ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Appellee,	:	Case No. 2010-1373
v.	:	Appeal taken from the Summit County Court of Common Pleas
ASHFORD THOMPSON,	:	Case No. CR 2008-07-2390
Appellant.	:	**This Is A Capital Case.**

MERIT BRIEF OF APPELLANT ASHFORD THOMPSON

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Statement of the Case and Statement of Facts[1]

A. Introduction

On July 12, 2008, Ashford Thompson was a nurse, deeply religious and dedicated to his faith, who had never been in real trouble with the law. On July 13, 2008, Ashford Thompson was a cop-killer.

Thompson "was always a good kid," had a been a cub scout, a member of the school band, played football, track, swimming, and basketball. (Mitig. Tr. 41, 48-49) He began to carry a concealed firearm because of the dangerous places in which he performed his duties as a nurse. (Mitig. Tr. 131-33.) He "[didn't] have any martial arts or any experience like that," and he was concerned about protecting himself "especially against a group of people." (Mitig. Tr. 131-32).

While taking the required courses to obtain a concealed carry license, Thompson learned that he should only pull his weapon if he is in fear of losing his life or receiving serious bodily harm. (Tr. 2022.) He learned that it is an individual determination—as instructor Luther Norman testified, "there's nobody going to be there that I can ask, is this serious enough to constitute use?" (Tr. 2023.) He learned to "aim for the center of the target," not the hand. (Tr. 2024.)

On July 13, 2008, Thompson was pulled over for a noise ordinance violation or, at most, suspicion of driving-under-the-influence. The police officer that pulled him over—Officer Joshua Miktarian—had a large, aggressive K-9 in his vehicle. (Tr. 1231, 1247, 2037.) When Miktarian handcuffed Thompson, he pulled him toward the vehicle with that K-9. (Tr. 2127.) The K-9 had access to both the front of the car and the back of the car (Tr. 2038), and Thompson

[1] Thompson raises 18 Propositions of Law. Because many of those propositions are fact-intensive, a more detailed statement of facts is deferred to those propositions. This statement provides an overview of relevant facts.

got "really alarmed" when he heard the dog barking and believed he was going to be forced in the car with it. (Mitig. Tr. 142.)

Thompson was not the only one afraid of the dog. The officer who arrived on-scene after the shooting witnessed the K-9 and felt it would have presented a danger to him or any other officers if he would have opened the car door without the dog restrained. (Tr. 2038.) A K-9 officer from the Stow Police Department had to be called to remove the dog. (Tr. 2042.) It attacked that officer upon being removed from the vehicle. (Tr. 2042.)

Whether it was because of the fear of being put in the car with the dog, or whether it was because Miktarian "reached on the that belt and pulled something out" that "looked like the gun," Thompson shot Miktarian in the head. (Mitig. Tr. 146-48). And he kept shooting. Thompson then fled the scene with his girlfriend, Danielle Roberson, and he was arrested shortly thereafter at the home of his sister.

B. Procedural history

Ashford Thompson was indicted by the Summit County grand jury on July 21, 2008. The grand jury charged Thompson with two counts each of Aggravated Murder, Escape, Resisting Arrest, three counts of Tampering with Evidence, and one count of Carrying a Concealed Weapon. (*See* Indictment) Each charge related to the fatal shooting of Officer Joshua Miktarian on July 13, 2008. (*Id.*) The two counts of Aggravated Murder carried with them three death specifications: (1) purposefully causing the death of a law enforcement officer; (2) committing the murder to escape detection; and (3) committing the murder while under detention. (*Id.*) All relevant charges carried firearm specifications. (*Id.*)

On May 17, 2011, Thompson proceeded to jury trial. The trial judge dismissed one of the Escape counts pursuant to Criminal Rule 29. (Tr. 2345) The jury convicted Thompson of

every other count on June 3, 2010. (Tr. 2512–21) The jury also found Thompson guilty of each death specification. (*Id.*)

For purposes of the mitigation hearing, the trial court merged the two counts of Aggravated Murder and the escaping detection and under detention specifications. (Opinion of the Court, pg. 1.) The mitigation hearing began on June 10, 2010 and ended on June 11, 2010 when the jury returned a verdict sentencing Thompson to death. (*Id.* pg. 2) On June 23, 2010, the trial judge accepted the jury's death sentence recommendation. (*Id.*)

On June 24, 2010 the court issued an Entry indicating that certain counts had been renumbered and summarizing the jury verdict. (Journal Entry filed June 24, 2010.) The trial court issued a nunc pro tunc entry to correct mistakes in its June 23, 2010 Entry on July 1, 2010. (Journal Entry filed 7/1/2010.)

On August 12, 2010, Thompson filed a timely Notice of Appeal that forms the basis of this appeal.

B. Voir dire

Voir Dire in Thompson's case was extensive due to the potential for a death sentence and the intense attention the local community brought to bear on the case. Thompson's counsel was concerned about the local media attention and the community's anger and filed a motion requesting a change in venue. (Motion for Change of Venue.) The trial court held this motion in abeyance, wanting first to attempt to find enough qualified jurors to serve on Thompson's jury. (Tr. 2/24/10 Hearing, pg. 10.) Following voir dire and a venire being chosen, it overruled the motion. (Tr. 992.)

The first phase of voir dire understandably focused on jurors' ability to fairly consider the death penalty and jurors' exposure to pre-trial publicity. (*Id.* at 5–7.) A specific concern about

pre-trial publicity was the fact that Thompson had previously pleaded guilty and then withdrew his plea. (*See, e.g., id.* at 905). Additionally, Thompson was using his fourth different set of lawyers to proceed to trial. Multiple jurors indicated that they were aware of these facts and many of them felt they could not be fair to the defendant because of them. In fact, at least twenty jurors had to be excused because they knew too much about the case, knew Thompson previously pleaded guilty, and/or believed Thompson to be already guilty. (*Id.* at 99, 150, 153, 204, 225, 353, 381, 418, 432, 437, 444, 546, 549, 616, 622, 675, 684, 698, 876, 905.)

1. Juror 100 – pretrial publicity

When Juror 100 was asked about pre-trail publicity, Juror 100 responded, "I kind of remember hearing about on the radio." (Tr. at 905.) Questioned further, he stated that the judge told them about a change in plea. (*Id.*) The judge corrected the juror and told the juror that she had not mentioned anything about his prior guilty plea and the juror remarked, "somebody had something in the courtroom or the jury pool about it." The juror stated he knew "there was a guilty plea but there was a technical problem or something and now it's a not guilty." (*Id.* at 906) The court went on to question the juror's ability to be impartial and the juror responded, "It's kind of hard with other people bringing these up." [sic] (*Id.* at 907) Juror 100 was excused for cause.

The court had already excluded every juror prior to Juror 100 who knew about Thompson's guilty plea except for one. (*Id.* at 99, 150, 153, 204, 225, 353, 381, 418, 432, 437, 444, 546, 549, 616, 622, 675, 684, 698, 876, 905.) Juror 51, when asked about pre-trial publicity, said, "I know it's about the murder of a policeman and that the defendant actually pleaded guilty and then he recanted, and now that's why we're having a trial." (*Id.* at 532) Juror

#51 then promised the court she could put it out of her mind and was not excused during individual voir dire. (*Id.* at 53) She also promised not to tell anybody else. (*Id.* at 542)

2. Juror 2 – ability to impose the death penalty

In addition to problems with pre-trial publicity, many jurors expressed concern about the death penalty and their ability to follow the law.

One such juror was Juror 2. She expressed concern about her ability to impose the death penalty, but appeared to retreat from the position after being reminded of her duty under the law. (*Id.* at 72–74) After being asked by the Court, "Are you religiously or morally or otherwise against the imposition of the death penalty," Juror 2 responded, "I do not believe in the death penalty." (Tr. at 72) After being asked, notwithstanding her objection, if she could follow the law, Juror 2 repeated the same response. (*Id.*) Indicating that this was a difficult question, the judge asked if Juror 2 was "saying you would not follow the law as I would instruct you?" (*Id.*) The juror responded, "I would do my best, but . . ." (*Id.*)

The judge then asked if her "views on the death penalty [would] prevent or substantially impair your ability as a juror to perform your duty in accordance with your oath and my instructions?" (*Id.* at 73) Juror 2 responded, "I honestly don't know. I've never been put in this position." (*Id.*) The court empathized that "[v]ery few people have been" put in the juror's position and asked if she was "saying [she] would follow the law." (*Id.*) Juror 2 said, "Yes." (*Id.*)

The court then asked the understandably hesitant juror if she was now saying "without any doubt . . . you could impose the death penalty." (*Id.*) Juror 2 stated, "No. I'm sorry. No." (*Id.*) The court then thanked and excused the juror. (*Id.* at 74.) Defense counsel protested that he should "get an opportunity to rehabilitate." (*Id.*) Rather than allowing the opportunity, the

court stated that it had "tried that," and then speculated that she has another problem with the scheduling of the case. (*Id.* at 75) Earlier in the voir dire, the juror had expressed some skepticism about her ability to have work covered, but never stated that it would be a substantial hardship. (*Id.* at 70) The court noted defense counsel's objection and said it would give counsel "one or two questions the next time." (*Id.* at 75)

3. Jurors 11, 48, 66, 69, 95, 102, 105 – death penalty skeptics dismissed without objection

Multiple jurors that expressed skepticism about the death penalty were dismissed without any objection from defense counsel. (*Id.* at 179, 512, 650, 670–71, 864, 913)

4. Juror 3 – Batson challenge

Prosecutors attempted to use one of their preemptory challenges to excuse Juror #3, an African-American woman. (*Id.* at 1129–30) Defense counsel made a *Batson* challenge to the preemptory challenge. (*Id.* at 1130)

The judge did not ask the Defense to make a prima facie showing but rather listened to the State's purported race-nuetral reason, that the juror had been the sole holdout on a prior criminal jury. (*Id.*) The judge did not accept that reason because the State could not know that the juror had been a hold out because no one had specifically asked the juror. (*Id.*) The judge told the State that she did not accept that reasoning: "Give me another [reason]. I'm not buying that." (*Id.* at 1131)

The State's next purported reason for excusing the juror was the fact she was related to a former employee of the prosecutor's office and worked for the sheriff's department. (*Id.*) The judge was again skeptical, asking, "You're uncomfortable having a juror who is a sheriff's deputy employee." (*Id.* at 1132) The judge also said she was "not buying" this alternative

reason. (*Id.* at 1133) The State then explained that it believed the juror was a holdout in her prior jury service and the Judge granted the preemptory challenge over objection. (*Id.* at 1135)

C. Pre-trial evidentiary rulings

Before trial began, Defense counsel objected to the testimony of a bar patron, Steve Bartz. (*Id.* at 1226–27) Specifically, Mr. Bartz was going to testify that he overhead Thompson saying at a bar earlier in the evening, "there's demons in me," "I will kill if another fucker threatens me," and "nobody understands the shit I've done and I'm capable of. I can't even talk about it." (*Id.* at 1226–27) Those statements were permitted over objection. (*Id.*) The court did not allow Mr. Bartz to testify that he heard Thompson say, "fuck them white boys," or "there's ain't no true niggers in this world." (*Id.* at 1227)

D. Trial

Trial began on May 24, 2010. The State called 34 witnesses in total and the Defense called one.

1. State's Opening

The State's opening statement began by referencing the statements that Mr. Bartz overhead at Rav's Creekside Bar. (*Id.* at 1231) The State then detailed its version of events that evening: Thompson was pulled over by Office Miktarian for playing loud music, other officers respond a short time later to find Officer Miktarian shot and killed, and Thompson was discovered by police at his sister's house with one handcuff on and was arrested after a brief struggle. (*Id.* at 1230–39.)

2. Defense's Opening

The Defense began by attempting to tell the jury the story of Thompson's life. (*Id.* at 1240) The State objected to this discussion and the judge sustained the objection. (*Id.*) The

Defense told the jury that "not every homicide is an aggravated murder. And certainly not every homicide is deserving of the death penalty." (*Id.* at 1243.) Thompson's counsel urged the jury to focus on "why did it happen." (*Id.* at 1244.)

3. State's Case

The State called 34 witnesses in its case-in-chief. Their second witnesses, Steve Bartz, testified that the evening started with Mr. Thompson in a bar earlier that evening making angry statements. (*Id.* at 1270–71.) The bartender that evening, however, only served Thompson one drink and did not recall him making any statements. (*Id.* at 1311, 1316.)

At around 1:45 A.M. on July 13, 2011, Officer Joshua Miktarian pulled over Thompson in Thompson's driveway. (*Id.* at 1329–30, 1398.) Witnesses stated that Thompson was playing loud music prior to being pulled over. (*Id.* at 1288.) A neighbor of Thompson's heard arguing coming from the area of his house and then popping noises. (*Id.* at 1329.)

Office Miktarian had requested backup before his stop of Thompson and dispatch sent another unit. (*Id.* at 1403–04.) When the other units arrived they found Officer Miktarian laying on the ground next to his cruiser. (*Id.* at 1430.) Officer Miktarian died from four gunshot wounds to the head. (*Id.* at 1935.)

On the evening Miktarian arrested Thompson he had his K-9 partner, Bagio, with him in the back of his cruiser. (*Id.* at 1409.) Thompson's K-9 vehicle was an older police cruiser with a videotape dashboard cam that, according to a police witness, only had video of an old arrest on it. (*Id.* at 1255.)

Thompson was arrested at his sister's home. (*Id.* at 1543.) There was a struggle in the kitchen where Thompson was arrested. (*Id.* at 1546–50.) Thompson was found with one of the

officer's handcuffs on his wrist. (*Id.* at 1546) Thompson's gun was found in the kitchen on the stove. (*Id.* at 1532.)

One of the State's expert witnesses testified about the orientation of Thompson and the officer during the shooting based on his study during one 40 hour blood spatter course. (*Id.* at 1962–80.) Other witnesseses testified that Thompson's DNA was on the weapon but that the dominant DNA profile on the weapon belonged to the officer. (Tr. at 1855–56) ("The partial DNA profile from the swab from the trigger is a mixture. The major profile is consistent with Joshua Miktarian. . . . The partial DNA profile from the swab from the handle areas is a mixture. The major profile is consistent with Joshua Miktarian.")

4. Defense Case

The Defense called only one witness. They called Thompson's girlfriend, Danielle Roberson. She testified that the officer and Thompson got into a confrontation and the officer told Thompson "you better not try anything or I'll let my dog out on your ass," while he reached towards his belt. (*Id.* at 2125.) After a struggle, the officer handcuffed one of Thompson's wrists and slammed him on the hood of the car before she saw Thompson shoot the officer. (*Id.* at 2128.)

The State cross-examined Roberson extensively about differences between her statements at trial and her statements to police immediately after the event. (*Id.* at 2149–55, 2162.) After a series of questions, the court asked the State, "Why don't you just impeach her with the statement and go on with it. Do you have it recorded[?]" (*Id.* at 2163.) Thompson's counsel then explained that they had never listened to the statement because Roberson told them she didn't think she was recorded. (*Id.*) The tape was played for Roberson's review for the first time in court. (*Id.* at 2249.)

5. Rebuttal

Rebuttal testimony at Thompson's trial consisted of jail recordings wherein Thompson told his girlfriend he didn't like her dressing a certain way the evening of the shooting. (Tr. 2309.) Defense counsel did not object to this evidence.

6. Jury Instructions

Thompson's lawyers asked the judge to include instructions for the lesser offenses of murder and manslaughter. (Tr. at 2371.) The trial court rejected the instruction for murder because it was clear the victim was a law enforcement officer. (*Id.*) The court also rejected the instruction for manslaughter, claiming it "would require far more evidence from the Defense than has been presented." (*Id.*)

7. Closing Arguments

In addition to reciting the evidence related to the elements of the crimes charged, the State's closing argument attempted to discredit Ms. Roberson's testimony. At one point during this effort, the State suggested that Thompson had put pressure on Ms. Roberson to lie: "And you have to feel bad for whatever motivations this defendant may have put upon her to come in here and not tell you everything that happened." (*Id.* at 2413) No evidence was presented at trial indicating that Thompson attempted to sway Ms. Roberson's testimony. The Defense objected to the State's comment and was overruled by the court. (*Id.* at 2413–14)

The State also, without objection, told the jury that the Defense would have lied about events if evidence wasn't present. (*Id.* at 2422) Specifically, the State told the jury that if Officer Miktarian's badge number was not engraved on the handcuff Thompson was arrested wearing, the Defense would have told the jury that the handcuff belonged to Thompson. (*Id.* at 2422–23)

During rebuttal, the State told the jurors that the evidence was overwhelming and that, in fact, the arguments of counsel were irrelevant: "My great hope right now is that I waste your time, because that the evidence you heard in this case, regardless of the arguments, is so overwhelmingly convincing that you already know the answers to all those verdicts." (*Id.* at 2465–66) The State then reminded the jurors that they were supposed to deliberate with an open-mind, but cautioned, "I hope you're already there in your heads." (*Id.* at 2466)

The State also suggested to jurors that the Defense was willing to do anything to win, including lying to the jury: "How much more do you think the Defense is willing to deceive you to find out – find the Defendant not guilty?" (*Id.* at 2474)

The State concluded by telling the jury that even though they did not have to find a motive to convict Thompson, the motive was simply that "Mr. Thompson had a bad day." (*Id.* at 2481) The State explained that Mr. Bartz's testimony demonstrated the extent of Thompson's anger. (*Id.*) The State emphasized the jail calls in its closing argument as "the most telling moment" because it displayed "the true Ashford Thompson." (*Id.* at 2437.) The State encouraged the jurors to listen to the tape that would be back with them in the deliberation room. (*Id.* at 2437–38.) The prosecutor encouraged them to "hear the anger in his voice." (*Id.* at 2438.) The State's discussion of the time encompassed the conclusion of its closing argument. (*Id.* at 2436–40.)

8. Verdict

On the day after closing arguments, Thompson's jury reached a verdict. After reaching a verdict, some jurors left to smoke accompanied by a Lieutenant and the trial judge. (*Id.* at 2509) Upon returning to the courtroom, the jurors announced they had convicted Thompson of all charges and specifications. (*Id.* at 2511–21)

E. Mitigation

Six days after the verdict, on June 10, 2010, the parties presented their mitigation-phase evidence. Thompson presented thirteen witnesses in addition to his own unsworn statement.

Many of the witnesses, like Cheryl Thomas, Stephanie Pounds, Lillie Torrence, Edgar Miller, Lois Martin, Kelvin Bailey, and Mattie Parham were family friends who described Thompson as both a good child and a responsible adult. (Mitigation Tr. at 40–41, 60–61, 64–67, 70–72, 88–89, 91–95, 98–100.) Ms. Pounds, in particular described Thompson as a reliable, caring person: "I've got family that I cannot depend on. I've got friends that I cannot depend on. I know if I call Ashford he is going to come for me." (*Id.* at 61.) Ms. Martin also emphasized Thompson's caring nature, explaining that he would see her stepmother, known as Mom B, about three times a week to bring her holiday decorations and help her around the house and in her garden. (*Id.* at 89) Mom B described Thompson as "her legs." (*Id.*)

Thompson's mother, Sharon Thompson, also testified on his behalf. She explained that Thompson was a license practical nurse (LPN) in the State of Ohio after graduating from Cleveland's ATS Institute of Techonology in 2004. (*Id.* at 45.) She described him as a teenager active in school, being one of the drum majors in his high school band and involved with a number of extra-curricular activities. (*Id.* at 49.)

Thompson's siblings also testified. His older sister, DeShon Thompson, described him as quiet, but explained that he treated her children quite well. (*Id.* at 55.)

Thompson's uncle, Gary Ashford, described Mr. Thompon's spiritual background and religious life. He told the jury that he spoke with Thompson about religious matters, and that Thompson had actually spent a year studying theology in Alabama before coming back to Ohio.

(*Id.* at 80.) Another one of Thompson's pastors recalled that Thompson served on the church's youth deacon board. (*Id.* at 103.)

Thompson elected to give an unsworn statement. (*Id.* at 114.) Before he sat down he apologized to Officer Miktarian's family. (*Id.* at 115–116.) He explained that while he sat with a straight face at trial, he was following the advice of his lawyers. (*Id.* at 116.) He personally apologized to Officer Mikitarian's widow, explaining "I can't imagine that kind of pain, I always wanted a family of my own . . ." (*Id.*)

Thompson told the jury that was twenty-three years old when the events that brought him to trial occurred. (*Id.* at 117.) In high school, Thompson was on the wrestling team, track team, and participated in the marching band before graduating. (*Id.* at 119.) After high school, he attended a community college and theology school before going to nursing school. (*Id.* at 121–22.)

Thompson's statement also focused on his work as a nurse. He described working with older patients in the throes of dementia and reading the Bible with them. (*Id.* at 123–24.) He told the jury that he "wouldn't have traded that profession for anything." (*Id.* at 125.) He also explained that he carried a gun for protection and obtained a license because he worked in difficult neighborhoods. (*Id.* at 130–34.)

Regarding the evening in question, Thompson told the jury that he saw Officer Miktarian reaching for what Thompson thought was a gun before Thompson withdrew his own gun and shot. (*Id.* at 147.)

In their closing remarks, Defense counsel told the jurors that their verdict was absolutely correct: "There is no excuse for those actions. You guys found that in your verdict last week,

which is a verdict you guys nailed 100 percent." (*Id.* at 180.) The Defense urged the jury to consider not just the offense, but Thompson's "entire body of work." (*Id.* at 177.)

The State started its argument by referring to the Defense's argument as "a nice little trick." (*Id.* at 202.) He then told the jury the Defense really wanted them to believe that the officer deserved his death: "But what they're really trying to tell you, in a really soft kind of way, is, look that officer did me wrong and he got what he deserved." (*Id.* at 205.) The Defense objected to this comment and was overruled. (*Id.*) The State concluded by telling jurors that they had to choose between honoring the Defendant or the badge: "Are you going to honor Thompson, or are you going to honor the law, that badge?" (*Id.* at 219.)

The jury returned a verdict recommending a sentence of death. (*Id.* at 237–38.)

F. Sentencing

On June 23, 2011 the trial court proceeded to sentence Thompson. Officer Miktarian's mother spoke at sentencing. (Sentencing Tr. at 5) His widow spoke as well. (*Id.* at 9) After hearing from Thompson, the court explained that it was "not in a position to consider mercy," and that it "[could not] consider proportionality." (*Id.* at 42) The trial court then merged the specifications and sentenced Thompson to death. (*Id.*)

The trial court's sentencing on the other charges was confusing. The court granted a defense motion to dismiss pursuant to Criminal Rule 29 as it related to the 3rd degree felony charge of escape, Count 3. (Tr. at 2340–45.) At sentencing, however, the court merged Count 3 and Count 4 (the dismissed F-3 Escape and the remaining F-5 Escape) and sentenced Thompson to five years of incarceration to be served concurrently with any other sentence. (Transcript of Proceedings – Sentencing, pg. 42–43.) The court's judgment entry does not reflect that sentence, and instead reflects a 12 month sentence for the F-5 Escape reflected in Count 4. (Judgment

Entry filed June 24, 2010). Making the matter more confusing, the Court had actually renumbered the counts, so while Thompson was acquitted of original Count three by virtue of the court's dismissal, he had been found guilty by the jury of renumbered Count 3, which become a Carrying Concealed Weapon charge. (Journal Entry filed June 24, 2010 explaining renumbering of counts).

The trial court's sentencing opinion makes the same error that the court made during Thompson's sentencing hearing and sentenced him on the original Count 3 – the dismissed Escape charge. (Sentencing Opinion filed June 23, 2010.) Thus, the court sentenced Thompson on a dismissed charge verbally and in its sentencing opinion but did not sentence him in its judgment entry on that charge.

Argument

Proposition of Law No. 1

A capital defendant's judgment is neither final, nor appealable until the sentencing opinion filed pursuant to R.C. § 2929.03(F) and the judgment of conviction filed pursuant to Crim. R. 32(C) comply with the requirements of Crim. R. 32(C) as well as the defendant's constitutional rights under the Double Jeopardy Clause. U.S. Const. Amend. V.

This case lacks a final appealable order. The failure to properly record all the formalities required by Crim. R. 32(C) prevents the purported judgment from being final and thus appealable. *State v. Baker*, 119 Ohio St. 3d 197 (2008). Here, the trial court filed a *nunc pro tunc* Judgment Entry on July 1, 2010, which failed to formalize any of the required formalities in Crim. R. 32(C). (See *nunc pro tunc* Judgment Entry filed July 1, 2010.) The trial court similarly failed to journalize that Thompson was acquitted of Count 3, F-3 Escape in its July 24, 2010 Judgment Entry. (See Judgment Entry filed June 24, 2010.) Furthermore, the trial court, in its R.C. § 2929.03(F) sentencing opinion, incorrectly merged original Count 3 (which had previously been dismissed for lack of sufficient evidence) with Count 4 and sentenced Thompson to five years of incarceration to be served concurrently with any other sentence. (Sent. Tr. pg. 42–43; see also 2929.03(F) Opinion filed June 23, 2010, pg. 8.)

Therefore, until the trial court files a judgment entry as well as a R.C. 2929.03(F) Opinion that are compliant with Crim. R. 32(C) and Thompson's constitutional rights, this matter is neither final nor appealable. *State v. Baker*, 119 Ohio St. 3d 197 (2008); *State v. Ketterer*, 126 Ohio St. 3d 448 (2010).

A. Relevant law

Crim. R. 32(C) states the following:

> A judgment of conviction shall set forth the plea, the verdict, or findings, upon which each conviction is based, and the sentence.

> Multiple judgments of conviction may be addressed in one judgment entry. If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall render judgment accordingly. The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.

In *Baker*, this Court explained the requirements of Crim. R.32(C) when it stated: "the judgment of conviction is a single document that must include: (1) the guilty plea, jury verdict, or finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court." *State v. Baker*, 119 Ohio St. 3d 197, 893 N.E.2d 163 (2008) at syllabus. The absence of any of these elements renders the entry non-final and non-appealable under R.C. § 2505.02. *Id.* at 199.

In *Ketterer*, this Court then provided that specific to capital cases, "[t]he judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed." R.C. 2929.03(F). As a result, this Court held that the final order in "cases in which R.C. 2929.03(F) requires the court or panel to file a sentencing opinion, a final, appealable order consists of both the sentencing opinion filed pursuant to R.C. 2929.03(F) and the judgment of conviction filed pursuant to Crim. R. 32(C)." *Ketterer*, 126 Ohio St.3d 448, 935 N.E.2d 4, at the syllabus.

B. Argument

Thompson's case lacks a final appealable order. The July 1, 2010 nunc pro tunc Judgment Entry, the June 24, 2010 Judgment Entry, and the R.C. 2929.03(F) Opinion all contain defects, which render the judgment in this case neither final, nor appealable.

1. The July 1, 2010 *nunc pro tunc* judgment entry is controlling in this case – it contains none of the required elements of Crim. R.32(C).

The trial court filed a *nunc pro tunc* judgment entry on July 1, 2010. Upon filing by the clerk, this *nunc pro tunc* entry "issued as a correction and replacement for the entire original judgment entry." *State ex rel. Elkins v. Sandusky Cty. Court of Common Pleas*, No. 5-11-008, 2011 Ohio App. LEXIS 1627 *6 (Sandusky Ct. App. April 19, 2011).

The court in *Elkins* stated the following:

> Respondent, acknowledging that the initial judgment entry was incorrect, issued the January 7, 2011 "nunc pro tunc" judgment entry. Nevertheless, that entry still does not comply with Crim. R. 32(C), in that it does not replace the original with a complete, corrected judgment. Instead, the second judgment merely references the omission of the dismissal of the firearm specifications in the prior judgment entry and states that "the remainder of the judgment entry dated May 13th, 2008 and filed stamped May 13th, 2008, shall remain in full force and effect." In other words, relator's judgment of conviction and sentence is divided between two judgment entries. Relator is entitled to a single document which comports with Crim. R. 32(C) and the *Baker* requirements.
>
> *Id.*

The court in *Elkins*, like this Court in *Baker*, found that "[o]nly **one** document can constitute a final appealable order." *Id.*; *Baker*, 119 Ohio St.3d at 201, 893 N.E.2d at 167. Although this Court then stated in *Ketterer* that capital cases are a "clear exception to the one document rule", this Court also held:

> We hold that in cases in which R.C. 2929.03(F) requires the court or panel to file a sentencing opinion, a final, appealable order consists of both the sentencing opinion filed pursuant to R.C. 2929.03(F) and the judgment of conviction filed pursuant to Crim.R. 32(C). Therefore, while the final, appealable order must satisfy the four requirements enumerated in *Baker*, the first requirement – that the final, appealable order include the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based – will be satisfied if either the judgment of conviction or the sentencing opinion includes the guilty plea, jury verdict, or finding of the court upon which the conviction is based.

Ketterer, 126 Ohio St. 3d at 452, 935 N.E.2d at 15. This Court specifically found that the R.C. 2929.03(F) Opinion is to be read in conjunction with ***the*** judgment of conviction. *See id.* Although capital cases are an exception to the one document rule in as much as the R.C. 2929.03(F) Opinion is to be read in pari materia with the Judgment Entry, it cannot then give trial courts free reign to use multiple entries to equal "the judgment of conviction." *Id.*

Here, the trial court issued its *nunc pro tunc* Judgment Entry on July 1, 2010. This entry states, "On June 28, 2010, the orders that this Journal Entry be filed NUNC PRO TUNC to correct the Journal Entry dated June 23, 2010 and filed June 25, 2010 to read in part as follows: The sentencing hearing commenced on June 10, 2010, and continued on until June 11, 2010. The jury made a unanimous recommendation of DEATH for the Defendant on merged Counts 1 and 2." This *nunc pro tunc* Judgment Entry falls well short of journalizing the formalities as required by Baker and Crim. R.32(C).

The July 1, 2010 *nunc pro tunc* Entry is signed by the Judge and contains an official time-stamp by the clerk. However, this Entry merely journalizes the jury verdict as to Counts 1 and 2 as required by *Baker*. 119 Ohio St. 3d at syllabus, 893 N.E.2d at syllabus. It contains no further information as to Counts 1 and 2 and absolutely no information as to the additional Counts in Thompson's indictment. As such, this judgment entry is lacking in the formalities required by *Baker* and Crim. R. 32(C). This is not a final, appealable order.

2. Count 3 is not journalized in the June 24, 2010 Judgment Entry.

Assuming arguendo that this Court finds that the June 24, 2010 Judgment Entry is indeed the final judgment of conviction filed pursuant to Crim. R. 32(C) in this case, this entry is similarly lacking in the requisite formalities and is not a final, appealable order.

Crim. R. 32(C) and *Baker* demand that "[i]f the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall render judgment accordingly." Crim.R. 32(C). Here, the trial court failed to journalize that it had previously granted a defense motion to dismiss pursuant to Criminal Rule 29 as it related to the F-3 Escape, Count 3. (Tr. at 2340-45; see also Judgment Entry filed June 24, 2010.) In fact, original Count 3, F-3 Escape, is never mentioned in the Judgment Entry filed by the trial court. Because that Count was never properly journalized, this renders the judgment entry neither final, nor appealable. See Crim. R. 32(C) and *Baker*, 119 Ohio St. 3d at syllabus, 893 N.E.2d at syllabus.

The trial court did in fact journalize that Count 3 was previously dismissed, however this was not in the July 24, 2010 Entry nor was it in the July 1, 2010 *nunc pro tunc* Entry. Instead, it was in yet another Journal Entry filed June 24, 2010 explaining renumbering of counts. In that Entry, the trial court stated: "The Court granted Rule 29 on the original Count 3, Escape with Specifications 1 and 2 to Count 3." But the fact that this was journalized in an entry is not dispositive of this issue. That Journal Entry is clearly not the judgment of conviction filed pursuant to Crim. R. 32(C). And although this Court must read the judgment of conviction in pari materia the R.C. 2929.03(F) Opinion, this Court may not read these three separate entries in pari materia in order to constitute one final judgment of conviction. (See *Baker*, 119 Ohio St.3d at 201, 893 N.E.2d at 167 ("[o]nly **one** document can constitute a final appealable order."); *Ketterer*, 126 Ohio St. 3d at 452, 935 N.E.2d at 15 (holding that "in cases in which R.C. 2929.03(F) requires the court or panel to file a sentencing opinion, a final, appealable order consists of both the sentencing opinion filed pursuant to R.C. 2929.03(F) and ***the*** judgment of conviction filed pursuant to Crim. R. 32(C)") (emphasis added)).

Further, Crim. R. 32 (C) indeed mandates that the entry specify the nature of ***each*** conviction. *See State v. Lupardus*, No. 07CA46, 2008 Ohio App. LEXIS 2234 (Washington Ct. App. May 30, 2008) at *6. It is well established that Crim. R. 32(C) requires that a trial court dispose of each count before the determination of a criminal action is final and appealable. See, e.g., *State v. White*, No. 92972, 2010 Ohio App. LEXIS 1924 (Cuyahoga Ct. App. May 27, 2010) at *60 *citing to State v. Waters*, No. 85691, 2005 Ohio App. LEXIS 4636 (Cuyahoga Ct. App. Sept. 29, 2005); *State v. Cooper*, No. 84716, 2005 Ohio App. LEXIS 750 (Cuyahoga Ct. App. Feb. 24, 2005). See also *State v. Goldsberry*, No. 14-07-06, 2009 Ohio App. LEXIS 5064 (Union Ct. App. Nov. 16, 2009) (collecting cases). Here, the fact that Count 3 was previously dismissed was not journalized in the June 24, 2010 Judgment Entry.

Because someone unfamiliar with a case could not glean from a plain reading of the June 24 2010 Judgment Entry (as well as the 2929.03(F) opinion) that Thompson was in fact acquitted of Count 3, F-3 Escape, then Crim. R. 32(c) and *Baker* cannot be satisfied. As such, even if this Court reads the June 24, 2010 Judgment Entry as the judgment of conviction in this case, Thompson's case still lacks a valid final, appealable order.

3. The trial court's R.C. 2929.03(F) Opinion violates Thompson's protection against double jeopardy as guaranteed by the United States Constitution.

Because R.C. 2929.03(F), as well as this Court's decision in *Ketterer*, requires that trial courts issue a sentencing opinion explaining the death verdict, the errors in the R.C. 2929.03(F) Opinion similarly render Thompson's case neither final, nor appealable. This Opinion also violates Thompson's constitutional right to protections from double jeopardy. U.S. Const. Amend. V.

Here, the trial court, in its R.C. 2929.03(F) sentencing opinion, incorrectly merged original count three and count four (the F-3 and F-5 counts of escape) and sentenced Thompson

to five years of incarceration to be served concurrently with any other sentence. (Sent. Tr. pg. 42–43; see also 2929.03(F) Opinion filed June 23, 2010, pg. 8.) This Count 3 is the same count that the trial court had previously granted a defense motion to dismiss pursuant to Criminal Rule 29. (Tr. at 2340-45.) As stated above, the court's judgment entry does not reflect that sentence, and instead reflects a 12 month sentence for the F-5 Escape reflected in Count 4. (Judgment Entry filed June 24, 2010).

Making the matter more confusing, the Court had actually renumbered the counts, so while Thompson was acquitted of original count three by virtue of the court's dismissal, he had been found guilty by the jury of renumbered Count 3, which become a Carrying Concealed Weapon charge. (Journal Entry filed June 24, 2010 explaining renumbering of counts.) Despite the unusual permutations of count numbering, it is clear that the court sentenced Thompson on "original count 3" to five-years incarceration. (Tr. at 2345). This was error.

