates this section is guilty of felonious assault. Except as otherwise provided in this division or division (D)(1)(b) of this section, felonious assault is a felony of the second degree. If the victim of a violation of division (A) of this section is a peace officer or an investigator of the bureau of criminal identification and investigation, felonious assault is a felony of the first degree.

(b) Regardless of whether the felonious assault is a felony of the first or second degree under division (D)(1)(a) of this section, if the offender also is convicted of or pleads guilty to a specification as described in section 2941.1423 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, except as otherwise provided in this division or unless a longer prison term is required under any other provision of law, the court shall sentence the offender to a mandatory prison term as provided in division (B)(8) of section 2929.14 of the Revised Code. If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation, and if the victim suffered serious physical harm as a result of the commission of the offense, felonious assault is a felony of the first degree, and the court, pursuant to division (F) of section 2929.13 of the Revised Code, shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(2) In addition to any other sanctions imposed pursuant to division (D)(1) of this section for felonious assault committed in violation of division (A)(2) of this section, if the deadly weapon used in the commission of the violation is a motor vehicle, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of section 4510.02 of the Revised Code.

(E) As used in this section:

(1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

(2) "Motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

(3) "Peace officer" has the same meaning as in section 2935.01 of the Revised Code.

(4) "Sexual conduct" has the same meaning as in section 2907.01 of the Revised Code, except that, as used in this section, it does not include the insertion of an instrument, apparatus, or other object that is not a part of the body into the vaginal or anal opening of another, unless the offender knew at the time of the insertion that the instrument, apparatus, or other object carried the offender's bodily fluid.

(5) "Investigator of the bureau of criminal identification and investigation" means an investigator of the bureau of criminal identification and investigation who is commissioned by the superintendent of the bureau as a special agent for the purpose of assisting law enforcement officers or providing emergency assistance to peace officers pursuant to authority granted under section 109.541 of the Revised Code.

(6) "Investigator" has the same meaning as in section 109.541 of the Revised Code.

#### OHIO REV. CODE §2909.01

##### Definitions

(A) To "create a substantial risk of serious physical harm to any person" includes the creation of a substantial risk of serious physical harm to any emergency personnel.

(B) "Emergency personnel" means any of the following persons:

(1) A peace officer, as defined in section 2935.01 of the Revised Code;

(2) A member of a fire department or other firefighting agency of a municipal corporation, township, township fire district, joint fire district, other political subdivision, or combination of political subdivisions;

(3) A member of a private fire company, as defined in section 9.60 of the Revised Code, or a volunteer firefighter;

(4) A member of a joint ambulance district or joint emergency medical services district;

(5) An emergency medical technician-basic, emergency medical technician-intermediate, emergency medical technician-paramedic, ambulance operator, or other member of an emergency medical service that is owned or operated by a political subdivision or a private entity;

(6) The state fire marshal, the chief deputy state fire marshal, or an assistant state fire marshal;

(7) A fire prevention officer of a political subdivision or an arson, fire, or similar investigator of a political subdivision.

(C) "Occupied structure" means any house, building, outbuilding, watercraft, aircraft, railroad car, truck, trailer, tent, or other structure, vehicle, or shelter, or any portion thereof, to which any of the following applies:

(1) It is maintained as a permanent or temporary dwelling, even though it is temporarily unoccupied and whether or not any person is actually present.

(2) At the time, it is occupied as the permanent or temporary habitation of any person, whether or not any person is actually present.

(3) At the time, it is specially adapted for the overnight accommodation of any person, whether or not any person is actually present.

(4) At the time, any person is present or likely to be present in it.

(D) "Political subdivision" and "state" have the same meanings as in section 2744.01 of the Revised Code.

(E) "Computer," "computer hacking," "computer network," "computer program," "computer software," "computer system," "data," and "telecommunications device" have the same meanings as in section 2913.01 of the Revised Code.

(F) "Computer contaminant" means a computer program that is designed to modify, damage, destroy, disable, deny or degrade access to, allow unauthorized access to, functionally impair, record, or transmit information within a computer, computer system, or computer network without the express or implied consent of the owner or other person authorized to give consent and that is of a type or kind described in divisions (F)(1) to (4) of this section or of a type or kind similar to a type or kind described in divisions (F)(1) to (4) of this section:

(1) A group of computer programs commonly known as "viruses" and "worms" that are self-replicating or self-propagating and that are designed to contaminate other computer programs, compromise computer security, consume computer resources, modify, destroy, record, or transmit data, or disrupt the normal operation of the computer, computer system, or computer network;

(2) A group of computer programs commonly known as "Trojans" or "Trojan horses" that are not self-replicating or self-propagating and that are designed to compromise computer security, consume computer resources, modify, destroy, record, or transmit data, or disrupt the normal operation of the computer, computer system, or computer network;

(3) A group of computer programs commonly known as "zombies" that are designed to use a computer without the knowledge and consent of the owner, or other person authorized to give consent, and that are designed to send large quantities of data to a targeted computer network for the purpose of degrading the targeted computer's or network's performance, or denying access through the network to the targeted computer or network, resulting in what is commonly known as "Denial of Service" or "Distributed Denial of Service" attacks;

(4) A group of computer programs commonly know as "trap doors," "back doors," or "root kits" that are designed to bypass standard authentication software and that are designed to allow access to or use of a computer without the knowledge or consent of the owner, or other person authorized to give consent.

