

1 The State of Ohio, Appellee, v. Garner, Appellant.

2 [Cite as State v. Garner (1995), \_\_\_\_\_ Ohio St. 3d \_\_\_\_\_.]

3 *Criminal law -- Aggravated murder -- Death penalty*  
4 *upheld, when.*

5 (No. 94-1964 -- Submitted July 12, 1995 -- Decided November 22,  
6 1995.)

7 Appeal from the Court of Appeals for Hamilton County, No.  
8 C-920864.

9 In the pre-dawn hours of January 26, 1992, three fires were  
10 intentionally set in the apartment of Addie F. Mack at 1969 Knob Court in  
11 Cincinnati while Mack was being treated at a local hospital emergency  
12 room. As a result, five children who had been sleeping on the second  
13 floor of the apartment died of smoke inhalation. Mack's oldest child, Rod  
14 (age thirteen), survived by escaping through a window. He was found at  
15 the scene by police officers: crying, upset and shoeless on the bitterly  
16 cold January night.

1           Later that morning, police interviewed Thomas J. Tolliver, a cab  
2 driver for the Yellow Cab Company. Investigators had been led to Tolliver  
3 based upon information provided by two police squad car officers who  
4 had observed a young man walking to a Yellow Cab waiting outside the  
5 1969 Knob Court address just prior to the time the fire was reported.

6           Tolliver provided police with an address on Burnet Avenue to which  
7 he had delivered his previous night's fare, who had identified himself as  
8 "William." Tolliver described picking "William" up at the same hospital  
9 emergency room where Mack had been treated, driving to 1969 Knob  
10 Court, and waiting while "William" entered the apartment and eventually  
11 brought several items to the cab. Tolliver told police he then drove his  
12 fare to a United Dairy Farmers ("UDF") convenience store and waited  
13 while "William" purchased several items. Police recovered a television  
14 set from Tolliver which "William" had removed from Knob Court, and  
15 which Tolliver accepted as collateral in lieu of payment of cab fare when  
16 "William" told him he could not pay cash.

1           Police obtained surveillance videotape from the UDF and showed  
2 Tolliver still photographs taken from it. Tolliver confirmed that the  
3 individual shown therein was his fare from the previous evening, although  
4 Tolliver made his identification on the basis of clothing rather than facial  
5 features. During this questioning, Tolliver was shown three photo arrays,  
6 two of which contained police photographs of appellant, William L.  
7 Garner. Tolliver identified Garner as the "William" he had transported the  
8 night before in both of the two photo arrays which included Garner's  
9 photograph.

10           As a result of the information received from Tolliver, police obtained  
11 a search warrant and searched the Burnet Avenue residence where  
12 "William" had been taken by Tolliver. Police there recovered several  
13 items which matched descriptions Tolliver had given of items his  
14 passenger had brought to the cab from the Knob Court address. Police  
15 recovered a VCR, a Sony "boom box," and a portable telephone, as well  
16 as a pair of gloves, a set of keys later identified as Addie Mack's, and

1 copies of her children's birth certificates. Police photographed a UDF  
2 grocery bag in a trash can at the residence. During the search police  
3 arrested Garner, in connection with the fire, and advised him of his  
4 Miranda rights.

5 Garner was interviewed at police headquarters, where he provided  
6 a taped statement in which he described events of the previous night. He  
7 recounted having found Mack's purse near a pay telephone in the  
8 emergency room area of the hospital, and obtaining Mack's address, food  
9 stamps, and keys from the purse. He admitted calling a cab and being  
10 transported to the Knob Court address. Garner acknowledged that his  
11 intent in going to Mack's apartment was to "take her things." Garner  
12 described going through the rooms in the apartment, and noticing that a  
13 back bedroom was "full o[f] girls." He described talking to one girl who  
14 asked him for water, and providing it to her. Garner said the girl then  
15 turned on a television set for a few minutes before going back to the room

1 where the other girls were sleeping. Garner also admitted having been in  
2 the bedroom in which the two boys were sleeping.

3 Garner admitted taking a television set, a VCR, a telephone, and a  
4 "radio box" from the apartment, and putting them in the cab. He  
5 described telling the driver that he and his girlfriend had a "fallin[g] out,"  
6 forcing him to move his possessions. He admitted setting one fire at  
7 Mack's apartment by throwing a lighted match onto a couch on the first  
8 floor, and confirmed watching a small flame ignite in the couch. He then  
9 left the apartment with the final stolen item (the television) and directed  
10 the cab driver to make a stop at a UDF convenience store. Garner said  
11 he there purchased several items before instructing the driver to take him  
12 to his residence at 3250 Burnet Avenue.

13 When asked why he had set the couch on fire, Garner stated that  
14 he had intended to create a smoke screen and to cover fingerprints he  
15 suspected he had left on the couch. He told police that he believed the  
16 children would smell the smoke and get out of the house, particularly as

1 he believed one child to be awake, and that all of the children were old  
2 enough to get out.

3 Rod Mack, the sole survivor of the fire, testified that he and his  
4 friend, Richard Gaines, were sleeping in one of the upstairs bedrooms on  
5 the night of the fire, and that all four girls were sleeping together in a  
6 second bedroom. Mack testified that the "radio" (Sony boom box) found  
7 by police at appellant's residence was his, and had been in his bedroom  
8 on the night of the fire. He testified that the receiver portion of a two-  
9 piece cordless phone (later recovered during the police search of  
10 Garner's residence) had been located in the bedroom where all of the  
11 girls had been sleeping. He testified that the VCR recovered from  
12 appellant's residence had been located in a third bedroom, his mother's  
13 room.

14 Rod described being awakened by smoke, seeing fire in the  
15 hallway outside his bedroom, and hearing his sisters screaming in their  
16 room. Finding the hallway blocked by fire, Rod told his friend Richard to

1 follow him out a bedroom window. As Rod exited through the window,  
2 Richard instead opened the door to the hall. As Rod continued his  
3 escape, he heard Richard fall to the floor, where his body was ultimately  
4 found by firefighters.

5 A smoke detector was found in the apartment after the fire, but did  
6 not contain a battery, and was thus inoperable.

7 Following the fire, Cincinnati Fire Division investigator Peter Frye  
8 concluded that, in addition to an intentional fire having been set in the  
9 living room couch, two other fires were intentionally set in the apartment.  
10 One fire was set in a bed in the mother's unoccupied bedroom, and one  
11 in a bed in the remaining unoccupied fourth bedroom. The latter two fires  
12 had smoldered but eventually gone out. Frye testified that the fire  
13 originating in the couch almost totally destroyed the contents of the living  
14 room, and resulted in heavy smoke filling the entire apartment.

15 Garner was indicted and charged with five counts of aggravated  
16 felony-murder (R.C. 2903.01[B]). Each count included three death penalty

1 specifications. In addition, Garner was charged with aggravated burglary  
2 (R.C. 2911.11), and two counts of aggravated arson (R.C. 2909.02). A  
3 jury found Garner guilty of all charges, including the death penalty  
4 specifications. Thereafter the jury returned a recommendation that he be  
5 sentenced to death, and that recommendation was accepted by the trial  
6 court.

7 The court of appeals affirmed Garner's convictions and death  
8 sentence, and the cause is now before this court upon an appeal as of  
9 right.

10

11 Joseph T. Deters, Hamilton County Prosecuting Attorney, and  
12 Christian J. Schaefer, Assistant Prosecuting Attorney, for appellee.