Even when the June 24, 2010 Judgment Entry (the vastly more complete of the two judgment entries filed in the case) and the R.C. 2929.03(F) Opinion are read in pari materia, as required by this Court's decision in *Ketterer*, it is still unclear what Thompson's sentence is as to Count 4. In the Judgment Entry, Thompson was sentenced to 12 months, concurrent to any other sentence. However, in the R.C. § 2929.03(F) Opinion, he was sentenced to 5 years on this same Count (after it was incorrectly merged with Count 3). Because Count 4 is charged only as the felony of the fifth degree, a sentence of more than 12 months is impossible. See R.C. § 2929.14(A)(5) ("For a felony of the fifth degree, the prison term shall be six, seven, eight, nine, ten, eleven, or twelve months."). It only makes sense then that the trial court, in its R.C. § 2929.03(F) opinion, was specifically sentencing Thompson on original Count 3, charged as a felony of the third degree, which is punishable with prison time up to 5 years. R.C. §

2929.14(A)(3) ("For a felony of the third degree, the prison term shall be one, two, three, four, or five years.") This was a violation of Thompson's constitutional rights.

Because Thompson could not be sentenced on a charge that was previously dismissed for insufficient evidence, the trial court's R.C. § 2929.03(F) Opinion violates his protection against double jeopardy as guaranteed by the United States Constitution. "The Double Jeopardy Clause of the Fifth Amendment commands that 'no person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb.' Under this Clause, once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)). "The federal rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy." *Crist v. Bretz*, 437 U.S. 28, 38 (1978). Thompson's jury was impaneled and sworn when the court granted defense's motion for Rule 29 to original count 3. The court's sentencing of Thompson on a charge for which he was acquitted punished him for an offense for which jeopardy had terminated.

As with the two judgment entries filed in this case, the R.C. 2929.03(F) Opinion also fails to comply with the demands of Crim. R. 32(C) and this Court's decision in *Baker*. The fact the Count 3, F-3 Escape was previously dismissed in no where mentioned; instead this Count incorrectly merged that count with Count 4 and sentenced Thompson to a sentence of five-years, in violation of Thompson's constitutional right against double jeopardy as guaranteed by the United States Constitution

4. Lack of final, appealable order deprives this Court of jurisdiction.

Because there is no final, appealable order in this case, this Court does not have jurisdiction to consider and correct any error. As this Court has found, without the filing of a proper final judgment, an appellate court can have no subject matter jurisdiction over a case. And without subject matter jurisdiction, any action taken by an appellate court is void ab initio. See *Gehm v. Timberline Post & Frame*, 112 Ohio St. 3d 514 (2007), citing Section 3(B)(2), Article IV of the Ohio Constitution and *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St. 3d 17, 20 (1989) ("As a result, '[i]t is well-established that an order must be final before it can be reviewed by an appellate court. If an order is not final, then an appellate court has no jurisdiction.'"); *State v. Threatt*, 108 Ohio St. 3d 277 (2006), at *22 ("If there is no final judgment or other type of final order, then there is no reviewable decision over which an appellate court can exercise jurisdiction") (citation omitted); and *Hubbard v. Canton City Sch. Bd. of Educ.*, 88 Ohio St. 3d 14, 15 (2000) ("The opinion of the court of appeals is vacated for the reason that the court of appeals lacked subject-matter jurisdiction for lack of a final appealable order."). A void judgment "place[s] the parties in the same place as if there had been no [judgment]." *State v. Bezak*, 114 Ohio St. 3d 94 (2007) (discussing void sentencing judgments), citing *Romito v. Maxwell*, 10 Ohio St. 2d 266, 267 (1967).

In addition, this Court's decision in *State v. Fischer*, 128 Ohio St. 3d 92 (2010) underlines the distinction between a valid judgment with void portions, and a judgment that is void ab initio. This Court explained that because postrelease control error did not render an entire sentence void, a defendant with improper postrelease control cannot appeal his sentence anew. *Id.* But the Court carefully distinguished postrelease control error from failure to issue a final appealable order error:

> Nothing in *Baker* discusses void or voidable sentences. Rather, the syllabus speaks only to the requirement that the judgment of conviction set forth "the sentence" in addition to the other necessary aspects of the judgment. The judgment in this case did set forth the sentence. ***The fact that the sentence was illegal does not deprive the appellate court of jurisdiction to consider and correct the error.***

Id. (emphasis added). And while sentencing error "does not deprive the appellate court of jurisdiction to consider and correct the error[,]" the lack of a final order does. *Gehm* 112 Ohio St. 3d at *13-14; *Gen. Acc. Ins. Co*, 44 Ohio St. 3d at 20; *Threatt*, 108 Ohio St. 3d at *22; *Hubbard*, 88 Ohio St. 3d at *15.

C. Conclusion

Baker held that a judgment of conviction that is non-compliant with the formalities of Crim. R. 32(C) is non-final. *Baker*, 119 Ohio St. 3d at 198-99, 893 N.E.2d at 165. In considering the R.C. § 2929.03(F) sentencing opinion in conjunction with either judgment entry, there is no final appealable order in this case. Until and unless the trial court files both a judgment entry and a R.C.§ 2929.03(F) Opinion that is complaint with Crim. R. 32(C) as well as Thompson's constitutional rights, his judgment can be neither final, nor appealable. *Id.*; *Ketterer*, 126 Ohio St.3d 448, 935 N.E.2d 4, at the syllabus.

Proposition of Law No. 2

The defendant's right to due process, equal protection, and freedom from cruel and unusual punishment is violated when the State excludes an African-American juror without providing a satisfactory race-neutral reason. U.S. Const. Amends. VIII and XIV.

The State violated Thompson's rights to due process, equal protection, and freedom from cruel and unusual punishment guaranteed by the United States and Ohio Constitutions when it excluded an African-American juror without being able to provide a satisfactory race-neutral reason. *See Batson v. Kentucky*, 476 U.S. 79, 97 (1986).

A. Relevant law

The *Batson* Court held that the State violates the Equal Protection clause of the Fourteenth Amendment when it challenges "potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a Black Defendant." *Id.* at 89. The Court delineated a three-step procedure to evaluate a *Batson* challenge. *Id.* at 93-98. First, the Defendant must make a prima-facie showing of discrimination. *Id.* at 93-97. Next, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Id.* at 97. Finally, the trial court determines "if the defendant has established purposeful discrimination." *Id.* at 98.

Sometimes, as in Thompson's case, the trial court will gloss over the prima facie showing and simply require the prosecutor to provide a race-neutral reason. *See, e.g., Hernandez v. New York*, 500 U.S. 352, 359 (1991); *Braxton v. Gansheimer*, 561 F.3d 453, 461 (6th Cir. 2009). When the trial court immediately requires the State to provide a race-neutral reason, "the preliminary issue of whether the defendant has made a prima facie showing becomes moot." *Hernandez*, 500 U.S. at 359.

A prosecutor's race neutral reason "need not rise to the level of justifying exercise of challenge for cause." *Batson*, 476 U.S. at 97. However, a prosecutor cannot meet his burden by denying a discriminatory motive or asserting his good faith. *Id.*

B. Analysis

In Thompson's case, the prosecutor exercised a preemptory challenge regarding Juror Outley-Kelley, an African American woman. (Tr. 1129-30.) Defense submitted a *Batson* challenge and the court and prosecutor immediately began discussing potential race-neutral reasons. (*Id.*) The first offered by the State was that the juror implied she was the sole holdout on a prior criminal case. (*Id.* at 1130.) The court responded that the State never asked and therefore no one knew whether she was, in fact, a holdout. (*Id.*) The court told the State to give it another reason because, "I'm not buying that." (*Id.* at 1131.) The next reason the State offered was that the juror was related to a former employee of the prosecutor's office and currently worked for the sheriff's department. (*Id.*) The court was skeptical of this reason as well, asking, "You're uncomfortable having a juror who is a sheriff's deputy employee?" (*Id.* at 1132.) The State then immediately abandoned that reason and argued again, "the main reason is because she was a holdout." (*Id.*)

After the State second-guessed its own reasons, the court told the prosecutor it was "not buying this she works for the Sheriff as a reason for the Prosecution to excuse her at all." (*Id.* at 1133.) The court then summarized that the State had "come to the . . . firm conclusion[] that she was a holdout juror." (*Id.*) Despite its stated skepticism, the court then granted the challenge over objection. (*Id.* at 1135.)

Thompson's judge shirked her duty to evaluate the prosecutors' demeanor and credibility to determine whether the race-neutral reason the State offered was pretextual. *Miller-El v.*

Cockrell, 537 U.S. 322, 339 (2003). After all, "the critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his preemptory strike." *Id.* at 338-39. Here, Thompson's judge told the prosecutor that she did not accept either of his purported race-neutral reasons. (Tr. 1131, 1133.) The State's subsequent presentation and immediate abandonment of the juror's relationship to the Sheriff's department indicated it was simply grasping at straws to come up with a purported race neutral reason. (*Id.* at 1132); *see Purkett v. Elem*, 514 U.S. 765, 768 (1995) ("[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.")

Reviewing the juror's answers during individual voir dire reveals the trial judge was right to be skeptical. The juror explained she had served on a jury fifteen years prior in Summit County and sat on a shooting case. (Tr. 113.) When asked what the verdict in the case was, the juror asked whether the prosecutor wanted her personal verdict or the verdict of the jury as a whole. (*Id.* at 114.) The Court then asked if it was a hung jury and she responded that it was. (*Id.*) Upon later questioning, she revealed there was one holdout, but didn't know whether she should say what side she was on. (*Id.* at 118.) The prosecutor did not question her further.

The State's behavior during the challenge and during voir dire also made the trial court's skepticism sensible. Much like the prosecutor in *Miller-El*, Thompson's prosecutor "suddenly came up with . . . another reason for the strike," when his original decision was challenged. *Miller-El*, 545 U.S. at 246. The court also properly considered the failure of the prosecutor to question the juror further to determine the precise nature of her prior services as evidence of discriminatory intent. *United States v. Odeneal*, 517 F.3d 406, 421 (6th Cir. 2008) ("The failure

of the prosecution to inquire regarding a reason purported to be a basis for a juror's dismissal serves as evidence of discrimination.")

Despite these red flags and rather than reviewing "all of the evidence and surrounding circumstances," the court indicated it did not believe the prosecutor but accepted the explanation because it was race-neutral simply on its face. *Coombs v. Diguglielmo*, 616 F.3d 255, 262 (3rd Cir. 2010). The court's acceptance of a proposed justification it recognized as pretextual violated Thompsons' rights under the Ohio and United States constitution because the court failed to engage in the analysis required by *Batson*. *See id.* ("Trial courts fail to engage in the required analysis when they 'fail[ ] to examine all of the evidence to determine whether the State's proffered race-neutral explanations [a]re pretextual.'") (quoting *Riley v. Taylor*, 277 F.3d 261, 286 (3rd Cir. 2001).

C. Conclusion

Because Thompson's rights to due process, equal protection, and freedom from cruel and unusual punishment guaranteed by the United States and Ohio Constitutions were violated by the impermissible exclusion of an African-American juror, this Court should reverse and remand for a new trial. *See Ford v. Norris*, 67 F.3d 162, 170 (8th Cir. 1995) ("[C]onstitutional error involving racial discrimination in jury selection is not subject to harmless error analysis.")

Proposition of Law No. 3

The defendant's rights to a fair jury and due process are violated when the trial court fails to inquire into pre-trial publicity after a juror reveals that members of the jury pool are discussing a defendant's withdrawn prior guilty plea. U.S. Const. Amends. VI and XIV, Ohio Const. Art. I, § 5.

The trial court violated Thompson's rights under the United States and Ohio Constitutions when it failed to inquire into pre-trial publicity after Juror 100 revealed that people in the jury pool were discussing Thompson's prior guilty plea.

A. Relevant law

Under the Sixth and Fourteenth Amendments, a defendant has a right to an unbiased and impartial jury. *Morgan v. Illinois*, 504 U.S. 719, 727 (1992). The Sixth Amendment gives "the trial court . . . a serious duty to determine the question of actual bias." *Dennis v. United States*, 339 U.S. 162, 168 (1950). Even with that broad discretion, however, "the trial court must be zealous to protect the rights of an accused." *Id.* The Supreme Court has recognized that one area of pretrial publicity that is especially damning is admissions of guilt by the accused. *See Skilling v. United States*, 130 S. Ct. 2896, 2916 (2010) (*citing United States v. Chagra*, 669 F.2d 241, 251–252, n. 11 (5th Cir. 1982)) ("A jury may have difficulty in disbelieving or forgetting a defendant's opinion of his own guilt but have no difficulty in rejecting the opinions of others because they may not be well-founded.")

To protect a defendant's rights, the court is required to conduct a sufficient voir dire of jurors exposed to pre-trial publicity. "An appellant can obtain a reversal of his conviction because of pretrial publicity . . . [by] establish[ing] both that pretrial publicity about his case raised 'a significant possibility of prejudice,' and that the voir dire procedure followed by the . . . court in his case failed to provide a 'reasonable assurance that prejudice would be discovered

if present.'" *United Statesv. Chagra*, 669 F.2d 241, 250 (5th Cir. 1982) (internal citations omitted). Thompon's previous guilty plea was clearly prejudicial and as outlined below, the trial court's failure to examine did not assure the discovery of prejudice.

B. Analysis

During individual voir dire, the court asked Juror 100 about pre-trial publicity and the juror responded, "I kind of remember hearing about on the radio." (Tr. 905.) Questioned further, he stated that the judge told them about a change in plea. (*Id.*) The judge corrected the juror that she had not mentioned anything about the prior guilty plea and the juror remarked, "somebody had said something in the courtroom or the jury pool about it." (*Id.*) Expounding, the juror stated he knew "there was a guilty plea but there was a technical problem or something and now it's a not guilty." (*Id.* at 906.) The court went on to question the juror's ability to be impartial and the juror responded, "It's kind of hard with other people bring these up." (*Id.* at 907.) Juror 100 was excused for cause, but the court made no further investigation into the knowledge being passed around the jury pool that Thompson had pleaded guilty previously. (*Id.* at 909.)

The court had already excluded every juror prior to Juror 100 who knew about Thompson's guilty plea except for one. (Tr. 225, 433–34, 437, 445–46, 616, 698, 876.) The only juror who was not excluded, Juror 51, when asked about pre-trial publicity, said, "I know it's about the murder of a policeman and that the defendant actually pleaded guilty and then he recanted, and now that's why we're having a trial." (*Id.* at 532.) Juror 51 then promised the court she could put it out of her mind. (*Id.* at 541.) She also promised not to tell anybody else. (*Id.* at 542.)

Even though Juror 51 was eventually excused during general voir dire for scheduling reasons, the fact remains a juror who knew about the prior guilty plea remained in the pool, jurors were talking about the prior guilty plea, and a number of jurors who had gone through individual voir dire prior to Juror 100 were seated on the jury. In fact, every juror that sat in the case had been individually questioned prior to Juror 100.

There is a distinct possibility that Juror 51 discussed Thompson's prior guilty plea with other jurors during voir dire and those jurors learned about that plea after they were questioned during individual voir dire. Specifically, it is known that Juror 86, who was eventually seated on Thompson's jury as an alternate, stated that she knew some about this case because other prospective jurors were talking about it in the hallways. (Tr. 776.) The trial court could have avoided this possibility by questioning Juror 100 in depth to determine who was talking about Thompson's prior plea.

C. Conclusion

The potential that jurors had knowledge of Thompson's prior guilty plea that was unknown to the parties and the court is constitutionally problematic because "[I]f just one juror receives prejudicial off-the-record information the prejudicial effect spills over and is viewed as having tainted all jurors." *United States v. Gaffney*, 676 F. Supp. 1544, 1556 (M.D. Fla. 1987). Thus, the trial court's failure to properly voir dire Juror 100 deprived Thompson of his rights to due process, an impartial jury, and freedom from cruel and unusual punishment guaranteed by the Ohio and United States Constitutions.

Proposition of Law No. 4

The defendant's rights to a fair trial, impartial jury, due process and freedom from cruel and unusual punishment are violated when the trial court refuses to allow counsel to question jurors who are hesitant about imposing the death penalty and applies the wrong standard in deciding whether to exclude jurors for cause. U.S. Const. Amends. VI, VIII and XIV, Ohio Const. Art. I, §§ 9, 10.

Ashford Thompson's right to a fair trial, impartial jury, due process, and freedom from cruel and unusual punishment guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States' Constitution, and Sections 9 and 10 of Article One of the Ohio Constitution were violated by the trial court's refusal to follow the standard for exclusion of a capital juror expressing reticence about the death penalty and its refusal to allow his counsel to ask questions of that juror violated Ohio Revised Code § 2945.25(C).

The United States Constitution demands that a jury empaneled to determine a death sentence be fairly composed: "[A] State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." *Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968), *modified by Wainwright v. Witt*, 469 U.S. 412 (1985). The federal constitutional standard for determining whether a juror expressing concern about the death penalty can be eliminated for cause is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Witt*, 469 U.S. at 424.

The *Witt* standard does not mirror the language contained in the Ohio Revised Code. In fact, Ohio Revised Code § 2945.25(C) indicates that a capital juror may be challenged for cause if he or she "*unequivocally* states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a particular case." In addition to the language setting out the substantive standard, O.R.C. § 2945.25(C) mandates, "*All*

parties shall be given wide latitude in voir dire questioning in this regard." O.R.C. § 2945.25(C) (emphasis added). Thompson has a federal due process right to have Ohio fairly apply its legislative enactments. *See Evitts v. Lucey*, 469 U.S. 387, 400-401 (1985); *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1993) (state violates defendant's right to due process when it fails to follow statutory procedures in capital case).

A. Juror 2 expressed skepticism about her ability to impose the death penalty by stating she "did not know" if she could follow the law and was summarily dismissed without defense counsel being allowed to engage her at all.

During individual voir dire, Juror 2 expressed concern about her ability to impose the death penalty, but appeared to retreat from the position after being reminded of her duty under the law. (Tr. 72-74.) After being asked by the Court, "Are you religiously or morally or otherwise against the imposition of the death penalty," Juror 2 responded, "I do not believe in the death penalty." (Tr. 72.) After being asked, notwithstanding her objection, if she could follow the law, Juror 2 repeated the same response. (*Id.*) Indicating that this was a difficult question, the judge asked if Juror 2 was "saying you would not follow the law as I would instruct you?" (*Id.*) The juror responded, "I would do my best, but . . ." (*Id.*)

The judge then asked the juror if her "views on the death penalty [would] prevent or substantially impair your ability as a juror to perform your duty in accordance with your oath and my instructions?" (Tr. 73), *see also Witt*, 469 U.S. at 424. Upon reflection, Juror 2 was ambivalent, stating, "I honestly don't know. I've never been put in this position." (*Id.*) The court empathized that "[v]ery few people have been" put in the juror's position and asked if she was "saying [she] would follow the law." (*Id.*) Juror 2 said, "Yes." (*Id.*)

The court then asked the understandably hesitant juror if she was now saying "without any doubt . . . you could impose the death penalty." (*Id.*) Juror 2 finally relented, saying "No.

I'm sorry. No." (*Id.*) The court then thanked and excused the juror. (*Id.* at 74.) Defense counsel protested that he should "get an opportunity to rehabilitate." (*Id.*) Rather than allowing defense counsel the opportunity, the court stated that it had "tried that," and then speculated that the juror had another problem with the scheduling of the case. (*Id.* at 75.) Earlier in the voir dire, the juror had expressed some skepticism about her ability to have work covered, but never stated that it would be a substantial hardship. (*Id.* at 70.) The court noted defense counsel's objection and said it would give counsel "one or two questions the next time." (*Id.* at 75.)

B. The Court applied the wrong standard in questioning juror two when it used the *Witt* language rather than the more restrictive language contained in Ohio Revised Code § 2945.25(C).

The *Witt* standard does not mirror the language contained in the Ohio Revised Code. In fact, Ohio Revised Code § 2945.25(C) indicates that a capital juror may be challenged for cause if he or she "*unequivocally* states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a particular case."

However, in *State v. Jackson*, 107 Ohio St. 3d 53, 59 (2005), this Court held, based on prior purportedly established precedent that, "the *Witt* standard is the correct standard for determining when a prospective juror may be excluded for cause based on his or her opposition to the death penalty." (*citing State v. Rogers*, 17 Ohio St. 3d 174, paragraph three of the syllabus (1985), *vacated on other grounds* by *Rogers v. Ohio*, 474 U.S. 1002, 1006 (1985); *State v. Beuke*, 38 Ohio St. 3d 29, 38 (1988)).

This Court's recent decision in *State v. Hodge*, 128 Ohio St. 3d 1 (2010), undermines this Court's interpretation of O.R.C. § 2945.25. The *Hodge* Court held that the United States Supreme Court's decision in *Ice* finding a sentencing scheme similar to Ohio's constitutional did not revive sections of the Ohio Revised Code demanding judicial fact-finding for consecutive

sentences that this Court previously held unconstitutional under its interpretation of the Sixth Amendment. *Id.* at 2. Instead, this Court refused to revive the old law because, "[i]t would be speculative to assume . . ." that the legislature would want to revive the provisions. *Id.* at 8.

This same forbidden speculation (i.e. that the Ohio legislature wanted to codify malleable Supreme Court standards rather than what it wrote) is what caused this Court to modify the clear language of O.R.C. § 2945.25(C) to comport with changing United States Supreme Court precedent. Therefore, this Court should overrule its prior holdings and find the O.R.C. § 2945.25(C) standard is the proper standard until there is "positive action by the General Assembly to indicate its intent and desire in a complicated area of law." *Id.*

C. Even if *Witt* is the appropriate substantive standard under Ohio law, the Court violated Ohio Revised Code 2945.25(C) when it refused to allow the defense to voir dire a juror expressing reticence about the death penalty.

Even assuming that O.R.C. § 2945.25(C) codifies the *Witt* standard, it provides an additional procedural right for voir dire of the hesitant juror. In addition to the language setting out the substantive standard, O.R.C. § 2945.25(C) mandates, "*All parties shall* be given wide latitude in voir dire questioning in this regard." O.R.C. § 2945.25(C) (emphasis added). This plain language gives a clear command to courts that a juror may not be excluded solely based on his or her initial answer. It is axiomatic that "plain language requires no additional statutory interpretation." *State ex rel. Carnail v. McCormick*, 126 Ohio St. 3d 124, 129 (2010).

The *Jackson* court briefly addressed the issue of a court refusing to allow defense counsel to voir dire a juror: "Although it might have been preferable for the trial court to permit defense counsel to question these jurors, the trial court did not abuse its discretion." *Jackson*, ¶34, 107 Ohio St.3d at 59. The jurors in *Jackson*, however, unlike Juror 2, had "unequivocally stated that [they] could not fairly consider imposing the death penalty." *Id.* In this case, Juror 2 was less

clear about her opposition, waffling back and forth before being summarily excused. Moreover, the *Jackson* court never addressed the argument regarding O.R.C. § 2945.25(C)'s plain language.

D. Even if the Ohio Revised Code provides a Defendant with no additional rights, the trial court violated Thompson's right to a fair and impartial jury under the United States and Ohio Constitutions when it excused juror two.

The Sixth Amendment gives "the trial court . . . a serious duty to determine the question of actual bias, and a broad discretion in its rulings on challenges therefore." *Dennis v. United States*, 339 U.S. 162, 168 (1950). Even with that broad discretion, however, "the trial court must be zealous to protect the rights of an accused." *Id.*

The trial court in Thompson's case did not zealously protect his rights. Even though the Court in *Witt* deferred to the findings of the trial judge, it did so under the rigid standards of the AEDPA and noted that Witt's lawyers "did not see fit to object to juror Colby's recusal, or to attempt rehabilitation. *Witt*, 469 U.S. at 430–31.

Thompson's counsel both objected to juror two's recusal and attempted rehabilitation. Tr. at 74-75. Rather than allowing counsel to question and attempt to rehabilitate the juror, the court told counsel that it had attempted rehabilitation and that it would give counsel "one or two questions the next time." *Id.* at 75. The trial court's actions in this case did not protect Thompson's rights and violated the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the analogous provisions of the Ohio Constitution. Therefore, his conviction must be overturned.

Proposition of Law No. 5

When a trial court death qualifies a capital jury, but fails to life qualify that same jury, the defendant is denied his fundamental right to a fair trial in violation of the Equal Protection Clause and the prosecution inures a benefit unfairly denied the defendant in violation of the Due Process Clause. U.S. Const. Amend. XIV.

A. Trial court death qualifies Thompson's jury

During individual voir dire on capital punishment, unless the jurors' questionnaires indicated that they highly favored the death penalty, the trial court made sure to death-qualify *every* prospective juror. Those death qualification questions resulted in the removal of seven prospective jurors from the jury based on their opposition to the death penalty. (Tr. 75, 179, 512, 647, 668, 864, and 913.) The trial court death-qualified all of the prospective jurors but the trial court failed to ask life qualifying questions of the vast majority of these same jurors.

Moreover, the trial court death qualified every member of Thompson's capital jury, including the alternate jurors, but failed to life-qualify 14 of 16 of those same jurors.[2] (See Tr. 57, 62, 161, 195, 261-2, 319-20, 326-27, 449, 459-60, 474, 489, 524-25, 561, 603, 653, 778, 796-97.)

B. The trial court ensured only that jurors could impose death, giving the prosecution an unfair advantage.

The Due Process Clause will not allow state court proceedings that provide an unfair advantage to the prosecution. Justice is due to both the accused and the accuser. *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934), *rev'd in part*, *Malloy v. Hogan*, 378 U.S. 1 (1964).

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[2] Juror 44 indicated on her jury questionnaire that she believed that the death penalty was appropriate for all murders, so the trial court did not specifically death qualify this juror. Further, Jurors 42, 43, and 88 indicated to the Court that they would be able to follow the law, however they were not specifically life qualified. (Tr. 450, 460-61, 807.)

This requires an equitable balance between the accused and the accuser. See *Wardius v. Oregon*, 412 U.S. 470, 475 (1973). The playing field must be kept level.

Because the State may present witnesses to prove its case, the defendant must have that same capability. *Washington v. Texas*, 388 U.S. 14 (1967). Moreover, no indigent defendant charged with a serious offense will be forced into court to face the state's attorneys without his own counsel. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Nor will a defendant be required to provide discovery to the state unless the state is required to reciprocate. *Wardius*, 412 U.S. 470. To provide otherwise would be fundamentally unfair to the defendant. *Id.* at 476. Always, the balance between the accused and the accuser is kept true. This principle of fairness must also apply to voir dire in capital cases.

Beyond requiring fairness, the Due Process Clause also requires that state-created procedures be administered in a meaningful manner. *Evitts v. Lucey*, 469 U.S. 387 (1985). In *Evitts* the Supreme Court addressed whether there was an appellate-level right to effective assistance of counsel. *Id.* at 392. *Evitts* noted that lawyers were as necessary as transcripts to a criminal appeal. *Id.* at 393. The Court held that when a state creates a system of appeals, that system must comport with due process. *Id.* Here, Ohio has created a statutory voir dire procedure under O.R.C. § 2945.27. The Due Process Clause requires meaningful administration of that statute. *Evitts*, 469 U.S. at 387.

"The right to a fair trial is a fundamental liberty[.]" *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (citing *Drope v. Missouri*, 420 U.S. 162 (1975)). A biased and partial juror deprives the criminal defendant of that right. See *Morgan v. Illinois*, 504 U.S. 719, 727 (1992) (citing *Irvin v. Dowd*, 366 U.S. 717 (1961); *Turner v. Louisiana*, 379 U.S. 466 (1965)). To ensure a fair

capital trial, jurors must be capable of imposing both life and death sentences. See *Wainwright v. Witt*, 469 U.S. 412 (1985); *Morgan*, 504 U.S. at 719.

The trial court cannot allow the State to present witnesses to prove its case and then deny that same opportunity to the defendant. *Washington*, 388 U.S. 14. The trial court cannot allow the prosecution to hide its case while at the same time requiring that the defendant provide discovery. *Wardius*, 412 U.S. 470. Voir dire is no different. The trial court must seek to ensure that jurors can be fair to both the prosecution and the defense. See *Lockhart v. McCree*, 476 U.S. 162, 192 (1986) ("settled constitutional principles guarantee a defendant the right to a fair trial and an impartial jury whose composition is not biased toward the prosecution"). In Thompson's case, however, most of the trial court's inquiry sought out only jurors who could impose death, in violation of the Due Process Clause.

It is the trial court that must ensure this fairness because, in Ohio, the ultimate responsibility for seating fair and impartial jurors rests with the trial court. Ohio Revised Code § 2945.27 states:

> The judge of the trial court shall examine the prospective jurors under oath or upon affirmation as to their qualifications to serve as fair and impartial jurors, but he shall permit reasonable examination of such jurors by the prosecuting attorney and by the defendant or his counsel.

While the Ohio Revised Code envisions the participation of the prosecution and defense in jury selection, the responsibility for seating a fair and impartial jury rests solely with the trial court. To ensure fairness in the criminal justice process, the trial court must administer voir dire evenhandedly. See *Lakeside v. Oregon*, 435 U.S. 333, 341-42 (1978) ("It is the judge ... who has the ultimate responsibility for the conduct of a fair and lawful trial."); see also *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) ("Every procedure...which might lead [the judge] not to hold the

balance nice, clear, and true between the state and the accused denies the latter due process of law.").

Despite both a constitutional and statutory duty to empanel a fair and impartial jury, Thompson's trial court failed to ensure that jurors could be fair to both the prosecution and to the defense. The trial court death qualified each prospective juror. The trial court took care to ensure that each prospective juror could impose the penalty sought by the prosecution; however, the trial court did not similarly inquire if each prospective juror could impose one of the alternative life sentences—penalties the defense would seek if Thompson were found guilty.

Thompson is not alleging that the trial court precluded him from questioning prospective jurors. Instead, Thompson argues that the trial court's conduct at voir dire was biased. The trial court asked if each juror could impose the death penalty—the penalty sought by the prosecution—while not making the concomitant inquiry of each juror as to whether he or she could impose a life sentence. In fact, the trial court failed to life-qualify 14 of the 16 jurors (including the alternate jurors) that ended up deciding Thompson's fate. (See Tr. 57, 62, 161, 195, 261-2, 319-20, 326-27, 449, 459-60, 474, 489, 524-25, 561, 603, 653, 778, 796-97.)

Jurors who cannot impose a death sentence are not fair and impartial. *Morgan*, 504 U.S. at 728. But jurors who will ***always*** impose death are likewise not fair and impartial. *Id.* at 729. Both the Constitution and the Ohio Revised Code require that both kinds of juror be sought out and removed. See O.R.C. § 2945.27; *Morgan*, 504 U.S. at 728-29. But the trial court's inquiry only located the first category of juror. Failure to assure that jurors could consider both life and death sentencing options was a failure to assure that each juror could be fair and impartial to both the prosecution and the defense.

The Ohio legislature planned for the trial court to keep that balance between the State and the criminal defendant by assigning to it the responsibility of determining the fairness and impartiality of each juror. O.R.C. § 2945.27. But that balance is not kept true when the trial court ensures that jurors can impose one, but not all, possible penalties in a capital case. The trial court jealously guarded the prosecution's interest in securing a death verdict by its careful inquiry. Thompson should not have had to make a request for the trial court to similarly protect his interest in ensuring that the jurors could consider ***all*** sentencing options. It is wholly unfair and a violation of the Due Process Clause for the trial court to ensure fairness to only one party in a criminal proceeding. See *Washington*, 388 U.S. 14; *Gideon*, 372 U.S. 335; *Wardius*, 412 U.S. 470.

Moreover, the trial court's one-sided inquiry failed to give meaning to O.R.C. § 2945.27. The statute's plain language requires the trial court to determine the fairness and impartiality of each juror. The trial court's determination that all jurors could impose death, but failure to determine that all jurors could also impose a life sentence, served only to partially fulfill the statute's purpose. The trial court's biased conduct of voir dire meant that Ohio's statutory procedure for voir dire was not applied in a meaningful manner, in violation of the Due Process Clause. *Evitts*, 469 U.S. at 401.

The trial court's one-sided voir dire tilted the playing field in favor of the prosecution, when the trial court was supposed to be refereeing the match. *Lakeside*, 435 U.S. at 341-42 ("It is the judge ... who has the ultimate responsibility for the conduct of a fair and lawful trial.") When a trial court ensures that jurors can impose the sentence sought by the prosecution, fundamental principles of fairness require that the trial court also ensure that jurors can impose the other available sentences. Meaningful application of Ohio's statutory voir dire process also

mandated both lines of inquiry. See *Evitts*, 469 U.S. 387. Anything less is fundamentally unfair and denies Thompson due process as guaranteed by the Fourteenth Amendment. See *Washington*, 388 U.S. at 22-23; *Gideon*, 372 U.S. at 344; *Wardius*, 412 U.S. at 476.

C. There was no compelling reason for the trial court to impanel a death-prone jury.

The Equal Protection Clause of the Fourteenth Amendment protects against state action that impinges on fundamental rights. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). This protection extends to the right to a fair trial, which is a fundamental right guaranteed to all criminal defendants. See *Estelle*, 425 U.S. at 503 (citing *Drope*, 420 U.S. 162). Encompassed within the guarantee of a fair trial is a "panel of impartial, 'indifferent' jurors." *Irvin*, 366 U.S. at 722. The jury is our most priceless safeguard of "individual liberty and of the dignity and worth of every man." *Id.* at 721. Trial by jury is integral to the criminal justice system and, thus, is required whenever a criminal defendant faces serious felony charges. See *Morgan*, 405 U.S. at 726 (citing *Duncan v. Louisiana*, 391 U.S. 145 (1968)).

When state action interferes with a fundamental right, an equal protection challenge to that action is evaluated under the strict scrutiny standard of review. *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973). State action that "significantly interferes with the exercise of a fundamental right" must be "supported by sufficiently important state interests and [be] closely tailored to effectuate only those interests." *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). To be "sufficiently important" a state interest must be "compelling." See *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), *rev'd in part*, *Edelman v. Jordan*, 415 U.S. 651 (1974). Anything less violates the Equal Protection Clause. See *Zablocki*, 434 U.S. at 388-91.

In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Supreme Court directed the release of the petitioners, finding that their detention was based on the discriminatory application of a

neutral law in violation of the Equal Protection Clause. *Id.* at 374. In *Yick Wo*, legislation was enacted permitting a laundry business to be conducted in buildings made only of certain materials, but the legislation also provided for consent to be given to operate such a business at sites not constructed of those same materials. Yick Wo complied with every requisite to ensure the protection of property from fire and to prevent injury to the public. *Id.* at 374. It was solely the will of the supervisors charged with administering the legislation that kept Yick Wo from carrying on his laundry business. *Id.* Supervisors withheld consent from Yick Wo and two hundred other Chinese subjects to operate a laundry, but gave consent to eighty others who were not Chinese subjects. *Id.* Despite neutral legislation, equal protection was denied because the law was administered in a discriminatory fashion. *Id.*

Over one hundred years after *Yick Wo*, in *Harris v. Alabama*, 513 U.S. 504 (1995), the Supreme Court rejected an Eighth Amendment challenge to an Alabama law that vested sentencing authority in capital cases with the trial court, but required that the trial court consider an advisory jury verdict. In so doing, the Supreme Court noted disparities in the weight given to jury verdicts by the various trial courts but indicated that Harris had not raised an equal protection challenge. *Id.* at 514-15. Harris should have presented an equal protection challenge.

