Supreme Court of Ohio Clerk of Court - Filed January 09, 2018 - Case No. 2016-1006

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

MICHAEL MADISON,

Defendant-Appellant,

CASE NO. 2016-1006

On Appeal from the Cuyahoga County Court of Common Pleas, Cleveland, Ohio

Court of Common Pleas Case No. CR-13-579539-A

MERIT BRIEF OF APPELLANT MICHAEL MADISON

(Volume I: Brief Only, Without Appendix)

(This is a Death Penalty Case—An Execution Date Has Not Been Set)

Timothy F. Sweeney (0040027)
COUNSEL OF RECORD
LAW OFFICE OF TIMOTHY FARRELL SWEENEY
The 820 Building, Suite 430
820 West Superior Ave.
Cleveland, Ohio 44113-1800
216-241-5003
216-241-3138 (fax)
Email: tim@timsweeneylaw.com

John B. Gibbons (0027294)
Attorney at Law
55 Public Square
Suite 2100
Cleveland, Ohio 44114
216-363-6086
Email: jgibbons4@sbcglobal.net

Counsel for Appellant Michael Madison

Michael O'Malley
Cuyahoga County Prosecutor

Christopher Schroeder
Assistant Prosecuting Attorney
Cuyahoga County Prosecutor's Office
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
(216) 443-7800

Counsel for Appellee State of Ohio

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STATEMENT OF THE CASE

Defendant-Appellant, Michael Madison ("Madison"), was arrested on July 19, 2013, in connection with the discovery of a deceased female body in the garage of his apartment building located in East Cleveland, Ohio. The body was enclosed in multiple layers of plastic garbage bags, with the victim's body bent forward at the waist so that her head was at the level of her feet. The next day, two more dead bodies of female victims, similarly enclosed in garbage bags, were discovered by police in the general vicinity of Madison's garage. The three victims were identified as Shirellda Terry ("Terry"), Shetisha Sheeley ("Sheeley"), and Angela H. Deskins ("Deskins").

After Madison's arrest, and in the subsequent days, detectives of both the East Cleveland ("ECPD") and City of Cleveland ("CPD") police departments conducted lengthy video-recorded interviews with Madison, during which he waived his Miranda rights and made numerous admissions of his involvement in at least some of the murders. (The video is State Exh. 301.)

Madison was initially indicted on July 29, 2013, in Cuyahoga County Common Pleas Court in Case No. CR-13-576472-A, with aggravated murder and other offenses arising from these three deaths. Judge Nancy R. McDonnell was randomly assigned to preside. Madison was declared indigent and assigned counsel: private attorney David Grant and the county public defender's office. Some limited pretrial proceedings occurred under Case No. 576472.

After a review by the prosecutor's office, the State made the decision to include death-penalty specifications and seek the death penalty against Madison. (Trial Transcript ("T.") at 24.) The case was thus re-indicted on October 28, 2013, under a new case number, and the case proceeded to conclusion under that case number, Case No. CR-13-579539-A. A random draw was conducted again, and Judge McDonnell was again assigned. (T. at 23-24.) The same attorneys continued to represent the indigent Madison. The charges in the first case number were

nolled on November 13, 2013. (T. 22-23.)

The capital indictment included **14 counts**: three counts of aggravated murder, one for each victim, in alleged violation of R.C. § 2903.01(A) (Counts 1, 4, and 7); three counts of aggravated murder in alleged violation of R.C. § 2903.01(B) (Counts 2, 5, and 8); three counts of kidnapping in alleged violation of R.C. § 2905.01(A)(3) (Counts 3, 6, and 9); one count of rape, as to Terry, in alleged violation of R.C. § 2907.02(A)(2) (Count 10); one count of having a weapon while under a disability in alleged violation of R.C. § 2923.13(A)(2) (Count 11); and three counts of gross abuse of a corpse in alleged violation of R.C. § 2927.01(B) (Counts 12, 13, and 14).

All six counts of aggravated murder were accompanied by two death penalty specifications: **(1)** under R.C. § 2929.04(A)(5), alleging a course of conduct involving the purposeful killing or attempt to kill two or more persons (in all six counts, the other two victims); and **(2)** under R.C. § 2929.04(A)(7), alleging the felony murder specification that the offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping (and, in the case of Terry, kidnapping and rape), 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. There were also firearm specifications under R.C. § 2941.141(A), repeat violent offender specifications under R.C. § 2941.149(A), sexually violent predator specifications under R.C. § 2941.148(A), sexual motivation specifications under R.C. § 2941.147(A), forfeiture of a weapon while under a disability, and notice of prior conviction under R.C. § 2929.13(F)(6).

Extensive pretrial proceedings and discovery occurred over the next several months. Trial was scheduled to begin on July 21, 2014.

On March 18, 2014, Madison filed a motion to suppress ECPD's warrantless search of

the garage on July 19, 2013, which had resulted in the discovery of the first body and had thus led to discovery of other evidence against Madison. (Motion to Suppress.) The State opposed the motion on April 16, 2014. (State's Opposition.) The court conducted a lengthy evidentiary hearing on April 28, 2014. (T. 93-409.) On May 7, 2014, the trial court denied the motion to suppress. (Journal Entry.)

With the trial approaching, the State, on May 22, 2014, filed a motion seeking to have Madison submit to a psychiatric examination by a prosecution expert, Dr. Steven Pitt. (No. 168, State's Motion.) The State sought the examination on the ostensible basis that it was necessary to enable the State to counter the expected trial- or penalty-phase testimony of defense mental health experts who would supposedly present testimony of Madison's psychological state as it existed before, during, and after the alleged offenses. On June 2, 2014, the defense opposed the requested examination as an infringement of Madison's right to remain silent and his privilege against self-incrimination under the Fifth Amendment. (No. 204, Opposition.) At a status conference on June 2, 2014, after permitting argument from the parties, the trial court granted the State's motion, and ordered Madison to "participate in the examination." (T. 430-48.) But the court specified the "examination only relates to the brain damage of defendant," and further ordered that the examiner "may not inquire into the facts and circumstances of the case." (No. 212, Order, June 3, 2014; see also T. 443-44.)

The trial court's June 2014 order resulted in extensive and prolonged appellate litigation over the propriety of the court-ordered examination, and related issues. On June 3, 2014, Madison took an immediate appeal to the Eighth District Appellate Court (in Case No. 101478). After rejecting the State's argument that the trial court's order was not immediately appealable, the appellate court granted Madison's motion for an emergency stay of both the examination—which had begun on June 4, for some 2 hours—and the proceedings in the trial court, all while

his appeal proceeded. The appellate court also denied the State's request to expedite the appeal. (Madison's appeal thus took nearly two years.) The State simultaneously pursued a writ of prohibition in this Court, seeking to disallow the appellate court to exercise jurisdiction, but those efforts were denied. State ex rel. McGinty v. Eighth Dist. Court of Appeals, 140 Ohio St. 3d 1519 (2014).

As the matter proceeded in the appellate court, the trial court conducted periodic status conferences to keep abreast of the status of the appellate proceedings. (T. 449-53, 454-56, 457-63, 464-73, 474-508, 509-18, 519-25, 526-40.) Trial dates were tentatively set, first for February 8, 2016 (T. 517), and then for April 4, 2016. (T. 539.)

On October 22, 2015, the appellate court affirmed the trial court's order permitting the state-requested examination. State v. Madison, 2015-Ohio-4365 (Eighth Dist. App. 2015). With the stay still in place, Madison sought review in this Court. On February 24, 2016, this Court denied Madison's request for discretionary review. State v. Madison, 144 Ohio St. 3d 1505 (2016). Madison's subsequent efforts to permit his attorney to be present during the examination were denied by the trial court (T. 534-35), and his effort to appeal that order too was denied by the appellate court, in Case No. 103950, as a non-appealable order. (Journal Entry of Jan. 27, 2016.)

Now that the appellate litigation concerning the State-requested psychiatric examination was concluded, the proceedings resumed in the trial court, with the trial still set for April 4, 2016. The hotly-contested psychiatric examination of Madison was concluded by Dr. Pitt on January 27, 2016, without Madison's counsel present. As the court had ordered (T. 535), Dr. Pitt's exam was video recorded. (Portions of the video became State Exh. 1103 (T. 7417-18).)

On March 30, 2016, Madison waived his right to a jury, and agreed to bifurcate and/or have tried to the court, the count for weapon under disability (Count 11), and the specifications

alleging that Madison is a sexually violent predator, that he is a repeat violent offender, and the notice of prior conviction. (T. 630-46.) In accepting the jury waivers, the court explained to Madison, and he said he understood, that convictions on the sexually violent predator specifications, and the underlying offenses, would mean that the only sentencing options would be life without parole or death. (T. 631-33.) The journal entries of the jury waivers were signed and filed the same day. (Journal Entries of March 30, 2016.)

The court and parties devoted some ten days to jury selection, which began on April 4, 2016, and concluded on April 15. (T. 736-3940.) Seventy-five prospective jurors were expected. (T. 629.) To assist with the jury selection, the defense added another lawyer to the defense team-—David A. Lane from Colorado, whose participation was paid for by the public defender's office. (T. 739-42.) Lane's role was to conduct the individual voir dire on Madison's behalf. The court permitted Lane's *pro hac vice* admission for these purposes, over the State's objection. (T. 736-42.) Before the individual voir dire began, the prospective jurors all completed a detailed written questionnaire—comprised of 33 pages and 106 questions. (Copies of all completed questionnaires are part of the record before this Court.)

The opening statements were delivered on Friday afternoon, April 15. (T. 3941-74.) The jury view was then conducted. (T. 3974-83.) Beginning on Monday, April 18, the State presented its case. It called 49 witnesses over the next 12 days. (T. 3984-6136.) The State rested on Tuesday, May 3, 2016. (T. 6136.) The defense moved for a judgment of acquittal under Rule 29, which was denied. (T. 6136-49.)

The admission of the State's exhibits was addressed, and objections resolved, on the morning of May 4. (T. 6136-87.) The defense then rested without calling any witnesses. (T. 6186-88.) Madison renewed his motion for judgment of acquittal. (T. 6186.) It was again denied. (T. 6186.) The closing arguments were then delivered. (T. 6189-6356.) The jury was instructed.

(T. 6358-6430.)

Later that same afternoon (May 4), after beginning deliberations, the jury had four questions. (T. 6436-39.) The parties were consulted and the court provided the jury with the answers. (T. 6439-43.) Late the next afternoon, May 5, the jury returned its verdict finding Madison guilty of all counts and specifications presented to it, with the exception of the firearm specifications. (T. 6458-74.) After discussion with counsel and the jury, the court scheduled the mitigation phase to begin on Thursday, May 12. (T. 6480-84.)

The court then explained defendant's right to a presentence report, which he waived. (T. 6486-87.) The court also explained Madison's right to request a mental examination, but cautioned him that, if he did request such an examination, copies would be provided to the State and the court. (T. 6487.) Madison waived his right to request that examination too. (T. 6487.)

On May 6, the court conducted proceedings on the bifurcated weapons count and the sexually violent predator specification. (T. 6490-6519.) That same day, Madison was found guilty by the court of having a weapon under disability and of the specifications that he is a sexually violent predator. (Journal Entries, May 6, 2016.)

The mitigation phase was conducted before the jury over five days, May 12 and May 16 to 19, 2016. (T. 6520-7586.) In addition to a single records custodian, there were four witnesses in the mitigation phase, all experts. Three of these expert witnesses were called by the defense: Daniel L. Davis, Ph.D., James E. Aiken, and Mark D. Cunningham, Ph.D. The State's expert witness was Steven Pitt, M.D., the forensic psychiatrist whose State-requested and court-ordered examination of Madison had been the subject of the pre-trial appellate litigation that consumed so many months, and all of 2015, earlier in the case. Dr. Pitt was called by the State after Madison had rested in his penalty-phase presentation on May 18, and Pitt finished testifying on May 19. (T. 7362-64.) He was the final witness.

Following the completion of each party's presentation, their respective exhibits for the penalty phase were identified and admitted. (T. 7508-13, 7586-90.) Several exhibits that were not admitted were proffered for appellate purposes (and are part of this Court's record). (T. 7510-13, 7588-90.) The closing arguments were then delivered, also on May 19. (T. 7592-7705.) The jury was instructed that same afternoon. (T. 7705-26.)

The jury began deliberating that afternoon. The jury later had three questions (T. 7727-28), which the court answered after consulting with the parties. (T. 7728-33.) The next day, May 20, the jury returned a verdict and recommendation of death on all six counts of aggravated murder. (T. 7740-43.)

The court's formal sentencing hearing took place on June 2, 2016. After merger was discussed, the State elected to proceed for sentencing on the capital aggravated murder convictions in Counts 1, 4, and 7, the counts for which Madison was found guilty of prior calculation and design. (T. 7755-56.) After hearing from the parties' counsel, and allowing Madison himself an opportunity to speak (which he declined), the court imposed death sentences on all three counts. (T. 7756-66.) The court then addressed the remaining non-capital counts of conviction, and after hearing again from counsel, and this time also from the families of the three victims (T. 7767-87), the court imposed maximum consecutive sentences on all counts, totaling 50 years to life. (T. 7788-91, 7794.) The court explained post-release control, but did not explain or address court costs or the cost of prosecution. (T. 7792-95.)

The court's sentencing journal entry was filed on June 8, 2016, along with its judgment entry and sentencing opinion under R.C. § 2929.03(F). (Amended sentencing journal entries, to correct very minor errors, were later filed on June 9, June 20, and October 16, 2016.)

Madison was again declared indigent for appeal and undersigned counsel were appointed. (T. 7793.) A transcript was ordered at State's expense. A timely Notice of Appeal and related

documents were filed on Madison's behalf. His merit brief is now timely filed.

STATEMENT OF THE FACTS

EVIDENCE PRESENTED IN THE GUILT PHASE

A. Introductory Facts.

This case began on Friday, July 19, 2013, when ECPD was called to the office of the East Cleveland Cable Company, at 1397 Hayden, located at the intersection of Hayden and Shaw Avenues in East Cleveland, Ohio, because of reports of a horrible stench coming from one of the four double-sized adjoining garages at that location. (T. 4279-81.)

One of the cable company's employees, Shaeaun Childs, had noticed the smell most of that week, first in the office itself, and then out by the garages, behind the office. (T. 4142-45.) Other employees had noticed it too, including Mikki Stovall Brown. (T. 4173-76.) On Wednesday, Childs had observed hundreds of flies hovering in the garage that adjoined the closed garage from which the smell was coming. By Friday July 19, the smell had gotten so bad that Childs' boss was unable to park in the cable company's garage. (T. 4145-53, 4160-62.) Childs thus called a friend at ECPD, who instructed him to call the main line, which both he and Ms. Brown did. (T. 4150-52, 4175-76.)

ECPD officers promptly arrived that same morning, and confirmed the horrible smell. (T. 4280-83, 4361, 4452.) The smell was coming from the first of the four garages ("Garage 1"), the one closest to Shaw Avenue. That garage was locked. (T. 4175-79.) Officers believed the smell was rotting flesh, but stated they were uncertain if it was human flesh. (T. 4465.)

B. The Discovery of the First Body on July 19, 2013: Shirellda Terry.

Police quickly learned that Garage 1 was shared by two of the residential tenants of the building in which the cable company operated. The cable company rented the first floor of the building; there were three apartments on the second floor, and the tenants from two of those

apartments shared the subject locked Garage 1. (T. 4099-4104, 4175-79, 4332-34.) Michael Madison resided at apartment #2 at 1397 Hayden, and Kym Henderson resided at apartment #1. (T. 4099-4104.) Madison and Henderson shared Garage 1. (Id.) Henderson used the right side of the garage for her milk crates and other storage. (T. 4106-08, 4454-56.) Madison used the left side of the garage, where he parked a 1984 Oldsmobile Cutlass. (T. 4106-08, 4740, 4778.)

Madison went by the street name "Ivan." (T. 4110-11, 4124-25, 4140, 4247, 4260, 4539-41, 4894.) He was known to sell marijuana from his apartment—one witness called him "the weed man" (T. 4115)—and he thus had relatively frequent visitors. (T. 4115, 4125, 4150, 4207, 4224-26, 4256, 4270-71, 4901-02.)

Police claim to have made an effort on July 19 to telephone Madison to see if he would open Garage 1 for them, but he did not answer the call (T. 4453), and he declined requests by others to come to the scene. (T. 4178-79, 4474.) Kym Henderson did not answer her door that morning, although she later appeared on her porch, overlooking the garage, after being woken up, on her first day of vacation, by all the noise and commotion. (T. 4114, 4177, 4284-85, 4310.) When the efforts to have the garage opened by Madison and/or Henderson failed (T. 4113-15, 4151-53, 4175-79, 4342-44), police enlisted the fire department to force the garage door open. (T. 4286-87, 4305, 4453.) They did not have a search warrant to do so, and had not sought one before breaching the locked garage.

Upon entering the garage, police located a "large plastic bag sitting on top of something, kind of jammed in right between the vehicle and the side wall of the garage." (T. 4288.) The plastic bag was "directly beside the driver's side door and the wall of the building." (T. 4288-89, 4364.) The officers pulled the bag out of the garage and, stationed now on the driveway, they began cutting into the bags. (T. 4289-92.) After cutting through some six layers of garbage bags, the officers noticed a large amount of fluid seep out of the container and drain down the

driveway. (T. 4365-66.) At that point, the officers stopped what they were doing. Realizing now that the bag might contain something other than decaying garbage or refrigerator meats—and that they were no longer just "looking at a smell," but at a crime scene (T. 4312, 4331-32)—the officers called the ECPD detectives to come to the scene, and they arrived within minutes. (T. 4307-08.) They also summoned the medical examiner's office. (T. 4289-92, 4305-07.) Crime scene experts from BCI also came to the scene, arriving at 11:30 a.m. (T. 4346-47, 4367, 4561.)

It was promptly determined that the bag contained a deceased human body. (T. 4292, 4562.) The body was identified three days later, on July 22, as Shirellda Terry, an 18-year old female who had been reported missing by her parents nine days earlier, on July 10, when uncharacteristically she did not come home from her summer job that afternoon. (T. 3996-4012.) To fit into the garbage bags, Terry's body had been folded in half, with her feet at the level of her ears. (T. 4915-26, 5933-37.)

C. <u>Madison's Apprehension by Police on July 19, 2013.</u>

After search warrants were obtained that morning (T. 4941-43, 5756-57, 5881, 5927-28), the police entered Madison's apartment. He was not present there. (T. 4943.) Efforts by police to contact Madison by phone continued to be unsuccessful. (T. 4939-40.)

Police learned that Madison had been observed, that morning, driving by the scene in a silver Ford SUV vehicle. (T. 4406, 4945.) This prompted ECPD to begin looking for Madison. (T. 4295-96.) Because it was believed that Madison might go to his mother's house on Chickasaw, on Cleveland's east side at the border with Euclid, Ohio (T. 4376-85), several law enforcement officers had been dispatched to watch for activity at that location. (T. 4406-09, 4515-20.) Eventually that same afternoon, police discovered the silver vehicle parked a couple blocks from Chickasaw, on Shawnee. (T. 4407-11, 4426-27, 4946-47.) Shortly after that, a man was observed inside the Chickasaw house, a small bungalow. (T. 4411-18, 4515-20.)

Officers with the county's violent crime task force approached the front door of the Chickasaw house, and were able to observe a man through the window, later identified as Madison, sitting on a couch in the living room, facing in their direction. They tried to engage Madison in conversation, through the window, and told him that officers wanted to speak with him and asked him to come out of the house. There was no response. (T. 4415-18.) Officers tried for some 15-20 minutes to urge Madison to come out, with no success. (T. 4417-19, 4518-20.)

Because of Madison's failure to comply with their requests, the officers considered Madison to be a "barricaded suspect." They summoned SWAT teams to the location to assist in resolving the standoff. (T. 4418-20.) It took the SWAT teams some 30-45 minutes to arrive, during which the officers on the scene at Chickasaw maintained a tight perimeter. (T. 4420-21.) A sheriff's marked unit also pulled up in front of the house, and with its loudspeaker on, attempted to urge Madison out of the house, still with no success. (T. 4420-21.)

By the time the SWAT units arrived—around 4:15 p.m. that Friday afternoon, July 19—there were some 13 officers on the scene, heavily armed, and with battering rams and other equipment. (T. 4392-93.) The SWAT team continued negotiations for another 30 minutes to an hour, with no success. (T. 4421-23.) When Madison did not surrender, police used battering rams to breach the front and side doors. Madison then surrendered to police without incident. (T. 4379-94.) Madison did not have any weapons, and he made no threats at any time during the stand-off. (T. 4441, 4510-11, 4522-23.)

D. <u>ECPD's First Interview with Madison on July 19, 2013.</u>

Madison was turned over to the custody of ECPD, who had an arrest warrant for him by that time. (T. 4948-49.) He was transported from Chickasaw to ECPD's station by Detective Michael Cardilli, then the commander of the ECPD detective bureau (and, by the time of trial in 2016, the chief of police). (T. 4931, 4948-50.) Det. Cardilli testified that he advised Madison of

his Miranda rights at that time. (T. 4950-51.) The only question Cardilli said he asked Madison on the ride to the station was his name. (T. 4954.)

Madison was booked at the station. During Madison's booking at ECPD on July 19, Cardilli said Madison made a statement, with only the two of them standing there, that "we are going to be famous." (T. 5322, 5324-25.) After Madison had been processed, Cardilli and another officer, Sgt. Scott Gardner, began to interview him later that evening beginning at about 6:30 p.m. (T. 4954-57; State Exh. 301.) Before doing so, the Miranda rights were again reviewed and a written waiver was obtained. (T. 4956-59, 5985-87; State Exhs. 60-63.) In all, police conducted multiple interrogations of Madison, over four days, on July 19, 20, 21, and 22, comprising some 16 to 17 hours, all of which were audio and video-recorded. (T. 4955.) (The complete un-redacted video of the interrogation is State Exh. 301.)[1]

The July 19 interview went on for almost two hours, from 6:25 to 8:15 p.m. Madison did not admit to any knowledge of the body found in his garage. He talked with officers about his background, and that he was 35 years old (born in 1977), had gone to Shaw and Euclid high schools, that he had two children of pre-school age, and that he has an estranged relationship with the children's mother, Tenia Plummer, whose father was a bailiff in the East Cleveland

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[1] The parties at trial also made references to transcripts of the video interviews, as State Exh. 302. The transcripts were prepared, before trial, by court reporters working from the video itself. The transcripts were not admitted in evidence or provided to the jury. (T. 6163, 6179-83, 6191.) The transcripts do, however, reflect, in black, the redactions from the video, representing those segments of the interviews that the parties had agreed would not be played for the jury because of objectionable content, such as references to Madison's prior convictions or to crimes of other people. The court reporters at trial, at the court's instruction and without objection (T. 4928), did not transcribe the video of the interview as it was being played to the jury. (See, e.g., T. 4959-61, 5267-70, 5276, 5283-85, 5434-35, 5438-39, 5649-51, 5658-60, 5747-48, 5752-53, 5803-04, 5882-83, 5886-87, 5903-08, 5983-88, 6020-22, 6026-28, 6042-43.) Therefore, it is necessary to review both the video (Exhibit 301) and the transcripts (Exhibit 302) to determine precisely which segments of the interviews were not played for the jury.

courts. (State Exh. 301 (**July 19**) at 19:24:00 to 19:30:00 [pp. 46-47].)[2] He told them it was not Ms. Plummer's body because he had spoken with her that day. (Id., 19:46:10 to 19:46:25 [pp. 66].) When asked who it was, Madison said he did not know (Id., 19:46:20 to 19:46:40 [pp. 66].)

When confronted with the officer's representation that the investigation at Madison's apartment had already demonstrated that the body had been in his apartment (Id., 19:35:40 to 19:36:10 [pp. 57]), Madison suggested that it may have been other people with access to his apartment. (Id., 19:37:00 to 19:37:30 [pp. 58], 19:55:30 to 19:56:00 [pp. 74].) The officers tried to persuade Madison that a show of remorse, and a willingness to tell them what happened, would help him not look like a cold-blooded killer. (Id., 19:44:20 to 19:44:50 [pp. 64-65], 20:00:10 to 20:01:50 [pp. 79-80].) Madison responded that no one wanted to listen to his story. (Id., 20:03:20 to 20:03:40 [pp. 83].) At one point he also said: "I'm not expecting to beat this, this is ugly, trust me, this is ugly." (Id., 19:31:50 to 19:32:10 [pp. 53].) He said: "I'm numb right now. I'm truly numb." (Id., 19:59:30 [pp. 79].)

Madison said to let science tell the story because he has huge respect for science. (Id., 20:01:50 to 20:02:20 [pp. 81].) He insisted that he had never killed anyone. (Id., 20:10:30 to 20:11:00 [pp. 90].)

E. The Discovery of the Second and Third Bodies on July 20, 2013: Shetisha Sheeley and Angela Deskins.

Det. Cardilli's interview with Madison on July 19, and Madison's "we are going to be famous" statement that afternoon, prompted Cardilli to go back to the scene again, with some of

[2] The citations are to the approximate time-stamp location (in military time), as generated by ECPD's recording system, for the referenced video excerpt, as reflected in Exhibit 301 for the referenced date. The brackets contain the approximate page location of that excerpt in the transcript of the video (State Exhibit 302) for that same referenced date.

his detectives, very early on Saturday morning, July 20. (T. 5325.) He testified he had a "hunch" and "gut feeling" that they might find more bodies. (T. 5350, 5819-20.)

Some 15 minutes after beginning their search of the neighboring fields and abandoned houses on July 20, the detectives found another body. (T. 5339-41.) The discovery was made in a field behind a garage that was located near Madison's apartment building. (State Exhs. 201, 584-99; T. 5339-42, 5823-29, 6131-32.) It was another garbage bag, covered over with debris and vegetation. Once the debris was removed, the bag was clearly visible. (T. 5329-36; State Exhs. 584-99.)

A few hours after discovering that first garbage bag in the debris field, the detectives discovered another similarly shaped garbage bag in the basement of a nearby abandoned house on East 139th Street, located below one of the house's broken basement windows. (T. 5238-53, 5825-27, 6131-32; State Exh. 201.) They theorized that the body had been dropped through the broken window. (T. 5828.) The abandoned house was less than a hundred yards from Madison's apartment building. (T. 5813, 5875; State Exh. 201.)

The two bodies that were discovered on Saturday, July 20 were later identified, using fingerprints, as Shetisha Sheeley (the body found in the field) and Angela H. Deskins (the body found in the basement). (T. 5595-5605; State Exhs. 325, 326.) To fit into the garbage bags, each of the bodies had been folded in half, with her feet at the level of her ears, and bound that way. (T. 4993-94, 5018, 5025.)

F. Subsequent Police Interviews with Madison, on July 20-22, 2013, Helped Explain Some of What May Have Happened.

The investigation progressed and included three additional lengthy interviews with Madison, on July 20, 21, and 22, totaling some 15 hours. The interrogators were, at various times, ECPD detectives Cardilli, Gardner, James Ruth, and a detective named Michael, and, on

July 22, CPD detectives Raymond Diaz and Nate Sowa. Cardilli, Ruth, and Diaz all testified at trial about the interrogation. (T. 5264-65, 5657-58, 5881-83, 5904-05, 5983, 6020.) Madison eventually made admissions of his involvement with two of the deceased women. His disclosures in this respect were encouraged by the interrogators, who repeatedly told him, in all interviews, that his cooperation would benefit him, including that it could prevent the case from being a capital case, and that it would be helpful to him to show remorse. (Exh. 301 (**July 21**) at 13:06:10 to 13:08:30 [pp. 29-30], 13:20:50 to 13:23:50 [pp. 35-37].)

During the interview on July 20, Madison asked for more time to get his bearings, and said he would then put it all together for police. (Exh. 301 (**July 20**) at 19:51:50 to 19:52:10 [pp. 46].) This interview went from approximately 7:00 p.m. to midnight. Madison denied that there were more than 10 bodies, saying that was "extreme." (Id., 21:06:00 to 21:06:20 [pp. 98].) After he was informed of the discovery of the third body, Madison said he did not know if there were more than three, or more than five. (Id., 23:01:10 to 23:02:10 [pp. 176], 23:05:00 to 23:06:20 [pp. 180], 23:16:20 to 23:17:20 [pp. 189].) "Only time will tell." (Id., 23:05:30 to 23:05:49 [pp. 180].) "If there's three, I'm pretty sure there's more." (Id., 00:00:20 to 00:00:30 [pp. 223].)

He repeatedly explained to the police interrogators that his life, during the past year, had been filled with bouts of heavy drinking and drugging, and this resulted in his inability to recall some of what he did. (Id., 20:35:10 to 20:35:20 [pp. 76-77], 20:51:10 to 20:51:55 [pp. 87-88], 21:23:20 to 21:24:20 [pp. 112], 21:47:00 to 21:48:00 [pp. 130], 22:22:50 to 22:23:40 [pp. 153-54], 22:47:40 to 22:48:50 [pp. 166], 23:17:20 to 23:18:20 [pp. 189-90], 23:33:50 to 23:36:40 [pp. 203-04].) He said he is not a monster when he is sober, and that his frequent mixing of alcohol and drugs made him like Jekyll and Hyde. (Id., 21:32:00 to 21:34:00 [pp. 119-20].)

He also repeatedly expressed intense frustration with, and anger toward, females in general, and both his baby mama and mother, in particular. (Id., 20:37:20 to 20:37:50 [pp. 81].)

This frustration was expressed in subsequent interviews too. He told the interrogators he had nevertheless been around a lot of females in the last year, and that he was "wasted" much of the time, and thus did not really remember much. (Id., 20:51:10 to 20:51:55 [pp. 87-88].)

Madison at first expressed a lack of recollection about the girl whose body was found in his garage the day before. (Id., 20:37:20 to 21:38:20 [pp. 123].) Later, after he was informed that her purse was found in his apartment (id., 22:10:40 to 22:11:20 [pp. 144]), Madison admitted that he put her body in the garage. But he also said he did not know what he planned on doing with it. (Id., 22:11:50 to 22:14:40 [pp. 145].) He professed no recollection of the girl, but he said one body is enough to do away with you as far as society goes. (Id., 22:17:40 to 22:18:30 [pp.149-50].) He said he dragged her body down to the garage and recalled it being very heavy. (Id., 22:27:40 to 22:28:20 [pp.157-58].) He agreed with the interrogators that his involvement with the body in the garage is why he eluded police when they were at his apartment on Friday July 19. (Id., 22:27:40 to 22:29:50 [pp.157-59].)

Although taking responsibility for moving the body to the garage, Madison denied that he killed the girl. He claimed that he found the body upstairs in his apartment, but said he has no recollection of killing anyone. (Id., 22:19:50 to 22:21:10 [pp. 151], 22:22:50 to 22:23:40 [pp. 153], 23:36:00 to 23:36:40 [pp. 204], 23:40:00 to 23:42:20 [pp. 208-09], 23:51:30 to 23:52:40 [pp. 216-17], 23:54:30 to 23:56:20 [pp. 218-19].) "9.99 times out of ten if I'm with a female, it's not to, it's not to kill. I don't, like view humans like I view roaches and flies." (Id., 22:14:45 to 22:15:00 [pp. 147].) When police asked him if they were going to find semen and if it would be his, Madison said he was not sure. (Id., 22:24:50 to 22:25:30 [pp. 155].) He said he did not recall the girl. (Id., 22:24:40 to 22:26:00 [pp. 155].)

When asked again if there were more bodies, he said he hoped there were not, because it would cause him to crumble under the weight of it. (Id., 22:27:00 to 22:27:40 [pp. 157].) When

shown a picture of another victim, Madison said he may have seen her at his apartment, but said he did not let her stay. (Id., 22:45:10 to 22:46:10 [pp. 165].) He told investigators he does not recall having to move other bodies, just the one found in the garage. (Id., 22:46:10 to 22:47:40 [pp. 165-66].)

He again expressed strong feelings of anger and resentment toward his mother. He had been asking police to see her, but, when that did not happen, he said she is more interested in her broken door and her dog than in him. “It’s always been about material shit, what’s hers and what’s not. The door and the dog come before me. . . . She don’t even want to talk to me, it’s definitely about that door and that dog. She already just pretty much persecuted me.” (Id., 22:41:50 to 22:43:00 [pp. 164]; see also id., 23:37:50 to 23:39:50 [pp. 206-07].)

During his interviews the next two days, July 21 and 22, Madison provided additional and new information. He admitted an encounter with the 18-year old victim at his apartment. He told police he had met her at a gas station on Noble Road, and she came back to his apartment. He said she told him her name was Shay. It was a very rainy day. She was playing on Madison’s computer and watching television. He said he left the apartment for a little bit to smoke a blunt and get some liquor, and, when he came back, he said she started to irritate him. He said it was blurry, but the next day she was laying there. (State Exh. 301 (**July 21**) at 11:37:10 to 11:43:20 [pp. 10-12].) He recalls she was not breathing and that his head was spinning. He left her in the house a couple days, in the closet, before he moved her to the garage because of the smell. (Id. at 11:43:20 to 11:47:30 [pp. 12-14], 12:01:00 to 12:01:50 [pp. 22], 13:23:50 to 14:02:40 [pp. 37-50].)

During the July 21/22 interviews, Madison also made admissions about involvement in a woman’s death at his apartment, he thought in October 2012, but he said he does not know her name. (Id., 12:19:00 to 12:20:30 [pp. 2-3].) This was an African-American woman he met at the

Honey-Do bar. (Id., 21:14:40 to 21:18:50 [pp. 9-11].) She came back to his apartment where he said she performed a sex act upon him for $10. When he woke up, Madison said he caught this woman going through his stuff. Words were exchanged. He grabbed her from behind and was choking her. When he stopped, he left her on the bed and left the apartment. He does not know if she was breathing, but he did not mean to kill her. (Id., 12:20:40 to 12:23:50 [pp. 3-4], 14:02:40 to 14:19:00 [pp. 50-55, 1-2], 21:14:40 to 21:18:50 [pp. 9-11], 22:10:00 to 22:38:00 [pp. 44-63]; see also id. (**July 22**) at 10:43:30 to 11:10:10 [pp. 39-62].)

When he returned, he put her in garbage bags. He explained that the only way you can put a person in bags is to bend them over and slide them in. (Id., (**July 21**) at 12:39:00 to 12:39:50 [pp. 13-14].) He eventually took her body to the garage, where she remained for a long time. Then he moved her behind the garage. (Id., 12:23:00 to 12:23:50 [pp. 4], 12:39:00 to 12:40:40 [pp. 13-15].) He recalls that she wore a turquoise hoody. (Id., 12:37:30 to 12:38:40 [pp. 12-13]; see also id. 14:02:40 to 14:19:00 [pp. 50-55, 1-2]; id. (**July 22**) at 11:08:30 to 11:08:50 [pp. 61].) This is the only woman he recalled placing in garbage bags. (Id. (**July 21**) at 14:52:30 to 14:53:50 [pp. 12-13].)

He told the interrogators that the October woman was his first victim. (Id., 14:16:40 to 14:16:55 [pp. 56], 21:13:00 to 21:14:00 [pp. 8-9].) He said he drank to forget that she was in the garage, but, when he sobered up, she was still there. This disturbed him, causing him to abuse alcohol and drugs even more. (Id. (**July 22**) at 11:07:40 to 11:08:30 [pp. 60-61].) The interrogators, during the July 22 interview, pushed back against Madison's claims of overindulgence in drugs and alcohol. They told him he had been in jail for almost four days, and was not exhibiting signs of going through withdrawal. Madison said he could not explain that, and said he was still in shock from it all. (Id., 11:11:20 to 11:13:20 [pp. 63-64].)

He was asked about a shovel that had been found in the trunk of the car parked in his garage. He said he had obtained the shovel to bury the October woman because he thought about doing that. But he never did, saying: "I guess maybe I wanted to get caught." (State Exh. 301 (**July 21**) at 13:14:30 to 13:15:30 [pp. 32-33].) This was also his explanation for why he moved the body of the October victim from inside his garage to such an open area where it was eventually discovered on July 20. (Id., 12:23:00 to 12:23:50 [pp. 4].)

Madison was asked about the third victim, but said he could not recall that one. (Id., 14:29:00 to 14:31:20 [pp. 6-7].) He said he was only sure of two. (Id., 12:26:20 to 12:26:40 [pp. 6], 12:31:00 to 12:32:20 [pp. 8-9].) "I don't really recollect this third one." (Id., 12:26:20 to 12:26:40 [pp. 6].) When shown a picture, he said he thinks she may have been to his apartment, and that he paid her $50 for sex. But he said he remembers her leaving. He said this was like in March or April 2013, somewhere in there. (Id., 12:06:30 to 12:18:50 [pp. 25-30, 1-2], 12:32:20 to 12:33:30 [pp. 9-10], 21:32:20 to 21:45:10 [pp. 20-28].) He said he recalls watching her "ass" as she was going down the stairs. (Id., 21:44:30 to 21:45:10 [pp. 28].)

Even after hours of interrogation, Madison continued to express an inability to recall the number of bodies. He was unable to say if there might be another body or more: "Like I can't be sure. But, I just can't see myself being that monstrous. . . . I don't know. I don't think so. I would hope like hell not. Outside of the one, I'm still trying to get it around my mind, that, you know what I am saying? . . . I can't say I wanted to be caught, but, it's like, I'm tired. I'm tired. Like, I'm not, you know what I am saying? I'm not fighting it." (Id., 23:03:00 to 23:04:30 [pp. 73-74]; see also 23:59:10 to 00:02:40 [pp. 92-94].)

He was asked if he remembered a blanket in his apartment with sports stuff on it, like a basketball or baseball. Madison said he had such a blanket in the doorway on one side of the apartment. (Id., 13:12:40 to 13:13:40 [pp. 32].)

In addition to the interviews, police also obtained a written statement from Madison, which was prepared, and reviewed in detail with him, during the July 21 interrogation. (Id., 13:20:50 to 15:13:00 [pp. 35-56].) The written statement is State Exhibit 343. (T. 5907-24.)

After a long morning and afternoon of interrogation on July 21, and after Madison had signed the written statement, the video camera continued playing as Madison sat and smoked, looking out the window. It lingered on him for a long while. Eventually, an unidentified African-American woman entered the room to bring Madison some coffee, with sugar. They were the only two in the room. Madison was not being interrogated at the time. They spoke briefly. He bantered with her in a friendly way. He said, "thank you, sweetheart," and then said something about kids, to "just be good, be good." (State Exh. 301 (**July 21**) at 20:53:20 to 20:53:55 [pp. 14-15].)

Later that same night, close to midnight, Madison was again alone in the room, not being interrogated, yet the camera was still recording. This break in the interrogation lasted some 21 minutes, from 23:16 to 23:37. At one point, Madison reacted to something he was reading with visible anger and used profanity. (State Exh. 301 (**July 21**) at 23:35:00 to 23:35:50 [pp. 79-80].) He later told the detective he was angry about the East Cleveland mayor.

G. Evidence at Trial Concerning Alleged Statements Madison Made About Women.

Through two of its trial witnesses, the State presented evidence of statements Madison had allegedly made to friends about his anger toward women.

Quiana Baker had known Madison from the neighborhood since 2011, and they were friends. (T. 4527-30.) She said he was a good dad to his two children. (T. 4543-44.) She testified, over the defendant's objection (T. 4525-26), about a statement she claimed Madison made to her after a funeral about his frustration with women:

> A. He said he was aggravated with the way women treating him and they make him want to Anthony Sowell -- a B word.
>
> Q. What's the B word? You can say it, it's fine. We're grownups here. I want to know what he said.
>
> A. He said -- I don't want to say it.
>
> THE COURT: Yeah. It's necessary that you do it. You can say it.
>
> A. Bitch. Is what he said. I apologize.
>
> Q. Put what Mr. Madison said into the full sentence.
>
> A. These hoes be acting crazy, acting like they don't want to fuck with a real nigga and they make you want to – what's the -- Anthony Sowell a bitch.

(T. 4535.)

Another friend of Madison's, Eugenia Thomas who lived nearby on Hayden, testified that she had known Madison since 2010. Referring to a conversation with him in 2013, she said he told her he was "sexually frustrated." (T. 5953.) Over the defendant's objection, she explained that "he got upset with women, and he talked about hitting women and tying them up. He liked submissive women." (T. 5953.) He allegedly told her he liked to tie women up during sex. (T. 5976.)

Thomas also testified about phone conversations she had with Madison in which he allegedly told her he was outdoors or at the mall, and was "watching the bitches." (T. 5954, 5958, 5964.) She agreed this was a "recurring theme" with him. (T. 5958.)

Finally, she testified that Madison told her, on multiple occasions since 2012, how he wanted to kill his baby mama because she would not let him see the children. (T. 5959-60.) When she saw the news reports of the body found in his garage, she said she called the FBI because she was "afraid he actually killed his baby's mama." (T. 5961-62.)

H. Additional Trial Evidence as to the Death of Each Victim.

In addition to Madison's interview and written statement, the State's case at trial relied upon forensic and other evidence in seeking to establish the charged crimes against Madison as pertinent to each of the three victims. Some of this additional evidence is summarized below for each victim, in the order in which the victim's deaths were claimed to have occurred.