13 H. Fred Hoefle and Robert J. Ranz, for appellant.

14

15 Moyer, C.J. Appellant has raised twenty-three propositions of  
16 law. We have reviewed each and, for the reasons stated below, we find



1 that none justifies reversal of appellant's conviction of the crimes of  
2 aggravated murder, aggravated burglary and aggravated arson. We  
3 have fulfilled our responsibilities to independently review the record,  
4 weigh the aggravating circumstances against the mitigating factors, and  
5 examine the proportionality of a sentence of death in this case. Upon full  
6 review of the record we affirm appellant's convictions and death  
7 sentence.

8 I

9 *Failure to Merge Specifications*

10 The jury found Garner guilty of three statutory death penalty  
11 specifications as to each murder: engaging in a course of conduct on  
12 January 26, 1992 involving the killing of two or more persons (R.C.  
13 2929.04[A][5]); committing the aggravated murders for the purpose of  
14 escaping detection, apprehension, trial or punishment for another offense  
15 (R.C. 2929.04[A][3]); and committing the aggravated murders, as a  
16 principal offender, while committing or fleeing immediately after

1 committing aggravated burglary and aggravated arson (R.C.  
2 2929.04[A][7]). Garner claims reversible error in the trial court's denial of  
3 his motion to merge the R.C. 2929.04(A)(3) and (A)(7) specifications, and  
4 to instruct the jury that they should be weighed as one aggravating  
5 circumstance in determining the appropriate sentence.

6 The law governing our resolution of this contention is set forth in the  
7 fifth paragraph of the syllabus of State v. Jenkins<sup>1</sup> (1984), 15 Ohio St.3d  
8 164, 15 OBR 311, 473 N.E.2d 264, which provides:

9 "In the penalty phase of a capital prosecution, where two or more  
10 aggravating circumstances arise from the same act or indivisible course  
11 of conduct and are thus duplicative, the duplicative aggravating  
12 circumstances will be merged for purposes of sentencing. Should this  
13 merging of aggravating circumstances take place upon appellate review  
14 of a death sentence, resentencing is not automatically required where the  
15 reviewing court independently determines that the remaining aggravating  
16 circumstances outweigh the mitigating factors beyond a reasonable doubt

1 and that the jury's consideration of duplicative aggravating circumstances  
2 in the penalty-phase did not affect the verdict."

3 We believe it is a necessary corollary to Jenkins that, where a jury  
4 in the guilt phase of a capital trial has found the defendant guilty of  
5 duplicative specifications, a trial court should instruct the jury in the  
6 penalty phase that those duplicative specifications must be considered  
7 merged for purposes of weighing the aggravating circumstances against  
8 the mitigating factors. In this case, no such instruction was given. Thus,  
9 pursuant to Jenkins, in order to determine whether that omission  
10 constituted reversible error, we must engage in a two-pronged analysis.  
11 We first look to see whether the specifications at issue "ar[is]e from the  
12 same act or indivisible course of conduct," and were thus, in fact,  
13 duplicative. If this initial inquiry is answered in the affirmative, Jenkins  
14 instructs us to proceed to determine whether the jury's penalty-phase  
15 consideration of those duplicative aggravating circumstances affected its  
16 verdict, and to independently determine whether the merged aggravating

1 circumstances outweigh the mitigating factors beyond a reasonable  
2 doubt.

3         The court of appeals correctly concluded that the specifications  
4 based on R.C. 2929.04 (3) and (7) arose from an indivisible course of  
5 conduct, *i.e.*, Garner's actions in burglarizing and setting fire to the  
6 residence at 1969 Knob Court. Having reviewed the record in detail, we  
7 reject the state's factual contention that Garner had completed the theft  
8 offense and then initiated a second, separate course of conduct in setting  
9 the fires. The record instead justifies the conclusion that Garner set the  
10 fires before exiting the apartment for the final time with the last stolen  
11 item, the television. His actions in burglarizing the residence and  
12 attempting to cover up his conduct by setting the fires were inextricably  
13 intertwined, and thereby constituted one indivisible course of conduct.  
14 This conclusion obtains even though Garner may have had multiple  
15 motives in setting the fire, *i.e.*, he may have intended both to eliminate  
16 possible witnesses as well as to destroy fingerprints or other evidence of

1 his presence. Similarly, the fact that the children did not actually die until  
2 some time after Garner left the premises does not require a finding that  
3 the specifications were non-duplicative, as the cause of the deaths, *i.e.*,  
4 the ignition of the fires, occurred in conjunction of time and place with the  
5 burglary and arson. We conclude that the defendant's motion to merge  
6 the specifications in this case for purposes of sentencing should have  
7 been granted, and the jury should have been instructed accordingly.

8       Having satisfied the first prong of the Jenkins analysis, we next  
9 determine whether the jury's consideration of duplicative aggravating  
10 circumstances in the penalty phase affected its verdict. We find beyond a  
11 reasonable doubt that the trial court's failure to instruct the jury that the  
12 duplicative specifications should be considered merged did not influence  
13 the jury to recommend death whereas it would otherwise have  
14 recommended life.

15       In coming to this conclusion we note that, where a verdict of guilt  
16 has been returned as to even a single R.C. 2929.04 (A) specification, a

1 jury is required to consider a wide range of evidence, including evidence  
2 of the nature and circumstances of the crime, in determining whether the  
3 aggravating circumstances outweigh the mitigating factors. R.C.  
4 2929.03(D)(1) and (2); State v. Gumm (1995), 73 Ohio St.3d 413, 653  
5 N.E. 2d 253. That is, merger of the duplicative circumstances in this case  
6 would not have significantly changed the nature of the evidence the jury  
7 was statutorily required to consider in making its recommendation as to a  
8 possible sentence of death. In this case the jury was not expressly  
9 instructed that its finding of guilt of multiple specifications should be  
10 deemed to increase the weight it accorded the aggravating  
11 circumstances. Cf. State v. Penix (1987), 32 Ohio St.3d 369, 372, 513  
12 N.E.2d 744, 747, discussing Jenkins. We do not believe that the weight  
13 of the aggravating circumstances was inflated as a result of the trial  
14 court's failure to instruct the jury that it was to consider the duplicative  
15 specifications merged.

1 Application of the Jenkins test does not violate Garner's right under  
2 the Ohio Constitution to trial by jury. See State v. Gumm, supra, at 429-  
3 430, 653 N.E.2d at 268. Similarly, we affirm our consistent precedent  
4 that no constitutional violation occurs where errors found to have  
5 occurred in the penalty phase of a capital trial are deemed cured by the  
6 independent review of this court. State v. Combs (1991), 62 Ohio St.3d  
7 278, 286, 581 N.E.2d 1071, 1079. See, also, Clemons v. Mississippi  
8 (1990), 494 U.S. 738, 745, 110 S.Ct. 1441, 1446, 108 L.Ed.2d 725, 736.

9 II

10 *Propriety of Instruction on Mental Disease*

11 *or Defect as Mitigation*

12 In State v. DePew (1988), 38 Ohio St.3d 275, 528 N.E.2d 542, this  
13 court held that, pursuant to R.C. 2929.04(C), "it is the defendant who has  
14 the right to present and argue the mitigating factors. If he does not do so,  
15 no comment on any factors not raised by him is permissible." Id. at 289,  
16 528 N.E.2d at 557. Similarly, the trial court should only instruct the jury

1 on those mitigating factors raised by the defense. State v. Hicks (1989),  
2 43 Ohio St.3d 72, 77, 538 N.E.2d 1030, 1036, at fn. 3. At issue in this  
3 case is whether the defense "raised" the mitigating factor set forth in  
4 R.C. 2929.04(B)(3) -- whether, as the result of a mental disease or  
5 defect, the offender lacked substantial capacity to appreciate the  
6 criminality of his conduct or to conform his conduct to the requirements of  
7 the law at the time he committed the offenses.