Harris should have crafted an equal protection challenge reminiscent of *Yick Wo*, based on interference with a capital defendant's fundamental right to a fair trial rather than racial discrimination. While trial courts were directed to weigh the jury's advisory verdict, the weight the courts accorded to those verdicts varied immensely without a reasonable explanation. *Harris*, 513 U.S. at 514. The Alabama statute was neutral on its face, but like *Yick Wo*, the trial courts charged with administering the statute applied it "with a mind so unequal and oppressive

as to amount to a practical denial by the state of [ ] equal protection of the laws[.]" *Yick Wo*, 118 U.S. at 373.

Neutral legislation violates the Equal Protection Clause when that legislation is applied in an unequal and oppressive manner. *Id.* at 373. The Constitution prohibits a law that is fair on its face, but administered "with an unequal hand." *Id.* at 373-74. Ohio Revised Code § 2945.27 is neutral on its face, directing the trial court to determine whether each juror is fair and impartial. But like *Yick Wo*, the trial court applied the statutory mandate with an uneven hand. *Id.*

It is beyond question that the trial court is a state actor. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991). In fact, the trial court is one of two state actors who participate in a criminal trial, the other being the prosecution. Despite both being representatives of the state, the trial court's and the prosecution's roles in jury selection are markedly different. The trial court is not the capital defendant's adversary. Nor is the trial court an advocate for a particular penalty. Instead, it is the neutral arbiter. *Lakeside*, 435 U.S. at 341-42 ("It is the judge, not counsel, who has the ultimate responsibility for the conduct of a fair and lawful trial. '[T]he judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.' *Quercia v. United States*, 289 U.S. 466, 469 (1933). *Geders v. United States*, 425 U.S. 80, 86 (1976)"). The trial court has only one goal during voir dire: to ensure that prospective jurors qualify to serve as fair and impartial jurors. O.R.C. § 2945.27.

Like *Yick Wo* and *Harris*, the trial court's administration of its responsibility under neutral legislation was unequal. The Ohio legislature designed O.R.C. § 2945.27 to ensure the fairness and impartiality of the juries by directing the trial court to examine jurors as to their qualifications. In a capital case, an impartial and indifferent juror is a juror capable of

considering both life and death sentencing options. See *Wainwright v. Witt*, 469 U.S. 412 (1985); *Morgan*, 504 U.S. 719; O.R.C. § 2945.27. If a juror refuses to consider or impose either option, that juror cannot be fair and impartial. *Morgan*, 504 U.S. at 729. His or her presence on the jury denies a capital defendant his fundamental right to a fair trial. See *Irvin*, 366 U.S. at 722.

The trial court is charged with providing fair trials to all that appear before it. This is why O.R.C. § 2945.27 requires that the trial court determine the fairness and impartiality of each juror. While ensuring fairness and impartiality to the prosecution, the trial court neglected to ensure fairness to Thompson. In its role as the neutral arbiter, the trial court can have no legitimate interest in securing a jury incapable of imposing each available sentencing option. Far from demonstrating a compelling interest, the trial court cannot even demonstrate a legitimate interest in seating a death-prone jury.

It may be appropriate for the prosecution to seek jurors capable and willing to sentence a defendant to death, but the trial court must do more. The trial court must seat jurors capable of being fair and impartial; that is, jurors capable of considering and imposing both life and death sentences. *Morgan*, 405 U.S. at 728-29. Therefore, when the trial court conducts voir dire in a manner that ensures only that jurors can impose the death penalty, the trial court runs afoul of the Equal Protection Clause. See *Yick Wo*, 118 U.S. at 373-74. The trial court's actions, held to the highest level of scrutiny because a fundamental right is at issue, cannot pass even rational basis review. There simply is no legitimate state interest in a capital jury selection process that creates a bias in favor of death.

D. Conclusion

The trial court's conduct of voir dire violated Thompson's rights to due process and equal protection. While ensuring a jury capable of imposing the ultimate penalty, the trial court neglected its duty to ensure that each juror could also consider and impose the available life sentences. The trial court's actions demonstrated bias and resulted in the seating of a death-prone jury. This Court must vacate Thompson's convictions and sentences and remand this case for a new trial.[3]

[3] Similar claims have been denied on the merits by this Court, *e.g. State v. Stojetz*, 84 Ohio St. 3d 452 (1999), and this Court may summarily reject this claim on the merits if it disagrees with Thompson's view of Federal law. *State v. Poindexter*, 36 Ohio St. 3d 1 (1988).

Proposition of Law No. 6

The capital defendant's rights to due process and a fair trial by an impartial jury are violated by the trial court's denial of a motion for change of venue where there is pervasive, prejudicial pretrial publicity. U.S. Const. Amends. V, VI, VIII, IX and XIV; Ohio Const. Art. I §§ 5 and 16.

The small community of Twinsburg was shocked by the murder of one of its own. The additional fact that an African-American defendant was charged with killing one of its police officers adorned with an "officer of the year" pin on his lapel made this crime even more newsworthy in this almost exclusively white suburb. Numerous newspaper articles provided extensive coverage of Ashford Thompson's case. (*See e.g.* Tr. 22, Motion for Change of Venue).

As a result, defense counsel moved the trial court for a change of venue based on the maelstrom of pretrial publicity. (Motion for Change of Venue). The trial court held this motion in abeyance, wanting first to attempt to find enough qualified jurors to serve on Thompson's jury. (Tr. Feb. 24, 2010 Motion Hearing, pg. 10). Following individual voir dire and the qualification of 50 jurors, it overruled the motion. (Tr. 992.) However, of those 50 "qualified" jurors, at least 27, in fact, knew about the case. (Tr. 120, 157-58, 181, 205, 214, 230-31, 259, 284, 305-06, 317, 329, 339-40, 361-63, 385-86, 421-22, 447-48, 457, 470-71, 486-87, 521-22, 532, 570-71, 686-87, 752, 776-77, 813, 865-66.) For example, Juror 81 knew "quite a bit" about the case and was still qualified. Moreover, 9 of the jurors (including alternates) that ended up serving on Thompson's jury had either read, heard, discussed or saw an account of the death of Officer Miktarian. (Tr. 158, 259, 317, 447, 457, 472, 486, 521, 776.)

A. Relevant law

The premium on impartiality is no where 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 (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 (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 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).

B. Argument

In the present case, Thompson was denied a fair trial due to the extensive pretrial publicity surrounding the death of Officer Miktarian. As the Judge stated in a pre-trial hearing, "I don't think the cross-section is the biggest problem in the case. ... I'm worried about pre-trial publicity." (October 22, 2008 Hearing, pg. 35). Based upon the Judge's and trial counsel's concerns, the first phase of voir dire understandably focused on jurors' ability to fairly consider the death penalty and jurors' exposure to pre-trial publicity. A specific concern about pre-trial publicity was the fact that Thompson had previously pleaded guilty and then withdrew his plea. (*See e.g.* Tr. at 905). Additionally, Thompson was using his fourth different set of lawyers to proceed to trial.

Due to the extreme amount of pre-trial publicity surrounding this case, the venire were replete with potential jurors who had been extensively prejudiced by media accounts and had formed such strong opinions as to not be able or willing to change their minds. In fact, at least twenty jurors had to be excused because they knew too much about the case, knew Mr. Thompson previously pleaded guilty, and/or believed Mr. Thompson to be already guilty. (*Id.* at 99, 150, 153, 204, 225, 353, 381, 418, 432, 437, 444, 546, 549, 616, 622, 675, 684, 698, 876, 905.) Further, the Judge expressed concern for at least one juror concerning the possibility that she may not feel comfortable going back to Twinsburg if she was to give a life sentence. (Tr. 301). This juror was not seated, but it demonstrates that the Judge indeed recognized that the citizens of at least Twinsburg believed that death was the only appropriate outcome.

When the Judge questioned Juror 100 about pre-trail publicity, Juror 100 responded, "I kind of remember hearing about on the radio." (Tr. at 905) Questioned further, he stated that the judge told them about a change in plea. (*Id.*) The judge corrected the juror and told the juror that she had not mentioned anything about Thompson's prior guilty plea and the juror remarked, "somebody had something in the courtroom or the jury pool about it." The juror stated he knew "there was a guilty plea but there was a technical problem or something and now it's a not guilty." (*Id.* at 906) The court went on to question the juror's ability to be impartial and the juror responded, "It's kind of hard with other people bring these up." (*Id.* at 907) Juror 100 was excused for cause.

The trial court had excluded every juror prior to Juror 100 who knew about Thompson's guilty plea except for one. (Tr. at 225, juror 38, 437, juror 41, 616, 698, 876) Juror 51, when asked about pre-trial publicity, said, "I know it's about the murder of a policeman and that the defendant actually pleaded guilty and then he recanted, and now that's why we're having a trial." (*Id.* at 532) Juror 51 then promised the court she could put it out of her mind and was not excused during individual voir dire. (*Id.* at 53) She also promised not to tell anybody else. (*Id.* at 542) Juror 86, who was eventually seated on Thompson's jury as an alternate, also stated that she knew some about the case because other prospective jurors were talking about it in the hallways. (Tr. 776.) Based upon the comments made by Jurors 100, 51, and 86, the venire should have been further questioned on pre-trial publicity and their ability to be fair. (*See* Proposition of Law 3.) Yet, no further questions were asked of the venire that decided Thompson's fate.

The result of this pre-trial publicity was a jury that was irreparably tainted, not only by their knowledge of the case, but from listening to other innumerable opinions about the case.

Under these circumstances, Thompson was denied a fair trial. In addressing one's constitutional right to be tried by a fair and impartial jury, the United States Court of Appeals for the Sixth Circuit stated as follows:

> In essence, the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136. In the ultimate analysis, only the jury can strip a man of his liberty. In the language of Lord Coke, a juror must be as "indifferent as he stands unsworn." His verdict must be based upon the evidence developed at trial. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies *** "The theory of the law is that a juror who has formed an opinion cannot be impartial." *Reynolds v. United States*, 98 U.S. 145, 155.

Goins v. McKeen, 605 F.2d 947, 951 (6th Cir. 1979) (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)).

In *Irvin*, 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).

Even though several jurors indicated that they had read or heard about Thompson's case, the trial court maintained its position that Thompson could get a fair trial in Summit County because the jurors stated that they could nonetheless be fair and impartial. 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).

Similarly, in *United States v. Dellinger*, 472 F.2d 340, 367 (7th Cir. 1972), the Court stated:

> The government's position . . . rest[s] upon an assumption that a general question to the group whether there is any reason they could not be fair and impartial can be relief on to produce a disclosure of any disqualifying state of mind. We do not believe that a prospective juror is so alert to his own prejudices.

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.

Therefore, Thompson was denied a fair trial because at least 9 of the jurors that ended up serving on his venire had either read, heard, discussed or saw an account of the death of Officer Miktarian. (Tr. 158, 259, 317, 447, 457, 472, 486, 521, 776.) The trial court's reliance on the jurors' own self-assessment of their ability to be fair and impartial ignored the reality that these

jurors could not set aside their opinions already formed from exposure to numerous and detailed media accounts of the Thompson case.

As in *Irvin* and *Sheppard*, prejudice from the weight of the adverse publicity must be presumed in this case. Summit County was saturated with stories concerning every aspect of this case. Thompson'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.

C. Conclusion

The pretrial publicity surrounding Thompson's case so infected the jury that he was unable to obtain a fair trial in Summit County. As a result, Thompson's constitutional guarantees under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 5,16 of the Ohio Constitution were violated. Therefore, his convictions and sentences must be vacated and this case must be remanded for a new trial.

Proposition of Law No. 7

The defendant's rights to a fair trial, due process and freedom from cruel and unusual punishment are violated when the trial court allows the state to introduce irrelevant prejudicial statements and impermissible character evidence over the objection of defense counsel. U.S. Const. Amends. VI, VIII and XIV, Ohio Const. Art. I, §§ 9, 10. Ohio R. Evid. 403, 404.

The trial court erred in violation of Ohio Evidence Rules 403 and 404 and Thompson's rights to due process, a fair trial, and freedom from cruel and unusual punishment contained in the United States and Ohio Constitutions when it allowed a bar patron to testify about angry statements Thompson purportedly made an hour before the shooting.

A. Relevant Law

Evidence Rule 403 requires a judge to exclude even relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice." Evidence Rule 403(A). "Usually, though not always, unfairly prejudicial evidence appeals to the jury's emotions rather than intellect." *Oberlin v. Akron Gen. Med. Ctr.*, 91 Ohio St. 3d 169, 172 (2001) (quoting Weisenberger's Ohio Evidence, pp. 85–87, section 403.3 (2000)). Additionally, Evidence Rule 404(A)(1) provides "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith." A trial court's decision to admit or exclude evidence is reviewed under an abuse of discretion standard. *Columbus v. Taylor*, 39 Ohio St. 3d 162, 164 (1988). Improper introduction of evidence of "bad acts and bad character" deny a Defendant his "due process right to a fair trial." *State v. Johnson*, 71 Ohio St. 3d 332, 339, 341 (1994).

B. Background

Before opening statements in Thompson's trial, the court improperly told the State it would be allowed to admit statements that Steve Bartz claimed he overhead Thompson making

at a bar approximately one hour before Officer Miktarian was shot. (Tr. 1226-28, 1231.) Defense counsel objected to the admissibility of the statements because they were unfairly prejudicial pursuant to Ohio Evidence Rule 403. (*Id.* at 1227.) Nevertheless, the court allowed Bartz to testify he heard Thompson say, "There's demons in me," "I will kill if another fucker threatens me," "Nobody understands the shit I've done and I'm capable of. I can't even talk about." (*Id.* at 1226-27.) The court did not allow Bartz to testify that he heard Thompson say, "fuck them white boys," or "there ain't no true niggers in this world." (*Id.*)

The State emphasized Bartz's testimony in its opening presentation. In the first substantive part of its opening statement, the State told the jury that an individual overhead Thompson say, "there is demons in me. I will kill if another fucker threatens me. Nobody understands the shit I've done and I'm capable of. I can't even talk about it." (*Id.* at 1231)

Bartz then testified as the State's second witness about the statements he overhead. (*Id.* at 1259.) He was at Rav's Creekside bar the night of the shooting. (*Id.* at 1260.) He recalled seeing Thompson at the bar appearing angry and drunk. (*Id.* at 1264.) Bartz told the jury Thompson said, "There's demons in me." (*Id.* at 1270.) He also remembered Thompson saying, "I will kill any one fucker that threatens me," and "Nobody understands the shit I've done and am capable of doing. I can't even talk about it." (*Id.* at 1271.) The bartender that evening, however only served Thompson one drink and did not recall him making any statements. (*Id.* at 1311, 1316.)

C. Analysis

Bartz's testimony was designed to appeal to the jurors' emotions rather than their intellect. This was highly prejudicial and served no probative purpose. Thompson was accused of the purposeful killing of a police officer in the line of duty. There was no question as to the

identity of the shooter. Thompson's counsel even admitted Thompson was the shooter in their opening statement. (Tr. 1243.) As evidence, the statements have no value as to the identity of Thompson as the shooter. But emotionally, they painted a picture of an unstable, angry, generally dangerous person in the jurors' minds. The introduction of Bartz's testimony encouraged them to decide the case based on fear rather than reason.

Moreover, the introduction of Thompson's statements constituted improper character evidence. The State was attempting to impermissibly portray Thompson as an angry person in general rather than to demonstrate " proof of motive, opportunity, preparation, plan, intent, knowledge, identity, or absence of mistake, or accident." *State v. Tibbetts*, 92 Ohio St. 3d 146, 160 (2001). Essentially, the State attempted to demonstrate that Thompson possessed a certain character trait, similar to the "hatred of women" character trait the prosecutors impermissibly elicited in the trial reversed in *State v. Johnson*, 71 Ohio St. 3d 332, 350 (1994) ("In our view, defendant's hatred of women could not be properly used to prove he killed Brunst.") Thompson's purported statements about demons and his use of the epithet "fuck" were, in fact, more inflammatory than the phrase "son of a bitch" that was found problematic in *Johnson*. *Id.*

D. Conclusion

Simply put, the prosecution sought to introduce Thompson's statements to prove only that he was angry and dangerous. His identity as the shooter was never in question. The court, therefore, violated Thompson's right to due process and a fair trial when it permitted the introduction of Thompsons's statements despite objections made pursuant to the Ohio Rules of Evidence.

Proposition of Law No. 8

The Defendant's due process rights are violated when the trial court instructs the jury in a manner that undermines his presumption of innocence, as guaranteed by the Fourteenth Amendment of the United States Constitution and Ohio Revised Code § 2901.05(A).

The trial court erred in instructing the jurors that there would conclusively be a second phase to Ashford Thompson's trial. Ohio has a bifurcated system, under which a capital jury does not proceed to the second phase if it does not first find that the defendant is guilty beyond a reasonable doubt of aggravated murder and the death specification(s). *State v. Harwell*, 102 Ohio St. 3d 128, 132 (2004) ("the jury ... reaches the capital sentencing phase of trial **only if** it finds that (1) the defendant is guilty of aggravated murder, (2) the defendant was found to be 18 years or older at the time of the commission of the offense, if the defendant has raised the matter of age at trial, and (3) the defendant is guilty of at least one death-penalty specification") (emphasis added). Thus, when the trial court communicates to the jury that there will conclusively be a second phase, it is effectively communicating to the jury that the defendant is guilty of the charges beyond a reasonable doubt.

Midway through the trial phase, Ashford Thompson's judge addressed the jurors regarding their remaining duties in the case. The judge's initial statements were to the alternates, instructing them that they were on the same schedule as the rest and would remain as jurors "if we get to the second phase." (Tr. 1822.) The judge then addressed all of the jurors and told them, "there will be a break between this phase and the next phase. And you will remain part of the jury until we finish the second phase of the – get to that second phase." (Tr. 1823.)

This conclusive statement by the trial judge was error. By instructing the jurors that they "will remain part of the jury until we finish the second phase", or even that they will "get to that second phase," the judge has instructed the jury that Thompson's guilt was a foregone

conclusion. (Tr. 1823.) And "[i]t is well known, as a matter of judicial notice, that juries are highly sensitive to every utterance by the trial judge." *State v. Thomas*, 36 Ohio St. 2d 68 (1973).

A defendant is innocent until proven guilty. Ohio Rev. Code § 2901.05(A). "One of the essential due process safeguards that attends the accused at his trial is the benefit of the presumption of innocence - that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." *Estelle v. Williams*, 425 U.S. 501, 517 (1976) (internal citations omitted). "Due process requires that the prosecution prove each element of a crime beyond a reasonable doubt prior to a conviction." *State v. Spikes*, 67 Ohio St. 2d 405, 413 (Ohio 1981) (citing *In re Winship*, 397 U.S. 358 (1970)).

This error in Thompson's case is different than the one this Court addressed in *State v. Williams*, 73 Ohio St. 3d 153, 169 (1995). In *Williams*, the Appellant alleged that because the judge mentioned that there would be two parts to the trial, the judge implied appellant was guilty, thereby prejudicing the appellant. *Id.* But in that case, "[t]he judge did not use conclusive language; he spoke generally of there being a possibility that the jury would have to return for a second phase depending on the verdict. When the judge mentioned that the penalty phase would begin on January 17, it was for scheduling purposes. The judge was trying to determine if any prospective jurors had any hardship in the event that the trial lasted for a few weeks." Because "[t]he judge never spoke in definitive terms," this Court did not believe that his comments communicated a belief in the appellant's guilt or innocence. *Id.*

In Thompson's case, however, there was nothing equivocal about the judge's statements, and her language was conclusive. By stating "there will be a break between this phase and the next phase," the court conveyed its belief that there would, in fact, be a next phase. And the

second statement – "[a]nd you will remain part of the jury until we finish the second phase of the – get to that second phase" – was even more alarming. It was an instruction to the jurors that they would not be done *until* the second phase was over. (Tr. 1823.) It was not stated as a "possibility that the jury would have to return for a second phase depending on the verdict." *Williams*, 73 Ohio St. 3d at 169.

"It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling." *Starr v. United States*, 153 U.S. 614, 626 (1894). It is the judge who instructs the jurors as to their duties, and "jurors are ever watchful of the words that fall from [the judge]." *Bollenbach v. United States*, 326 U.S. 607, 612 (1946). "In the exercise of this duty, the judge must be cognizant of the effect of his comments upon the jury." *State v. Wade*, 53 Ohio St. 2d 182, 187 (1978).

Thompson requires a new trial, as his rights to due process and a fair trial were violated by the judge's conclusive statements regarding the second phase. The judge conveyed that Thompson's guilt was a foregone conclusion. Harmless error analysis is not appropriate because "the question is not whether guilt may be spelt out of a record, but rather, whether guilt has been found by a *jury* according to the procedure and standards appropriate for criminal trials." *Bollenbach*, 326 U.S. at 614 (Emphasis added).

This error prejudiced Thompson and infringed upon his presumption of innocence. Capital trials are bifurcated in order to separate the jury's determination of guilt from its determination of whether the defendant— once proven guilty beyond a reasonable doubt of capital murder—deserves the ultimate punishment. The second phase is so separated from the first that the trial court is forbidden from even mentioning "the penalty that may be the

consequence of a guilty or not guilty verdict on any charge or specification," Ohio Rev. Code § 2929.03(B).

"Indeed, whether a sentencing phase is needed at all rests upon this predetermination." *State v. Morales*, 32 Ohio St. 3d 252, 259 (1987). The jury alone was charged with the responsibility of determining whether the State proved beyond a reasonable doubt Thompson's guilt of aggravated murder and the specifications. The trial court erred to Thompson's prejudice when it conveyed to the jury that there would—not might—be a second phase.

Proposition of Law No. 9

The trial court erred when it allowed unqualified expert witness testimony in violation of Ohio Rule of Evidence 702 and the Fourteenth Amendment of the United States Constitution, as well as Art. I, §§ 10 and 16 of the Ohio Constitution.

A. Introduction

The trial court erroneously allowed John Saraya to testify as an expert in blood spatter analysis. Saraya was never qualified as an expert in this area, and his testimony was speculative and without the necessary scientific basis. Additionally, the court allowed other unqualified experts to testify. It was the trial court's duty to assess the relevancy and reliability of all scientific evidence introduced at trial, but it failed to do so. *See Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 589 (1993). *See also Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 147 (1999).

B. Relevant law

Both this Court and the Supreme Court of the United States have explicitly recognized the gatekeeping role of the trial court when it comes to expert testimony. *See Miller v. Bike Athletic Co.*, 80 Ohio St. 3d 607 (1998), *Daubert,* 509 U.S. at 595 (1993). "This gatekeeping function imposes an **obligation** upon a trial court to assess both the reliability of an expert's methodology and the relevance of any testimony offered before permitting the expert to testify." *Terry v. Caputo*, 115 Ohio St. 3d 351, 356 (2007) (emphasis added).

This burden on the trial court makes sense, especially in a capital case, because of how persuasive a perceived expert's testimony can seem to the jury. "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." *Daubert,* 509 U.S. at 595 (internal

citation omitted). The trial court has the power, through Evidence Rule 403, to exclude evidence in order to ensure fairness and reliability at trial. *See Chambers v. Mississippi,* 410 U.S. 284, 302 (1973).

The Rules of Evidence speak specifically to the admissibility of expert testimony. Under Ohio Rule of Evidence 702, a witness may testify as an expert if three criteria are met. First, the expert's testimony must relate to a matter beyond the knowledge or experience of lay persons or must dispel a common misconception. Ohio R. Evid. 702(A). Second, an expert must be qualified by specialized knowledge, skill, experience, training, or education regarding the subject matter of his or her testimony. Ohio R. Evid. 702(B). Third, the expert must base his or her testimony on reliable scientific, technical, or other specialized information. Ohio R. Evid. 702(C). All three criteria must be met for a witness to qualify to testify as an expert pursuant to Evidence Rule 702.

This Court addressed what qualifications are necessary to accord a witness expert status in *State v. Baston*, 85 Ohio St. 3d 418, 423 (1999). According to its interpretation of Ohio R. Evid. 702, "a witness may qualify as an expert by reason of her knowledge, experience, skill, training, or education. Neither special education nor certification is necessary to confer expert status. The individual offered as an expert need not have complete knowledge of the field in question, as long as the knowledge she possesses will aid the trier-of-fact in performing its fact-finding function." *Id.* (internal citations omitted) "[T]he trial court determines whether an individual qualifies as an expert, and that determination will be overturned only for an abuse of discretion." *State v. Williams*, 4 Ohio St. 3d 53, 58 (1983).

A witness must first be qualified as an expert before testifying as one. But even qualification as an expert does not give a witness free reign to testify to anything he, she, or

counsel desires. There are limitations on the testimony that an expert may offer. While an expert may be qualified to testify on one subject, he or she may not be similarly qualified to testify as an expert on a related subject. *Campbell v. Daimler Group*, 115 Ohio App. 3d 783, 793 (1996) (citation omitted). Thus, an expert may only give an opinion as to matters that are within his or her realm of expertise. *Shilling v. Mobile Analytical Services Inc.*, 65 Ohio St. 3d 252, 255 (1992).

C. John Saraya was not qualified to give testimony regarding blood splatter, and the trial court erred in allowing this testimony.

During Thompson's trial, an "expert" gave testimony well outside his realm of expertise. John Saraya testified, without first being qualified as an expert in blood splatter analysis, to the blood splatter found on Thompson's shoes. He testified that based upon his observations, Thompson was standing no more than twelve to eighteen inches from the victim's head when he shot the victim. (Tr. 1973, 1981) In fact, in addition to testifying to this fact, he demonstrated for the jury, with the use of a mannequin and Thompson's actual shoes, how he believed everything played out. (Tr. 1981) The prosecutor was then able to capitalize upon, and distort, this testimony during closing argument when he stated:

> [T]hat barrel had a fine splatter on it that you'll see . . .that came from here and here (indicating), what was indicated as shot number two and number four, because those are the ones that according to the doctor, were no contact but were not that far away; according to Mr. Saraya, 12 to 16 inches away. . . .Again, those physical evidence, those shoes, according to John Saraya were no more that – in a 270--degree circle, were no more than 12 inches to 16 inches away. Officer Miktarian is on the ground. To be a contact wound, 12 to 16 inches away, a contact wound, Ladies and Gentleman, this is what Ashford Tompson did to that Officer. This is what that man did to another human being (indicating). After shooting him once, pointblank, barrel to temple – barrel to forehead, and having him fall, he then walked over, pumped his second shot and then his third shot and then his forth shot. And in this second shot and the forth shot, two and four, is where we receive this splatter that is 12 to 16 inches away. Ashford Thompson's feet were at Officer Miktarian's head when he finished his execution.

(Tr. 2435-37)

The State then concluded with, "never judge a man until you've walked in his shoes. Well, Ladies and Gentlemen, don't judge this man until you've heard the ballistics and blood spatter experts talk about his shoes." (Tr. 2437.)

Saraya's testimony on blood splatter is unreliable and prejudicial. This testimony was allowed into evidence even though Saraya was never qualified as an expert in blood-pattern analysis. Furthermore, the State failed to lay a proper foundation for the reliability of the science of blood spatter. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993). Moreover, blood spatter evidence may be misleading and confuse the jury. *Franco v. State*, 25 S.W.3d 26, 29-30 (Texas 2000). The trial judge is the "gatekeeper" and must ensure that only reliable evidence from qualified witnesses reaches the jury. Excluding Saraya's testimony on blood spatter "prevents the jury from considering information that would not assist in rendering a verdict founded on reliable expert evidence." *Valentine v. Conrad*, 110 Ohio St. 3d 42, 45 (2006).

Trial counsel failed to object to Saraya's testimony (counsel's failure to object to this testimony is raised in Proposition of Law 13). Because of that failure of trial counsel, Thompson must prove that this error rises to plain error. See *State v. Williams*, 51 Ohio St. 2d 112 (1977), para. two of the syllabus (vacated on other grounds at 438 U.S. 911). Thompson can meet that burden; the trial court abused its discretion in allowing the testimony.

Saraya testified that he had recently transferred to the Special Investigation Unit for BCI; before that, he worked at BCI in the Crime Scene Unit for twelve years. (Tr. 1953) He further testified that as a part of his training for his job, he attended a 40-hour "blood splatter school." (Tr. 1962) After this cursory introduction, he then testified at length to the science of blood

splatter, and its application to this case. But taking a one-week course and the fact that he was employed by the Special Investigation Unit/Crime Scene Unit does not then somehow uniquely qualify Saraya as an expert in blood splatter evidence. See *Campbell*, 115 Ohio App. 3d at 793, 686 N.E.2d at 344. See also *State v. Howard*, 626 So. 2d 459, 464 (La. App. 3d Cir. 1993) (witness accepted as blood spatter expert with nearly twenty years' experience; attended several courses; lecturer on the subject; has lectured at several training institutes; has worked as a consultant in the field; previously qualified as an expert); and compare *State v. Biros*, 78 Ohio St. 3d 426, 452-453 (1997) ("the trial court did not abuse its discretion in allowing a forensic scientist to give expert testimony about blood-spatter evidence, as the witness had been involved in thousands of cases dealing with blood analysis and trace evidence . . . so there was no plain error.").

The case of *State v. Hall*, 297 N.W.2d 80 (Iowa 1980), is similarly instructive. In *Hall*, the Iowa Supreme Court upheld the admissibility of bloodstain pattern analysis evidence, but only after considering several factors: "(1) Professor MacDonnell's considerable experience and his status as the leading expert in the field; (2) the existence of national training programs; (3) the existence of national and state organizations for experts in the field; (4) the offering of courses on the subject in several major schools; (5) use by police departments throughout the country in their day-to-day operations; (6) the holding of annual seminars; and (7) the existence of specialized publications." *Id.* at 85.

In addition, the case of *Deel v. Jago*, 967 F.2d 1079, 1084 (6th Cir. 1992) is also on point. The expert in that case, Ms. Caraballo, "was twenty-five years old at the time of trial and held a Bachelor of Science degree in Forensic Chemistry. She served as an intern at a Regional Forensic laboratory, and had taken seminars on several specialized topics within forensic

science. In 1984, Caraballo completed a one-week work shop on bloodstain pattern analysis. . . . This workshop, together with some individual experimentation, one year of college physics, and familiarity with two books on bloodstain pattern interpretation comprised the breadth of her experience in this field at the time of her testimony." The Court in *Deel* did not have to decide whether or not Ms. Caraballo was adequately qualified as an expert, however they still pointed out in dicta that her level of training fell far short of what is ordinarily required:

> [Ms Caraballo's] level of training contrasts sharply with that of Herbert MacDonell, whose bloodstain pattern testimony was admitted in *State v. Hall*, 297 N.W.2d 80 (Iowa 1980). In that case, a divided en banc court allowed MacDonnell to testify as an expert concerning bloodstain patterning, noting that MacDonell, a professor of criminalistics, had spent two years researching bloodstain patterning on a federal grant, was author of a forthcoming text on bloodstain pattern analysis, and was 'one of the few people in the nation qualified in this field.'

Id. at 83.

Here, Saraya is even more lacking in expertise than Ms. Caraballo in the *Deel* case. It is unknown what, if any, experience Saraya had with blood splatter evidence prior to this case, particularly how long he has conducted blood splatter analysis, how many cases he has done where blood splatter was at issue, if he has been qualified as an expert prior to his testimony in this case, or if he is familiar with articles, reviews, or the up-to-date scientific methods in this area. Further, Saraya did not mention any articles he has written on the subject or whether he teaches or lectures on the topic.

In addition, Saraya did not give his opinion in terms of a reasonable degree of scientific certainty, and he was never asked to. Instead, his testimony consisted of speculative statements such as:

- "Staining like this is going to be relatively close; I would say probably no more than a foot away from the source of the blood..." T.p 1975
- "It could possibly be – it's just a movement of the body as it's spinning away." T.p. 1980

- "Not knowing the exact orientation, somewhere in – about a 270-degree arc here around. I couldn't say exactly. Based on the spatter of the shoes, again, stronger on the left than on the right, it could be an orientation similar to this (indicating)..." T.p. 1981

- "...I had at some point – going to be somebody pigeon-toed, kind of toes in, heels out, standing in orientation like this (indicating). That's also possible." T.p. 1982

- responding to the question, "so if an individual was standing here and was shot in the head and took a step back, would that account for that movement as they fell?" Saraya answered, "Yes, sir, it could." T.p. 1980

In searching through Saraya's testimony, all that is clear is that Saraya worked for BCI and took one 40-hour course in blood splatter analysis. He is neither a leader in this field nor does it appear that he even specializes in this field. (See Tr. 1956-62) (Saraya's testimony re being involved in the Crime Scene Unit, executing a search warrant, and searching Thompson's car.)

The Sixth Amendment guarantees criminal defendants the right to confront witnesses against them. The Fourteenth Amendment makes this right applicable to the criminal defendants in the state court system. *See Davis v. Alaska*, 415 U.S. 308, 315 (1974); *Olden v. Kentucky*, 488 U.S. 227, 231 (1988). Encompassed within the confrontation right is the right to cross-examine witnesses and the right to present a complete defense. *See Davis*, 415 U.S. at 315-16; *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *California v. Trombetta*, 467 U.S. 479, 485 (1984). Cross-examination is the primary right that the Confrontation Clause secures. *Davis*, 415 U.S. at 316 (citing *Douglas v. Alabama*, 380 U.S. 415, 418 (1965)). Beyond merely delving into the witness's story, cross-examination is "the principal means of testing the believability and truth of a witness's testimony." *Davis*, 415 U.S. at 316-17.

Admission of this unreliable scientific evidence deprived Thompson of both rights. How can a criminal defendant confront a scientifically unreliable possibility? It was all but impossible to explain to the jury that it could not trust this evidence.

As with all evidence introduced at trial, an expert's testimony must satisfy the requirements of Ohio R. Evid. 401, 402, and 403. Just because the rules of evidence provide for the admission of expert testimony, the expert is not given carte blanche to offer any opinion at trial. *Schaffter v. Ward*, 17 Ohio St. 3d 79, 81 (1985). Only relevant evidence is admissible. Ohio R. Evid. 402. If the expert's opinion is irrelevant, the expert cannot offer it. Moreover, despite relevancy, if the probative value of the expert's opinion is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury, that evidence must be excluded. Ohio R. Evid. 403(A). Like every other piece of evidence admitted during trial, an expert's testimony must survive Rule 403 balancing. Faced with a difficult decision, one that could be incorrect, "jurors may too willingly embrace the opinion of an 'expert.'" *State v. Jones*, 114 Ohio App. 3d 306, 319 (1996). *See also Daubert*, 509 U.S. at 595 (internal citation omitted). This reality makes it all the more important that the trial courts conduct a searching balance under Rule 403 in capital cases.

John Saraya was lacking in the "knowledge, experience, skill, training, or education" required to give expert testimony. See Ohio R. Evid. 702(B). The jury was fed scientific information from a "bogus" expert, and the jury was therefore likely confused. John Saraya lacked the knowledge to testify to blood splatter analysis under Evidence Rule 702. The court's failure to exclude this testimony allowed the jurors to consider unreliable evidence, thus violating Thompson's Sixth and Fourteenth Amendments rights to a fair trial and due process. The trial court abused its discretion in allowing this testimony to proceed; because of the prejudicial nature of the testimony (as well as the courtroom reenactment) and the prosecution's exploitation of that testimony in closing argument, plain error is apparent. Furthermore, this error was not harmless. See *Chapman v. California*, 386 U.S. 18 (1967).