1. Shetisha Sheeley

Shetisha Sheeley was 28 years old when she died. (T. 4066.) She had a teenage daughter who was being raised by Sheeley's father, and she did not have much contact with her family. (T. 4066-75.) She had been living in an apartment alone, in Cleveland, since 2010-11. (T. 4077-82.) Her sister testified that Sheeley had been in jail in the summer of 2012, and, according to records, was released on September 24, 2012. (T. 6086.) Her family had not seen or heard from her since at least September 2012. (T. 4080-90.) She did not attend her brother's funeral in December 2012. (T. 4089.)

There were no missing person reports concerning Sheeley. (T. 4431.) When her sister, Samerra, saw the news reports on July 20 about the women's bodies found in East Cleveland, she recognized one of the reported tattoos—of Lil Wayne—as a tattoo her sister had on her chest. (T. 4091-92.) She called the hotline to say it may be her sister. (T. 4092.)

Sheeley's was the second body (of the three) found by police, in her case in the field behind the garage on July 20. A number of photographs—of her body in the bags, and of the scene of its discovery—were taken at the scene on July 20, and were introduced into evidence. (T. 4748-55; State Exhs. 584-99). Also introduced were photographs of Sheeley's body, as taken by the medical examiner's office, when that office received the body on July 20. (T. 4989-5013; State Exhs. 700-741.)

Sheeley was wearing a green hooded sweatshirt made by Hollister. (T. 5005-06, 5009-10; State Exhs. 737-38.) This and other clothing could not be tested because of contamination from the decomposition fluid. (T. 5039-40.) Sheeley's body had been wrapped in six layers of garbage bags in alternating order, and duct tape was used to compress the body and keep it intact in the bags. (T. 4992-5002, 5039-49.)

DNA testing had been conducted by BCI on a number of items of evidence collected from Madison's apartment at 1397 Hayden and from the Oldsmobile that was in his garage. Sheeley's DNA was not found on any of those items. (T. 5734.)

Dr. Krista Timm,[3] a forensic pathologist then with the county Medical Examiner's office, performed the autopsies on all three victims. (T. 5051-55.) The autopsy report for Sheeley's autopsy was introduced as State Exhibit 259, and the autopsy photos were introduced as State Exhibits 1069-78. (T. 5109-10.) Sheeley's body, like that of the other two victims, was received by the medical examiner's office in the folded fashion: "And they were all similarly received like that where their feet were joined with their heads or necks and folded in half at the waist." (T. 5132.)

According to Dr. Timm, Sheeley had a bruise to the left side of her face, and deep into her left scalp, which were the result of blunt trauma. (T. 5116, 5120-21.) The bruise was measured as 3 inches by 3 inches of "dark brown discoloration on the left face involving the periorbital region which is the region around the eye and the left cheek." (T. 5123; see also State Exh. 1076.) Dr. Timm opined that, because of the evidence of bruising, Sheeley was alive when

[3] The doctor got married subsequent to the 2013 events at issue, when she was known as Krista L. Pekarski, M.D. (T. 5051.) Her maiden name thus appears on the autopsy reports. (State Exhs. 251, 255, 259.)

she sustained that injury to her face. (T. 5117-18.) The injury could have been caused by a single blow. (T. 5168.)

Based upon the doctor's observations of the neck, she could not tell if Sheeley had been strangled. But she also testified she could not rule that out because of the body's significant state of decomposition. (T. 5123-24, 5171-73.) She could not say with any degree of medical certainty that Sheeley had been sexually assaulted. (T. 5168.)

Dr. Timm opined that Sheeley's cause of death was homicidal violence by unspecified means. Her anatomic diagnoses were that Sheeley had suffered blunt impact to the head and post-mortem decomposition. She also opined that the manner of death was homicide. (T. 5124-25.)

In his interview, Madison had admitted "choking out" a woman at his apartment, he thought in October 2012. One of his female friends, Brittney Darby, testified that in October she observed Madison with a scratch in the middle of his face on top of his nose. (T. 5489-91.) She testified Madison told her he received the scratch from breaking up a fight between two girls. (Id.)

2. Angela Deskins

Angela Deskins was 38 years old when she died. (T. 4050.) In about May 2013, she stopped responding to communications from her family and friends. (T. 4054-56, 4600-01, 5997-98.) Her family filed a missing person report and put up fliers to seek information. (T. 4056-58; State Exh. 341.)

One of Deskins' male friends testified that he had dropped Deskins off in East Cleveland on two occasions, in the April/May 2013 time period, for her to visit with Madison, whom she referred to as a friend. (T. 5450-53, 5464.) After the second time, this friend said he never saw Deskins again. (T. 5458.)

Evidence was introduced of cell phone calls, but no texts, between Madison's cell phone and Deskins' cell phone, during the period from May 4 to May 25, 2013. There were 15 calls from Deskins' phone to Madison's, and 4 from Madison's phone to Deskins'. They were all of relatively short duration. The last was on May 25, 2013. (T. 5428-33, 5817; State Exh. 372.)

Deskins' was the third body (of the three) found by police. Her body was found on July 20 in the basement of the abandoned house on East 139th Street. A number of photographs—of her body in the bags, and of the scene of its discovery—were taken at the scene on July 20, and were introduced into evidence. (T. 4693-4716; State Exhs. 496-526). Also introduced were photographs of Deskins' body, as taken by the medical examiner's office, when that office received the body on July 20. (T. 5013-35; State Exhs. 753-812.)

There was a white cloth belt wrapped around Deskins' neck. There was also an electrical cord that was wrapped around her folded body and which secured her head to her ankles. (T. 5043.) The yellow receptacle at the end of the chord was partially lodged in her mouth. (T. 5023-24, 5932; State Exhs. 781-82.) The body was packaged with a number of layers, including four layers of trash bags and a blue comforter with a design of sports balls on it. (T. 4710, 5018, 5040, 5228; State Exhs. 518, 771-76, 799.)

The State presented evidence of DNA analysis by BCI of a carpet stain from the north closet of Madison's apartment. The stain was reported as being consistent with Deskins' DNA. (T. 5697; State Exh. 202.) According to the DNA witness, BCI's Emily Feldenkris, the expected frequency of occurrence of the major DNA profile on the stain from the carpet was 1 in 254 billion 900 million unrelated individuals. (T. 5698, 5738-39; State Exh. 224-A.) Consistency with Deskins' DNA was also reported for a stain on the carpet padding from that same closet, but at a much less robust frequency, 1 in 2,036 unrelated individuals. (T. 5706-09, 5722-23, 5739.)

Dr. Timm's report for the Deskins autopsy was State Exhibit 255, and her autopsy photos were introduced as State Exhibits 1079 to 1090. (T. 5140-41.) According to Dr. Timm, Deskins had a ligature around her neck (T. 5142, 5151), and there was "furrowing where the ligature was with a lot of decomposition changes and skin slippage." (T. 5147; State Exhs. 1080-81.) As with Sheeley's body, the body was folded on itself, in this instance with the electrical cord binding the neck to the ankles. Deskins was nude from the waist down. (T. 5151.) The doctor detected no trauma to the genital area. (T. 5156.) She did not perform a sexual assault kit because of the body's state of decomposition. (T. 5158.)

Dr. Timm opined that the cause of Deskins' death was ligature strangulation, and the manner of death was homicide. (T. 5172-73.) She explained that ligature strangulation cuts off the supply of blood to the brain. If the pressure is constant, the person will lose consciousness in approximately 10 to 30 seconds, and, after that loss of consciousness, if the pressure is maintained, the person will undergo brain death in approximately one-and-a-half minutes, and cardiac death within a range of three to five minutes. (T. 5091-92, 5154-55.) Dr. Timm testified that, if the ligature is removed, the person can regain consciousness, provided it is removed prior to that one-and-a-half minutes. (T. 5091-92.)

3. Shirellda Terry

Shirellda Terry was 18 years old when she died. (T. 3989, 6003.) She was active in her church, where her step-father was the pastor, and she participated in praise dancing. (T. 3987, 6017.) In the summer of 2013, she was working at a school at East 144th Street and St. Clair Avenue in Cleveland, with working hours from 7:30 a.m. to 4:00 p.m. (T. 3990-94.) She did not have a cell phone, but she had an i-Pad, and could only make calls and place texts if she was in an area with wireless internet access. (T. 3996.)

When she did not return home from her job on July 10, her parents immediately reported her missing. The family began to look for her that evening. (T. 3997-4003, 4034-40, 6006-12, 6100.) They eventually learned that Terry had left work earlier than usual, at 1:30 p.m., on July 10. (T. 4004.) They put up fliers and recruited volunteers to help search. (T. 4004-05, 4521; State Exh. 340.) Multiple police departments, and the FBI violent crime task force, were all involved in the efforts to find Terry. (T. 4396-98, 4430-32, 4446, 4480-84, 4931-33, 6101.)

The day the body was found on July 19, Terry's older sister saw something on the TV news reports that mentioned the name "Ivan." She recognized that as the name of a man Terry had recently told her she met, and with whom she had shared text messages. (T. 4028-34, 4043.)

The State introduced evidence of some 120 text messages that were exchanged between Madison's cell phone and Terry's i-Pad, during the period from July 3 to July 10, 2013. (T. 4856-60, 5312-21, 5359-88; State Exh. 4, 331, 333-D.) In these messages, Madison told her he was 25 years old, that he had no children, and that his job was working on houses. The messages also revealed a mutual attempt by the two to schedule a meeting for July 10. Terry declined Madison's texted request for her to come to his place, stating "I don't trust you like that yet." The text messages reflect the plan for Terry to instead meet Madison at the corner of Hayden and Elm at 4:30, after she finished work that day. (T. 4047-48, 5361-88; State Exh. 4.) The last text message between them was at 2:27 p.m. on July 10 from Madison's phone: "Are you ok." (State Exh. 4.)

Terry's was the first body (of the three) discovered by police. Her body was found on July 19 in Madison's garage. The State introduced evidence of a number of photographs, of the body and the scene, that had been taken at the scene by BCI. (T. 4572-73; State Exhs. 400-413.) Also introduced were photographs of Terry's body, and of related evidence from the body, as

taken by the medical examiner's office and the county regional forensic lab. (T. 4915-26; State Exhs. 818-839; T. 5068-69; State Exhs. 1050-53.)

There was a belt around Terry's neck. (T. 4920-21; State Exhs. 823-25, 832.) The belt was also wrapped around both ankles. (T. 4922; State Exhs. 828, 832.) Her body was enclosed in a blue paisley print bedsheet, a pink comforter, and seven alternating layers of garbage bags. (T. 4918, 4923-25, 4965-68, 6116; State Exhs. 834-35.) The paisley sheet matched a pillow case in Madison's apartment. (T. 5211-14, 6116; State Exh. 218-B.) Madison's friend Brittney Darby testified that Madison had a pink comforter in his apartment. (T. 5520-21.)

There was evidence that five of the garbage bags on Terry's body were "indistinguishable" from those in a box of garbage bags that were found in Madison's apartment. (T. 5216-19, 5235-36.) That box of "heavy duty contractor bags" states on the face of the box that it contains 20 bags; only 15 were left in the box when it was recovered by police from the apartment. (T. 4762-63, 5217, 6113-14; State Exhs. 132, 554-58.) William Plummer, the father of the mother of Madison's children, testified that, when he was working security at Silverman's store on July 18, he observed a woman with Madison purchase that same type of box of contractor bags, and the two then left together. (T. 5780-86, 5796-97; State Exh. 219-B.)

The State also presented evidence, including DNA evidence, of a number of items of Terry's personal property that were found in Madison's apartment. This included her purse (and its contents) and two pair of eyeglasses. (T. 4759-61, 4767-68, 5695-97, 5700-01, 5719-22, 5889-91, 6014-17, 6120-21; State Exhs. 130, 547-50, 572-73.)

Dr. Timm's report for the Terry autopsy was State Exhibit 215, and her autopsy photos were introduced as State Exhibits 1050 to 1068. (T. 5066-69.) According to Dr. Timm, there was a furrow visible on Terry's neck where a ligature had been. (T. 5077.) She again explained the

process of ligature strangulation, and the approximate amount of time it takes for brain death (1 to 1 ½ minutes) and death to occur (3 to 5 minutes). (T. 5090-91.)

The doctor testified there was trauma to Terry's vaginal and anal region, a laceration that extends through that area and which resulted in hemorrhage. (T. 5082-83.) The laceration extended 4.5 inches from the vaginal area to the anal area (T. 5105), and it was a gaping wound of 1.5 inches wide. (T. 5099.) Dr. Timm initially opined that the evidence of hemorrhage meant that the trauma occurred "prior to or right around the time of death" (T. 5083), but she later agreed with the prosecutor's leading questions that it was prior to death. (T. 5101, 5105, 5135-38.) The doctor explained there was still cardiac activity when the injury was inflicted. (T. 5136.) But she admitted on cross that Terry could have been at the stage of brain death, and unconscious, when the injury was inflicted, even if not yet deceased. (T. 5164.)

Dr. Timm testified she did not know what caused the injury to the anovaginal region, saying it was "likely an instrument of some sort but I don't know what." (T. 5085.) But she agreed with the prosecutor's leading question suggesting a knife (T. 5085), and later agreed with the prosecutor's leading question suggesting "a serrated knife to be exact." (T. 5170-71.)

Dr. Timm opined that the cause of Terry's death was ligature strangulation, and the manner of death was homicide. (T. 5101-02, 5137, 5169.) She also opined that there was anovaginal mutilation and post-mortem decomposition. (T. 5102.) Later, resuming her testimony after a weekend break, she testified over objection that, if left untreated, the anovaginal injury, because it is in such a vascular area, could itself result in death. (T. 5136.) This opinion was neither in her report nor in the testimony she had provided the Friday before the weekend break. (T. 5165-66.)

Evidence Presented in the Sentencing Phase

The evidence about Madison's background and social history was provided by two forensic psychologists—Daniel L. Davis, Ph.D. and Mark Cunningham, Ph.D.—based on their review of numerous records and interviews with Madison, some of his family members, and other persons.

The psychological testing showed Madison to be of average intelligence, and the experts saw nothing to question that assessment. (T. 6709.) There was also no indication of any serious mental illness or psychosis. (T. 6643-47, 6694, 7278.) There was no evidence that Madison suffers from brain damage. (T. 6669-70.) If the testifying psychologists had seen evidence of that, they would have referred Madison for proper testing to determine if such damage exists. (T. 6669-70.)

The theory of the mitigation presentation was that, due to Madison's family circumstances and his unique experience of childhood and adolescence resulting from those circumstances, Madison was a severely damaged person by the time he reached adulthood. Placing his horrific upbringing in a context supported by accepted research in the field of forensic psychology, the experts identified a number of "adverse development factors" that exist in Madison's case. When a person is plagued with so many adverse factors—especially when combined, as was also true in Madison's case, with the absence of any of the "protective factors"—the person is more likely to have negative outcomes in terms of mental health and involvement with antisocial and criminal behavior than persons not similarly disadvantaged.

A. The facts of Madison's background and social history.

Madison described his upbringing in extremely negative terms, and the records fully support that description. He was physically abused, emotionally neglected, and psychologically

abandoned. (T. 6588.) Some of this centered upon issues with his mother, Diane Madison, but there were many other problems as well. (T. 6587-88.)

Diane was 19 years old when Madison was born in 1977. The pregnancy was unexpected, the result of a weekend fling, and Diane did not know she was pregnant for months. She thus continued to drink heavily during much of the pregnancy. (T. 7054.) The father was evidently a man named John Baldwin, and he was never involved in Madison's life. (T. 7003-05.) Indeed, Madison has never met his birth father, an absence in his life that became a source of anger for him. (T. 6597.) He never had a positive male in his life to teach him the kinds of things that a father can teach a son.

When Madison was an infant and toddler, Diane was involved with a man named William Miller. Miller was on the scene from March 1978 until 1982, when Madison was ages 1 to 5. Miller is the father of William Jr., Madison's younger half-brother, who is also known as J.R. (T. 7003-05.) During these formative years, both Diane and Miller subjected Madison to harrowing physical abuse.

Some of the abuse to which Madison and J.R. were subjected is documented in contemporaneous social service records. Other abuse almost certainly occurred, but was never reported. The records of the Department of Children and Family Services for Cuyahoga County ("CFS") documented numerous reported instances of abuse and neglect toward Madison and J.R. (T. 6600-01.) These records document allegations of abuse toward Madison himself during 1981 to 1983, and allegations of abuse toward his brother until 1989. (T. 6672-73.) As the experts testified, and common sense teaches, it is extremely unlikely that abuse which continued for six more years would only be directed at one child in the same home. (T. 6715-16, 7083.)

When Madison was not yet 3 years old, there was an allegation that Diane had put him in a hot bath and, when he started screaming that the water was too hot, she allegedly hit him with

an extension cord. And she allegedly stuffed food down his throat on other occasions during this same time frame. There were also allegations of other physical abuse such as picking Madison up by the hair, hitting him in the temple with her fist, and causing him to suffer a black eye. (T. 6601, 7077-78.)

Another report in January 1981, when Madison was 3 years old, was that Diane's boyfriend, William Miller, told Madison to pick up his toys and Madison did not follow the instruction. The report alleges that Miller pushed the three-year-old very hard, into a solid object, and then beat him with a belt striking the lower half of the child's body. After two hours Madison began to vomit and pass out. Around midnight, an ambulance took him to the emergency room of Mt. Sinai Hospital. The records indicate that they found marks and abrasions and contusions on the right or left side of his body as well as in the penis shaft that was swollen, contusions with abrasions in the proximal portion of the glans penis. Madison lost hearing due to this beating. (T. 6602-04, 6597, 7078-83.) It was described as a potentially life-threatening event. (T. 7128-29.)

As a result of this incident, Madison was placed in his grandmother's care for a short while. But he was returned to his mother's custody within a year or so. (T. 6605.) The records do not reflect any intervention by the courts or CFS with Diane and Miller, other than some out-of-the-home counseling. (T. 6716.) This is an example of a protective service agency providing inadequate intervention, and enabling Madison to be returned to an abusive home with cruel authority figures. (T. 7128-29.)

Even after Miller dropped out of the scene, Diane continued to choose boyfriends who were involved with drugs and were physically abusive to her and her children. These abusive males included Cowboy Dave, Robert, Billy Brown, and Timothy Callahan. (T. 7005, 7085-90.) All of these men were abusive, and they subjected Madison and his brother to physical abuse. So

too did his own mother, both by herself inflicting physical and emotional abuse, and by permitting her boyfriends to do so.

Some of this physical abuse is also documented in CFS reports, reflecting that Madison and/or his brother had been whipped or otherwise physically mistreated at home. (T. 6605-06.) The last record of referral to Children Services was in 1989. (T. 6605-07.) But that does not mean the abuse stopped. As the boys got older, Diane and her boyfriends required them to perform repetitive and painful exercises for punishment, such as squats, pushups, and holding encyclopedias out from their body for extended periods. (T. 7084-85.) Billy Brown, for example, ordered Madison to squat in a stress position for hours at a time. If he moved or got up, time would be added. Madison recalled his muscles aching and subsequently being sore for days. (T. 7085-86.)

The experience of childhood abuse and neglect, particularly with the brain still developing, can profoundly impact the victimized person's later development. It makes it very difficult to form healthy social attachments because the person is always on guard. (T. 6614-15.) This was most certainly the case with Michael Madison.

But it was more than just physical and emotional abuse that plagued Madison's upbringing. In addition to subjecting her son to physical abuse, Diane moved around frequently and denied Madison any steady or reliable home base. She also frequently changed her sex partners, or otherwise caused Madison and his brother to live elsewhere with different adults. Indeed, Madison had some 14 to 15 transient parental figures during his developmental years, a situation that injured his relationship capacities and his later social identification, in much the same way as children who go from one foster care setting to another. (T. 7103.) This was combined with residential instability. Madison had at least 21 changes in residence or household configurations by the age of 18 (T. 7104), depriving him of any opportunity to form enduring

relationships with friends or neighbors, or to have any sense of consistency and security. (T. 7105.) And he changed schools at least 7 times between grade 1 through 9. (T. 7106.)

Madison did not graduate from high school. At age 15, he allegedly touched a female student on the breast. He was adjudicated delinquent for a misdemeanor charge of gross sexual imposition in the Cuyahoga County Juvenile Court. (T. 6593-94.) As a result, his mother sent both boys to live with her half-brother, Mohammed Rahim (f/k/a Leonard Madison, Jr.), in Pennsylvania, thinking her brother could provide a better role model and more structure than she was providing. (T. 6593-94, 6599-6600.) Rahim was only 8 years older than Madison, and he was a toxic role model for the troubled young teen. (T. 6628, 7040-45.) In the vernacular of forensic psychology, Rahim "modeled" for Madison numerous "scripts" of inappropriate and unlawful behavior, providing the young teen with examples that such behavior is acceptable within the family. (T. 6624, 6923-24, 6996-97, 7050-54.)

Rahim had first been sentenced to prison at age 18 for sexually assaulting a high school friend, and he was involved in drug trafficking. (T. 7039-45.) He had only recently been released from prison when Madison was sent to live with him in 1993. Rahim had himself been the victim of physical and sexual abuse as a child and teen (T. 7036, 7040-41), and, in turn, he was abusive to the boys: he would punch J.R. in the chest or legs with a closed fist and backhand him with an open hand. (T. 7042-43.) When Madison was 16, Rahim took him to a woman's house and they both proceeded to have sex with her on that same occurrence. (T. 6594-95, 7044-46, 7113-15.) By the time of Madison's trial, Rahim had been in prison since 2002, on a sexual battery offense, with a release date in 2028. (T. 6636, 7030, 7040-43.)

Not long after Madison returned from Pennsylvania, he was convicted in 1999 for a drug offense and spent some time in prison. (T. 6567, 7242-43.) In 2001, he was convicted of attempted rape and drug abuse, and was in prison from 2001 to 2005, from age 24 to 28. (T.

6567, 7406.) Dr. Cunningham testified that, because of Madison's upbringing and developmental trajectories, it was not unexpected that he would wind up offending and in prison. "That is exactly what I would have expected." (T. 6718.) Such prison incarceration in early adulthood, even though legally required, can have a very damaging impact on the individual, and, during this formative period for a young man, can contribute to the formation of identity as a criminal. (T. 7150-51.)

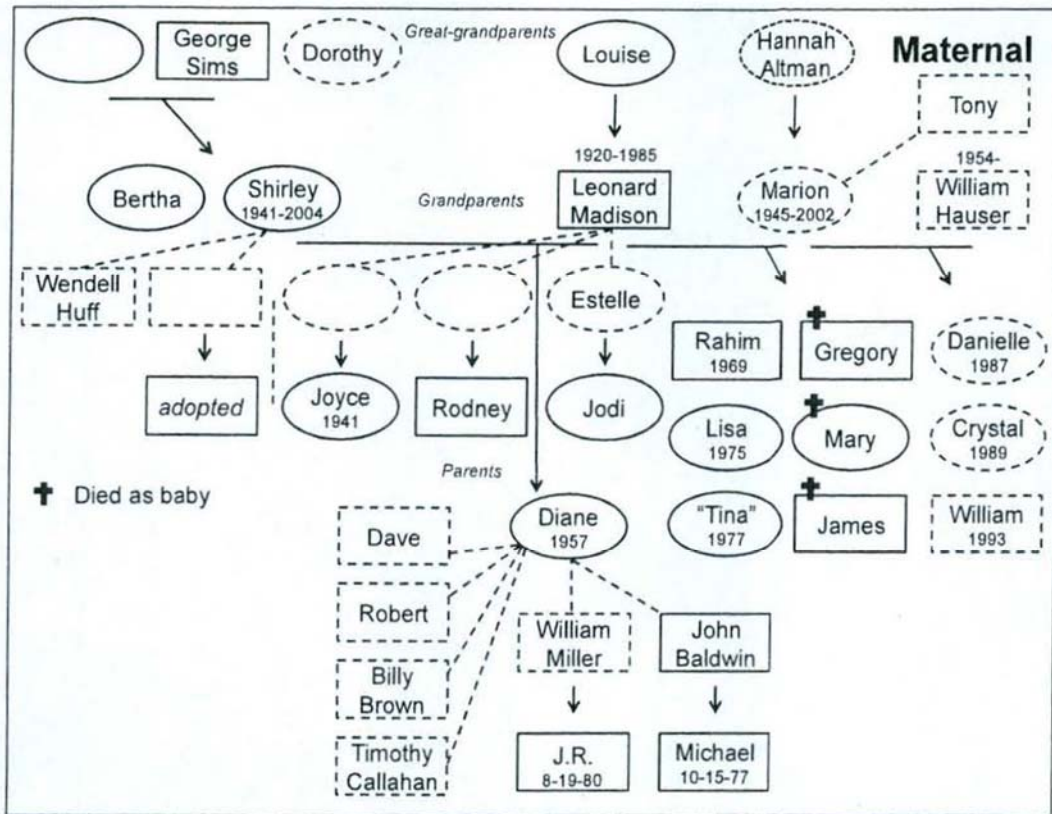
The unfortunate experience of his childhood and adolescence caused Madison to develop deep animosity toward his mother. He expressed an anger and resentment toward her that persists to this day, and was revealed, for example, in the interrogation by the police on July 19-22, and in his interviews by the mental health experts. (T. 6680-85, 6719.)

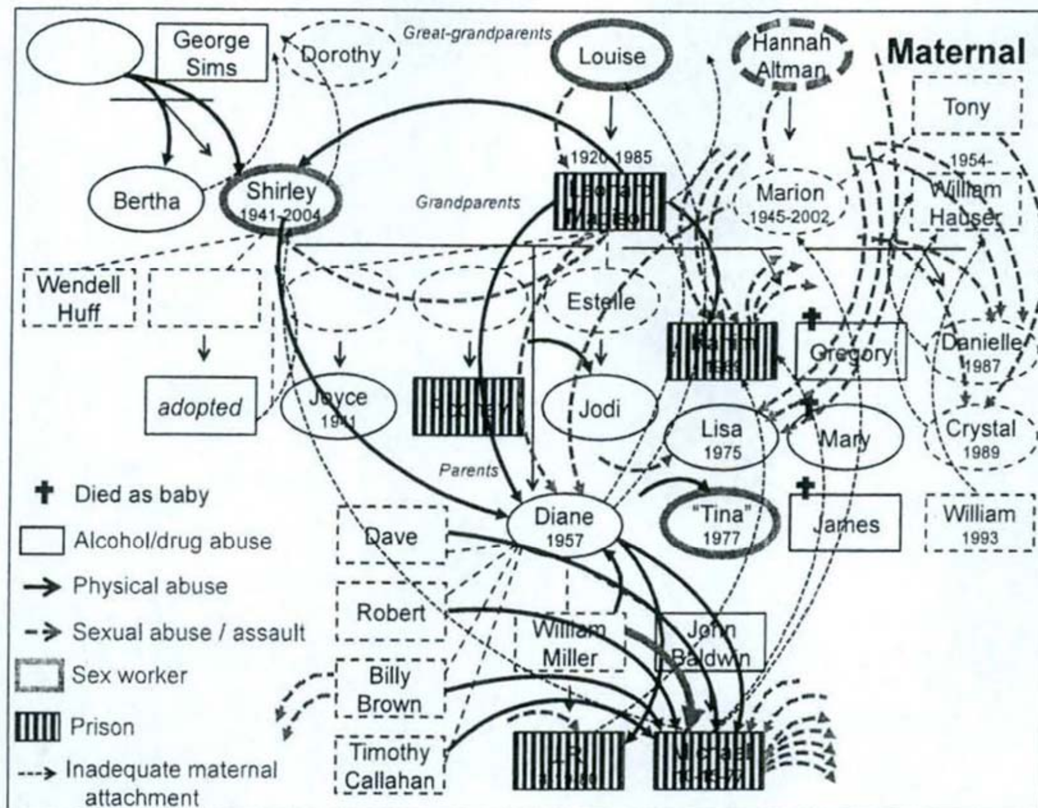
In addition to the abuse that she perpetrated, enabled, and/or tolerated, Diane Madison was not emotionally involved in Madison's life. She was more interested in her boyfriends and material things. Madison felt abandoned and rejected by her. He did not feel that she loved him or even liked him. He perceived her as being unaffectionate with him and emotionally detached from him. She did not participate in child-oriented activities, did not provide nurturing routines like meal preparation or laundry, and she typically addressed him with a tone of irritation. (T. 7069.)

The impact of the lack of maternal bonding on an individual's development is that secure and emotionally nurturing attachments, upon which so much is built, are missing. "When those attachments are disrupted, there is an emotional neglect, particularly in early childhood, that can have disastrous effects essentially shattering the foundation the rest of this person's personality and house is going to be built upon." (T. 7069.)

B. <u>Madison's toxic family history spanned generations.</u>

Michael Madison's outcome was not a random thing. He was the product of a toxic family history that spanned generations. To demonstrate some of this troubling history for the jury, Dr. Cunningham prepared a "Madison family tree," going back three generations, and he summarized the multiple categories of dysfunction that appeared repeatedly across the generations, literally a family tree of abuse, neglect, and criminality. (T. 6920-25, 6997-7007, 7018-53 [Slide 72].)





(Def. Proffer Exh. P-16, Cunningham Report at pp. 20, 22 (Def. Exh. GG); T. 6839, 7513.)

Madison's mother, Diane, was born to Leonard Madison Sr. and a teenager named Shirley Sims, who was 16 years old at the time. (T. 6560-61, 7000.) Leonard Sr. knew Shirley because she was the best friend of Shirley's high school friend, Joyce, who is Leonard Sr.'s *own daughter*. (T. 7000-02.) After Diane was born to Shirley in 1957 (T. 6560), Shirley abandoned Diane when she was only 3 months old, and left her in the care of Leonard Sr., even though his abuse of her is what caused Shirley to flee. (T. 6560-61, 7033-34.) Shirley wound up in California, where she became a prostitute and heroin addict. Diane did not see her mother again until she was 20 years old. (T. 6560-61, 7002, 7036.)

Diane was raised by Leonard Sr. for four years, until he went to prison for a year when Diane was age 4. (T. 7034.) Diane was then raised by a madam, named Louise, until Leonard Sr. was released. Leonard Sr. abused Diane throughout her formative years, both physically and

sexually. (T. 6560-62, 7001-04.) He regularly molested her from the ages of 6 to 12. The abuse occurred approximately every other week when her father took her out riding in the car and consisted of his fondling her. (T. 7034.) In later years, Shirley Sims reported to Diane that she had tried to take Diane with her when she left for California, but Leonard, Sr. threatened to kill her if she did so. (T. 7033-34.)

When Diane was about 10 or 12 years old, Leonard Sr. married Marion, who was 25 years younger than he was, and, at 4' 11" and slender, looked more like a girl than a grown woman. (T. 7034.) Leonard and Marion had three children: Leonard, Jr.—who later in prison changed his name to Rahim Mohammed—and Lisa and Tina. (T. 7004-05.) When Diane was 16, Leonard Sr. tried to get her into bed, where he and Marion were naked, so that he could enlist her in a sexual exchange with them. Diane screamed and ran from the room. (T. 7022, 7034-35.)

Leonard Sr. was also physically abusive to Diane. He whipped the lower half of her body with belts, leaving welts and likely bruises. She has a moon-shaped scar on the top of her head and also across the bridge of her nose from her father striking her across the head and face with a ceramic ashtray for changing the television channel from a football game. On another occasion, Leonard Sr. reacted to the dishes not being washed in the proper order by slamming a pot into the dish water when Diane was handling glassware and causing her to be cut. (T. 7035.)

Leonard Sr. also physically abused his son Rahim Mohammed. These beatings occurred approximately once a month when Rahim was a child, most often with an extension cord. The blows were directed everywhere on his body, including his head, and they resulted in bruises. (T. 7036.)

As monstrous as he was, Leonard, Sr. had himself been mistreated and sexually exploited as young as age 8, in his case by his madam-prostitute mother and her customers. (T. 7003, 7032-33.) He was later adopted by a relative. (T. 7033.) He left school and joined the Army at

age 16 and reportedly served in World War II and Korea. (T. 7032-34.) Little is known about his early adulthood except that he had a daughter, Joyce, in approximately 1941, who was best friends with Shirley Sims, the teenager with whom Leonard Sr. fathered the child who became Madison's mother, Diane.

The family history also revealed substance abuse across generations. (T. 6917-19, 7005-07, 7019.) Diane's boyfriends also abused drugs or were involved in drug dealing themselves. (T. 7094.)

There was also a history of family violence and physical abuse within the family, again across generations, sometimes of a sexual nature. (T. 7018-50.) For example, Leonard Sr. was physically abusive to Shirley and Diane; Shirley was abusive to Diane; William Miller was abusive to Diane, Madison, and J.R.; Diane was abusive to Madison and J.R.; Cowboy Dave was abusive to Madison; Robert was abusive to Madison and J.R.; Billy Brown was abusive to Madison; Timothy Callahan was abusive to Madison; and Madison was abusive toward J.R. (T. 7019-20, 7085-90.) This reflects a "script of aggression in even what would otherwise be considered to be benevolent relationships. It is a source of trauma for the people that are victimized." (T. 7021, 7050-52.)

There are at least five known sex offenders in the family, including Madison. (T. 7030-50.) Studies show a substantial familial aggregation of sexual violence, and suggest that the family system from which an offender comes has a potential role in such offenses. (T. 7030-32)

C. <u>In his developmental years, Madison confronted numerous "adverse factors," and had none of the "protective factors."</u>

The facts about Madison's upbringing and his family history are important not only because they help explain the sources of some of his rage and anger toward women, but also because they enable informed forensic psychologists to assess his situation applying current

research which establishes that a person's disadvantaged background is highly correlated to negative outcomes in terms of mental health and antisocial and criminal behavior. (T. 6620-22.) As explained by Drs. Davis and Cunningham, this research focuses on what are called "adverse developmental factors" and "supportive factors"; the presence or absence of such factors in a person's development enables psychologists to make informed assessments of how that person's perception of available choices may be impacted insofar as becoming involved with or avoiding criminal behavior. The research on which these experts relied enabled the defense to scientifically connect adverse factors in Madison's development with a criminally violent outcome.

Dr. Cunningham, in fact, is one of the leading and most distinguished scholars in the field. A former Naval officer, he is a fellow of the American Psychological Association, the American Academy of Forensic Psychology, and the American Academy of Clinical Psychology. (T. 6823.) He has testified as an expert in some 37 jurisdictions. (T. 6832.) He is the author of the influential book, Best Practices -- Evaluation for Capital Sentencing, one of a series on Best Practices for Forensic Mental Health Assessments published by Oxford University Press. (T. 6620, 6829-30; see also https://global.oup.com/academic/content/series/b/best-practices-for-forensic-mental-health-assessments-gbp/?lang=en&cc=us). In 2006, Dr. Cunningham won the American Psychological Association's annual award for Distinguished Contributions to Research and Public Policy. Most recently, in 2017, he was one of nine scientists—from an international field of 95 nominees from 25 countries—commended by the judges for that year's John Maddox Prize, an international award that recognizes the work of individuals who promote sound science and evidence on a matter of public interest. Dr. Cunningham's commendation was

for "challeng[ing] longstanding misconceptions around the perception of capital offenders." [4] http://senseaboutscience.org/activities/2017-john-maddox-prize/.

Dr. Cunningham's research and expertise are especially useful in capital sentencing proceedings because such sentencing, as a fundamental matter in Ohio, requires each juror, and the judge, to make a moral judgment about an offender's culpability. An elemental psychological reality, and a foundation of some of the relevant research, is that we do not all arrive at our choices from equivalent raw material. It thus follows that the degree of "blameworthiness" for an individual for a capital offense, as with any criminal offense, may vary in each juror's mind depending upon what factors and experiences shaped, influenced, or comprised that choice. The modern research about adverse development factors provides a peer-reviewed and scholarly-grounded framework with which to enable meaningful juror consideration of moral culpability in this unique context. Because a person does not choose to be born into a situation in which adverse development factors predominate, that person, in the relevant respect for capital mitigation purposes, may be viewed as less "morally culpable" than an offender whose development was not so disadvantaged.

As will be addressed more in the Propositions of Law, the trial court, at the aggressive insistence of the prosecutor, *significantly* restricted the ability of Madison's principal expert witness, Dr. Mark Cunningham, to present the available research and some of the principles it teaches as relevant in this context. The court blocked almost any testimony by Madison's experts of adverse factors impairing or limiting "choices." (T. 6932, 6941, 6954-62, 6987-88.) It likewise barred any testimony about the critically relevant concept of "moral culpability." (T.

[4] The winner of the 2017 prize was Dr. Riko Muranaka, of Kyoto University in Japan, for her work championing the use of evidence in public discussions of the Human Papilloma Virus (HPV) vaccine.

6801-12.) Nonetheless, and although the court unfairly restricted Madison's presentation of this critical mitigation evidence, some of the basic principles were presented.

1. Adverse Development Factors.

Drs. Davis and Cunningham identified five categories of developmental adversity that have been identified by scholars. Within each category are a number of "adverse factors" which, if present in a person's upbringing, are known to be toxic formative influences which can have malignant implications for the person's life trajectory. The five categories, and 25 adverse factors as relevant to Madison, are:

I. Transgenerational Category

1. Transgenerational family dysfunction and distress
2. Hereditary predisposition for alcohol and drug abuse and dependence
3. Hereditary predisposition to personality disturbance

II. Neurodevelopmental Category

4. Fetal substance exposure
5. History of head injury
6. History of hypoxia/anoxia (losing consciousness) from trauma
7. Exposure to chronic trauma in childhood

III. Family and Parenting Category

8. Inadequate maternal bonding
9. Father absence
10. Physical abuse
11. Neglect
12. Chronic family conflict and family violence
13. Sequential and transient parent figures
14. Residential and family configuration instability
15. Frequent school changes
16. Parent figure substance abuse
17. Recurrent exposures to sex offenders

IV. Community Category

18. Inadequate protective service intervention
19. Sexual abuse and sexually traumatic exposures
20. Peer isolation

21. Corruptive community

V. Disturbed Trajectory Category

22. Alcohol and drug abuse
23. Disturbed sexuality
24. Prison incarceration in early adulthood
25. Self-reported intoxication at the time of two offenses

a. Transgenerational Category

The "transgenerational" category is concerned with those adverse factors which are transmitted from generation to generation as established by, for example, strong scientific evidence of a hereditary link or other reliable research demonstrating a transgenerational impact. (T. 6917-27.) The principle that alcoholism and substance abuse have strong hereditary components is well known (T. 6919), and was not disputed by the State's expert Pitt. (T. 7531.) The literature also establishes a hereditary predisposition to personality disturbance and the related development of personality disorders, and also to family dysfunction and distress. (T. 6921-25, 7020-21, 7023, 7024-28, 7345-46.)

As Dr. Cunningham explained: "The peer review research identifies that the personality characteristics of a number of different disorders and continuums of disorders have a hereditary element to them. In other words, that's an important part of the story of who develops that disorder." (T. 6922.) He continued: "[H]ereditary factors are [also] specific to characteristics . . . having to do with a reduced appreciation of the humanity of someone else, of what we might call reciprocal social obligation that you fundamentally get that this is another human being who has a life and feelings and those kinds of things. That the deficits in that capability have a hereditary element to them. And it's been observed that that risk is there if any family system members are having that. Mother or father, siblings, mama has this, it increases the virulence of the transmission to her son." (T. 6921.)

The defense attempted to introduce a number of research papers and other studies to support the principle that personality traits and disorders have a hereditary component, but the State objected and the court disallowed that evidence and much of Dr. Cunningham's presentation about it. (T. 7007-09, 7010-18.) The defense proffered these materials. (T. 7117-20; Def. Proffer Exhs. P-2 to P-7, P-9 to P-11.) The State objected to this evidence even though, later, its own expert, Dr. Pitt, agreed with much of the research and affirmed the hereditary links. (T. 7532-33 ("I don't think there is any dispute about the role that genetics, hereditary issues, and environmental issues can play in someone's development. It's pretty straightforward.").)

The defense also presented evidence that family dysfunction has a strong transgenerational component: "families influence each other across generations." (T. 6923.) The research shows that where one generation of a family is exposed to psychologically injuring or traumatizing neglect or abuse, and other corruptive influences, the next generation is more likely to be similarly exposed and damaged. (T. 6925.) This results from a number of factors, but principally includes: (1) the prevalence of "scripts," (2) the prevalence of "modeling" toxic behaviors, and (3) "sequential damage." (T. 6923-26.)

As Dr. Cunningham explained, "[s]cripts [are] the unwritten story of how your life is supposed to go that's based on what you've observed your own family of origin, the stories that you've heard, what you've observed in the extended family or stories you've heard about the extended family, somewhat on your community as well." (T. 6923.)

"Modeling is where you -- is imitation, whether you wanted to or not, when you catch yourself doing the thing your parent said or did that you swore you never would. So that's imitation, even though you might not even have wanted to." (T. 6924.)

Dr. Cunningham explained "sequential damage" as follows: "[For example, if] mama suffered significant psychological trauma and emotional injury as she was growing up[,] she

grows up to be a damaged person. As she has children, she's parenting them out of that damaged background that she has, and out of her own psychological injuries and vulnerabilities, and she goes about that badly. [As a result, she is] [p]sychologically injuring or traumatizing or neglecting or abusing or exposing to corrupted influences the next generation who then grow up to be damaged people psychologically, injured and damaged people, who as they go about their lives exhibit that. And as they are parents, potentially injuring the next generation, and that's part of how you get damaged from generation to generation to generation is that sequential effect. All of these are well accepted principles in the field of psychology about factors within family systems that influence the outcomes of the children growing up in those families." (T. 6925-26.)