8 At the beginning of the mitigation phase of the trial, defense  
9 counsel requested the court to include an instruction on the R.C.  
10 2929.04(B)(3) mitigating factor. As part of its mitigation case the defense  
11 called Dr. Nancy Schmidtgoessling, a psychologist, and Dr. Jeffrey  
12 Smalldon, a clinical psychologist. Both psychologists testified at length  
13 about their assessments of Garner's intelligence, overall mental condition  
14 and psychological health. Dr. Smalldon testified that, in his professional  
15 opinion, Garner suffered from relatively mild brain impairment, residual  
16 attention deficit disorder, probable marijuana abuse, borderline



1 intellectual functioning, and mixed personality disorder with borderline  
2 antisocial features. On cross-examination Dr. Smalldon testified that  
3 Garner's mild organic dysfunction caused him to have problems in  
4 exercising good judgment and complex decision making, but further  
5 acknowledged that Garner had scored within a nonimpaired range on  
6 tests designed to measure problem-solving judgment, abstract reasoning,  
7 concept formation, mental flexibility and mental deficiency.

8 After the psychologists had testified, the defense withdrew its  
9 request for jury instructions on the R.C. 2929.04(B)(3) mitigating factor,  
10 stating that "[w]e are not going to assert that particular mitigating  
11 circumstance." However, in first requesting the (B)(3) instruction, and  
12 calling expert witnesses to testify to the mental condition of the  
13 defendant, the defense had already "raised" the (B)(3) mitigating factor as  
14 that term was used in DePew. We will not sanction a procedure whereby  
15 the defense may effectively control the court's charge by representing  
16 that it is abandoning a particular mitigating factor based on an evaluation

1 that the testimony of its mitigation witnesses was unfavorable. The  
2 defense indeed raised R.C. 2929.04(B)(3) as possible mitigation, and the  
3 trial court did not err in including that statutory mitigating factor in its  
4 instructions.

### 5 III

#### 6 *Rejection of Proposed Instructions on*

#### 7 *Residual Doubt and Mercy*

8 The trial court overruled a defense motion to instruct the jury that  
9 "residual doubt or lingering doubts about the guilt of the defendant" could  
10 be considered a mitigating factor. Similarly, the trial court refused to give  
11 the following instruction proffered by the defense: "[W]hile your decision  
12 should not be based merely upon sympathy, you may extend mercy by  
13 returning a verdict for life imprisonment, where such a verdict is  
14 appropriate, considering the evidence presented in mitigation, and the  
15 mitigating factors which you find to exist." Garner asserts in this court  
16 that failure to use the proffered instructions constituted reversible error.

1           Residual doubt of guilt has been defined as "a lingering uncertainty  
2 about facts, a state of mind that exists somewhere between `beyond a  
3 reasonable doubt' and `absolute certainty.'" Franklin v. Lynaugh (1988),  
4 487 U.S. 164, 188, 108 S. Ct. 2320, 2335, 101 L.Ed. 2d 155, 175  
5 (O'Connor, J., concurring). This court has previously recognized residual  
6 doubt to be a proper subject of jury consideration during the penalty  
7 phase of a capital case. State v. Gillard (1988), 40 Ohio St.3d 226, 234,  
8 533 N.E.2d 272, 281; State v. Grant (1993), 67 Ohio St.3d 465, 481, 620  
9 N.E.2d 50, 67-68. See, also, State v. Watson (1991), 61 Ohio St.3d 1,  
10 17, 572 N.E.2d 97, 111. We note that this view is not uniformly shared.  
11 See, e.g., State v. Watson, supra (Resnick, J., concurring); Franklin v.  
12 Lynaugh, supra (O'Connor, J., concurring).

13           The overwhelming weight of authority, even in jurisdictions that  
14 recognize a capital defendant's right to argue residual doubt, is that a  
15 defendant is not entitled to an *instruction* on residual doubt. See, e.g.,  
16 Smith v. Black (C.A. 5, 1990), 904 F.2d 950, 968; Franklin v. Lynaugh,

1 supra, at 173-174, 108 S.Ct. at 2326-2328, 101 L.Ed.2d at 155, 165-166.  
2 Cf. Lockhart v. McCree (1986), 476 U.S. 162, 181, 106 S.Ct. 1758, 1769,  
3 90 L.Ed.2d 137, 153; Carroll v. State (Ala. Crim. App. 1992), 599 So.2d  
4 1253, 1271; People v. Johnson (1992), 3 Cal.4th 1183, 1252, 14  
5 Cal.Rptr.2d 702, 741, 842 P.2d 1, 40. We agree with this authority.  
6 Garner was not entitled to an instruction identifying residual doubt as a  
7 mitigating factor.<sup>2</sup>

8 Similarly, precedent from this court precludes Garner's argument  
9 that he was entitled to an instruction that the jury could lawfully extend  
10 mercy in returning its sentencing verdict. In State v. Lorraine (1993), 66  
11 Ohio St.3d 414, 613 N.E.2d 212, we held that a capital defendant is not  
12 entitled to an instruction that mercy may be deemed a mitigating factor.  
13 In this case the trial judge adequately instructed the jury that it might  
14 consider the mitigating factors to be those circumstances which "in  
15 fairness and mercy may be considered as extenuating or reducing the  
16 degree of moral culpability." Such a charge constitutes adequate

1 instruction concerning the extension of mercy to a capital defendant.  
2 State v. Grant, 67 Ohio St.3d at 481, 620 N.E.2d at 67, citing State v.  
3 Jenkins, supra.

4 The trial court did not err in rejecting the defendant's proffered  
5 instructions on residual doubt and mercy.

6 IV

7 *Alleged Ex Post Facto Application of*

8 *New Judicial Doctrine*

9 Garner argues that, prior to the 1993 case of State v. Lorraine,  
10 supra, Ohio law recognized mercy as a mitigating factor, citing State v.  
11 Rogers (1986), 28 Ohio St.3d 427, 434, 28 OBR 480, 486, 504 N.E.2d  
12 52, 58, and State v. Zuern (1987), 32 Ohio St.3d 56, 63-64, 512 N.E.2d  
13 585, 593. Garner contends that Lorraine constituted a judicial change in  
14 this law which cannot, consistent with due process, be applied against  
15 him, as his trial occurred prior to the Lorraine decision. The argument is  
16 not well taken.

1           The United States Supreme Court has acknowledged that "[a]n  
2 unforeseeable judicial enlargement of a criminal statute, applied  
3 retroactively, operates precisely like an ex post facto law \* \* \*," Bouie v.  
4 Columbia (1964), 378 U.S. 347, 353, 84 S. Ct. 1697, 1702 12 L. Ed. 2d  
5 894, 899, and can thereby violate the Due Process Clause of the  
6 Fourteenth Amendment to the United States Constitution. This is so  
7 even though the constitutional prohibition against ex post facto laws is  
8 applicable only to legislative enactments. Marks v. United States (1977),  
9 430 U.S. 188, 191-192, 97 S.Ct. 990, 992-993, 51 L. Ed. 2d 260, 265.  
10 Accord State v. Webb (1994), 70 Ohio St.3d 325, 638 N.E.2d 1023.