D. Other "expert" testimony should have likewise been excluded.

Other "experts" similarly testified in areas in which they were not qualified to testify. These experts included Dale Laux, (1798-1800), Martin Lewis (1840-41), Stacy Violi (1848-49), and Andrew Chappell (1869-71). Each person, in turn, discussed some of their qualifications (see above), however not one of the above persons were then qualified as experts in this case. As gatekeeper, the trial court should not have allowed this testimony. And even though the State failed qualify these persons as experts, it then held them out as such. (See e.g. Tr. 1838, 2058, 2380, and 2410 and 2437 (State's closing argument).) And the trial court reciprocated, when it stated, "[y]ou heard from some – from witnesses who were declared to be experts. Generally, a witness may not express an opinion. However, one who follows a profession or a special line of work may express his or her opinion because of education, knowledge and experience." (Tr. 2380-81.) Because these witnesses were not in fact declared experts, this prejudiced Thompson.

Trial counsel again failed to challenge the qualifications of any and all of these so called experts. (See Proposition of Law 13.) As such, Thompson has waived all but plain error. However, plain error is apparent. And this was not harmless error. See *Chapman v. California*, 386 U.S. 18 (1967).

"Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." *Daubert,* 509 U.S. at 595 (internal citation omitted). The trial court had the power, through Evidence Rule 403, to exclude this evidence in order to ensure fairness and reliability and trial. *See Chambers v. Mississippi,* 410 U.S. 284, 302 (1973). Based upon the risk that the jury was misled, the trial court erred in not excluding this bogus "expert" testimony.

E. Conclusion

More process, not less, is required in a death penalty case. U.S. Const. amends. V, XIV. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). *See also Evitts v. Lucey*, 469 U.S. 387, 401 (1985) ("When a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause"). Application of Rule 702 to allow the admission of evidence that does not pass scientific muster violates the Due Process Clause.

The trial judge is the "gatekeeper" and must ensure that only reliable evidence from qualified witnesses reaches the jury. Excluding these "experts'" testimony "prevents the jury from considering information that would not assist in rendering a verdict founded on reliable expert evidence." *Valentine*, 110 Ohio St. 3d at 45. The trial court erred in allowing testimony by these witnesses, who were not qualified as "experts". Thompson's convictions and sentence must be reversed.

Proposition of Law No. 10

A trial court violates a capital defendant's constitutional rights to a fair trial and due process when it excuses jurors in violation of the law, allows misleading, prejudicial evidence and testimony, fails to give appropriate jury instructions during voir dire and the trial phase, and fails to ensure the defendant is present during all important proceedings. U.S. Const. Amends. VI, XIV.

Ashford Thompson's rights to due process and a fair trial were violated by the trial court's errors and omissions. "The right to a fair trial is a fundamental liberty[.]" *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (citing *Drope v. Missouri*, 420 U.S. 162 (1975)). "It is the judge . . . who has the ultimate responsibility for the conduct of a fair and lawful trial." *Lakeside v. Oregon,* 435 U.S. 333, 341-42 (1978).

A. The trial court failed to correct improper definition given to jurors during voir dire.

"A trial court must give jury instructions that correctly and completely state the law. An inadequate jury instruction that misleads the jury constitutes reversible error." *Groob v. Keybank*, 108 Ohio St. 3d 348, 355 (2006). The court failed to correct the misstatements of the law during voir dire. *See also* Propositions of Law 11 and 13.

During voir dire, the State described mitigation as "any good the defendant wants you to hear and consider." (See e.g. Tr. 126) Defense counsel also described mitigating factors as "good things . . . about Mr. Thompson's life." (See e.g. Tr. 132.) But mitigation includes many other aspects, including any duress or provocation felt by Thompson that led to the shooting.

The State also described mitigation as "factors that the Defense can put on or may put on —and that could be anything that tends to lessen the severity of the case or his culpability." (Tr. 220.) "[M]itigating factors under R.C. § 2929.04(B) are not related to a defendant's culpability but, rather, are those factors that are relevant to the issue of whether an offender convicted under

R.C. § 2903.01 should be sentenced to death." *State v. Holloway*, 38 Ohio St. 3d 239, 242 (1988).

B. The trial court erroneously excluded potential jurors in violation of *Batson*.

The State violated Thompson's rights to due process, equal protection, and freedom from cruel and unusual punishment guaranteed by the United States and Ohio Constitutions when it excluded an African-American juror without being able to provide a satisfactory race-neutral reason. *See Batson v. Kentucky*, 476 U.S. 79, 97 (1986). The trial court erred to Thompson's prejudice when it glossed over the prima facie showing and simply required the prosecutor to provide a race-neutral reason. *See, e.g., Hernandez v. New York*, 500 U.S. 352, 359 (1991); *Braxton v. Gansheimer*, 561 F.3d 453, 461 (6th Cir. 2009). To avoid duplication, Thompson fully incorporates Proposition of Law 2.

C. The trial court allowed improper questioning, testimony, and evidence.

"Within limits, the judge may control the scope of rebuttal testimony, may refuse to allow cumulative, repetitive, or irrelevant testimony, and may control the scope of examination of witnesses." *Geders v. United States*, 425 U.S. 80, 86-87 (1976) (internal citations omitted). Throughout Thompson's trial, the prosecutor repeatedly led witnesses to communicate to the jury his own theories on the matter, elicited hearsay from witnesses, made wholly improper and inflammatory statements during closing arguments, and introduced improper and prejudicial evidence. *See* Proposition of Law 11. "The trial judge must meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process." *Geders*, 425 U.S. at 86-87.

"If truth and fairness are not to be sacrificed, the judge must exert substantial control over the proceedings." *Id.* By permitting the prosecution's errors, the trial court failed to protect Thompson's right to due process and a fair trial. *See* Proposition of Law 11.

For example, the prosecutor repeatedly asked leading questions to witnesses to communicate to the jury his own theories about the case. The State also elicited hearsay; during Steven Bartz's testimony, the prosecutor handed Bartz the written statement he had given to police and asked him to read the contents out loud. (Tr. 1270, 1279-80.) Although there was no objection made to many of the leading questions or the hearsay, the trial court should not have permitted it.

Several of the statements made by the prosecutor during closing argument were wholly improper and violated Thompson's rights to due process, a fair trial, and his right to remain silent. Defense counsel objected when the State offered its personal opinion of the veracity of Danielle Roberson, but the trial court erroneously overruled the objection. "Danielle told you quite a few things. And you have to feel bad for whatever motivations this defendant may have put upon her to come in here and not tell you everything that happened." (Tr. 2413)

The trial court further improperly allowed the State to admit improper character and/or other bad acts evidence. The prosecution used a recording of a phone call between Thompson and his girlfriend to show the jury that Thompson was "obsessing and controlling" with her. (Tr. 2439) The State then argued that the man on the tape was the "true" Ashford Thompson. (Tr. 2437.)

When the State indicated it was going to play a portion of the jailhouse phone call recordings between Thompson and his girlfriend, the trial court told the State, "You can play whatever you want." Tr. 2299-2300. "The Rules of Evidence impose upon the trial court the

duty to weigh the probative value of the evidence against the potential for unfair prejudice, confusion of the issues, and misleading of the jury." *State v. Williams*, 73 Ohio St. 3d 153, 159 (1995). The court essentially abandoned this duty.

This Court has held that where evidence of other acts is admitted, it is the duty of the trial court at the time such evidence is offered to instruct the jury regarding the purpose for which it is admitted. *Baxter v. State*, 91 Ohio St. 167 (1914). The jury should be instructed that such evidence must not be considered by them as any proof whatsoever that the accused did any act alleged in the indictment. *State v. Flonnory*, 31 Ohio St. 2d 124, 129 (1972). "To be effective, a limiting instruction on 'other acts' testimony should specifically say that this evidence is not to be used as substantive evidence that the defendant committed the crime charged." *State v. Lewis*, 66 Ohio App. 3d 37, 43 (1990) (citing *State v. Pigott*, 1 Ohio App. 2d 22, (1964)).

Assuming arguendo that this Court finds the other acts evidence did qualify as a 404(B) exception, the trial court was still required to properly instruct the jury that the evidence could not be utilized to demonstrate Thompson's guilt, and could only go to demonstrate one of the proper purposes under 404(B). In the present case, the trial court failed to do so. The trial court's failure to instruct the jury properly invited the jury to take the State's advice and draw its own conclusions as to how to utilize this evidence.

The State cannot demonstrate the admission of the prejudicial testimony was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 26 (1967). The admittance of the other acts testimony was not harmless in the present case. Due to the prejudicial nature of the character and other acts evidence in this case, an argument that there is no reasonable probability that the evidence affected Thompson's conviction fails. *State v. Lytle*, 48 Ohio St. 2d 391 (1973).

The improper questioning, testimony, and evidence admitted during Thompson's trial denied him the right to a fair trial in violation of the Due Process Clause of the Fourteenth Amendment. Thompson's convictions should be reversed, and this matter remanded for a new trial. The State's use of "unduly prejudicial" evidence in a capital case violates the defendant's right to due process. *See Payne v. Tennessee*, 501 U.S. 808, 825, 111 S.Ct. 2597, 2608 (1991). Without any type of limiting instruction, the improper character evidence also created a prejudicial "carry over" effect to Thompson's penalty phase deliberations. *State v. Thompson*, 33 Ohio St. 3d 1, 15 (1987).

D. The trial court failed to ensure that the defendant was present for inspection of the officer's records.

A key issue in Thompson's case was the availability and content of the officer's personnel records. The prosecutor refused to copy them for defense counsel and the court suggested an in-camera inspection. (Transcript of March 24, 2010 Hearing, pp. 16, 19.) Instead of the inspection, Thompson's counsel decided to "streamline" the case by reviewing the records at the prosecutor's office without Thompson present. (*Id.* at 20–21.)

Thompson's case centered on whether he was provoked or acting in self-defense and the officer's record of potential prior bad conduct was clearly germane to that defense. The trial court should have ensured that Thompson was present during an off-the-record review of potentially critical evidence.

E. The defendant was prejudiced by the errors above.

"The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But [the Supreme Court of the United States] has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny." *Estelle v. Williams*, 425 U.S. 501, 504 (1976). And the State's use of "unduly prejudicial" evidence in a

capital case violates the defendant's right to due process. *See Payne v. Tennessee,* 501 U.S. 808, 825 (1991).

The Equal Protection Clause of the Fourteenth Amendment protects against state action that impinges on fundamental rights. *See Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942). This protection extends to the right to a fair trial, which is a fundamental right guaranteed to all criminal defendants. *See Estelle*, 425 U.S. at 503 (citing *Drope*, 420 U.S. 162).

It is beyond question that the trial court is a state actor. *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 624 (1991). In fact, the trial court is one of two state actors who participate in a criminal trial, the other being the prosecution. Despite both being representatives of the state, the trial court's and the prosecution's roles in a trial are markedly different. The trial court is not the capital defendant's adversary. Nor is the trial court an advocate for a particular penalty. Instead, it is the neutral arbiter. *Lakeside*, 435 U.S. at 341-42. "[T]he judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law." *Quercia v. United States*, 289 U.S. 466, 469 (1933).

F. Conclusion

The trial court's errors and omissions mandate reversal of Thompson's convictions and sentence. The trial court failed to ensure that Thompson received a fair trial and reliable sentence.

Proposition of Law No. 11

A capital defendant is denied his substantive and procedural due process rights to a fair trial and reliable sentencing as guaranteed by U.S. Const. Amends. VIII and XIV; Ohio Const. Art. I, §§ 9 and 16 when a prosecutor commits acts of misconduct during his capital trial.

Thompson's prosecutor committed acts of misconduct that deprived Thompson of a fair trial. These acts resulted in a violation of Thompson's rights as guaranteed under the Eighth and Fourteenth Amendments to the United States Constitution as well as Article I, §§ 9 and 16 of the Ohio Constitution. Thus, Thompson's convictions and sentence must be reversed.

A. Substantive law on prosecutor misconduct

To succeed on a claim of prosecutor misconduct, Thompson must meet one of two standards. Thompson must demonstrate either that the prosecutor's misconduct prejudiced a substantive right, see *Donnelly v. DeChristoforo*, 416 U.S. 637, 644 (1974) (citing *Griffin v. California*, 380 U.S. 609 (1965)) (footnote omitted); *United States v. Carter*, 236 F.3d 777, 785 (6th Cir. 2001), or that the prosecutor's misconduct rendered the trial fundamentally unfair. See *Berger v. United States*, 295 U.S. 78 (1935); *Gravley v. Mills*, 87 F.3d 779, 786 (6th Cir. 1996).

The reviewing court should not give inordinate weight to the strength of the evidence. In *Boyle v. Million*, 201 F.3d 711, 717-18 (6th Cir. 2000), the Sixth Circuit Court of Appeals reversed a habeas petitioner's conviction based on a finding of prosecutorial misconduct even though the evidence of guilt was quite strong. *See also Carter*, 236 F.3d at 791 (granting habeas relief on grounds of prosecutorial misconduct despite sufficiency of evidence).

B. The prosecution provided potential jurors with an improper definition of mitigation and improper description of the law.

The prosecutor committed misconduct by repeatedly providing the potential jurors with an improper and misleading definition of mitigating factors. The State described mitigation as

"any good the defendant wants you to hear and consider." (Tr. 126.) But mitigation includes many other aspects, including any duress or provocation Thompson felt that led to the shooting. *See* Ohio Rev. Code § 2929.04(B).

The State also described mitigation as "factors that the Defense can put on or may put on —and that could be anything that tends to lessen the severity of the case or his culpability." (Tr. 220.) But "mitigating factors under R.C. 2929.04(B) are not related to a defendant's culpability but, rather, are those factors that are relevant to the issue of whether an offender convicted under R.C. § 2903.01 should be sentenced to death." *State v. Holloway*, 38 Ohio St. 3d 239, 242 (1988).

C. The prosecution improperly asked leading questions and improper questions, and elicited speculative testimony and hearsay.

The prosecution improperly asked leading questions of several witnesses. A leading question is "one that suggests to the witness the answer desired by the examiner" and "should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony." *State v. Diar*, 120 Ohio St. 3d 460, 481 (2008) The continued use of leading questions after sustained objections from defense counsel can constitute prosecutorial misconduct. See *id. at* 485 ("[T]he prosecutor committed misconduct by continuing to ask leading questions after the trial court had sustained objections to such questioning.")

Although the trial court retains discretion to allow leading questions on direct examination (*State v. D'Ambrosio,* 67 Ohio St. 3d 185, 190 (1993)), the court made clear it was allowing "lead[ing] witnesses on just the normal foundational crap." (Tr. 1739.)

The prosecutor repeatedly led witnesses to communicate to the jury his own theories about the case. For example, the prosecutor used leading questions to explain the differences between what John Jira (the bartender) and Steven Bartz (the bar patron) observed about

Thompson at the bar. Through leading questions of Jira, the prosecutor communicated to the jury that the reason Jira didn't hear the inflammatory statements reported by Bartz was because Jira was not "paying attention to Mr. Thompson at all." (Tr. 1316.)

During the testimony of Christine Franco, the prosecutor sought to change the testimony elicited from Franco on cross-examination. Franco was the police dispatcher, and she testified in response to a question by the defense that there were never any distress codes that came from Miktarian. (Tr. 1400.) The prosecutor made two attempts to get Franco to state that Miktarian meant "I need another unit" as a distress call, but both were objected to and sustained because Franco could not know Miktarian's thought processes.

The prosecutor asked on redirect: "When he said—when Officer Miktarian said on the radio, send Reminderville up here. I need another unit—I know you don't know one way of the other, but could that have been a distress call?" (Tr. 1403.) Although Franco never answered, because the court sustained the objection, the prosecutor went on to ask, "So when you answered [defense counsel's] question, you didn't know that either?" Franco finally gave in and agreed with the prosecutor. (*Id.*)

The prosecutor used leading questions with many witnesses, including the following:

- Steven Bartz (Tr. 1281.)
- Patrick Quinn (Tr. 1447.)
- Officer Anthony Vanek (Tr. 1551, 1552, 1554.)
- David Sandoval (Tr. 1564.)
- Andrew Chappell (Tr. 1889, 1890.)
- Darin Trelka (Tr. 1918.)
- John Saraya (Tr. 1997.)

- Jason Kline (Tr. 2048, 2049.)

The prosecutor also elicited hearsay. During Steven Bartz's testimony, the prosecutor handed Bartz the written statement he had given to police and asked him to read the contents out loud. (Tr. 1270.) Bartz had not indicated that he needed his memory refreshed to recall the words he purportedly heard Thompson say. (Tr. 1269.) Still, after the prosecutor instructed him to "take a look at the statements that you wrote," Bartz read them to the jury. (Tr. 1270.)

Then, on redirect examination, the prosecutor again handed Bartz his police statement without any indication from Bartz that he needed his memory refreshed. (Tr. 1278-79.) The prosecutor made no attempt to have Bartz testify from memory; instead, he instructed Bartz, "Now, I'm going to show you your statement again. And let's just— instead of beating around the bush about this 1:15 time, just starting right there . . . ." He had Bartz read his statement out loud and continued to ask him questions about what he wrote. (Tr. 1279–80.)

The hearsay admission deprived Thompson of his right to confront witnesses against him. Bartz could not be examined regarding the truth of the matter he asserted, because his reading out loud of his own prior statement took the place of any testimony regarding his personal knowledge of the events as they transpired. *See Lilly v. Virginia*, 527 U.S. 116, 124 (1999). (Confrontation Clause protects accused from State's use of unreliable evidence that is not subjected to adversarial testing).

Furthermore, the prosecutor repeatedly tried to elicit improper and speculative testimony from the Dispatcher about Officer Mikarian's call for backup. He apparently wanted to have the Dispatcher testify that Miktarian was in distress and called for that purpose, in order to contradict the defense case that a split-second decision is what led to Thompson shooting Miktarian. The prosecutor asked the dispatcher to speculate about what Miktarian meant when he requested

another unit, and the defense objected. The trial court sustained the objection, but the prosecutor tried again: he asked the witness if Miktarian was, in fact, making a distress call when he requested another unit. Again, the trial court sustained the defense objection. Still, the prosecutor continued asking, until finally the witness stated that she did not know if it was a distress call.

In addition to those improper questions, the prosecutor asked prejudicial questions of David Sandoval, in an apparent attempt to inflame the jury. Sergeant Sandoval's initial testimony was about his recall of the arrest of Thompson, including the handcuff that was on Thompson's hand, the slippery nature of Thompson's hand, and the struggle that resulted in the refrigerator door coming off. On redirect examination, however, the prosecutor improperly asked Sandoval the following inflammatory and prejudicial question: "Sir, how many seconds does it take to reach for a gun and shoot and kill a police officer?" (Tr. 1587.)

Defense counsel immediately objected to this improper question, as well as to the inflammatory question the prosecution asked Danielle Roberson: "That officer had every reason in the world to be nervous, didn't he?" (Tr. 2262.) The court sustained both the objections. Still, the jury heard the questions, and it prejudiced Thompson.

"[W]hen constitutionally inadmissible evidence has been admitted, a reversal is required where 'there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'" *State v. Cowans*, 10 Ohio St. 2d 96, 105 (1967) (citing *Fahy v. Connecticut*, 375 U.S. 85 (1963); *Chapman v. California*, 386 U.S. 18 (1967)). This is true despite the overwhelming nature of any remaining admissible evidence. *See id.* When the inadmissible evidence is admitted during the mitigation phase, the proper review is whether it contributed to the jury's imposition of a death sentence.

By supplying answers for the State's witnesses and by soliciting hearsay, the prosecutors violated Thompson's Sixth Amendment right to confrontation. "Although violations of the Rules of Evidence during trial, singularly, may not rise to the level of prejudicial error, a conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial." *State v. DeMarco*, 31 Ohio St.3d 191, 196-97 (1987).

Because this is a death penalty case, "under the Eighth Amendment the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985) (citing *California v. Ramos*, 463 U.S. 992, 998-99 (1983)) (internal quotations omitted).

D. The prosecution made inflammatory and improper remarks in closing arguments.

Several of the statements made by the prosecutor during closing argument were wholly improper and violated Thompson's rights to due process, a fair trial, and his right to remain silent. "The test regarding prosecutorial misconduct in closing arguments is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant." *State v. Elmore*, 111 Ohio St. 3d 515, 525-26 (2006).

1) The prosecution improperly shifted the burden and denigrated the defense (see *State v. Keenan*, 66 Ohio St. 3d 402, 405-06 (1993); *State v. Getsy*, 84 Ohio St. 3d 180, 194 (1998)):

- "What in the world is their defense going to be? ... They're not claiming insanity....What other defenses are there? It wasn't me....State failed to meet its burden? Ladies and Gentlemen, that's not the defense. The Defense basically has told you that he did this." (Tr. 2467.)

- "So what is their defense? ... The officer was rude. So after two weeks of being here, two and a half weeks of being here, putting on mounds and mounds and mounds of evidence, scientific evidence, eyewitnesses, audio witnesses, overwhelming evidence, we are here now talking about the bedside manner of Officer Miktarian. It's absurd. It is absurd." (Tr. 2469.)

- "But the officer, when he approached him was upset with him, oh, now he's rude. So now I get to be – I get to shoot him." (Tr. 2472.)

- "How much more do you think the Defense is willing to deceive you to find out – find the defendant not guilty?" (Tr. 2474.)

- "We know he was angry at the bar because Mr. Bartz – now, I know they want to take that away because it's very offensive. But there's no evidence to suggest that Mr. Bartz had any motive to lie." (Tr. 2481.)

See also Mitig. Tr. 203 (referring to defense argument as "absurd" and "crazy"); *id.* at 210 ("and if you don't think that [defense counsel are] shading those facts in their favor, you're wrong, because they are and you know they are").

2) The prosecution expressed his opinion as to witness credibility and vouched for State's witnesses (*see State v. Clemons*, 82 Ohio St. 3d 438, 452 (1998); *State v. Watson*, 61 Ohio St. 3d 1, 10 (1991); *State v. Jackson*, 107 Ohio St. 3d 53, 77 (2005) (argument that witness "lacked motive to lie" not improper *if* in response to defense counsel's attack on witness' credibility)):

- "Danielle told you quite a few things. And you have to feel bad for whatever motivations this defendant may have put upon her to come in here and not tell you everything that happened." (Defense objected, but it was overruled) (Tr. 2413.)

- "And Danielle, she twisted some things, but, Ladies and Gentlemen, at times, even in those lies, the truth comes out." (Tr. 2414-15.)

- "Count 8, the number 45 handcuffs, Ladies and Gentlemen, and if those weren't engraved by Officer Miktarian, he'd probably say they were his." (Tr. 2422-23.)

- "Danielle was willing to come here for and change her account of what happened." (Tr. 2439.)

- [T]here's no evidence to suggest that Mr. Bartz had any motive to lie." (Tr. 2481.)

- "[Saraya's] testimony is something, again, that is based on the physical evidence, something that doesn't have a stake in the case." (Tr. 2434)

3) The prosecution argued evidence of character or bad acts to have the jury draw negative inferences about Thompson (see *State v. Treesh*, 90 Ohio St. 3d 460, 483 (2001) (citing *State v. Lytle*, 48 Ohio St. 2d 391, para. 3 of syllabus (1976)):

- "[T]he most telling moment actually came yesterday late morning, after Danielle testified. There was a phone call of the true Ashford Thompson that was played in here before you....That was the real Ashford Thompson, the man at 2454 Glenwood on July 13th if 2008, not the man put in a suit here in front of you for the past two weeks who makes his smiles and rolls his eyes. ... He is the same man you heard obsessing and controlling Danielle in that phone call yesterday." (Tr. 2437-39.)

These statements during closing argument revealed the State's true purpose in using the tape of the phone call in "rebuttal."

E. The prosecution offered irrelevant and prejudicial evidence

The State introduced a picture of a broken bottle of Colt 45 malt liquor in order to have the jury draw the inference that it had belonged to Thompson and that he had, in fact, been intoxicated when Officer Miktarian confronted him. (Tr. 1772.) There was no evidence that the bottle had, in fact, been Thompson's. The bottle had not even been found on Thompson's property.

As the defense pointed out, Thompson did not even drink Colt 45. (Tr. 2459.) No one testified that Thompson had ever drank Colt 45. No fingerprints, DNA, or other scientific evidence linked the Colt 45 bottle to Thompson. There was simply no basis for the State to admit photos of the bottle as evidence against Thompson. Its only purpose was to have the jury draw a negative inference.

The State also used a photograph of the victim in which he was wearing and an "Officer of the Year" pin and posing with his dog, Bagio. These photographs had no basis other than to invoke sympathy in the jurors.

F. The prosecution used character and other acts evidence disguised as rebuttal testimony.

The State introduced the recording of a phone call between Thompson and his girlfriend, Danielle Roberson, under the guise of rebuttal testimony. The tape revealed a conversation in which Thompson told Roberson that he was upset with her the last night they were together because she was dressed inappropriately. (*See* tr. 2307) The State's purported justification for playing the call was to rebut Roberson's testimony, but she had not disputed its contents. She simply testified that "I really can't—I don't recall a lot of phone conversations because they were so long ago. It's been two years." (Tr. 2281.)

The State claimed it needed to use the tape because Thompson told his girlfriend that "he was not himself. He was pissed off." (Tr. 2297.) In actuality, the prosecution used it to show the jury that Thompson was "obsessing and controlling" with his girlfriend. (Tr. 2439.) The State then argued that the man on the tape was the "true" Ashford Thompson. (Tr. 2437.)

The manner in which Thompson treated his girlfriend had no bearing on the elements of the crimes for which he was being tried. Further, the tape did not reveal Thompson stating that "he was not himself," as represented by the State. The State merely wanted the jury to feel that Thompson was a bad person and acted in conformity therewith on the night in question. This is entirely improper under Ohio R. Evid. 404.

Evidence of character or other acts is not admissible simply because such proof demonstrates a trait, disposition, or propensity toward the commission of a crime. *State v. Lytle*, 48 Ohio St. 2d 391, 401-02, 358 N.E.2d 623 (1976). Since observance of this axiom is essential to a fundamentally fair trial, this Court has long held that, as a general rule, evidence of acts independent of the crime for which the accused is on trial are not admissible to show that the defendant acted in conformity therewith. *State v. Mann*, 19 Ohio St. 3d 34, 36 (1985); *State v.*

Curry, 43 Ohio St. 2d 66-69 (1975); *State v. Burson*, 38 Ohio St. 2d 157 (1974); *State v. Hector*, 19 Ohio St. 2d 167 (1969).

The rule prohibiting the admission of other acts evidence to show conduct is set forth in Ohio R. Evid. 404(A) which provides that "evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion." There are exceptions to Rule 404(A) which provide that evidence of other crimes, wrongs or acts may be admissible for other limited purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Ohio R. Evid. 404(B). Ohio Revised Code § 2945.59 (Anderson 1996) codifies this rule. Although the Revised Code does not specifically list identity as a proper purpose, the Ohio Supreme Court has held that identity is "included within the concept of scheme, plan, or system." *State v. Shedrick*, 61 Ohio St. 3d 331, 337 (1991).

Therefore, to be admissible under Evidence Rule 404(B) and O.R.C. § 2945.59, the proponent of the other acts evidence must show a proper purpose. *Id.* Nevertheless, because Rule 404(B) codifies an exception to the common law with respect to evidence of other acts of wrongdoing, they must be construed against admissibility, and the standard for determining admissibility of such evidence is strict. *State v. Broom*, 40 Ohio St. 3d 277, 282 (1988). Evidentiary rules concerning character evidence help to assure that a defendant "is tried for what he did, not for who he is." *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977).

"[T]he improper use of other-acts evidence necessitates reversal when there is a reasonable possibility that the testimony contributed to the accused's conviction." *Treesh*, 90 Ohio St. 3d at 483 (internal citation omitted). The prosecution used a phone call between Thompson and Roberson to show the jury that Thompson was "obsessing and controlling" with

his girlfriend. (Tr. 2439) It obviously contributed to the conviction since, as the prosecutor put it in closing, "the most telling moment actually came" when the "phone call of the true Ashford Thompson" was played for the jury. (Tr. 2437)

Due to the prejudicial nature of the character and other acts evidence in this case, an argument that there is no reasonable probability that the evidence affected Thompson's conviction fails. *State v. Lytle*, 48 Ohio St. 2d 391, 358 N.E.2d 623 (1973).

G. The prosecution appealed to sympathy and emotion in mitigation phase closing arguments.

The State played upon the emotions of the jurors during closing argument for the mitigation phase by implying that the jurors would be dishonoring the law if they sentenced Thompson to anything but death. The prosecutor told the jury that "it's time to stop honoring the Defendant and start honoring the law." (*Id.*) (*See also* Mit. Tr. 212) ("Officer Miktarian had the honor of carrying this badge. He carried this badge in to harm's way. He carried this badge to enforce the laws of his community.")

This was a case in which there had been extensive publicity, the community was outraged, and a verdict other than death seemed unpopular. Even the judge stated to counsel during voir dire that "the question I wish somebody would ask but I didn't think it would be appropriate to ask was can you go back to Twinsburg if you find life." (Tr. 301.) (*See also* Tr. 303-4) ("Hopefully, if she's going to be asked questions about being able to go back and say life, can you hold your head up or are they going to bomb your house"). Especially in light of that, it was improper for the prosecution to tell the jury it would be "honoring the law" by sentencing Thompson to death. (Mit. Tr. 214.)

The prosecutor made similar statements in *State v. Bryan*, 101 Ohio St. 3d 272, 294 (2004), but the improper statements at issue in *Bryan* occurred during the trial phase. Therefore,

in *Bryan*, this Court was able to find that the "comments do not prejudicially affect the substantive rights of Bryan in this case in view of the overwhelming evidence of his guilt." *Id.* Here, the comments occurred during the mitigation phase, so evidence of Thompson's guilt does not matter. And there was not "overwhelming" evidence that Thompson deserved to die.

The improper questioning, testimony, and evidence admitted during Thompson's trial denied him the right to a fair trial in violation of the Due Process Clause of the Fourteenth Amendment. Thompson's convictions should be reversed, and this matter remanded for a new trial. The State's use of "unduly prejudicial" evidence in a capital case violates the defendant's right to due process. *See Payne v. Tennessee*, 501 U.S. 808, 825, 111 S.Ct. 2597, 2608 (1991). Without any type of limiting instruction, the improper character evidence also created a prejudicial "carry over" effect to Thompson's penalty phase deliberations. *State v. Thompson*, 33 Ohio St. 3d 1, 15 (1987).

H. Cumulative effect of misconduct

This Court has recognized the necessity of considering the cumulative effect of prosecutorial misconduct. *See State v. Fears*, 86 Ohio St. 3d 329, (1999) (Moyer, C.J., dissenting) (citing *State v. Keenan*, 66 Ohio St. 3d 402 (1993); *State v. Liberatore*, 69 Ohio St. 2d 583 (1982)). Each individual act of misconduct, or type of misconduct, is not separated out for consideration. Under such circumstances, it would be nearly impossible to succeed on a claim of misconduct. Rather, the alleged misconduct in its entirety should be reviewed to determine whether it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *See Darden*, 477 U.S. at 181 (citing *Donnelly*, 416 U.S. 637) (internal quotations omitted); *See also Francis*, 170 F.3d at 556.

I. Conclusion

The prosecutor committed pervasive and prejudicial misconduct during Thompson's trial. *See State v. Thompson,* 33 Ohio St. 3d 1, 15 (1987). These errors "cannot be ignored or overlooked." *Id.* at 14. The State's misconduct during the trial phase deprived him of a reliable sentence as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution, as well as Article I, §§ 9, 16 and 20 of the Ohio Constitution, and it surely had a prejudicial "carry over" effect to Thompson's penalty phase deliberations. *Thompson*, 33 Ohio St. 3d at 15. Thompson's conviction and sentence must be vacated and this case remanded.

Proposition of Law No. 12

When evidence is presented that could mitigate against a jury finding of aggravated murder, a capital defendant is entitled to an instruction on the inferior degree offense of voluntary manslaughter. R.C. § 2945.74, U.S. Const. Amends. VI, VIII, XIV, Ohio Const. Art. I, §§ 9, 10.

Prior to the case being submitted to the jury, Thompson's trial counsel requested that the trial court instruct the jury on the inferior degree offense of voluntary manslaughter. (Tr. 2371.) The trial court denied that request stating "this would require far more evidence from the Defense than has been presented. I can't give this instruction" (*Id.*) Because an instruction on voluntary manslaughter was warranted under the facts as adduced at trial, this denial was erroneous and deprived Thompson of his rights under the Eighth and Fourteenth Amendments to the United States Constitution.

A. Relevant law

Voluntary manslaughter is defined in R.C. § 2903.03(A) in the following terms: "No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another." Although not a lesser included offense of aggravated murder, voluntary manslaughter is "an inferior degree offense" of aggravated murder since "its elements are contained within the indicted offense, except for one or more additional mitigating elements." *State v. Tyler*, 50 Ohio St. 3d 24, 36 (1990), quoting *State v. Deem*, 40 Ohio St. 3d 205, 209 (1988). The element of provocation mitigates the offender's culpability. *Tyler*, 50 Ohio St. 3d at 36, 553 N.E.2d at 592.

A jury "must find a defendant guilty of voluntary manslaughter rather than murder if the prosecution proves, beyond a reasonable doubt, that the defendant knowingly caused the victim's death, and if the defendant establishes, by a preponderance of the evidence, the existence of a

mitigating circumstance." *State v. Rhodes*, 63 Ohio St. 3d 613, 617 (1992). The mitigating circumstances are "(1) sudden passion in response to serious provocation by the victim sufficient to incite the defendant to use deadly force, and (2) a sudden fit of rage in response to serious provocation by the victim sufficient to incite the defendant to use deadly force." *Id.*

Even though voluntary manslaughter is not a lesser included offense of aggravated murder, "the test for whether a judge should give a jury instruction on voluntary manslaughter where a defendant is charged with the more serious crime is the same test to be applied as when an instruction on a lesser included offense is sought." *State v. Shane*, 63 Ohio St. 3d 630, 632 (1992). In a capital case, a trial court must instruct the jury on a lesser-included or inferior offense when the evidence supports such a verdict. *Beck v. Alabama*, 447 U.S. 625, 627 (1980); see also *Hopper v. Evans*, 456 U.S. 605, 609 (1982); *Hopkins v. Reeves*, 524 U.S. 88, 97 (1998).

An instruction on an inferior degree offense, such as voluntary manslaughter "must be given if, under any reasonable view of the evidence, it is possible for the trier of fact to find the defendant not guilty of the greater offense and guilty of the lesser or inferior offense." *Shane*, 63 Ohio St. 3d at 632, 590 N.E.2d at 274; *State v. Huertas*, 51 Ohio St. 3d 22, 31-32 (1990). Failure to so instruct the jury injects a "level of uncertainty and unreliability into the fact finding process that cannot be tolerated in a capital case." *Beck*, 447 U.S. at 643.