(G) "Internet" has the same meaning as in section 341.42 of the Revised Code.

#### OHIO REV. CODE 2911.01

(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;

(2) Have a dangerous ordnance on or about the offender's person or under the offender's control;

(3) Inflict, or attempt to inflict, serious physical harm on another.

(B) No person, without privilege to do so, shall knowingly remove or attempt to remove a deadly weapon from the person of a law enforcement officer, or shall knowingly deprive or attempt to deprive a law enforcement officer of a deadly weapon, when both of the following apply:

(1) The law enforcement officer, at the time of the removal, attempted removal, deprivation, or attempted deprivation, is acting within the course and scope of the officer's duties;

(2) The offender knows or has reasonable cause to know that the law enforcement officer is a law enforcement officer.

(C) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

(D) As used in this section:

(1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

(2) "Law enforcement officer" has the same meaning as in section 2901.01 of the Revised Code and also includes employees of the department of rehabilitation and correction who are authorized to carry weapons within the course and scope of their duties.

#### OHIO REV. CODE 2911.11

##### Aggravated burglary.

(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

(2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

(B) Whoever violates this section is guilty of aggravated burglary, a felony of the first degree.

(C) As used in this section:

(1) "Occupied structure" has the same meaning as in section 2909.01 of the Revised Code.

(2) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

## OHIO REV. CODE §2913.02

### Theft

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

(1) Without the consent of the owner or person authorized to give consent;

(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

(3) By deception;

(4) By threat;

(5) By intimidation.

(B)(1) Whoever violates this section is guilty of theft.

(2) Except as otherwise provided in this division or division (B)(3), (4), (5), (6), (7), (8), or (9) of this section, a violation of this section is petty theft, a misdemeanor of the first degree. If the value of the property or services stolen is one thousand dollars or more and is less than seven thousand five hundred dollars or if the property stolen is any of the property listed in section 2913.71 of the Revised Code, a violation of this section is theft, a felony of the fifth degree. If the value of the property or services stolen is seven thousand five hundred dollars or more and is less than one hundred fifty thousand dollars, a violation of this section is grand theft, a felony of the fourth degree. If the value of the property or services stolen is one hundred fifty thousand dollars or more and is less than seven hundred fifty thousand dollars, a violation of this section is aggravated theft, a felony of the third degree. If the value of the property or services is seven hundred fifty thousand dollars or more and is less than one million five hundred thousand dollars, a violation of this section is aggravated theft, a felony of the second degree. If the value of the property or services stolen is one million five hundred thousand dollars or more, a violation of this

section is aggravated theft of one million five hundred thousand dollars or more, a felony of the first degree.

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

(4) If the property stolen is a firearm or dangerous ordnance, a violation of this section is grand theft. Except as otherwise provided in this division, grand theft when the property stolen is a firearm or dangerous ordnance is a felony of the third degree, and there is a presumption in favor of the court imposing a prison term for the offense. If the firearm or dangerous ordnance was stolen from a federally licensed firearms dealer, grand theft when the property stolen is a firearm or dangerous ordnance is a felony of the first degree. The offender shall serve a prison term imposed for grand theft when the property stolen is a firearm or dangerous ordnance consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(5) If the property stolen is a motor vehicle, a violation of this section is grand theft of a motor vehicle, a felony of the fourth degree.

(6) If the property stolen is any dangerous drug, a violation of this section is theft of drugs, a felony of the fourth degree, or, if the offender previously has been convicted of a felony drug abuse offense, a felony of the third degree.

(7) If the property stolen is a police dog or horse or an assistance dog and the offender knows or should know that the property stolen is a police dog or horse or an assistance dog, a violation of this section is theft of a police dog or horse or an assistance dog, a felony of the third degree.

(8) If the property stolen is anhydrous ammonia, a violation of this section is theft of anhydrous ammonia, a felony of the third degree.

(9) Except as provided in division (B)(2) of this section with respect to property with a value of seven thousand five hundred dollars or more and division (B)(3) of this section with respect to property with a value of one thousand dollars or more, if the property stolen is a special purpose article as defined in section 4737.04 of the Revised Code or is a bulk merchandise container as defined in section 4737.012 of the Revised Code, a violation of this section is theft of a special purpose article or articles or theft of a bulk merchandise container or containers, a felony of the fifth degree.

(10) In addition to the penalties described in division (B)(2) of this section, if the offender committed the violation by causing a motor vehicle to leave the premises of an establishment at which gasoline is offered for retail sale without the offender making full payment for gasoline that was dispensed into the fuel tank of the motor vehicle or into another container, the court may do one of the following:

(a) Unless division (B)(10)(b) of this section applies, suspend for not more than six months the offender's driver's license, probationary driver's license, commercial driver's license, temporary instruction permit, or nonresident operating privilege;

(b) If the offender's driver's license, probationary driver's license, commercial driver's license, temporary instruction permit, or nonresident operating privilege has previously been suspended pursuant to division (B)(10)(a) of this section, impose a class seven suspension of the offender's license, permit, or privilege from the range specified in division (A)(7) of section 4510.02 of the Revised Code, provided that the suspension shall be for at least six months.