11           We reject Garner's contention, however, that Rogers and Zuern  
12 stand for the proposition that, prior to Lorraine, mercy was a recognized  
13 mitigating factor in Ohio. In Rogers, the court simply noted that "[defense  
14 counsel] certainly has the right to plead for mercy." Rogers, 28 Ohio  
15 St.3d at 434, 28 OBR at 486, 504 N.E.2d at 58. This dictum does not  
16 constitute recognition of mercy as a mitigating factor. Nor did Zuern

1 recognize mercy as a mitigating factor, but rather merely recognized that  
2 an Ohio jury "is not precluded from extending mercy to a defendant."  
3 Zuern, 32 Ohio St.3d at 63-64, 512 N.E.2d at 592-593. Accord State v.  
4 Mills (1992), 62 Ohio St.3d 357, 372, 582 N.E.2d 972, 986. In Lorraine  
5 we rejected the contention that a capital defendant was entitled to a jury  
6 instruction concerning mercy. There being no judicial precedent prior to  
7 Lorraine recognizing a right to an instruction on either mercy or residual  
8 doubt, no change of law by judicial construction occurred, and no cause  
9 exists for engaging in an ex-post-facto analysis as to these issues.

10 Consistent with the jury instructions, defense counsel asked the jury  
11 during his summation to consider the mitigating quality of the evidence in  
12 a spirit of "fairness and mercy," and indeed, defense counsel invoked the  
13 jury "to open your hearts for mercy." No objection was interposed to  
14 these arguments. Because Garner was permitted to plead for mercy, he  
15 has no standing to assert, and we have no cause to determine, the claim

1 that Lorraine changed prior law to preclude defense counsel in a capital  
2 case from arguing for mercy.

3 V

4 *Prosecutorial Misconduct*

5 Garner contends that the prosecutors' final argument to the jury at  
6 the conclusion of the penalty phase constituted prosecutorial misconduct  
7 so egregious as to warrant reversal of the death sentence. We disagree.

8 Garner objects to what he contends was impermissible argument of  
9 nonstatutory aggravating circumstances. His position is foreclosed by our  
10 recognition in State v. Gumm, supra, that prosecutorial argument based  
11 on the nature and circumstances of the crime as disclosed by the  
12 evidence is permissible. For example, the prosecutor could legitimately  
13 refer to the screams of the girls who died in the fire, as that fact was  
14 testified to by the only survivor of the fire, Rod Mack.

15 We have examined the record of both the prosecutors' conduct  
16 during voir dire and in closing arguments and we do not find that the



1 prosecutors who tried this case argued facts not in evidence, misstated  
2 the law, or engaged in inflammatory rhetoric so as to justify the  
3 conclusion that Garner was prejudicially deprived of a fair trial. Cf. State  
4 v. Lott (1990), 51 Ohio St.3d 160, 166, 555 N.E.2d 293, 300; State v. Fox  
5 (1994), 69 Ohio St.3d 183, 189, 631 N.E.2d 124, 129.

6 VI

7 *Alleged Prejudicial Reference to Arrest Record of Defendant*

8 Garner became a suspect in this case as a result of Tolliver's  
9 having informed police that he had delivered his fare to 3250 Burnet  
10 Avenue on the night of the fire. A police investigator testified that, when  
11 given this information, he sought further information as to the occupants  
12 of that residence, and "ran the phone number that was at the residence  
13 at 3250 Burnett [sic] Avenue and it came back William Garner *using that*  
14 *address in one of his arrests.*" (Emphasis added.) Defense counsel  
15 immediately objected to this reference to Garner's prior police record, and  
16 moved for a mistrial. The court refused to grant a mistrial, but sustained

1 the defense objection in the presence of the jury, and expressly instructed  
2 the jury to disregard the officer's statement.

3 The grant or denial of an order of mistrial lies within the sound  
4 discretion of the trial court. State v. Glover (1988), 35 Ohio St.3d 18, 517  
5 N.E.2d 900; State v. Widner (1981), 68 Ohio St.2d 188, 190, 22 O.O.3d  
6 430, 431, 429 N.E.2d 1065, 1066-1067. A jury is presumed to follow the  
7 instructions, including curative instructions, given it by a trial judge. See  
8 State v. Loza (1994), 71 Ohio St.3d 61, 75, 641 N.E. 1082, 1100, quoting  
9 State v. Henderson (1988), 39 Ohio St.3d 24, 33, 528 N.E.2d 1237, 1246.

10 Moreover, mistrials need be declared only when the ends of justice so  
11 require and a fair trial is no longer possible. State v. Franklin (1991), 62  
12 Ohio St.3d 118, 127, 580 N.E.2d 1, 9. In this case, the reference to the  
13 defendant's prior arrests was fleeting and was promptly followed by a  
14 curative instruction. The trial court did not abuse its discretion in failing to  
15 order a mistrial. Cf. State v. Glenn (1986), 28 Ohio St.3d 451, 455, 504

1 N.E.2d 701, 706; see State v. Warren (1990), 67 Ohio App.3d 789, 799,  
2 588 N.E.2d 905, 912.

3 VII

4 *Sufficiency of Evidence of Intent to Kill*

5 R.C. 2903.01 provides that guilt of aggravated murder is dependent  
6 upon establishment of a "specific intent of the [defendant] to have caused  
7 the death [of another] by proof beyond a reasonable doubt." At trial,  
8 Garner did not dispute that he was responsible for causing the fire at  
9 Mack's apartment. Garner's defense to the aggravated murder charge  
10 centered on his claim that he lacked the requisite *mens rea* element of  
11 intent to kill. The defense asserted, on the basis of Garner's taped  
12 confession, that he did not believe that the children would be killed but  
13 rather that he thought that they would awaken and escape. Garner  
14 argued that he should be found guilty only of the lesser-included offense  
15 of involuntary manslaughter, rather than aggravated murder.

1           The law has long recognized that intent, lying as it does within the  
2           privacy of a person's own thoughts, is not susceptible to objective proof.  
3           The law recognizes that intent can be determined from the surrounding  
4           facts and circumstances, and persons are presumed to have intended the  
5           natural, reasonable and probable consequences of their voluntary acts.  
6           State v. Carter (1995), 72 Ohio St.3d 545, 554, 651 N.E.2d 965, 974;  
7           State v. Johnson (1978), 56 Ohio St.2d 35, 39, 10 O.O. 3d 78, 80, 381  
8           N.E.2d 637, 640; State v. Thomas (1988), 40 Ohio St.3d 213, 217, 533  
9           N.E.2d 286, 290. Intent ““can never be proved by the direct testimony of  
10          a third person and it need not be. It must be gathered from the  
11          surrounding facts and circumstances \* \* \*.”” State v. Lott, 51 Ohio St.3d  
12          at 168, 555 N.E.2d at 302, quoting State v. Huffman (1936), 131 Ohio St.  
13          27, 5 O.O. 325, 1 N.E.2d 313, paragraph four of the syllabus. Similarly  
14          while guilt of aggravated murder requires proof of specific intent to kill,  
15          R.C. 2903.01 contemplates that such an intent may be inferred in a

1 felony-murder when the offense and the manner of its commission would  
2 be likely to produce death.

3 Appellant argues to this court that the evidence demonstrated no  
4 more than a thoughtless act by a nineteen-year-old who did not think  
5 about the potential consequences of his reckless acts. While this  
6 argument constitutes a plausible interpretation of the evidence, it was the  
7 jury's responsibility to determine Garner's intent as a matter of fact, and  
8 the jury rejected the defense interpretation of the evidence. When a  
9 defendant challenges the sufficiency of the evidence, "[t]he relevant  
10 inquiry is whether, after viewing the evidence in a light most favorable to  
11 the prosecution, any rational trier of fact could have found the essential  
12 elements of the crime proven beyond a reasonable doubt." State v.  
13 Jenks (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the  
14 syllabus; State v. Campbell (1994), 69 Ohio St.3d 38, 46, 630 N.E.2d  
15 339, 348. We will not second-guess the jury's finding. We unhesitatingly  
16 find that the natural, reasonable and probable consequence of Garner's

1 having set three separate fires in an apartment occupied by six children  
2 age thirteen and under is that those children would die. There was thus  
3 sufficient evidence to support the jury's finding that Garner possessed the  
4 requisite mental elements of the crime of aggravated murder.