B. Argument

Ashford Thompson was charged with capital felony murder under O.R.C. § 2903.01(E). Voluntary manslaughter is an inferior degree offense of aggravated murder. *Tyler*, 50 Ohio St. 3d at 36, 553 N.E.2d at 592. Thompson presented evidence to warrant an instruction on the inferior degree offense of voluntary manslaughter based upon the evidence adduced at trial; the trial court erred in failing to instruct Thompson's capital jury on this inferior offense.

Thompson admitted that he indeed caused the death of Officer Miktarian, however the circumstances surrounding the victim's death warranted an instruction on the inferior degree offense of voluntary manslaughter. Not only was evidence supporting of this instruction admitted at trial through several different State and Defense witnesses, but Thompson himself, indicated in his unsworn statement during mitigation that he feared for his life and that he shot the victim in response to "serious provocation by the victim sufficient to incite the defendant to use deadly force."[4] *Rhodes*, 63 Ohio St. 3d at 617, 590 N.E.2d at 263.

Thompson described in his own words during his unsworn statement how this horrible tragedy occurred. He stated that when he was first stopped by the victim, the victim remarked "you were playing that boom, boom, boom, you know, S word stuff and I should rip it out ..." (Mit. Tr. 139.) It escalated from there when the victim started pulling Thompson towards his cruiser and "the dog started barking and I really got alarmed" (*Id.* at 142.) Then things escalated even further. Thompson described that "I never touched him, and I wouldn't let him pull me, and he, knocked me to the ground some kind of way pretty hard, I hit the ground and it knocked my wind out and I was down for a few seconds there." (*Id.* at 145.) Thompson continued, "you

[4] Although Thompson did not testify during the trial phase, he made an unsworn statement during the mitigation phase of the trial. (Tr. Appellate Counsel have contended in Proposition of Law 13 that Thompson's trial counsel were ineffective for failing to have Thompson testify in their case in chief.

know, I see and hear this dog barking, okay, and you're trying to put me in the car with that; and, by the way, when I'm getting off the ground he threatened to release the dog on me and he said something like 'Don't do anything stupid, I will let him out'; so, now I'm thinking where is this getting ready to go." (*Id.* at 146.) Things then culminated when "[the victim] reached down to his right side I just – I could have sworn he was pulling his gun out, you know, to shoot me." (*Id.* at 147.) Thompson went on, "I know he reached on that belt and pulled something out of there and, I mean, it kind of – it looked like the gun, but I didn't actually, you know, see it. . ." (*Id.* at 148.)

Along with Thompson's testimony, the testimony of several State's witnesses and the one defense witness, Danielle Roberson, also mandated an inferior degree offense instruction of voluntary manslaughter. Roberson's testimony confirms much of what Thompson stated in his unsworn statement. She testified that the victim was being "rude" (Tr. 2256), that Thompson "ended up on the ground" (Tr. 2124), that the Officer then threatened "to let [his] dog out on [Thompson's] ass" (Tr. 2125), that the officer "pushed [Thompson] back to the police car and slammed – kind of slammed him down on the hood" (Tr. 2274-75), that she "feared for Ashford's life" (Tr. 2257), and that Thompson told her that he shot the victim because the victim "was trying to hurt him." (Tr. 2277.) The trial court also summarized both Thompson and Roberson's testimony during sentencing. (*See* Sent. Tr. 34-35, 36-37.)

Further evidence came in through the State's case. Testimony indicated that Officer Miktarian had in fact pulled his taser from his duty belt. (Tr. 1785-86.) There was also testimony that the dominant DNA profile on the handle and trigger of Thompson's gun was not Thompson's, but the victim's. (Tr. at 1855–56 ("The partial DNA profile from the trigger is a mixture. The major profile is consistent with Joshua Miktarian. . . . The partial DNA profile

from the swab from the handles areas is a mixture. The major profile is consistent with Joshua Miktarian.")) Neither of the swabbed areas tested presumptive positive for blood. (*Id.* at 1863.) The State's expert could not state certainly that the officer had grabbed Thompson's gun. (*Id.* at 1864.) However, that is certainly the implication from this physical evidence; if it is not blood, it is presumably sweat and/or skin slough-off. And as the State stated in closing, "[p]hysical evidence in this case, it does not lie. It does not take a side. It doesn't care who presents it or what the outcome is. (Tr. 2432.)

Further, Luther Norman, a National Rifle Association Instructor, testified that Thompson was instructed in his conceal carry class that if you are going to own and carry a weapon, that you better be prepared to use that weapon. (Tr. 2020.) Norman then specifically testified that, "I tell them that if I'm concerned about the possibility of me losing my life or receiving serious bodily harm – there's nobody going to be there that I can ask, is this serious enough to constitute use? That's a personal decision that each one of the students that I trained have to make on their own." (Tr. 2021-22.) He again stressed that he teaches that this is a personal decision, depending upon the circumstances. (Tr. 2025.) He also testified that he taught Thompson, as a student, that if you are going to use your firearm, to aim at the center of the target. (Tr. 2024.)

Detective Kline additionally testified that even the police officers who were trained to retrieve, and had presumably been around, Bagio, the large German Shepard that was in the back seat of the victim's car, were too scared to immediately retrieve him from the car. According to the testimony of Det. Kline, no one let the dog out initially because "it's a big dog and he did not seem happy. He was being very aggressive in the back seat, trying to get through to the front of the car." (Tr. 2037; see also Tr. 1439.) This is the same dog that Thompson spoke of when he stated, "the dog started barking and I really got alarmed" (Mit Tr. at 142.) Moreover, Detective

Kline's observations of Bagio were made approximately three hours after the incident took place, so one would think that the dog was actually less hostile by that point in time.

The Ohio General Assembly predicted cases, such as Thompson's, when it enacted Ohio Rev. Code § 2945.74. R.C. § 2945.74 specifically states that "When the indictment or information charges an offense, including different degrees, or if other offenses are included within the offense charged, the jury may find the defendant not guilty of the degree charged but guilty of an ***inferior degree thereof*** or lesser included offense." (emphasis added.) Here, on these facts, the jury may have indeed found Thompson guilty of the inferior degree offense of voluntary manslaughter but for the trial court's erroneous denial of such an instruction.

Trial counsel requested an instruction for voluntary manslaughter based upon the above evidence. Trial counsel's request was rejected by the trial court because there was no "evidence that there's a fit of rage or serious provocation." (Tr. 2372.) However, Thompson had put forth at least by a "preponderance of the evidence, the existence of a mitigating circumstance." *Rhodes*, 63 Ohio St. 3d at 617, 590 N.E.2d at 263. The victim here was rude, he pushed Thompson to the ground, and then he slammed Thompson on the hood of the car. The victim then threatened to put Thompson in the back seat with Bagio, a large, hostile German Shepard. Thompson, who had been trained to use a gun when he feared for his life, did just that when he saw the officer reach for something black, which to Thompson, "looked like the gun" (Mit. Tr. 148.) Contrary to the trial court's finding, Thompson put forth sufficient evidence that there was indeed "a fit of rage or serious provocation." (Tr. 2372.)

The trial court's denial was erroneous and deprived Thompson of his rights under the Eighth and Fourteenth Amendments to the United States Constitution. It also denied Thompson

his right to due process and "to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

C. Conclusion

The evidence presented "reasonably supported" the defense request for an inferior degree offense instruction for voluntary manslaughter. Failing to so instruct the jury injected a "level of uncertainty and unreliability into the fact finding process that cannot be tolerated in a capital case." *Beck*, 447 U.S. at 643. Therefore, Thompson's conviction should be reversed and his case remanded for a new trial.

Proposition of Law No. 13

The defendant's right to the effective assistance of counsel is violated when counsel's performance, during the trial phase, is deficient to defendant's prejudice. U.S. Const. Amends. VI and XIV, Ohio Const. Art. I, § 10.

Thompson's trial counsel provided ineffective assistance in myriad fashion during his capital trial. As such, his rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution were violated.

A. Standard of review for ineffective assistance of counsel claims

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685–86 (1984). Where the procedure for sentencing in a capital case is similar to a trial, like Ohio's, "counsel's role in the proceeding is comparable to counsel's role at trial - to ensure that the adversarial testing process works to produce a just result under the standards governing decision." *Id.* at 687.

An ineffective assistance of counsel claim has two components: deficient performance and prejudice. *Id.* Regarding deficient performance, "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688. Courts consistently recognize that the prevailing professional norms of representation in death penalty cases are outlined in the Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. *See Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 522 (2003); *Hamblin v. Mitchell*, 354 F.3d 482, 486 (6th Cir. 2003).

To demonstrate prejudice, a defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the

outcome." *Strickland*, 466 U.S. at 694. The reasonable probability standard is lower than but-for causation or a showing that it's more-likely-than-not that counsel's error affected the outcome of the trial. *Id.* at 693 ("[W]e believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case.") The prejudice prong is satisfied if "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537.

In addition to finding prejudice from individual deficiencies, the cumulative impact of counsel's errors and omissions must be assessed as well. *See State v. DeMarco*, 31 Ohio St. 3d 191 (1987); *Harris By & Through Ramseyer v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995).

B. Failure to object to and adequately challenge unqualified expert testimony regarding blood-pattern analysis

Defense counsel for Thompson failed to adequately challenge the State's case and allowed the State's unqualified expert witness to testify without objection. John Saraya rendered his opinion on blood spatter analysis. Saraya was never qualified as an expert in this area, and his testimony was speculative and without the necessary scientific basis. *See State v. Jackson*, 92 Ohio St. 3d 436, 448 (2001). *See Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 589 (1993). *See also Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 147 (1999).

Saraya's testimony began as that of a crime scene investigator. He discussed his years of experience as an investigator, explained the search warrant he executed on Thompson's car, and discussed what he found and labeled as evidence. (Tr. 1953-61.) But his testimony took a turn when the State asked him his opinion of Thompson's shoes. (Tr. 1961.) At that point, Saraya offered that he'd attended a 40-hour blood spatter school and went on to describe to the jury what he'd learned about blood spatter. (Tr. 1962-67.) Without any more, the State began eliciting an expert opinion from Saraya, and defense counsel sat silent.

Saraya did not give his opinion in terms of a reasonable degree of scientific certainty, and he was never asked to. Instead, his testimony consisted of speculative statements such as:

- "Staining like this is going to be relatively close; I would say probably no more than a foot away from the source of the blood..." Tr. 1975
- "It could possibly be – it's just a movement of the body as it's spinning away." Tr. 1980
- "Not knowing the exact orientation, somewhere in – about a 270-degree arc here around. I couldn't say exactly. Based on the spatter of the shoes, again, stronger on the left than on the right, it could be an orientation similar to this (indicating)..." Tr. 1981
- "...I had at some point – going to be somebody pigeon-toed, kind of toes in, heels out, standing in orientation like this (indicating). That's also possible." Tr. 1982
- responding to the question, "so if an individual was standing here and was shot in the head and took a step back, would that account for that movement as they fell?" Saraya answered, "Yes, sir, it could." Tr. 1980

Thompson's attorneys were unreasonable in their failure to challenge the unreliable and prejudicial "expert" testimony of a witness who was not qualified as an expert. "Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials." *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2537 (2009). Saraya testified in terms of "could possibly," "could," and "maybe," when "an expert opinion is competent if it is held to a reasonable degree of scientific or medical certainty." *Jackson*, 92 Ohio St. 3d at 448. Counsel was obligated to challenge this incompetent "expert" opinion.

There is a reason for such procedural safeguards: "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." *Daubert,* 509 U.S. at 595 (internal citation omitted). And "[u]nless a defendant charged with a serious offense has counsel able to

invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985)

Assuming *arguendo* that Saraya was qualified to testify as an expert in crime scene investigation, that does not translate to an expertise in blood spatter analysis. One does not encompass the other. Similarly, in *State v. Baston*, 85 Ohio St. 3d 418, 423 (1999), a doctor was board certified in pathology and forensic pathology, had experience as a deputy coroner, and she still was not qualified as an expert in blood spatter. The difference in *Baston*, however, was that defense counsel objected to her testimony as not being expert in blood spatter, and the trial court sustained the objection. *Id.* Thompson's attorneys were just as obligated to prevent the admission of unqualified and baseless expert testimony.

Instead, defense counsel failed to even cross-examine Saraya about the limits of his expertise. "Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination." *Melendez-Diaz*, 129 S. Ct. at 2537. And according to the recent findings by the National Academy of Sciences (discussed and relied upon by the Supreme Court of the United States in *Melendez-Diaz*), "[t]he forensic science system, encompassing both research and practice, has serious problems...." *Id.* at 2537 (citing National Academy Report P-1). Especially in light of these recent findings—some of which were specific to blood-pattern analysis—it was unreasonable for counsel to neglect to question and challenge Saraya.

Saraya testified that based upon his observations, Thompson was standing no more than twelve to eighteen inches from the victim's head when he shot the victim. (Tr. 1973, 1981) In fact, in addition to testifying to this fact, he demonstrated for the jury, with the use of a mannequin and Thompson's actual shoes, how he believed everything played out. (Tr. 1981)

Thompson was prejudiced by Saraya's testimony, as shown by the State's reliance on it in closing arguments. The State first pointed out that "[Saraya's] testimony is something, again, that is based on the physical evidence, something that doesn't have a stake in the case." (Tr. 2434) The prosecutor then argued that "those shoes, according to John Saraya, were no more than – in a 270-degree circle, were no more than 12 inches to 16 inches away.... Ashford Thompson's feet were at Officer Miktarian's head when he finished his execution." (Tr. 2436-37) He then assured the jury that "the physical evidence doesn't pick a side," and "don't judge this man until you've heard the ballistics and blood spatter experts talk about his shoes. They tell a story." (Tr. 2437)

Thompson's attorneys were unable to challenge the prosecutor's arguments about Saraya's findings because they never challenged Saraya. Both the Rules of Evidence and the case law require that an expert witness be qualified, and his testimony must be relevant, reliable, and "to a reasonable degree of scientific or medical certainty." *Jackson*, 92 Ohio St. 3d at 448. *See also* Ohio R. Evid. 702; *Daubert,* 509 U.S. at 589. Thompson was prejudiced by his counsel's failure to adequately challenge the State's case and "expert" witness.

C. Failure to object to qualified jurors being eliminated

Thompson's counsel ineffectively failed to object when jurors who expressed reticence about the death penalty were excused for cause.

The Sixth Amendment right to a jury trial includes the right to be tried by an impartial jury. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) ("[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process.") The right to an impartial jury is "so basic to a fair trial that its infraction can never be treated as harmless error."

Gray v. Mississippi, 481 U.S. 648, 667-68 (1987). In the context of a capital trial, "[A] State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." *Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968), *modified by Wainwright v. Witt*, 469 U.S. 412 (1985). It is therefore incumbent that defense counsel adequately voir dire jurors who are skeptical of the death penalty and preserve for appeal the issue of improperly excluded jurors. Thompson's counsel failed to do both.

Juror 11 stated that he didn't believe he could impose a death sentence. (Tr. 174.) Thompson's counsel attempted to discuss the issue with him further and then asked if counsel's "haranguing" him had changed his mind and the juror responded "No." Thompson's counsel did not object to his removal. (Tr. 179.)

Juror 48 said that imposing the death penalty would be troubling because of his religious background as a devout Catholic. (*Id.* at 497.) He said "it would be a distinct obstacle," but not "impossible." (*Id.* at 498.) In his questionnaire, he answered that the death penalty was appropriate in some circumstances, but during voir dire he said it would be difficult for him to deliver the verdict personally. (*Id.* at 503.) He finally told the State that he could not sign a verdict form. (*Id.* at 505.) The court excused him without objection. (*Id.* at 512.)

Juror 66 was ambivalent about her ability to impose the death penalty. She said she would not "lean towards capital punishment." (*Id.* at 647.) She said that "if [she] had to follow the orders, [she] would follow the orders." (*Id.*) She finally relented and said she didn't think she could impose a death sentence after being told "There's no wrong answer." (*Id.* at 648.) Defense counsel did not inquire and did not object to her removal. (*Id.* at 650.)

Juror 69 did not religiously oppose the death penalty and initially said he couldn't answer whether he believed in the death penalty because he would want to decide "case to case." (*Id.* at

663.) After a long speech from the State which suggested that he had to assume Thompson would be put to death if he signed the verdict form, the juror said he could not sign the form. (*Id.* at 665–68.) Thompson's counsel asked him two questions and he was excused without objection. (*Id.* at 670–71.)

Juror 95 stated he was morally opposed to the death penalty because he was an Adventist. (*Id.* at 862.) Neither the State nor the Defense questioned him before he was dismissed without objection. (*Id.* at 864.)

Juror 102 said she did not know whether she could set her objections to the death penalty aside. (*Id.* at 912.) She then, when asked again, said she could not set them aside and was dismissed without objection or further inquiry. (*Id.* at 913.)

In each of these instances Thompson's counsel shirked their duty to ensure that he received a fair trial. Consequently, they performed deficiently and to his prejudice.

D. Failure to object to one-sided voir dire

As outlined in Proposition of Law No. 5, the court only questioned jurors as to whether they could impose the death penalty but never asked about their ability to decide on a life-sentence in a case involving the shooting of a police officer. This "death qualified" jury was not properly composed of people who were also "life qualified" and the failure of Thompson's trial counsel to ensure such proper process took place was deficient and prejudicial.

Moreover, counsel could have taken it upon themselves to "life qualify" the jurors during individual voir dire, but did not do so. This failure was additionally deficient and prejudicial as "Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981).

E. Failure to voir dire on race

Thompson's counsel unreasonably failed to adequately voir dire the jurors on race, despite the fact that the Supreme Court has found that "particularly in capital cases, ... certain inquiries must be made to effectuate constitutional protections." *Morgan*, 504 U.S. at 730 (citing to *Turner v. Murray*, 476 U.S. 28, 36 (1986) and *Ham v. South Carolina*, 409 U.S. 524, 526-527 (1973)). Counsel clearly recognized the possibility of racial biases and the problems that would cause, because they asked the trial judge to ask the jurors if they had "ever had any problems with a member of the African-American race ... that would prevent them from being fair and impartial." (Tr. 51.) The judge was skeptical that anyone would answer that question honestly but agreed to ask it anyway. (Tr. 51)

Thompson is a black man who was on trial for killing a white police officer. His attorneys were obligated to uncover any racial biases in the potential jurors. They apparently knew the issue was important enough to raise, yet they put forth no effort in actually uncovering any racial biases in the venire.

The entire purpose of voir dire is to ferret out those potential jurors who would not be fair and impartial. "If conducted properly, voir dire can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise. Voir dire provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently." *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 143-144 (1994). Even the trial judge questioned whether the jurors would readily admit their biases, and still counsel asked no further questions that dealt with race.

"Questions on voir dire must be sufficient to identify prospective jurors who hold views that would prevent or substantially impair them from performing the duties required of jurors." *State v. Jackson*, 107 Ohio St. 3d 53, 64 (2005) (citing *Morgan v. Illinois*, 504 U.S. 719, 734-735 (1992). And as this Court further stated, "the fact that defendant bears the burden of establishing juror partiality makes it all the more imperative that a defendant be entitled to meaningful examination at voir dire in order to elicit potential biases held by prospective jurors." *Id.* (internal citations omitted).

The one question about race asked by the trial court was not sufficient to ferret out any potential issues among the jurors. Thompson's trial counsel acted unreasonably and to his prejudice when they failed to voir dire the jurors to uncover any racial biases.

F. Failure to request questioning of jurors about Thompson's prior plea

As outlined in Proposition of Law No. 3, the court should have additionally questioned jurors after it was revealed that knowledge of Thompson's prior guilty plea was possibly being passed around the jury pool. Thompson's counsel had the duty to request adequate voir dire because, "Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Rosales-Lopez*, 451 U.S. at 188. When the court did not do its duty, counsel performed deficiently to Thompson's prejudice when they failed to step in. *See i.d.* at 189. (Stating the "obligation to impanel an impartial jury lies in the first instance with the trial judge.")

G. Failure to argue for change of venue after voir dire

As outlined in Proposition of Law No. 6, the court should have granted counsel's motion for change in venue due to pervasive pre-trial publicity. To the extent that counsel's failure to reargue the motion after voir dire potentially waived error, they performed deficiently to Thompson's prejudice.

H. Failure to hire a serologist and/or a DNA expert

Thompson's counsel did not present any expert testimony refuting the State's case and never requested funding for expert evaluation of the State's case. Thompson's case, however, contained unusual physical evidence, i.e., the presence of the officer's DNA as the dominant profile on the handle and trigger of Thompson's gun. (Tr. at 1855–56) ("The partial DNA profile from the swab from the trigger is a mixture. The major profile is consistent with Joshua Miktarian. . . . The partial DNA profile from the swab from the handle areas is a mixture. The major profile is consistent with Joshua Miktarian.") Neither of the swabbed areas tested presumptive positive for blood. (*Id.* at 1863.) The other potential bodily fluids on the gun included sweat, semen, and saliva. (*Id.* at 1860.) The State's expert was willing to concede that the presence of semen was realistically impossible but would not state certainly that the officer had grabbed Thompson's gun. (*Id.* at 1864.)

Counsel has an established duty to "to conduct a thorough and independent investigation relating to the issues of both guilt and penalty." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7(A). Trial counsel also has a duty to subject the State's case to "meaningful adversarial testing." *United States v. Cronic* 466 U.S. 648, 656 (1984).

Expert assistance was both available and required to comport with this established duty. Capital defendants are entitled to the assistance of experts where necessary to prepare an effective defense. *State v. Mason*, 82 Ohio St. 3d 144, 149 (1998) (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985)). This Court recognized in *Mason* that the Due Process Clause might require the appointment of other experts beyond psychologists. *Id.* *Mason* requires that the defendant make a "particularized showing of two factors." *Id.* at 150, 694 N.E.2d at 944. First, the defendant must show that the expert would aid his defense. *Id.* Second, the defendant must show that the denial of the expert would result in an unfair trial. *Id.*

A DNA expert coupled with a serologist could have testified that the presence of the officer's DNA on the gun was indicative of a struggle over the weapon. Considering that Thompson's primary defense was provocation (*See* Proposition of Law No. 13(M)), establishing that there was a fight over a deadly weapon makes abundant sense. Without expert assistance, counsel was unable to establish these important facts and unable to render effective assistance of counsel.

I. Failure to hire a private investigator

Thompson's counsel did not hire anyone to assist them in investigating the facts of the case. Thompson expressed concern on multiple occasions about his trial counsel's failure to hire a private investigator and asked his counsel to file a motion to appoint an investigator. (Transcript of January 27, 2010 Hearing, pg. 13, Transcript of February 24, 2010 Hearing, pg. 15). Counsel never filed a motion.

It is counsel's duty to investigate pre-trial. *Mitchell v. Mason*, 257 F.3d 554, 574 (6th Cir. 2001), *aff'd*, *Mitchell v. Mason*, 325 F.3d 732 (6th Cir. 2003); *Hunt v. Mitchell*, 261 F.3d

575, 583 (6th Cir. 2001). Without investigation, counsel cannot put the State's case to meaningful adversarial testing. *United States v. Cronic* 466 U.S. 648, 656 (1984).

Thompson did not go trial until two years after he was indicted and none of his lawyers hired a private investigator. A private investigator could have, for example, reviewed the only defense's witnesses statement prior to her testifying (*See* Proposition of Law No. 13(L)) or reviewed the video in the officer's car (*See* Proposition of Law No. 13(O)). This complete failure to obtain funding for, hire, and direct a readily available component of a capital defense team constituted ineffective assistance of counsel.

J. Failure to assure defendant's presence during inspection of records

A key issue in Thompson's case was the availability and content of the officer's personnel records. The prosecutor refused to copy them for defense counsel and the court suggested an in-camera inspection. (Transcript of March 24, 2010 Hearing, pp. 16, 19.) Instead of the inspection, Thompson's counsel decided to "streamline" the case by reviewing the records at the prosecutor's office without Thompson present. (*Id.* at 20–21.)

As outlined above, Thompson's case centered on whether he was provoked or acting in self-defense and the officer's record of potential prior bad conduct was clearly germane to that defense. Failing to have Thompson present during an off-the-record review of potentially critical evidence constitutes ineffective assistance of counsel.

K. Failure to object to leading questions

Throughout the trial, Thompson's counsel performed ineffectively when they failed to object to the State asking leading questions.

A leading question "suggests to the witness the answer desired by the examiner." 1 McCormick, Evidence (5th Ed.1999) 19, Section 6. Under Evidence Rule 611(C), "[l]eading

questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony." The trial court retains discretion to allow leading questions on direct examination. *State v. D'Ambrosio*, 67 Ohio St. 3d 185, 190 (1993).

The continued use of leading questions after sustained objections from defense counsel can constitute prosecutorial misconduct. *See State v. Diar*, 120 Ohio St. 3d 460, 482–485 (2008) ("The prosecutor continued misconduct by continuing to ask leading questions after the trial court had sustained objection to such questioning.") "One of defense counsel's most important roles is to ensure that the prosecutor does not transgress [the bounds of prosecutorial misconduct]." *Washington v. Hofbauer*, 228 F.3d 689, 709 (6th Cir. 2000). *Strickland's* duty to advocate and employ "skill and knowledge" includes the necessity for trial counsel to object or otherwise preserve federal issues for review. *See e.g. Groseclose v. Bell*, 895 F. Supp. 935, 956 (M.D. Tenn. 1995) ; *Gravley v. Mills*, 87 F.3d 779, 785 (6th Cir. 1996); *Starr v. Lockhart*, 23 F.3d 1280, 1285 (8th Cir. 1994); *Cabello v. United States*, 884 F. Supp. 298, 302-03 (N.D. Ind. 1995); *Cf. Freeman v. Lane*, 962 F.2d 1252, 1259 (7th Cir. 1992) (appellate counsel ineffective for abandoning viable federal claim). Trial counsel repeatedly failed to object and thus protect Thompsons's rights.

Defense counsel acquiesced to "lead[ing] witnesses on just the normal foundational crap," saying "[t]hat won't be a problem with us." (Tr. 1739.) Defense counsel then explicitly waived their objection to leading questions for "foundational types of things." (*Id.*) This waiver was particular problematic in that it allowed numerous "expert" witnesses to be qualified without any sort of adversarial testing. *See* Propositions of Law 9, 15(B). Counsel abandoned their duty to preserve potential issues of prosecutorial misconduct as it related to leading questions and thus, performed deficiently to Thompson's prejudice.

L. Failure to listen to Roberson's statement before she testified

Thompson's counsel performed deficiently when they failed to listen to their only witnesses' prior statement given to police.

It is counsel's duty to investigate pre-trial. *Mitchell v. Mason*, 257 F.3d 554, 574 (6th Cir. 2001), *aff'd*, *Mitchell v. Mason*, 325 F.3d 732 (6th Cir. 2003); *Hunt v. Mitchell*, 261 F.3d 575, 583 (6th Cir. 2001). Without investigation, counsel cannot put the State's case to meaningful adversarial testing. *United States v. Cronic* 466 U.S. 648, 656 (1984).

Thompson's counsel presented only one defense witness, Thompson's girlfriend, Danielle Roberson. (Tr. 2110–12.) She testified that the officer and Thompson got into a confrontation and the officer told Thompson "you better not try anything or I'll let my dog out on your ass," while he reached towards his belt. (*Id.* at 2125.) After a struggle, the officer handcuffed one of Thompson's wrists and slammed him on the hood of the car before she saw Thompson shoot the officer. (*Id.* at 2128.)

The State cross-examined Roberson extensively about differences between her statements at trial and her statements to police immediately after the event. (*Id.* at 2149–55, 2162.) After a series of questions, the court asked the State, "Why don't you just impeach her with the statement and go on with it. Do you have it recorded[?]" (*Id.* at 2163.) Thompson's counsel then explained that they had never listened to the statement because Roberson told them she didn't think she was recorded. (*Id.*) The tape was played for Roberson's review for the first time in court. (*Id.* at 2249.)

The State made clear that the recording of Roberson's statement was readily available for review: "Just for discovery purposes, in case there's any issue on appeal, in - - the State has 11 books of discovery . . . Book number seven, which was available to Defense . . . And under the

first tab for Danielle Roberson, it has the CDs in the book for defendant's attorney to listen to." (Tr. at 2367–68.) It was incumbent upon Thompson's counsel to review the prior statements of their only witness. It was not a strategic choice to not review the statement because counsel, by their own admission did not know the statement existed. This failure of basic preparation constituted ineffective assistance of counsel.

M. Failure to present Thompson's testimony

Thompson's counsel was ineffective when they failed to present Thompson's testimony. After all, Thompson's primary defense was that he did not act with purpose and that he should be convicted of the lesser offense of manslaughter. (Tr. 2372, 2442.) His manslaughter instruction was rejected because there was no "evidence that there's a fit of rage or serious provocation." (*Id.* 2372.) After that instruction was rejected, counsel asked jurors to focus on the purpose element of the Aggravated Murder charge. (Tr. 2442–43.)

Thompson had an absolute right to testify on his own behalf. *State v. Bey*, 85 Ohio St. 3d 487, 499 (1999) ("Generally, the defendant's right to testify is regarded both as a fundamental and a personal right that is waivable only by an accused.") Defense counsel knew that Thompson's only defense was that he was provoked, panicked, and acted without purpose. (*See i.d.* at 1243–44.) Alternatively, defense counsel could have argued that he was entitled to a self-defense instruction because he was resisting the use of excessive and unnecessary force by the arresting officer. *See Columbus v. Fraley*, 41 Ohio St. 2d 173, 180 (1975).

Importantly, all of the defense theories offered by Thompson's counsel required an inquiry into Thompson's mental state. He either acted without purpose, subject to provocation, or under "a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force." *State v. Robbins*,

58 Ohio St. 2d 74, 80 (1979). Failing to have Thompson testify about his mental state made sure that the Court would be unable to provide any instruction on affirmative defenses. In essence, Thompson's counsel failed to protect his due process " right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

Thompson's counsel's failure to present his testimony completely deprived him of any realistic opportunity to defend against the State's accusations and as such, their performance was ineffective.

N. Failure to present a complete defense

Thompson's counsel failed to put on evidence to support Thompson's defense, failed to challenge the State's experts, failed to object to improper rebuttal testimony, failed to object to leading questions, and failed to request appropriate jury instructions. "[T]he adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." *United States v. Cronic*, 466 U.S. 648, 656 (U.S. 1984).

Counsel's failures in challenging the State's case are addressed elsewhere in this Proposition of Law. But they also completely failed to put on evidence to support their case. Danielle Roberson was the only defense witness, and her testimony did not—and could not—provide the missing pieces the jury needed to hear.

In opening statement, defense counsel told the jury that they would not dispute most of the State's case. He told the jury the following:

> "What I am going to tell you is the Defense agrees—and we will agree with the Prosecution on a lot of things that they will say.... [W]hat I do want you to focus on as you hear the evidence is how it happened. And most importantly, I want you to focus on *why* did it happen."

(Tr. 1243-44)

This opening statement indicates that Thompson's defense consisted of either provocation or self-defense. *See Walden v. State*, 47 Ohio St. 3d 47, 55 (1989) ("[self-defense] admits the facts claimed by the prosecution and then relies on independent facts or circumstances which the defendant claims exempt him from liability....Self-defense seeks to relieve the defendant from culpability rather than to negate an element of the offense charged") (internal citations omitted). *See also State v. Smith*, 61 Ohio St. 3d 284, 291 (1991) ("Extreme emotional stress, as described in R.C. § 2903.03, is a circumstance, the establishment of which mitigates a defendant's criminal culpability") (internal citations omitted). Both defenses have both an objective and subjective element to them. *State v. Shane*, 63 Ohio St. 3d 630, 634 (1992), *State v. Thomas*, 77 Ohio St. 3d 323, 330-331 (1997). In other words, an explanation of Thompson's mindset was crucial to his defense.

It was impossible for Thompson to convince a jury of either provocation or self-defense without affirmatively putting on evidence. The following facts needed to be tied together with evidence from the defense:

- Thompson was someone who had never been in real trouble with the law, and he was being pulled over for a noise ordinance violation or, at most, suspicion of driving-under-the-influence.
- He had a license to carry a concealed firearm because of the dangerous places in which he performed his duties as a nurse. (Tr. 1242)
- He learned in classes for concealed carry that he should only pull his weapon if he is in fear of losing his life or receiving serious bodily harm. (Tr. 2022.)
- He learned that it is an individual determination—as instructor Luther Norman testified, "there's nobody going to be there that I can ask, is this serious enough to constitute use?" (Tr. 2023.)
- He learned to "aim for the center of the target," not the hand. (Tr. 2024.)
- The police officer that pulled him over for the noise ordinance had a K-9 in his vehicle. (Tr. 1231, 1247.)
- That K-9 was very aggressive. (Tr. 2037)

- The officer who arrived on-scene after the shooting witnessed the K-9 and felt it would've presented a danger to him or any other officers if he would have opened the car door without the dog restrained. (Tr. 2038)
- The K-9 attacked the officer who ultimately removed him from the vehicle. (Tr. 2042)
- When Miktarian had handcuffed Thompson, he was going to put him in that vehicle with that K-9. (Tr. 2127.)
- The K-9 had access to both the front of the car and the back of the car. (Tr. 2038)
- Thompson somehow got to the point where he shot and killed a police officer.

The jury needed to hear from Thompson to understand how he transformed from a law-abiding nurse to a cop-shooting escapee.

Counsel further failed to request a self-defense instruction. If counsel's focus was self-defense, then they should have requested a self-defense instruction. Thompson's counsel was required to request the instruction and submit it in writing. *State v. Fanning*, 1 Ohio St. 3d 19, 20 (1982). If counsel fails to make such a request then the trial court cannot be said to have erred when it did not provide the instruction. *Id.* Thus, Thompson's counsel ineffectively abandoned an entire avenue of defense that was the only complete defense Thompson had to the charges against him.

"[T]here are certain 'justification[s] for admitted conduct' allowed to a defendant in a criminal case, provable for the most part under the plea of not guilty, which are referred to as 'affirmative defenses.'" *State v. Rhodes*, 63 Ohio St. 3d 613, 625 (1992). As this Court puts it, "an affirmative defense is in the nature of a "confession and avoidance," in which the defendant admits the elements of the crime, but seeks to prove some additional fact that absolves the defendant of guilt." *Id.*

Both provocation and self-defense require the defense to put on evidence, and Thompson's counsel completely failed in this regard. If counsel does not even try to prove the

additional facts, then he is not assisting in the defense. "If no actual 'Assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated." *Cronic*, 466 U.S. at 654.

O. Failure to review video from officer's cruiser

Thompson's counsel was ineffective when they failed to review the videotape that was found in the officer's cruiser after the crime. By not reviewing a key piece of evidence, Thompson's counsel shirked their duty to investigate pretrial and put the state's case to meaningful adversarial testing. *United States v. Cronic* 466 U.S. 648, 656 (1984); *Mitchell v. Mason*, 257 F.3d 554, 574 (6th Cir. 2001), *aff'd*, *Mitchell v. Mason*, 325 F.3d 732 (6th Cir. 2003); *Hunt v. Mitchell*, 261 F.3d 575, 583 (6th Cir. 2001).

There was a video found in Officer Miktarian's cruiser the night of the offense, but an officer testified that it contained only an old tape. (Tr. 1255.) Officer Miktarian's dash camera, however, never worked right. (*Id.* at 1478). While it is probable the tape was completely unrelated to Thompson's case, defense counsel had an obligation to review it.

Thompson's counsel's apparent failure to independently view and verify this potentially crucial piece of evidence constituted ineffective assistance of counsel.