(c) The court, in lieu of suspending the offender's driver's or commercial driver's license, probationary driver's license, temporary instruction permit, or nonresident operating privilege pursuant to division (B)(10)(a) or (b) of this section, instead may require the offender to perform community service for a number of hours determined by the court.

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

intent to commit theft of rented property or rental services shall be determined pursuant to the provisions of section 2913.72 of the Revised Code.

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

#### OHIO REV. CODE §2929.024

Investigation services and experts for indigent.

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

#### OHIO REV. CODE §2929.03

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

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

(a) Life imprisonment without parole;

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

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

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

(e) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or

information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (A)(1)(a) of this section, the trial court shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that shall be served pursuant to that section.

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

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

(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 of the Revised Code, the trial court shall impose sentence on the offender as follows:

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

(i) Life imprisonment without parole;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If the trial jury recommends that the offender be sentenced to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, life imprisonment with parole eligibility after serving thirty full years of imprisonment, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code, the court shall impose the sentence recommended by the jury

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

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

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

(i) Life imprisonment without parole;

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

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

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

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

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code, was convicted of aggravated murder and one or

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

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

(a) Life imprisonment without parole;

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

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

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

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

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to

outweigh the mitigating factors. For cases in which a sentence of death is imposed for an offense committed before January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. For cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

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

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

#### OHIO REV. CODE §2929.04

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

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

(2) The offense was committed for hire.

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

(4) The offense was committed while the offender was under detention or while the offender was at large after having broken detention. As used in division (A)(4) of this section, "detention" has the same meaning as in section

2921.01 of the Revised Code, except that detention does not include hospitalization, institutionalization, or confinement in a mental health facility or mental retardation and developmentally disabled facility unless at the time of the commission of the offense either of the following circumstances apply:

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

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

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

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

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

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

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

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

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and

proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

- (1) Whether the victim of the offense induced or facilitated it;
- (2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;
- (3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law;
- (4) The youth of the offender;
- (5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;
- (6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;
- (7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

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

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

#### OHIO REV. CODE §2929.05

(A) Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall review upon appeal the sentence of death at the same time that they review the other issues in the case. The court of appeals and the supreme court shall review the judgment in the case and the sentence

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

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

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

(C) At any time after a sentence of death is imposed pursuant to section 2929.022 or 2929.03 of the Revised Code, the court of common pleas that sentenced the offender shall vacate the sentence if the offender did not present evidence at trial that the offender was not eighteen years of age or older at the time of the commission of the aggravated murder for which the offender was sentenced and if the offender shows by a preponderance of the evidence that the offender was less than eighteen years of age at the time of the commission of the

aggravated murder for which the offender was sentenced. The court is not required to hold a hearing on a motion filed pursuant to this division unless the court finds, based on the motion and any supporting information submitted by the defendant, any information submitted by the prosecuting attorney, and the record in the case, including any previous hearings and orders, probable cause to believe that the defendant was not eighteen years of age or older at the time of the commission of the aggravated murder for which the defendant was sentenced to death.

#### OHIO REV. CODE §2929.06

(A) If a sentence of death imposed upon an offender is set aside, nullified, or vacated because the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, or the supreme court, in cases in which the supreme court reviews the sentence upon appeal, could not affirm the sentence of death under the standards imposed by section 2929.05 of the Revised Code, is set aside, nullified, or vacated for the sole reason that the statutory procedure for imposing the sentence of death that is set forth in sections 2929.03 and 2929.04 of the Revised Code is unconstitutional, is set aside, nullified, or vacated pursuant to division (C) of section 2929.05 of the Revised Code, or is set aside, nullified, or vacated because a court has determined that the offender is mentally retarded under standards set forth in decisions of the supreme court of this state or the United States supreme court, the trial court that sentenced the offender shall conduct a hearing to resentence the offender. At the resentencing hearing, the court shall impose upon the offender a sentence of life imprisonment or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that is determined as specified in this division. If division (D) of section 2929.03 of the Revised Code, at the time the offender committed the aggravated murder for which the sentence of death was imposed, required the imposition when a sentence of death was not imposed of a sentence of life imprisonment without parole or a sentence of an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (A) or (B)(3) of section 2971.03 of the Revised Code and served pursuant to that section, the court shall impose the sentence so required. In all other cases, the sentences of life imprisonment that are available at the hearing, and from which the court shall impose sentence, shall be the same sentences of life imprisonment that were available under division (D) of section 2929.03 or under section 2909.24 of the Revised Code at the time the offender committed the offense for which the sentence of death was imposed. Nothing in this division regarding the resentencing of an offender shall affect the operation of section 2971.03 of the Revised Code.