## 5 VIII

### 6 *Miranda Issues*

7 Law enforcement officers were not required to inform Garner that  
8 he was potentially eligible for a death sentence prior to obtaining a valid  
9 waiver of the right to counsel. State v. Bell (1976), 48 Ohio St.2d 270,  
10 278, 2 O.O.3d 427, 431, 358 N.E.2d 556, 562; State v. Campbell, supra,  
11 at 46, 630 N.E.2d at 348. See, also, Colorado v. Spring (1987), 479 U.S.  
12 564, 577, 107 S. Ct. 851, 859, 93 L.Ed.2d 954, 968 (validity of waiver is  
13 not dependent upon the suspect being aware of the gravity of the  
14 offenses of which he is suspected).

15 Police acknowledged a time discrepancy on the Miranda rights form  
16 signed by the defendant. Garner signed and dated the form citing the

1 time of his waiver as 1:47 p.m. The advice-of-rights form, however,  
2 indicates the time of the waiver to be "1445 HRS" (2:45 p.m.). Appellant  
3 contends that this discrepancy raises the question whether he was  
4 interviewed prior to having validly waived his Sixth Amendment right to  
5 counsel.

6 We do not find this contention to be well founded. First, we note  
7 that appellant provided no rebuttal to the testimony of the interrogating  
8 police officer who made the "1445 HRS" notation that his mistaken use of  
9 military time on the form caused the discrepancy. Further, other officers  
10 testified that appellant was advised of his rights prior to giving the taped  
11 statement not only at the police station, but prior thereto at the time of his  
12 arrest. Moreover, the audiotape of appellant's confession contains  
13 appellant's acknowledgment that he had previously executed the Miranda  
14 waiver form.





1 the circumstances the identification is reliable even though the  
2 confrontation procedure was suggestive." State v. Parker (1990), 53  
3 Ohio St.3d 82, 87, 558 N.E.2d 1164, 1169, citing Manson v. Brathwaite  
4 (1976), 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140,154, and  
5 Neil v. Biggers (1972), 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d  
6 401, 411.

7 In this case the evidence overwhelmingly supports the conclusion  
8 that Tolliver's identification of William Garner as his fare was reliable.  
9 Significantly, Tolliver refused to identify "William" in the first array of  
10 photographs he was shown, which did not include a photograph of  
11 Garner. However, when shown the UDF surveillance videotape shortly  
12 thereafter, Tolliver immediately identified the individual shown therein as  
13 "William" based on match of clothing. Because Tolliver was unable to  
14 discern the facial features of "William" on the videotape, however,  
15 exposure to that videotape could not have predisposed Tolliver towards  
16 subsequently identifying a picture of Garner's face. Similarly, because

1 Tolliver identified Garner immediately upon being presented with the first  
2 array which included Garner's picture, the fact that Garner's picture  
3 appeared later in a second array could not have had a suggestive effect  
4 on Tolliver's initial photographic identification. Moreover, while only  
5 Garner was shown in the police photos as being 5'8", several of the other  
6 photos displayed men of heights falling within inches of 5'8", and Tolliver  
7 testified that his identification of Garner "wasn't because of his height in  
8 the background," but because "[t]his is the man that was in my cab."

9 Tolliver had contact with Garner for an extended period from the  
10 time he picked him up at the hospital at 4:45 a.m. until the time Garner  
11 was finally dropped off on Burnet Ave., approximately an hour later.  
12 Tolliver repeatedly testified that he watched "William's" actions closely, in  
13 part because he was concerned he was not going to be paid

14 Based on the totality of these circumstances the trial court properly  
15 deemed Tolliver's identification of Garner to be reliable and did not err in  
16 refusing to suppress it.

*Alleged Unreliability of Informant Tolliver*

Garner asserts that the search warrant authorizing search of Garner's residence was illegally obtained, having been issued based on information provided by an unreliable informant, Tolliver. Garner claims that the evidence obtained during the search should thus have been excluded.

In reviewing this contention, we look to the totality of the circumstances to determine whether Tolliver's information provided the municipal judge with a substantial basis for concluding that probable cause existed that contraband or evidence of a crime would be found at Garner's residence. State v. George (1989), 45 Ohio St.3d 325, 544 N.E.2d 640, at paragraph one of the syllabus, and citing Illinois v. Gates (1983), 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527. As a reviewing court we accord great deference to the judge's determination of the

1 existence of probable cause. George, supra, at paragraph two of the  
2 syllabus.

3 In this case Tolliver was neither a confidential nor anonymous  
4 informant repeating hearsay information to police in the form of a "tip."  
5 He was rather a direct, citizen eyewitness to the activities of William  
6 Garner at the scene of a crime. Information coming from a citizen  
7 eyewitness is presumed credible and reliable, and supplies a basis for a  
8 finding of probable cause in compliance with Gates. Accord People v.  
9 Hall (1987), 164 Ill.App.3d 770, 776, 518 N.E.2d 275, 280; Winters v.  
10 State (Tex. App.1995), 897 S.W.2d 938. Such individuals do not expect  
11 any gain or concession in exchange for the information they give to the  
12 police, and are less likely to produce false or untrustworthy information.  
13 See Jaben v. United States (1965), 381 U.S. 214, 85 S. Ct. 1365, 14 L.  
14 Ed. 2d 345; People v. Hall, supra. Moreover Tolliver did not initiate  
15 contact with police, but rather was identified as a potential witness by the  
16 police who sought him out for questioning as a consequence of its

1 independent criminal investigation. Cf. State v. Rodriguez (1992), 223  
2 Conn. 127, 141, 613 A.2d 211, 218-219. We would create an undue  
3 burden on the issuance of search warrants were we to impose a  
4 requirement that police provide evidence of past instances of reliability of  
5 citizen eyewitnesses such as Tolliver, who generally provide information  
6 to police only once. See, generally, 1 LaFare, Search and Seizure (2  
7 Ed. 1987), Section 3.4(a). We refuse to impose such a requirement.

8 Review of the totality of the circumstances results in the clear  
9 conclusion that the judge acted lawfully in issuing the search warrant at  
10 issue in this case.

## 11 XI

### 12 *Voir Dire Issues*

13 Garner asserts that at least four prospective jurors who were  
14 philosophically opposed to capital punishment were improperly excused  
15 from the venire based on the doctrine of Witherspoon v. Illinois (1968),  
16 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776, and in contravention of

1 R.C. 2945.25(C). We follow our existing precedent in rejecting his  
2 argument. See State v. Rogers, supra; State v. Beuke (1988), 38 Ohio  
3 St.3d 29, 38, 526 N.E.2d 274, 284.

4 All of the four prospective jurors referenced by appellant indicated  
5 in substance that they could not sign a verdict form recommending a  
6 death sentence and would be unable to follow the instructions of the court  
7 if those instructions required the signing of such a form. The judge  
8 appropriately recognized that the views of each prospective juror would  
9 ""prevent or substantially impair the performance of his duties as a juror  
10 in accordance with his instructions and his oath."" State v. Beuke, supra,  
11 at 38, 526 N.E.2d at 284, citing Wainwright v. Witt (1985), 469 U.S. 412,  
12 105 S.Ct. 844, 83 L.Ed.2d 841. The trial court did not err in excusing  
13 these prospective jurors for cause.