Numerous adverse factors under the transgenerational category confronted Madison as he was growing up and developing. His family included multiple generations of family dysfunction and distress, from Louise to Leonard Sr. to Shirley Sims to Diane to Rahim Muhammed to Madison to J.R. There is also a strong and documented family history of alcohol and drug abuse and dependence, which ensnared Madison too. And the hereditary predisposition to personality disturbances also plagued the family, and Madison himself, as demonstrated by the suggestion of the State's expert, Pitt, that Madison suffers from "antisocial personality disorder." (T. 7441-45.)

b. Neurodevelopmental Category.

The "neurodevelopmental" category is concerned with those factors that can impact pathways in a developing brain, as demonstrated in the available research. (T. 6612-18, 6909-10, 6927-28.) Dr. Davis explained the concept this way:

> It's as if you wanted to devise paving for a town. You could do it one of two ways. You could just lay out a bunch of sidewalks and make people walk on them. Or you could wait a little while and see the pathways and then pave over them. And to a great extent that's how the human brain develops. And then also -- as well there's an insulation, something called the myelin sheath, the white matters send the signals also. And so as we are growing, we develop those

> pathways. If you read to a child very early, then that pathway develops. If you don't read, if you don't verbally stimulate a child, then those don't.

(T. 6613.)

He testified the category is distinct from, and not dependent upon, the presence of brain damage:

> Some of the most famous research in developmental psychology was the Spitz Foundling Home Study where he found that kids who were not touched or held as infants died. And actually what he did to turn around that nursing home was -- this was all -- the reason they weren't being touched and so forth, that was back when antiseptics were discovered. Everybody was wearing white and put up sheets around the beds. The staff were all gowned and gloved. There was no contact with the baby. So he came in and tore down the sheets, had them pick up the babies and interact with them and the infant mortality rate dropped. But that also – it's the ability to form attachments.
>
> [Attachments are] [b]ondings to other human beings, love, a sense of connectedness, a sense of being taken care of. If you have what we would call unstable or insecure attachments, then those pathways in the brain that allow for that to happen don't develop. You know, we're not really talking about brain damage here, we're just talking about how the brain develops. And we have seen in the research that youth who have been abused, one of the things that also happens is you're in a cave, a constant fight or flight, that very primitive reaction where you have to defend yourself. And the person that has done the most research about this, Bruce Perry, talks about these kids being in a perpetual state of fear so they're always on guard, which then also makes it difficult for them to form healthy social attachments because they're wiring is such -- to use a metaphor, that they are always on guard. And that goes into the use-it-or-lose-it sort of thing.

(T. 6613-15.)

Adverse factors that exist under the neurodevelopment category include history of head trauma, chronic trauma exposure, substance abuse by the parent, poor diet, neglect, and similar things that can result in damage to or underutilization of a developing brain's pathways. (T. 6622, 6927-28.) Again, the presence of these factors does not mean the person is brain damaged,

or even that objective indicia of such developmental impairments would be seen when the person reaches adulthood. They are, instead, factors which, as confirmed by the research, correlate with poor outcomes. (T. 6622, 6927-35.)

The State objected to some of Madison's evidence about the neurodevelopment category and its significance. In the State's view, some of the adverse factors in this category pertain to brain functioning, or suggest the presence of brain damage, and thus required neurological testing by a neurologist or neuropsychiatrist, and were beyond the expertise of forensic psychologists like Drs. Davis and Cunningham. (T. 6799-6800, 6810-15, 6856-63, 6955-60.) The defense strongly resisted these objections, including because forensic psychologists routinely draw conclusions from such factors and the prevailing literature supports such conclusions. (T. 6856-63.)

The court agreed with the State in some respects. (T. 6862-63 ("[H]e can testify as to what he learned, you know, historically, what was told to him and that it could cause a brain injury. But he cannot testify that there is brain injury."), 6914-17, 6960 ("Can you ask him, do you have something you label as faulty wiring and what is it? And if it implies any kind of neurological damage, then I will not allow it.").) Ultimately, the court permitted the defense to present testimony about the neurodevelopment category, but it barred any testimony about brain damage and, at the State's request (T. 6975-76), provided a cautionary instruction that when the defense talks about "wiring" they "are not talking about brain injury or brain damage." (T. 6979.) It also barred the defense from presenting supporting evidence for its conclusions as to some of the adverse factors within this category.[5]

[5] The defense again proffered the evidence it was barred from presenting. (T. 7118-19; Def. Proffer Exhs. P-9, P-10, P-11.)

Although constrained by these rulings, the defense experts presented evidence that four adverse factors under the neurodevelopment category confronted Madison as he was growing up and developing. His mother's unexpected pregnancy at age 19, and her heavy drinking while pregnant, subjected him to the risk of fetal substance exposure. (T. 6927-29, 7054-57.) Madison sustained head injuries as a result of the physical abuse and harsh discipline to which he was subjected, including during the life-threatening situation, at age three, when William Miller's abuse caused him to vomit and pass out. (T. 6623, 6927-29, 7058.) There was at least one instance in childhood when Madison was "choked" by his mother to the point of passing out, thus constituting another occurrence of hypoxia. (T. 7060.) And the chronic stress and trauma, to which he was exposed throughout his childhood, was recurrent and unrelenting. It included disrupted primary attachments, poor maternal bonding, exposure to an emotionally volatile and chronically irritable mother, physical and emotional abuse, emotional and supervisory neglect in middle childhood and his teens, father absence, sequential stepfather figures, residential and family configuration instability, recurrent school changes, sexual abuse (such as the incident at age 3 with injuries to his penis), and peer alienation. (T. 7060-61.)

Dr. Cunningham explained the neurodevelopmental impact of such relentless stressors on a young child and developing teen:

> [T]he trauma and stress in childhood don't just create bad memories or even faulty programming about how you relate. It actually results in changes in the electrical activity and chemistry and even anatomy of the brain. The brain adapts to that context. And so that's a -- it has to do with the plasticity of the brain, the adaptability of the brain. While the brain is adapting to that stress environment, those adaptations are not healthy for how you relate in nonadversarial, nonconfrontational setting. In other words, it doesn't equip you well for normal life; it equips you for being on chronic wartime footing.

> So research findings that are psychophysiologic effects, neurohormonal chemical accounts and also neuroanatomical effects from that exposure to chronic stress.
>
> Q. Is there a nexus between childhood trauma and violent conduct later in life?
>
> A. Yes, sir.
>
> Q. What is that nexus?
>
> A. The experience of childhood trauma has – most simply, it increases the likelihood -- neglect, abuse in childhood increases the likelihood of criminal offending and violent offending in adulthood. The effects are sometimes, and maybe even many times, delayed, where the injuries that are happening in childhood may not be immediately apparent, but instead then arise many years later. Some of the -- one scholar regarding the traumatic literature talks about trauma in childhood as being like rheumatic fever in childhood; a person recovers from it but years later develops congestive heart failure from that. Trauma in childhood can have a similar sleeper effect. The effects of it may not be evident for many years.

(T. 7061-62.)

c. Family and Parenting Category

The category of "family and parenting" is self-explanatory. It is concerned with "any adverse factors, any injuries that are occurring within a parent/family relationship." (T. 7064-65; see also T. 6625.) Some of it overlaps with other categories.

Evidence was presented that Madison's family history included ten adverse factors within the family/parenting category: **(1)** inadequate maternal bonding, **(2)** father absence, **(3)** physical abuse with genital injury, **(4)** neglect, **(5)** chronic family conflict and family violence, **(6)** sequential and transient parent figures, **(7)** residential and family configuration instability, **(8)** frequent school changes, **(9)** parental figure substance abuse, and **(10)** recurrent exposures to sex offenders. (T. 6928, 7065-7115, 7121-27.)

There was strong evidence establishing each of these ten adverse factors, some of which was detailed above in subsections A and B of this section of the Brief. In Madison's childhood, there was inadequate bonding, neglect, abuse, and instability. He did not recall some of the abuse, other than a memory of a long room. (T. 6588.) This is typical. Many people do not recall trauma as a way to psychologically protect themselves. This is called disassociation, where if a memory is too painful, the person blocks it out of his memory. (T. 6588-89.)

In addition to the substantial evidence supporting the presence of these ten adverse factors in Madison's development, the defense also presented the science that establishes their profoundly negative impact on a developing child and young teen. (T. 6612-38, 7065-7127.) For example, the research shows that those people who are in violent environments are more likely to choose violence as a response. (T. 6635.)

d. Community Category

The "community" category addresses those factors that involve the developing person's experiences in the larger community around them. "[T]hat's another area of exposure for a child and another influence either positively or negatively on the child's development." (T. 7128.)

Evidence was presented that Madison confronted at least four adverse factors within this category:

> **(1)** Inadequate protective service intervention, as demonstrated, for example, by the failure of CFS to provide adequate protective care for Madison after, and in follow up to, the nearly life-threatening abuse he suffered at age 3, and which resulted in continued maltreatment, neglect, abuse, and corruptive exposures as he got older. (T. 7128-34.)
>
> **(2)** Sexual abuse and sexually traumatic exposures in the community, including, for example, a sexual encounter at age 15 with a 35-year-old crackhead, and multiple exposures to graphic sexuality at a very young age. (T. 7135-40.)
>
> **(3)** Peer isolation as evidenced, for example, by Madison's sad inability to form friendships and his extreme reported discomfort, when he was a child, in groups of his peers. As Dr. Cunningham explained:

> He never had a best friend as a child or adult, never went on sleep-overs or birthday parties as a youth, never participated in organized or youth sports or organizations. As he went to high school, he -- even though the racial mix in the high schools varied significantly, he didn't feel more comfortable in one setting than the next. In other words, his discomfort is not about the setting that he is in or whether it's more black or more white in its mix. Instead, it's about his own internal sense of not knowing how, being unable to relate to others comfortably.
>
> Q. What are the implications of peer isolation on a person's development?
>
> A. Well, in the face of the family pathology that is present in his background, it may have been – had he had close relationships with peers, that may have had some supportive or rehabilitative effect on that. Instead he is recurrently experiencing just the opposite. Those relationships are recurrently broken by the instability and by his own lack of capabilities. The peer isolation, peer alienation, rejection, peer harassment, all of those are well-established risk factors for mental health disorders, criminal activity, criminal violence, and sex offending as well.

(T. 7141-42.)

(4) A corruptive community in the sense that Madison grew up exclusively in neighborhoods that were "characterized by low employment, low motivation to work, alcohol and drug abuse, criminal activity, hanging out, drug sales, prostitution, [and] father abandonment of families and children." (T. 7142-43.) Dr. Cunningham testified that numerous studies have established a nexus between community influence and an individual's development:

> [There] is a study that was sponsored by the U.S. Department of Justice, and it looked at the delinquency rates of male teens in three violent neighborhoods, three underprivileged, higher risk zone neighborhoods. And what they found is that 80 percent of the young men in those neighborhoods were involved in felony-level criminality. 80 percent. Almost 32 percent were property offenders. 4.7 percent drug dealers. 7 percent robbers, also likely to commit other offense. 15-and-a-half percent property offenders and drug dealers. 19 percent assaults only.
>
> So you only -- again, it's not that all of them were involved in criminality, but 80 percent were.

> Now, any time you have 80 percent of the young men in a given zone being involved in criminality, that's no longer a story of the individual deviant choice. That's a social epidemic that is bringing down a whole generation in a given zone.

(T. 7143-44; see also T. 6626.)

e. Disturbed Trajectory Category

The "disturbed trajectory" category involves factors that arise because of the damage that has occurred, thus reinforcing the trajectory toward negative outcomes: "Disturbed trajectory means that the effect of toxic or damaging factors in the wiring or parenting and family and community act like a force that deflects the direction of the person's life. It's like a force that would push the car off the road and into the ditch. Now the longer the car runs along in the ditch, the more it tears up the car. So these are things that happen in response to earlier damage but are within -- are damaging in and of themselves." (T. 6909.)

Evidence was presented that Madison confronted at least four adverse factors within this category: **(1)** alcohol and drug abuse, including near daily use of marijuana from age 19, and heavy drinking and other drug use by the time of these crimes (T. 7145-48); **(2)** disturbed sexuality, which, in Madison's case, drew upon and continued the instances of sexual trauma, sexual perversity, and sexual abuse that were involved in his family tree (T. 7148); **(3)** prison incarceration in early adulthood, as evidenced by his 4-year incarceration for attempted rape in 2001-05, from which he emerged angry at the world and with more "brittle" moods (T. 7149-51); and **(4)** self-reported intoxication at the time of two offenses, those involving Shirellda Terry and Shetisha Sheeley. (T. 7151-52.)

2. Protective Factors.

On the other side of the coin from the adverse development factors are those "protective factors" that can contribute to a positive development, and against delinquency and criminality

and criminal violence. These are factors that may be present in development which "maximize the likelihood of positive outcomes or that insulate this person from the effects to some degree of the bad things that happen." (T. 6980.)

The most powerful protective factor is being female. (T. 6980-81.) Others include:

1. high intelligence;
2. positive social orientation such as possessing natural charisma;
3. resilient temperament;
4. social bonding to positive role models;
5. healthy beliefs;
6. clear standards for behavior; and
7. effective early interventions, such as by social service agencies.

(T. 6980-85.)

Madison did not have any of these protective factors as a child and teen. (T. 6980-85.) "He's not female, his IQ is average, he was socially isolated as a child, and his temperament was certainly not resilient." (T. 6982; see also T. 6709, 7422.) There were no positive role models to boost him up, and encourage him along, and his family system lacked any clear standards for behavior, including those that promote nonviolence and abstinence from drugs. On the contrary, "[t]he family background is unstable, substance abusing, abusive, neglectful." (T. 6983.) He never received the benefit of early interventions to correct the family pathology because no such interventions ever happened. Thus, by the time he was 17, 18, 19 years old, it is "way late in the game," and, metaphorically speaking, the "concrete has hardened." (T. 6984.)

D. The catastrophic accumulation of adverse factors that Madison faced in his developing years, and the absence of protective factors, placed him at substantially greater risk of engaging in criminally violent and anti-social behavior than those not similarly disadvantaged.

As detailed above, Madison's youth and developmental years were plagued with a catastrophic accumulation of adverse factors and an absence of any protective factors. The research establishes that these circumstances placed Madison at a substantially greater risk of engaging in criminally violent and anti-social behavior than those persons not similarly disadvantaged. The research teaches that the more adverse factors to which a person is exposed the more likely he will have negative consequences which continue all the way through adulthood (T. 6627-29), and which "increase the potential of a negative result in a human being" (T. 6630.) The presence of adverse factors can affect the choices a person makes. (T. 6634.) It is not that Madison did not have choices, but the perception of the available choices can be impacted where adverse development factors predominate. (T. 6847-48.)

The greater the number of damaging and impairing factors, the lower the quality of decisional resources the person has available to make good choices. (T. 6846-49, 6930.) The defense experts referenced studies by the FBI Behavioral Science Unit, Department of Justice ("DOJ"), relative to common factors in the childhoods of sexual homicide offenders. These and related studies, which are widely accepted in the field of forensic psychology, report that the deficits which occurred in offenders' childhoods—as reflected, for example, by the presence of adverse developmental factors—are fundamental to ultimately causing such offenses. (T. 6936-55.) The larger the number of adverse factors to which a youth is exposed, the greater the probability that he will choose to behave violently in the community. In Madison's case, for example, he was exposed to the vast majority of the adverse factors identified in the DOJ studies and related research. (T. 6940-55.)

The catastrophic accumulation of adverse factors meant that Madison's outcome was at "grave risk of delinquency and violence." (T. 6952.) It much increased the likelihood "of forming a person who chooses to behave in a toxic fashion." (T. 6979; see also T. 6985.) Dr.

Cunningham explained: “as the risk factors increase and there aren’t very many protective factors, then increasingly large percentage of young men end up being involved in delinquency and violence as those risk factors accumulate. Alternatively, if you’ve got protective factors and very few risk factors, then a very low rate of these individuals end up being involved in delinquency and violence in the community.” (T. 6986.)

It is certainly the case that not all those who suffer with an accumulation of adverse factors commit serial murder, or any form of murder. But the research also establishes that those who commit serial crimes, or who commit murder in general, have a higher instance of serious traumatic childhoods. (T. 6718.) The adverse developmental factors that plagued Madison’s upbringing had a significant negative impact on his ability to make good decisions, much more so than persons not similarly disadvantaged:

> [Madison’s] foundation was not one of coming from a family system that has a healthy rather than unhealthy genetic characteristics in many respects. His early life experience was characterized by neglect and very significant abuse. Emotionally -- emotionally and physically negated. And that nurturance and abuse and chaos continued across his development in a family context, perverse sexuality.
>
> This is a terribly damaged developmental course. This is a -- these are choices that are made on a pretty steep slope as compared to the choices that I might have coming from my own background. And so that’s part of the problem. You get a choice, you just don’t get the same choice. You get a choice that rests on all of the damage of that history.

(T. 7198-99; see also T. 7182-83.)

E. By the time of the events in question, Madison was a profoundly damaged human being, largely due to the family and other circumstances in which his development occurred and over which he had no choice or control.

By the time of his criminal acts at issue here in 2012 and 2013, Madison was a profoundly damaged human being. The cause of the damage was largely due to the family and

other circumstance in which his development occurred and over which he had no choice or control.

As Dr. Cunningham explained:

> In early childhood as that foundation was being poured, it's unplanned pregnancy, unwed mother, fetal alcohol exposure, inadequate maternal bonding and nurturance, physical abuse with head strikes, genital injury, recurrent changes in residence and care.
>
> In middle childhood as we're trying to get a firm workup, there is continued physical and emotional abuse. There is neglect in emotional stability, protective, socialization and guidance arenas, sexual abuse and sexually traumatic exposures, social deficits and interpersonal isolation.
>
> And residential, school and father figure instability as well as instability of household configuration.
>
> In early and mid-adolescence, continuing social deficits and peer isolation, disturbed sexuality, sexual abuse by the mother of a peer, corruptive exposures to his uncle Mohammed.
>
> And then continuing in his adolescence, substance abuse, context of a violent and corruptive East Cleveland community with inadequate support and guidance.
>
> And then in adolescence and early adulthood, disturbed sexuality with attempted rape, prison incarceration as a sex offender, and ongoing substance abuse. **You end up with a very damaged house of a person.**

(T. 7154 (emphasis supplied).)

Among the consequences of the damage Madison sustained are his profoundly mixed feelings and ambivalence toward his mother, in particular, and his hostility toward women in general:

> [O]n one hand he continues to seek the blessing that all kids do from that parent. At the same time he is angry, bitter, disillusioned, disappointed, even enraged about all of the things that happened to him and what he observed and how his experience of having

> [Diane] in control of him and exercising that malevolently and neglectfully.
>
> So he’s got tremendous negative feelings. At the same time he seeks her blessing. He seeks – you know, would like for her to like him, to pay attention to him, to nurture him, those kinds of things. And you see this kind of thing happening in the community as well. He seeks out women a lot, seems to have almost a compulsive need to interact with women. Doesn’t really develop much of an authentic relationship, even the longer term of relationships. Certainly has the capacity to become enraged, verbally abusive, sexually coercive and assaultive and even homicidally violent, tragically.
>
> So his interactions with women in the community also have the -- this two-phase element. And Michael’s statement to law enforcement, he characterized himself as Dr. Jekyll and Mr. Hyde, as if there were two circuits that were operating. And I think that’s descriptive. And descriptive about what he would want from his mother and his rage with her at the same time.

(T. 7179-80.)

It does nothing to illuminate the source of Madison’s psychological damage to apply a label, as Dr. Pitt did, branding Madison with “antisocial personality disorder.” Dr. Cunningham explained, critiquing Dr. Pitt:

> [A]s a forensic mental health expert there is some obligation, particularly in a capital context, to not just describe the topology, not just describe this guy is really screwed up, which is pretty obvious, but instead to offer some perspectives about how -- where that came from. And to what extent did that emerge from what he chose as opposed to what happened to him. And certainly the science of psychology and psychiatry is that etiology in terms of hereditary influences, in terms of neglect and trauma and corruptive sexual experiences and all of these things, that these have a clear relationship to the outcome to psychological disorders, to the quality of relationships that people have, to criminal offending and to the nature of very disturbed sexuality such as exists here.
>
> The science is very clear about those things. Dr. Pitt does not -- besides a passing reference I think to the factors that Dr. Davis said, but in spite of those he still knew right from wrong. That's about as far as we get into the etiology, the causative, the

> developmental factors of where this comes from. So I think it's a profoundly restricted opinion that could lead -- could result in the reader thinking he did self select, not just his conduct on these days, but even how he got here.

(T. 7190-91; see also 7023-26, 7189-90, 7195-97, 7345-46.)

And, because Madison became the damaged human being that his history and developmental trajectory placed him at grave risk of becoming, it is neither surprising nor unexpected that he became involved in serious, even deviant, criminal behavior. Nor is it surprising or unexpected that he would minimize, and even lie about, his culpability for such behavior, and that he would be unable to express remorse or genuine human feeling about his victims, as observed, for example, in the video of the police interrogation and in the excerpts of his video-recorded interview with Dr. Pitt. Those are all consequences of the psychological damage he sustained:

> That these events that he has experienced growing up, that psychologically damaged him, the effect of that is that here in the present, that this is somebody whose sexuality is disturbed, whose sense of social reciprocity is disturbed, whose capacities to take responsibility for himself or to organize his -- and marshal his resources in a productive way that would even give him much life satisfaction out here in the community, all of those things are impaired. So in fact if he could be responsible, you know, in terms of taking responsibility for this, and be candid and authentic about it and fully emote, have emotions around it, then you would -- it would begin to make you wonder, was he in fact even damaged? Because, gee, he's drawing upon resources that reflect that there's a lot there that is workable, healthy, constructive.
>
> When someone is damaged, the effect of that is that they are not able to do those things. So it's almost like the guy is paralyzed. Gee, why don't you get up and walk? Well, because he's paralyzed. One follows the other, and we really wouldn't expect it to be otherwise.

(T. 7174-75; see also T. 7196-97 ("[T]hat is the evidence of being damaged. What did we think all these things were doing to this person? Except to distort their ability to use their own experience to care about other people.").

F. Despite being a profoundly damaged person, Madison presented a very low risk of committing violence in prison.

The defense also presented evidence in mitigation that Madison, despite the damage he has sustained, is at very low risk of committing violence in prison. This evidence was provided by James E. Aiken and Dr. Cunningham.

Mr. Aiken has some 40 years of experience working in prisons, including serving as a warden in South Carolina and serving as director of Indiana's, and later the U.S. Virgin Islands', departments of corrections. (T. 6767-70.) Aiken assessed Madison for purposes of determining his ability to adapt in a highly-structured prison setting and the degree to which he presented a risk of danger to others in prison. (T. 6761-79.) Mr. Aiken opined that Madison's probability of posing a danger to other inmates or staff in a life without parole setting is very low. (6869-70.) This assessment was supported by Madison's record of relatively good behavior during his prolonged stay in the county jail awaiting trial in this case, and also by his age. Mr. Aiken opined that the level of dangerousness of a person entering a highly-structured prison setting at the age of 38 is much reduced from that of much younger prisoners. (T. 6895.)

Dr. Cunningham likewise opined that there is a very low likelihood Madison will engage in violence when confined for life in state prison. (T. 7156-72.) Six factors supported his conclusion that Madison is very unlikely to commit violence in prison: (1) Madison would be age 38 at entrance into the Ohio Department of Corrections on a life sentence; (2) he has a pattern of minor infrequent disciplinary infractions in prison and jail; (3) he holds a GED; (4) he has been convicted of aggravated murder; (5) he will be serving a life without parole sentence;

and (6) he would be subject to special confinement procedures surrounding the nature of his offenses. The seriousness of the offense that sends somebody to prison is not predictive of their violence in prison. Indeed, the rates of violence among capital offenders in prison are very low. (T. 7156-72.)

LEGAL ARGUMENT

Proposition of Law No. 1. **The trial court commits prejudicial error in a capital case when it fails to ensure the defendant receives the adequate voir dire necessary to empanel a fair and impartial jury, free from bias and preconceived opinions about the death penalty, and comprised of jurors capable of imposing a life sentence upon conviction in accordance with the facts and the law, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution, and Article I, Sections 5, 9, 10, and 16 of the Ohio Constitution.**

By any realistic assessment of the State's expected case against Madison, including the video interrogations, this capital case was going to proceed to a sentencing phase. It was therefore essential for jurors to be selected who would be willing and able to reasonably consider the mitigation evidence Madison would present—which is, indeed, very substantial—and to reasonably consider, and not be biased against, sentences other than death. Madison did not receive a jury-selection proceeding that allowed for the identification and selection of such jurors. It was completely denied to him due to an unfortunate combination of an overzealous prosecution and a trial court that allowed the unseemly prosecutorial zeal to interfere with the meaningful and searching voir dire the constitution demands in a capital case.

As a result, the voir dire proceedings in Madison's case were dominated by repeated and numerous groundless objections, and other intended obstructions, by the prosecutor, many of which were sustained or tolerated by the court. Proper areas of inquiry were repeatedly disrupted and/or disallowed, as if the primary concern was to complete the process as quickly as possible, and with insufficient regard for whether the jurors were actually qualified to serve in a capital case. Many were *not* qualified, yet they were permitted to remain in the venire nonetheless. Only

some of these unqualified and biased jurors were able to be excused by Madison with his paltry six peremptory challenges, leaving still others who sat in his judgment while lacking the essential quality for doing so: an ability to fairly consider a life sentence upon conviction for multiple horrendous murders like those the State charged here. Still more were almost certainly similarly unqualified by bias, yet the defense was given almost no fair chance to remove the masks which concealed their disqualifying biases, due to the inadequate voir dire the trial court provided at the prosecution's overzealous urging.

In the end, there were some 88 prospective jurors questioned over the ten days of jury selection, a relatively short amount of time, and small number of jurors, for such a high-profile capital case where there was little question of defendant's involvement in the murders, and which included multiple victims and horrific alleged crimes. Of these 88, half (or 44) were determined to be "death qualified" by the court (T. 3473-75) as a result of the superficial voir dire. Of those 44, at least 12 had been retained on the venire as "death qualified" despite motions by Madison to excuse them for cause (Juror Nos. 3, 5, 11, 12, 29, 31, 34, 37, 40, 43, 53, and 89), and at least another 7 involved such a superficial voir dire, due to the State's obstruction and the court's sustained objections, that the defense was denied any ability to determine if such jurors were qualified or not, thus allowing them to remain in the venire as among those deemed to be "death qualified" (i.e., Juror Nos. 59, 61, 66, 69, 72, 77, and 90). On the other hand, some 13 jurors, of the original 88, were permitted to be excused from those who were deemed "death qualified" based solely on their scrupled religiously-based view that the death penalty is morally wrong.

The twelve jurors selected for service as a result of the inadequate voir dire were: Juror Nos. 5, 7, 9, 23, 24, 30, 32, 35, 39, 40, 42, and 43. The four alternates were: Juror Nos. 47, 51, 52, and 56.[6]

A. General legal principles requiring an adequate voir dire.

Jury selection is critically important in a capital case to ensure that the defendant's constitutional rights are protected. Not just his rights to due process and a fair trial before an impartial jury, but his equally important rights, if he is convicted, to individualized sentencing by a jury willing and able to fairly consider the life sentencing options and any mitigating factors the defendant identifies in support of a sentence less than death. Penry v. Johnson, 532 U.S. 782 (2001); Eddings v. Oklahoma, 455 U.S. 104 (1982). If even *one* juror is unable to perform in that required manner, because of a bias in favor of death or which impairs fair consideration of mitigation evidence, any resulting death sentence violates the defendant's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution, and Article I, Sections 5, 9, 10, and 16 of the Ohio Constitution, and must be set aside.

"Much like cross-examination is the engine of truth in our justice system, voir dire is the engine of selecting a jury that will be fair and impartial." Ellington v. State, 292 Ga. 109, 124, 735 S.E.2d 736, 752 (2012). Thus, while recognizing that trial judges must have substantial discretion to oversee jury selection, the U.S. Supreme Court has held that due process requires that voir dire be sufficient to allow the parties and the trial court to elicit juror bias. "Voir

[6] As the court did at trial, Madison will use juror numbers in this Brief to identify the jurors. The names of the jurors are in their questionnaires, which are part of the record, and the names were also sometimes used during jury selection. To avoid any confusion, the last names corresponding to the numbers are: No. 5 (Battista); No. 7 (Ramirez); No. 9 (Lawler); No. 23 (Slifko); No. 24 (Voll); No. 30 (Jones); No. 32 (Martin); No. 35 (Wieczorek); No. 39 (Poth); No. 40 (Miller); No. 42 (Maloney); and No. 43 (Munroe). The four alternates: No. 47 (Mims); No. 51 (Busser); No. 52 (Larson); and No. 56 (Landek).

dire plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored. 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." Morgan v. Illinois, 504 U.S. 719, 729-30 (1992) (quoting Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (plurality opinion)).

A capital case like this one—because of the multiple female victims, serial aspect of the murders, the sexual nature of the crimes charged, and disposal of the bodies like trash—will inevitably elicit strong emotions. As a result, jury selection in such a case, if done properly, will take a substantial amount of time and require hundreds of prospective jurors. It must not be rushed, as it was here.

"[A] jury selection process of several weeks in length is not unusual in either contemporary or historical terms. '[M]ajor cases have been known to require six weeks or more before the jury is seated.' David W. Neubauer & Stephen S. Meinhold, Judicial Process: Law, Courts, and Politics in the United States 358 (6th ed. 2013)." In re Tsarnaev, 780 F.3d 14, 25-26 (1st Cir. 2015). See also Miller-El v. Cockrell, 537 U.S. 322, 328 (2003) (noting that jury selection in capital murder case took five weeks); James S. Liebman and Peter Clarke, David H. Bodiker Lecture on Criminal Justice: Minority Practice, Majority's Burden: The Death Penalty Today, 9 Ohio St. J. Crim. L. 255, 309-10 & n.258 (2011) (citing New Jersey Death Penalty Study Comm'n, Report at pp. 31 (2007), available at http://www.njleg.state.nj.us/committees/dpsc_final.pdf (noting that jury selection takes four to six weeks in a capital case as opposed to one or two days in an otherwise comparable noncapital case)); Bill Hawkins, Capital Punishment and the Administration of Justice: A Trial Prosecutor's Perspective, 89 Judicature 258, 259 (2006) (noting that, in Texas, jury selection in counties that often handle death-penalty cases typically takes three weeks, while in locales where the death

penalty is a “rare instance” selection “may last much longer”).

Although the trial court has some discretion to determine the scope of permitted inquiry during voir dire, that discretion is “subject to the essential demands of fairness.” Morgan, 504 U.S. at 730 (quoting Aldridge v. United States, 283 U.S. 308, 310 (1931)). Moreover, the Supreme Court has “not hesitated, particularly in capital cases, to find that certain inquiries must be made to effectuate constitutional protections.” Morgan, 504 U.S. at 730.

The general rule of exclusion is that prospective jurors may be excused for cause when their views on capital punishment would prevent or substantially impair the performance of their duties as jurors. Wainwright v. Witt, 469 U.S. 412, 424 (1985); State v. Williams, 99 Ohio St. 3d 493, 499-500 (1999); R.C. § 2945.25. “Moreover, 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.” State v. Jackson, 107 Ohio St. 3d 53, 64 (2005) (citations omitted).

Morgan applied these principles—the reverse of Witherspoon v. Illinois, 391 U.S. 510 (1968)—to hold that a capital defendant is entitled to an inquiry that will “life qualify” his prospective jurors, and thus enable him to remove for cause, on the ground of bias, any prospective juror who will automatically vote for the death penalty in the case irrespective of the facts or the trial court’s instructions:

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

Morgan, 504 U.S. at 729. See also United States v. Johnson, 366 F. Supp. 2d 822, 827-28 (N.D. Iowa 2005).

Morgan viewed Witherspoon's restriction, on the State's exercise of challenges for cause, as a bar to voir dire that is designed to empanel a pro-death jury:

> [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. Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.

Morgan, 504 U.S. at 732 (quoting Witherspoon, 391 U.S. at 522). See also Lockhart v. McCree, 476 U.S. 162, 179-180 (1986).

Morgan stands for the proposition that, in order to ensure the fairness and impartiality of the jury, a capital defendant must be afforded the opportunity to conduct adequate voir dire to determine whether potential jurors are capable of imposing a life sentence upon conviction in accordance with the facts and the law. Morgan, 504 U.S. at 729-34. The Court determined in Morgan that general questions of fairness and impartiality, and ability to "follow the law," are not sufficient to afford the defendant adequate voir dire. Id. at 734-35 ("Witherspoon and its succeeding cases would be in large measure superfluous were this Court convinced that such general ['follow the law'] inquiries could detect those jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath. But such jurors -- whether they be unalterably in favor of, or opposed to, the death penalty in every case -- by definition are ones who cannot perform their duties in accordance with law, their protestations to the contrary notwithstanding.").

"Morgan establishes the *minimum* inquiry constitutionally required to life-qualify a jury." See, e.g., United States v. Johnson, 366 F. Supp. 2d 822, 831 (N.D. Iowa 2005). The defendant must be permitted to inquire whether, in the event of his conviction in the particular case as charged, prospective jurors will automatically vote to impose death no matter what the facts may be in mitigation.[7] And, in order to properly identify those prospective jurors who may be laboring under such a bias in favor of death, it is not sufficient to ask them general questions of fairness and impartiality, or whether they will "follow the law" as instructed by the court. A much more searching inquiry is mandated to ensure an impartial jury.

In order to effectuate constitutional protections in capital cases, such a searching voir dire must include the right of the defendant to ask his prospective jurors questions specific to the case, or the category of case, particularly if the questions deal with subject matter that could reveal impermissible bias on the part of a juror. See, e.g., United States v. Fell, 372 F. Supp. 2d 766, 770 (D. Vt. 2005) (suggesting that "a trial court should allow [case-specific] questions to be asked when they are reasonably directed toward discovering juror bias"); People v. Cash, 50 P.3d 332, 340-43 (Cal. 2002); United States v. Johnson, 366 F. Supp. 2d at 848. To be meaningful, voir dire requires "the revelation of some portion of the facts of the case. An insufficient description of the facts jeopardizes [defendant's] right to an impartial jury. Therefore, some inquiry into the critical facts of the case is essential to a defendant's right to search for bias and prejudice in the jury who will determine guilt and mete out punishment." State v. Clark, 981 S.W.2d 143, 147 (Mo. 1998) (citations omitted).

[7] The Court in Morgan held that the defendant was entitled to ask: "If you found [the defendant] guilty, would you automatically vote to impose the death penalty no matter what the facts are?" Id. at 739.

This rule follows from the recognition in Morgan itself that "general inquiries" are insufficient to "discern" those jurors who, even before the State presents its evidence, will have "predetermined the terminating issue of his trial, that being whether to impose the death penalty." Morgan, 504 U.S. at 734-35. See also United States v. Fell, 372 F. Supp. 2d 766, 769 (D. Vt. 2005) ("The entire premise of the Morgan decision is that highly general questions may not be adequate to detect specific forms of juror bias. Thus, Morgan suggests that, in appropriate circumstances, the parties should be allowed to ask more specific questions to investigate potential bias.").

Therefore, for example, more specific questioning is generally required to empanel a fair and impartial jury in a case involving child victims. See, e.g., State v. Jackson, 107 Ohio St. 3d 53, 65 (2005) ("We hold that in a death-penalty case involving the murder of a young child the defendant is entitled, upon request, to have the prospective jurors informed of that fact and to ask questions that seek to reveal bias."); Ellington v. State, 735 S.E.2d 736, 750-62 (Ga. 2012) (reversing death sentence where trial court disallowed inquiry by defendant to ask prospective jurors whether they would consider all three sentencing options—death, life without parole, and life with the possibility of parole—in a case involving the murder of young children, where that was clearly a critical fact in this case); State v. Clark, 981 S.W.2d 143, 147 (Mo. 1998) (reversing where the trial court refused to allow voir dire questions regarding potential bias arising from the "critical fact" that one of the victims was three years old).

"Every fact need not be disclosed to prospective jurors. Only those critical facts--facts with substantial potential for disqualifying bias--must be divulged to the venire." Clark, 981 S.W.2d at 147. But a capital defendant must be permitted meaningful and discerning inquiry about *at least* those facts and circumstances, as expected to be in evidence based upon the State's charges, which "experience, reason, and common sense indicate will be so influential for at least

some prospective jurors that they will be unable to consider all of the evidence in the case in light of the court's instructions on the law and render a fair and impartial verdict." Ellington, 735 S.E.2d at 760. See also Jackson, 107 Ohio St. 3d at 60-65.

The possibility that one juror might not have fairly considered sentencing options and may have voted for the death penalty, solely because of certain inflammatory aspects of the defendant's crime or its commission, is a risk too great to ignore. "If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence." Morgan, 504 U.S. at 729.

B. The trial court failed to afford Madison a constitutionally adequate voir dire.

The trial court violated the foregoing principles in multiple respects, and failed to afford Madison a constitutionally sufficient voir dire on issues pertaining to whether prospective jurors had disqualifying biases in favor of death. The court erred in multiple respects, including (1) failing to permit sufficiently probative Morgan questioning by Madison's counsel on the essential facts of the case or, even, category of case; (2) placing undue and unconstitutional reliance on "follow the law" questions to retain prospective jurors who had already revealed disqualifying biases in favor of death; (3) barring or unreasonably restricting inquiry by Madison's counsel about the prospective jurors' understanding of their role should the case proceed to a sentencing phase; and (4) refusing to define critical terms such as "aggravating circumstances" and "mitigating factors." Each is addressed below.

1. The trial court failed to permit sufficiently probative questioning on relevant matters likely to reveal bias in favor of death and/or an unwillingness to consider mitigation factors.

Under the principles addressed above, Madison had the constitutional right to inquire about facts and circumstances that might reveal a prospective juror's inability or unwillingness to

fairly consider mitigation evidence or a sentence less than death. This included the right to ask sufficiently probative Morgan questions about those particular facts or circumstances of the case that are likely to inflame biases with at least some prospective jurors, so as to render them unqualified to serve. The trial court repeatedly failed to permit the proper inquiry.

In this case, Madison was accused of killing three women, in serial fashion, after kidnapping each of them and raping one of them, all with sexual motivation and having already been convicted of a sex offense, and then contorting each of their dead bodies so they could fit in garbage bags and be disposed of like trash. The State *chose* to charge the crimes in this way. The prosecutor *insisted* upon being allowed to label Madison to the jury as a "serial killer" throughout the trial (T. 647-49, 794-98, 3935-36, 6223, 6244, 6281, 6330, 6644, 6649, 6653-54, 6661, 6674, 6703-04, 6707-08, 7182, 7229, 7232-33, 7464-65), and chose to include criminal offenses—three counts of gross abuse of a corpse—that made relevant the manner in which the bodies were disposed.

There can be no reasonable dispute that multiple killings by the accused may inflame the passions of even the most dispassionate persons, especially when committed in serial, sequential fashion, and for sexual reasons, and more so when the accused has committed a sex crime before. These essential facts of the State's case are inflammatory to a degree that, based upon experience, reason, and common sense, they are likely to be so influential for at least some prospective jurors that such jurors will not be able to follow the law and the court's instructions when deciding the appropriate sentence. Applying the reasoning of this Court's decision in Jackson, the commission of such serial offenses against three innocent women, one of them only 18 years old and still in high school, will for many people illicit "strong feelings and emotions," such that, when presented with these facts, they may be "unable to remain dispassionate and

impartial when deciding whether the death sentence should be imposed." Jackson, 107 Ohio St. 3d at 65.

Madison was therefore required under Morgan to be allowed to tell the prospective jurors about these essential inflammatory facts—e.g., three female victims, murdered in serial fashion, in the course of kidnapping and/or raping each of them, committed with sexual motivation and where the accused has a prior sex offense, and the bodies were disposed of in garbage bags. And, he was also required under Morgan to then be able to *ask* each juror, in a meaningful way, whether, assuming an accused is convicted of such offenses with those essential charged facts, a death sentence is the only sentence that juror would meaningfully consider. He was also required to be allowed to ask each juror whether, in those circumstances, the juror would be able to meaningfully consider one of the life sentences.

To Madison's extreme prejudice, the court did not allow the required inquiry *at all* for some jurors, and, for many others, it unduly restricted the inquiry so as to make it totally ineffective for achieving any meaningful discernment of the juror's views on the death penalty in such a case. A hasty pace was overemphasized by the court, and zealously pursued by the prosecution, to the detriment of Madison's constitutional rights to a fair trial and impartial jury.

The problems began with the jury questionnaire. The questionnaire the jury venire received included a description of the charged crimes as necessary to inquire about exposure to pretrial publicity. That description provided a very brief summary of the more detailed descriptive information the court would provide to the prospective jurors when it read the indictment to them before the voir dire began. (T. 770-79, 2875-85.) The description in the questionnaire was as follows:

> This case involves the murder of three women, Shirellda H. Terry, age 18, Shetisha D. Sheeley, age 28, and Angela Deskins, age 38, whose decomposing bodies were discovered in garbage bags areas

> around Hayden Rd. in East Cleveland around July 19, 2013. Ms. Deskin's remains indicate that she was strangled. Ms. Terry's remains indicate she also was strangled and sexually mutilated. Ms. Sheeley's remains indicate she was beaten to death. (homicidal violence). Michael Madison is accused of these three murders, in addition to kidnapping the women and abusing their corpses. Some of you may have heard or read something about this case in the media. . . .