(B) Whenever any court of this state or any federal court sets aside, nullifies, or vacates a sentence of death imposed upon an offender because of error that occurred in the sentencing phase of the trial and if division (A) of this section does not apply, the trial court that sentenced the offender shall conduct a new hearing to resentence the offender. If the offender was tried by a jury, the trial court shall impanel a new jury for the hearing. If the offender was tried by a panel of three judges, that panel or, if necessary, a new panel of three judges shall conduct the hearing. At the hearing, the court or panel shall follow the procedure set forth in division (D) of section 2929.03 of the Revised Code in determining whether to impose upon the offender a sentence of death, a sentence of life imprisonment, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment. If, pursuant to that procedure, the court or panel determines that it will impose a sentence other than a sentence of death, the court or panel shall impose upon the offender one of the sentences of life imprisonment that could have been imposed at the time the offender committed the offense for which the sentence of death was imposed, determined as specified in this division, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that is determined as specified in this division. If division (D) of section 2929.03 of the Revised Code, at the time the offender committed the aggravated murder for which the sentence of death was imposed, required the imposition when a sentence of death was not imposed of a sentence of life imprisonment without parole or a sentence of an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (A) or (B)(3) of section 2971.03 of the Revised Code and served pursuant to that section, the court or panel shall impose the sentence so required. In all other cases, the sentences of life imprisonment that are available at the hearing, and from which the court or panel shall impose sentence, shall be the same sentences of life imprisonment that were available under division (D) of section 2929.03 or under section 2909.24 of the Revised Code at the time the offender committed the offense for which the sentence of death was imposed.

(C) If a sentence of life imprisonment without parole imposed upon an offender pursuant to section 2929.021 or 2929.03 of the Revised Code is set aside, nullified, or vacated for the sole reason that the statutory procedure for imposing the sentence of life imprisonment without parole that is set forth in sections 2929.03 and 2929.04 of the Revised Code is unconstitutional, the trial court that sentenced the offender shall conduct a hearing to resentence the offender to life imprisonment with parole eligibility after serving twenty-five full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(D) Nothing in this section limits or restricts the rights of the state to appeal any order setting aside, nullifying, or vacating a conviction or sentence of death, when an appeal of that nature otherwise would be available.

(E) This section, as amended by H.B. 184 of the 125th general assembly, shall apply to all offenders who have been sentenced to death for an aggravated murder that was committed on or after October 19, 1981, or for terrorism that was committed on or after May 15, 2002. This section, as amended by H.B. 184 of the 125th general assembly, shall apply equally to all such offenders sentenced to death prior to, on, or after March 23, 2005, including offenders who, on March 23, 2005, are challenging their sentence of death and offenders whose sentence of death has been set aside, nullified, or vacated by any court of this state or any federal court but who, as of March 23, 2005, have not yet been resentenced.

#### OHIO REV. CODE §2929.11

(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

(2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

(B) Whoever violates this section is guilty of aggravated burglary, a felony of the first degree.

(C) As used in this section:

(1) "Occupied structure" has the same meaning as in section 2909.01 of the Revised Code.

(2) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

#### OHIO REV. CODE §2941.14

(A) In an indictment for aggravated murder, murder, or voluntary or involuntary manslaughter, the manner in which, or the means by which the death was caused need not be set forth.

(B) Imposition of the death penalty for aggravated murder is precluded unless the indictment or count in the indictment charging the offense specifies one or more of the aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code. If more than one aggravating circumstance is

specified to an indictment or count, each shall be in a separately numbered specification, and if an aggravating circumstance is specified to a count in an indictment containing more than one count, such specification shall be identified as to the count to which it applies.

(C) A specification to an indictment or count in an indictment charging aggravated murder shall be stated at the end of the body of the indictment or count, and may be in substantially the following form:

SPECIFICATION (or, SPECIFICATION 1, SPECIFICATION TO THE FIRST COUNT, or SPECIFICATION 1 TO THE FIRST COUNT). The Grand Jurors further find and specify that (set forth the applicable aggravating circumstance listed in divisions (A)(1) to (10) of section 2929.04 of the Revised Code. The aggravating circumstance may be stated in the words of the subdivision in which it appears, or in words sufficient to give the accused notice of the same)

#### OHIO REV. CODE §2947.06

Testimony in mitigation of sentence; presentence investigation report; psychological reports.

(A)(1) The trial court may hear testimony in mitigation of a sentence at the term of conviction or plea or at the next term. The prosecuting attorney may offer testimony on behalf of the state to give the court a true understanding of the case. The court shall determine whether sentence should immediately be imposed. The court on its own motion may direct the department of probation of the county in which the defendant resides, or its own regular probation officer, to make any inquiries and presentence investigation reports that the court requires concerning the defendant.

(2) The provisions of section 2951.03 of the Revised Code shall govern the preparation of, the provision, receipt, and retention of copies of, the use of, and the confidentiality, nonpublic record character, and sealing of a presentence investigation report prepared pursuant to division (A) (1) of this section.

(B) The court may appoint not more than two psychologists or psychiatrists to make any reports concerning the defendant that the court requires for the purpose of determining the disposition of the case. Each psychologist or psychiatrist shall receive a fee to be fixed by the court and taxed in the costs of the case. The psychologist's or psychiatrist's reports shall be made in writing, in open court, and in the presence of the defendant, except in misdemeanor cases in which sentence may be pronounced in the absence of the defendant. A copy of each report of a psychologist or psychiatrist may be furnished to the defendant, if present, who may examine the persons making the report, under oath, as to any matter or thing contained in the report.