14 We further reject Garner's suggestion that due process required his  
15 being provided more than six peremptory challenges. We instead affirm  
16 our existing precedent to the contrary. See, e.g., State v. Greer (1988),

1 39 Ohio St.3d 236, 245-246, 530 N.E.2d 382, 395-396; State v. Carter,  
2 supra.

3 In addition, Garner was not denied the opportunity to intelligently  
4 exercise his peremptory challenges, nor impermissibly limited in his voir-  
5 dire questioning of prospective jurors. The trial court refused to allow  
6 counsel to ask prospective jurors whether they would "consider the youth  
7 of Mr. Garner if you had to go to that second [sentencing  
8 recommendation] phase as far as mitigating factor," based on the form of  
9 that question. However, the court allowed prospective jurors to be  
10 questioned as to whether they would follow instructions the court might  
11 later give them, including an instruction that youth should be considered  
12 as a mitigating factor. The ruling complied with Ohio law. See State v.  
13 Bedford (1988), 39 Ohio St.3d 122, 128-129, 529 N.E.2d 913, 920; State  
14 v. Landrum (1990), 53 Ohio St.3d 107, 118, 559 N.E.2d 710, 723-724.

15 Similarly, the United States Supreme Court has recognized that a  
16 trial judge is afforded considerable discretion in conducting voir dire.

1 Mu'Min v. Virginia (1991), 500 U.S. 415, 423, 111 S. Ct. 1899, 1904, 114  
2 L. Ed. 2d 493, 505. While a capital defendant must be allowed to identify  
3 prospective jurors who have "predetermined the terminating issue of his  
4 trial, that being whether to impose the death penalty," Morgan v. Illinois  
5 (1992), 504 U.S. 719, 736, 112 S. Ct. 2222, 2233, 119 L.Ed.2d 492, 507,  
6 Garner was not precluded from asking prospective jurors whether they  
7 would impose a death sentence based solely upon a finding of  
8 aggravated murder, and irrespective of the facts and circumstances or  
9 the instructions of the court. This case is thus clearly distinguishable  
10 from Morgan. Cf. United States v. Chandler (C.A. 11, 1993), 996 F.2d  
11 1073, 1103; State v. Miller (1995), 339 N.C. 663, 681, 455 S.E.2d 137,  
12 146-147; Plantz v. State (Okla.Crim. App. 1994), 876 P.2d 268, 278.

13 The trial court's rulings during voir dire comported with the  
14 requirements of the United States Constitution as well as with Ohio law.

15 XII

16 *Cumulative Error*



1 In State v. DeMarco (1987), 31 Ohio St.3d 191, 31 OBR 390, 509  
2 N.E.2d 1256, paragraph two of the syllabus, we recognized the doctrine  
3 of cumulative error. Pursuant to this doctrine, a conviction will be  
4 reversed where the cumulative effect of errors in a trial deprives a  
5 defendant of the constitutional right to a fair trial even though each of  
6 numerous instances of trial court error does not individually constitute  
7 cause for reversal. The doctrine is not applicable to the case at bar as  
8 we do not find multiple instances of harmless error. Cf. State v. Webb,  
9 70 Ohio St.3d at 335, 638 N.E.2d at 1033; State v. Davis (1992), 62 Ohio  
10 St.3d 326, 348, 581 N.E.2d 1362, 1380.

11 XIII

12 *Alleged Insufficiency of Trial Court Sentencing Opinion*

13 Assuming, arguendo, that the trial court's sentencing opinion was  
14 deficient in any way, errors in the opinion are cured by this court's  
15 independent review. State v. Fox (1994), 69 Ohio St.3d 183, 191-192,  
16 631 N.E.2d 124, 131.

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XIV

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*Alleged Unconstitutionality of Ohio Death Penalty Statutes*

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Garner challenges the constitutionality of Ohio's death-penalty statutory framework for the express purpose of preserving the issue for federal review. “\*\*\* [W]e have consistently held that Ohio's death penalty scheme is constitutional and we continue to adhere to that position.” State v. Carter, 72 Ohio St.3d at 560, 651 N.E.2d at 979, citing State v. Woodard (1993), 68 Ohio St.3d 70, 79, 623 N.E.2d 75, 82, and numerous other cases.

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XV

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*Independent Review*

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The defense offered evidence that Garner possessed lower than average intelligence and was raised in a deplorable home environment, devoid of love, support, consistency and stability. Evidence existed from which the jury could conclude that Garner suffered sexual abuse as a child by an older brother, and physical abuse from his mother and others.

1 The defense offered considerable mitigating evidence which is entitled to  
2 significant weight.<sup>3</sup> However, production of substantial mitigation  
3 evidence does not preclude a finding that the aggravating circumstances  
4 nevertheless outweigh the mitigating factors beyond a reasonable doubt.  
5 The tragic case of William Garner exemplifies this principle.

6 In addition to Garner's age (nineteen at the time of the crime) and  
7 appalling childhood history, he asks us to consider residual doubt of his  
8 guilt as part of our independent review. The state produced abundant  
9 proof that Garner was responsible for causing the fire that took the lives  
10 of five children. While there is virtually no residual doubt on the question  
11 of Garner's identity as the perpetrator of this crime, Garner nevertheless  
12 contends that this court should accord significant weight to residual doubt  
13 that Garner *intended* to kill the children.

14 As discussed, supra, ascertainment of a person's intent is not often  
15 objectively proven, but is reliant upon proof of the nature and  
16 circumstances surrounding an act, combined with determination of the

1 natural, reasonable and probable consequences of that act. Ultimately in  
2 such a case, resolution of questions of intent is highly dependent upon  
3 the evaluation of the evidence by the factfinder at trial. Although this  
4 court is statutorily mandated to independently review the record to  
5 determine whether the aggravating circumstances outweigh the mitigating  
6 factors beyond a reasonable doubt, we are not required to redetermine  
7 *de novo* questions of fact previously determined by a jury. Rather, we are  
8 required to determine “if the evidence supports the finding” of guilt by the  
9 jury. R.C. 2929.05. Even assuming there is some modicum of residual  
10 doubt on the question of whether Garner intended to kill the children, we  
11 do not accord it significant weight in this case.

12 In each capital case we are statutorily mandated to posit  
13 aggravating circumstances against mitigating factors. In so doing, we are  
14 required to "independently weigh all of the facts and other evidence  
15 disclosed in the record and consider both the offense and the offender" to  
16 determine whether a sentence of death is appropriate. R.C. 2929.05. In

1 this case the jury found that Garner intentionally set fires in an apartment  
2 occupied by six young children, all but one of whom he knew to be  
3 sleeping. Garner set three fires, in three separate locations, and had  
4 been wearing gloves up until the time he set fire to the couch. The  
5 setting of those fires, wholly unnecessary even from the perspective of a  
6 burglar concerned about apprehension, resulted in the deaths of five of  
7 those children, undoubtedly shattering the lives of three separate families.  
8 When Garner drove away from the Mack apartment, he not only took  
9 with him the telephone from the girls' room, thereby depriving them of a  
10 means of summoning help, but he also took with him the futures of five  
11 children, and left them to die trapped in an apartment filled with smoke.  
12 His acts were callous, heinous, and completely unjustifiable.