(See, e.g., Jury Questionnaire, Juror No. 5, at pp. 8.)

Madison also wanted the questionnaire to include an initial Morgan question that would at least describe the offense of aggravated murder in neutral terms, and which would then prompt more discerning Morgan questioning during voir dire, depending upon the respective juror's answers. Madison proposed the following question, as Question 35, for inclusion in the questionnaire:

> 35. If you and 11 other jurors all agree beyond a reasonable doubt that a defendant charged with murder, intentionally, after thinking about it, premeditated the taking of human life, without any legal justification or excuse such as self-defense, defense of another, insanity, duress, intoxication, accident, or heat of passion, and that person unlawfully wanted to kill, and in fact then killed another human being, and you were convinced beyond a reasonable doubt that you had the right defendant, do you believe that the death penalty is the only appropriate penalty for that guilty murderer?
>
> __Yes __No
>
> Please explain why or why not?
>
> (a) Would a sentence of life in prison without any possibility of release also be an appropriate sentence? Please explain why or why not?
>
> (b) Would a sentence of life in prison with the possibility of parole after 30 full years also be an appropriate sentence? Please explain why or why not?
>
> (c) Would a sentence of life in prison with the possibility of parole after 25 full years also be an appropriate sentence? Please explain why or why not?

(Def. Proposed Questionnaire, Question No. 35; see also No. 335, Motion to Reconsider, filed April 1, 2016.) The State objected to Question 35. (T. 667.) Madison argued in response that Question 35 is precisely the type of question the defendant is permitted to ask under Morgan. (T. 661-82, 747-52.) The court sustained the objection and did not allow Question 35. (T. 748.) That question was ordered to be deleted from the questionnaire, and the questions were renumbered.

The court's refusal to permit even *that* basic Morgan question—one which did not include any of the specific circumstances of the charged offenses likely to inflame some jurors—was contrary to Morgan and to Madison's right to a constitutionally adequate voir dire. But the court only compounded the error, at the prosecutor's urging, during the voir dire itself.

The court failed to permit Madison's counsel to pose proper Morgan questions to at least 24 of the 88 prospective jurors, and this group of 24 was largely comprised of those jurors with strong feelings in favor of the death penalty for murder. Some examples are detailed in Proposition of Law No. 2, and are incorporated here by reference. The 24 prospective jurors for which the trial court failed to permit, and/or unreasonably restricted, the constitutionally required inquiry are as follows: Juror No. 3 (T. 850-890); **Juror No. 5** (T. 993-97); Juror No. 11 (T. 1105-25); Juror No. 12 (T. 1164-87); Juror No. 15 (T. 1252-68); **Juror No. 23** (T. 1441-50); Juror No. 29 (T. 1557-67); Juror No. 31 (T. 1631-35); Juror No. 34 (T. 1734-38, 1752-56); Juror No. 37 (T. 1847-71, 1906-21); **Juror No. 40** (T. 2012-17); **Juror No. 43** (T. 2126-30); **Juror No. 47** (T. 2304-12); Juror No. 48 (T. 2368-72); **Juror No. 51** (T. 2420-26); **Juror No. 52** (T. 2447-61); Juror No. 53 (T. 2481-90); **Juror No. 56** (T. 2575-76, 2592-92); Juror No. 59 (T. 2677-82); Juror No. 61 (T. 2714-18); Juror No. 65 (T. 2781-85); Juror No. 72 (T. 3050-54); Juror No. 89 (T. 3378-85); and Juror No. 90 (T. 3414-23). The eight jurors identified in **BOLD** in the list above, ultimately sat on the jury that recommended Madison's death sentences (Nos. 5, 23, 40, 43), or were one of the four alternate jurors (Nos. 47, 51, 52, 56).

The prosecutor's objections to the Morgan questions the defense sought to pose were groundless and designed to obstruct Madison's searching voir dire. The objections were also disingenuous. The prosecutor argued in closing argument in the guilt phase the *very same facts* about which the defense had unsuccessfully sought a probing voir dire via the attempted Morgan question: "And tell the truth to this defendant. Return a verdict of guilty of every single count and specification in this indictment. Find him to be a serial killer. . . . Find that the man who killed these three women without provocation, without justification, without excuse as part of a course of conduct was this defendant, Michael Madison." (T. 6281-82.) Yet, Madison's efforts to frame a Morgan question, that inquired whether jurors would be able to consider a sentence other than death for an accused charged with precisely those requested "findings," was repeatedly obstructed by the prosecutor and disallowed by the court.

Madison diligently preserved his objections to the court's repeated failure to permit the proper inquiry and/or to the court's unreasonable restriction of that inquiry. See, e.g., Overriding Objections Applicable to all Jurors (T. 1332-46, 1699-1704, 1738-54, 1826-33, 2074-76, 2936-37); Juror No. 3 (T. 859-68, 938-44); Juror No. 11 (T. 1126-27); Juror No. 12 (T. 1187-96); Juror No. 15 (T. 1305-11); Juror No. 29 (T. 1568-70, 1606-12, 1699-1704); Juror No. 31 (T. 1645; No. 345, Defendant's Written Objections, filed April 7, 2016)); Juror No. 34 (T. 1738-54, 1769-73); Juror No. 37 (T. 1874-1906, 1922-28, 2069-72); Juror No. 40 (T. 2021-25); Juror No. 43 (T. 2130-41, 2162-64); Juror No. 48 (T. 2523-24); Juror No. 51 (T. 2523-25); Juror No. 52 (T. 2523-25); Juror No. 53 (T. 2499-2501, 2523-25); Juror No. 56 (T. 2577-91).

With some prospective jurors, Madison objected because the court's restrictions on the questioning denied Madison's counsel sufficient information to make an informed decision as to whether to challenge the juror for cause. See, e.g., Juror No. 52 (T. 2461-62, 2525); Juror No. 59

(T. 2694-95); Juror No. 61 (T. 2730-31); Juror No. 65 (T. 2794-96); Juror No. 72 (T. 3057); Juror No. 89 (T. 3399-3403); Juror No. 90 (T. 3430).

The trial court's persistent failure to permit the proper inquiry, as required by Morgan, denied Madison the adequate voir dire to which he was entitled. This error denied Madison a fair opportunity to determine if members of the venire harbored disqualifying prejudices, in favor of a death sentence and/or against any of the life sentences, due to the inflammatory nature of the charged crimes. It resulted in a jury that was not impartial.

2. The trial court placed undue and unconstitutional reliance on "follow the law" questions, including to retain prospective jurors who had already revealed disqualifying biases in favor of death.

The court compounded its failure to provide Madison an adequate voir dire by repeatedly using, or permitting the prosecutor to use, superficial "follow the law" questions with dozens of prospective jurors.

The trial court relied upon or permitted improper "follow the law" questions with at least the following members of the venire: Juror No. 3 (T. 840-94); **Juror No. 5** (T. 958-975); **Juror No. 7** (T. 1022-27); Juror No. 11 (T. 1105-20); Juror No. 12 (T. 1164-87); Juror No. 15 (T. 1262-64, 1292-95); **Juror No. 23** (T. 1435-38, 1449-50); Juror No. 29 (T. 1549-52, 1556-57); Juror No. 31 (T. 1620-29); **Juror No. 32** (T. 1649-51, 1656-60); Juror No. 34 (T. 1715-19, 1723-33); Juror No. 37 (T. 1838-41, 1854-56, 1862); **Juror No. 40** (T. 1998-2002, 2003-08, 2014); **Juror No. 42** (T. 2041-44); **Juror No. 43** (T. 2086-89, 2101-02, 2107-12, 2141-44); **Juror No. 47** (T. 2295-96, 2299-2301, 2307-08); Juror No. 49 (2387-93); **Juror No. 51** (T. 2408-10, 2416-19); **Juror No. 52** (T. 2438-41, 2445-47); Juror No. 53 (T. 2469-71, 2475-81, 2484-85); **Juror No. 56** (T. 2546-52, 2556-70); Juror No. 57 (T. 2608-13, 2616-20, 2631-32); Juror No. 59 (T. 2672-73); Juror No. 61 (T. 2707-09); Juror No. 65 (T. 2775-80); Juror No. 66 (T. 2804-08, 2812-13,

2823); Juror No. 68 (T. 2840-46, 2855-60); Juror No. 69 (T. 2901-09, 2920-22, 2929-30); Juror No. 71 (T. 2970-76, 2980-91); Juror No. 72 (T. 3030-33, 3041-45); Juror No. 77 (T. 3124-26, 3128-39); Juror No. 80 (T. 3186-90); Juror No. 89 (T. 3365-68, 3372-75); and Juror No. 90 (T. 3419-21).

This included using such "follow the law" questions to permit the retention of jurors whose bias was strong enough to demonstrate that, or to at least suggest grave doubt about whether, the juror's views prevented or substantially impaired that juror from doing his/her duties in accordance with the court's instructions and the juror's oath. See, e.g., Juror No. 3 (T. 840-85); **Juror No. 5** (T. 1002-04); Juror No. 11 (T. 1105-20); Juror No. 12 (T. 1132-37, 1164-87); Juror No. 15 (T. 1262-64, 1292-95); Juror No. 29 (T. 1551-52, 1556-57); Juror No. 31 (T. 1620-21, 1627-28); Juror No. 34 (T. 1716-19); Juror No. 37 (T. 1854-56, 1862); **Juror No. 40** (T. 2013-14); **Juror No. 43** (T. 2141-44); Juror No. 53 (T. 2484-85); and Juror No. 90 (T. 3419-21).

Madison's counsel diligently preserved his objections to such repeated improper use of these superficial "follow the law" questions. (T. 861-69, 885-94, 937-49, 1002-08, 1126-27, 1140-43, 1192-95, 1305-12, 1372-74, 1387-89, 1421-23, 1568-70, 1699-1703, 1739-50, 1768-73, 1826-31, 1922-28, 2021-22, 2059-60, 2074-76, 2795-97, 3399-3401.) Madison made eleven motions for a mistrial because of the court's failures to provide the searching voir dire to which he was entitled, all of which were denied. (T. 938-49, 1007-08, 1128, 1188-99, 1335-40, 1490, 1570, 1740-50, 2163-64, 2795-96, 3014-15.) In addition, on two occasions, Madison moved to recuse the judge because the court's rulings concerning the conduct of the voir dire suggested the court was unfairly biased in favor of the State and/or was cooperating with the State in the formation of a tribunal organized to return a verdict of death. (T. 1188-99, 2163-64.) These

motions were also denied.

As a result of these persistent and repeated failures, Madison's counsel was denied a reasonable opportunity to discovery necessary information about at least some of these juror's views about capital punishment such as would allow counsel to make informed decisions about whether to challenge such jurors for cause and/or to support such challenges that were made.

3. The trial court barred and/or unreasonably restricted Madison's counsel from examining prospective jurors about their understanding of, and willingness to accept, the rights and responsibilities they would have as jurors if the case proceeds to a sentencing phase.

Essential to an adequate voir dire in a capital case is that prospective jurors understand, and are willing to accept, the rights and responsibilities that come with jury service in the event the case proceeds to the sentencing phase. Neither the court nor a capital defendant is able to determine if a juror is substantially impaired without making a searching inquiry into the juror's understanding and agreement with these rights and responsibilities. The trial court repeatedly denied and/or unreasonably restricted Madison's counsel from making the required inquiries. Five specific topics of attempted inquiry are at issue here.

First, with respect to many jurors, the court restricted Madison's counsel from inquiring about the juror's understanding that they are each entitled to their own personal moral judgment about the weighing of aggravating circumstances and mitigating factors, and that no one, not even the judge, can tell them how to exercise that moral judgment. Counsel was able to briefly explore the issue of "personal moral judgment" with many jurors, but the inquiry was often obstructed with improper objections, which were sustained, resulting in an inquiry that was very superficial and hardly the searching inquiry the law allows. For example:

> MR. LANE: Okay. And if somebody were to say -- for example, let's say there's a fingerprint, somebody back there says that's not his fingerprint, somebody else says, yes, it is, that analysis is

subject to a scientific level of proof; somebody is absolutely scientifically right, and somebody else is scientifically provably wrong. Are you with me on that?

JUROR NUMBER 3: Yeah.

MR. LANE: Okay. At the penalty phase it's a whole different way of looking at the case because you are no longer simply looking at facts. Ultimately you're looking at the reasons the prosecutor gives for the death penalty, the reasons the defense gives for a life sentence, and then each individual juror does what the United States Supreme Court calls -- makes an individual reasoned moral judgment, a –

MS. FARAGLIA: Objection.

THE COURT: The objection's sustained.

MR. LANE: Judge, I'd like to make a record.

THE COURT: At the --

MR. LANE: I have ten cases I'd like to cite.

THE COURT: And you may do so at a break. Thank you.

MR. LANE: The decision making at the penalty phase, if it gets to the penalty phase, is not only a fact-based way of thinking because every single individual juror makes their own decision and it is based on that individual juror's personal moral judgment. Based on how much weight you want to give the prosecutor's argument as opposed to how much you want to give the defense argument --

MS. FARAGLIA: Objection.

THE COURT: Overruled.

MR. LANE: Thank you, Your Honor. What I'm saying is the decision of life and death becomes a morality-based way of thinking as opposed to a purely factual-based thinking, like the fingerprint example --

MS. FARAGLIA: Objection, Your Honor.

THE COURT: Overruled. Go ahead.

MR. LANE: The fingerprint example is 12 jurors can put their heads together and come up with a scientifically correct answer, but in terms of whether somebody lives or dies because your morality is your morality and how you view the evidence and what you think about things like mercy, for example, all right? Do you believe yourself to be a merciful person?

MS. FARAGLIA: Objection, Your Honor.

THE COURT: Objection is sustained. You don't have to answer that one.

MR. LANE: Again, I have a case I'd like to cite.

THE COURT: You may do so later.

MR. LANE: Everything that has come together in your life to form your morality can be brought to bear on the personal moral judgment you make about whether Michael Madison lives or dies.

MS. FARAGLIA: Objection, Your Honor.

THE COURT: Overruled.

MR. LANE: Are you with me on that? Are you following what I'm saying?

JUROR NUMBER 3: Yes.

MR. LANE: Okay. Now, in context of that decision-making process – an example, let's say you are -- have you ever had the experience in your life of somebody describing their personal religious beliefs to you, for example, and you're thinking politely to yourself that's the craziest stuff I ever heard, I can't believe they actually believe what they're telling me they believe? You had that experience?

JUROR NUMBER 3: Yeah.

MR. LANE: Okay. And under those circumstances, you know, it's America, it's a diverse country, you're thinking they're entitled to whatever their personal morality tells them they can, right?

JUROR NUMBER 3: Yes.

MR. LANE: Okay. And it works for them, but in no way, shape, or form would it ever work for you, right?

> JUROR NUMBER 3: Yeah.
>
> MR. LANE: It's the same thing in determining whether Michael Madison lives or dies because --
>
> MS. FARAGLIA: Objection, Your Honor, to the term "lives or dies."
>
> THE COURT: No speaking --
>
> MS. FARAGLIA: I apologize, Judge.
>
> THE COURT: Ma'am, ultimately at a sentencing phase you would be asked to listen to what's presented by both the state and the defense, if they chose to present something, and then you and your fellow jurors would deliberate and decide what is the appropriate punishment. Do you
> understand that?
>
> JUROR NUMBER 3: Yeah.
>
> THE COURT: All right. And what's required is that you would consider what's being said by everyone, take the law as I instruct you regardless of your personal feelings about it and decide what you think is appropriate.
>
> JUROR NUMBER 3: Yeah.
>
> THE COURT: And would you be able to do that, ma'am?
>
> JUROR NUMBER 3: Yeah.

(T. 874-79.) See also T. 988, 1066-67, 1231, 1536-37, 1560-61, 1600, 1604-06, 1693-96, 1761-63, 1912-13, 1925-30, 1941-42, 1947, 1987-89, 2247-48, 2252-55, 2276-77, 2361-65, 2368-69, 2691-92, 2720, 2827-29, 2933-34, 2936-38, 3204.

Second, the court denied or restricted Madison's counsel from inquiring about the juror's understanding that, in exercising his/her personal moral judgment, each juror is entitled to treat as mitigating against death anything within that juror's discretion, such as, for example, if the juror saw "a spark of humanity" in Michael Madison. For example:

> JUROR NUMBER 5: Yes.
>
> MR. LANE: Okay. Do you know that the law in the State of Ohio says merely seeing a spark of humanity in Michael Madison, if a juror decides that that carries with it the weight of life, they're entitled to that?
>
> MR. McGINTY: Objection.
>
> THE COURT: Objection is sustained.
>
> MR. LANE: If that juror says I saw a spark of humanity in Michael -
>
> MR. McGINTY: Objection.
>
> THE COURT: The objection is sustained.

(T. 999-1000.) <u>See also</u> T. 1031, 1035, 1536-37, 1597-98, 1638-39, 1693-94, 1795-96, 1943-44, 2157-58, 2252-54, 2324-25, 2354-55, 2629-31, 2722-23, 2793, 2828, 2931-32, 2959-60, 3152. Relatedly, the court also denied Madison's counsel from inquiring whether jurors understood that mercy on the part of any juror is alone sufficient to outweigh any aggravation the State may present. <u>See, e.g.</u>, T. 877, 939-44, 2145, 2923-24, 2999-3000. Eventually, at the State's request, the court issued an oral motion in limine to bar the defense from making any references to mercy in the voir dire. (T. 2939.)

Third, the court denied Madison's counsel from inquiring about the juror's duty to respect the personal moral judgment of their fellow jurors as to the relative weighing of aggravating circumstances and mitigating factors. In this respect, counsel sought to ensure that each juror understood that, in the realm of morality-based thinking, there is not one correct answer and, therefore, each juror's personal moral judgment is entitled to respect. The court consistently barred this inquiry. <u>See, e.g.</u>, T. 917-20, 928-30, 1460-61, 1482-84, 1562-63, 1594-95, 1603-06, 1643-44, 1673-74, 1758-59, 1763, 1914-17, 1943-46, 2017-20, 2053-55, 2151-54,

2159-61, 2278-80, 2320-21, 2359-60, 2363-64, 2455-58, 2602-03, 2690-91, 2787-89, 3006-12, 3155-60, 3427-28.

Fourth, the court denied or restricted Madison's counsel from inquiring about the juror's understanding that one juror voting for life means the sentence shall be a life sentence, and that each juror thus possesses that "awesome power of life." See, e.g., T. 921, 1486-88, 1531-32, 1605-06, 1640-42, 1675-76, 1760-61, 2016, 2323-24, 2823-24, 3312-13.

Fifth, the court barred Madison's counsel from inquiring about the prospective jurors' understanding as to whether, if a death sentence is imposed in Ohio, it would actually be carried out. For example:

> MR. LANE: Do you believe that in Ohio if you actually sentence someone to death, that they'll actually be executed?
>
> MS. FARAGLIA: Objection, Your Honor.
>
> THE COURT: The objection is sustained.
>
> MR. LANE: Would you believe that in Ohio if you gave someone a sentence of life without any possibility of parole, that they in fact would never be released from the Department of Corrections?
>
> MS. FARAGLIA: Objection, Your Honor.
>
> THE COURT: Objection sustained.

(T. 1869; see also T. 2148-49, 2287, 2460-61, 2518-19, 2718-19, 2731, 3385.)

The court's restrictions on Madison's inquiry into these five matters were contrary to law, and they further contributed to denying Madison an adequate voir dire and a fair trial. The constitution prohibits a mandatory death penalty. See, e.g., Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). To be constitutional under the Eighth Amendment, a capital sentencing statute must permit jurors to broadly consider as mitigation "any aspect of a defendant's character or record and any of the circumstances of the offense that

the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978); see also Eddings v. Oklahoma, 455 U.S. 104 (1982); Tennard v. Dretke, 542 U.S. 274, 284 (2004).

In a weighing state, like Ohio, this means each juror is required to determine his/her own "reasoned *moral* response" to the defendant's background, character, and crime, as expressed through the weighing of aggravation and mitigation. See, e.g., Brewer v. Quarterman, 550 U.S. 286, 289 (2007). See also Abdul-Kabir v. Quarterman, 550 U.S. 233, 254 (2007); Penry v. Lynaugh, 492 U.S. 302 (1989) (Penry I); Franklin v. Lynaugh, 487 U.S. 164, 184-85 (1988) (O'Connor, J., concurring). **Each juror is required to decide a purely moral question.** Abdul-Kabir, 550 U.S. at 252 (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). "The decision to impose the death sentence is not a product of fact-finding, but rather, a product of jurors' beliefs and experiences. A fact either exists or not, and thus a factfinder may objectively be wrong; **the answer to the question whether someone should live or die is never objectively incorrect because of the moral nature of the question.**" United States v. Con-Ui, 2017 U.S. Dist. LEXIS 58873, at *12-13 (M.D. Pa. Apr. 18, 2017) (emphasis supplied).

Because each juror's weighing calculus, by its nature, will represent a personal moral response to the aggravation and mitigation presented about the unique human being upon whom the juror will sit in judgment, the assignment of "weight" to any factor, and the ultimate result of the weighing calculus, is *exclusively* a matter of each juror's individual discretion, and is *not* controlled or dictated by the court or the law. See, e.g., Eddings, 455 U.S. at 113-115 ("The sentencer . . . may determine the weight to be given relevant mitigating evidence."); see also Simmons v. Bowersox, 235 F.3d 1124, 1137 (8th Cir. 2001), cert. denied, 534 U.S. 924 (2001). Whatever ramifications, for Ohio, this Court may ultimately determine are the result of

the U.S. Supreme Court's decision in Hurst v. Florida, 136 S. Ct. 616 (2016), at least this much is clear: jurors, not judges, are to decide whether the weighing calculus favors life.

The complex moral judgment each individual juror will be required to make has, at its core, the question of mercy:

> Whether mitigation exists . . . is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not. And of course the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy-the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it. . . . [J]urors will accord mercy if they deem it appropriate, and withhold mercy if they do not, which is what our case law is designed to achieve.

Kansas v. Carr, 136 S. Ct. 633, 642 (2016). Indeed, in an earlier capital case from Kansas, the U.S. Supreme Court recognized that mercy is an appropriate mitigating factor. Kansas v. Marsh, 548 U.S. 163 (2006). What's more, it is a constitutional requirement that the jury be "given a 'vehicle for expressing its reasoned moral response to [mitigation] evidence in rendering its sentencing decision.'" Penry v. Johnson, 532 U.S. 782, 797 (2001) (Penry II) (quoting Penry I, 492 U.S. at 328). That means, at a minimum, the jurors must have a vehicle for expressing mercy for the fellow human being whose life will be in their hands. Only then can reviewing courts be sure that the jury "has treated the defendant as a 'uniquely individual human being' and has made a reliable determination that death is the appropriate sentence." Penry I, 492 U.S. at 319 (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976)).

Not only will each selected juror thus be responsible for making his/her own moral judgment on a complex issue that is "mostly a question of mercy," Carr, 136 S. Ct. at 642, but the result of that moral judgment, if it is death, means that the jurors are, in effect, "decreeing death on behalf of the state." Antonin Scalia, God's Justice and Ours, FIRST THINGS (May 2002)

(https://www.firstthings.com/article/2002/05/gods-justice-and-ours). They are each fully responsible for that sentence, and may not be led to believe the responsibility lies elsewhere or that the sentence is unlikely to be imposed due to appellate review. Caldwell v. Mississippi, 472 U.S. 320 (1985) ("It is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.").

Madison's counsel properly sought to inquire about all of these critical issues, but was repeatedly shut down by improper objections and the court's erroneous rulings sustaining those objections. Madison was entitled to know whether his prospective jurors understood, and accepted, that, if the case proceeds to a sentencing phase, each juror shall be required to make a personal moral judgment in the weighing of aggravation and mitigation, and that neither the court, the State, nor the other jurors are permitted to tell that juror how much weight to give any factor in reaching that personal moral judgment. He was also entitled to discover whether prospective jurors understood and accepted the corollary of the foregoing principle, to wit, that each fellow juror's personal moral judgment is entitled to the same respect every other juror may expect and demand for his/her own personal moral judgment. It is not sufficient if each juror is able to commit to deciding the case for themselves, as the court superficially ruled in sustaining objections to Madison's questioning. (T. 1988-89.) Rather, each juror must be willing, on such a morally-based issue, to respect the moral judgment of their fellow jurors. Any juror who is unwilling to do so—because, for example, the juror considers the weighing calculus to be just another fact-based decision the jury will make—is not qualified to serve.

Equally critical for the defense was ensuring that jurors understood and accepted that the weighing process is the vehicle by which mercy can be expressed, an expression that is so uniquely personal that it can literally be inexpressible, and can include, for example, a juror's

recognition in Madison of a "spark of humanity." As Madison's counsel correctly argued, "a juror's desire to show mercy trumps any aggravation." (T. 2936; see also T. 2522 ("I believe the correct statement is mercy can trump any aggravation that the state proves."), T. 2965.) Knowledge and acceptance of those core duties and responsibilities, along with the juror's awareness that each shall possess the awesome power of life upon a matter that rests exclusively in their responsibility, are essential requirements for a juror to be qualified to serve.

The court's rulings, as addresses above, did not allow meaningful inquiry on these critical issues, and, therefore, failed to enable Madison to identify and exclude unqualified jurors. The errors resulted in a jury that was pre-disposed to imposing a death sentence.

4. The trial court failed to define essential terms.

Further compounding its error in jury selection, the court refused to define for the venire essential terms necessary for prospective jurors to understand the process and give informed responses to inquiries about their fitness to serve.

It became increasingly evident as the jury selection progressed, that many prospective jurors were struggling to respond to the most basic questions because they did not know what it meant when a questioner—whether the court, the prosecutor, or the defense—referred to aggravating circumstances and/or mitigating factors. Many questions presumed or were dependent upon at least a basic understanding of those core terms, including questioning seeking assurances that the prospects would engage in weighing of aggravating circumstances and/or mitigating factors, that the prospects understood the law required a recommendation of death if aggravating circumstances outweighed mitigating factors, and that the prospects understood the law required a life sentence if the aggravating circumstances did not outweigh the mitigating factors or were equal. See, e.g., T. 904, 961-63, 1042-43, 1047, 1097, 1134-35, 1353-54, 1432, 1465-67, 1498-99, 1544-49, 1934-35, 1959-60, 2031-32, 2233-34, 2372, 2381, 2505-06, 2546-

48, 2608-09, 2670-71, 2743-44, 2756-58, 2781-82, 2805-07, 2947-48, 2971-7, 3124-25, 3188-89, 3217-18.

But many jurors simply did not understand these unfamiliar legal terms, and some said so. (T. 1073, 1166-69, 1238-39, 1399, 1450-51, 1716-18, 1806, 1971, 2549-50, 2678, 2806, 2973-74, 3150.) The efforts of Madison's counsel to define the terms himself, or to have the court do so, were repeatedly denied by the court. (T. 865-66, 984, 1073, 1166-69, 1193-94, 1204, 1238, 1256, 1415-17, 1427, 1432, 1451, 1465, 1499, 1574-75, 1617, 1649, 1683, 1716-18, 1739-40, 1804-06, 1827-29, 1851, 1861-62, 1959-60, 2000, 2031-32, 2069-70, 2073-74, 2186-87, 2260, 2316, 2337-38, 2372, 2488-89, 2505-06, 2524, 2547, 2549, 2572-73, 2609, 2670-71, 2743-44, 2756-58, 2805, 2948, 2973-74, 3217.)

This refusal was especially prejudicial in Madison's case given the extreme degree to which the court and the prosecutor overused improper "follow the law" questions to overlook or excuse biases in favor of death and against life sentences. (<u>See supra</u> at section (B)(2) above). Such evidently biased jurors, who do not understand core terms on which "follow the law" questions are premised, but nonetheless agree to "follow the law," have not been rehabilitated and are not qualified to serve. The preponderance of follow-the-law questions, with undefined terms jurors did not understand, contributed to denying Madison the adequate voir dire to which he was entitled.

C. <u>Conclusion.</u>

As a result of the errors identified in this Proposition of Law, Madison was denied the meaningful and searching voir dire the constitution requires in a capital case. The resulting jury was not a fair and impartial jury (<u>see</u> Proposition of Law Nos. 2 and 3), nor could it have been, given the court's many errors that enabled the prosecutor to obstruct the jury selection process. Unqualified jurors who were biased in favor of death were permitted to serve, and other similarly

unqualified jurors were unable to be exposed and thus unable to be excused for cause. Madison's conviction and death sentence resulting from such a "tribunal organized for death" must be reversed. He is entitled to a new trial or, at least, a new sentencing proceeding conducted before a properly selected and impartial jury.

Proposition of Law No. 2. **The trial court in a capital case commits prejudicial error and denies the accused due process, a fair trial, a reliable sentencing proceeding, and an impartial jury, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution, and Article I, Sections 5, 9, 10, and 16 of the Ohio Constitution, when it overrules his challenges for cause against nine prospective jurors who were unfairly biased in favor of the death penalty and/or were otherwise unqualified to serve, thereby forcing him to expend all of his peremptory challenges against six of those biased jurors and enabling three of them to sit on the jury that sentenced him to death.**

Even with the constitutionally inadequate voir dire and the trial court's repeated failure to, for example, permit the inquiry required under Morgan v. Illinois, the record still establishes that there were at least *nine* prospective jurors who were ineligible to be seated because of their views about the death penalty and/or about the relevance of mitigation in a case involving the defendant's alleged commission in serial fashion of three aggravated murders and the subsequent disposal of each victim in garbage bags, to wit, Juror Nos. 5, 11, 12, 29, 31, 34, 37, 40, and 43. The trial court's denial of a searching voir dire means there were certainly more than only these nine. But, as to these nine, Madison made challenges for cause, which were denied. He was thus forced to use all six of his peremptory challenges to excuse six of the nine. And, when his requests for additional peremptory challenges were denied (T. 423, 656, 3835-40), he was forced to go to trial for his life with three of these biased jurors still on the panel: Juror Nos. 5, 40, and 43. The death sentence cannot stand in these circumstances. Madison is entitled to a new trial.

A. General Legal Principles Applicable to this Proposition.

The U.S. Supreme Court has held that, under the Eighth and Fourteenth Amendments to the United States Constitution, a capital defendant is entitled to an individualized sentencing by a

jury empowered to consider and give effect to any mitigating evidence that the defendant can produce that calls for a sentence less than death. Penry v. Johnson, 532 U.S. 782 (2001); Eddings v. Oklahoma, 455 U.S. 104 (1982). Given the lengthy video interrogation with Madison's many admissions, and the forensic and cell phone evidence linking the victims with Madison and/or his apartment, there was substantial probability Madison's capital trial would proceed to the penalty phase and thereby require each juror to determine whether the State could meet its burden that aggravating circumstances outweigh mitigating factors beyond a reasonable doubt.

In furtherance of a capital defendant's right to individualized sentencing, the Court has held that such a defendant is entitled to have removed for cause any potential juror so biased in favor of the death penalty that he/she would automatically vote for that penalty regardless of any mitigating evidence. Such a juror, the court explained, will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. The defendant may excuse such a juror for cause if "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." Morgan v. Illinois, 504 U.S. at 728 (quoting Wainwright v. Witt, 469 U.S. 412, 424 (1985)).

The seating of even one juror, whose bias in favor of death would prevent or substantially impair that juror's fair consideration of mitigation evidence, would, if the death sentence is imposed by that jury, disentitle the State to execute the sentence. Ross v. Oklahoma, 487 U.S. 81, 85 (1988) ("Had [the biased juror] sat on the jury that ultimately sentenced petitioner to death, and had the petitioner properly preserved his right to challenge the trial court's failure to remove [the juror] for cause, the sentence would have to be overturned.").

B. Facts Relevant to Madison's Claim that Biased Jurors Were Seated.

The following nine jurors should all have been excused for cause. Their respective views on the death penalty prevented or substantially impaired the performance of their duties as jurors in this particular capital case. The trial court erred in failing to excuse them at Madison's request. Its failure to excuse each of these jurors was, as to each, an abuse of discretion. But that abuse of discretion did not occur in a vacuum. It was the inevitable result of the court's misapplication of the principles discussed above and in Proposition of Law No. 1, and of an insufficient consideration for Madison's right to a capital trial by jurors who would be able to fairly consider his mitigation evidence and who would be open-minded about a sentence other than death. These nine jurors did not possess those constitutionally-required characteristics.

1. Juror No. 5.

The questioning of Juror No. 5 (Ms. Battista) occurred very early during the jury selection, and shortly after the court had denied a challenge for cause as to Juror No. 3 (Ms. Hazlett), the first prospective juror to be subjected to in-court questioning. The voir dire of Juror No. 3 provides a preview of the same types of error that the trial court, encouraged by the overzealous prosecutor, would make again and again, for the ten days of jury selection, to Madison's extreme prejudice.

Juror No. 3, like many of the other nine addressed here, was an easy case of exclusion for cause. That juror had made it very clear in her questionnaire that the death penalty "should be used" in a serial murder case. (Jury Questionnaire ("JQ"), Juror No. 3 at pp. 15.) She repeated her commitment to death when the defense was allowed to ask her at least a semblance of the type of probing question permitted under Morgan:

> MR. LANE: There is really nothing I can show you if he did what they say he did and he wanted to do it and he's legally responsible for doing it, it would be the death penalty, wouldn't it?

MS. FARAGLIA: Objection, Your Honor.

THE COURT: Overruled. Can you answer that yes or no, ma'am?

JUROR NUMBER 3: Yeah.

(T. 884; see also T. 852-53.)

Yet, Madison's motion to excuse Juror No. 3 for cause was denied by the court (T. 889, 894), based *entirely* on the juror's answers, satisfactory to the court, to formulaic, "follow the law," type questions. (T. 857 ("THE COURT: In other words, would you follow the law, even if it doesn't agree with you? As you sit here today -- JUROR NUMBER 3: Yes. THE COURT: -- you think for that kind of crime for the death penalty -- but if I gave you the law and you said the law doesn't fit what I thought, would you follow the law and consider one of the other punishments that's available? JUROR NUMBER 3: Yes. So -- yes.").) These are *precisely* the type of questions held in Morgan to be inadequate for detecting those jurors in the venire who automatically would vote for the death penalty. (T. 886-90; see also Morgan, 504 U.S. at 734-35 ("Witherspoon and its succeeding cases would be in large measure superfluous were this Court convinced that such general inquiries could detect those jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath. But such jurors -- whether they be unalterably in favor of, or opposed to, the death penalty in every case -- by definition are ones who cannot perform their duties in accordance with law, their protestations to the contrary notwithstanding.").) Not only did the court deny the motion for cause, but it criticized the defense because Juror No. 3's voir dire had taken "over an hour." (T. 893.)

Thus, when Juror No. 5's turn came up the first thing the next day, the court had already displayed its unwillingness, urged on by the prosecutor, to conduct the jury selection in a manner

required by the controlling Supreme Court precedent and as necessary to ensure an impartial jury. These errors would continue, over and over again, for the next nine days.

Juror No. 5 described herself as residing in a white/Polish neighborhood, with no crime problems, and a 12-year employee of a large Cleveland law firm, working as a legal assistant. (JQ, Juror No. 5 at pp. 3-4.) As to her views on the death penalty, she checked the box in the questionnaire that it "should be imposed in most, but not all, murder cases." (Id. at pp. 15.) In explaining her views, she wrote: "In certain cases the death penalty is appropriate. That is, if it can be proven without any doubt whatsoever that another life was taken, not in self defense. Sometimes a life sentence is not punishment enough for a vicious crime which end another human being's life." (Id. at pp. 14.) The factor most important to her was strong proof of the person's guilt. (Id. at pp. 16.)

During voir dire, she repeatedly said unequivocally that if an accused was found guilty of these offenses, she would vote to impose death. The following exchange made that clear (and the objections and interruptions by the prosecutor were typical of what occurred throughout the entire jury selection process):

> MR. LANE: So let's start by asking you this. I want you to assume that you and 11 other people have heard a case of aggravated murder, and you and 11 other people have decided beyond a reasonable doubt that the person involved in that case has in fact committed this aggravated murder. They did it knowingly, intentionally, you know, without provocation. There was no self-defense involved, there was no defense of others, there was no defense of property, there was no insanity, there was no legal justification or excuse for it. And let's further say that you have found that it was done in the course of a kidnapping or a rape or multiple homicides, okay? And further you are absolutely 100 percent positive that you got the right guy here, okay? You with me?
>
> JUROR NUMBER 5: Yes.

> MR. LANE: My question to you is: If that all exists, all right, do you believe that the death penalty would be the only appropriate penalty for that guilty murderer?
>
> MR. McGINTY: Objection to hypothetical and law.
>
> THE COURT: Yes. If you could ask one question at a time.
>
> MR. LANE: Well, you understood the hypothetical, right?
>
> JUROR NUMBER 5: Yes.
>
> MR. LANE: Okay. You weren't confused by it, were you?
>
> JUROR NUMBER 5: No.
>
> MR. LANE: Okay. Given those facts and circumstances, do you believe that the death penalty in your heart of hearts would be the only real appropriate penalty for that kind of a guilty murderer?
>
> MR. McGINTY: Objection.
>
> THE COURT: Just a moment.
>
> MR. LANE: May we approach, if you want to --
>
> THE COURT: No, you may not.
>
> MR. LANE: Okay.
>
> THE COURT: I'll allow it.
>
> MR. LANE: Thank you. You can answer that. You want me to say it again?
>
> THE COURT: No. Just go ahead and answer.
>
> JUROR NUMBER 5: Yes.
>
> MR. LANE: Okay. And can you elaborate on why that would be?
>
> JUROR NUMBER 5: Well, I think that the punishment should fit the crime, and I don't know how much I'm allowed to talk.

(T. 978-80.)

She made her views clear more than once:

> MR. LANE: Really what I'm looking to find out, your heart, if Michael Madison gets convicted of what they say he did, in your mind, if it's ultimately going to come down to your personal moral judgment about the appropriate penalty based on aggravation and mitigation, it's the death penalty, isn't it?
>
> JUROR NUMBER 5: Correct.

(T. 986; see also T. 980-81.) She was completely dismissive of any willingness to consider a life sentence with parole eligibility in 25 years. (T. 981 ("Would you ever believe that making him parole eligible after 25 years would be something you could ever vote for for that kind of a guilty murderer? JUROR NUMBER 5: No. Absolutely not.").)

The court interrupted the questioning, and attempted to rehabilitate the juror. (T. 988-90.) But, again, the court sought formulaic, "follow the law" type assurances which are insufficient, under Morgan and its progeny, to unwind the automatic-death-penalty bias that had already been revealed to exist in this juror's heart based upon her answers to the questionnaire and to the more probing questions posed by Madison's counsel. Of course, when the judge looked down upon this legal professional from the bench, and asked if she would weigh everything the law requires, she dutifully responded: "Sure, I would." (T. 989.) But these assurances are meaningless, and, like similarly court-induced representations to "follow the law" which plagued the entire voir dire, do not make a biased juror an unbiased one on the critical issue of the death penalty.

Juror No. 5 was unqualified to serve in *this* capital case because it involved—to use her words—"vicious crimes" which ended not one, but three, other human lives, and for which there was unlikely to be much if any doubt of Madison's involvement. The video interrogation, and the forensic evidence, would settle that. It was going to depend upon mitigation, and, for Madison to receive a fair trial, upon the willingness of his jurors to not only weigh the evidence he would present as to why he was deserving of a sentence less than death, but to also be willing

to *fairly consider* imposing such a sentence if the evidence warranted it. Juror No. 5 was not such a juror and she was, accordingly, required to be excused for cause.

The prosecution of this case was characterized by overreaching at virtually every stage: voir dire was no different. Thus, rather than accept the sound conclusion the record compels, the prosecutor aggressively *advocated* for Juror No. 5's qualification, and, in so doing, betrayed a disturbing lack of concern for a fair trial. Some of the same themes and arguments, that would recur over and over, were used by the State in seeking to persuade the court that Juror No. 5 was not biased: e.g., that Morgan does not permit a question that faithfully describes the State's charged case; that suggesting a murder was committed without excuse is improper because that suggests there is no mitigation, and there is always mitigation; that any prospective juror who is asked the question as framed by Madison's counsel—stating that the defendant "commits serial murders, chops up innocent women, mutilates them, rapes them, kidnaps them, has absolutely no excuse" (T. 1006)—will give the same answer as Juror No. 5; that the defense is attacking the juror unfairly; and that defendant's counsel is playing a "game," "that's his game, [a]nd that's going to be his continued game here." (T. 1004.)

But Morgan *does* permit the very type of probing question the defense put to Juror No. 5, and which the defense tried to present to the other prospective jurors, only to be barred more times than not by the State's objections and the court's rulings. It is critically important for the defendant, and the court, to know if a prospective juror will be an automatic vote for death if the State's case is proven during the guilt phase. That is why a Morgan question, which faithfully captures the essentials of that expected case, is justified and was properly posed to Juror No. 5. The prosecutor should *want to know* if a juror will automatically vote for death in such a situation, and, if the juror will do so, should *want to ensure* that such a juror is not seated. In the circumstances of the case the State chose to bring against Madison, that means finding out the

prospective jurors' answers to questions *exactly* like those the prosecutor (and the court, at the prosecutor's urging) was afraid to let defense counsel ask: Is a death sentence the only sentence you would fairly consider if the State proves to you beyond a reasonable doubt that an accused, intentionally and without justification, murdered three women, in serial fashion (as the State *insisted* upon calling Madison's crimes, see Proposition of Law No. 8), after kidnapping and/or raping them, and then disposed of their bodies in garbage bags? Any prospective juror who would answer "yes" to that question, or similarly framed questions, is unqualified to sit.