P. Failure to object to hearsay testimony

As outlined in Proposition of Law No. 10, the trial court permitted numerous witnesses to offer improper hearsay evidence. To the extent Thompson's counsel waived these objections, their performance was deficient and prejudiced Thompson.

Q. Failure to object to irrelevant photos

Thompson's trial counsel performed ineffectively when they failed to object to irrelevant photographs being entered into evidence. As outlined in Proposition of Law No. 10, the

admission of particular photographs (including the photograph of an admittedly irrelevant Colt 45 bottle) and gruesome autopsy photos was error. To the extent trial counsel failed to preserve said error and by silence, assented to the admission of prejudicial evidence, they were ineffective.

R. Failure to object to speculative testimony

As outlined in Proposition of Law No. 10, it was error for the trial court to permit continued questioning and eventually to allow the answer to speculative questions. This impermissible speculation by lay witnesses (*See* Proposition of Law No. 9 for discussion of improper expert testimony) occurred when Sargent Sandoval was asked about the time it would take to grab a gun and shoot a police officer. (*Id.* at 1587–88).

During Sargent Sandoval's testimony, Thompson's counsel's initial objection was sustained by the court. (*Id.* at 1587.) Defense counsel, however remained silent when the prosecutor rephrased the question into a series of questions about the time it took for the arresting officer to enter the kitchen with Mr. Thompson: "Q: In the time it took for you to get from the bottom of the steps to that kitchen is it possible for an individual to reach for a gun? A: Yes . . . Q: And if he only reached twice, would it have been possible for him to have grabbed the gun and shot somebody. A: Yes." (*Id.* at 1588.) Defense counsel failed to object to this line of questioning that elicited precisely the same answer the court had stricken.

Defense counsel's failure to object here failed to subject the State's case to meaningful adversarial testing and was thus, ineffective.

S. Failure to object to improper expert testimony

As outlined in Proposition of Law No. 9, experts besides Saraya offered testimony without first being qualified or offered testimony that they were objective unqualified to provide. Thompson's counsel performed ineffectively when they failed to object to this testimony.

T. Failure to object to rebuttal testimony

Defense counsel performed ineffectively when they failed to object to the wholly irrelevant testimony offered by the State in rebuttal.

Ohio law defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ohio R. Evid. 401. Rebuttal testimony at Thompson's trial consisted of jail recordings wherein Thompson told his girlfriend he didn't like her dressing a certain way the evening of the shooting. (Tr. 2309.) The record is devoid of any evidence where Thompson suggested he was not annoyed at his girlfriend's clothing. The State's evidence did not, in fact, rebut anything. It, along with Bartz's (the bar patron) testimony served only to paint Thompson as an angry man.

The State emphasized the phone call in its closing argument as "the most telling moment" because it displayed "the true Ashford Thompson." (*Id.* at 2437.) The State encouraged the jurors to listen to the tape that would be back with them in the deliberation room. (*Id.* at 2437–38.) The prosecutor encouraged them to "hear the anger in his voice." (*Id.* at 2438.) The State's discussion of the time encompassed the conclusion of its closing argument. (*Id.* at 2436–40.)

Defense counsel should have prevented the tape from being introduced. It provided no proof of any element of the State's case. Defense counsel performed deficiently and to Thompson's prejudice when they stood silent while the State introduced what it considered to be

evidence of "the Ashford Thompson that Officer Joshua Miktarian encountered that morning." (*Id.* at 2438.)

U. Failure to object to the court telling the jury there "will be" a mitigation phase

As outlined in Proposition of Law No. 8, the trial court erred in instructing the jury that there would necessarily be a second mitigation phase. Thompson's counsel failed to act as effective counsel when they failed to object to this error on the part of the trial court.

V. Failure to properly describe mitigating factors

"[M]itigating factors under R.C. § 2929.04(B) are not related to a defendant's culpability but, rather, are those factors that are relevant to the issue of whether an offender convicted under R.C. § 2903.01 should be sentenced to death." *State v. Holloway*, 38 Ohio St. 3d 239, 242 (1988). Mitigating factors are not just "good things...about Mr. Thompson's life," as they were repeatedly described by defense counsel. (Tr. 132.)

Defense counsel's improper description of mitigating factors placed a very heavy burden on Thompson. As one juror pointed out in voir dire, "good things in [Thompson's] life as far as accomplishments" did not seem to "have anything to do with where we're at right now." (Tr. 326.) This characterization of mitigation was prejudicial to Thompson.

W. Failure to object to five year sentence on dismissed charge

As outlined in Proposition of Law No. 1, Thompson was improperly sentenced to five years on a charge that was dismissed during trial. (Sent. Tr. pg. 42–43.) His lawyers were ineffective when they failed to notice and object to this plain error.

X. Failure to object to State's improper closing argument

As outlined in Proposition of Law No. 10, the prosecutor's closing argument was improper. Counsel's failure to object was ineffective.

Y. Failure to request that the death specifications be dismissed

As outlined in Proposition of Law No. 16, the specification in this case does not actually narrow the category of persons eligible for the death penalty and is thus, unconstitutional. To the extent that failure to request dismissal waived this argument, Thompson's counsel was ineffective.

Z. 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 Thompson 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).

Here, if the above claims of ineffective assistance of counsel at mitigation are not deemed to merit relief when considered individually, then considered cumulatively the effect of the errors

or omissions of counsel establish that Thompson's constitutional rights were violated under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Proposition of Law No. 14

The defendant's rights to the effective assistance of counsel, and protection from cruel and unusual punishment are violated when counsel's performance during the mitigation phase is deficient to defendant's prejudice. U.S. Const. Amends. VI, VIII and XIV, Ohio Const. Art. I, §10.

Thompson's trial counsel provided ineffective assistance in myriad fashion during the sentencing phase of his capital trial. As such, his rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitutions were violated.

A. Legal standard for ineffective assistance at mitigation

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685–86 (1984). Where the procedure for sentencing in a capital case is similar to a trial, like Ohio's, "counsel's role in the proceeding is comparable to counsel's role at trial - to ensure that the adversarial testing process works to produce a just result under the standards governing decision." *Id.* at 687.

An ineffective assistance of counsel claim has two components: deficient performance and prejudice. *Id.* Regarding deficient performance, "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688. Courts consistently recognize that the prevailing professional norms of representation in death penalty cases are outlined in the Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. *See Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 522 (2003); *Hamblin v. Mitchell*, 354 F.3d 482, 486 (6th Cir. 2003).

To demonstrate prejudice, a defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The reasonable probability standard is lower than but-for causation or a showing that it's more-likely-than-not that counsel's error affected the outcome of the trial. *Id.* at 693 ("[W]e believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case.") The prejudice prong is satisfied if "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537.

Capital defendants also enjoy an Eighth and Fourteenth Amendment protection against incomplete mitigation investigation. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982), 110 (holding that the jury must be able to consider all mitigating evidence under the Eighth and Fourteenth Amendments).

B. Failure to maintain credibility with the jury

Thompson's counsel performed ineffectively when they failed to maintain any semblance of credibility with the jury. His counsel lost credibility when they told the jury that they "nailed" their verdict. (Transcript of Proceedings – Mitigation Phase, pg. 180.) ("You guys found that in your verdict last week, which is a verdict you guys nailed 100%.") That statement would be fine, if defense counsel had not previously asked the jury to find their client not guilty because he lacked the purpose to commit aggravated murder. (Tr. at 2443–44.) Essentially, counsel admitted at the beginning of their mitigation presentation that they had attempted to mislead the jury during the trial phase and then credited them for seeing past the obfuscation. Counsel could not have maintained any credibility when they then asked the jury to spare Thompson's life.

Harmonizing a trial phase defense with a mitigation theme is an acceptable strategy even if it necessarily compels admitting certain client behavior. *See e.g., Matthews v. Parker*, 2011 U.S. App. LEXIS 13091, *77–80 (6th Cir. 2011). In this case, it stands to reason doing the opposite was not a sensible strategy because it necessarily entailed telling the jury two non-compatible versions of events. Counsel told the jury Thompson acted without purpose and then when the jury found the opposite they told the jury it was completely correct to look past the attempted defense. Such an about-face is sorely damaging to credibility and is necessarily ineffective. In Thompson's case, as outlined below, there was no obvious reason for counsel to abandon the arguments that they had made during the trial phase.

C. Failure to present complete mitigation presentation

Thompson's trial counsel failed to argue the mitigating factor that was suggested by their client's own unsworn statement. Thompson told the jury that he thought the officer was reaching for his gun during the arrest and that's the reason he shot the officer. (Transcript of Proceedings – Mitigation Phase, pg. 147–48.) In essence, Thompson was telling the jury that he was "under duress, coercion, or strong provocation," and that "the nature and circumstances of the offense" weighed against the imposition of the death penalty. Ohio Rev. Code § 2929.04(B).

Thompson's counsel did not support the testimony of their client and never argued the nature and circumstances of the offense. Instead they argued the jury should judge Thompson based on the good things he had done in his life. (Transcript of Proceedings – Mitigation Phase, pg. 175–76.) After Thompson had provided the reasons for his actions, counsel told the jury, "There is no excuse for those actions." (*Id.* at 179.)

To perform effectively, Thompson's counsel should have argued the mitigating factors in their client's case. Ignoring and disparaging Thompson's testimony constituted deficient

performance and certainly acted to Thompson's prejudice. Nothing in Thompson's testimony conflicted with the mitigation presentation about him being a good person. Instead, the jurors were left listening to counsel who told them that they had reached the correct verdict despite counsel's argument. Counsel then abandoned their client's own mitigation defense. For brevity and to avoid duplication, Thompson also incorporates Proposition of law 13, Section N as if rewritten here.

D. Failure to retain a psychological and neuropsychological expert

Thompson's counsel did not offer any expert psychological testimony during his sentencing. It was crucial for a proper mitigation presentation for counsel to explain how a man in his twenties with an almost non-existent prior record panicked and shot a police officer.

Counsel's failure to present a psychiatric expert was deficient because there is a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." *United States v. Edwards*, 488 F.2d 1154, 1163 (5th Cir. 1974).

Additionally the failure to present any neuropsychological expert was ineffective. Courts recognize that "jurors are more likely to credit [organic problems] and to express sympathy." *Brewer v. Aiken*, 935 F.2d 850, 862 (7th Cir. 1991) (Easterbrook, concurring); *see also Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999) (evidence of brain damage may be the difference between life and death). A failure to inform the jurors of an organic brain problem is "objectively unreasonable and prejudicial." *Glenn v. Tate*, 71 F.3d 1204, 1211 (9th Cir. 1999). Jurors were therefore unable to consider all relevant mitigation evidence.

If counsel had presented proper expert testimony, there is a reasonable probability that one juror could have changed his or her mind about the death penalty. See *Wiggins*, 539 U.S. at

537. Moreover, Thompson's jury handed down a death sentence without considering all relevant mitigation evidence in violation of his Eighth Amendment rights. *Eddings*, 455 U.S at 110.

E. Failure to object to improper closing arguments

As outlined in Proposition of Law 11, the State improperly argued during closing that jurors should "honor the badge" and impose the death sentence on Thompson. Thompson's counsel performed deficiently and to Thompson's prejudice when they failed to object to this improper line of argument.

F. Cumulative ineffective assistance

Here and as outlined in Proposition of Law 13 if the above claims of ineffective assistance of counsel at mitigation are not deemed to merit relief when considered individually, then considered cumulatively the effect of the errors or omissions of counsel establish that Thompson's constitutional rights were violated under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Thompson's sentence must be vacated.

Proposition of Law No. 15

The cumulative effect of trial error renders a capital defendant's trial unfair and his sentence arbitrary and unreliable. U.S. Const. Amends. VI, XIV; Ohio Const. Art. I, §§ 5, 16.

Ashford Thompson 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 Thompson's trial fundamentally unfair. See *Walker v. Engle*, 703 F.2d 959, 963 (6th Cir. 1983). This Court must reverse Thompson's convictions and sentence.

From beginning to end, Thompson's capital trial was replete with prejudicial error. See Propositions of Law Nos. 1-15. Assuming *arguendo* that none of the errors Thompson raised alone warrant reversal of his convictions and sentence, the cumulative effect of the errors is so prejudicial that this Court must order a new trial.

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 Thompson's trial are the trial court evidentiary rulings, ineffective assistance of counsel, and misconduct that combined to deprive Thompson 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). In general, trial counsel failed to fully investigate this case and present a complete and competent defense. For example, they failed to hire pertinent experts, they failed to make relevant objections, and significantly, they failed to have Thompson testify during the trial phase to support their contentions of self-defense and/or a lesser included offense instruction. In combination with prejudicial evidence, which was offered and admitted against Thompson, as well as errors during jury selection and the State's misconduct during closing argument, Thompson was destined to receive the penalty of death.

The result of cumulative error entitles Thompson 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 Thompson's death sentence unreliable and arbitrary. U.S. Const. amends. VIII, XIV; Ohio Const. art. I, §§ 9, 16.

Proposition of Law No. 16

A Defendant's rights to due process and freedom from cruel and unusual punishment are violated when Ohio law makes the killing of a law enforcement both Aggravated Murder and an aggravating factor and thus, automatically death eligible.[5] U.S. Const. Amends. VIII, XIV.

Under Ohio law, the killing of a law enforcement officer constitutes Aggravated Murder. O.R.C. § 2903.01(E). The killing of a law enforcement officer is also an aggravating circumstance under O.R.C. § 2929.04(A)(6). Thus, all murders of law enforcement officers are capital offenses, and Ohio's death penalty law unconstitutionally fails to narrow the class of homicides subject to capital punishment in violation of the United States Constitution.

Ohio is required to narrow those eligible for the death penalty. The United States Supreme Court has made clear "a State's capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty.'" *Arave v. Creech*, 507 U.S. 463 (1993), *quoting Zant v. Stephens*, 462 U.S. 862, 877 (1983); *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (discussing narrowing requirement); *Barclay v. Florida*, 463 U.S. 939, 960 (1983) (Stevens, J., concurring) ("[W]e have stressed the necessity of' genuinely narrowing the class of persons eligible for the death penalty.'")

Typically, the State is required to prove all of the elements of aggravated murder, and it is also then required to prove a specification that elevates the aggravated murder to a death-eligible offense. In cases where the victim is a police officer, however, the State need not prove an additional specification; it is encompassed in the aggravated murder. Nothing additional is needed to elevate it to a death penalty offense.

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[5] This Court rejected this argument in *State v. Bryan*, 101 Ohio St. 3d 272 (2004). Thompson asks this Court to reconsider.

The problem with the statute is not necessarily that a police officer is given special significance under the law. The President and the Governor are also given special significance under the law, but unlike police officers, there is that additional element required for conviction: prior calculation and design. With the killing of the President or Governor, the State would first prove the defendant is guilty of aggravated murder under R.C. § 2903.01(A), and the death specification 2929.04(A)(1) would be what elevates it to a death-eligible offense. It should be the same for the police-officer specification.

The Eighth Amendment requires that States "assure consistency, fairness, and rationality in the evenhanded operation of state law . . . to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed . . . ." *Proffitt v. Florida*, 428 U.S. 242, 260 (1976) (Joint Opinion of Stewart, Powell and Stevens, JJ.) (citation omitted).

The aggravating circumstance in this case was meaningless because the aggravated murder statute was exactly the same. As such, making the killing of a law enforcement officer both a sufficient element for Aggravated Murder and an aggravating circumstance runs afoul of the Eighth and Fourteenth Amendments to the United States Constitution.

Proposition of Law No. 17

Thompson's sentence of death is inappropriate. The circumstances of the offense, his good character, the love and support of his family, and the ability to successfully adjust to a prison sentence all favor a life sentence. Moreover, Thompson's death sentence is not proportionate when compared to other similar offenses.

When this Court conducts its independent review of Thompson's death sentence it should find that death is inappropriate. Thompson is a man of strong character who has had only minimal prior criminal contact. The nature and circumstances of the offense are indicative of a man who panicked and made a terrible decision. Additionally, Thompson has expressed appropriate remorse and given his non-violent past, he is likely to adjust peacefully to life in prison.

A. The history, character, and background of the offender (O.R.C. § 2929.04(B))

Thompson was twenty-three years old when the events that brought him to trial occurred. (*Id.* at 117.) In high school, Thompson was on the wrestling team, track team, and participated in the marching band before graduating. (*Id.* at 119.) After high school, he attended a community college and theology school before graduating from nursing school. (*Id.* at 121–22.)

At the time of the shooting, Thompson worked as a nurse. He became a licensed practical nurse (LPN) in the State of Ohio after graduating from Cleveland's ATS Institute of Techonology in 2004. (*Id.* at 45.) He worked with older patients in the throes of dementia and spent time reading the Bible with them. (*Id.* at 123–24.) He told the jury that he "wouldn't have traded that profession for anything." (*Id.* at 125.) He also explained that he carried a gun for protection and obtained a license because he worked in difficult neighborhoods. (*Id.* at 130–34.)

Many witnesses came forward in support of Thompson at his trial. Cheryl Thomas, Stephanie Pounds, Lillie Torrence, Edgar Miller, Lois Martin, Kelvin Bailey, and Mattie Parham

were family friends who described Thompson as both a good child and a responsible adult. (Mitigation Tr. at 40–41, 60–61, 64–67, 70–72, 88–89, 91–95, 98–100.) Ms. Pounds, in particular described Thompson as a reliable, caring person: "I've got family that I cannot depend on. I've got friends that I cannot depend on. I know if I call Ashford he is going to come for me." (*Id.* at 61.) Ms. Martin also emphasized Thompson's caring nature, explaining that he would see her stepmother, known as Mom B, about three times a week to bring her holiday decorations and help her around the house and in her garden. (*Id.* at 89) Mom B described Thompson as "her legs." (*Id.*)

Thompson's uncle, Gary Ashford, described Mr. Thompon's spiritual background and religious life. He told the jury that he spoke with Thompson about religious matters, and that Thompson had actually spent a year studying theology in Alabama before coming back to Ohio. (*Id.* at 80.) Another one of Thompson's pastors recalled that Thompson served on the church's youth deacon board. (*Id.* at 103.)

B. The nature and circumstances of the offense (O.R.C. § 2929.04(B))

Thompson saw Officer Miktarian reaching for what Thompson thought was a gun before Thompson drew his own gun and shot. (*Id.* at 147.) Thompson was also faced with a police K-9 officer in the back seat of the car.

Danielle Roberson testified that Officer Miktarian and Thompson got into a confrontation and the officer told Thompson "you better not try anything or I'll let my dog out on your ass," while he reached towards his belt. (*Id.* at 2125.) After a struggle, the officer handcuffed one of Thompson's wrists and slammed him on the hood of the car before Roberson saw Thompson shoot the officer. (*Id.* at 2128.)

The shooting of a police officer is a terrible act for a family and a community to face. However, this Court should endeavor to understand how something like this event occurred. It seems unlikely that a 23 year-old nurse with almost no prior criminal record would shoot an officer to avoid apprehension for a DUI or a loud-noise ticket unless that person was absolutely panicked.

C. 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 (O.R.C. § 2929.04(B)(2)

Based on the testimony outlined above, Thompson's trial judge found that there was support that he acted under duress. (Tr. – Sentencing, pg. 34–35; see also Section B of Proposition of Law No. 12.)

D. The offender's lack of a significant history of prior criminal convictions and delinquency adjudications (O.R.C. § 2929.04(B)(5))

Thompson's prior criminal history is limited to a violation of a loud noise ordinance and having physical control of a motor vehicle while intoxicated. (*Id.* at 37.) This lack of criminal history is mitigating.

E. Other factors relevant to the issue of whether the offender should be sentenced to death (O.R.C. § 2929.04(B)(7)

1. Thompson is remorseful.

At his first opportunity, Thompson expressed remorse to the victim's family. (*Id.* at 115-16.) He explained that while he sat with a straight face at trial, he was following the advice of his lawyers. (*Id.* at 116.) He personally apologized to Officer Mikitarian's widow, explaining "I can't imagine that kind of pain, I always wanted a family of my own . . ." (*Id.*)

2. Thompson can adjust to life in prison.

A review of Thompson's record and life reveals that he is not a violent man. Numerous witnesses described him as supporting and caring. Even the trial judge conceded before sentencing him to death, "Ashford Thompson did not set out . . . to kill an officer . . . ." (Tr. – Sentencing, pg. 41.)

Thompson is an educated young man who has the potential to thrive in prison. There is nothing to suggest he will not be a model prisoner.

F. Conclusion

The record must persuade this Court that the aggravating circumstances do not outweigh the mitigating factors and that the death sentence is not appropriate in Thompson's case. O.R.C. 2929.05(A). This is no simple task. This Court is "constituted as a super jury to review the record and to decide whether the death sentence is appropriate." *State v. Apanovitch*, 33 Ohio St. 3d 19, 29 (1987) (Brown, J., dissenting). As such, the trier of facts' findings of fact do not bind this Court. *Id.* Instead, this Court "must be persuaded." *Id.*

This Court must do more than simply "guard against error." *State v. Morales*, 32 Ohio St. 3d 252, 263 (1987) (Brown, J., concurring). This Court must make a *de novo* determination of the appropriateness of the death sentence. *Id.*; *State v. Campbell*, 69 Ohio St. 3d 38, 54, (1994).

The aggravating circumstances do not outweigh the powerful mitigation offered by a panicked non-violent young man with a promising career in nursing. Thompson should not receive a death sentence.

Proposition of Law No. 18

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 Thompson. 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. [6]

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. 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:

A. 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.*

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[6] In *State v. Jenkins*, 15 Ohio St. 3d 164 (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 (1988).

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.

B. 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 (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 Tex. Appx. 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.

C. 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 R. Crim. P. 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.

D. 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. O.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.

E. O.R.C. §§ 2929.03(D)(1) and 2929.04 are unconstitutionally vague.

O.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 O.R.C. § 2929.04(B). O.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 O.R.C. § 2929.04(A)(1)-(8) are both.

F. 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. O.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 (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 (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. O.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 Thompson's due process and liberty interest in O.R.C. § 2929.05.

H. 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, Thompson's capital convictions and sentences cannot stand.

H.1 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 (2nd Cir. 1980); *Forti v. Suarez-Mason*, 672 F.Supp. 1531 (N.D. Cal. 1987).

H.2 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* Subsection 1).

H.2.1 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.

H.2.2 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.

H.2.3 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* Section A). 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.

H.2.4 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.

H.2.5 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.

H.2.6 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.

H.3 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.

I. 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. Thompson's death sentence must be vacated.

Conclusion

For the foregoing reasons, Ashford Thompson's convictions and sentence must be reversed.

Respectfully Submitted:

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Certificate Of Service

I hereby certify that a true copy of the foregoing MERIT BRIEF OF APPELLANT ASHFORD THOMPSON AND APPENDIX TO MERIT BRIEF was forwarded by regular U.S. Mail to Richard Kasay, Assistant Summit County Prosecutor, 53 University Ave., Akron, Ohio 44308, this 26th day of July, 2011.

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348193

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Appellee,	:	Case No. 2010-1373
v.	:	Appeal taken from the Summit County Court of Common Pleas
ASHFORD THOMPSON,	:	Case No. CR 2008-07-2390
Appellant.	:	**This Is A Capital Case.**

APPENDIX TO MERIT BRIEF OF APPELLANT ASHFORD THOMPSON

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In The Supreme Court Of Ohio

State Of Ohio,	:	
Appellee,	:	
-Vs-	:	Case No.: 10-1373
Ashford Thompson,	:	
Appellant.	:	**This Is A Capital Case.**

On Appeal From The Court Of
Common Pleas Of Summit County
Case No. CR 2008-07-2390

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Appellant Thompson's Notice Of Appeal

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In The Supreme Court Of Ohio

State Of Ohio,	:	
Appellee,	:	
-Vs-	:	Case No.:
Ashford Thompson,	:	
Appellant.	:	**This Is A Capital Case.**

On Appeal From The Court Of
Common Pleas Of Summit County
Case No. CR 2008-07-2390

Appellant Thompson's Notice Of Appeal

Appellant Ashford Thompson hereby gives notice that he is pursuing his appeal as of right to obtain relief from his conviction of aggravated murder, and his death sentence, imposed on June 24, 2010 in the Summit County Court of Common Pleas. The date of this offense was July 13, 2008. See Sup. Ct. Prac. R. XIX §1(A).

Respectfully submitted,

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Counsel For Appellant

Certificate Of Service

I hereby certify that a true copy of the foregoing NOTICE OF APPEAL was forwarded by regular U.S. Mail to Sherri Bevan Walsh, Summit County Prosecutor, 53 University Ave. Akron, Ohio 44308, this 6th day of August, 2010.

Kimberly S. Rigby - 0078245
Counsel For Appellant

324985

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

STATE OF OHIO,	**CASE NO. CR 2008-07-2390**
Plaintiff	**JUDGE STORMER**
-vs-	
ASHFORD L. THOMPSON	**JUDGMENT ENTRY**
Defendant	**OPINION OF THE COURT**
	(per 2929.03(F))

On June 4, 2010, a jury convicted Ashford L. Thompson of three counts of tampering with evidence, two counts of resisting arrest, two counts of escape and one count of carrying a concealed weapon, each with firearm specifications. He was also found guilty beyond a reasonable doubt of two counts of aggravated murder. The aggravated murder convictions involved the death of Twinsburg police officer, Joshua Miktarian and carried five identical specifications: two firearm specifications and three death penalty specifications. The jury separately found Defendant guilty of the firearm specifications and each of the death penalty specifications.

For purposes of the mitigation/sentencing hearing, the Court merged the two Aggravated Murder counts as there is only one victim and merged two of the death specifications, specification two referring to Defendant's escape and specification three referring to the fact that Defendant was under detention at the time of the murder. Given the facts of this case, Thompson could not commit the crime of escape without also committing the crime of breaking detention; the Court found that this constituted one act by the

Defendant. As a result, the Court considers and sentences the Defendant on one count of aggravated murder with two specifications. The first specification, now an aggravating circumstance is that Joshua Miktarian, when murdered, was a police officer performing his official duties; the second specification, now an aggravating circumstance is that Defendant committed the murder to facilitate an escape from apprehension for other crimes.

The Court advised Ashford L. Thompson of his rights during the sentencing phase. He waived his right to a pre-sentence investigation and a mental health evaluation and was fully advised of his rights before the Court began the sentencing phase.

On June 10, 2010, the sentencing phase began. The Court permitted the State to use selected evidence related only to the two specifications. The State introduced the selected trial exhibits and rested. The defendant presented mitigation evidence and made an unsworn statement. Counsel presented final arguments. On July 11, 2010, the jury returned a verdict finding that the State of Ohio proved beyond a reasonable doubt that the aggravating circumstances involving the death of Joshua Miktarian outweighed the mitigating factors. The jury verdict indicated the penalty of death.

The jury was appropriately sequestered during the trial phase and the sentencing phase deliberations. In each phase, the jury was sequestered overnight. The jury deliberated for approximately 3 ½ hours over two days in the sentencing phase.

The jury's verdict of death on the count of aggravated murder involving the death of Joshua Miktarian constitutes a recommendation to the Court. The Court must perform an independent review of this matter pursuant to Ohio law.

The Court must now separately weigh the two specific aggravating circumstances connected to the aggravated murder of Joshua Miktarian to determine whether the jury recommendation of death should be the final sentence of the Court. Guidance is provided to the Court in case law and the requirements of the Ohio Revised Code. The Court must set forth its specific findings as to the existence of any mitigating factors pursuant to O.R.C. 2929.04(B) as well as any other mitigating factors, the relevant aggravating circumstances and the Court's reasoning in the weighing process.

In the weighing process, the Court does not consider the aggravated murder of Joshua Miktarian as an aggravating circumstance, does not consider the nature and circumstances of the offense unless they are mitigating and does not consider any victim impact evidence.

AGGRAVATING CIRCUMSTANCES

The jury found Defendant guilty of aggravated murder and found him guilty beyond or reasonable doubt of two specifications, specifically that:

The offense was committed for the purpose of escaping detection, apprehension, trial or punishment, for another offense committed by the offender. 2929.04(A)(3). Officer Miktarian stopped Ashford Thompson for a noise violation, and apparently, for a possible OVI. In addition, Defendant did not announce that he was legally carrying a weapon.

and,

The victim of the offense was a law enforcement officer whom the offender know or has reasonable cause to know or knew to be a law enforcement officer 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. 2929.04(A)(6). Officer

Miktarian was arresting Ashford Thompson when Thompson shot him. Thompson understood that Miktarian was a law enforcement officer who was on duty.

MITIGATING FACTORS

The following factors were considered in possible mitigation of the death penalty:

1. *The nature and circumstances of the offense*

This Court has reviewed the nature and circumstances of the offense for any mitigating factors. The Court considers the testimony of Danielle Roberson. Ms. Roberson stated that Miktarian behaved unprofessionally, pulled Ashford Thompson, may have pushed him down, threw him on the hood of the police car and reached for something on his belt, which she thought might have been a gun. Her testimony supports the mitigation factor that Defendant was acting under duress.

2. *The history, character and background of Ashford L. Thompson*

Mr. Thompson grew up with a loving mother, without significant contact with his father. He was emotionally and spiritually supported by several of the mitigation witnesses during his youth. As a result, he was considered to be a very nice, caring and considerate boy and man. He participated in some high school sports, most notably as a wrestler and drum major for the band.

Family and friends found him to be mature for his years, reliable and helpful. He described himself as a "normal kid", not perfect. After graduating from high school, he went to college. He considered the ministry and healthcare, but chose healthcare as it provided a hands-on opportunity to help. He trained to become and became a certified Licensed Practical Nurse. He successfully practiced in this capacity in nursing homes and in private duty and was a conscientious caregiver.

He obtained a legal concealed carry permit and carried a handgun because he often had private duty jobs at night in unsavory neighborhoods, and was committed to being there for his patients.

3. *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.*

Ashford Thompson stated that Joshua Miktarian's aggressive and unprofessional behavior during his traffic stop made him fearful. He felt that this was not a normal traffic stop. When cuffed, he used a wrestling stance and dug in his heels. He and the officer "struggled" and Thompson was knocked to the ground. Miktarian called for another unit and threatened to release his dog from the cruiser. Miktarian then put him on the hood of the car and Thompson saw him reach for something on his duty belt. It did not make sense to him. Thompson believed that Miktarian was about to shoot him, so he turned and, using the gun concealed in pocket of his shorts, shot him in the forehead. He left because he thought the police would shoot and kill him if they found him there.

Danielle Roberson corroborated this statement.

4. *The age of the Defendant*

Ashford Thompson was 23 years old when he murdered Joshua Miktarian.

5. *Lack of a significant history of prior criminal convictions*

Ashford Thompson does not have a significant criminal history. He has two prior minor misdemeanor convictions for violating a noise ordinance (loud music) and one conviction for physical control of a motor vehicle.

6. Any other factors

Here, the Court considers as mitigating, Defendant's family and friends statements about him. He did express remorse and apologize to the Miktarian family before beginning his unsworn statement. He stated that he had confessed on the night of his arrest and told the police just what he stated in court. He was involved with his church and led youth bible study classes.

AGGRAVATING CIRCUMSTANCES VERSUS MITIGATING FACTORS

When weighing the aggravated circumstances against the mitigating factors, the Court finds that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt.

The death penalty can be imposed in ten situations upon a finding of guilt. Six of the specifications refer to actions taken by the defendant. Here, the specification relevant to Defendant's actions was that the murder occurred as a consequence of trying to escape detection for other crimes.

Four of the statutory criteria refer only to the status of the victim. Those protected by status are the president and the vice-president of the United States, the governor and the lieutenant governor of Ohio, children under the age of 13 and police officers. Thus, in the State of Ohio, the murder of a police officer exists in the same category as the assassination of our top elected officials or the murder of a young child. No other persons have been placed into these categories.

The Court considers the mitigating factors listed previously, which diminish the appropriateness of the death penalty. First, the Court considers the age of the Defendant and accords it little weight. At 23, Ashford Thompson was not so young and inexperienced that age makes him less morally culpable. His prior criminal record is scant and is given some weight, however, on this night, he was stopped for the same loud music violation as in his prior convictions.

Based upon the testimony of friends and family, Ashford Thompson had a supportive and caring family. He, himself, achieved success in high school, finished college and worked in a job he loved helping the elderly and sick. He remained active in his church. He was "normal" until July 13, 2008. The Court gives this significant weight.

On this night, Thompson believed that Officer Miktarian behaved abusively and reached for something on his belt. He suggests that he was compelled to act to save his own life and that the officer's actions overcame his mind so that he had no choice but to kill him. The Court does not accept this argument.

Ashford Thompson did not set out on July 13, 2008 to kill an officer, but he decided to kill Officer Miktarian when he reached for the gun in his pocket, turned and fired. He could have turned and not fired. He could have not reached for the gun; he could have simply allowed himself to be arrested and filed a grievance against the officer for his behavior. But when he turned and fired, he was a normal, church going man who chose to ignore much of what he had been taught and knew. He was not impaired in any way, so the decision was conscious and purposeful.

After shooting the officer, he then fled the scene. While he expressed remorse, the aggravating circumstance of escape reduces the impact of remorse as a mitigating factor. The Court gives the expression of remorse slight weight.

In consideration of the law and the evidence as expressed in this opinion, the Court finds that the aggravating circumstances outweigh the mitigating factors. Therefore, the Court concurs with the jury's sentence and hereby sentences Ashford L. Thompson on merged original Counts One and Two to death for the aggravated murder of Joshua Miktarian. The Court orders that the execution date be set for the 23rd of June, 2011, one year from today or as set by a Court of competent jurisdiction.

As required by law, the Court further sentences the Defendant: the Court merges the original Counts Three and Four, Escape and sentences him to 5 years in prison to be served concurrently to any other sentence; on original Count Five, Resisting Arrest, the Court sentences him to 18 months concurrent; original Count Six, misdemeanor Resisting Arrest, 90 days with credit for 90 days; the Court merges original Counts Seven, Eight and Nine, Tampering with Evidence, and sentences him to 5 years concurrent; original Count 10, Carrying a Concealed Weapon, 12 months concurrent. Finally, the Court merges all of the firearm specifications and sentences him to the mandatory 7 years consecutive to all other sentences. The Court gives the Defendant credit for the 711 days he has served to date.

The Court orders Defendant to be conveyed to the appropriate state institution where he will be placed on death row. Notification of appellate rights was given and the Court appoints Rachael Troutman and Kim Rigby of the Ohio Public Defenders office to represent

the Defendant. This opinion will be filed with the Summit County Clerk of Courts as well as with the Clerk of the Supreme Court of Ohio. Court costs to the Defendant.

IT IS SO ORDERED.

Judge Elinore Marsh Stormer

Cc: Brian Lo Prinzi, Esq.; Brad Gessner, Esq.
Kerry O'Brien, Esq; John Greven, Esq.

EMS:lcb
08-2390

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

THE STATE OF OHIO
vs.
ASHFORD L. THOMPSON

Case No. CR 08 07 2390

JOURNAL ENTRY

On May 24, 2009 at 10:00 A.M., the jury trial began. The Defendant appeared in Court with defense counsels, Kerry O'Brien and John Greven, for trial. The State was represented by Assistant Prosecutors Brian Loprinzi and Brad Gessner.