13 We note as well that the state produced evidence which tended to  
14 diminish the weight to be given the mitigation evidence. For example,  
15 court-appointed psychologist Dr. Nancy Schmidtgoessling testified that  
16 Garner appeared healthy, neatly groomed, very coherent, organized,

1 cooperative, emotionally calm, realistic in his thoughts, and of near  
2 average intelligence, even though she suspected possible organic brain  
3 impairment. She saw no signs of a major mental illness and deemed him  
4 fully competent to stand trial. Appellant was fully capable of scheming  
5 the burglary of Mack's apartment, and was able to concoct a plausible  
6 explanation for the cab driver's benefit as to why he was removing  
7 property from an apartment in the middle of the night. Dr.  
8 Schmidtgoessling opined that defendant's diagnosed failure to thrive as  
9 an infant, referenced in Justice Wright's dissent, infra, did not affect or  
10 delay his early development beyond the first few months of life. Several  
11 of the reprehensible events which occurred in Garner's family occurred  
12 before Garner was even born, e.g., the injury to the feet of Garner's  
13 brother, Marvin, and the murder of Garner's sister, Bobbie Lynette.

14 The weighing of aggravating circumstances against mitigating  
15 factors in review of capital cases necessarily proceeds on a case-by-case  
16 basis. Having reviewed the entire record, we find beyond a reasonable

1 doubt that the balance of aggravating circumstances against mitigating  
2 factors in this case weighs in favor of a death sentence.

3 XVI

4 *Proportionality Review*

5 Pursuant to R.C. 2929.05(A), we are called upon to determine  
6 whether imposition of a death sentence in this case is both appropriate  
7 and proportional to other Ohio death penalty cases. We find that this  
8 court has consistently upheld the imposition of death stemming from  
9 murder in the commission of aggravated arson in cases whose facts are  
10 no more heinous or egregious in nature than are the facts of the case at  
11 bar. See, e.g., State v. Grant (1993), 67 Ohio St.3d 465, 486, 620 N.E.2d  
12 50, 72. ("That Rosalie Grant committed arson in order to murder her two  
13 infant sons outweighs the mitigating factors of Grant's troubled childhood,  
14 young age, lack of criminal record, and the existence of residual doubt.  
15 Thus, the death penalty is appropriate."); State v. Richey (1992), 64 Ohio  
16 St.3d 353, 595 N.E.2d 915; State v. DePew, supra. In addition, we have

1 affirmed death sentences in cases where multiple victims have been  
2 murdered. State v. Lorraine, *supra*; State v. Frazier (1991), 61 Ohio  
3 St.3d 247, 574 N.E.2d 483; State v. Coleman (1989), 45 Ohio St.3d 298,  
4 544 N.E.2d 622; State v. Brooks (1986), 25 Ohio St.3d 144, 25 OBR 190,  
5 495 N.E.2d 407; and cases where the aggravated murder was committed  
6 in the course of an aggravated burglary, *e.g.*, State v. Wiles (1991), 59  
7 Ohio St.3d 71, 571 N.E.2d 97; State v. Holloway (1988), 38 Ohio St.3d  
8 239, 527 N.E.2d 831. Imposition of a death sentence upon William  
9 Garner is consistent with the proportionality analysis we are statutorily  
10 required to undertake.

11 Accordingly, appellant's convictions and sentences are affirmed.

12 Judgment affirmed.

13 DOUGLAS, RESNICK, F.E. SWEENEY, PFEIFER and COOK, JJ., concur.

14 WRIGHT, J., dissents.

15  
16 FOOTNOTES:



1           <sup>1</sup>       The law set forth in the fifth paragraph of Jenkins has  
2 consistently been followed by this court. See, e.g., State v. Spisak  
3 (1988), 36 Ohio St.3d 80, 84, 521 N.E.2d 800, 803; State v. Wiles (1991),  
4 59 Ohio St.3d 71, 84, 571 N.E.2d 97, 115.

5           <sup>2</sup>       Although the trial court rejected Garner's proposed residual  
6 doubt instruction, it advised defense counsel that it would allow a residual  
7 doubt argument in the defense summation, and such an argument was in  
8 fact made to the jury.

9           <sup>3</sup>       In his dissent, infra, Justice Wright has extensively outlined  
10 the nature of the mitigation evidence presented by the defense.

11           WRIGHT, J., dissenting. As I have said on other  
12 occasions, I have no moral compunctions about imposing the  
13 death penalty when required. However, I believe that the  
14 death penalty should be applied only when the state has met  
15 its heavy burden of proof and should be used sparingly. That  
16 view is supported by the legislative history of R.C. 2929.04.

1           As part of this court's review, we must independently  
2 determine whether the state has met its burden in proving that  
3 the aggravating circumstances outweigh the mitigating factors  
4 beyond a reasonable doubt. This, of course, is the heaviest  
5 burden under the law. In my view, the aggravating  
6 circumstances clearly do not outweigh the mitigating factors in  
7 this matter. This is the type of case that calls for the  
8 application of mercy, and it is for this reason that I respectfully  
9 dissent.

10           I certainly cannot deny that this was a horrible crime,  
11 resulting in the senseless death of five innocent children. It is  
12 not my job to criticize a jury verdict supported by adequate  
13 evidence. I do not excuse Garner's actions, and I do believe  
14 that he should be severely punished for his crimes, *i.e.*, five  
15 life sentences. However, although the state has proven  
16 William Garner's guilt beyond a reasonable doubt, I believe

1 that there is a fair amount of residual doubt as to whether  
2 Garner possessed the necessary purpose to kill.

3 The mitigating factors that Garner presented are among  
4 the most compelling that this court has seen. The conditions  
5 in which Garner was raised and the experiences that he  
6 endured throughout his entire life are even more extreme than  
7 the factors presented in *State v. Murphy* (1992), 65 Ohio St.3d  
8 554, 605 N.E.2d 884 (Moyer, C.J., Wright and Herbert R.  
9 Brown, JJ., dissenting).

10 Garner's home life was one in which the "family structure"  
11 was replaced with violence, physical injury, sexual abuse and  
12 abject terror. The basic needs of Garner and his siblings were  
13 ignored by their mother, a child-care provider of all things.  
14 His mother's need to satisfy her own immediate gratification  
15 superseded the needs of, and her responsibility to, her  
16 children.

1 William Garner is the youngest of six children born to  
2 Patricia Garner. Mrs. Garner's other children are Gary  
3 Sawyer, Lisa Ross, Marvin Garner, Bobbie Lynette (now  
4 deceased), and William Garner's twin brother, Willie. Gary  
5 Sawyer is now incarcerated at the Southern Ohio Correctional  
6 Facility at Lucasville. While Mrs. Garner was pregnant with  
7 William and Willie, Bobbie was murdered by one of Mrs.  
8 Garner's boyfriends. Lisa was sexually abused over a period  
9 of years by one of Mrs. Garner's boyfriends. One instance of  
10 abuse was committed in the presence of Mrs. Garner, who did  
11 nothing to prevent it. Lisa's brother, Gary, also sexually  
12 assaulted her. Lisa testified that Gary also assaulted or  
13 attempted to assault two female cousins. Mrs. Garner  
14 testified that Gary admitted to her that he also sexually  
15 abused his brother, William, when they were children. Another  
16 one of Mrs. Garner's boyfriends submerged Marvin's feet into

1 scalding water, causing severe burns that have left Marvin  
2 Garner disfigured to this day. This, of course, has resulted in  
3 a constant reminder to the entire family of the abuse that was  
4 a common occurrence in their house.

5         Although the state has argued that the instances of  
6 abuse suffered by Lisa and the other Garner children are  
7 irrelevant as mitigating factors for appellant, the recitation of  
8 events that occurred throughout Garner's lifetime adds  
9 credence to the descriptions above and below of his tragic  
10 upbringing.

11         Additionally, Garner was present in the household during  
12 the physical and sexual abuse of Lisa and the physical abuse  
13 suffered by the other children. This was the lifestyle in which  
14 he was reared. A constant pattern of physical, mental,  
15 emotional and sexual abuse and neglect is all that Garner has  
16 ever known.