Not all would answer "yes," even though many would. There are certainly prospective jurors who, if such a case was proven, would still be able to fairly consider mitigation and a sentence other than death. The prosecutor scoffed at that prospect, repeatedly insisting that not even "the pope" would be willing to consider a life sentence when asked the question in that way. (T. 1333, 1738, 2131, 3069.) But that jaded attitude shows insufficient respect for the ability of a proper voir dire to identify unbiased jurors. It may take more time, and perhaps require more prospective jurors, to identify enough such "life qualified" jurors in a case with facts as disturbing as these. But that additional time and effort is what the constitution commands. Morgan. Juror No. 5 is not such a juror.

Madison's counsel challenged Juror No. 5 for cause on the basis of her automatic-death-penalty bias (T. 1002-03), and he renewed the motion again during general voir dire. (T. 3835-36.) The trial court erroneously denied both motions. (T. 1007, 3836-40.) The court also denied Madison's request for additional peremptory challenges so that Juror No. 5 could be excused. (T. 3836-40.) As a result, Madison was unable to excuse her because all six of his peremptory challenges had been exhausted in excluding *other* jurors similarly unqualified because of a bias in favor of death. (T. 3835-38.) Juror No. 5 thus sat in judgment of Madison and, of course, she

voted to impose the death sentence, just as she said she would do during voir dire. Madison is entitled to a new trial.

2. Juror No. 11.

Juror No. 11 (Mr. Fisher) described himself in his questionnaire as a white male, middle-aged, warehouse manager, residing in the Cleveland suburb of Seven Hills. (JQ, Juror No. 11 at pp. 3-4.) In response to the death penalty questions, he wrote that “the punishment should fit the crime. I am in favor of the death penalty.” (Id. at pp. 14.) He also checked the box that the death penalty should be imposed in all cases involving the murder of a police officer, and was otherwise appropriate in some murder cases and not appropriate in others. (Id. at pp. 14.) He responded that he would be more likely to impose the death penalty in cases of multiple victims if it “shows pattern and intent.” (Id. at pp. 15.)

During voir dire by the court and prosecutor, Juror No. 11 provided the “correct” answers to the typically rote catechism of “follow the law” inquiries. (T. 1096-1102.) Such a stilted inquiry, taking only a few pages of transcript, is effective only in enabling a biased juror to *conceal* his/her true attitudes about the death penalty. It does nothing to illuminate what the juror truly believes about the death penalty or, in the case of Juror No. 11, what his questionnaire responses mean. It was wholly ineffective in determining whether he could be a fair juror for this case.

Because Juror No. 11’s questionnaire responses suggest he may be unable to consider mitigation in those murder cases which he considered to be particularly egregious—such as the murder of a police officer, or cases with multiple murders showing “pattern and intent”—Madison’s counsel reasonably sought to inquire what he meant by those responses, and by his statement that the “punishment should fit the crime.” The court and the prosecutor disallowed the inquiry:

MR. LANE: . . . . I want to ask you about your questionnaire. You said the punishment should fit the crime, okay? What did you mean by that?

JUROR NUMBER 11: I'm not sure if I can elaborate. I mean, if -- I don't know. It should fit the crime based on the law that is written.

MR. LANE: Well, I mean, you know Michael Madison is alleged to have killed three women, right?

JUROR NUMBER 11: Yes.

MR. LANE: Raped one, mutilated one. When you say the punishment fits the crime, I take that to mean, you know, what goes around comes around; what you give out, you get back. That's what he deserves. So if he did this, then the punishment should fit the crime?

MR. McGINTY: Objection.

THE COURT: The objection is sustained.

MR. LANE: Is that what you meant?

MR. McGINTY: Objection.

THE COURT: The objection is sustained.

MR. LANE: What did you mean?

THE COURT: Sustained.

MR. LANE: What did you mean?

MR. McGINTY: Objection.

THE COURT: Go ahead. You asked him the question once. If you can elaborate, feel free to do so. If not --

JUROR NUMBER 11: I think I answered the question based on the law. Punishment should fit the crime that was committed.

MR. LANE: My question now becomes: So if you kill three people and you do all those things, would you in your heart of hearts -- you, this is not a law school quiz; this is you, Mr. Fisher -- would

> you ever realistically consider a sentence for somebody who did these things of making them parole eligible after 25 years?
>
> MR. McGINTY: Objection.
>
> THE COURT: Objection is sustained.

(T. 1113-14.)

After Juror No. 11 then responded affirmatively to the court's inquiry about whether he would "consider all possibilities as I outlined" (T. 1115), the defense sought to inquire about the degree of "consideration" he would actually give. For example, a person might truthfully give assurance he would "consider" climbing Mount Everest, but that assurance is meaningless if the likelihood of actually doing it is zero. Where "consideration" is only perfunctory or superficial, it is no consideration at all. That is precisely why a searching voir dire is essential: to pierce beyond platitudinous responses which conceal what jurors really believe. The court disallowed this inquiry too. (T. 1115-19.)

Madison's counsel challenged Juror No. 11 for cause on the basis of his bias and the court's refusal to allow a meaningful inquiry that would probe beyond platitudes. (T. 1126-27.) The trial court erroneously denied the challenge. (T. 1127.) Madison was thus required to use the first of his six peremptory challenges to excuse this unqualified juror. (T. 3690.) As a result, and had he not been forced to use this and his other five peremptory challenges to excuse jurors who should have been excused for cause, Madison was denied his right to use his peremptory challenges to excuse other jurors he would have excused including Juror Nos. 5, 23, 32, 40, 43, 52, and 56. Madison is entitled to a new trial.

3. Juror No. 12.

Juror No. 12 (Mr. Derbin) is another example of a juror whose exclusion for cause should have been consensual.

The juror described himself in his questionnaire as a white middle-aged male, residing in a Polish/white neighborhood. He is a police officer with 29 years of service, and his son is also a police officer. (JQ, Juror No. 12 at pp. 4-7.) He revealed that he knows five of the ECPD officers involved in the investigation of Madison's case, including two of the detectives who conducted Madison's interrogation, Det. Cardilli and Sgt. Ruth. (JQ, Juror No. 12 at pp. 11.) In response to the death penalty questions, he checked the boxes that the death penalty should be imposed **in all cases where someone is convicted of murder**, and in all cases involving the murder of a police officer. (Id. at pp. 15.) In cases of more than one victim, he responded that he would be more likely to impose the death penalty. (Id. at pp. 15.)

Based on his responses to the questionnaire, the defense argued he should be excused for cause. (T. 1129.) The court appeared to agree, but was persuaded by the prosecutor to at least question him briefly to see if he was "automatic." (T. 1129-32.) In response to the court's questions, he reiterated his view that the death penalty is the punishment he'd impose:

> THE COURT: In your questionnaire, sir, question 34, let me get to that, the question is: Which of the following best describe your views of the death penalty? And you checked: Should be imposed in all cases where someone is convicted of murder. Is that your answer?
>
> JUROR NUMBER 12: Yes.
>
> THE COURT: Now, if we get to a penalty phase -- and we may not because first we're going to have the trial phase, the guilt/nonguilt phase -- as a police officer I'm sure you're aware of this, is that right?
>
> JUROR NUMBER 12: Yes.
>
> THE COURT: And then if we get to the sentencing phase, then if you were chosen as a juror, you and your fellow jurors would decide what is the appropriate sentence, do you understand that?
>
> JUROR NUMBER 12: The death penalty.

> THE COURT: For you you're saying it's the death penalty?
>
> JUROR NUMBER 12: Yes.
>
> THE COURT: Now, I just want you to know the law provides that there are four options. It could be life in prison with parole at -- parole eligibility at 25, life in prison with parole eligibility at 30, it could be life without parole, or the death penalty. Do you understand those would be your four options?
>
> JUROR NUMBER 12: Yes.
>
> THE COURT: Would you consider those four options? If in fact we got to a sentencing phase, would you consider all four of them before rendering your verdict?
>
> JUROR NUMBER 12: I'd have to see all the information to give an honest answer.

(T. 1132-34.)

This juror should have been excused based *solely* on the above responses. He is an experienced police officer who knows the law, and knows what the options are. Yet he made clear, in both his questionnaire and in these initial responses during voir dire, *exactly* where his heart is on a case like Madison's, insofar as the death penalty is concerned.

Predictably, as the questioning by the court continued into the "follow the law" catechism, Juror No. 12 delivered superficial platitudes that he would "consider" what the law required (T. 1134-37), as, of course, any police officer would say to a judge. The defense urged the court that the juror's platitudes are meaningless under Morgan and the controlling law, and that the juror should be excused without further inquiry:

> MR. LANE: I can just say that in any -- if you step back from this juror and take a 35,000-foot look at what we're talking about here, this is a man who says the death penalty should be imposed in every case. You could get Adolf Hitler or Attila the Hun to say, oh, yeah, I'd consider mitigation. That is meaningless. That is a "follow the law" question. That's why Morgan made that illegal because everybody in the world would say that.

> And that’s what this guy is saying. And so now somehow magically everybody in this courtroom knows this guy’s going to impose a death penalty if he gets convicted, there’s no doubt in anybody’s mind, but we’re all pretending like, oh, somehow this is fair, somehow this process is working because he says the magic words, “Oh, yeah, I’d consider everything.” No. You know, at some point this court has to intervene and simply say, “Look, I understand where this guy’s coming from. He’s going to impose the death penalty, there’s really no doubt in my mind, and he’s got a hardship.” So why are we going to waste time sitting down having Mr. McGinty try his best to make this guy a fair and impartial juror when every single person in this courtroom, including this court, knows exactly where he’s coming from?
>
> And I object to continuing with this juror. He has said enough in his questionnaire and in his answers to be excused for cause. His first answer to the Court without even prompting was -- you know, he said death penalty if conviction, and now he’s saying, oh, well, you know, after you say the law says X, Y, and Z, then he starts to backtrack because you’re making him feel like somehow he’s breaking the law. So everybody knows where he’s at. Why are we pretending that he’s going to be fair and impartial? And I object to this.

(T. 1142-43.)

When the questioning of Juror No. 12 resumed after a break, the court, urged on by the prosecutor, did not allow Madison’s counsel to make any meaningful inquiry of the juror about his views, falling far short of what Morgan requires:

> MR. LANE: Now, [Juror No. 12], this is not a law quiz. I know you'll follow the law. I know you'll be a fair individual. I know you -- fairness is extremely important to you. But that's not what I'm asking you about right now. I'm asking you about your attitudes and beliefs. You personally, [Juror No. 12]. Not what the law says. Not what the prosecutor says. Not what the defense says. Not what the judge says. I want to know your beliefs about the death penalty, okay? So that's the context I'm asking you this.
>
> Bottom line, [Juror No. 12], in your heart of hearts, with all honesty, assume they prove everything that the judge said he did. He kidnapped three women, he raped one of them, he sexually mutilated another one, he killed all three of them, and there were no legal defenses. In your mind, would you agree that I could show you mitigation in –

> Mitigation is not an excuse for the crime, all right? Mitigation means he had a rough childhood. Mitigation means, you know, anything that should possibly cause you to feel sorry for him, feel bad, poor Michael. But he's legally responsible for what he did, okay?
>
> Is there any way in your mind you could ever impose any sentence other than the death penalty if you find they've got the goods, they've proved it, and he's legally responsible for doing it? In your heart, truly?
>
> JUROR NUMBER 12: It's --
>
> MR. McGINTY: Objection.
>
> THE COURT: The objection is sustained.

(T. 1163-65; see also T. 1170-75.)

The court likewise would not allow the defense to explain to the jury what mitigation factors are:

> MR. LANE: Right. But she's asking you if you're going to consider mitigating factors, but you don't know what mitigating factors are, do you, from a legal perspective?
>
> JUROR NUMBER 12: No.
>
> MR. LANE: I would like to explain to [Juror No. 12] what these mitigating factors are that he would consider, Your Honor, because that's important in –
>
> MR. McGINTY: Objection.
>
> THE COURT: Yes, the objection is sustained. We've gone over this several times. Do not make extraneous comments.
>
> MR. LANE: I'm not making extraneous --
>
> THE COURT: It is to me.
>
> MR. LANE: I'm making a motion.
>
> THE COURT: It is to me. Please --

MR. LANE: I'm trying to make a motion. Am I being precluded from making a motion, Your Honor?

THE COURT: You may do so at a break.

MR. LANE: I'd like to take a break so we can make a motion.

THE COURT: We're not going to take a break. Go ahead.

MR. LANE: Sir, you don't know what mitigation is under the law; you've said that, right?

JUROR NUMBER 12: Yes.

MR. LANE: Okay. But -- and I understand that the law requires that you consider it. Whatever it is, you'll follow the law, right? I mean, if the judge tells you you got to consider mitigation, and later the judge is going to say this is what mitigation is, you'll consider whatever she says, right?

JUROR NUMBER 12: The facts.

MR. LANE: Right. I mean, whatever mitigation is, whatever aggravation is, she hasn't defined either one of them, has she?

JUROR NUMBER 12: Consider the facts.

MR. LANE: Well, the facts -- yeah. I mean, there is the facts of the case. When you're promising to consider aggravation and mitigation without any definition of what aggravation and mitigation is, it's difficult, isn't it? Because you haven't had it defined for you, right? It's not a trick question. And I'm sorry to put you on the spot.

JUROR NUMBER 12: Okay.

MR. LANE: But do you find it difficult to say yes, I will consider aggravation and I will consider mitigation when nobody has told you what those things are? It's not easy, is it?

JUROR NUMBER 12: Okay.

MR. LANE: Do you agree?

JUROR NUMBER 12: Okay.

> MR. LANE: Okay. So we go back to simply your attitudes about the death penalty. And in your questionnaire you said that it should be imposed in all cases where someone is convicted of murder. That's your belief, right?
>
> JUROR NUMBER 12: Yes.
>
> MR. LANE: Okay.
>
> JUROR NUMBER 12: At the time.
>
> THE COURT: Pardon me, sir?
>
> JUROR NUMBER 12: Yes. When I wrote that, yes.
>
> MR. LANE: Well, you wrote this yesterday, right?
>
> JUROR NUMBER 12: Yes.
>
> MR. LANE: Okay. And you've had these beliefs about the death penalty for presumably years and years, haven't you?
>
> JUROR NUMBER 12: To a point.
>
> MR. LANE: And you believe that it should be imposed every single case where there is a police officer that's been murdered, right?
>
> JUROR NUMBER 12: On duty, yes.
>
> MR. LANE: Yeah. I mean -- and you've held that belief for a long time too, haven't you?
>
> JUROR NUMBER 12: Yes.

(T. 1166-69.)

Madison's counsel challenged Juror No. 12 for cause on the basis of his automatic-death-penalty bias. (T. 1129-30, 1188.) He also moved to recuse the judge and for a mistrial on the grounds that the inadequate voir dire, and the court's rulings, had resulted in a tribunal organized for death. (T. 1187-88.) The court denied all motions and declined to excuse the juror. (T. 1198-99.) Madison renewed the motion to excuse Juror No. 12 for cause during the general voir dire,

and it was denied again. (T. 3652.) Madison was thus required to use the second of his six peremptory challenges to excuse this unqualified juror. (T. 3714.) As a result—and had he not been forced to use this and his other five peremptory challenges to excuse jurors who should have been excused for cause—Madison was denied his right to use his peremptory challenges to excuse other jurors he would have excused, including Juror Nos. 5, 23, 32, 40, 43, 52, and 56. Madison is entitled to a new trial.

4. Juror No. 29.

Juror No. 29 (Mr. Zona) is another example where exclusion should have been uncontroversial. He was unqualified to sit for two reasons. First, he was going to be filing for a divorce in the next week, and he said the divorce would be a distraction that will prevent him from giving the trial all of his attention. (T. 1543, 1553-54.) Second, he was biased in favor of death and would thus be substantially impaired in the performance of his duties as a juror. The presence of either one of these disabilities required his exclusion for cause; the presence of both certainly did.

The juror described himself in his questionnaire as a white middle-aged male who works as a fabric cutter. (JQ, Juror No. 29 at pp. 4-7.) In response to the questionnaire's death penalty questions, he checked the box that the death penalty should be imposed in most but not all murder case. (Id. at pp. 15.) But he left blank many of the questions that sought to explore his views about the death penalty. (Id. at pp. 15-17.)

In his answers during voir dire, Juror No. 29 made clear he was an "eye for an eye" person on the death penalty. All the formulaic platitudes he subsequently assented to about "following the law" (T. 1550-52), could not unwind those frankly expressed beliefs:

> MS. FARAGLIA: And you indicated in your questionnaire here that you said in some cases, so am I to understand -- what does that mean?

> JUROR NUMBER 29: It all depends on if the person is guilty of the crime, if you're proved beyond a reasonable doubt that he's guilty of a crime, that he's taken somebody else's life, then he should give his own life for that life that he's taken.

(T. 1549-50.) With that being his view for taking *one* life, he is plainly incapable of serving on Madison's case with three victims.

Yet, once the prosecutor got Juror No. 29 to incant the proper "follow the law" responses, the court, at the prosecutor's urging, barred any meaningful inquiry by the defense to explore Juror No. 29's troubling "eye for an eye" views:

> [Juror No. 29], in your personal attitude about the death penalty, you just answered counsel's question here that if somebody takes a life and there's no legal justification or excuse for it, it's not self-defense, it's not protecting somebody else, you just go out and you take a life, in your personal opinion that person's giving up their right to life, right?
>
> JUROR NUMBER 29: Yes.
>
> MR. LANE: And can you elaborate on that? Tell me your thoughts on that.
>
> JUROR NUMBER 29: Basically what you just explained.
>
> MR. LANE: Eye for an eye?
>
> JUROR NUMBER 29: Yeah. I guess you could put it that way, sure.
>
> MR. LANE: Okay.
>
> JUROR NUMBER 29: There are cases where –
>
> MS. FARAGLIA: Objection, Your Honor.
>
> THE COURT: Overruled. Go ahead.
>
> MR. LANE: Go ahead. You can keep -- tell me what –
>
> JUROR NUMBER 29: I can elaborate? In certain cases where, you know, you just explained where you have to save another

> life or for self-defense, I can understand it that way, but just to go out and ruthlessly take somebody else's life –
>
> MR. LANE: Right. If somebody intends to kill, deliberative, you know, thinks about it in advance, goes out, kills with no legal justification or excuse, no self-defense, no defense of –
>
> MS. FARAGLIA: Objection, Your Honor.
>
> THE COURT: Objection sustained.
>
> MR. LANE: Well, I'm responding to what you're talking about, okay? The kind of -- you know, a murder that there's no excuse for.
>
> MS. FARAGLIA: Objection.
>
> MR. LANE: It's eye for an eye.
>
> THE COURT: Objection sustained.
>
> . . . .
>
> MR. LANE: That's what I'm getting at, though, which is if you decide that the mitigating factors outweigh the aggravating factors, then yeah, the law says it's a life sentence. But what I'm asking you -- I'm not asking you what you think the law is or what the judge is telling you what the law is. I'm trying to find out your personal beliefs in your operating system internally. I want to know your attitudes and beliefs, not what the law requires. I'm not here to tell you what the law requires. I just want to know where your heart's at. And what I'm hearing you say is if you go out and intentionally kill somebody –
>
> MS. FARAGLIA: Objection, Your Honor.
>
> THE COURT: Objection is sustained.

(T. 1555-58; <u>see also</u> T. 1559-67.)

Madison's counsel challenged Juror No. 29 for cause on the basis of his automatic-death-penalty bias and his distraction. (T. 1568, 1610, 1701-03.) In making the challenge because of the "eye for an eye" views, the defense argued that the court's erroneous restrictions on counsel's inquiry during voir dire had impaired Madison's ability to fully support his motion for cause. (T. 1568 ("[T]he entire voir dire was inadequate for me to explore his attitudes and beliefs about the

death penalty pursuant to Morgan versus Illinois, so I'm hamstrung in my challenge for cause based of this court's blatant disregard of applicable case law from the United States Supreme Court."); T. 1701-03.)

The trial court erroneously denied the exclusion for cause. Indeed, the court denied it *before* even allowing Madison's counsel to make a complete record of the grounds. (T. 1570, 1701-03.) Madison again sought a mistrial, which was again denied. (T. 1570.) Madison was thus required to use the third of his six peremptory challenges to excuse this unqualified juror. (T. 3723.) As a result—and had he not been forced to exhaust *all* his peremptory challenges to excuse jurors who should have been excused for cause—Madison was denied his right to use his peremptory challenges to excuse other jurors he would have excused, including Juror Nos. 5, 23, 32, 40, 43, 52, 56. Madison is entitled to a new trial.

5. Juror No. 31.

Juror No. 31 (Ms. King) described herself in her questionnaire as an elderly African-American female, residing in Cleveland, and retired from her nursing job at a Cleveland hospital. (JQ, Juror No. 31 at pp. 3-4.) She was very familiar with the case from the media coverage. She admitted in the questionnaire that, from the media coverage, she had already formed the opinion that Madison committed the murders. (Id. at pp. 9 ("Almost everything shed a very damning light on the possibility that Madison appeared responsible.").) She also had strong opinions in favor of the death penalty for a "heinous" case, especially if it involved multiple victims and "violence [was] perpetrated on the victim." (Id. at pp. 14-15.) When there are multiple victims, it would "appear the perpetrator is consciousless, has a total disconnect with humanity, is vile, and I feel is certainly one to repeat." (Id. at pp. 15.)

This was another example where the juror agreed with formulaic, leading questions posed by the court and the prosecutor. And agreed to "follow the law." (T. 1617-28.) But when it was

the defendant's turn to question her, and counsel sought to inquire about the bias she expressed for an automatic death sentence for "heinous crimes" with multiple victims—i.e., this case—the court, urged on by the prosecutor, disallowed the probing inquiry compelled by Morgan:

> MR. LANE: What did you mean when you said that? What are these heinous cases that you're talking about?
>
> JUROR NUMBER 31: If it's been proven --
>
> MR. LANE: Mm-hmm.
>
> JUROR NUMBER 31: If it's been proven that all of these things were done and these things are of a heinous nature, and I would say something that's beyond what you would expect from an average case -- if it's something so horrendous that it's not fathomable to you, then I would say it's heinous.
>
> MR. LANE: Now, you heard the judge read the indictment, right?
>
> JUROR NUMBER 31: Yes.
>
> MR. LANE: And you read what was in the questionnaire?
>
> JUROR NUMBER 31: Yes.
>
> MR. LANE: Presumably this is heinous, right?
>
> JUROR NUMBER 31: (Indicating.)
>
> MR. McGINTY: Objection.
>
> JUROR NUMBER 31: If it's proven.
>
> THE COURT: Objection sustained.
>
> MR. LANE: If it's proven. Does that mean that in every one of those kinds of cases from your -- and I'm not -- this is not a legal quiz. I'm not asking you what you think the law of Ohio requires or, you know, what the judge's instructions are going to be. I just want to know your own personal thoughts on this. This is not just a law quiz, a law school exam, but in every heinous case do you believe that the death penalty would be the only appropriate penalty?
>
> MR. McGINTY: Objection.

> THE COURT: Sustained.
>
> MR. LANE: When she sustains it, you don't ever have to answer, okay?
>
> JUROR NUMBER 31: All right.
>
> MR. LANE: When she overrules it, then I'm going to ask you for an answer.
>
> JUROR NUMBER 31: Okay.
>
> MR. LANE: What I'm trying to get at is can you just talk to me, elaborate, you know, your thoughts on those kinds of things?
>
> JUROR NUMBER 31: What I consider heinous, is that the question?
>
> MR. LANE: No. You kind of explained that. But your views on the death penalty in society generally, what do you think about that?
>
> JUROR NUMBER 31: As I wrote in my answer, I believe that it is appropriate in certain circumstances. Others, maybe not. Maybe there's a chance for any of those other penalties.
>
> MR. LANE: What kinds of -- what are you referring to when you talk about in a heinous case versus a nonheinous case?
>
> JUROR NUMBER 31: **I think in a heinous case I would say that all would probably involve the death penalty.**
>
> MR. LANE: Okay.
>
> JUROR NUMBER 31: In lesser degrees of guilt, that there may be other sentences that are more appropriate.

(T. 1630-33 (emphasis supplied).)

Madison's counsel challenged Juror No. 31 for cause on the basis of her automatic-death-penalty bias in a heinous case with multiple victims, just like this case. (T. 1644-45.) The court denied the motion, and, as with Juror No. 29, did so without allowing Madison's counsel to make a record of his reasons for the motion, requiring that he do so at a break. (T. 1645.) The defense

renewed the motion later when the peremptory challenges were being exercised. (T. 3837.) Madison was thus required to use the sixth of his six peremptory challenges to excuse this unqualified juror. (T. 3806.) As a result—and had he not been forced to exhaust *all* his peremptory challenges to excuse jurors who should have been excused for cause—Madison was denied his right to use his peremptory challenges to excuse other jurors he would have excused, including Juror Nos. 5, 23, 32, 40, 43, 52, and 56. Madison is entitled to a new trial.

6. Juror No. 34.

Juror No. 34 (Mr. Cullen) is another example where exclusion should have been uncontroversial. There were extensive discussions during the selection of this juror as to the scope of the Morgan question the court would permit. Then, when the juror even answered *that* question in a way that revealed his bias, the court declined his exclusion.

Juror No. 34 described himself in his questionnaire as a late middle-aged white male, who works as a regional asset manager, and resides in Strongsville. (JQ, Juror No. 34 at pp. 3-4.) He was very familiar with the case from the media coverage. He admitted in the questionnaire that, from the media coverage, he had formed the opinion that Madison committed the murders. (Id. at pp. 9.)

His views on the death penalty, as expressed in the questionnaire, made him ineligible to serve. He believes the death penalty should be imposed in all cases of murder. "The taking of someone's life is the worst crime and should be punished accordingly." (Id. at pp. 15.) He wrote that it does not matter "if it is one life or several lifes [sic]. Believe the death penalty should be imposed." (Id.) In selecting the appropriate punishment for a crime, he believes in the saying "an eye for an eye." (Id. at 16.)

His responses to the court's superficial and leading "follow the law" questions were typically unrevealing about his views on the death penalty or his willingness to consider

mitigation. He gave tepid assurances that he would try to do what the law required. (T. 1717-18 ("I suppose I could," "I think so," "I would try to apply that," "I would believe so.").) His responses to the State's leading questions were similarly unrevealing about his views. (T. 1718-34.)

Once it was Madison's counsel's turn to probe the man's questionnaire responses, which are *alone* disqualifying, there were repeated objections to any questions that sought an explanation. (T. 1737-38.) At a sidebar, the prosecutor aggressively encouraged the court to disallow any of the inquiries Morgan requires. The prosecutor insisted that a question which describes the essential facts of the State's case, and then asks the juror whether death would be the only punishment the juror would consider if the State proves those facts, is not proper unless the question also includes a reference to mitigation factors. (T. 1738-42.) This was the State's "pope" argument all over again: "the nuns at the nunnery would vote for the death penalty" if the question asks only about the crime. (T. 1742.) But, as defense counsel tried to explain, that is *precisely* what Morgan permits a capital defendant to ask:

> Morgan is simply upon a conviction, are you the kind of person who would vote for the death penalty automatically? That's all Morgan talks about. And then Morgan -- and the law in Ohio says you can't be that kind of a person. If you have that state of mind, you can't sit on a capital jury. That's all I'm asking. I'm giving him the definition of aggravated murder, and I'm asking him given only those facts, is it your belief that the death penalty at that point is the only thing you could possibly vote for. You have to ask them a hypothetical about what they vote for. That's what Morgan's all about.
>
> If they're coming in like this guy and they say it's the death penalty -- if you commit murder, it's the death penalty; if you kill someone, it's the death penalty; that guy shouldn't be sitting on this jury because he has the discretion whether -- to decide whether aggravation outweighs mitigation when he's telling us in his questionnaire that -- and orally that every time he has that discretion, you will exercise his personal moral judgment to impose the death penalty.

(T. 1745-46.)

After this discussion continued (T. 1746-54), the court ultimately concluded it would allow Madison's counsel to ask a Morgan question that provided a description of "unadorned aggravated murder after deliberation, intentional, no legal justification or excuse. . . . If you find that person did that thing, is it always the death penalty for you regardless of mitigation." (T. 1754.)

Madison's counsel then proceeded to ask *that* approved question:

> MR. LANE: Now, if somebody were to go out and intentionally kill another human being after deliberation, they thought about it in advance, wanted to do it, went out and did it, okay, no legal justification or excuse, it was self-defense, defense of another, defense of property, not insane, no legal justification or excuse whatsoever, they went out, wanted to do it, did it, okay? For that guilty murderer, in your opinion – not what does the law require but in your opinion -- is the death penalty the only appropriate penalty without regard to any mitigation?
>
> JUROR NUMBER 34: **Yes.**

(T. 1755 (emphasis supplied).)

When Madison sought to excuse this juror for cause, based on his answers to the questionnaire and to the approved Morgan question, the prosecutor demurred. (T. 1769-71.) Defense counsel then detailed his reasons for seeking exclusion:

> MR. LANE: The juror said that he -- in his beliefs, anyone who commits aggravated murder should get the death penalty without regard to any mitigation. That is a challenge for cause under Morgan. He has also said exactly what Morgan anticipated, which is, yes, I will follow the law. I will consider all aggravation, I will consider all mitigation.
>
> Morgan says that's exactly the problem with a typical capital voir dire, and Morgan said that is not an appropriate capital voir dire. But that is the voir dire that we've been going through, though, as to this juror, given the fact that in every case his belief is that the death penalty is appropriate for aggravated murder, and given the

> fact that Ohio law allows him to put any weight he wants to on any aggravating circumstances and any mitigating factor. Because of his state of mind, he will always find that aggravation outweighs mitigation because it's a discretionary call with him. And his own morality tells him this guy should die. He will start from a baseline that Michael Madison should die for his crimes if he gets convicted, and then he will find aggravation outweighs mitigation 100 times out of 100 times.
>
> There is no rational reading of this man's questionnaire or his answers that could possibly make this court believe that he would be a neutral and detached fair and impartial juror. You can't just rely on magic words spoken, I will follow the law, I will consider mitigation. You just read this guy's questionnaire and you say, well, would I want this person sitting on a capital jury if my life is on the line? And the answer is absolutely not because he cannot possibly be fair because the death penalty is what he's going to give Michael Madison. And I cannot stress that strongly enough. We have been playing this, you know -- well, if he says the magic words, he passes muster. But that's not how this works.

(T. 1771-73.) The trial court overruled the challenge. (T. 1773 ("I think you've made your point. He is not excused for cause.").) This juror was excused with Madison's fourth of six peremptory challenges. (T. 3739-40.) As a result—and had he not been forced to exhaust *all* his peremptory challenges to excuse jurors who should have been excused for cause—Madison was denied his right to use his peremptory challenges to excuse other jurors he would have excused, including Juror Nos. 5, 23, 32, 40, 43, 52, and 56. Madison is entitled to a new trial.

7. Juror No. 37.

Juror No. 37 (Mr. Veverka) is another example where exclusion should have been uncontroversial. The juror's views on the death penalty made him unqualified to serve.

Juror No. 37 described himself in his questionnaire as a single white male, of Czech descent, who works in hotel maintenance and resides in the Parma area. (JQ, Juror No. 37 at pp. 3-4.) He was slightly familiar with the case from the media coverage, but responded he had formed no opinion about the case. (Id. at pp. 9.)

His views on the death penalty, as expressed in the questionnaire, raised serious questions about his ability to serve. He believes the death penalty should be imposed in most, but not all, cases of murder. He suggested that if the murder was imposed in a "less intentional way," it might be deserving of a lesser penalty. (Id. at pp. 15.) Among the facts he would consider important in deciding a life sentence versus death are the "details, mostly testimony from witnesses [and] police officers" and the "past history [and] criminal record of the defendant." (Id. at pp. 16.) In selecting the appropriate punishment for a crime, he believes in the saying "an eye for an eye." (Id. at 16.)

His responses to the court's superficial and leading "follow the law" questions were typically unrevealing about his views on the death penalty or his willingness to consider mitigation. (T. 1834-41.) When it was defendant's turn, the objections and the interruptions were unrelenting. (T. 1847-71.) Counsel's efforts to ask a reasonable Morgan question were repeatedly interfered with by the court and the prosecutor, as if they did not want to know, or did not care, what this man really believed, beyond "follow the law" platitudes. His bias nevertheless revealed itself through the obstruction:

> MR. LANE: Let me just try and make it -- you don't need to apologize for a thing. You're doing great. My question to you is just very simply, a guy goes out, kills somebody after he thought about it, wanted to do it, went out and did it. No legal defense. No self-defense. No nothing like that. Death penalty for that guy in –
>
> JUROR NUMBER 37: Yes, sir. That was my first --
>
> MS. FARAGLIA: Objection.
>
> THE COURT: Objection is sustained.

(T. 1853-54.) After the judge interrupted, and told him the law requires him to consider mitigation, he, of course, said he would do what the law compels. (T. 1855-57 ("I would have to

entertain mitigating factors.”).) But, when questioning continued by defendant seeking to *reveal* Juror No. 37’s views, his disqualifying bias revealed itself again:

> JUROR NUMBER 37: Your Honor, could Mr. Lane repeat the question again to me?
>
> THE COURT: He can repeat the situation.
>
> MR. LANE: Thank you.
>
> THE COURT: But you'll answer my question, if you will, after he describes the situation.
>
> JUROR NUMBER 37: Yes, ma'am.
>
> MR. LANE: You understand that the judge is saying under the law of Ohio you have to consider aggravation and mitigation, right?
>
> JUROR NUMBER 37: Yes.
>
> MR. LANE: All that, but that's not my question. My question is – I want to know your opinion, just you. Forget what the law requires of you because I'm not asking you what the law requires. I'm asking you what in your -- what is your personal belief about this, okay?
>
> JUROR NUMBER 37: (Indicating.)
>
> MR. LANE: So no law school question coming from me. I'm just asking you, pretend we're just sitting down having lunch or whatever. I say, I want you to think about this guy who goes out, kills somebody, he intended to do it, thought about it in advance, went out and did it. No justification or excuse for it. Okay?
>
> JUROR NUMBER 37: (Indicating.)
>
> MR. LANE: And it was done during the course of a rape and a kidnapping, all right?
>
> MS. FARAGLIA: Objection, Your Honor.
>
> THE COURT: Objection's sustained. You're not asking the same question you asked before, sir. Go ahead.
>
> MR. LANE: Can we ask Greg to read back the question I asked before?

> THE COURT: You may not.
>
> MR. LANE: You with me?
>
> JUROR NUMBER 37: I'm with you, sir.
>
> MR. LANE: There's this guy --
>
> THE COURT: You've already asked it. Do you understand the scenario he described to you?
>
> JUROR NUMBER 37: Yes, I do, Your Honor.
>
> THE COURT: And if you can answer, go right ahead.
>
> MR. LANE: Just your opinion –
>
> JUROR NUMBER 37: My first thought would be death penalty. For such a heinous crime, what I would consider a lesser penalty –

(T. 1858-60.)

When the defense then asked Juror No. 37 what his opinion would be if he learned "that that guilty murderer we were talking about before had a prior conviction for a sexual assault" (T. 1871), the State became apoplectic with its objections, claiming the defense was "throwing" the case and other similarly hyperbolic allegations. (T. 1872-1906.) The court also overreacted. (T. Id.) This incident was a revealing snapshot of the extent to which the prosecutor and the court were hostile to providing Madison the full and fair voir dire that is necessary to protect his constitutional rights to due process and to an impartial jury.

The inquiry by Madison's counsel was perfectly appropriate under Morgan, and especially so with Juror No. 37, given his statement in the questionnaire that Madison's prior record would be important to him in deciding life vs. death. (JQ, Juror No. 37 at pp. 16.) As explained by Madison's counsel:

MR. LANE: Well, what I would like to say is the questions I'm asking are, first of all, couched in hypothetical terms. I haven't said Michael Madison has this or Michael Madison has that. They're couched in hypothetical. And they are Morgan questions because what I'm asking is simply if upon the simple fact of conviction and aggravation has been proven, would you impose a death penalty without regard to mitigation? That is the question this court has permitted me to ask. That's all I did ask because I already asked this juror if three people get murdered and it's done in the course of a kidnapping or a rape, and you find out the perpetrator has a prior conviction for a sexual assault –

THE COURT: This is the first time you've asked that question. Go ahead.

MR. LANE: It is. Okay. Will you sentence him to death without regard to mitigation? That's what we're dealing with here. I have not done anything other than ask unadorned aggravated murder, and if he will sentence Michael Madison to death simply on unadorned, you know, capital murder or aggravated murder without regard to mitigation, then he's going into this trial unable or substantially impaired in his ability to consider mitigation. That's all that question asks. That is the Morgan question. There is nothing whatsoever improper about it.
. . . .

Even Tim McVeigh, his jury was properly asked if you find him guilty of killing 169 people by blowing up the federal building in Oklahoma City, will you sentence him to death without regard to mitigation? That's very simple, and that's all I'm doing here. Tim McVeigh, if his jury would say yes, he blew up 169 people, he's going to get the death penalty, they are unable or substantially impaired in their ability to consider mitigation, and that's a challenge for cause.

In Michael Madison's case it's exactly the same. If you find him guilty of three counts of aggravated murder in the course of a rape, kidnapping, and ongoing course of conduct, and he has a prior sexual offense, will you sentence him to death without regards to mitigation? That's all I am asking. That is the Morgan question. Just like it applies to Tim McVeigh, it applies to Michael Madison. It applies to every single defendant. I haven't asked for anything other than that.

(T. 1874-75, 1882-83.)

Morgan makes clear that Madison has the right to know if his prospective jurors would be able to consider sentences other than death if Madison is convicted of the crimes charged by the State, charges which include Madison's prior conviction for attempted rape. All trial participants knew, or should have known, that Madison's prior conviction would be openly discussed with the jury during the mitigation phase, as, in fact, it was. Instead, the prosecutor and court bluntly suggested to Madison himself that his counsel's inquiries were improper, and—driving a wedge into the attorney-client relationship—the court ordered Madison's counsel to discuss the issue with their client. (T. 1883-1900.) This was improper and highly prejudicial; it is important here because of the further proof it provides that Madison was denied the constitutionally-required comprehensive voir dire.

Madison's counsel moved to excuse Juror No. 37 for cause, arguing:

> MR. LANE: [Juror No. 37] indicated that in his opinion -- pursuant to Morgan, the Morgan question -- that yes, if a person kills three during a course of kidnapping and rape and has a prior sexual offense -- and he indicated this before lunch -- then in his mind it's the death penalty. Then when asked the specific question that Morgan disapproves of, which is will you follow the law if I tell you you must consider aggravation and mitigation and weigh them, he said yes, I will consider that. This court refused to allow me to flesh out the fact that he would consider it about the same level as he would consider climbing Mount Everest. He would consider it for exactly one second and then dismiss it from his mind.
>
> THE COURT: He never said that.
>
> MR. LANE: No. Because this court wouldn't let me ask him that. Again showing utter and complete unfairness to Michael Madison.
>
> So I move to strike this juror for cause based on, A, a stilted voir dire where this court constantly is telling me move along, move along, move along, and not allowing me to ask the basic Morgan questions under Morgan versus Illinois, which by the way is not a federal case contrary to what Mr. McGinty thinks, it's Morgan versus Illinois which is a state. And so I move to strike that juror for cause.

(T. 1922-23.) He renewed the motion again during general voir dire. (T. 3835-36.) The trial court erroneously denied both motions. (T. 1923, 3836-40.) Juror No. 37 was excused with Madison's fifth of six peremptory challenges. (T. 3764.) As a result—and had he not been forced to exhaust *all* his peremptory challenges to excuse jurors who should have been excused for cause—Madison was denied his right to use his peremptory challenges to excuse other jurors he would have excused, including Juror Nos. 5, 23, 32, 40, 43, 52, and 56. Madison is entitled to a new trial.

8. Juror No. 40.

Juror No. 40 (Mr. Miller) described himself in his questionnaire as a married white male, residing in North Royalton, and employed as a political advertising supervisor. (JQ, Juror No. 40 at pp. 3-4.) As to his views on the death penalty, he checked the box that it is appropriate in some murder cases, and inappropriate in others. (Id. at pp. 15.) He responded that he is probably more likely to impose death in a case of multiple victims because "it seems like it must be more planned out." (Id. at pp. 15.) An important fact for him in deciding between life and death is if guilt is "100% sure" and the defendant "did not show remorse." (Id. at pp. 16.) In selecting the appropriate punishment for a crime, he believes in the saying "an eye for an eye." (Id. at 16.)

This was another example where the juror agreed with formulaic, leading questions posed by the court and the prosecutor. And agreed to "follow the law," all confirmed, nice and tidy, in *12 pages* of superficial questioning. (T. 1997-2008.)