## Rules

### OHIO CRIM.R. 8

#### (A) Joinder of offenses.

Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct.

#### (B) Joinder of defendants.

Two or more defendants may be charged in the same indictment, information or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses, or in the same course of criminal conduct. Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count.

### OHIO CRIM.R. 11

#### (A) Pleas.

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

#### (B) Effect of guilty or no contest pleas.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(D) Misdemeanor cases involving serious offenses.

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

(E) Misdemeanor cases involving petty offenses.

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

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

(F) Negotiated plea in felony cases.

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

(G) Refusal of court to accept plea.

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

(H) Defense of insanity.

The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial.

#### OHIO CRIM.R. 14

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

When two or more persons are jointly indicted for a capital offense, each of such persons shall be tried separately, unless the court orders the defendants to be tried jointly, upon application by the prosecuting attorney or one or more of the defendants, and for good cause shown.

OHIO CRIM.R. 16

(A) Purpose, scope and reciprocity.

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

(B) Discovery; Right to copy or photograph.

Upon receipt of a written demand for discovery by the defendant, and except as provided in division (C), (D), (E), (F), or (J) of this rule, the prosecuting attorney shall provide copies or photographs, or permit counsel for the defendant to copy or photograph, the following items related to the particular case indictment, information, or complaint, and which are material to the preparation of a defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant, within the possession of, or reasonably available to the state, subject to the provisions of this rule:

(1) Any written or recorded statement by the defendant or a co-defendant, including police summaries of such statements, and including grand jury testimony by either the defendant or co-defendant;

(2) Criminal records of the defendant, a co-defendant, and the record of prior convictions that could be admissible under Rule 609 of the Ohio Rules of Evidence of a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal;

(3) Subject to divisions (D)(4) and (E) of this rule, all laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings, or places;

(4) Subject to division (D)(4) and (E) of this rule, results of physical or mental examinations, experiments or scientific tests;

(5) Any evidence favorable to the defendant and material to guilt or punishment;

(6) All reports from peace officers, the Ohio State Highway Patrol, and federal law enforcement agents, provided however, that a document prepared by a person other than the witness testifying will not be considered to be the

witness's prior statement for purposes of the cross examination of that particular witness under the Rules of Evidence unless explicitly adopted by the witness;

(7) Any written or recorded statement by a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal.

(C) Prosecuting attorney's designation of "counsel only" materials.

The prosecuting attorney may designate any material subject to disclosure under this rule as "counsel only" by stamping a prominent notice on each page or thing so designated. "Counsel only" material also includes materials ordered disclosed under division (F) of this rule. Except as otherwise provided, "counsel only" material may not be shown to the defendant or any other person, but may be disclosed only to defense counsel, or the agents or employees of defense counsel, and may not otherwise be reproduced, copied or disseminated in any way. Defense counsel may orally communicate the content of the "counsel only" material to the defendant.

(D) Prosecuting attorney's certification of nondisclosure.

If the prosecuting attorney does not disclose materials or portions of materials under this rule, the prosecuting attorney shall certify to the court that the prosecuting attorney is not disclosing material or portions of material otherwise subject to disclosure under this rule for one or more of the following reasons:

(1) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will compromise the safety of a witness, victim, or third party, or subject them to intimidation or coercion;

(2) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will subject a witness, victim, or third party to a substantial risk of serious economic harm;

(3) Disclosure will compromise an ongoing criminal investigation or a confidential law enforcement technique or investigation regardless of whether that investigation involves the pending case or the defendant;

(4) The statement is of a child victim of sexually oriented offense under the age of thirteen;

(5) The interests of justice require non-disclosure.

Reasonable, articulable grounds may include, but are not limited to, the nature of the case, the specific course of conduct of one or more parties, threats or prior instances of witness tampering or intimidation, whether or not those instances resulted in criminal charges, whether the defendant is pro se, and any other relevant information.

The prosecuting attorney's certification shall identify the nondisclosed material.

(E) Right of inspection in cases of sexual assault.

(1) In cases of sexual assault, defense counsel, or the agents or employees of defense counsel, shall have the right to inspect photographs, results of physical or mental examinations, or hospital reports, related to the indictment, information, or complaint as described in section (B)(3) or (B)(4) of this rule. Hospital records not related to the information, indictment, or complaint are not subject to inspection or disclosure. Upon motion by defendant, copies of the photographs, results of physical or mental examinations, or hospital reports, shall be provided to defendant's expert under seal and under protection from unauthorized dissemination pursuant to protective order.

(2) In cases involving a victim of a sexually oriented offense less than thirteen years of age, the court, for good cause shown, may order the child's statement be provided, under seal and pursuant to protective order from unauthorized dissemination, to defense counsel and the defendant's expert. Notwithstanding any provision to the contrary, counsel for the defendant shall be permitted to discuss the content of the statement with the expert.