1 Lisa testified that she was responsible for the children  
2 when her mother was not at home. By age four, the twins,  
3 William and Willie, would go to the grocery store to “hustle for  
4 money” for food. Lisa said the children would go to the  
5 neighborhood grocery store and offer to carry bags of  
6 groceries in exchange for food. On occasion, Mrs. Garner  
7 would take the money the children earned for food and would  
8 “go out with it.”

9 Lisa testified that their mother was abusive and  
10 violent towards the children as well as to her boyfriends and  
11 husbands. The children were beaten with anything she could  
12 get her hands on, such as two by fours and extension cords.  
13 Mrs. Garner had her children assist her in beating up her  
14 boyfriends, and the children were present when she and a  
15 boyfriend beat up her husband. Garner participated in one  
16 such beating when he was four or five years old.

1                   Dr. Nancy Schmidtgoessling, a psychologist  
2 appointed by the court to evaluate Garner, agreed that it is  
3 very difficult for a person like William Garner who is “raised in  
4 an environment where you have a mother who does not  
5 provide proper care and support for children, a brother who  
6 rapes you and beats you up, a home life where people are  
7 violated in numerous ways, a home life where no one cares as  
8 far as your educational background is concerned, where you  
9 find that situation, and you have a person who has a low IQ  
10 and some brain impairment to act in a pro social way.”

11                 Dr. Schmidtgoessling continued by stating, “[G]iven that  
12 kind of background and resources, it is very difficult for that  
13 person to behave appropriately. They do not have the  
14 opportunity to develop the kind of skills and the appropriate  
15 emotional reactions that enable you to be a functional,  
16 normally healthy, normally productive person.”

1           Dr. Jeffrey Smallldon, a clinical psychologist, also  
2           evaluated Garner. Dr. Smallldon testified that the results of  
3           the tests administered to appellant indicated quite clearly that  
4           Garner has some degree of underlying brain impairment and  
5           that he functions in a borderline range of intellectual  
6           functioning between mild retardation and low average IQ. Dr.  
7           Smallldon testified that Garner has residual attention deficit  
8           disorder and a diagnostic impression of marijuana abuse,  
9           possibly marijuana dependence. Dr. Smallldon also testified  
10          that Garner has a mixed personality disorder with borderline  
11          antisocial features.

12          Dr. Smallldon also testified about certain factors that have  
13          an important effect and continuing influence on the  
14          development of a disorder such as Garner's and applied those  
15          factors to Garner's lifestyle and upbringing. One of the factors  
16          discussed was parental bonding. Dr. Smallldon theorized that



1 the necessary bonding process between Garner and his  
2 mother would have been profoundly disrupted when appellant  
3 returned to the hospital for the first nine months of his life due  
4 to his failure to thrive.

5 Other factors Dr. Smalldon applied included  
6 environmental factors and appropriate role models during  
7 Garner's childhood. Dr. Smalldon testified that appellant was  
8 traumatized by the environmental influences to which he was  
9 exposed, including the lack of parental figures and role  
10 models. Garner had virtually no structured opportunities for  
11 learning, enrichment, or stimulation. Garner's biological father  
12 denied paternity, and the primary male figure in the household  
13 while Garner was a child was George Cunningham, the man  
14 who repeatedly sexually abused Garner's sister. Many of  
15 Garner's mother's subsequent boyfriends were abusive to  
16 Garner and his siblings. Appellant had no consistent,

1 physically present, emotionally available parental figure in his  
2 early life. The only consistency in his life was the pattern of  
3 irresponsible behavior, inadequate attention to his needs, and  
4 his exposure to violent and repeated sexual and physical  
5 abuse from his older brother and frequent physical abuse from  
6 his mother.

7 Even Dr. Joseph Schroeder, a rebuttal witness for the  
8 state, testified that Garner had a brain impairment and that his  
9 IQ showed that he is in the below average and borderline  
10 range, i.e., on the border between below average and mental  
11 retardation.

12 When continually pressed by the state with regard to  
13 whether Garner knew the difference between right and wrong,  
14 Dr. Schroeder answered, “[t]here is no psychological tests  
15 [*sic*] that we can administer that is designed solely to discern  
16 right from wrong.” Dr. Schroeder’s job was to determine

1 whether Garner was competent to stand trial and whether  
2 there were any neuropsychological problems. Defense  
3 counsel did not raise the issue of insanity as a defense.  
4 Therefore, the prosecution's attempts to turn the history,  
5 character and background of the defendant into an argument  
6 that Garner did *not* lack the substantial capacity to appreciate  
7 the criminality of his conduct or to conform his conduct to the  
8 requirements of the law were irrelevant.

9       The prosecution believed that the psychological  
10 testimony was somehow supposed to lead the jury to believe  
11 that the organic brain injury caused Garner to act as he did.  
12 This was not the argument presented by the defense. The  
13 organic brain injury had nothing to do with the motivation  
14 behind the burglary and fires. Nor did the injury in any way  
15 cause Garner not to be able to appreciate the criminality of his

1 conduct. Appellant's history, character and background were  
2 presented solely for purposes of mitigation.

3 Garner's age, both chronological and mental, is an  
4 additional mitigating factor. At the time of the offense,  
5 Garner, it appears, had just turned nineteen. However, he  
6 was much younger than nineteen mentally and emotionally.  
7 This court held in *State v. Rogers* (1985), 17 Ohio St.3d 174,  
8 17 OBR 414, 478 N.E.2d 984 (Wright, J., concurring in part  
9 and dissenting in part), vacated (1985), 747 U.S. 1002, 106  
10 S.Ct. 518, 88 L.Ed.2d 452, paragraph seven of the syllabus,  
11 that "[t]he word 'age' as used in R.C. 2929.02(A), 2929.023,  
12 2929.03 and 2929.04 refers to a defendant's chronological  
13 age." In my dissent, I stated that I could not "sanction the  
14 electric chair for a person with the mentality of a child \*\*\*." *Id.*  
15 at 188, 17 OBR at 427, 478 N.E.2d at 997. I continue to hold  
16 to this belief today.

1           Garner did commit a heinous crime. Although his youth  
2 alone would not be enough to persuade me to overturn the  
3 lower court's sentence of death, his youth, combined with his  
4 atrocious upbringing, is enough to convince me that justice  
5 would be served if Garner were sentenced to the maximum  
6 prison term allowed by law. This means that Garner would  
7 serve up to one hundred and fifty years in prison for the  
8 murder charges; ten to twenty-five years on the aggravated  
9 burglary charge and on each of the aggravated arson charges;  
10 and two years each for the theft charge and the two charges of  
11 receiving stolen property. This certainly amounts to life  
12 without parole.

13           To quote Chief Justice Moyer: "The crime was  
14 committed, not after defendant had matured to an age when  
15 education, normal life experiences, and maturity could have  
16 intervened, but so soon after the brutally abusive conditions

1 created by his family that I am compelled to find that the death  
2 sentence is not appropriate for the defendant in this case.”  
3 *State v. Murphy* (1992), 65 Ohio St.3d 554, 588, 605 N.E.2d  
4 884, 910 (Moyer, C.J., Wright and Herbert R. Brown, JJ.,  
5 dissenting).

6 The same philosophy holds true for this case. William  
7 Garner never had a chance at a normal life. He was born into  
8 an atmosphere of violence, deprivation, and abuse. He had a  
9 borderline IQ and an organic brain impairment. He suffered  
10 physical, mental, sexual, and emotional abuse his entire life.  
11 He lacked proper nourishment, appropriate discipline, parental  
12 bonding, appropriate role models and any semblance of a  
13 normal childhood.

14 For the reasons stated above, I dissent from the  
15 majority’s affirmance of Garner’s death sentence.

16