But when it was the defendant's turn to question Juror No. 40, his lack of essential qualifications to serve on a capital jury became clear. He was unwilling, or unable, to give his assurances that the pressure of his political-advertising job would not detract him from giving Madison's case the attention it deserves. The 2016 presidential election meant that his job was then very busy and at the forefront of his mind. (T. 2010-11.)

When asked the court-approved Morgan question, he affirmed his bias in favor of death:

> MR. LANE: I want to ask you some questions about your personal opinion about the death penalty, okay?
>
> JUROR NUMBER 40: Okay.
>
> MR. LANE: And I'm not asking you for a -- this is not a law school exam, this is not a quiz on the law, I just want what you think, okay?
>
> JUROR NUMBER 40: Yeah.
>
> MR. LANE: And you said an eye for an eye applies when you're talking about murder –
>
> JUROR NUMBER 40: (Indicating.)
>
> MR. LANE: -- okay? So I want to give you a hypothetical situation, all right? If you have questions along the way, ask me, I'll try to clarify.
>
> JUROR NUMBER 40: Okay.
>
> MR. LANE: I want you to imagine that you're sitting on an aggravated murder case, and you and 11 other people have heard all the evidence in that case, and you have concluded beyond a reasonable doubt that the guy in that case is guilty beyond a reasonable doubt of aggravated murder. That means you thought about it in advance, he wanted to do it, he went out and did it, okay?
>
> And furthermore, there is no legal justification or excuse, it was not self-defense, wasn't defense of another, wasn't defense of property, wasn't an accident. You know, he wasn't insane at the time, no legal justification. Just a guy, wanted to go out and kill somebody, goes out, does it, okay? You with me?
>
> JUROR NUMBER 40: Yeah.
>
> MR. LANE: Do you believe -- oh, and furthermore, that because it's aggravated murder, it was done during the course of a kidnapping or a rape, okay?
>
> JUROR NUMBER 40: Okay.

> MR. LANE: Not a legal quiz, just in your heart, in your opinion, not in the opinion of the judge or me or anybody else, just in your opinion, I want to know do you believe that the death penalty is the only appropriate penalty for a guy like that, regardless of any mitigation that you may hear?
>
> JUROR NUMBER 40: From what you just described, yes.

(T. 2011-13.) Playing the role of the prosecutor, as opposed to a neutral judge, the court immediately interrupted to again ask the "follow the law" questions that had plagued the voir dire from its inception. And, as usual, the court received the response such improper questions are *intended* to induce: the juror assured the judge he would "consider" all the things the court will order him to consider. (T. 2014.) And, having received that meaningless assurance, the court sustained multiple objections to any further defense inquiry seeking to learn what this eye-for-an-eye juror—who had already revealed he would impose death on a defendant who did what the State alleges Madison has done—actually means when he assents to the court's order that he must "consider" other sentences. (T. 2014-20.)

Madison's counsel moved to excuse Juror No. 40 for cause, because of the juror's job and his response to the Morgan question. (T. 2021, 2074-75.) Counsel later explained his motion in more detail, and again objected to the court's improper reliance on "follow the law" questions and its failure to comply with Morgan:

> The general -- the last bench conference we had, the Court said essentially all we are interested in in this entire voir dire -- this entire so-called searching voir dire that the Court granted a motion saying, yes, we can have a searching voir dire because it's mandated by Morgan versus Illinois – is if a juror simply says the words, "I would consider aggravation, I would consider mitigation, I would weigh them before I arrive at any penalty, and I would consider the death penalty and alternative penalties," we're done. That's it as far as this court is concerned.
>
> That is not a searching voir dire. That is not the voir dire that Morgan versus Illinois mandates. That is simply having jurors say what the Court perceives to be magic words that allow them to

> somehow pass muster. But as a result, we are seating unfair juror after unfair juror after unfair juror because that is not a searching voir dire designed to seek out unfairness. That is a catechism that the jurors are being asked to recite, and if they say the magic words, they're on, and we don't need to make any further inquiry. I object to all of those things. And I continue all my prior objections under the United States Constitution, Eighth Amendment, and analogous provisions of the Ohio Constitution. Thank you.

(T. 2074-75.)

The court erroneously refused to excuse Juror No. 40. (T. 2024.) The court also denied Madison's request for additional peremptory challenges. (T. 3836-40.) As a result, Madison was unable to excuse Juror No. 40 because all six of his peremptory challenges had been exhausted in excluding *other* jurors similarly unqualified because of a bias in favor of death. (T. 3835-38.) Juror No. 40 thus sat in judgment of Madison and, of course, he voted to impose the death sentence, just as he said he would do during voir dire. Madison is entitled to a new trial.

9. Juror No. 43.

Juror No. 43 (Mr. Munroe) is another example where exclusion should have been uncontroversial. The juror has difficulty reading and writing in English, and he did not complete most of the questionnaire, and none of the death penalty questions.

Based on the few questions he did complete, Juror No. 43 described himself in the questionnaire as a retired black male who is from Jamaica and attended school there. (JQ, Juror No. 43 at pp. 3-4.) The in-court questioning revealed he was 64 years old. He was born and raised in Jamaica, moved to New York City when he was young, and has been in Cleveland for some 50 years. He told the judge he cannot read or write (T. 2063), and he later described his reading as "very slow" (T. 2103); his ability to speak English was fine. (T. 2103.)

His views on the death penalty, as expressed under questioning, made him unqualified to serve. The defense zealously sought to make the appropriate Morgan inquiry. The one time the court allowed the question with this juror, his bias showed through:

> MR. LANE: What I want to ask you, I'm trying to understand your views on the death penalty better, so I want to give you a hypothetical situation, not this case. Just follow me on this, okay?
>
> JUROR NUMBER 43: Okay.
>
> MR. LANE: Pretend you are on a jury with 11 other people –
>
> MR. McGINTY: Objection to hypothetical.
>
> THE COURT: Yes. It's sustained.
>
> MR. LANE: If you were on a jury with 11 other people –
>
> MR. McGINTY: Objection.
>
> THE COURT: Let him finish the question.
>
> MR. LANE: -- and you and 11 other people found someone guilty of three murders done in the commission of kidnapping and rape, and after hearing all the testimony you were convinced beyond any reasonable doubt -- all 12 jurors were convinced that the person who did that intended to do it, thought about it in advance, went out and did it, all right?
>
> JUROR NUMBER 43: Yeah.
>
> MR. LANE: And you further have decided you further have decided there are no legal defenses or excuses for having done it, meaning there was no self-defense, he wasn't defending somebody else's life, he wasn't defending property, it wasn't an accident, nobody made him do it, it's murders where he thought about it, wanted to do it, went out and did it in the course of kidnapping and rape. My question to you is: If you were to find that to be the case, do you believe that the death penalty -- just your opinion I'm asking, I'm not asking you what you think the law requires.
>
> JUROR NUMBER 43: Yeah.

(T. 2128-29.) When defense counsel sought to inquire further, the court barred any meaningful inquiry whatsoever, sustaining objections more than 20 different times. (T. 2041-62.)

Madison's counsel moved to excuse Juror No. 43 for cause, on the basis of the juror's answer to the Morgan question. (T. 2162.) The court denied the motion without allowing counsel to make his record of the reasons. (T. 2163-65, 2174.) Later, during general voir dire, the defense renewed the motion for cause, this time on the basis of the juror's very limited reading skills and the resulting impairment in his ability to review the trial exhibits. (T. 3824-35.)

The court erroneously refused to excuse Juror No. 43. (T. 2163-65, 2174, 3835.) The court also denied Madison's request for additional peremptory challenges. (T. 3836-40.) As a result, Madison was unable to excuse Juror No. 43 because all six of his peremptory challenges had been exhausted in excluding *other* jurors similarly unqualified because of a bias in favor of death. (T. 3835-38.) Juror No. 43 thus sat in judgment of Madison and, of course, he voted to impose the death sentence, just as he said he would do during voir dire. Madison is entitled to a new trial.

C. Conclusion.

As a result of the errors identified in this Proposition of Law, and in Proposition of Law No. 1, Madison was not provided a fair and impartial jury. Unqualified jurors who were biased in favor of death were permitted to serve, and other similarly unqualified jurors were unable to be exposed and thus excused for cause. Madison's conviction and death sentence resulting from such a "tribunal organized for death" must be reversed.

There were at least three jurors who served on Madison's jury who were biased in favor of death to a degree that made them unqualified (Juror Nos. 5, 40 and 43) and, in the case of Juror Nos. 40 (his job) and 43 (his inability to read and write), also unqualified for other reasons too. Madison was forced to use all six of his peremptory challenges on similarly unqualified

jurors (Juror Nos. 11, 12, 29, 31, 34, and 37). "[W]here the defense exhausts its peremptory challenges before the full jury is seated, the erroneous denial of a challenge for cause in a criminal case may be prejudicial." State v. Cornwell, 86 Ohio St. 3d 560, 564 (1999). See also Ross v. Oklahoma, 487 U.S. 81 (1988); State v. Johnson, 112 Ohio St. 3d 210, 236 (2006). The denials of the for-cause challenges as to all nine of these jurors was prejudicial to Madison. There were several other jurors, unburdened with disqualifying biases and able to fairly consider mitigation evidence, that remained in the jury pool and would have been selected had these nine for-cause challenges been granted. Moreover, Madison's six peremptory challenges could have then been used on other jurors, including Juror Nos. 23, 32, 52, and 56, two of whom were on the jury that convicted Madison and sentenced him to death (Nos. 23 and 32), and one of whom became foreman (No. 23 (Mr. Slifko)), or were alternate jurors (Nos. 52 and 56).

Madison is entitled to a new trial or, at least, a new sentencing proceeding conducted before a properly selected and impartial jury.

Proposition of Law No. 3. The trial court in a capital case denies the accused his constitutional rights to a fair trial before an impartial jury, under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 5, 9, 10, and 16 of the Ohio Constitution, when it erroneously grants the State's motions to excuse for cause three jurors who were opposed to the death penalty but whose views did not substantially impair their ability to serve as jurors, and when, in excusing those jurors, the court applied a different standard, more favorable to the State, than it applied in denying the accused's motions for exclusion of prospective jurors who were biased in favor of death.

A. Relevant Facts Underlying this Proposition.

This Proposition of Law concerns three prospective jurors that the State was permitted to exclude from service, over defendant's objection, on challenges for cause based upon the juror's views in favor of life and against imposition of a death sentence.

1. Juror No. 18.

Juror No. 18 (Ms. Vanderschalie) stated she was opposed to the death penalty. (T. 1393-95.) However, she also stated that she would be willing to engage in the required weighing process, as the law required, and would consider the aggravating circumstances and mitigating factors:

> MR. LANE: You as an individual juror get to weigh aggravation and mitigation any way you want.
>
> So, for example, if you were to see a glimmer of humanity in Michael Madison and you decided to give that glimmer of humanity, spark of humanity the weight of life, you have that absolute right as a juror as long as you would consider whatever aggravation they're putting in and consider any mitigation the defense puts in and compare and contrast them in your own personal moral judgment, you could sit on this jury.
>
> Can you say that you would be able to consider – nobody's telling you how you have to weigh it. The State of Ohio will never mandate that you give their aggravation the weight of a locomotive and our mitigation the weight of a feather. You can give any weight to it you want. The only question is can you consider, just consider it? Would you be able to consider it, aggravation and mitigation?
>
> JUROR NUMBER 18: Absolutely. I mean --
>
> MR. LANE: Okay.
>
> JUROR NUMBER 18: -- he could be guilty, but I still wouldn't impose the death penalty.
>
> MR. LANE: Well, the question I'm asking is could you consider whatever aggravation they present --
>
> JUROR NUMBER 18: Yes.
>
> MR. LANE: -- weigh it against the mitigation? Can you do that?
>
> JUROR NUMBER 18: Yes.
>
> MR. LANE: And then come to your own personal moral judgment about which outweighs which? Could you do that?
>
> JUROR NUMBER 18: Yes.

(T. 1400-01.)

The court excused Juror No. 18 for cause on the State's motion (T. 1401), and over Madison's objection. (T. 1402.)

2. Juror No. 38.

Juror No. 38 (Ms. Davis) was also opposed to the death penalty, but she agreed she would engage in the required weighing process and would consider aggravation and mitigation.

After Juror No. 38 had told the court, in response to the court's questioning, that she did not believe she would be able to sign a verdict in favor of death (T. 1933-35), the prosecutor sought to obstruct, with groundless objections, the effort of Madison's counsel to probe Juror No. 38's views beyond the superficial "follow the law" inquiry the court had pursued. The court sustained many of the objections, demonstrating again that the prosecutor and the court were seating a jury "organized to return a verdict of death."

> MR. LANE: In your personal moral judgment you've listened to everything and you've considered both the aggravation and the mitigation, if you alone in your personal moral judgment in your heart believe mitigation outweighs aggravation, then you are obligated to vote for a life sentence, okay?
>
> JUROR NUMBER 38: (Indicating.)
>
> MR. LANE: It is only if you, [Juror No. 38], in your personal moral judgment somehow believe that their aggravation outweighs mitigation, that's the only time you have to vote for the death penalty. But if they don't ever get over that hurdle and prove to your satisfaction, your satisfaction -- it's not they put a number on it. It's not like, okay, [Juror No. 38], here we come with aggravation, if we prove this, you got to give us a hundred points, and I come in with mitigation and I say, okay, [Juror No. 38], here's mitigation, that's worth 20 points, 20 points, 20 points. Not like that. You are the decider as to how much weight to give any of this stuff. And you never have to say if you don't believe it that aggravation outweighs mitigation, do you understand that?
>
> JUROR NUMBER 38: I do now.

MR. LANE: All you have to do is agree, yeah, I'll consider everything, I'll consider their aggravation, I'll consider their mitigation.

MS. FARAGLIA: Objection.

THE COURT: The objection is sustained.

MR. LANE: You make the decision. And do you understand that in Ohio if --

MS. FARAGLIA: Objection, Your Honor.

THE COURT: Let him finish the question.

MR. LANE: -- that if there is no unanimous jury -- if all 12 jurors do not agree that aggravation outweighs mitigation and that death is the appropriate penalty, if there's not unanimous decision –

MS. FARAGLIA: Objection, Your Honor.

THE COURT: Overruled.

MR. LANE: -- one juror -- then it's a life sentence? Did you know that?

JUROR NUMBER 38: No.

MR. LANE: That's the law, okay? Now that you know these things, do you understand that in the trial process, in the guilt/innocence part of the case, you're deciding facts, is that his fingerprint, is that not his fingerprint? Are you with me?

JUROR NUMBER 38: Mm-hmm.

MR. LANE: Somebody back there says that's his, somebody else says that's not, somebody can be statistically proven right, somebody can with be proven scientifically wrong. You with me?

JUROR NUMBER 38: Yes.

MR. LANE: So in terms of penalty for personal moral judgment, all right, you may be -- and I'm just giving you an example, a hypothetical. You're sitting there as a juror, you're considering all their aggravation as you're duty-bound to do, you're considering all

> the mitigation and somehow you see a spark of humanity in Michael Madison.
>
> MS. FARAGLIA: Objection, Your Honor.
>
> THE COURT: The objection is sustained.
>
> MR. LANE: Whatever mitigation you –
>
> THE COURT: The objection is sustained.
>
> MR. LANE: I understand. Whatever mitigation you observe during the course of this trial --
>
> MS. FARAGLIA: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> MR. LANE: -- whatever your mitigation is, you decide it, okay? And you decide that mitigation -- I'm giving that full weight and the DA -- or the prosecutors' aggravation I'm not giving any weight to. And in my personal moral judgment life is the appropriate penalty, the guy –
>
> MS. FARAGLIA: Objection.
>
> THE COURT: The objection is sustained.

(T. 1940-43.)

Despite the obstruction of Madison's efforts to inquire about these critically relevant topics, Juror No. 38 ultimately made clear she would engage in the required weighing, thereby making her eligible to serve under the same standard the court had applied for this case in allowing death-penalty inclined jurors to serve over Madison's objections:

> MR. LANE: So just closing it down here, are you telling me you could sit in a trial and consider any aggravation that the state wants to put on, you would then consider any mitigation that the defense wants to put on, you would use your personal moral judgment to figure out which weighs more and vote that way?
>
> MS. FARAGLIA: Objection, Your Honor.
>
> MR. LANE: You would do that, wouldn't you?

> THE COURT: Overruled.
>
> JUROR NUMBER 38: I would weigh both the –
>
> MR. LANE: Yeah?
>
> JUROR NUMBER 38: Yeah.
>
> MR. LANE: And then you make a decision in your own heart which one weighs more --
>
> MS. FARAGLIA: Objection.
>
> MR. LANE: -- and vote accordingly?
>
> THE COURT: Overruled.
>
> MR. LANE: You'd do that, wouldn't you?
>
> JUROR NUMBER 38: Yes.

(T. 1948-49.)

The State moved to excuse Juror No. 38 for cause. (T. 1950.) Madison's counsel opposed the motion, arguing that, given Juror No. 38's willingness to engage in the weighing process, the court's granting of her exclusion would result in the application of an unconstitutional double standard, in favor of seating death-inclined jurors and against seating life-inclined jurors:

> MR. LANE: Yes, Your Honor. We have had innumerable jurors who have said in their minds if -- if somebody kills, the only verdict that in their mind they could impose is the death penalty. Those jurors have all passed muster for cause over the defense objection. This juror has agreed to consider all aggravation and consider all mitigation and then vote according to what her personal moral judgment tells her is appropriate.
>
> The test in Ohio is not can you sign a death verdict according to this court; the test in Ohio is can you follow the law and the law requires according to this court on every juror that has indicated previously that they would automatically impose a death penalty, all they have to do is be able to consider mitigation and once they say they can consider mitigation, then they pass muster. This juror

> said she would consider aggravation and she's gone -- she's going to [be] gone for cause I predict so I think this court is applying two different standards one to the prosecution one to the defense, I object to that, and I object to this juror being challenged for cause when we have made exactly the same arguments, you know, for all these jurors that are coming in to impose the death penalty and all of our challenges for cause have been denied.

(T. 1950-51.) Despite these arguments, the court granted the State's motion and excused Juror No. 38 for cause. (T. 1951.)

3. Juror No. 45.

Juror No. 45 (Mr. Schilens) was reluctant to impose a death sentence. (T. 2215-17.) He checked the box in his questionnaire that it is appropriate in some murder cases but inappropriate in others. (JQ, Juror No. 45 at pp. 14.) He said a death sentence may be necessary in extreme cases. (Id.; T. 2214, 2217.) The court did not allow Madison's counsel to explore what he meant by "extreme cases." (T. 2244-46, 2521.)

In an effort to probe beyond the follow-the-law questions the court and the State had posed, Madison's counsel sought to learn more about Juror No. 45's views and his willingness to consider both aggravation and mitigation. He confirmed that he would do so:

> MR. LANE: . . . What nobody is telling you is this, the law in the State of Ohio requires that if you get to a penalty phase, every juror uses their own personal moral judgment to determine what facts the prosecutor presents in aggravation -- and aggravation means to speak in favor of a death penalty. You decide in your own personal morality how much weight to give any of that. And you then consider all the mitigation, which is something that speaks in favor of a life sentence. And you decide what weight in your own personal moral judgment to give any mitigation. And if in your personal moral judgment you choose as a conscientious juror to give no weight to their aggravation and weight to the mitigation, then you're duty-bound based on your own morality to vote for life.
>
> MR. McGINTY: Objection.
>
> THE COURT: The objection's overruled.

MR. LANE: Do you understand that?

JUROR NUMBER 45: Yes.

MR. LANE: The law in Ohio will never require you to ever vote for the death penalty unless in your own moral judgment it's appropriate, okay?

JUROR NUMBER 45: (Indicating.)

MR. LANE: You with me on that?

JUROR NUMBER 45: Yes.

MR. LANE: Does this help clarify things for you?

JUROR NUMBER 45: Yes.

MR. LANE: There are possibly -- and you've said, you could – you are not against the death penalty in every case. If it's an extreme case, you've written in your questionnaire, yes, the death penalty may be appropriate?

JUROR NUMBER 45: Yes.

MR. LANE: It's up to you in your personal moral judgment to decide within yourself if this might be that extreme case in which case you'd consider the death penalty as an appropriate penalty, would you?

THE COURT: It's not whether it's an extreme case, it's whether or not the aggravating circumstances have been proven beyond a reasonable doubt to outweigh the mitigation factors.

MR. LANE: As you weigh it in your own personal moral judgment, right.

JUROR NUMBER 45: Yes.

MR. LANE: And if in your personal moral judgment aggravation outweighs mitigation, the law says it's a death penalty, and because you agree that aggravation outweighs mitigation, you'd presumably follow the law and vote for the death penalty if in
your personal moral judgment you thought that was appropriate, right?

> JUROR NUMBER 45: Yes, potentially.
>
> THE COURT: You said yes, what?
>
> JUROR NUMBER 45: I said potentially. Yes, potentially.
>
> MR. LANE: If you thought it was appropriate, if the extreme case has aggravation that outweighs mitigation in your personal moral judgment –
>
> THE COURT: It's not extreme case. I just want to make that clear. The aggravating circumstances and mitigating factors has a definition. And extreme cases is not the definition. I just want you to know that.
>
> MR. LANE: I guess really all I'm trying to ask you is this. And, again, I know you feel totally put upon here, and I don't blame you. You'd listen to everything in this case, correct?
>
> JUROR NUMBER 45: Yes.
>
> MR. LANE: If you think the death penalty is warranted after considering aggravation and mitigation, would you consider the death penalty?
>
> JUROR NUMBER 45: Yes.
>
> MR. LANE: If you think life is appropriate, would you consider life?
>
> JUROR NUMBER 45: Yes.
>
> MR. LANE: You'd consider both possible penalties after hearing all the facts and circumstances both sides present to you, correct?
>
> JUROR NUMBER 45: Yes.

(T. 2242-45.) Based on these answers, the court denied the State's motion for cause.

Later, during general voir dire, Juror No. 45 (then identified by seating order as Juror No. 13), expressed again his reluctance to impose a death sentence. (T. 3852-56.) But he reaffirmed his commitment to engage in the required weighing process. (T. 3877-86.)

However, some of his responses during general voir dire suggested he preferred that jury service not take him away from his job with Turner Construction, where he was then the lead superintendent of construction for a new cancer building at the Cleveland Clinic. (T. 3847-48.) He claimed the job was at the "peak" of construction. (T. 2225.) Moreover, during general voir dire, Juror No. 45's boss sent a letter to the judge asking that he be excused from jury service due to the Clinic construction project. (T. 3772.) The court made the letter part of the record and said she would not excuse him on that basis, and the defense agreed. The State took no position. (T. 3772.)

There was no reason the court should have permitted the State's belated re-visitation of Juror No. 45's already-resolved "death qualification" status. (T. 3852-56.) Its order was clear that the parties were precluded from doing that. (T. 3652-43.) Indeed, it should have been obvious to any skeptical observer that prosecutor Tim McGinty—St. Edward High School, class of 1969, varsity football and wrestling (T. 1724)—chose to revisit this issue with Juror No. 45—St. Edward High School, class of 1996, varsity football and wrestling (T. 3845, 3849-50)—in an effort to accommodate a favored juror's preference not to serve, and not because of any further legitimate need to explore the juror's death penalty views. This time, however, the court granted the State's motion to excuse him for cause (T. 3886-87), over the defendant's objection.

B. Merits of the Proposition.

"[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. Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Witherspoon, 391 U.S. at 521-23.

These three jurors were improperly excluded for cause. The State did not meet its burden that the jurors' respective views on capital punishment would prevent or substantially impair the performance of their duties as jurors in accordance with the instructions and their oath, and certainly did not meet that standard as it had been applied by the court when Madison sought to exclude death-biased jurors. In granting the State's motions as to these three jurors, the court applied an unfair double standard in favor of seating death-biased jurors. It excluded these life-inclined jurors despite their willingness to engage in the required weighing of aggravating circumstances and mitigating factors, while, in the same trial, the court repeatedly *refused to exclude* many death-biased and/or death-inclined jurors precisely because they said they would be willing to engage in the weighing process.

These errors, and this double standard, are additional reasons why Madison was unconstitutionally compelled to go to trial for his life before a tribunal organized to return a verdict of death. He is entitled to a new trial or, at least, a new sentencing proceeding conducted before a properly selected and impartial jury.

Proposition of Law No. 4. **The trial court in a capital case commits prejudicial error, denies the accused his right to an impartial jury that represents a cross-section of the community, denies prospective jurors their free exercise and establishment clause rights, and denies equal protection of the law, when the court excludes those jurors from service based on their firmly-held religious beliefs against the death penalty, all in violation of the First, Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution, and Article I, Sections 5, 7, 9, 10, and 16 of the Ohio Constitution.**

All eligible citizens have the right to serve on a jury in a capital case, and a citizen may not be excluded from service merely because of his or her religious beliefs. Exclusion because of religious convictions would violate the First Amendment's Free Exercise and Establishment clauses and Article I, Section 7 of the Ohio Constitution. Madison, for his part, has the constitutional right that the jury in his capital trial shall be drawn from a cross-section of the community. These respective constitutional rights, and Madison's rights to a fair trial before an

impartial jury, are denied when the State is permitted to exclude from jury service, and the court enforces that exclusion against, those prospective jurors whose opposition to the death penalty is based upon their firmly-held religious beliefs or convictions.

For example, if a proposed juror is a Catholic, Baptist, or any sect of any other religion, and is adamantly opposed to the death penalty, "death qualification" effectively discriminates against the juror's religion. No rule—including, for example, "conscientious scruples" against death—should be used to sanction religious discrimination. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."). In addition to the constitutional provisions, such a rule violates the excluded juror's rights under the Religious Freedom Restoration Act, 42 USCS § 2000bb-1, insofar as it burdens the juror's exercise of religion, even though the burden may result from a rule of general applicability.

Madison requested that, to preserve these constitutional rights, the court empanel two juries:

> MR. LANE: As stated yesterday, Your Honor, I understand the holding of Lockhart versus McCree, M-c-C-r-e-e, that allows death qualification of jurors. I believe this is religious discrimination against religiously-scrupled Catholics. We have had numerous religiously-scrupled Catholics that have been challenged for cause successfully under applicable current law. I believe this is a First Amendment violation, and I also believe under applicable federal law, the Religious Freedom Restoration Act among others, that this is violative of that.
>
> It's my motion that this court impanel a jury for the guilt/nonguilt phase of the trial that would include religiously-scrupled Catholics, and I ask that a -- if in fact we have to have a penalty phase that does not include people who will not impose a death penalty, which I believe also to be unconstitutional, that we have a second jury for a penalty phase. I believe it is the right of a juror to participate as a citizen of the State of Ohio in the most important

> cases coming before the Court, and they should not be precluded from serving on the most important cases that come through the courthouse based upon their religious beliefs. As I stated previously, hanging a sign on the front door of the courthouse that religiously-scrupled Catholics need not apply for jury service is unconstitutional, but that is in essence what is occurring here. And I object.

(T. 1406-07; see also T. 838-39, 2665-66.) This request was denied.

Madison preserved his constitutional and statutory challenges on these grounds to eleven prospective jurors who were excluded for cause, over his objection, because the jurors had firmly held religious beliefs against capital punishment. These are Juror No. 2 (T. 838-39); Juror No. 18 (T. 1402); Juror No. 19 (T. 1404, 1406-07); Juror No. 54 (T. 2502-18); Juror No. 58 (T. 2644-66); Juror No. 63 (T. 2750-71); Juror No. 64 (T. 2797-98); Juror No. 70 (T. 2940-66); Juror No. 78 (T. 3120); Juror No. 85 (T. 3318); and Juror No. 91 (T. 3433-40).

Madison's constitutional and statutory rights were denied by the exclusion of these jurors. He is entitled to a new trial, or at least a new sentencing proceeding, before a jury that has not been culled of all such scrupled jurors.

Proposition of Law No. 5. Prosecutorial misconduct during jury selection in a capital case denies the criminal defendant his rights under Article I, Sections 5, 9, 10, and 16 of the Ohio Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution.

A defendant's due process rights are violated when a prosecutor's misconduct renders a trial fundamentally unfair. Darden v. Wainwright, 477 U.S. 168, 181 (1986). Such misconduct can occur at any point during trial, including during jury selection.

The inquiry in determining the validity of a claim of prosecutorial misconduct is "whether [the] remarks are improper and, if so, whether they prejudicially affected substantial rights of the accused." State v. Lott, 51 Ohio St. 3d 160, 165 (1990). See also State v. LaMar, 95 Ohio St. 3d 181, 210 (2002). The touchstone of this analysis "is the fairness of the trial, not the

culpability of the prosecutor." Smith v. Phillips, 455 U.S. 209, 219 (1982). This Court has stated that it "will not deem a trial unfair if, in the context of the entire trial, it appears clear beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments." State v. Skatzes, 104 Ohio St. 3d 195, 229 (2004) (citing State v. Treesh, 90 Ohio St. 3d 460, 464 (2001)).

The prosecutor in Madison's trial engaged in misconduct that rendered Madison's trial fundamentally unfair, especially as to Madison's ability to receive a fair and reliable sentencing hearing before jurors who are unbiased and are able to fairly consider sentences other than death. The prosecutor employed a strategy to assert multiple groundless objections to obstruct Madison's counsel's proper efforts to identify jurors who were incapable of putting aside the pro-death penalty biases which, given Madison's alleged multiple killings and the manner in which they were allegedly committed, so many of the prospective jurors possessed. As detailed in Proposition of Law Nos. 1 and 2, and also incorporated here, the prosecutor repeatedly obstructed that constitutionally-based inquiry, and did so with the intention to deny Madison the impartial jury to which he is entitled. This misconduct affected all stages of the trial, but most prejudicially the mitigation phase.

The prosecutor's misconduct during voir dire was not confined to his improper strategy to obstruct, with repeated objections, defendant's efforts to achieve an adequate voir dire. The prosecutor also misrepresented the law in important respects and repeatedly disparaged Madison's counsel.

The prosecutor's misstatements about the role of mercy was especially egregious and prejudicial. As addressed in Proposition of Law No. 1, and incorporated here too, the prosecutor repeatedly objected to defense counsel's efforts to properly inform the prospective jurors that mercy is relevant in capital sentencing. As the Supreme Court made clear in Kansas v. Carr, 136

S. Ct. at 642, the Court's case law is "designed to achieve" a sentencing process in capital cases by which jurors will afford "mercy" when they believe it is appropriate. It is one thing for the prosecutor to object to defense counsel's efforts to explain the proper role of mercy, but it is even worse when the prosecutor affirmatively misrepresents the issue of "mercy." The prosecutor did that here too:

> MR. McGINTY: You cannot invoke mercy as that is not part of a jury's duty, do you understand that?
>
> THE COURT: Overruled.
>
> JUROR NUMBER 11: Yes.

(T. 3728-29.)

> MR. McGINTY: But will you put that aside and follow the law?
>
> JUROR NO. 15: Yes.
>
> MR. McGINTY: And not overbalance for the state or the victim because of your sympathy or prejudice for the defense or the defendant because of the sympathy or go the other way, become sympathetic for a defendant and decide, well, I'm not God. I don't give mercy. Mercy isn't available either or sympathy.
>
> MR. GRANT: Objection.
>
> THE COURT: The objection is overruled.
>
> MR. McGINTY: Or sympathy for the victims to weigh your evidence.
>
> JUROR NO. 15: Yes. I can do that.

(T. 3866; see also T. 3504, 3521, 3528, 3552, 3558-59.)

The personal moral judgment by which each juror will weigh aggravation and mitigation is, by its very nature, a judgment that implicates mercy. It is wrong to tell jurors they may not "consider" mercy when undertaking such a personal moral judgment: of course they may consider mercy. That is one essence of their role in sentencing. The reality is that mercy may

properly, *for any juror*, trump whatever aggravating circumstances the State may prove, due to the weighing calculus that particular juror may employ, such as, for example, mercifully placing dispositive weight on a mitigation factor to which other jurors or the court may choose to assign less weight. (T. 941, 2388-89, 2521-22, 2936, 2965, 3372-73.) Telling a capital juror she may not "consider" mercy is like telling her she may not conduct the weighing calculus in accordance with her own moral judgment. The fairness of Madison's trial was poisoned by this wrongheaded thinking from the beginning to the end. (T. 7700 (State's final closing argument).)

In addition to obstructing a searching voir dire and misrepresenting the law, the prosecutor also repeatedly disparaged Madison's counsel and demeaned counsel's efforts to zealously represent their client. The prosecutor made numerous *ad hominem* and other attacks against defense counsel, some in front of the prospective jurors, all in an effort to poison the court and the jury against the defense. (T. 748, 798, 896-97, 1004, 1008, 1287-90, 1335-42.)

The prosecutor characterized defendant's positions as "silly," or "frivolous," or "obnoxious." (T. 748, 798, 947, 1008, 1196, 1198, 1333, 1701, 1741, 2166-67, 2171-72, 2173, 2289, 2731, 2796, 2801, 3018-19, 3069, 3402-03, 3612, 3834.) The prosecutor said the defense counsel is playing "a game" in jury selection. "That's his game. And that's going to be his continued game here." (T. 1004.) He claimed defense counsel was trying to "obstruct justice" (T. 2173), and that counsel was "borderline delusional." (T. 3401.) "He's been hired to obstruct." (T. 3401.) The prosecutor suggested that defense counsel was conceding Madison's guilt, and that in doing so defense counsel was being dishonest and was seeking to mislead and/or criticize prospective jurors. (T. 1287-90, 1335-36.)

The prosecutor also intentionally sought to drive a wedge between Madison and his counsel. He did so by stridently criticizing, in Madison's presence, defense counsel's efforts to properly include, in the Morgan questions he attempted to ask prospective jurors, a reference to

the hypothetical guilty-multiple-murderer also having, as the jury was expected to learn in *this* case about Madison, a previous conviction for a sexual assault offense. (T. 1871-1900.) When Madison's counsel sought to include that detail in his Morgan questions (T. 1871), the prosecutor became apoplectic with rage against defense counsel. The prosecutor yelled at the court that counsel was "throwing this case," and claimed that, "[i]nstead of protecting his client, he's outing his client." (T. 1872-73.) The prosecutor further claimed the defense was making that inquiry—about whether such a prior conviction might affect the jurors' death-sentence views—for an improper reason, and as a "tactical" basis for getting a retrial. (T. 1879, 1887-89.) He claimed defense counsel was engaged in a "farce," that he was "mocking justice," and that he was "mocking the Court." (T. 1897-98.)

Not only were these objections utterly groundless and made in clueless defiance of Morgan, but the prosecutor's effort to damage the attorney-client relationship in this calculated way, at the beginning of the trial, was reprehensible misconduct. Even after the court ruled against the prosecutor, and held that it is within counsel's trial strategy to inquire of jurors about their views of a prior sexual assault, the prosecutor kept up his attack on defense counsel, undermining them in front of Madison:

> THE COURT: It's a matter of trial strategy. I certainly have brought it to his attention and –
>
> MR. McGINTY: I haven't heard any waiver from this man. The waiver I heard was -- what he put on the record was he didn't want it to come in. That's what he said on the record.
>
> THE COURT: You mean the waiver of the jury trial on the having a weapon while under disability count?
>
> MR. McGINTY: And that – he had brought that up yet the gun –
>
> THE COURT: I'm just saying by --
>
> MR. McGINTY: The sexual --

THE COURT: The count to myself –

MR. McGINTY: Yes, that and the sexual conviction. The sexual assault conviction he didn't want that jury to know. That's all I heard from Mr. Madison.

MR. LANE: Well, Mr. McGinty may want to interview Mr. Madison, but he can't, and so that's just too bad.

MR. McGINTY: Well, what he said on the record is contrary to what counsel's doing, and it's certainly going to be raised. Just as sure as there's a Lake Erie at the end of 9th Street, it's going to be raised.

THE COURT: And that may well be. Mr. Grant is his lead counsel. He's indicated he's discussed it.

MR. McGINTY: That's not what he –

THE COURT: I can't stop the defense from having their trial strategy. And if that's the strategy that they wish to employ, they may.

MR. McGINTY: I mean, to tell the jury that he's a sexually violent predator when they don't have to, and I think we should inquire -- the Court should inquire of the defendant if that is indeed what he wants. I took from Mister --

MR. LANE: Judge, I object.

MR. McGINTY: He has not been -- that he was not prior consulted with Mr. Madison, Mr. Grant, before this outburst by the defense attorney in front of the jury or –

THE COURT: Certainly Mr. Madison was in court and heard it. Mr. Grant.

MR. McGINTY: Your Honor, this is correctible, but --

THE COURT: Hold on.

MR. McGINTY: -- one juror –

MR. GRANT: Your Honor, with all due respect, under no circumstances would the prosecution or the Court in our position

> inquire of Mr. Madison what his trial strategy is or what confidential communication we have had with Mr. Madison.
>
> MR. McGINTY: We don't –
>
> MR. GRANT: We made trial strategy decisions, and Mr. Lane has been authorized to ask the questions he's asking. Now we understand that it's subject to whatever the Court's ultimate limitations –
>
> THE COURT: Yes. And I want everyone to understand that I inquired of him because it is highly unusual -- I think everyone can agree to that -- that a defense team would put into evidence the fact that he has a sexual conviction in his past.
>
> MR. LANE: Well, that hasn't happened, Your Honor. I have asked it in the context of a hypothetical, and that's -- and I've specifically said a hypothetical. So –
>
> THE COURT: That's irrelevant here. It certainly is the impression to this juror that that is a fact. That is the impression that was given.
>
> MR. LANE: Well –
>
> THE COURT: If you disagree with me, that's your right. I note that you object to that. That's your trial strategy. You're entitled to it. And, you know --
>
> MR. LANE: I'll make inquiry of this juror if he's misunderstanding that I have accused Michael Madison of all that, because every time I've asked a juror -- I've said, let's just assume that if at the end of this trial hypothetically you find Michael Madison guilty, you know, it's – I have never said ever -- not one time Michael Madison did the following things. And so if I am misleading a juror or inadvertently leaving that impression, I should clarify it. I think I have taken great pains to make that abundantly clear to every juror, and I will continue along those lines, Your Honor.

(T. 1902-06.)

The prosecutor continued his personal attacks on defense counsel into the next day:

> MR. McGINTY: . . . Every day his mission is to derail the trial, to drag out the trial and to create error. We're supposed to be seeking justice here.

> If we made the wrong accusations against someone or our accusations can't hold water, great. You know, that's their job to do it. We respect their job as the defense to do a good job, and I'm sure they're going to put on a vigorous defense.
>
> And yesterday we had hit a new low when we heard the -- earlier in the case that -- Monday that the defendant said he didn't want the jury to know about him being a sexual predator and his conviction and imprisonment for it. And we have yesterday, to the shock of everyone in the room, including the defense –
>
> MR. GRANT: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> MR. McGINTY: That's my observations.
>
> THE COURT: Mr. Grant, you were not party to this.
>
> MR. LANE: Objection, Your Honor.
>
> MR. McGINTY: He throws him --
>
> THE COURT: The objection is overruled.
>
> MR. McGINTY: -- throws him under the bus and says he's a sexual predator to the juror, undoing what was said, and obviously creating a huge issue on appeal if that juror's put on the venire here or the case. It's so concerning. Every day he seeks to disrupt this case, and we're only in the fifth day. We're in the fifth day, and we should be concluded with this, and he's purposely dragging it out.

(T. 2168-69.)

These audacious attempts to undermine defense counsel, and the defendant himself, were completely at odds with the prosecutor's mellow acknowledgment, only days earlier, that Madison's prior sexual offense was very likely to come before the jury depending upon the strategy the defense pursued in mitigation:

> MR. McGINTY: And we don't intend to [introduce the prior sexual offense]. Will that come into a mitigation phase, or if they open that door to that, that's -- **so be it, we'll see**. But it's like the

> other arguments they're making regarding the Sowell -- you know, they're playing word games here. . . .

(T. 800 (emphasis supplied).) The prospect of the jury learning about that prior sexual offense went from being an occurrence of "so be it, we'll see," to a hugely disruptive ordeal, orchestrated by the prosecutor, to undermine defense counsel and the important attorney-client relationship they had developed with Madison.

This improper behavior was emblematic of the disruptive approach the prosecutor chose to employ, as a tactical matter, throughout jury selection. But the prosecutor's efforts to poison the attorney-client relationship with such intemperate allegations against defense counsel had ramifications beyond the jury selection too. Not long after the opening statement, and after a few witnesses had testified, Madison expressed to the court a desire to fire his lead counsel because of a breakdown in communication and disagreement about strategy. (T. 4233-42.) Although Madison promptly withdrew that request after consulting with counsel, and affirmed that he wanted his lead counsel to continue (T. 4243-44), the State's cynical misconduct during jury selection is most likely what planted the seed that led to that episode of conflict between Madison and his counsel.

Madison was prejudiced by these multiple acts of prosecutorial misconduct because, in the context of the entire trial, it is clear beyond a reasonable doubt that, without the improper conduct, a death sentence would not have been imposed. Madison is entitled to a new trial or, at least, a new sentencing proceeding.