The Counts in the indictment were re-numbered as follows: Count 5 becomes Count 1, Resisting Arrest, Specification 1 to Count 5 becomes Specification 1 to Count 1, Specification 1 to Count 5 becomes Specification 2 to Count 1, Count 6 becomes Count 2, Resisting Arrest, Count 10 becomes Count 3, Carrying Concealed Weapons, Specification 1 to Count 10 becomes Specification 1 to Count 3, Count 4 remains as originally indicted, Escape, Count 1 becomes Count 5, Aggravated Murder, Specification 1 to Count 1 becomes Specification 1 (Aggravated Murder of Law Enforcement Officer) to Count 5, Specification 2 to Count 1 becomes Specification 2 (Aggravated Murder of Law Enforcement Officer) to Count 5, Specification 3 to Count 1 becomes Specification 3 (Aggravated Murder of Law Enforcement Officer) to Count 5, Specification 4 to Count 1 becomes Specification 4 (Aggravated Murder of Law Enforcement Officer) to Count 5, Specification 5 to Count 1 becomes Specification 5 (Aggravated Murder of Law Enforcement Officer) to Count 5, Count 2 becomes Count 6, Aggravated Murder (Fleeing/Escaping), Specification 1 to Count 2 becomes Specification 1 (Aggravated Murder – Fleeing/Escaping) to Count 6, Specification 2 to Count 2 becomes Specification 2 (Aggravated Murder – Fleeing/Escaping) to Count 6, Specification 3 to Count 2 becomes Specification 3 (Aggravated Murder – Fleeing/Escaping) to Count 6, Specification 4 to Count 2 becomes Specification 4 (Aggravated Murder – Fleeing/Escaping) to Count 6, and Specification 5 to Count 2 becomes Specification 5 (Aggravated Murder – Fleeing/Escaping) to Count 6.

The trial continued on until June 2, 2010 until 1:00 P.M., at which time the Jury having heard the testimony, the arguments of counsel and the charge of the Court, retired to deliberate.

On June 3, 2010 at 10:45 A.M., the Jury returned their verdict in open court and found the Defendant GUILTY of:

1) Count 1, Resisting Arrest, Ohio Revised Code Section 2921.33(C), a felony of the fourth (4th) degree, which occurred on July 13, 2008
2) Specification 1 to Count 1, which occurred on July 13, 2008
3) Specification 2 to Count 1, which occurred on July 13, 2008
4) Count 2, Resisting Arrest, Ohio Revised Code Section 2921.33(A), a misdemeanor of the second (2nd) degree, which occurred on July 13, 2008
5) Count 3, Carrying Concealed Weapons, Ohio Revised Code Section 2923.12(B)(3), a felony of the fifth (5th) degree, which occurred on July 13, 2008
6) Specification 1 to Count 3, which occurred on July 13, 2008
7) Count 4, Escape, Ohio Revised Code Section 2921.34(A)(1), a felony of the fifth (5th) degree, which occurred on July 13, 2008
8) Specification 1 to Count 4, which occurred on July 13, 2008
9) Specification 2 to Count 4, which occurred on July 13, 2008
10) Count 5, Aggravated Murder, Ohio Revised Code Section 2903.01(E), a special felony, which occurred on July 13, 2008
11) Specification 1 (Aggravated Murder of Law Enforcement Officer) to Count 5, which occurred on July 13, 2008
12) Specification 2 (Aggravated Murder of Law Enforcement Officer) to Count 5, which occurred on July 13, 2008
13) Specification 3 (Aggravated Murder of Law Enforcement Officer) to Count 5, which occurred on July 13, 2008
14) Specification 4 (Aggravated Murder of Law Enforcement Officer) to Count 5, which occurred on July 13, 2008
15) Specification 5 (Aggravated Murder of Law Enforcement Officer) to Count 5, which occurred on July 13, 2008
16) Count 6, Aggravated Murder (Fleeing/Escaping), Ohio Revised Code Section 2903.01(B), a special felony, which occurred on July 13, 2008
17) Specification 1 (Aggravated Murder – Fleeing/Escaping) to Count 6, which occurred on July 13, 2008
18) Specification 2 (Aggravated Murder – Fleeing/Escaping) to Count 6, which occurred on July 13, 2008
19) Specification 3 (Aggravated Murder – Fleeing/Escaping) to Count 6, which occurred on July 13, 2008

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20) Specification 4 (Aggravated Murder – Fleeing/Escaping) to Count 6, which occurred on July 13, 2008

21) Specification 5 (Aggravated Murder – Fleeing/Escaping) to Count 6, which occurred on July 13, 2008

22) Count 7, Tampering with Evidence (Dodge Intrepid), Ohio Revised Code Section 2921.12(A)(1), a felony of the third (3rd) degree, which occurred on July 13, 2008

23) Specification 1 to Count 7, which occurred on July 13, 2008

24) Specification 1 to Count 8, which occurred on July 13, 2008

25) Count 8, Tampering with Evidence (handcuffs), Ohio Revised Code Section 2921.12(A)(1), a felony of the third (3rd) degree, which occurred on July 13, 2008

26) Count 9, Tampering with Evidence (Keltec, Model P-11 9mm pistol), Ohio Revised Code Section 2921.12(A)(1), a felony of the third (3rd) degree, which occurred on July 13, 2008

The Firearm Specification 1 to Count 9 is Dismissed.

The Court granted Rule 29 on the original Count 3, Escape with Specifications 1 and 2 to Count 3.

The Defendant was remanded to the Summit County Jail pending mitigation hearing set for June 10, 2010 at 11:00 A.M.

APPROVED:
June 4, 2010
tms

PATRICIA A. COSGROVE, Judge for

ELINORE MARSH STORMER, Judge
Court of Common Pleas
Summit County, Ohio

cc: Prosecutor Brian Loprinzi
Prosecutor Brad Gessner
Attorney John Greven
Attorney Kerry O'Brien

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

THE STATE OF OHIO)
vs.)
ASHFORD L. THOMPSON)

Case No. CR 08 07 2390

JOURNAL ENTRY

On June 23, 2010, the Assistant Prosecuting Attorney on behalf of the State of Ohio, the Defendant, ASHFORD L. THOMPSON, being in Court with counsels, KERRY O'BRIEN and JOHN GREVEN, for sentencing. On June 3, 2010, the Defendant was found GUILTY by a Jury Trial of the following charges as numbered in the Indictment:

1) Count 1, Aggravated Murder, Ohio Revised Code Section 2903.01(E), a special felony, which occurred on July 13, 2008
2) Specification 1 (Aggravated Murder of Law Enforcement Officer) to Count 1, which occurred on July 13, 2008
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6) Specification 5 (Aggravated Murder of Law Enforcement Officer) to Count 1, which occurred on July 13, 2008
7) Count 2, Aggravated Murder (Fleeing/Escaping), Ohio Revised Code Section 2903.01(B), a special felony, which occurred on July 13, 2008
8) Specification 1 (Aggravated Murder – Fleeing/Escaping) to Count 2, which occurred on July 13, 2008
9) Specification 2 (Aggravated Murder – Fleeing/Escaping) to Count 2, which occurred on July 13, 2008
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12) Specification 5 (Aggravated Murder – Fleeing/Escaping) to Count 2, which occurred on July 13, 2008

13) Count 4, Escape, Ohio Revised Code Section 2921.34(A)(1), a felony of the fifth (5th) degree, which occurred on July 13, 2008

14) Specification 1 to Count 4, which occurred on July 13, 2008

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16) Count 5, Resisting Arrest, Ohio Revised Code Section 2921.33(C), a felony of the fourth (4th) degree, which occurred on July 13, 2008

17) Specification 1 to Count 5, which occurred on July 13, 2008

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19) Count 6, Resisting Arrest, Ohio Revised Code Section 2921.33(A), a misdemeanor of the second (2nd) degree, which occurred on July 13, 2008

20) Count 7, Tampering with Evidence (Dodge Intrepid), Ohio Revised Code Section 2921.12(A)(1), a felony of the third (3rd) degree, which occurred on July 13, 2008

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23) Specification 1 to Count 8, which occurred on July 13, 2008

24) Count 9, Tampering with Evidence (Keltec, Model P-11 9mm pistol), Ohio Revised Code Section 2921.12(A)(1), a felony of the third (3rd) degree, which occurred on July 13, 2008

25) Count 10, Carrying Concealed Weapons, Ohio Revised Code Section 2923.12(B)(3), a felony of the fifth (5th) degree, which occurred on July 13, 2008

26) Specification 1 to Count 10, which occurred on July 13, 2008

The sentencing hearing commenced on June 10, 2006, and continued on until June 11, 2010. The jury made a unanimous recommendation of **DEATH** for the Defendant on merged Counts 1 and 2.

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

The Court then announced that it found beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors and that the death penalty would be imposed.

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

THE STATE OF OHIO
vs.
ASHFORD L. THOMPSON

Case No. CR 08 07 2390

JOURNAL ENTRY

When imposing a sentence in this case for the non-capital counts, the Court has considered the overriding purposes of felony sentencing, which are to protect the public from future crime and to punish the offenders, States vs. Comer, 99 Ohio St. 3d 463, Revised Code Section 2929.11(A).

The Court has 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.

Counts 1 and 2 are merged for the purpose of sentencing. Counts 7, 8 and 9 are merged for the purpose of sentencing.

The Court merges all Specifications into a single specification as a matter of law.

IT IS ORDERED BY THIS COURT that the Defendant, ASHFORD L. THOMPSON, for punishment of the crime of AGGRAVATED MURDER, as to the death of JOSHUA MIKTARIAN, Ohio Revised Code Section 2903.01(E), a special felony, **the sentence is DEATH**. The Court finds that because of the nature of the sentence on merged Counts 1 and 2, there is no reason to advise the Defendant of post release control on this special felony.

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 at Lucasville, Ohio, and that he be there safely kept until June 23, 2011, 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 ASHFORD L. THOMPSON, 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 Warden or his duly authorized Deputy, shall administer a lethal injection until the Defendant, ASHFORD L. THOMPSON, is **DEAD**.

The Court proceeded with sentencing as to the remaining counts. The Defendant is committed to the Ohio Department Of Rehabilitation And Correction for punishment of the crime of:

1) Merged Firearm Specifications, for a definite term of Seven (7) years
2) Escape, Ohio Revised Code Section 2921.34(A)(1), a felony of the fifth (5th) degree, for a definite term of Twelve (12) months
3) Resisting Arrest, Ohio Revised Code Section 2921.33(C), a felony of the fourth (4th) degree, for a definite term of Eighteen (18) months
4) Resisting Arrest, Ohio Revised Code Section 2921.33(A), a misdemeanor of the second (2nd) degree, for a definite term of Ninety (90) days
5) Tampering with Evidence Ohio Revised Code Section 2921.12(A)(1), a felony of the third (3rd) degree, for a definite term of Five (5) years
6) Carrying Concealed Weapons, Ohio Revised Code Section 2923.12(B)(3), a felony of the fifth (5th) degree, for a definite term of Twelve (12) months

Pay the costs of this prosecution and *attorney fees* as directed by the Adult Probation Department. Monies are to be paid to the Summit County Clerk of Courts, Courthouse, 205 South High Street, Akron, Ohio 44308-1662.

Pursuant to the above sentence, that the Defendant be conveyed to the Lorain Correctional Institution at Grafton, Ohio, to commence the prison intake procedure.

The Merged Firearm Specifications are to be served consecutively with all counts in this case.

On merged Counts 7, 8 and 9 and Counts 4, 5 and 10, as part of the sentence in this case, the Defendant *may* be supervised on post-release control by the Adult Parole Authority for a *discretionary* period of *up to Three (3) years* after being released from prison, as determined by the Adult Parole Authority. If the Defendant is placed on post-release control and 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 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.

COPY

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

THE STATE OF OHIO DANIEL M. HORRIGAN)
vs.)
2010 JUN 24 PM 3:00)
ASHFORD L. THOMPSON)

Case No. CR 08 07 2390

JOURNAL ENTRY

SUMMIT COUNTY
CLERK OF COURTS

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OPY

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

THE STATE OF OHIO	)	**Case No. CR** 08 07 2390
vs.	)	
	)	
ASHFORD L. THOMPSON	)	**JOURNAL ENTRY**

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Counts 1 and 2 are merged for the purpose of sentencing. Counts 7, 8 and 9 are merged for the purpose of sentencing.

The Court merges all Specifications into a single specification as a matter of law.

IT IS ORDERED BY THIS COURT that the Defendant, ASHFORD L. THOMPSON, for punishment of the crime of AGGRAVATED MURDER, as to the death of JOSHUA MIKTARIAN, Ohio Revised Code Section 2903.01(E), a special felony, **the sentence is DEATH**. The Court finds that because of the nature of the sentence on merged Counts 1 and 2, there is no reason to advise the Defendant of post release control on this special felony.

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 at Lucasville, Ohio, and that he be there safely kept until June 23, 2011, 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 ASHFORD L. THOMPSON, 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 Warden or his duly authorized Deputy, shall administer a lethal injection until the Defendant, ASHFORD L. THOMPSON, is **DEAD**.

;OPY The Court proceeded with sentencing as to the remaining counts. The Defendant is committed to the Ohio Department Of Rehabilitation And Correction for punishment of the crime of:

1) Merged Firearm Specifications, for a definite term of Seven (7) years
2) Escape, Ohio Revised Code Section 2921.34(A)(1), a felony of the fifth (5th) degree, for a definite term of Twelve (12) months
3) Resisting Arrest, Ohio Revised Code Section 2921.33(C), a felony of the fourth (4th) degree, for a definite term of Eighteen (18) months
4) Resisting Arrest, Ohio Revised Code Section 2921.33(A), a misdemeanor of the second (2nd) degree, for a definite term of Ninety (90) days
5) Tampering with Evidence Ohio Revised Code Section 2921.12(A)(1), a felony of the third (3rd) degree, for a definite term of Five (5) years
6) Carrying Concealed Weapons, Ohio Revised Code Section 2923.12(B)(3), a felony of the fifth (5th) degree, for a definite term of Twelve (12) months

Pay the costs of this prosecution and *attorney fees* as directed by the Adult Probation Department. Monies are to be paid to the Summit County Clerk of Courts, Courthouse, 205 South High Street, Akron, Ohio 44308-1662.

Pursuant to the above sentence, that the Defendant be conveyed to the Lorain Correctional Institution at Grafton, Ohio, to commence the prison intake procedure.

The Merged Firearm Specifications are to be served consecutively with all counts in this case.

On merged Counts 7, 8 and 9 and Counts 4, 5 and 10, as part of the sentence in this case, the Defendant *may* be supervised on post-release control by the Adult Parole Authority for a *discretionary* period of *up to Three (3) years* after being released from prison, as determined by the Adult Parole Authority. If the Defendant is placed on post-release control and 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 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.

COPY

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

THE STATE OF OHIO	)	**Case No. CR** 08 07 2390
vs.	)	
	)	
ASHFORD L. THOMPSON	)	**JOURNAL ENTRY**

The Court finds that the Defendant is entitled to a total of 711 days jail credit served in this case.

The Court informed the Defendant of his right to appeal pursuant to Rule 32A2, Criminal Rules of Procedure, Ohio Supreme Court. The Court appointed Attorney Rachael Troutman and Attorney Kim Rigby of the Ohio Public Defenders for purposes of appeal.

APPROVED:
June 24, 2010
tms

PATRICIA A. COSGROVE, Judge for

ELINORE MARSH STORMER, Judge
Court of Common Pleas
Summit County, Ohio

cc: Prosecutors Brian Loprinzi and Brad Gessner
Criminal Assignment
(Registrar's Office *email*)
(G Habig, Court Convey *email*)
(L Campbell, SCSO *email*)
Bureau of Sentence Computation **CERTIFIED**
Southern Ohio Correctional Facility **CERTIFIED**

COPY

DANIEL M. HORRIGAN

2010 JUN 23 AM 11:41

SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

STATE OF OHIO,	)	**CASE NO. CR 2008-07-2390**
	)	
Plaintiff	)	**JUDGE STORMER**
	)	
-vs-	)	
	)	
ASHFORD L. THOMPSON	)	**JUDGMENT ENTRY**
	)	**OPINION OF THE COURT**
Defendant	)	**(per 2929.03(F))**

On June 4, 2010, a jury convicted Ashford L. Thompson of three counts of tampering with evidence, two counts of resisting arrest, two counts of escape and one count of carrying a concealed weapon, each with firearm specifications. He was also found guilty beyond a reasonable doubt of two counts of aggravated murder. The aggravated murder convictions involved the death of Twinsburg police officer, Joshua Miktarian and carried five identical specifications: two firearm specifications and three death penalty specifications. The jury separately found Defendant guilty of the firearm specifications and each of the death penalty specifications.

For purposes of the mitigation/sentencing hearing, the Court merged the two Aggravated Murder counts as there is only one victim and merged two of the death specifications, specification two referring to Defendant's escape and specification three referring to the fact that Defendant was under detention at the time of the murder. Given the facts of this case, Thompson could not commit the crime of escape without also committing the crime of breaking detention; the Court found that this constituted one act by the

Defendant. As a result, the Court considers and sentences the Defendant on one count of aggravated murder with two specifications. The first specification, now an aggravating circumstance is that Joshua Miktarian, when murdered, was a police officer performing his official duties; the second specification, now an aggravating circumstance is that Defendant committed the murder to facilitate an escape from apprehension for other crimes.

The Court advised Ashford L. Thompson of his rights during the sentencing phase. He waived his right to a pre-sentence investigation and a mental health evaluation and was fully advised of his rights before the Court began the sentencing phase.

On June 10, 2010, the sentencing phase began. The Court permitted the State to use selected evidence related only to the two specifications. The State introduced the selected trial exhibits and rested. The defendant presented mitigation evidence and made an unsworn statement. Counsel presented final arguments. On July 11, 2010, the jury returned a verdict finding that the State of Ohio proved beyond a reasonable doubt that the aggravating circumstances involving the death of Joshua Miktarian outweighed the mitigating factors. The jury verdict indicated the penalty of death.

The jury was appropriately sequestered during the trial phase and the sentencing phase deliberations. In each phase, the jury was sequestered overnight. The jury deliberated for approximately 3 ½ hours over two days in the sentencing phase.

The jury's verdict of death on the count of aggravated murder involving the death of Joshua Miktarian constitutes a recommendation to the Court. The Court must perform an independent review of this matter pursuant to Ohio law.

The Court must now separately weigh the two specific aggravating circumstances connected to the aggravated murder of Joshua Miktarian to determine whether the jury recommendation of death should be the final sentence of the Court. Guidance is provided to the Court in case law and the requirements of the Ohio Revised Code. The Court must set forth its specific findings as to the existence of any mitigating factors pursuant to O.R.C. 2929.04(B) as well as any other mitigating factors, the relevant aggravating circumstances and the Court's reasoning in the weighing process.

In the weighing process, the Court does not consider the aggravated murder of Joshua Miktarian as an aggravating circumstance, does not consider the nature and circumstances of the offense unless they are mitigating and does not consider any victim impact evidence.

AGGRAVATING CIRCUMSTANCES

The jury found Defendant guilty of aggravated murder and found him guilty beyond or reasonable doubt of two specifications, specifically that:

The offense was committed for the purpose of escaping detection, apprehension, trial or punishment, for another offense committed by the offender. 2929.04(A)(3). Officer Miktarian stopped Ashford Thompson for a noise violation, and apparently, for a possible OVI. In addition, Defendant did not announce that he was legally carrying a weapon.

and,

The victim of the offense was a law enforcement officer whom the offender know or has reasonable cause to know or knew to be a law enforcement officer 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. 2929.04(A)(6). Officer

Miktarian was arresting Ashford Thompson when Thompson shot him. Thompson understood that Miktarian was a law enforcement officer who was on duty.

MITIGATING FACTORS

The following factors were considered in possible mitigation of the death penalty:

1. *The nature and circumstances of the offense*

This Court has reviewed the nature and circumstances of the offense for any mitigating factors. The Court considers the testimony of Danielle Roberson. Ms. Roberson stated that Miktarian behaved unprofessionally, pulled Ashford Thompson, may have pushed him down, threw him on the hood of the police car and reached for something on his belt, which she thought might have been a gun. Her testimony supports the mitigation factor that Defendant was acting under duress.

2. *The history, character and background of Ashford L. Thompson*

Mr. Thompson grew up with a loving mother, without significant contact with his father. He was emotionally and spiritually supported by several of the mitigation witnesses during his youth. As a result, he was considered to be a very nice, caring and considerate boy and man. He participated in some high school sports, most notably as a wrestler and drum major for the band.

Family and friends found him to be mature for his years, reliable and helpful. He described himself as a "normal kid", not perfect. After graduating from high school, he went to college. He considered the ministry and healthcare, but chose healthcare as it provided a hands-on opportunity to help. He trained to become and became a certified Licensed Practical Nurse. He successfully practiced in this capacity in nursing homes and in private duty and was a conscientious caregiver.

He obtained a legal concealed carry permit and carried a handgun because he often had private duty jobs at night in unsavory neighborhoods, and was committed to being there for his patients.

3. 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.

Ashford Thompson stated that Joshua Miktarian's aggressive and unprofessional behavior during his traffic stop made him fearful. He felt that this was not a normal traffic stop. When cuffed, he used a wrestling stance and dug in his heels. He and the officer "struggled" and Thompson was knocked to the ground. Miktarian called for another unit and threatened to release his dog from the cruiser. Miktarian then put him on the hood of the car and Thompson saw him reach for something on his duty belt. It did not make sense to him. Thompson believed that Miktarian was about to shoot him, so he turned and, using the gun concealed in pocket of his shorts, shot him in the forehead. He left because he thought the police would shoot and kill him if they found him there.

Danielle Roberson corroborated this statement.

4. The age of the Defendant

Ashford Thompson was 23 years old when he murdered Joshua Miktarian.

5. Lack of a significant history of prior criminal convictions

Ashford Thompson does not have a significant criminal history. He has two prior minor misdemeanor convictions for violating a noise ordinance (loud music) and one conviction for physical control of a motor vehicle.

6. Any other factors

Here, the Court considers as mitigating, Defendant's family and friends statements about him. He did express remorse and apologize to the Miktarian family before beginning his unsworn statement. He stated that he had confessed on the night of his arrest and told the police just what he stated in court. He was involved with his church and led youth bible study classes.

AGGRAVATING CIRCUMSTANCES VERSUS MITIGATING FACTORS

When weighing the aggravated circumstances against the mitigating factors, the Court finds that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt.

The death penalty can be imposed in ten situations upon a finding of guilt. Six of the specifications refer to actions taken by the defendant. Here, the specification relevant to Defendant's actions was that the murder occurred as a consequence of trying to escape detection for other crimes.

Four of the statutory criteria refer only to the status of the victim. Those protected by status are the president and the vice-president of the United States, the governor and the lieutenant governor of Ohio, children under the age of 13 and police officers. Thus, in the State of Ohio, the murder of a police officer exists in the same category as the assassination of our top elected officials or the murder of a young child. No other persons have been placed into these categories.

The Court considers the mitigating factors listed previously, which diminish the appropriateness of the death penalty. First, the Court considers the age of the Defendant and accords it little weight. At 23, Ashford Thompson was not so young and inexperienced that age makes him less morally culpable. His prior criminal record is scant and is given some weight, however, on this night, he was stopped for the same loud music violation as in his prior convictions.

Based upon the testimony of friends and family, Ashford Thompson had a supportive and caring family. He, himself, achieved success in high school, finished college and worked in a job he loved helping the elderly and sick. He remained active in his church. He was "normal" until July 13. 2008. The Court gives this significant weight.

On this night, Thompson believed that Officer Miktarian behaved abusively and reached for something on his belt. He suggests that he was compelled to act to save his own life and that the officer's actions overcame his mind so that he had no choice but to kill him. The Court does not accept this argument.

Ashford Thompson did not set out on July 13, 2008 to kill an officer, but he decided to kill Officer Miktarian when he reached for the gun in his pocket, turned and fired. He could have turned and not fired. He could have not reached for the gun; he could have simply allowed himself to be arrested and filed a grievance against the officer for his behavior. But when he turned and fired, he was a normal, church going man who chose to ignore much of what he had been taught and knew. He was not impaired in any way, so the decision was conscious and purposeful.

After shooting the officer, he then fled the scene. While he expressed remorse, the aggravating circumstance of escape reduces the impact of remorse as a mitigating factor. The Court gives the expression of remorse slight weight.

In consideration of the law and the evidence as expressed in this opinion, the Court finds that the aggravating circumstances outweigh the mitigating factors. Therefore, the Court concurs with the jury's sentence and hereby sentences Ashford L. Thompson on merged original Counts One and Two to death for the aggravated murder of Joshua Miktarian. The Court orders that the execution date be set for the 23rd of June, 2011, one year from today or as set by a Court of competent jurisdiction.

As required by law, the Court further sentences the Defendant: the Court merges the original Counts Three and Four, Escape and sentences him to 5 years in prison to be served concurrently to any other sentence; on original Count Five, Resisting Arrest, the Court sentences him to 18 months concurrent; original Count Six, misdemeanor Resisting Arrest, 90 days with credit for 90 days; the Court merges original Counts Seven, Eight and Nine, Tampering with Evidence, and sentences him to 5 years concurrent; original Count 10, Carrying a Concealed Weapon, 12 months concurrent. Finally, the Court merges all of the firearm specifications and sentences him to the mandatory 7 years consecutive to all other sentences. The Court gives the Defendant credit for the 711 days he has served to date.

The Court orders Defendant to be conveyed to the appropriate state institution where he will be placed on death row. Notification of appellate rights was given and the Court appoints Rachael Troutman and Kim Rigby of the Ohio Public Defenders office to represent

the Defendant. This opinion will be filed with the Summit County Clerk of Courts as well as with the Clerk of the Supreme Court of Ohio. Court costs to the Defendant.

IT IS SO ORDERED.

Judge Elinore Marsh Stormer

Cc: Brian Lo Prinzi, Esq.; Brad Gessner, Esq.
Kerry O'Brien, Esq; John Greven, Esq.

EMS:lcb
08-2390

COPY

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

THE STATE OF OHIO
vs.

ASHFORD L. THOMPSON

DANIEL M. HORRIGAN

Case No. CR 08 07 2390

2010 JUN 24 PM 2:15

JOURNAL ENTRY

SUMMIT COUNTY
CLERK OF COURTS

On May 24, 2009 at 10:00 A.M., the jury trial began. The Defendant appeared in Court with defense counsels, Kerry O'Brien and John Greven, for trial. The State was represented by Assistant Prosecutors Brian Loprinzi and Brad Gessner.

The Counts in the indictment were re-numbered as follows: Count 5 becomes Count 1, Resisting Arrest, Specification 1 to Count 5 becomes Specification 1 to Count 1, Specification 1 to Count 5 becomes Specification 2 to Count 1, Count 6 becomes Count 2, Resisting Arrest, Count 10 becomes Count 3, Carrying Concealed Weapons, Specification 1 to Count 10 becomes Specification 1 to Count 3, Count 4 remains as originally indicted, Escape, Count 1 becomes Count 5, Aggravated Murder, Specification 1 to Count 1 becomes Specification 1 (Aggravated Murder of Law Enforcement Officer) to Count 5, Specification 2 to Count 1 becomes Specification 2 (Aggravated Murder of Law Enforcement Officer) to Count 5, Specification 3 to Count 1 becomes Specification 3 (Aggravated Murder of Law Enforcement Officer) to Count 5, Specification 4 to Count 1 becomes Specification 4 (Aggravated Murder of Law Enforcement Officer) to Count 5, Specification 5 to Count 1 becomes Specification 5 (Aggravated Murder of Law Enforcement Officer) to Count 5, Count 2 becomes Count 6, Aggravated Murder (Fleeing/Escaping), Specification 1 to Count 2 becomes Specification 1 (Aggravated Murder – Fleeing/Escaping) to Count 6, Specification 2 to Count 2 becomes Specification 2 (Aggravated Murder – Fleeing/Escaping) to Count 6, Specification 3 to Count 2 becomes Specification 3 (Aggravated Murder – Fleeing/Escaping) to Count 6,
Specification 4 to Count 2 becomes Specification 4 (Aggravated Murder – Fleeing/Escaping) to Count 6, and Specification 5 to Count 2 becomes Specification 5 (Aggravated Murder – Fleeing/Escaping) to Count 6.

The trial continued on until June 2, 2010 until 1:00 P.M., at which time the Jury having heard the testimony, the arguments of counsel and the charge of the Court, retired to deliberate.

On June 3, 2010 at 10:45 A.M., the Jury returned their verdict in open court and found the Defendant GUILTY of:

1) Count 1, Resisting Arrest, Ohio Revised Code Section 2921.33(C), a felony of the fourth (4th) degree, which occurred on July 13, 2008
2) Specification 1 to Count 1, which occurred on July 13, 2008
3) Specification 2 to Count 1, which occurred on July 13, 2008
4) Count 2, Resisting Arrest, Ohio Revised Code Section 2921.33(A), a misdemeanor of the second (2nd) degree, which occurred on July 13, 2008
5) Count 3, Carrying Concealed Weapons, Ohio Revised Code Section 2923.12(B)(3), a felony of the fifth (5th) degree, which occurred on July 13, 2008
6) Specification 1 to Count 3, which occurred on July 13, 2008
7) Count 4, Escape, Ohio Revised Code Section 2921.34(A)(1), a felony of the fifth (5th) degree, which occurred on July 13, 2008
8) Specification 1 to Count 4, which occurred on July 13, 2008
9) Specification 2 to Count 4, which occurred on July 13, 2008
10) Count 5, Aggravated Murder, Ohio Revised Code Section 2903.01(E), a special felony, which occurred on July 13, 2008
11) Specification 1 (Aggravated Murder of Law Enforcement Officer) to Count 5, which occurred on July 13, 2008
12) Specification 2 (Aggravated Murder of Law Enforcement Officer) to Count 5, which occurred on July 13, 2008
13) Specification 3 (Aggravated Murder of Law Enforcement Officer) to Count 5, which occurred on July 13, 2008
14) Specification 4 (Aggravated Murder of Law Enforcement Officer) to Count 5, which occurred on July 13, 2008
15) Specification 5 (Aggravated Murder of Law Enforcement Officer) to Count 5, which occurred on July 13, 2008
16) Count 6, Aggravated Murder (Fleeing/Escaping), Ohio Revised Code Section 2903.01(B), a special felony, which occurred on July 13, 2008
17) Specification 1 (Aggravated Murder – Fleeing/Escaping) to Count 6, which occurred on July 13, 2008
18) Specification 2 (Aggravated Murder – Fleeing/Escaping) to Count 6, which occurred on July 13, 2008
19) Specification 3 (Aggravated Murder – Fleeing/Escaping) to Count 6, which occurred on July 13, 2008

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IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

THE STATE OF OHIO vs. ASHFORD L. THOMPSON	)	Case No. CR 08 07 2390 JOURNAL ENTRY

20) Specification 4 (Aggravated Murder – Fleeing/Escaping) to Count 6, which occurred on July 13, 2008

21) Specification 5 (Aggravated Murder – Fleeing/Escaping) to Count 6, which occurred on July 13, 2008

22) Count 7, Tampering with Evidence (Dodge Intrepid), Ohio Revised Code Section 2921.12(A)(1), a felony of the third (3rd) degree, which occurred on July 13, 2008

23) Specification 1 to Count 7, which occurred on July 13, 2008

24) Specification 1 to Count 8, which occurred on July 13, 2008

25) Count 8, Tampering with Evidence (handcuffs), Ohio Revised Code Section 2921.12(A)(1), a felony of the third (3rd) degree, which occurred on July 13, 2008

26) Count 9, Tampering with Evidence (Keltec, Model P-11 9mm pistol), Ohio Revised Code Section 2921.12(A)(1), a felony of the third (3rd) degree, which occurred on July 13, 2008

The Firearm Specification 1 to Count 9 is Dismissed.

The Court granted Rule 29 on the original Count 3, Escape with Specifications 1 and 2 to Count 3.

The Defendant was remanded to the Summit County Jail pending mitigation hearing set for June 10, 2010 at 11:00 A.M.

APPROVED:
June 4, 2010
tms

Patricia A. Cosgrove

PATRICIA A. COSGROVE, Judge for

ELINORE MARSH STORMER, Judge
Court of Common Pleas
Summit County, Ohio

cc: Prosecutor Brian Loprinzi
Prosecutor Brad Gessner
Attorney John Greven
Attorney Kerry O'Brien

COPY

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

THE STATE OF OHIO
vs.
ASHFORD L. THOMPSON

DANIEL M. HORRIGAN
2010 JUL -1 AM 9:05
SUMMIT COUNTY
CLERK OF COURTS

Case No. CR 08 07 2390

JOURNAL ENTRY

On June 28, 2010, the Court ordered that this Journal Entry be filed NUNC PRO TUNC to correct the Journal Entry dated June 23, 2010 and filed June 25, 2010 to read in part as follows:

The sentencing hearing commenced on **June 10, 2010**, and continued on until June 11, 2010. The jury made a unanimous recommendation of **DEATH** for the Defendant on merged Counts 1 and 2.

APPROVED:
June 28, 2010
tms

ELINORE MARSH STORMER, Judge
Court of Common Pleas
Summit County, Ohio

cc: Prosecutors Brian Loprinzi and Brad Gessner
Criminal Assignment
Attorney Kerry O'Brien
Attorney John Greven
Bureau of Sentence Computation **CERTIFIED**
Ohio State Penitentiary **CERTIFIED**

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.

Ohio Const. art. IV, § 3

(A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B) (1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2(B) (2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

U.S. Const. art. II, § 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 Offences 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.

U.S. Const. art. VI

Section. 1.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section. 2.

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.
A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section. 3.

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section. 4.

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.

U.S. Const. amend. 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 offence 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.

U.S. Const. amend. 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 defence.

U.S. Const. amend. VIII

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

U.S. Const. amend. 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 the power to enforce, by appropriate legislation, the provisions of this article.

O.R.C. § 2901.05 Burden of proof - reasonable doubt - self-defense.

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

(B)(1) Subject to division (B)(2) of this section, a person is presumed to have acted in self defense or defense of another when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used is in the process of unlawfully and without privilege to do so entering, or has unlawfully and without privilege to do so entered, the residence or vehicle occupied by the person using the defensive force.

(2)(a) The presumption set forth in division (B)(1) of this section does not apply if the person against whom the defensive force is used has a right to be in, or is a lawful resident of, the residence or vehicle.

(b) The presumption set forth in division (B)(1) of this section does not apply if the person who uses the defensive force uses it while in a residence or vehicle and the person is unlawfully, and without privilege to be, in that residence or vehicle.

(3) The presumption set forth in division (B)(1) of this section is a rebuttable presumption and may be rebutted by a preponderance of the evidence.

(C) As part of its charge to the jury in a criminal case, the court shall read the definitions of "reasonable doubt" and "proof beyond a reasonable doubt," contained in division (D) of this section.

(D) As used in this section:

(1) An "affirmative defense" is either of the following:

(a) A defense expressly designated as affirmative;

(b) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which the accused can fairly be required to adduce supporting evidence.

(2) "Dwelling" means a building or conveyance of any kind that has a roof over it and that is designed to be occupied by people lodging in the building or conveyance at night, regardless of whether the building or conveyance is temporary or permanent or is mobile or immobile. As used in this division, a building or conveyance includes, but is not limited to, an attached porch, and a building or conveyance with a roof over it includes, but is not limited to, a tent.

(3) "Residence" means a dwelling in which a person resides either temporarily or permanently or is visiting as a guest.