(F) Review of prosecuting attorney's certification of non-disclosure.

Upon motion of the defendant, the trial court shall review the prosecuting attorney's decision of nondisclosure or designation of "counsel only" material for abuse of discretion during an in camera hearing conducted seven days prior to trial, with counsel participating.

(1) Upon a finding of an abuse of discretion by the prosecuting attorney, the trial court may order disclosure, grant a continuance, or other appropriate relief.

(2) Upon a finding by the trial court of an abuse of discretion by the prosecuting attorney, the prosecuting attorney may file an interlocutory appeal pursuant to division (K) of Rule 12 of the Rules of Criminal Procedure.

(3) Unless, for good cause shown, the court orders otherwise, any material disclosed by court order under this section shall be deemed to be "counsel only" material, whether or not it is marked as such.

(4) Notwithstanding the provisions of (E)(2), in the case of a statement by a victim of a sexually oriented offense less than thirteen years of age, where the trial court finds no abuse of discretion, and the prosecuting attorney has not certified for nondisclosure under (D)(1) or (D)(2) of this rule, or has filed for nondisclosure under (D)(1) or (D)(2) of this rule and the court has found an abuse of discretion in doing so, the prosecuting attorney shall permit defense counsel, or the agents or employees of defense counsel to inspect the statement at that time.

(5) If the court finds no abuse of discretion by the prosecuting attorney, a copy of any discoverable material that was not disclosed before trial shall be provided to the defendant no later than commencement of trial. If the court continues the trial after the disclosure, the testimony of any witness shall be

perpetuated on motion of the state subject to further cross-examination for good cause shown.

(G) Perpetuation of testimony.

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

(H) Discovery: Right to copy or photograph.

If the defendant serves a written demand for discovery or any other pleading seeking disclosure of evidence on the prosecuting attorney, a reciprocal duty of disclosure by the defendant arises without further demand by the state. A public records request made by the defendant, directly or indirectly, shall be treated as a demand for discovery in a criminal case if, and only if, the request is made to an agency involved in the prosecution or investigation of that case. The defendant shall provide copies or photographs, or permit the prosecuting attorney to copy or photograph, the following items related to the particular case indictment, information or complaint, and which are material to the innocence or alibi of the defendant, or are intended for use by the defense as evidence at the trial, or were obtained from or belong to the victim, within the possession of, or reasonably available to the defendant, except as provided in division (J) of this rule:

(1) All laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings or places;

(2) Results of physical or mental examinations, experiments or scientific tests;

(3) Any evidence that tends to negate the guilt of the defendant, or is material to punishment, or tends to support an alibi. However, nothing in this rule shall be construed to require the defendant to disclose information that would tend to incriminate that defendant;

(4) All investigative reports, except as provided in division (J) of this rule;

(5) Any written or recorded statement by a witness in the defendant's case-in-chief, or any witness that it reasonably anticipates calling as a witness in surrebuttal.

(I) Witness list.

Each party shall provide to opposing counsel a written witness list, including names and addresses of any witness it intends to call in its case-in-chief, or reasonably anticipates calling in rebuttal or surrebuttal. The content of the witness list may not be commented upon or disclosed to the jury

by opposing counsel, but during argument, the presence or absence of the witness may be commented upon.

(J) Information not subject to disclosure.

The following items are not subject to disclosure under this rule:

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

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

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

(K) Expert witnesses; Reports.

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

(L) Regulation of discovery.

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

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

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

(M) Time of motions.

A defendant shall make his demand for discovery within twenty-one days after arraignment or seven days before the date of trial, whichever is earlier, or at such reasonable time later as the court may permit. A party's motion to

compel compliance with this rule shall be made no later than seven days prior to trial, or three days after the opposing party provides discovery, whichever is later. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon showing of cause why such motion would be in the interest of justice.

## OHIO CRIM.R. 24

### Rule 24. Trial jurors

#### (A) Brief introduction of case.

To assist prospective jurors in understanding the general nature of the case, the court, in consultation with the parties, may give jurors a brief introduction to the case.

#### (B) Examination of prospective jurors.

Any person called as a prospective juror for the trial of any cause shall be examined under oath or upon affirmation as to the prospective juror's qualifications. The court may permit the attorney for the defendant, or the defendant if appearing pro se, and the attorney for the state to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the state and defense to supplement the examination by further inquiry. Nothing in this rule shall limit the court's discretion, with timely notice to the parties at anytime prior to trial, to allow the examination of all prospective jurors in the array or, in the alternative, to permit individual examination of each prospective juror seated on a panel, prior to any challenges for cause or peremptory challenges.

#### (C) Challenge for cause.

A person called as a juror may be challenged for the following causes:

(1) That the juror has been convicted of a crime which by law renders the juror disqualified to serve on a jury.

(2) That the juror is a chronic alcoholic, or drug dependent person.

(3) That the juror was a member of the grand jury that found the indictment in the case.

(4) That the juror served on a petit jury drawn in the same cause against the same defendant, and the petit jury was discharged after hearing the evidence or rendering a verdict on the evidence that was set aside.

(5) That the juror served as a juror in a civil case brought against the defendant for the same act.