Proposition of Law No. 6. **The trial court denies due process, invades the province of the jury, prevents a fair trial, violates the Rules of Evidence, and commits plain error, when during the guilt phase of a capital case, it admits, without sufficient redactions and limiting instructions, a lengthy video-and-audio recording of the defendant's multi-day interrogation, during which the detectives expressed their personal opinions that defendant was lying, that there were more dead bodies than he was acknowledging, that he needed to show remorse, that he committed the crimes with a sexual motivation, that his claims of excessive alcohol and drug use were not true, and other irrelevant, inadmissible, inflammatory, and unfairly prejudicial statements and opinions, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution, and Article I, Sections 5, 9, 10, and 16 of the Ohio Constitution.**

The audio-and-video recording of Madison's interrogation by police (Exhibit 301) includes numerous unfairly prejudicial, irrelevant, and inflammatory statements and opinions by the various detectives that never should have been admitted into evidence or heard by the jury. Although the video included numerous redactions, there were many other unfairly prejudicial statements and opinions of the officers that should have been redacted (i.e., skipped over and not played) but were not. No sufficient limiting instructions were ever provided.

Madison's counsel objected to some of the improper comments, but failed to object to most of them. The admission of so many unfairly prejudicial, irrelevant, and inflammatory statements and opinions denied Madison due process, invaded the province of the jury, prevented a fair trial and reliable sentencing proceeding, violated the Rules of Evidence, and constitutes plain error, all in violation of Madison's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 5, 9, 10, and 16 of the Ohio Constitution.

A. General Legal Principles.

Generally, a witness's opinion as to the credibility, guilt, innocence, or bad character of the accused is inadmissible. See, e.g., State v. Boston, 46 Ohio St. 3d 108, 128 (1989) (overruled on other grounds); State v. McKelton, 148 Ohio St. 3d 261, 286 (2016) ("The jurors had no way to know that the 'statements were not evidence' or that the officers' representations to Crystal may not have been entirely truthful."); State v. Davis, 116 Ohio St. 3d 404, ¶ 122 (2008); State v.

Edwards, 2006 Ohio 5596, ¶35 (Ohio App. Oct. 27, 2006). "In our system of justice, it is the factfinder, not the expert or lay witness, who bears the burden of assessing the credibility of witnesses and for determining the accused's guilt or innocence." Boston, 46 Ohio St. 3d at 129. Allowing lay or expert witnesses to express opinions on credibility, guilt, or bad character in a criminal trial invades the role of the jury and thus denies an accused the right to a trial by an impartial jury including the independent determination of the facts by the jury. See, e.g., State v. Haney, 2006 Ohio 4687, ¶ 42 (Ohio App. 2006); Seibert v. State, 923 So. 2d 460, 472 (Fla. 2006); State v. Demery, 30 P.3d 1278, 1282 (Wash. 2001).

When the witness offering an opinion is a police officer involved in the investigation of the defendant who is on trial, the allowance of such opinion testimony is especially problematic. "[J]urors are likely to perceive police officers as expert witnesses, especially when such officers are giving opinions about the present case based upon their previous experiences with other cases." State v. Carpenter, 2013 Ohio 1385, ¶20 (Ohio App. Apr. 8, 2013). "Police officers, by virtue of their positions, rightfully bring with their testimony an air of authority and legitimacy. A jury is inclined to give great weight to their opinions. . . ." Tumblin v. State, 29 So. 3d 1093, 1101 (Fla. 2010). See also State v. Potter, 2003 Ohio 1338, ¶¶ 39 (Eighth Dist. App. 2003).

Accordingly, it is especially problematic when a jury is exposed to an interrogating officer's opinions regarding the guilt or innocence of the accused, or the accused's veracity, credibility, or bad character. In addition to invading the role of the jury, such testimony denies due process and a fair trial. Cooper v. Sowders, 837 F.2d 284, 287 (6th Cir. 1988); State v. Vance, 2008 Ohio 4763, ¶32 (Ohio App. 2008). It also violates the Rules of Evidence, including Evid. R. 401, 403(A), 608(A), 701, 702, 704, and 802. See, e.g., People v. Musser, 835 N.W.2d 319, 331-32 (Mich. 2013); State v. McKelton, 148 Ohio St. 3d at 285-87.

The rules against police officers expressing opinions on guilt, credibility, and/or bad character are applicable not only to addressing live testimony in court, but also to taped statements taken elsewhere and presented in court. See, e.g., Jackson v. State, 107 So. 3d 328, 339-40 (Fla. 2012); Smith v. State, 721 N.E.2d 213, 215-17 (Ind. 1999); State v. Elnicki, 105 P.3d 1222 (Kan. 2005); People v. Musser, 835 N.W.2d at 329; Sweet v. State, 234 P.3d 1193, 1196-1206 (Wyo. 2010); State v. Relfe, 2005 Wash. App. LEXIS 1790 (July 25, 2005) (citing State v. Demery, 30 P.3d 1278 (2001)).

In Commonwealth v. Kitchen, 730 A.2d 513, 521 (Pa. Super. 1999), for example, the Superior Court of Pennsylvania agreed with the trial court that comments where the police, either directly or indirectly, accused Kitchen of lying "must be redacted from the videotapes" of his interrogation. The court stated: "When the troopers stated to Appellee, 'You're lying,' or 'We know that you're lying' or phrases to that effect, their statements were akin to a prosecutor offering his or her opinion of the truth or falsity of the evidence presented by a criminal defendant, and such opinions are inadmissible at trial. The troopers' statements could also be analogized to a prosecutor's personal opinion, either in argument or via witnesses from the stand, as to the guilt or innocence of a criminal defendant, which is inadmissible at trial." 730 A.2d at 521. See also State v. Kidder, 32 Ohio St. 3d 279, 285 (1987) (error in admitting un-redacted hearsay through police interview, but not so prejudicial in that case as to require reversal); State v. Rocha, 890 N.W.2d 178 (Neb. 2017); State v. Jones, 68 P.3d 1153 (Wash. App. 2003); State v. Cordova, 51 P.3d 449 (Id. App. 2002); State v. Elnicki, 105 P.3d 1222 (Kan. 2005); Jackson v. State, 107 So. 3d 328 (Fla. 2012).

In Jackson v. State, a capital case, the Florida Supreme Court reversed the defendant's conviction, vacated his death sentence, and remanded for a new trial because of the trial court's improper admission in the guilt phase of a lengthy videotape of the defendant's interrogation in

which the investigating officers, among other things, "repeatedly expressed their personal opinions about [defendant's] guilt." Jackson, 107 So. 3d at 330. The court reversed the conviction even though there was DNA evidence presented that Jackson was a "full match" for the semen found in the victim's vagina and rectum, with chances of the DNA profile matching someone else being "one in a quintillion Caucasians, one in 31 quadrillion African Americans, and one in 1.3 quintillion southeastern Hispanics." Id. at 333.

B. Merits of the Proposition.

This claim includes three broad categories of unfairly prejudicial comments and opinions: (1) comments and opinions about claims of excessive drug and alcohol use; (2) opinions and statements suggesting the possibility of more victims; and (3) opinions and statements about remorse, cooperation, and guilt of sexual predation.

1. Improper comments and opinions about claims of excessive drug and alcohol use.

Madison repeatedly expressed throughout the lengthy interrogation that he did not recall many things from the time period due to his excessive drinking and drugging, and that he did not recall very much about the women he was being asked about. What he was able to remember, he told the police about as the interrogation progressed. Some of his statements were frank admissions of his involvement in killing and/or placing two victims in bags. He nonetheless resolutely maintained, throughout the interrogation, an inability to recall key details and events.

The detectives repeatedly expressed their opinions that Madison was not being truthful with them about his claims of drinking and drugging, his lack of memory, and other things. The video of the interrogation includes the following strongly-expressed police opinions about Madison's claimed inability to recall (with most of the quoted excerpts below taken from Exhibit

302, whereas the cited video excerpts from Exhibit 301 will always be the best representation of what the jury actually saw and heard):

> COMMANDER CARDILLI: The Heineken excuse.
>
> MICHAEL MADISON: --I'm saying I'm pretty sure there's more than just some Heinekens, like I wouldn't --
>
> COMMANDER CARDILLI: Oh, I've heard better ones. The Heineken excuse, **I don't think that there's anybody in the world that's going to buy the Heineken excuse**.

(State Exh. 301 (**July 20**) at 23:02:10 to 23:02:40 [pp. 177].)

> COMMANDER CARDILLI: Mike, that drug offense -- defense is almost as ridiculous as that Heineken defense. Wasn't there a person that tried a Skittles defense or something like that at one point? Am I –
>
> MICHAEL MADISON: He was meaning Ectasy.
>
> COMMANDER CARDILLI: No, Mike, like –
>
> MICHAEL MADISON: Candy?
>
> COMMANDER CARDILLI: Yeah, like candy.

(State Exh. 301 (**July 20**) at 23:06:10 to 23:06:35 [pp. 180].)

> Q. I'm not even gonna say confronting you. I mean, we are asking you what your involvement was with these girls, okay? **Like, I said, it is gonna be real hard for people to understand that you don't remember**.

(State Exh. 301 (**July 21/22**) at 00:00:20 to 00:00:30 [pp. 93].)

> Q. Where's the other body, Mike?
>
> A. What other body?
>
> Q. Where's the other body?
>
> A. What other body?

> Q. **You know exactly which one I am talking about. That drinking and boozing bullshit story that you have been feeding me for two fucking days, it ain't cutting it.**
>
> A. Man, the way I feel right now, man. Gas chamber, fuck it. Man. I'm not on this shit, man. Like I told you, this hope that, fuck it. Shit ain't gonna change.

(Exhibit 301 (**July 21/22**) at 00:23:40 to 00:24:40 [pp. 104-05].)

> DETECTIVE 1: . . . In a month, we will have the results back. And, if there is other people with DNA on this, I'm telling you, dude, you are gonna take a hit. **Because, again, it is gonna show that you have been lying. And, you are not cooperating**.
>
> A. If I am not recollecting certain shit, like, I'm telling you. I don't, man.
>
> Q. I'm just keeping it real, Mike.

(Exhibit 301 (**July 21/22**) at 00:19:30 to 00:20:05 [pp. 102].)

> CARDILLI. Who helped you carry the bodies? Who helped you carry the bodies?
>
> A. Shit ain't nothing, man. I've been cooperative as fuck. You all send this dude in here to try and tell me what I feel, and don't feel. I told you. What outside of alcohol have you ever done?
>
> CARDILLI. **We are not talking about me, Mike.**
>
> OTHER DETECTIVE: **Your drug use isn't an excuse for this.**

(Exhibit 301 (**July 21/22**) at 00:24:30 to 00:25:20[8] [see also pp. 105].)

> DET. SOWA: **Michael, I don't think you're being honest with us**. And the reason I say that is you're telling us that you're drinking more and more to forget, and when you get sober you remember, so you drink more to forget. And you're getting into a habit or a pattern, but -- how long have you been in jail?
>
> MICHAEL MADISON: This is what, Thursday?

[8] The quotation above is the result of a careful listening of the video. The transcript comprised of Exhibit 302, while generally accurate, did not capture the entire exchange. The video itself is always the best evidence of what was said and presented to the jury.

> DET. SOWA: And this is Monday, so three days, four days. Not even. **And you're exhibiting no signs that you were alcohol dependent, you're not shaking, you're calm, you're not going through withdrawals, and it's just not adding up to me**. What you're saying, I'm not seeing from my experience.
>
> DET. DIAZ: Are you feeling any of those things that he just said?
>
> MICHAEL MADISON: Huh?
>
> DET. DIAZ: Are you feeling that way right now? I agree. Like –
>
> MICHAEL MADISON: I mean, the shock of it all pretty much –
>
> DET. DIAZ: I'm saying I try to help people like that, that have drinking problems, all the time. And when they go without alcohol for a day or two, they are, like, a wreck. They're sweating, they can't handle things. **You're not exhibiting any of those things that he just said.**
>
> MICHAEL MADISON: I can't really explain that, it's just -- I don't know, like, I'm in the shock of it.

(Exhibit 301 (**July 22**) at 11:11:50 to 11:13:15 [pp. 63].)

Madison's counsel objected to the inclusion of the detectives' respective opinions that Madison was not being truthful about substance abuse impairing his memory and that Madison was not exhibiting signs of withdrawal from such abuse. (T. 5276-83 5882-86, 5884.) The court overruled the objections but gave an instruction that the detectives are not experts in "alcohol dependence." (T. 5282-83.)

The instruction was not sufficient to undo the damage. Moreover, the court never gave any instruction—during or after the playing of the recording, or even in the jury instructions at the end of the trial—that the detectives' questions, statements, and opinions were not evidence, and that they may only be considered, if at all, for the limited purpose of providing context to the defendant's statements. See, e.g., McKelton, 148 Ohio St. 3d at 286 ("It [was] error to admit statements by an interrogating officer without any limiting instruction or admonishment."),

quoting Lampkins v. State, 778 N.E.2d 1248, 1251-52 (Ind. 2002)); Musser, 835 N.W.2d at 336 (a timely limiting instruction, before presentation of the recording, is a minimum requirement, but such impermissible police opinions may still require reversal); State v. Rocha, 890 N.W.2d at 199 (same); State v. Gaudreau, 146 A.3d 848, 864 (R.I. 2016).

The detectives' opinions about Madison's truthfulness on this issue—even to the point of demeaning it as a "bullshit" story and as "ridiculous"—carry an outsize weight with juries. It was prejudicial error to allow those opinions to be heard by the jury, and especially without a timely and sufficient limiting instruction. They should have all been redacted from the recording.

2. Opinions and statements suggesting the possibility of more victims.

Also of extreme prejudice were the many unnecessary statements and opinions about the number of victims. Even after all three victims had been found by mid-day on July 20, 2013, the detectives continued to ask Madison about whether there were more than those three, and if there were more than five, and if there were more than ten.

> COMMANDER CARDILLI: Was it more than 10, Mike?
>
> MICHAEL MADISON: My goodness, I ain't been, I ain't been, -- it ain't be that many. I don't --
>
> COMMANDER CARDILLI: It's not that many?
>
> MICHAEL MADISON: That's extreme.
>
> COMMANDER CARDILLI: More than five?
>
> SERGEANT RUTH: We're just asking you. You would know, we won't, that's why we're asking.
>
> COMMANDER CARDILLI: More than five?
>
> MICHAEL MADISON: Still, five is extreme, one is extreme, one is extreme, so I'm saying --

> COMMANDER CARDILLI: We're already past one. We're already past two.

(State Exh. 301 (**July 20**) at 21:06:00 to 21:06:35 [pp. 98].)

> COMMANDER CARDILLI: How many bodies are we going to find, Mike? Do me a favor and just answer me that, that's all I want.
>
> MICHAEL MADISON: I don't know, man. You know, this whole –
>
> COMMANDER CARDILLI: Is it more than five? Mike, is it more than five? You owe me that much. If nothing else, you owe me that much. Am I going to find another one?
>
> MICHAEL MADISON: I don't know; I don't know.
>
> COMMANDER CARDILLI: It's not more than five?
>
> MICHAEL MADISON: I don't know.
>
> COMMANDER CARDILLI: Why did you just shake your head and say no, then?
>
> MICHAEL MADISON: I'm saying I don't know.
>
> COMMANDER CARDILLI: That's bull shit, Mike.
>
> MICHAEL MADISON: I'm seriously telling you I don't know if there's more than five. I don't.

(State Exh. 301 (**July 20**) at 23:01:15 to 23:02:10 [pp. 176].)

> COMMANDER CARDILLI: Is it more than five? Just tell me that, give me that much respect; give me that much respect.
>
> MICHAEL MADISON: I don't know, Mike. What I do know is like, you know, I know what I told you, and anything, whether it's more than five, less than five, like only time will tell.

(State Exh. 301 (**July 20**) at 23:05:10 to 23:05:40 [pp. 180].)

> Q. I'm not even gonna say confronting you. I mean, we are asking you what your involvement was with these girls, okay? Like, I said, it is gonna be real hard for people to understand that you don't remember.

A. Ten. Like, there ain't enough drinking and drugging for it to be ten.

Q. How many is there enough drinking and drugging to do?

A. I don't know. I don't know.

(State Exh. 301 (**July 21/22**) at 00:00:20 to 00:00:55 [pp. 93].)

DET. DIAZ: Okay. How long after you take that second girl out does that third girl get there? Is it a couple days?

MICHAEL MADISON: I have no recollection of a third girl.

DET. SOWA: You do -- are you aware that there are three bodies?

MICHAEL MADISON: I'm aware there's three, but –

DET. SOWA: You only remember one.

MICHAEL MADISON: -- from what I'm hearing, there's even more.

DET. SOWA: Well, who are you hearing that from? And please don't tell me a voice in your head is telling you there's more.

MICHAEL MADISON: Um, like the paper they gave me that says –

DET. SOWA: Well, do you believe everything you read in the paper?

MICHAEL MADISON: No.

DET. SOWA: Where does the best information come from?

MICHAEL MADISON: The source.

DET. SOWA: Michael.

MICHAEL MADISON: The source.

DET. SOWA: I guess that's one of the reasons we're here. That's why we're having this chitchat.

. . . .

> DET. SOWA: I'm just trying to put it in – I'm not saying you knew at that moment know you were choking the life out of her, but at some point you realized that that's what had happened. I'm trying to be matter-of-fact about it. I don't want to beat around the bush, but that's what happened. So in October there's a girl you choked, she ends up dead. Can you say that?
>
> MICHAEL MADISON: (Affirmative nod.)
>
> DET. SOWA: Now, within a day or so or a short period of time, you put her into a garbage bag and put her in your garage. The next thing you remember is a bad smell from your closet, and in the closet is a garbage bag that the smell is coming from, and you take that garbage bag and you put it in the garage.
>
> DET. DIAZ: Here's the thing, okay, Mike? Um, we got to wrap it up, (inaudible) said.
>
> DET. SOWA: Fine. I think it's up to Michael.
>
> DET. DIAZ: I know.
>
> DET. SOWA: I guess you have an appointment somewhere that you have to go to, and this is your opportunity to tell us -- you know, they're not gonna let us sit here and drink coffee and smoke cigarettes with you all day, unfortunately there's constraints. **And this is your opportunity to help the families of these girls, more than one, and only you know how many.** So this is your opportunity. It's up to you.

(State Exh. 301 (**July 22**) at 11:39:30 to 11:43:05 [pp. 84-86].)

These lines of inquiry might have been good police work in July 2013. But, by the time of trial in April 2016, the questions and answers (see infra Proposition of Law No. 7) about whether there may be more than three victims were not pertinent or relevant. The questioning, as played at trial, only served to suggest there may be more victims than the three women for which Madison was charged. That suggestion was extremely prejudicial. These questions and answers should have been redacted. At the very least a limiting instruction was required.

3. Opinions and statements about remorse, cooperation, and guilt of sexual predation.

Equally or more prejudicial were the many opinions, comments, and statements by the detectives to Madison about the need to cooperate, show remorse, and demonstrate concern for the victims, all of which comments suggested or stated that Madison's *failure* to do so demonstrated his guilt and bad character, and would or should be held against him by the jury. There was also the crass allegation that Madison committed the crimes with sexual motivation, an especially devastating expression of police opinion in this case.

The video of the interrogation includes the following examples (with most quoted excerpts below being taken from Exhibit 302, whereas the cited video excerpts from Exhibit 301 are always the best representation of what the jury saw and heard):

> SERGEANT GARDNER: Mike, you have to have feeling, **you have to have remorse**. That's the key in this.

(State Exh. 301 (**July 19**) at 19:41:30 [pp. 62].)

> MICHAEL MADISON: What I'm saying, I'm saying like it's already not looking good.
>
> SERGEANT GARDNER: Mike, the situation that I was talking about remorse before, it's going to come down to two things. One, **you're going to look like a cold-blooded killer if you show no remorse and don't explain what happened**, or you're going to explain what happened and the jury is going to hear this and understand this a little more, they're going to understand what happened to you a little more. Again, I'm not here to blow smoke up your ass, either. You're hit, dude. You're going to take a hit. **But the difference is between coming out and breathing the air at some point in your life or not, because if you're labeled that cold-blooded killer, you're not going to see daylight**.

(State Exh. 301 (**July 19**) at 19:44:00 to 19:44:45 [pp. 64-65].)

> SERGEANT RUTH: We can talk on your behalf, though, in the way of what you're helping us, you're talking to us about, **we can talk to the prosecutors and everyone else concerning what you're doing to help yourself and us, which goes a long way**. We have that power, also. I got it. It usually stays up, too. There you go. Now we're good.
>
> . . . .

> SERGEANT RUTH: And when we do talk to the prosecutors and it goes further, I know I can personally go up and say, you know, "He's the one that told me this. I didn't have to go do this. He told me, he explained this to me, he explained this to me." I'll tell you what they're going to "Really?" I've seen it a number – "He told you that?" "Yeah." "Oh, okay." **The judge and everyone else, the prosecutors, you name it, look better on that, I'm not going to lie to you on that.** And I'm here to help you any way I can, and I know you said you're going to help us, I mean, we're here, we're not going anywhere, I mean, we're going to help you if we can.

(State Exh. 301 (**July 20**) at 19:36:30 to 19:37:10, 19:55:30 to 19:56:15 [pp. 36, 49].)

> MICHAEL MADISON: What exactly is capital, capital murder?
>
> SERGEANT RUTH: That's what the prosecution, the prosecutors decide, but **it's also decided on the cooperation of the person**.
> . . . .
>
> MICHAEL MADISON: Okay. Well, I think once I know the full extent of what my charges could be --
>
> SERGEANT RUTH: Right now, I mean, the charges could be murder. Now, when I went back to the accident, if it's an accident, it's murder, if you planned on doing things like this, "I planned on doing this" or "I wanted to do this," gets into the aggravated, but also, even if it's aggravated and you cooperate, **they can drop that back down to murder, which would not be a capital. Believe it or not, it's all up to you, it really is, your cooperation in this**.

(State Exh. 301 (**July 20**) at 21:56:30 to 21:58:00 [pp. 136-37].)

> SGT. RUTH: . . . He was asking about the capital charge compared to just life, you know, in prison. . . . And I couldn't be more honest in saying that actually coming out with the truth and explaining it and giving its way -- giving it to them that way is what's gonna help instead of just going with the forensics, and we know what happened, and him not saying anything. **That's when they go harder**.
>
> SGT. GARDNER: Right.
>
> SGT. RUTH: But when he goes with telling us what happened in the statement here, **the jury knows he cooperated, the judge knows he cooperated. It's a lot different than just nothing, anything.**

> SGT. GARDNER: Absolutely.
>
> . . . .
>
> SGT. GARDNER: Well, I mean, this is sort of your why this is important, Mike, is that **this is gonna show, again, your cooperation and then you're gonna want to show the remorse in there, man**. There's going to be an opportunity – he's going to give you an opportunity to say what you want to say, all right, and this is where you want to -- you know, **you want to show a little remorse, man. You want to show that hey, yeah, I fucked up, but I didn't mean to fuck up**. Like I said, the drugs, the alcohol got to me and this is -- you know, I'm sorry for what happened. I'm sorry for what happened. And he's going to give you an opportunity to do that and that's why it's important.

(State Exh. 301 (**July 21**) at 13:21:10 to 13:23:50 [pp. 36-37].)

> DETECTIVE 1: We are not passing judgment on you. But, you can read this shit, man. **Others are passing judgment.**
>
> A. Fuck them.
>
> DETECTIVE 2: But, **it bothers them that you haven't even shed a tear**. I mean, I would be fucking upset. I'd be real upset. I'd be bothered, man.
>
> A. I don't know. All this shit, man. I don't know.
>
> Q. So, you are saying that you are totally unemotional as a person? You have no capability to love somebody?
>
> A. Yeah. I am capable of loving somebody. But, this shit don't get turned on and off like a faucet.
>
> Q. I understand what you are saying. **But, you are telling me that it is okay to have no remorse for dead people that didn't deserve to die.**
>
> A. Why, because I'm not showing it.
>
> Q. Yeah.
>
> A. You don't know what I feel on the inside.
>
> Q. I've been asking you if this bothers you, and you are not really giving me anything.

(State Exh. 301 (**July 21/22**) at 00:16:10 to 00:17:40 [pp. 100-01].)

Q. I'm just keeping it real, Mike.

A. **I understand, man. Like, right now, he telling me, I ain't got no remorse. He trying to tell me how I should feel.**

DETECTIVE 2: **I'm not trying to tell you how to feel. I'm telling you how the typical man would view it**. I understand that you don't recollect some things. I'm not trying to piss you off, Mike. **I'm just having trouble understanding that you don't seem real upset, other than the fact that you are in trouble.**

A. I told you. I got a million and one thoughts rushing in. I can't seem to hold a thought too long.

Q. So, you haven't had a chance to absorb this yet really?

A. No. I've absorbed it, but you know? There was a time when l would have felt something, but I've been through so much shit in my life. Like, all three of you haven't been through the shit I've been through in my life.

Q. **I understand. That is not an excuse here.**

A. Man. You trying to tell me what I feel and what I don't feel.

Q**. No. I am not trying to tell you that. I am asking you. But, you are not telling me anything.**

(State Exh. 301 (**July 21/22**) at 00:20:00 to 00:21:20 [pp. 102-03].)

A. What outside of alcohol have you ever done?

CARDILLII. **We are not talking about me, Mike.**

OTHER DETECTIVE: **Your drug use isn't an excuse for this.**

A. Come on man. Where you all get this dude from? You all started drawing out like they was you alls kids or something, man. You all ain't that damn passionate about this shit.

CARDILLI. How do you know what I am, sit there and tell me what I am and what I ain't?

A. Just the same way he just sat there and told me what I feel.

> CARDILLI. Don't tell me what I ain't.
>
> A. But what the fuck is he telling me what I am and what I ain't? Like man oh man. Come on man. Like I told you dude. Like I can understand you got a job to do.
>
> CARDILLI. **You killed little girls, that's what the fuck you did.**
>
> A. Yeah, I see why you ain't came back.
>
> CARDILLI. You're right. Because I was about sick of your god damn ass.
>
> A. I don't care.
>
> CARDILLI. **You strangled fucking defenseless women, and that made your fucking dick hard.**
>
> A. Call it what you want, man. Call it what you want.
>
> CARDILLI. **That's what I just called it.**
>
> A. You wish you was out there getting your fifteen seconds, fifteen minutes of fame too?
>
> CARDILLI. Come on. Let's go. I'm done with your ass. Let's go.
>
> A. I don't care man. You don't talk shit to me.

(State Exh. 301 (**July 21/22**) at 00:25:10 to 00:26:20[9] [see also pp. 105-06].)

These comments, statements, and opinions were inflammatory and unfairly prejudicial, and should not have been presented to the jury in a capital case. The detectives' many improper comments bluntly informed the jury, or at the very least encouraged the jury to reasonably infer, that a helpful, cooperative, remorseful defendant would simply not be facing a death sentence, and, indeed, would have a chance for freedom at some point. The invited inference was that Madison—the man on whom the jury was now sitting in judgment—is obviously not such a person. Almost

[9] The quotation above is the result of a careful listening of the video. The transcript comprised of Exhibit 302, while generally accurate, did not capture this entire exchange. The video itself is always the best evidence of what was said and what the jury saw and heard.

three years had passed since his interrogation, and yet here Madison was, facing death. The inference was that Madison had *failed* to cooperate and to show the necessary "remorse," and so the authorities were "going harder" to seek his death.

The objectionable comments and opinions were not necessary to put Madison's answers in "context" or for any legitimate "interrogation technique." They were merely gratuitous allegations and opinions whose redaction would not have affected the substance of the interview, or interfere in any way with the jury's understanding of Madison's statements or their context. The State had more than a *dozen hours* of interrogation: the redaction of the objectionable material would have had absolutely no impact on the context of the remaining interrogation. Moreover, the detectives' questions, demeanor, reactions and statements did more than merely put Madison's answers in "context." They invited the jury to agree with the detectives' opinions that Madison is a "cold blooded killer," that he is heartless and remorseless, that his "excuses" of excessive drinking and drugging were lies, that he not only committed these crimes but did so with a sexual motivation to "get his f***ing dick hard," and that he deserved to be where he was, facing the ultimate punishment.

Under any properly-conducted balancing under Rule 403, these opinions and comments were grossly more prejudicial than probative. See, e.g., Musser, 835 N.W.2d at 331-36 (applying Rule 403 in this context, and reversing for a new trial). They were probative of nothing, yet their prejudice was substantial, especially as to sentencing.

C. Conclusion.

Because there are so many unfairly prejudicial statements and opinions by the detectives, the only constitutionally sufficient approaches were either to redact all such statements and opinions (as the parties had done with other objectionable material) or to not allow the jury to see or hear the video at all. The State had Madison's written statement.

The trial court's admission of the videotaped interrogation, containing so many expressions of opinion, proclamations of guilt, accusations of lying and lack of remorse, and other unfairly prejudicial comments and opinions, was, to the extent not made subject to defense objections, plain error in the circumstances of this capital case because Madison's substantial rights were denied in a way that affected the outcome of his trial, or at least his sentencing proceeding. See Ohio Crim. R. 52(B); State v. Thomas, 2017-Ohio-8011, ¶¶ 32-34 (2017). The improper comments and opinions of the detectives went to core issues of guilt, credibility, character, and punishment, and thus invaded the province of the jury with respect to its most central functions. Sweet v. State, 234 P.3d at 1204 (plain error for trial court to admit video interviews of defendant during which investigator "expressed opinions about the accused's mendacity and guilt and about the alleged victim's truthfulness and credibility [because] such statements invade the exclusive province of the jury to determine the credibility of the witnesses and the evidence.").

Madison is entitled to a new trial, or, at least, a new sentencing proceeding.

Proposition of Law No. 7. A criminal defendant is denied a fair trial and a reliable sentencing proceeding, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 5, 9, 10, and 16 of the Ohio Constitution, when the trial court allows the introduction of unfairly prejudicial testimony, of minimal if any relevance, during the trial phase of a capital trial.

A. General Legal Principles.

When evidence is "so unduly prejudicial that it renders the trial fundamentally unfair, the due process clause of the Fourteenth Amendment provides a mechanism for relief." Payne v. Tennessee, 501 U.S. 808, 825 (1991). Moreover, when an individual's life is at stake, the Supreme Court has repeatedly insisted upon higher standards of reliability and fairness. See e.g., Beck v. Alabama, 447 U.S. 625 (1980) (need for heightened reliability); Lockett v. Ohio, 438

U.S. 586, 604 (1978) (the penalty of death is qualitatively different from any other sentence and requires a heightened degree of reliability).

Evidence Rule 401 provides: "'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." The admissibility of relevant evidence rests within the sound discretion of the trial court. State v. Drummond, 111 Ohio St. 3d 14, 28 (2006).

Evidence Rule 403(A) provides that 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. The determination of whether a piece of evidence is inadmissible under this standard is left to the sound discretion of the trial court. State v. Crotts, 104 Ohio St. 3d 432, 437 (2004). All evidence that tends to prove the State's version of the facts necessarily is prejudicial to the defendant. Id. Thus, the Rules of Evidence do not bar all prejudicial evidence, only unfairly prejudicial evidence is excludable. Id.

Evidence is unfairly prejudicial when it may result in an improper basis for the jury's decision. Id. If the evidence "arouses the jury's emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish, the evidence may be unfairly prejudicial." Id. In other words, if the evidence appeals to the jury's emotions rather than its intellect, it is usually prejudicial. Id. Further, a Rule 403 objection requires heightened scrutiny in capital cases. State v. Morales, 32 Ohio St. 3d 252, 257-58 (1987). Whereas exclusion under Rule 403 generally requires that the probative value of the evidence be minimal and the prejudice great, in capital cases, the probative value of each piece of evidence must outweigh any potential danger of prejudice to the defendant. Id. at 258. If the probative worth of the evidence does not outweigh the danger of prejudice to the defendant, it must be excluded. Id.

On direct appeal, constitutional trial error is harmless only if the prosecution proves it to be harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 26 (1967). When the record on direct appeal establishes constitutional error, the burden is on the State to prove that the error is harmless beyond a reasonable doubt. Id. "The harmless error standard is even more stringent when applied to errors committed at the penalty phase of a capital trial. 'The question . . . is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" State v. Fears, 86 Ohio St. 3d 329, 354 (1999) (Moyer, C.J., dissenting) (quoting Satterwhite v. Texas, 486 U.S. 249, 258-59 (1988)).

B. Merits of the Proposition.

This Proposition concerns the trial court's admission of the following evidence: **(1)** Madison's video statement to the extent he expressed a lack of knowledge or awareness of the number of victims, including if there were more homicides than the three victims for which he was charged (see supra Statement of Facts at pp. 15-19); **(2)** the testimony of Quiana Baker of Madison's alleged statement to her about his annoyance with women and that they made him "want to Anthony Sowell a bitch" (see supra Statement of Facts at pp. 21); **(3)** the testimony of Eugenia Thomas of Madison's alleged statements to her about hitting women and tying them up during sex, about "watching the bitches" at the mall, and about supposedly wanting to kill his "baby mama" because she would not let him see the children (see supra Statement of Facts at pp. 21-22); and **(4)** the video interrogation insofar as depicting Madison's interaction with the female who brought him coffee on July 21, and of the period, also on July 21, when he was alone in the room and used some profanity (see supra Statement of Facts at pp. 20). The relevant statements,

testimony, and/or depictions at issue here are set forth in the Statement of the Facts, at the pages noted, and are incorporated here by reference.

Madison's counsel objected when the State sought to introduce Ms. Baker's testimony about the alleged "Anthony Sowell" comment, as they had told the court they would do during pretrial proceedings. (T. 802, 4525-26.) Madison's counsel also objected to the admission of Ms. Thomas's testimony about Madison's alleged statements to her about his "attitude towards women." (T. 5953.) These objections were overruled and the objectionable testimony was allowed. (T. 4526, 5953.) As for the video tape, Madison's counsel objected, when the tape was being played, to the admission of any statements or inquiries about unsolved homicides (T. 5268, 5271), but apparently did not specifically object to questions and statements about the number of possible victims. The court granted Madison's motion in limine about any unsolved homicides, as unopposed, because the State represented to the court it would redact such material. (T. 5268.)

The defense did not object to Ms. Thomas's testimony about Madison's supposed statements about "watching the bitches" (T. 5954-55, 5958) or supposedly wanting to kill his "baby mama" (T. 5959.) There was no objection to the State's use of the interaction with the woman bringing coffee, or the incident where Madison swore while he was alone.

None of the foregoing four categories of testimony and statements was relevant to any material issue in the case. And, even if there was some minimal relevance for any of it, that minimal probative value was substantially outweighed by the danger of unfair prejudice, especially with respect to the sentencing phase. It all should have been excluded. Even as to the testimony or statements referenced above for which objections were not made, the admission of the evidence was plain error because Madison's substantial rights were denied in a way that affected the outcome of his trial, or at least his sentencing proceeding. See Ohio Crim. R. 52(B); State v. Thomas, 2017-Ohio-8011, ¶¶ 32-34 (2017).

The admission of the alleged "Anthony Sowell" statement was as unnecessary as it was unfairly prejudicial. This episode is emblematic of the prosecutor's complete lack of any perspective and of any desire for a fair trial. "Anthony Sowell" is a notorious Cleveland serial killer, of recent renown, who murdered eleven women, and was sentenced to death. (T. 6144.) This Court certainly knows the case. State v. Sowell, 148 Ohio St. 3d 554 (2016). It was because of the trial court's awareness of the unfair prejudice "Sowell's" shadow would cast over Madison's trial if his name was invoked, that the court, early in the proceedings, granted Madison's motion in limine, without objection by the State, to prohibit the prosecutor from comparing Madison to Sowell. (T. 574-75.) Likewise, any references to Sowell were "redacted" (made silent) from Madison's video-recorded interrogation by police. (T. 4927-28, 5885-86.) When one of the first witnesses in the trial (Shaeaun Childs) made a reference to Sowell, the court immediately sustained Madison's objection. (T. 4149.)

That Madison had supposedly used the name "Sowell" in a conversation with Baker, on some date she could not recall in 2011 or 2012, after a friend's funeral at which Madison had been drinking, is of minimal if any relevance to the charges in this case. But even if relevant, the heighted Rule 403 scrutiny required in capital cases, Morales, supra, makes this an easy case for exclusion because the danger of unfair prejudice was obviously so great. The truly de minimis *probative* value of this one piece of evidence—when the State already had the DNA evidence, the items in Madison's apartment, the text messages, the five garbage bags used on Shirellda Terry's body that were "indistinguishable" from the 15 bags remaining in the 20-quantity box in Madison's apartment, *and* Madison's 17-plus-hour interrogation from which references to "Sowell" had been redacted—*pales* in comparison to the grave danger of unfair prejudice to Madison from its admission. It was as if the prosecutor, lying in wait, had acquiesced in the court's wise rulings to eliminate Sowell's shadow from the case, because the prosecutor fully

intended to simply eviscerate all those protections by driving a truck through the narrow opening the court erroneously allowed him here. That is, of course, exactly what the prosecutor did: he repeated the inflammatory "makes you want to Anthony Sowell a bitch" testimony in guilt-phase closing argument (T. 6198), used it again when cross-examining Madison's expert during the sentencing phase to remind the jury that Sowell is a local "mass murderer" (T. 7221, 7261), and used it again in his sentencing phase closing argument. (T. 7624.) The prosecutor's unspoken wink to the jury: Sowell is on death row, so too should Madison.

The other inflammatory evidence cited here should also have been excluded. Madison was not on trial for killing his "baby mama," or even for harming her. There is no reason whatsoever the testimony about that irrelevant and inflammatory statement should have been allowed in a capital case. Likewise for Madison's alleged statements about being at the mall and "watching the bitches," or his alleged preference for "submissive" women who would let him tie them up during sex. These alleged statements have nothing to do with anything at issue in the case, and their only purpose was to seek to further demonize Madison and make a death sentence more likely.

The 17-hour interrogation was not only insufficiently reviewed and redacted so as to remove the many unfairly prejudicial opinions and other irrelevant comments by the detectives (<u>see</u> Proposition of Law No. 6), but it was also prejudicial error to admit Madison's statements in that video expressing uncertainty as to the number of bodies police would find, and whether there were more than the three victims that were discovered. The detectives' questions about whether there were more than five, or more than ten, may have perhaps been good police work, in July 2013, in the event there *were* more bodies. But there were not more, thankfully. Indeed, by the time of Madison's trial, in April/May **2016**, nearly three years had elapsed since the discovery of the three victims on July 19/20, 2013. Madison was charged with those three

murders, and the evidence should have been scrupulously limited to those three victims. The evidence of Madison's responses to police questions about possible other victims, and how many there may be, was totally irrelevant and only served to inflame the jury against him, especially as to sentencing. Madison's timely objection to the admission of any questions or statements about "unsolved homicides" preserved his objection to this issue too, and the admission of the evidence violated the court's motion in limine. But even if not within the scope of that ruling, it was plain error to admit such irrelevant inflammatory evidence in a capital case.

The admission of Madison's interaction with the woman delivering the coffee on July 21 was obvious error. Madison was not then being interrogated, but was relaxing and smoking a cigarette. The detectives conducting the interview were no longer in the room. Madison did not even know he was being recorded. His interaction with the woman was not relevant evidence to any issue in the case. The woman was not identified on the recording, but the prosecutor identified her in closing argument as ECPD Detective Yashila Crowell. (T. 6241.) Det. Crowell testified at trial, but only about her involvement obtaining search warrants and interviewing witnesses. She did not testify at all about the scene with Madison in the video, not one word about that subject. (T. 5754-70.) Yet, the prosecutor emphasized this scene in closing argument in a very prejudicial and unfair way:

> There is one point in this video where a female enters the room, and that's Detective Yashila Crowell from East Cleveland. She comes in the room to bring him some coffee. She doesn't even question him. Watch how he reacts to her after hours. I mean, he knows his life is over at this point. He says that he knows that he's caught and he knows he can't talk his way out of it, because this is July 21st. We're on the third day of interrogation now. He knows he's not going to get away with it. Watch his reaction when Yashila Crowell comes into the room.
> \- - - -
> (Video played.)
> \- - - -

> MR. SCHROEDER: If you couldn't hear that, he says, "Be good." Smiles, nods his head. He says, "Be good." So he takes this opportunity when he's in the East Cleveland Police Department being interrogated for three homicides to flirt with the only female who comes into the room. And that's the charming, charismatic version of Michael Madison that you saw in these texts where he talked Shirellda Terry into meeting up with him, a guy she doesn't really know that she only met a week ago. That's that version of Michael Madison, but that's not the version of Michael Madison that she saw when she got into the apartment. She saw this Michael Madison.

(T. 6241-42.)

In the closing argument, the prosecutor also compared this episode with the coffee to the later episode on July 21, where Madison used profanity and got angry about the mayor. (T. 6243.) The admission of that later episode was likewise error. Madison was not being interrogated, and was sitting alone in the room. His behavior at that time, close to midnight and alone in the room, has no evidentiary value for any issue in the case and should not have been admitted. It was used solely to make him look bad and to demonize him further in front of the jury, a purpose confirmed by its emphasis in the State's closing argument.

During the mitigation phase, the prosecutor again emphasized the coffee episode, this time through the testimony of the State's expert Pitt:

> Q. You have also seen some instances where the defendant is capable of being very charming.
>
> A. Oh, yes.
>
> Q. What were those?
>
> A. Well, the most significant one and the one that stands out in my mind is you may recall during the interrogation there's a break at a certain point, I can't remember on what day it is, but a female detective or female police officer comes in and offers Mr. Madison some coffee. And here's a guy who has been dodging and weaving and giving partial answers, talking during his interrogation with the police, I don't believe all three bodies at this point had even been found. And yet this woman comes in to offer him coffee and all of

> a sudden it's The Dating Game and he's as affable and charming and delightful and chatting her up like it's nobody's business. That would be the best example.
>
> Q. Did you think that was unusual given the setting and the circumstances?
>
> A. Absolutely. You bet.