(4) "Vehicle" means a conveyance of any kind, whether or not motorized, that is designed to transport people or property.

(E) "Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. "Proof beyond a reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of the person's own affairs.

O.R.C. § 2505.02 Final orders

(A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

(3) An order that vacates or sets aside a judgment or grants a new trial;

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

(5) An order that determines that an action may or may not be maintained as a class action;

(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234, 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018, and the enactment of sections 2305.113, 2323.41, 2323.43, and 2323.55 of the Revised Code or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131, 2315.18, 2315.19, and 2315.21 of the Revised Code;

(7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code.

(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

(D) This section applies to and governs any action, including an appeal, that is pending in any court on July 22, 1998, and all claims filed or actions commenced on or after July 22, 1998, notwithstanding any provision of any prior statute or rule of law of this state.

O.R.C. § 2903.01 Aggravated murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, terrorism, or escape.

(C) No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense.

(D) No person who is under detention as a result of having been found guilty of or having pleaded guilty to a felony or who breaks that detention shall purposely cause the death of another.

(E) No person shall purposely cause the death of a law enforcement officer whom the offender knows or has reasonable cause to know is a law enforcement officer when either of the following applies:

(1) The victim, at the time of the commission of the offense, is engaged in the victim's duties.

(2) It is the offender's specific purpose to kill a law enforcement officer.

(F) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(G) As used in this section:

(1) "Detention" has the same meaning as in section 2921.01 of the Revised Code.

(2) "Law enforcement officer" has the same meaning as in section 2911.01 of the Revised Code.

O.R.C. § 2903.03 Voluntary manslaughter.

(A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another or the unlawful termination of another's pregnancy.

(B) Whoever violates this section is guilty of voluntary manslaughter, a felony of the first degree.

O.R.C. § 2929.02 Murder penalties.

(A) Whoever is convicted of or pleads guilty to aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.022, 2929.03, and 2929.04 of the Revised Code, except that no person who raises the matter of age pursuant to section 2929.023 of the Revised Code and who is not found to have been eighteen years of age or older at the time of the commission of the offense shall suffer death. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B)(1) Except as otherwise provided in division (B)(2) or (3) of this section, whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life.

(2) Except as otherwise provided in division (B)(3) of this section, if a person is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code, the victim of the offense was less than thirteen years of age, and 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, the court shall impose an indefinite prison term of thirty years to life pursuant to division (B)(3) of section 2971.03 of the Revised Code.

(3) If a person is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code and also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that were included in the indictment, count in the indictment, or information that charged the murder, the court shall impose upon the offender a term of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(4) In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to the offender or to the dependents of the offender, or will prevent the offender from making reparation for the victim's wrongful death.

(D)(1) In addition to any other sanctions imposed for a violation of section 2903.01 or 2903.02 of the Revised Code, if the offender used a motor vehicle as the means to commit the violation, 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.

(2) As used in division (D) of this section, "motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

O.R.C. § 2929.021 Notice to supreme court of indictment charging aggravated murder with aggravating circumstances.

(A) If an indictment or a count in an indictment charges the defendant with aggravated murder and contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the clerk of the court in which the indictment is filed, within fifteen days after the day on which it is filed, shall file a notice with the supreme court indicating that the indictment was filed. The notice shall be in the form prescribed by the clerk of the supreme court and shall contain, for each charge of aggravated murder with a specification, at least the following information pertaining to the charge:

(1) The name of the person charged in the indictment or count in the indictment with aggravated murder with a specification;

(2) The docket number or numbers of the case or cases arising out of the charge, if available;

(3) The court in which the case or cases will be heard;

(4) The date on which the indictment was filed.

(B) If the indictment or a count in an indictment charges the defendant with aggravated murder and contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code and if the defendant pleads guilty or no contest to any offense in the case or if the indictment or any count in the indictment is dismissed, the clerk of the court in which the plea is entered or the indictment or count is dismissed shall file a notice with the supreme court indicating what action was taken in the case. The notice shall be filed within fifteen days after the plea is entered or the indictment or count is dismissed, shall be in the form prescribed by the clerk of the supreme court, and shall contain at least the following information:

(1) The name of the person who entered the guilty or no contest plea or who is named in the indictment or count that is dismissed;

(2) The docket numbers of the cases in which the guilty or no contest plea is entered or in which the indictment or count is dismissed;

(3) The sentence imposed on the offender in each case.

O.R.C. § 2929.022 Sentencing hearing - determining existence of aggravating circumstance.

(A) If an indictment or count in an indictment charging a defendant with aggravated murder contains a specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code, the defendant may elect to have the panel of three judges, if the defendant waives trial by jury, or the trial judge, if the defendant is tried by jury, determine the existence of that aggravating circumstance at the sentencing hearing held pursuant to divisions (C) and (D) of section 2929.03 of the Revised Code.

(1) If the defendant does not elect to have the existence of the aggravating circumstance determined at the sentencing hearing, the defendant shall be tried on the charge of aggravated murder, on the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code, and on any other specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code in a single trial as in any other criminal case in which a person is charged with aggravated murder and specifications.

(2) If the defendant does elect to have the existence of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code determined at the sentencing hearing, then, following a verdict of guilty of the charge of aggravated murder, the panel of three judges or the trial judge shall:

(a) Hold a sentencing hearing pursuant to division (B) of this section, unless required to do otherwise under division (A)(2)(b) of this section;

(b) If the offender raises the matter of age at trial pursuant to section 2929.023 of the Revised Code and is not found at trial to have been eighteen years of age or older at the time of the commission of the offense, conduct a hearing to determine if the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt. After conducting the hearing, the panel or judge shall proceed as follows:

(i) If that aggravating circumstance is proven beyond a reasonable doubt or if the defendant at trial was convicted of any other specification of an aggravating circumstance, the panel or judge shall impose sentence according to division (E) of section 2929.03 of the Revised Code.

(ii) If that aggravating circumstance is not proven beyond a reasonable doubt and the defendant at trial was not convicted of any other specification of an aggravating circumstance, except as otherwise provided in this division, the panel or judge shall impose sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender. If that aggravating circumstance is not proven beyond a reasonable doubt, the defendant at trial was not convicted of any other specification of an aggravating circumstance, the victim of the aggravated murder was less than thirteen years of age, and 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, the panel or judge 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) At the sentencing hearing, the panel of judges, if the defendant was tried by a panel of three judges, or the trial judge, if the defendant was tried by jury, shall, when required pursuant to division (A)(2) of this section, first determine if the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt. If the panel of judges or the trial judge determines that the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt or if they do not determine that the specification is proven beyond a reasonable doubt but the defendant at trial was convicted of a specification of any other aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, the panel of judges or the trial judge and trial jury shall impose sentence on the offender pursuant to division (D) of section 2929.03 and section 2929.04 of the Revised Code. If the panel of judges or the trial judge does not determine that the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt and the defendant at trial was not convicted of any other specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, the panel of judges or the trial judge shall terminate the sentencing hearing and impose sentence on the offender as follows:

(1) Subject to division (B)(2) of this section, the panel or judge shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(2) If the victim of the aggravated murder was less than thirteen years of age and 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, the panel or judge 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.

O.R.C. § 2929.023 Raising the matter of age at trial.

A person charged with aggravated murder and one or more specifications of an aggravating circumstance may, at trial, raise the matter of his age at the time of the alleged commission of the offense and may present evidence at trial that he was not eighteen years of age or older at the time of the alleged commission of the offense. The burdens of raising the matter of age, and of going forward with the evidence relating to the matter of age, are upon the defendant. After a defendant has raised the matter of age at trial, the prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the defendant was eighteen years of age or older at the time of the alleged commission of the offense.

O.R.C. § 2929.03 Imposition of sentence for aggravated murder.

(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.

O.R.C. § 2929.04 Death penalty or imprisonment - aggravating and mitigating factors.

(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.

O.R.C. § 2929.05 Supreme court review upon appeal of sentence of death.

(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.

O.R.C. § 2929.14 Definite prison terms.

(A) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(4), (D)(5), (D)(6), (D)(7), (D)(8), (G), (I), (J), or (L) of this section or in division (D)(6) of section 2919.25 of the Revised Code and except in relation to an offense for which a sentence of death or life imprisonment is to be imposed, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a definite prison term that shall be one of the following:

(1) For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, or ten years.

(2) For a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years.

(3) For a felony of the third degree, the prison term shall be one, two, three, four, or five years.

(4) For a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.

(5) For a felony of the fifth degree, the prison term shall be six, seven, eight, nine, ten, eleven, or twelve months.

(B) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(5), (D)(6), (D)(7), (D)(8), (G), (I), (J), or (L) of this section, in section 2907.02, 2907.05, or 2919.25 of the Revised Code, or in Chapter 2925. of the Revised Code, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless one or more of the following applies:

(1) The offender was serving a prison term at the time of the offense, or the offender previously had served a prison term.

(2) The court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others.

(C) Except as provided in division (D)(7), (D)(8), (G), or (L) of this section, in section 2919.25 of the Revised Code, or in Chapter 2925. of the Revised Code, the court imposing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense pursuant to division (A) of this section only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders under division (D)(3) of this section, and upon certain repeat violent offenders in accordance with division (D)(2) of this section.

(D)(1)(a) Except as provided in division (D)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification of the type described in section 2941.141, 2941.144, or 2941.145 of the Revised Code, the court shall impose on the offender one of the following prison terms:

(i) A prison term of six years if the specification is of the type described in section 2941.144 of the Revised Code that charges the offender with having a firearm that is an automatic firearm or that was equipped with a firearm muffler or silencer on or about the offender's person or under the offender's control while committing the felony;

(ii) A prison term of three years if the specification is of the type described in section 2941.145 of the Revised Code that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the offense and displaying the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using it to facilitate the offense;

(iii) A prison term of one year if the specification is of the type described in section 2941.141 of the Revised Code that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the felony.

(b) If a court imposes a prison term on an offender under division (D)(1)(a) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. Except as provided in division (D)(1)(g) of this section, a court shall not impose more than one prison term on an offender under division (D)(1)(a) of this section for felonies committed as part of the same act or transaction.

(c) Except as provided in division (D)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a violation of section 2923.161 of the Revised Code or to a felony that includes, as an essential element, purposely or knowingly causing or attempting to cause the death of or physical harm to another, also is convicted of or pleads guilty to a specification of the type described in section 2941.146 of the Revised Code that charges the offender with committing the offense by discharging a firearm from a motor vehicle other than a manufactured home, the court, after imposing a prison term on the offender for the violation of section 2923.161 of the Revised Code or for the other felony offense under division (A), (D)(2), or (D)(3) of this section, shall impose an additional prison term of five years upon the offender that shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one additional prison term on an offender under division (D)(1)(c) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term on an offender under division (D)(1)(c) of this section relative to an offense, the court also shall impose a prison term under division (D)(1)(a) of this section relative to the same offense, provided the criteria specified in that division for imposing an additional prison term are satisfied relative to the offender and the offense.

(d) If an offender who is convicted of or pleads guilty to an offense of violence that is a felony also is convicted of or pleads guilty to a specification of the type described in section 2941.1411 of the Revised Code that charges the offender with wearing or carrying body armor while committing the felony offense of violence, the court shall impose on the offender a prison term of two years. The prison term so imposed shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(1)(d) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term under division (D)(1)(a) or (c) of this section, the court is not precluded from imposing an additional prison term under division (D)(1)(d) of this section.

(e) The court shall not impose any of the prison terms described in division (D)(1)(a) of this section or any of the additional prison terms described in division (D)(1)(c) of this section upon an offender for a violation of section 2923.12 or 2923.123 of the Revised Code. The court shall not impose any of the prison terms described in division (D)(1)(a) or (b) of this section upon an offender for a violation of section 2923.122 that involves a deadly weapon that is a firearm other than a dangerous ordnance, section 2923.16, or section 2923.121 of the Revised Code. The court shall not impose any of the prison terms described in division (D)(1)(a) of this section or any of the additional prison terms described in division (D)(1)(c) of this section upon an offender for a violation of section 2923.13 of the Revised Code unless all of the following apply:

(i) The offender previously has been convicted of aggravated murder, murder, or any felony of the first or second degree.

(ii) Less than five years have passed since the offender was released from prison or post-release control, whichever is later, for the prior offense.

(f) If an offender is convicted of or pleads guilty to a felony that includes, as an essential element, causing or attempting to cause the death of or physical harm to another and also is convicted of or pleads guilty to a specification of the type described in section 2941.1412 of the Revised Code that charges the offender with committing the offense by discharging a firearm at a peace officer as defined in section 2935.01 of the Revised Code or a corrections officer, as defined in section 2941.1412 of the Revised Code, the court, after imposing a prison term on the offender for the felony offense under division (A), (D)(2), or (D)(3) of this section, shall impose an additional prison term of seven years upon the offender that shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. If an offender is convicted of or pleads guilty to two or more felonies that include, as an essential element, causing or attempting to cause the death or physical harm to another and also is convicted of or pleads guilty to a specification of the type described under division (D)(1)(f) of this section in connection with two or more of the felonies of which the offender is convicted or to which the offender pleads guilty, the sentencing court shall impose on the offender the prison term specified under division (D)(1)(f) of this section for each of two of the specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications. If a court imposes an additional prison term on an

offender under division (D)(1)(f) of this section relative to an offense, the court shall not impose a prison term under division (D)(1)(a) or (c) of this section relative to the same offense.

(g) If an offender is convicted of or pleads guilty to two or more felonies, if one or more of those felonies is aggravated murder, murder, attempted aggravated murder, attempted murder, aggravated robbery, felonious assault, or rape, and if the offender is convicted of or pleads guilty to a specification of the type described under division (D)(1)(a) of this section in connection with two or more of the felonies, the sentencing court shall impose on the offender the prison term specified under division (D)(1)(a) of this section for each of the two most serious specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications.

(2)(a) If division (D)(2)(b) of this section does not apply, the court may impose on an offender, in addition to the longest prison term authorized or required for the offense, an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in section 2941.149 of the Revised Code that the offender is a repeat violent offender.

(ii) The offense of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(iii) The court imposes the longest prison term for the offense that is not life imprisonment without parole.

(iv) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are inadequate to punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.

(v) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are demeaning to the seriousness of the offense, because one or more of the factors under section 2929.12 of the Revised Code indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense.

(b) The court shall impose on an offender the longest prison term authorized or required for the offense and shall impose on the offender an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in section 2941.149 of the Revised Code that the offender is a repeat violent offender.

(ii) The offender within the preceding twenty years has been convicted of or pleaded guilty to three or more offenses described in division (CC)(1) of section 2929.01 of the Revised Code, including all offenses described in that division of which the offender is convicted or to which the offender pleads guilty in the current prosecution and all offenses described in that division of which the offender previously has been convicted or to which the offender previously pleaded guilty, whether prosecuted together or separately.

(iii) The offense or offenses of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(c) For purposes of division (D)(2)(b) of this section, two or more offenses committed at the same time or as part of the same act or event shall be considered one offense, and that one offense shall be the offense with the greatest penalty.

(d) A sentence imposed under division (D)(2)(a) or (b) of this section shall not be reduced pursuant to section 2929.20 or section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. The offender shall serve an additional prison term imposed under this section consecutively to and prior to the prison term imposed for the underlying offense.

(e) When imposing a sentence pursuant to division (D)(2)(a) or (b) of this section, the court shall state its findings explaining the imposed sentence.

(3)(a) Except when an offender commits a violation of section 2903.01 or 2907.02 of the Revised Code and the penalty imposed for the violation is life imprisonment or commits a violation of section 2903.02 of the Revised Code, if the offender commits a violation of section 2925.03 or 2925.11 of the Revised Code and that section classifies the offender as a major drug offender and requires the imposition of a ten-year prison term on the offender, if the offender commits a felony violation of section 2925.02, 2925.04, 2925.05, 2925.36, 3719.07, 3719.08, 3719.16, 3719.161, 4729.37, or 4729.61, division (C) or (D) of section 3719.172, division (C) of section 4729.51, or division (J) of section 4729.54 of the Revised Code that includes the sale, offer to sell, or possession of a schedule I or II controlled substance, with the exception of marihuana, and the court imposing sentence upon the offender finds that the offender is guilty of

a specification of the type described in section 2941.1410 of the Revised Code charging that the offender is a major drug offender, if the court imposing sentence upon an offender for a felony finds that the offender is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree, or if the offender is guilty of an attempted violation of section 2907.02 of the Revised Code and, had the offender completed the violation of section 2907.02 of the Revised Code that was attempted, the offender would have been subject to a sentence of life imprisonment or life imprisonment without parole for the violation of section 2907.02 of the Revised Code, the court shall impose upon the offender for the felony violation a ten-year prison term that cannot be reduced pursuant to section 2929.20 or Chapter 2967. or 5120. of the Revised Code.

(b) The court imposing a prison term on an offender under division (D)(3)(a) of this section may impose an additional prison term of one, two, three, four, five, six, seven, eight, nine, or ten years, if the court, with respect to the term imposed under division (D)(3)(a) of this section and, if applicable, divisions (D)(1) and (2) of this section, makes both of the findings set forth in divisions (D)(2)(a)(iv) and (v) of this section.

(4) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of section 2929.13 of the Revised Code, the sentencing court shall impose upon the offender a mandatory prison term in accordance with that division. In addition to the mandatory prison term, if the offender is being sentenced for a fourth degree felony OVI offense, the court, notwithstanding division (A)(4) of this section, may sentence the offender to a definite prison term of not less than six months and not more than thirty months, and if the offender is being sentenced for a third degree felony OVI offense, the sentencing court may sentence the offender to an additional prison term of any duration specified in division (A)(3) of this section. In either case, the additional prison term imposed shall be reduced by the sixty or one hundred twenty days imposed upon the offender as the mandatory prison term. The total of the additional prison term imposed under division (D)(4) of this section plus the sixty or one hundred twenty days imposed as the mandatory prison term shall equal a definite term in the range of six months to thirty months for a fourth degree felony OVI offense and shall equal one of the authorized prison terms specified in division (A)(3) of this section for a third degree felony OVI offense. If the court imposes an additional prison term under division (D)(4) of this section, the offender shall serve the additional prison term after the offender has served the mandatory prison term required for the offense. In addition to the mandatory prison term or mandatory and additional prison term imposed as described in division (D)(4) of this section, the court also may sentence the offender to a community control sanction under section 2929.16 or 2929.17 of the Revised Code, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

If the offender is being sentenced for a fourth degree felony OVI offense under division (G)(1) of section 2929.13 of the Revised Code and the court imposes a mandatory term of local incarceration, the court may impose a prison term as described in division (A)(1) of that section.

(5) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of section 2903.06 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1414 of the Revised Code that charges that the victim of the

offense is a peace officer, as defined in section 2935.01 of the Revised Code, or an investigator of the bureau of criminal identification and investigation, as defined in section 2903.11 of the Revised Code, the court shall impose on the offender a prison term of five years. If a court imposes a prison term on an offender under division (D)(5) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(5) of this section for felonies committed as part of the same act.

(6) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of section 2903.06 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1415 of the Revised Code that charges that the offender previously has been convicted of or pleaded guilty to three or more violations of division (A) or (B) of section 4511.19 of the Revised Code or an equivalent offense, as defined in section 2941.1415 of the Revised Code, or three or more violations of any combination of those divisions and offenses, the court shall impose on the offender a prison term of three years. If a court imposes a prison term on an offender under division (D)(6) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(6) of this section for felonies committed as part of the same act.

(7)(a) If an offender is convicted of or pleads guilty to a felony violation of section 2905.01, 2905.02, 2907.21, 2907.22, or 2923.32, division (A)(1) or (2) of section 2907.323, or division (B)(1), (2), (3), (4), or (5) of section 2919.22 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1422 of the Revised Code that charges that the offender knowingly committed the offense in furtherance of human trafficking, the court shall impose on the offender a mandatory prison term that is one of the following:

(i) If the offense is a felony of the first degree, a definite prison term of not less than five years and not greater than ten years;

(ii) If the offense is a felony of the second or third degree, a definite prison term of not less than three years and not greater than the maximum prison term allowed for the offense by division (A) of section 2929.14 of the Revised Code;

(iii) If the offense is a felony of the fourth or fifth degree, a definite prison term that is the maximum prison term allowed for the offense by division (A) of section 2929.14 of the Revised.

(b) The prison term imposed under division (D)(7)(a) of this section shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. of the Revised Code. A court shall not impose more than one prison term on an offender under division (D)(7)(a) of this section for felonies committed as part of the same act, scheme, or plan.

(8) If an offender is convicted of or pleads guilty to a felony violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1423 of the Revised Code that charges that the victim of the violation was a woman whom the offender knew was pregnant at the time of the violation, notwithstanding the range of prison terms prescribed in division (A) of this section for felonies of the same degree as the violation, the court shall impose on the offender a mandatory prison term that is either a definite prison term of six months or one of the prison terms prescribed in section 2929.14 of the Revised Code for felonies of the same degree as the violation.

(E)(1)(a) Subject to division (E)(1)(b) of this section, if a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(a) of this section for having a firearm on or about the offender's person or under the offender's control while committing a felony, if a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(c) of this section for committing a felony specified in that division by discharging a firearm from a motor vehicle, or if both types of mandatory prison terms are imposed, the offender shall serve any mandatory prison term imposed under either division consecutively to any other mandatory prison term imposed under either division or under division (D)(1)(d) of this section, consecutively to and prior to any prison term imposed for the underlying felony pursuant to division (A), (D)(2), or (D)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(b) If a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(d) of this section for wearing or carrying body armor while committing an offense of violence that is a felony, the offender shall serve the mandatory term so imposed consecutively to any other mandatory prison term imposed under that division or under division (D)(1)(a) or (c) of this section, consecutively to and prior to any prison term imposed for the underlying felony under division (A), (D)(2), or (D)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(c) If a mandatory prison term is imposed upon an offender pursuant to division (D)(1)(f) of this section, the offender shall serve the mandatory prison term so imposed consecutively to and prior to any prison term imposed for the underlying felony under division (A), (D)(2), or (D)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(d) If a mandatory prison term is imposed upon an offender pursuant to division (D)(7) or (8) of this section, the offender shall serve the mandatory prison term so imposed consecutively to any other mandatory prison term imposed under that division or under any other provision of law and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(2) If an offender who is an inmate in a jail, prison, or other residential detention facility violates section 2917.02, 2917.03, 2921.34, or 2921.35 of the Revised Code, if an offender who is under detention at a detention facility commits a felony violation of section 2923.131 of the Revised

Code, or if an offender who is an inmate in a jail, prison, or other residential detention facility or is under detention at a detention facility commits another felony while the offender is an escapee in violation of section 2921.34 of the Revised Code, any prison term imposed upon the offender for one of those violations shall be served by the offender consecutively to the prison term or term of imprisonment the offender was serving when the offender committed that offense and to any other prison term previously or subsequently imposed upon the offender.

(3) If a prison term is imposed for a violation of division (B) of section 2911.01 of the Revised Code, a violation of division (A) of section 2913.02 of the Revised Code in which the stolen property is a firearm or dangerous ordnance, or a felony violation of division (B) of section 2921.331 of the Revised Code, the offender shall serve that prison term consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) 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.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

(5) If a mandatory prison term is imposed upon an offender pursuant to division (D)(5) or (6) of this section, the offender shall serve the mandatory prison term consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of section 2903.06 of the Revised Code pursuant to division (A) of this section or section 2929.142 of the Revised Code. If a mandatory prison term is imposed upon an offender pursuant to division (D)(5) of this section, and if a mandatory prison term also is imposed upon the offender pursuant to division (D)(6) of this section in relation to the same violation, the offender shall serve the mandatory prison term imposed pursuant to division (D)(5) of this section consecutively to and prior to the mandatory prison term imposed pursuant to division (D)(6) of this section and consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of section 2903.06 of the Revised Code pursuant to division (A) of this section or section 2929.142 of the Revised Code.

(6) When consecutive prison terms are imposed pursuant to division (E)(1), (2), (3), (4), or (5) or division (J)(1) or (2) of this section, the term to be served is the aggregate of all of the terms so imposed.

(F)(1) If a court imposes a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division. If a court imposes a sentence including a prison term of a type described in this division on or after July 11, 2006, the failure of a court to include a post-release control requirement in the sentence pursuant to this division does not negate, limit, or otherwise affect the mandatory period of post-release control that is required for the offender under division (B) of section 2967.28 of the Revised Code. Section 2929.191 of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

(2) If a court imposes a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (F)(1) of this section, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division, if the parole board determines that a period of post-release control is necessary. Section 2929.191 of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

(G) The court shall impose sentence upon the offender in accordance with section 2971.03 of the Revised Code, and Chapter 2971. of the Revised Code applies regarding the prison term or term of life imprisonment without parole imposed upon the offender and the service of that term of imprisonment if any of the following apply:

(1) A person is convicted of or pleads guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense, and, in relation to that offense, the offender is adjudicated a sexually violent predator.

(2) A person is convicted of or pleads guilty to a violation of division (A)(1)(b) of section 2907.02 of the Revised Code committed on or after January 2, 2007, and either the court does not impose a sentence of life without parole when authorized pursuant to division (B) of section 2907.02 of the Revised Code, or division (B) of section 2907.02 of the Revised Code provides that the court shall not sentence the offender pursuant to section 2971.03 of the Revised Code.

(3) A person is convicted of or pleads guilty to attempted rape committed on or after January 2, 2007, and a specification of the type described in section 2941.1418, 2941.1419, or 2941.1420 of the Revised Code.

(4) A person is convicted of or pleads guilty to a violation of section 2905.01 of the Revised Code committed on or after January 1, 2008, and that section requires the court to sentence the offender pursuant to section 2971.03 of the Revised Code.

(5) A person is convicted of or pleads guilty to aggravated murder committed on or after January 1, 2008, and division (A)(2)(b)(ii) of section 2929.022, division (A)(1)(e), (C)(1)(a)(v), (C)(2)(a)(ii), (D)(2)(b), (D)(3)(a)(iv), or (E)(1)(d) of section 2929.03, or division (A) or (B) of section 2929.06 of the Revised Code requires the court to sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code.

(6) A person is convicted of or pleads guilty to murder committed on or after January 1, 2008, and division (B)(2) of section 2929.02 of the Revised Code requires the court to sentence the offender pursuant to section 2971.03 of the Revised Code.

(H) If a person who has been convicted of or pleaded guilty to a felony is sentenced to a prison term or term of imprisonment under this section, sections 2929.02 to 2929.06 of the Revised Code, section 2929.142 of the Revised Code, section 2971.03 of the Revised Code, or any other provision of law, section 5120.163 of the Revised Code applies regarding the person while the person is confined in a state correctional institution.

(I) If an offender who is convicted of or pleads guilty to a felony that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in section 2941.142 of the Revised Code that charges the offender with having committed the felony while participating in a criminal gang, the court shall impose upon the offender an additional prison term of one, two, or three years.

(J)(1) If an offender who is convicted of or pleads guilty to aggravated murder, murder, or a felony of the first, second, or third degree that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in section 2941.143 of the Revised Code that charges the offender with having committed the offense in a school safety zone or towards a person in a school safety zone, the court shall impose upon the offender an additional prison term of two years. The offender shall serve the additional two years consecutively to and prior to the prison term imposed for the underlying offense.

(2)(a) If an offender is convicted of or pleads guilty to a felony violation of section 2907.22, 2907.24, 2907.241, or 2907.25 of the Revised Code and to a specification of the type described in section 2941.1421 of the Revised Code and if the court imposes a prison term on the offender for the felony violation, the court may impose upon the offender an additional prison term as follows:

(i) Subject to division (J)(2)(a)(ii) of this section, an additional prison term of one, two, three, four, five, or six months;

(ii) If the offender previously has been convicted of or pleaded guilty to one or more felony or misdemeanor violations of section 2907.22, 2907.23, 2907.24, 2907.241, or 2907.25 of the Revised Code and also was convicted of or pleaded guilty to a specification of the type described

in section 2941.1421 of the Revised Code regarding one or more of those violations, an additional prison term of one, two, three, four, five, six, seven, eight, nine, ten, eleven, or twelve months.

(b) In lieu of imposing an additional prison term under division (J)(2)(a) of this section, the court may directly impose on the offender a sanction that requires the offender to wear a real-time processing, continual tracking electronic monitoring device during the period of time specified by the court. The period of time specified by the court shall equal the duration of an additional prison term that the court could have imposed upon the offender under division (J)(2)(a) of this section. A sanction imposed under this division shall commence on the date specified by the court, provided that the sanction shall not commence until after the offender has served the prison term imposed for the felony violation of section 2907.22, 2907.24, 2907.241, or 2907.25 of the Revised Code and any residential sanction imposed for the violation under section 2929.16 of the Revised Code. A sanction imposed under this division shall be considered to be a community control sanction for purposes of section 2929.15 of the Revised Code, and all provisions of the Revised Code that pertain to community control sanctions shall apply to a sanction imposed under this division, except to the extent that they would by their nature be clearly inapplicable. The offender shall pay all costs associated with a sanction imposed under this division, including the cost of the use of the monitoring device.

(K) At the time of sentencing, the court may recommend the offender for placement in a program of shock incarceration under section 5120.031 of the Revised Code or for placement in an intensive program prison under section 5120.032 of the Revised Code, disapprove placement of the offender in a program of shock incarceration or an intensive program prison of that nature, or make no recommendation on placement of the offender. In no case shall the department of rehabilitation and correction place the offender in a program or prison of that nature unless the department determines as specified in section 5120.031 or 5120.032 of the Revised Code, whichever is applicable, that the offender is eligible for the placement.

If the court disapproves placement of the offender in a program or prison of that nature, the department of rehabilitation and correction shall not place the offender in any program of shock incarceration or intensive program prison.

If the court recommends placement of the offender in a program of shock incarceration or in an intensive program prison, and if the offender is subsequently placed in the recommended program or prison, the department shall notify the court of the placement and shall include with the notice a brief description of the placement.

If the court recommends placement of the offender in a program of shock incarceration or in an intensive program prison and the department does not subsequently place the offender in the recommended program or prison, the department shall send a notice to the court indicating why the offender was not placed in the recommended program or prison.

If the court does not make a recommendation under this division with respect to an offender and if the department determines as specified in section 5120.031 or 5120.032 of the Revised Code, whichever is applicable, that the offender is eligible for placement in a program or prison of that

nature, the department shall screen the offender and determine if there is an available program of shock incarceration or an intensive program prison for which the offender is suited. If there is an available program of shock incarceration or an intensive program prison for which the offender is suited, the department shall notify the court of the proposed placement of the offender as specified in section 5120.031 or 5120.032 of the Revised Code and shall include with the notice a brief description of the placement. The court shall have ten days from receipt of the notice to disapprove the placement.

(L) If a person is convicted of or pleads guilty to aggravated vehicular homicide in violation of division (A)(1) of section 2903.06 of the Revised Code and division (B)(2)(c) of that section applies, the person shall be sentenced pursuant to section 2929.142 of the Revised Code.

§ 2945.25. Causes of challenging of jurors

A person called as a juror in a criminal case may be challenged for the following causes:

(A) That he was a member of the grand jury that found the indictment in the case;

(B) That he 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 examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial;

(C) In the trial of a capital offense, that he unequivocally states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a particular case. A prospective juror's conscientious or religious opposition to the death penalty in and of itself is not grounds for a challenge for cause. All parties shall be given wide latitude in voir dire questioning in this regard.

(D) That he 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;

(E) That he served on a petit jury drawn in the same cause against the same defendant, and that [petit]* jury was discharged after hearing the evidence or rendering a verdict on the evidence that was set aside;

(F) That he served as a juror in a civil case brought against the defendant for the same act;

(G) That he has been subpoenaed in good faith as a witness in the case;

(H) That he is a chronic alcoholic, or drug dependent person;

(I) That he has been convicted of a crime that by law disqualifies him from serving on a jury;

(J) That he has an action pending between him and the state or the defendant;

(K) That he or his 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 him;

(L) That he is the person alleged to be injured or attempted to be injured by the offense charged, or is the person on whose complaint the prosecution was instituted, or the defendant;

(M) That he 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 (L) of this section;

(N) That English is not his native language, and his knowledge of English is insufficient to permit him to understand the facts and law in the case;

(O) That he otherwise is unsuitable for any other cause to serve as a juror.

The validity of each challenge listed in this section shall be determined by the court.

§ 2945.27. Examination of jurors by the court

The judge of the trial court shall examine the prospective jurors under oath or upon affirmation as to their qualifications to serve as fair and impartial jurors, but he shall permit reasonable examination of such jurors by the prosecuting attorney and by the defendant or his counsel.

O.R.C. § 2945.59 Proof of defendant's motive.

In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

O.R.C. § 2945.74 Defendant may be convicted of lesser offense.

The jury may find the defendant not guilty of the offense charged, but guilty of an attempt to commit it if such attempt is an offense at law. When the indictment or information charges an offense, including different degrees, or if other offenses are included within the offense charged, the jury may find the defendant not guilty of the degree charged but guilty of an inferior degree thereof or lesser included offense.

If the offense charged is murder and the accused is convicted by confession in open court, the court shall examine the witnesses, determine the degree of the crime, and pronounce sentence accordingly.

Ohio R. Crim. P. 11 Pleas, Rights Upon Plea

(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 R. Crim. P. 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.

Ohio R. Crim. P. 32 Sentence

(A) Imposition of sentence.

Sentence shall be imposed without unnecessary delay. Pending sentence, the court may commit the defendant or continue or alter the bail. At the time of imposing sentence, the court shall do all of the following:

(1) Afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment.

(2) Afford the prosecuting attorney an opportunity to speak;

(3) Afford the victim the rights provided by law;

(4) In serious offenses, state its statutory findings and give reasons supporting those findings, if appropriate.

(B) Notification of right to appeal.

(1) After imposing sentence in a serious offense that has gone to trial, the court shall advise the defendant that the defendant has a right to appeal the conviction.

(2) After imposing sentence in a serious offense, the court shall advise the defendant of the defendant's right, where applicable, to appeal or to seek leave to appeal the sentence imposed.

(3) If a right to appeal or a right to seek leave to appeal applies under division (B)(1) or (B)(2) of this rule, the court shall also advise the defendant of all of the following:

(a) That if the defendant is unable to pay the cost of an appeal, the defendant has the right to appeal without payment;

(b) That if the defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost;

(c) That if the defendant is unable to pay the costs of documents necessary to an appeal, the documents will be provided without cost;

(d) That the defendant has a right to have a notice of appeal timely filed on his or her behalf.

Upon defendant's request, the court shall forthwith appoint counsel for appeal.

(C) Judgment.

A judgment of conviction shall set forth the plea, the verdict, or findings, upon which each conviction is based, and the sentence. Multiple judgments of conviction may be addressed in one judgment entry. If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall render judgment accordingly. The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.

Ohio R. Evid. 401 Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Ohio R. Evid. 402 Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio. Evidence which is not relevant is not admissible.

Ohio R. Evid. 403 Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Undue Delay

(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 R. Evid. 404 Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(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.

Ohio R. Evid. 611 Mode and Order of Interrogation and Presentation

(A) Control by court.

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(B) Scope of cross-examination.

Cross-examination shall be permitted on all relevant matters and matters affecting credibility.

(C) Leading questions.

Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Ohio R. Evid. 702 Testimony by Experts

A witness may testify as an expert if all of the following apply:

(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

(2) The design of the procedure, test, or experiment reliably implements the theory;

(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.