(6) That the juror has an action pending between him or her and the State of Ohio or the defendant.

(7) That the juror or the juror's spouse is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against the juror.

(8) That the juror has been subpoenaed in good faith as a witness in the case.

(9) That the juror is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that the juror will render an impartial verdict according to the law and the evidence submitted to the jury at the trial.

(10) That the juror is related by consanguinity or affinity within the fifth degree to the person alleged to be injured or attempted to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted; or to the defendant.

(11) That the juror is the person alleged to be injured or attempted to be injured by the offense charged, or the person on whose complaint the prosecution was instituted, or the defendant.

(12) That the juror is the employer or employee, or the spouse, parent, son, or daughter of the employer or employee, or the counselor, agent, or attorney, of any person included in division (B)(11) of this rule.

(13) That English is not the juror's native language, and the juror's knowledge of English is insufficient to permit the juror to understand the facts and the law in the case.

(14) That the juror is otherwise unsuitable for any other cause to serve as a juror.

The validity of each challenge listed in division (B) of this rule shall be determined by the court.

(D) Peremptory challenges.

In addition to challenges provided in division (C) of this rule, if there is one defendant, each party peremptorily may challenge three prospective jurors in misdemeanor cases, four prospective jurors in felony cases other than capital cases, and six prospective jurors in capital cases. If there is more than one defendant, each defendant peremptorily may challenge the same number of prospective jurors as if the defendant was the sole defendant.

In any case where there are multiple defendants, the prosecuting attorney peremptorily may challenge a number of prospective jurors equal to the total peremptory challenges allowed all defendants. In case of the consolidation of any indictments, informations, or complaints for trial, the consolidated cases shall be considered, for purposes of exercising peremptory challenges, as though the defendants or offenses had been joined in the same indictment, information, or complaint.

(E) Manner of exercising peremptory challenges.

Peremptory challenges shall be exercised alternately, with the first challenge exercised by the state. The failure of a party to exercise a peremptory challenge constitutes a waiver of that challenge, but does not constitute a waiver of any subsequent challenge. However, if all parties, alternately and in sequence, fail to exercise a peremptory challenge, the joint failure constitutes a waiver of all peremptory challenges.

A prospective juror peremptorily challenged by either party shall be excused.

Nothing in this rule shall limit the court's discretion to allow challenges under this division or division (D) of this rule to be made outside the hearing of prospective jurors.

(F) Challenge to array.

The prosecuting attorney or the attorney for the defendant may challenge the array of petit jurors on the ground that it was not selected, drawn or summoned in accordance with law. A challenge to the array shall be made before the examination of the jurors pursuant to division (A) of this rule and shall be tried by the court.

No array of petit jurors shall be set aside, nor shall any verdict in any case be set aside because the jury commissioners have returned such jury or any juror in any informal or irregular manner, if in the opinion of the court the irregularity is unimportant and insufficient to vitiate the return.

(G) Alternate jurors.

(1) Non-capital cases.

The court may direct that not more than six jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same oath, and have the same functions, powers, facilities, and privileges as the regular jurors. The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew. Each party is entitled to one peremptory challenge in addition to those otherwise allowed if one or two alternate jurors are to be impaneled, two peremptory challenges if three or four alternate jurors are to be impaneled, and three peremptory challenges if five or six alternative jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and the

other peremptory challenges allowed by this rule may not be used against an alternate juror.

(2) Capital cases.

The procedure designated in division (G)(1) of this rule shall be the same in capital cases, except that any alternate juror shall continue to serve if more than one deliberation is required. If an alternate juror replaces a regular juror after a guilty verdict, the court shall instruct the alternate juror that the juror is bound by that verdict.

(H) Control of juries.

(1) Before submission of case to jury.

Before submission of a case to the jury, the court, upon its own motion or the motion of a party, may restrict the separation of jurors or may sequester the jury.

(2) After submission of case to jury.

(a) Misdemeanor cases.

After submission of a misdemeanor case to the jury, the court, after giving cautionary instructions, may permit the separation of jurors.

(b) Non-capital felony cases.

After submission of a non-capital felony case to the jury, the court, after giving cautionary instructions, may permit the separation of jurors during any period of court adjournment or may require the jury to remain under the supervision of an officer of the court.

(c) Capital cases.

After submission of a capital case to the jury, the jury shall remain under the supervision of an officer of the court until a verdict is rendered or the jury is discharged by the court.

(3) Separation in emergency.

Where the jury is sequestered or after a capital case is submitted to the jury, the court may, in an emergency and upon giving cautionary instructions, allow temporary separation of jurors.

(4) Duties of supervising officer.

Where jurors are required to remain under the supervision of an officer of the court, the court shall make arrangements for their care, maintenance and comfort.

When the jury is in the care of an officer of the court and until the jury is discharged by the court, the officer may inquire whether the jury has reached a verdict, but shall not:

(a) Communicate any matter concerning jury conduct to anyone except the judge or;

(b) Communicate with the jurors or permit communications with jurors, except as allowed by court order.

(I) Taking of notes by jurors.

The court, after providing appropriate cautionary instructions, may permit jurors who wish to do so to take notes during a trial. If the court permits the taking of notes, notes taken by a juror may be carried into deliberations by that juror. The court shall require that all juror notes be collected and destroyed promptly after the jury renders a verdict.

(J) Juror questions to witnesses.

The court may permit jurors to propose questions for the court to ask of the witnesses. If the court permits jurors to propose questions, the court shall use procedures that minimize the risk of prejudice, including all of the following:

- (1) Require jurors to propose any questions to the court in writing;
- (2) Retain a copy of each proposed question for the record;
- (3) Instruct the jurors that they shall not display or discuss a proposed question with other jurors;
- (4) Before reading a question to a witness, provide counsel with an opportunity to object to each question on the record and outside the hearing of the jury;
- (5) Read the question, either as proposed or rephrased, to the witness;
- (6) Permit counsel to reexamine the witness regarding a matter addressed by a juror question;
- (7) If a question proposed by a juror is not asked, instruct the jurors that they should not draw any adverse inference from the court's refusal to ask any question proposed by a juror.

OHIO CRIM.R. 29

Motion for acquittal

(A) Motion for judgment of acquittal.

The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

(B) Reservation of decision on motion.

If a motion for a judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict, or after it returns a verdict of guilty, or after it is discharged without having returned a verdict.

(C) Motion after verdict or discharge of jury.

If a jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within fourteen days after the jury is discharged or within such further time as the court may fix during the fourteen day period. If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal. It shall not be a prerequisite to the making of such motion that a similar motion has been made prior to the submission of the case to the jury.

## RULES OF EVIDENCE

### OHIO EVID.R. 403

#### (A) Exclusion mandatory.

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

#### (B) Exclusion discretionary.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence

### OHIO EVID.R. 404

#### (A) Character evidence generally.

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, subject to the following exceptions:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable.

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable.

(3) Character of witness. Evidence of the character of a witness on the issue of credibility is admissible as provided in Rules 607, 608, and 609.

#### (B) Other crimes, wrongs or acts.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this rule shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

OHIO EVID.R. 606

(A) At the trial.

A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(B) Inquiry into validity of verdict or indictment.

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

OHIO EVID.R. 607

(A) Who May Impeach.

The credibility of a witness may be attacked by any party except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage. This exception does not apply to statements admitted pursuant to Evid.R. 801(D)(1)(a), 801(D)(2), or 803.

(B) Impeachment; reasonable basis.

A questioner must have a reasonable basis for asking any question pertaining to impeachment that implies the existence of an impeaching fact.

OHIO EVID.R. 612

If a witness uses a writing to refresh memory for the purpose of testifying, either: (1) while testifying; or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing. The adverse party is also entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony

the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

#### OHIO EVID.R. 801

The following definitions apply under this article:

(A) Statement.

A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(B) Declarant.

A "declarant" is a person who makes a statement.

(C) Hearsay.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(D) Statements which are not hearsay.

A statement is not hearsay if:

(1) Prior statement by witness.

The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is (a) inconsistent with declarant's testimony, and was given under oath subject to cross-examination by the party against whom the statement is offered and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive, or (c) one of identification of a person soon after perceiving the person, if the circumstances demonstrate the reliability of the prior identification.

(2) Admission by party-opponent.

The statement is offered against a party and is (a) the party's own statement, in either an individual or a representative capacity, or (b) a statement of which the party has manifested an adoption or belief in its truth, or (c) a statement by a person authorized by the party to make a statement concerning the subject, or (d) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made

during the existence of the relationship, or (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy.

#### OHIO EVID.R. 803

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) Present sense impression.

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness.

(2) Excited utterance.

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing, mental, emotional, or physical condition.

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment.

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection.

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown by the testimony of the witness to have been made or adopted when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity.

A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or

circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in record kept in accordance with the provisions of paragraph (6).

Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports.

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics.

Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirement of law.

(10) Absence of public record.

Testimony--or a certification under Evid.R. 901(B)(10)--that a diligent search failed to disclose a public record or statement if:

(a) the testimony or certification is admitted to prove that

(i) the record or statement does not exist; or

(ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(b) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice --unless the court sets a different time for the notice or the objection.

(11) Records of religious organizations.

Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates.

Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family Records.

Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property.

The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property.

A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents.

Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications.

Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned Treatises.

To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history.

Reputation among members of the declarant's family by blood, adoption, or marriage or among the declarant's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy,

relationship by blood, adoption or marriage, ancestry, or other similar fact of the declarant's personal or family history.

(20) Reputation concerning boundaries or general history.

Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character.

Reputation of a person's character among the person's associates or in the community.

(22) Judgment of previous conviction.

Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of no contest or the equivalent plea from another jurisdiction), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family, or general history, or boundaries.

Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

## Other Authorities

### *United Nations Charter*

#### Chapter I

#### Article 1

The Purposes of the United Nations are:

1. \* \* \*

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

### *International Convention on the Elimination of All Forms of Racial Discrimination*

#### Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall

in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

*International Covenant on Civil and Political Rights*

Article 2.

1. Each State Party to the present Covenant undertakes to respect to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.