(T. 7455.)

The admission of these four categories of evidence denied Madison a fair trial and a reliable sentencing proceeding. Absent these errors, there is a reasonable likelihood Madison would not have been sentenced to death. He is entitled to a new trial or, at least, a new sentencing proceeding.

<u>Proposition of Law No. 8.</u> A capital defendant's rights to due process, a fair trial, a reliable sentencing proceeding, and against cruel and unusual punishments are denied, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution, and Article I, Sections 5, 9, 10, and 16 of the Ohio Constitution, when the trial court allows the prosecutor to refer to the defendant by the inflammatory, unfairly prejudicial, and irrelevant term, "serial killer."

There was no issue relevant to this case which required or permitted the State to refer to Madison by the inflammatory, unfairly prejudicial, and irrelevant term, "serial killer." Its usage here was nothing more than impermissible name-calling. Madison sought a pretrial ruling that would bar the State from using the term (T. 647-50, 794-98), but those efforts were denied by the trial court. (T. 3935 ("You may use the term 'serial killer.'").) The defense asked for, and the court allowed, a continuing objection to the State's use of the term. (T. 3935.)

The State thereafter called Madison a "serial killer," and a "depraved serial killer," during closing argument in the guilt phase. (T. 6223, 6244, 6281, 6330.) The State referred to Madison again as a "serial killer," and "serial murderer," during the evidence presentation in the sentencing phase. (T. 6644, 6649, 6653-54, 6661, 6674, 6703-04, 6707-08, 7216, 7228-29, 7232-33, 7464-65.) Madison objected again when the term was used.

Evidence and argument that Madison is a "serial killer" was not relevant to any issue. The capital specification under R.C. § 2929.04(A)(5) was for a "course of conduct" that involved "the purposeful killing of or attempt to kill two or more persons by the offender." The term "serial killer" does not appear anywhere in the Ohio statute, and its usage did not have any evidentiary significance in this case. It is purely a pejorative label, which the State had no reason to use, and only sought to use because it is so inflammatory and unfairly prejudicial. Even had there been an issue for which the term had some modest relevance, any such minimal relevance was substantially outweighed by the danger of unfair prejudice. See Ohio R. Evid. 403. The trial court should have disallowed the use of the term, as the defense requested. The court abused its discretion in failing to do so.

The court's allowance of the State's use of such an unnecessary and inflammatory term was particularly erroneous in a capital case. Death is different. It demands greater reliability than any other sentence. Gardner v. Florida, 430 U.S. 349, 357 (1977) (plurality opinion); Lockett v. Ohio, 438 U.S. 586, 605 (1978). This Court, for example, applies a "stricter evidentiary standard for the introduction of photographs" in capital cases than in other contexts. State v. Morales, 32 Ohio St.3d 252, 257-58 (1987). See also State v. Montgomery, 148 Ohio St. 3d 347, 377-78 (2016). A similarly stricter standard should be applied to the use of epithets like "serial killer" and "depraved serial killer," and especially when the terms have no relevance to any issue in the case, and when they are principally, if not entirely, used to demonize the defendant and inflame the jury. Such terms should be disallowed because of their danger of unfair prejudice.

This is particularly true for the sentencing phase of a capital case. There, Madison has the constitutional right to a reliable sentencing proceeding in which the jury will give fair and dispassionate consideration to any evidence which may call for a sentence less than death. Eddings v. Oklahoma, 455 U.S. at 114-15. By needlessly allowing an already emotional trial to

be further inflamed with name-calling and epithets, like "serial killer" and "depraved serial killer," the court denied Madison those constitutional rights, and allowed undue passion to invade the sentencing process.

This error is not harmless error. There is a grave risk that the error caused one or more jurors, and the court, to minimize or overlook mitigation evidence, and/or to give undue weight to aggravating circumstances, and thereby resulted in a death sentence based at least in part on passion and unfair prejudice, and not fairness, reason, and evidence.

Proposition of Law No. 9. **It violates the defendant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution, and Article I, Sections 5, 9, 10, and 16 of the Ohio Constitution, for the trial court in a capital case to: (1) refuse to instruct the jury that each juror may properly consider mercy in weighing the aggravating circumstances and mitigating factors, and (2) permit the prosecutor to tell jurors they may not consider mercy.**

The trial court denied Madison's motions for a jury instruction that the jury may consider mercy in the mitigation phase, and for an order prohibiting the prosecutor from arguing that the jury should not consider mercy. (T. 423.) Later, during jury selection, the court granted the State's oral motion in limine to prohibit the defense from asking the prospective jurors about mercy. (T. 2939.) The prosecutor thereafter continually misled prospective jurors by telling them that mercy cannot be considered. (T. 3504, 3521, 3528, 3552, 3558-59, 3728, 3866.) He told them that again in closing argument in the sentencing phase, over the defendant's objection. (T. 7700).

For a death penalty statute to be constitutional under the Sixth, Eighth and Fourteenth Amendments, and Ohio's counterparts, it must enable a jury to consider any evidence the defendant may present that calls for a sentence less than death. Penry v. Johnson, 532 U.S. 782 (2001); Eddings v. Oklahoma, 455 U.S. 104 (1982). As addressed above in Proposition of Law

No. 1, and incorporated here too, each juror in weighing states, like Ohio, must be empowered to make his/her own "reasoned *moral* response" to the defendant's background, character, and crime, as expressed through the weighing of aggravation and mitigation. **Each juror is required to decide a purely moral question.** Abdul-Kabir, 550 U.S. at 252 (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

That moral judgment will always, without exception, implicate mercy. Asking jurors to weigh "factors"—in a process designed to determine between, on the one hand, allowing a fellow human being to continue to live or, on the other, to suffer death for his crime—is at its core a question of mercy. The weighing that each juror conducts, and how much "weight" this factor or that factor receives, is a reflection of each juror's individual assessment of mercy's role for that unique human being in that case. To instruct a juror he may not consider mercy is to tell him he may not perform the moral judgment that is true to who he is. It places the thumb on the scale of death, and skews the weighing process in favor of the State. It introduces a defect in the foundation of the entire process, undermining the constitutional protections to which a capital defendant is entitled at the most crucial time.

The Eighth Amendment compels consideration of mercy. It does so on both macro and micro levels.

On a macro level, the gauge of Eighth Amendment compliance is the "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion). See also Hall v. Florida, 134 S. Ct. 1986 (2014). Those evolving standards, by now in 2017, and based upon objective sources reflecting a societal consensus to mercifully exempt such offenders from capital punishment, no longer permit, for example, the execution of offenders under 18 years of age and offenders suffering from intellectual disability.

Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002). Society's extension of mercy dictated those constitutional results.

The Eighth Amendment compels consideration of mercy on a micro level too. Each time a jury sits in judgment in a capital case it must be permitted to accurately represent the most current snapshot of those evolving standards, the rawest reflection of "decency's" status. Each jury's sentence must be permitted to reflect mercy's role in that unique case.

To ensure these essential constitutional protections, capital juries in Ohio must no longer be instructed that mercy may not be considered. That instruction denies the constitutional protections to which capital defendants like Madison are entitled. And it places the thumb on the scales in favor of death. Court decisions in Ohio permitting that flawed instruction should be reconsidered and overruled.

Reconsideration of those flawed rulings is compelled not only by the constitutional doctrines discussed above, but by recent U.S. Supreme Court decisions. For example, in Kansas v. Marsh, 548 U.S. 163 (2006), the Court recognized that mercy is an appropriate mitigating factor. Id. Justice Thomas writing for the majority, in a decision about whether the Constitution permits Kansas to allow a death sentence when aggravating and mitigating factors are in equipoise, quoted with approval the Kansas jury instruction on mercy:

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

Id. at 176. In footnote 3, Justice Thomas explained that mercy as a mitigating factor is important "because it 'alone forecloses the possibility of Furman-type error as it' eliminate[s] the risk that a death sentence will be imposed in spite of facts calling for a lesser penalty." Id. at 176 n.3. The quotation is from Justice Souter's dissenting opinion. Id. at 206. The entire Court joined either

the majority or the dissent. Thus, all nine Justices recognized the importance of avoiding Furman error, and five specifically said that a mercy instruction is the key protection against Furman error.

And, in another death penalty case from Kansas, cited earlier in this Brief, the Court in 2016 reemphasized what should have already been clear about mercy's vital role in any constitutionally-sufficient capital-sentencing scheme: The weighing process is "***mostly*** a question of mercy–the quality of which, as we know, is not strained. . . . [J]urors will accord mercy if they deem it appropriate, and withhold mercy if they do not, **which is what our case law is designed to achieve**." Kansas v. Carr, 136 S. Ct. at 642.

This Court has not yet addressed, in light of Kansas v. Marsh and Kansas v. Carr, the denial of a mercy instruction, and the equally pernicious prosecutor-demanded, thumb-on-the-scale-of-death instruction that mercy may not be considered. This Court should revisit the issue and hold, as the Supreme Court did in Carr, that mercy's role is and must be central in capital sentencing.

The trial court's failure to properly instruct the jury about mercy in Madison's case, and to allow the prosecutor to affirmatively tell jurors that mercy may not be considered, denied Madison a fair trial and reliable sentencing proceeding. A new penalty phase must be ordered in light of these errors.

Proposition of Law No. 10. A criminal defendant in a capital case is denied a fair trial and reliable sentencing proceeding, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution, and Article I, Sections 5, 9, 10, and 16 of the Ohio Constitution, when the trial court refuses, in the sentencing phase, to allow the defendant's expert witness to present relevant mitigation evidence in support of defendant's request for a sentence less than death.

Madison already faced a difficult task in the sentencing proceeding because, due to the inadequate voir dire, the jury had been unfairly stacked with jurors biased in favor of death

(Proposition of Law Nos. 1, 2, 3, 4, 5) and, due to the incongruous instruction that mercy may not be considered, the court and the prosecutor had placed the thumb down in favor of death (Proposition of Law Nos. 5, 9). The court further greatly compounded these errors by granting the State's motions to bar Madison's expert witness, Dr. Cunningham, from presenting relevant mitigation evidence in support of Madison's request for a sentence less than death. The excluded evidence is evidence that "diminish[es] the appropriateness of the death sentence" in Madison's case. (T. 7710 (Sentencing-Phase Jury Instructions).) It should not have been excluded.

A. The excluded testimony and evidence.

Dr. Cunningham is a nationally-renowned clinical and forensic psychologist whose work has made significant contributions to the application of principles of psychology to the context of capital sentencing. (See supra Statement of Facts at pp. 40-41; Defense Exh. FF (Cunningham curriculum *vitae*, T. 6839).) His work, and that of others in the field, provides a peer-reviewed and scholarly-grounded framework with which to enable meaningful juror consideration of moral culpability in this unique context. Because a person does not choose to be born into a situation in which "adverse development factors" predominate, that person, in the relevant respect for capital mitigation purposes, may be viewed as less "morally culpable" than an offender whose development was not so disadvantaged. Or, in other words, he is an offender whose formative developmental adversity, and its impact upon him, substantially diminishes the "appropriateness of the death sentence." The presentation of this evidence was critical to Madison's receipt of the fair sentencing proceeding required by the Eighth Amendment and other constitutional provisions.

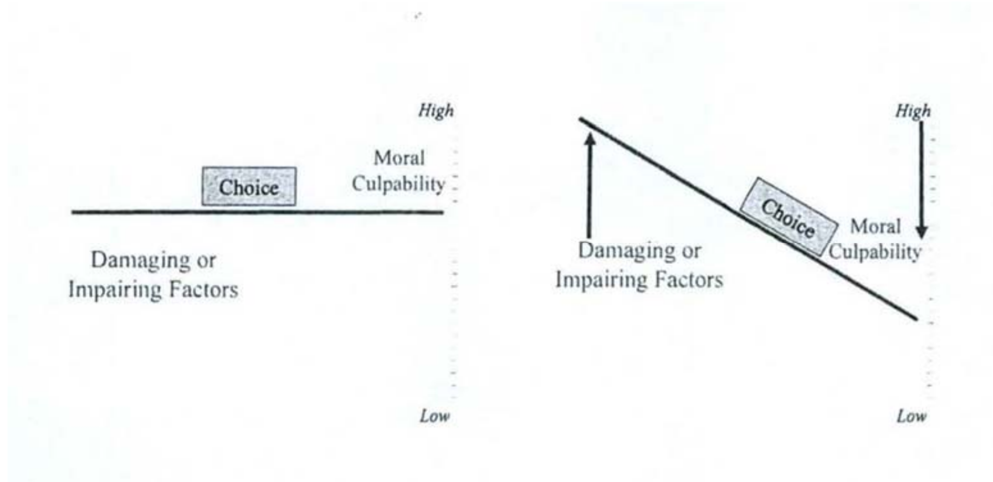
Unfortunately, the trial court, at the aggressive insistence of the prosecutor, *significantly* restricted the ability of Dr. Cunningham to present the available research, its relevance to capital sentencing, and some of the principles it teaches. There are three significant categories of

relevant mitigation evidence that the trial court limited Madison from presenting to the jury through the testimony of Dr. Cunningham. These are: **(1)** testimony and evidence about "moral culpability" and the development of that critical concept in capital sentencing, its significance to a forensic psychologist, and what it means and how it is applied by such mental health professionals in this context; **(2)** testimony and evidence about the connection between, on the one hand, adverse development factors in a person's upbringing, and, on the other, the "choices" available to that person and/or the impairment or limitation of such choices; and **(3)** testimony and evidence about certain of the adverse development factors, including available research and other learned authorities that support the presence of those factors in Madison's case. Each is addressed more fully below.

1. Evidence concerning "moral culpability."

Dr. Cunningham was prepared to address with the jury the important concept of "moral culpability" and its meaning, evolution, and significance *to a mental health professional* like him for purposes of capital sentencing. These concepts were a foundation of his testimony and expert opinions, and were thus central to his presentation, as reflected in his expert report and in power-point slides he had prepared for his in-court testimony (some as depicted in his report). (See Defendant's Proffer Exh. P-16, Cunningham Report at pp. 5-7; T. 6806-08, 6839, 7510-13.)

One such slide is depicted below (from pp. 6 of the Cunningham Report):



Dr. Cunningham's 110-page report explained the concept of "moral culpability" in great detail, and grounded the concept in the prevailing peer-reviewed research, as "the primary psycho-legal consideration at capital sentencing" (id. at 84) and "the central psycho-legal focus of mental health evaluations for capital sentencing." (Id. at 93.) The concept in part arises from the controlling case law, an assertion which is a *fact*, not a legal opinion, to any reputable and properly-informed forensic psychologist working in this field:

> **Moral culpability is a concept at the heart of mitigation** (*Burger v. Kemp*, 1987), citing *Woodson v. North Carolina* (1976) (see also other SCOTUS decisions, e.g., *Coker v. Georgia*, 1977; *Lockett v. Ohio*, 1978; *California v. Brown*, 1987; *Franklin v. Lynaugh*, 1988; *Penry v. Lynaugh*, 1989; *South Carolina v. Gathers*, 1989; *Payne v. Tennessee*, 1991; *Graham v. Collins*, 1993; *Penry v. Johnson*, 2001; *Atkins v. Virginia*, 2002; *Wiggins v. Smith*, 2003; *Roper v. Simmons*, 2005; *Abdul-Kabir v. Quarterman*, 2007). **An understanding of the concept of moral culpability is critical to the mental health expert's and the jury's consideration of the nexus between the mitigating factors presented at sentencing and the offense** (see Cunningham, 2010). To explain, the concept of moral culpability acknowledges an elementary psychological reality: we do not all arrive at our choices out of equivalent raw material. It follows that the degree of "blameworthiness" for an individual for criminal or even murderous conduct may vary depending on what factors and experiences shaped, influenced, or compromised that choice. The relationship of developmental damage and other impairing factors to the exercise of choice, and

> subsequently to moral culpability, is illustrated in the graphic models below. [**The graphs are excerpted immediately above in this Brief**]. As the damage and impairing factors (e.g., neglect, abuse, psychological disorder, corruptive socialization, substance dependency/ intoxication, etc.) increase, choice remains, but is exercised on an increasing slope, and moral culpability is correspondingly reduced. **The greater the damaging or impairing factors, the steeper the angle or slope on which the choices are made; and thus the lower the level of moral culpability.**
>
> This concept of moral culpability is central to the rationale of *Wiggins v. Smith*, *Atkins v.Virginia*, and *Roper v. Simmons* - i.e., background factors, mental retardation (now intellectual disability), and/or youthfulness all impact on the level of moral culpability of a defendant, *even though the respective youth (Roper), person with mental retardation/intellectual disability (Atkins), and/or person with a trauma history (Wiggins) still exhibits basic capacity for choice, wrongful awareness, and self-control*. Their youthfulness, cognitive limitation, or adversity does not render them "insane" or even "imperfectly insane," but still impacts on the raw material brought to their decision-making and their associated moral culpability. **The formative or limiting impact from any source of developmental damage or impairment is relevant in the weighing of moral culpability**. **An appraisal of moral culpability involves an examination of the degree to which the background and circumstances of the defendant influenced, predisposed, or diminished the defendant's moral sensibilities and the exercise of volition or free will. Stated more plainly, how steep was the angle from which the choices were mad**e?
>
> The history, perspectives, and scholarly findings that follow in this report regarding adverse developmental factors, and subsequently the critique of the evaluation and report of Dr. Pitt, illuminate the formative influences and raw materials Mr. Madison brought to his decision-making (i.e., inform factors relevant to his moral culpability).

(See Defendant's Proffer Exh. P-16, Cunningham Report at pp. 5-6 (emphasis in bold is supplied).)

Dr. Cunningham's report details the substantial peer-reviewed scholarship in recent years that discusses the "variety of formative/impairing factors that mental health evaluations at capital

sentencing should explore and consider in illuminating a defendant's moral culpability." This scholarship includes:

(1) Cunningham, M. D. (2008), Forensic psychology evaluations at capital sentencing, In R. Jackson (Ed.), *Learning forensic assessment (International perspectives on forensic mental health)*, pp. 211-238 (New York: Routledge, Taylor & Francis Group).

(2) Cunningham, M. D. (2010), Evaluation for capital sentencing, A volume in the *Oxford best practices in forensic mental health assessment series*, Series Editors: A. Goldstein, T. Grisso, and K. Heilbrun (New York: Oxford University).

(3) Cunningham, M. D. (2013), Evaluations at capital sentencing, in R. Roesch and P. Zapf (Eds.), *Forensic assessments in criminal and civil law: A handbook for lawyers*, pp. 103-17 (New York: Oxford University Press).

(4) Cunningham, M. D. (2016), Forensic psychology evaluations at capital sentencing, In R. Jackson and R. Roesch (Eds.), *Learning forensic assessment: Research and practice (International perspectives on forensic mental health)*, 2nd edition, pp. 202-228 (New York: Routledge, Taylor & Francis Group).

(5) Cunningham, M. D., & Goldstein, A. M. (2003), Sentencing determinations in death penalty cases, in A. Goldstein (Ed.), *Forensic psychology* (Vol. 11 of 12), pp. 407-36 (I. Weiner (Ed.), *Handbook of psychology*) (New York: John Wiley & Sons).

(6) Cunningham, M. D., & Goldstein, A. M. (2013), Sentencing determinations in death penalty cases, in R. Otto (Ed.), *Forensic psychology* (vol. 11 of 12) (I. Weiner (Ed.), *Handbook of psychology*, 2nd edition), pp. 473-514 (New York: John Wiley & Sons).

(7) Cunningham, M. D., & Reidy, T. J. (2001), A matter of life or death: Special considerations and heightened practice standards in capital sentencing evaluations, *Behavioral Sciences & the Law*, 19 (4), pp. 473-90 (doi: 10.1002/bsl.460).

See also Defendant's Proffer Exh. 16, Cunningham Report at pp. 100-10 (cited references).

These and other authorities teach that it is critical for forensic mental health evaluators in capital cases to "understand the differential of criminal responsibility and moral culpability, [because] their operational definition of the psycho-legal issue at stake will guide the

methodology and analysis of their evaluations, and because their confusion regarding these may misinform the court/jury." (Cunningham Report at pp. 87-88 (citing DeMatteo, D., Murrie, D. C., Anumba, N. M., & Keesler, M. E. (2011), Forensic mental health assessments in death penalty cases, at pp. 238 (New York: Oxford University Press).)

Those two concepts, of "moral culpability" and "criminal responsibility," must not be confused. The latter—criminal responsibility—has already been adjudicated against the defendant by the time the sentencing phase begins. "Re-examining criminal responsibility does little to 'individualize' the sentencing decisions, because all defendants who reach the sentencing phase have been found criminally responsible (Cunningham, 2008). Rather, the sentencing process is more likely to reach an individualized decision by considering the defendant's experiences, influences, and capacities ***as these relate to moral culpability***." (Cunningham Report at pp. 88 (quoting DeMatteo, et al., supra (2011), at pp. 238).)

The court barred Madison from presenting this critically relevant and important evidence concerning moral culpability. It did so in response to the prosecutor's typically demeaning, and superficial, objections that the report and expected proffered testimony, and by extension the entire professional field, is "entirely ridiculous" and "junk science." (T. 6800-01; see also No. 400, State's Motion in Limine filed May 15, 2016.) The prosecutor alleged that the evidence involved legal conclusions and interfered with the jury's function to weigh aggravating circumstances and mitigating factors. (T. 6801-12.) Madison's counsel responded that "moral culpability," as that concept is applied by Dr. Cunningham and others in his professional field (a field in which he had been accepted by the court as an expert), is a proper mitigating factor under Ohio law and is central to Dr. Cunningham's expert testimony. Counsel also assured the court that Dr. Cunningham would not be rendering any opinions on the *weight* to give aggravating circumstances or mitigating factors. (T. 6806.)

The court rejected these arguments. (T. 6812.) It disallowed the testimony about "moral culpability," and prohibited the use of that term by Dr. Cunningham. It also barred any testimony about the legal landscape from which these forensic-psychology concepts arose, accepting the prosecutor's superficial and flawed argument that those are "legal issues."

2. Evidence about, and establishing the scientific connection between, adverse development factors and choice.

Madison also sought to present through Dr. Cunningham the evidence about, and which establishes the scientific connection between, adverse development factors and choice. The relationship between developmental adversity and choice is an intuitive one to a psychologist, or, as Dr. Cunningham says, it is "an elementary psychological reality":

> [W]e do not all arrive at our choices out of equivalent raw material. It follows that the degree of "blameworthiness" for an individual for criminal or even murderous conduct may vary depending on what factors and experiences shaped, influenced, or compromised that choice.

(See Defendant's Proffer Exh. P-16, Cunningham Report at pp. 5.)

The relationship is also confirmed in the research, as detailed in Dr. Cunningham's report, including:

> In general terms, our moral culpability for wrong decisions or wrong behavior appears greater to the extent that we have resources, capacities, influences, and experiences that allow us to consider a range of options, yet we knowingly and independently chose a wrong behavior with minimal pressure to do so. Our moral culpability appears lesser to the extent that we lack the resources, capacities, influences, or experiences that allow us to consider a range of options, or to the extent that our options have been shaped and limited by influences and experiences we did not chose.

(See Id., Cunningham Report at pp. 93 (citing DeMatteo et al., supra, (2011) at pp. 236).)

Or, as another researcher, cited by Dr. Cunningham, explained:

> The question at mitigation, therefore, focuses on the interaction of those biological, psychological, or social factors that might have shaped a defendant's life or affected his value system, and the capacity to make mature and reasonable choices. Cunningham (2003) refers to those factors that have diminished or shaped the moral development of the defendant, thus affecting the "choices" that he or she makes. Moral culpability suggests that there are a number of factors that might make someone more or less culpable.

(See Id., Cunningham Report at pp. 93-94 (citing Eisenberg, J. R. (2004), Law, psychology, and death penalty litigation, at pp. 66 (Sarasota, FL: Professional Resources Press).)

The U.S. Department of Justice has also "embraced the nexus between developmental factors and criminal outcome in its own research findings and resultant prevention efforts." (See Id., Cunningham Report at pp. 13).

> More specifically, research on factors associated with an increased risk of chronic delinquency and serious violence in the community has been conducted and synthesized under the sponsorship of the U.S. Department of Justice (DOJ) as part of their increasing commitment to violence prevention programs. Consistent with past explanations (e.g., Masten & Garmezy, 1985), DOJ-sponsored reviews have concluded that risk of violent criminal outcome is a function of the interaction or balancing of risk and protective factors (Hawkins et al., 2000; U.S. Department of Justice, June 1995). **That is, as the risk factors increase and the protective factors diminish, an increasing percentage of persons (particularly males) chose criminality and criminal violence.**

(See Id., Cunningham Report at pp. 13 (emphasis supplied) (citing Masten, A.S. & Garmezy, N. (1985), Risk, vulnerability, and protective factors in developmental psychopathology, in *Advances in clinical child psychology: Vol. 8*, pp. 1-52 (New York: Plenum Press); Hawkins, J.D., Herrenkohl, T.I., Farrington, D.P., Brewer, D., Catalano, R.F., Harachi, T.W., & Cothern, L. (April 2000), Predictors of youth violence, *Juvenile Justice Bulletin* (U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention); U.S. Department of Justice (1995), *Guide for implementing the comprehensive strategy for serious,*

violent, and chronic juvenile offenders (Juvenile Justice Bulletin, Juvenile Justice Clearinghouse, Washington, D.C.).)

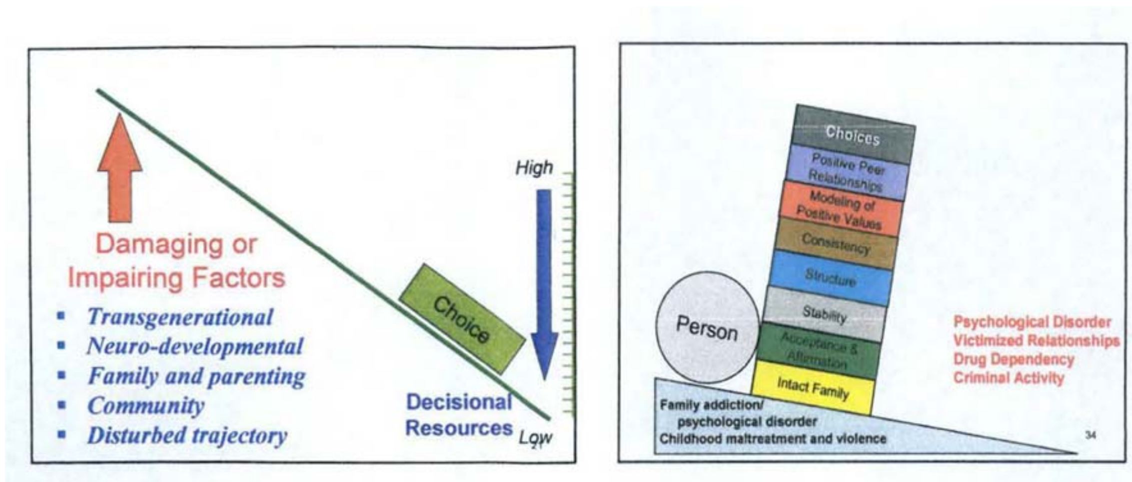
Moreover, the nexus between adverse developmental factors and impaired choice leading to criminal outcomes does not, contrary to the prosecutor's argument in successfully barring this evidence, suggest that the offender lacks a choice. (T. 6958.) To the contrary, there is "**extensive psychological and psychiatric science** that adverse factors significantly impact perception, reactions, attitudes, judgment, self-control, morality, sexuality, and interpersonal capacity; and the resultant exercise of volition, including choices to engage in criminality and criminal violence. It is not that these adverse factors absolutely determine conduct or 'rob' the individual of any volition. **Rather, they influence, predispose, and frame the perception of choices**." (Cunningham Report at pp. 91-92 (emphasis supplied).)

> Addressing the factors that influenced a defendant's choice to commit an offense can be perceived as deterministic, and even misperceived as a claim that a defendant lacked free will to choose among various behaviors. But considering moral culpability never requires one to accept a strict deterministic perspective, and it never denies that a defendant had some degree of choice in his or her offense behavior. An emphasis on moral culpability only considers the psychological, social, and biological factors that influenced, not determined, a particular behavior. It is because the court considers these factors (i.e., psychological, social, biological, and related influences on behavior) that forensic mental health professionals have a role in sentencing deliberations that consider moral culpability.

Id. at pp. 92 (quoting DeMatteo et al., supra, (2011).)

The evidence of the nexus between developmental adversity and impaired choice leading to criminal activity, and the research establishing that nexus to the satisfaction of professional standards in forensic psychology, was a central component of Madison's mitigation case. Nonetheless, the court sustained the prosecutor's objections to the evidence and disallowed the

testimony and associated slides. It also prevented Dr. Cunningham's use of the term "choices," and disallowed Dr. Cunningham's depiction of these concepts using scales, such as:



(T. 6932, 6941, 6987-88.) This resulted in Madison's counsel having to omit significant parts of Dr. Cunningham's testimony, and skipping some 20 slides that educated the jury about and illustrated these important concepts underlying Dr. Cunningham's opinions. (T. 6954-58.) Madison's counsel proffered the slides. (T. 6962 (Defense Proffer Exh. P-1 [Slide Nos. 24-43]).)

3. Evidence about certain adverse development factors and research about them.

Madison also sought to present through Dr. Cunningham additional information about, and scientific support for, some of the adverse development factors that were found to be present in Madison's upbringing.

The hereditary predisposition of certain personality traits and afflictions, such as substance/alcohol abuse and personality "disorders," was an important focus of the mitigation presentation, and was in part the reason Dr. Cunningham constructed the "family tree." (<u>See supra</u> at pp. 36-37). The hereditary predisposition was also important to counter the expected testimony of the State's expert, Pitt, that Madison meets Pitt's opinion of an "anti-social" personality disorder. The defense had every right to present this testimony and evidence, but the

court disallowed it. (T. 7010-18.) This ruling again necessitated that the defense adjust the mitigation presentation, and skip over these important topics and the associated articles and slides. The defense proffered these materials too. (T. 7117-21 (Defense Proffer Exhs. P-2 through P-8 [including Slide Nos. 79-85]).)

The court likewise barred testimony by Dr. Cunningham about, and scientific support for, certain opinions and conclusions he had formed concerning the impact, in Madison's development, of the adverse development factors relating to abuse and head injuries, hypoxia from being choked, and neurological insult. The court's limitation on such evidence arose from the prosecutor's objection that Dr. Cunningham cannot opine on head injuries (T. 7057), and also from the court's ruling that Madison could only present evidence about assaultive conduct that he sustained from the actions of family members, but *not* from those of his peers. (T. 7058-60.) The court rejected defendant's contention that Dr. Cunningham was offering opinions, well-grounded in the field and within his expertise, based upon evidence of Madison's history of head injuries and multiple hypoxic episodes as a child (*regardless* of who caused the episode). (T. 7119-20.) The defense proffered the omitted slides. (T. 7117-21 (Defense Proffer Exhs. P-9 and P-10 [including Slide Nos. 153-176, 185-188].)

The court also limited Dr. Cunningham's testimony on the adverse development factors concerning maternal bonding, sexually perverse family background, and inadequate protective service supervision. The court disallowed testimony about how sexually perverse behavior in the home, to the extent directed at Madison's *brother*, also impacted Madison too, including Dr. Cunningham's opinion about what such behavior demonstrates about the circumstances under which Madison was forced to live. The court only permitted testimony of those instances Madison was *aware of*, and barred testimony about instances of sexually perverse activity of which he was not. (T. 7124-25.) The testimony and slides concerning maternal bonding and

inadequate protective services were limited by the court because the prosecutor claimed they were "repetitive." (T. 7129-34.) The defense proffered these materials too. (T. 7160-61 (Defense Proffer Exhs. P-11, P-12 and P-13 [including Slide Nos. 197-200, 345-48, 353-68].)

B. Merits of the Proposition.

By restricting Madison's presentation of mitigation evidence in all the foregoing ways, the court denied Madison his rights to a fair trial and reliable sentencing proceeding, and to present his defense against imposition of a death sentence.

A sentence of death is cruel, within the meaning of the Eighth Amendment, when it is inflicted despite the existence of factors which, according to contemporary moral standards, reasonably warrant a sentence less than death. Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976). Accordingly, capital sentencers must be allowed to consider and give meaningful effect to proffered mitigating evidence regarding the defendant's history and background, the circumstances of the offense, and any other evidence that a juror could reasonably find warrants a sentence less than death. Lockett v. Ohio, 438 U.S. 586, 605-06 (1978); Tennard v. Dretke, 542 U.S. 274, 284-85 (2004); McKoy v. North Carolina, 494 U.S. 433, 442 (1990); Mills v. Maryland, 486 U.S. 367, 375 (1988). Otherwise, there is an unacceptable risk that an unwarranted, cruel death sentence will be imposed. Lockett, 438 U.S. at 605-06.

The requirement to allow, in mitigation, any other evidence that a juror could reasonably determine warrants a sentence less than death is essential because it ensures jurors have an adequate vehicle for expressing their reasoned moral response to the defendant and his crime. Then and only then can we be sure that the jury has treated the defendant as a uniquely individual human being and has made a reliable determination that death is the appropriate sentence. Penry v. Johnson, 532 U.S. 782, 797 (2001).

It is not relevant whether the barrier to the jury's consideration of mitigating evidence is interposed by statute, Lockett, Hitchcock v. Dugger, 481 U.S. 393 (1987); by the sentencing court, Eddings; or by an evidentiary ruling, Skipper v. South Carolina, 476 U.S. 1 (1986). Such barriers all violate the capital defendant's rights. Mills v. Maryland, 486 U.S. at 375. "Whatever the cause, . . . the conclusion would necessarily be the same: 'Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of Lockett, it is our duty to remand this case for resentencing.' Eddings v. Oklahoma, 455 U.S., at 117 n. (O'Connor, J., concurring)." Mills v. Maryland, 486 U.S. at 375.

These constitutional protections were denied by the trial court. Dr. Cunningham was Madison's most important witness for mitigation, and his report and anticipated testimony provided numerous compelling reasons for the jury to impose a sentence less than death. The court's rulings severely undermined his presentation of mitigation evidence. The rulings deprived Madison of his rights to present the evidence and to have his jury consider and weigh that evidence.

The testimony and evidence about "moral culpability," and the established nexus between developmental adversity and choice, were critically important to Madison's mitigation case. The proffered concepts are firmly established in the peer-reviewed literature which prevails in the field, as detailed in Dr. Cunningham's report. Dr. Cunningham is a pioneer in that field, and himself an author of many of the published papers. He was the ideal person to present the testimony about these important concepts as applied to Michael Madison. He was prepared to opine that these concepts are considered highly relevant in his profession to an offender's criminal punishment. They are thus, *ipso facto*, squarely within the broad scope of R.C. § 2929.04(B), which requires the jury to consider and weigh, *against* the aggravating circumstances, the following, if presented by defendant: the "nature and circumstances of the

offense, the history, character, and background of the offender, [and] [***a]ny other factors that are relevant to the issue of whether the offender shall be sentenced to death.***" (Cunningham Report at pp. 85-86 (citing R.C. § 2929.04(B).) The evidence should not have been excluded.

The legal landscape which inspired the use of "moral culpability" in forensic psychology is important factual background that Dr. Cunningham should also have been permitted to present to the jury. The jurors are not familiar with how the Supreme Court has defined and applied "evolving standards of decency" to establish certain exemptions from capital punishment, as reflective of society's prevailing moral standard that offenders within the exempted categories are less morally culpable than offenders not so exempt. See, e.g., Roper v. Simmons, 543 U.S. 551, 570 (2005) ("The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as ***morally*** reprehensible as that of an adult.' . . . From a ***moral standpoint*** it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.") (citation omitted); Graham v. Florida, 560 U.S. 48, 69 (2010) ("[W]hen compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished ***moral culpability***. Age and the nature of the crime each bear on the analysis."); Atkins v. Virginia, 536 U.S. 304, 306 (2002) (offenders with intellectual disability are categorically ineligible for a death sentence because "their disabilities in areas of reasoning, judgment, and control of their impulses [means] they do not act with the level of ***moral culpability*** that characterizes the most serious adult criminal conduct.").

Nor are jurors familiar with the Court's *repeated and unambiguous* emphasis on that same concept of moral culpability—as distinct from criminal responsibility—in determining the appropriateness of the death penalty for those offenders not exempt. See, e.g., Wiggins v. Smith, 539 U.S. 510, 535 (2003) (evidence of an capital defendant's troubled childhood is the kind of

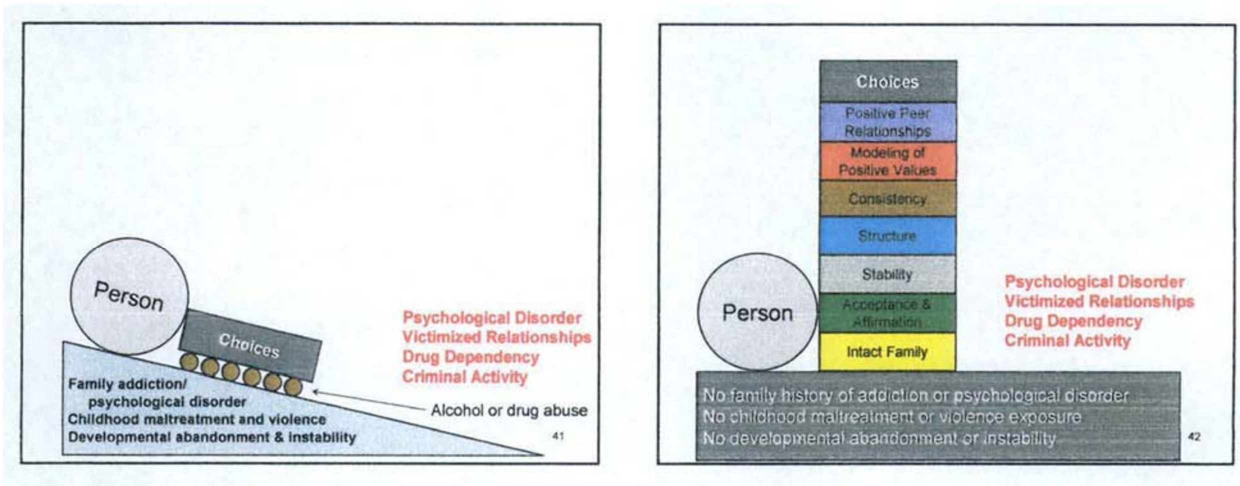
evidence the Supreme Court has "declared relevant to assessing a defendant's ***moral culpability***."); Penry v. Lynaugh, 492 U.S. at 319 ("'Evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be ***less culpable*** than defendants who have no such excuse'").

This factual background is important to those in the field of forensic psychology and critically relevant to understanding the evolution of moral culpability, in that field, as the central psycho-legal focus of mental health evaluations for capital sentencing. The testimony would not have involved legal opinions or conclusions, but, rather, the factual significance these trained mental health professionals have assigned to landmark U.S. Supreme Court decisions which impact their profession (e.g., Roper, Atkins, Wiggins, etc.), and whose holdings cannot be the subject of legitimate dispute. If the prosecutor disagreed with how that profession chose to respond to those seminal decisions, or with Dr. Cunningham's factual recitation of what the Court did in those cases, he was free to cross-examine. (And, even to the extent such important factual background *did* involve "legal conclusions," and could not properly be addressed by Dr. Cunningham himself, which Madison disputes, Madison would, in that event, *still* have been entitled to a jury instruction setting out that exact same information). See Proposition of Law No. 16.

Equally egregious were the court's restrictions on evidence of the hereditary predisposition of certain personality traits and afflictions. All of these principles are firmly grounded in the literature and were an important foundation for opinions and conclusions that Dr. Cunningham formed about Madison. Not only was Madison unfortunately compelled to endure his formative years in such toxic family circumstances, but he was doomed by heredity to endure, in his generation, many of the same afflictions that plagued his ancestors going back two

or three generations. He possessed, in the words of Justice Kennedy for the Court in Graham, a "twice diminished moral culpability." Graham, 560 U.S. at 69. Madison should not have been barred from presenting this important mitigation evidence.

Nor should the court have placed such unfair restrictions on *how* Dr. Cunningham presented his opinions and conclusions. There was no justification whatsoever for barring any of the power-point slides, especially those which depicted the challenges of developmental adversity, for a person also lacking any of the "protective factors," as an increasingly more unmanageable descent into psychological disorder, victimized relationships, drug dependency, and criminal activity. Or for barring those slides which compared that person's situation to a person *without* such adversity and with *intact* protective factors. Slides like these:



(Def. Proffer Exh. P-1 at pp. 11.)

As Dr. Cunningham explained in his report, and as he should have been allowed to explain to the jury: "The person in the model above [on the left] has a choice, but not the same choice as the person [on the right] with a level foundation and strong developmental assets standing between them and the bad outcomes. **Mitigation or moral culpability can be conceptualized as the angle of the ramp on which the choice is made**." (Def. Proffer Exh. P-16, Cunningham Report at 13 (emphasis supplied).)

These slides, and their method of explaining Dr. Cunningham's testimony, are persuasive precisely because they are true. They are true to the research, true to the principles of the profession, and true to the moral-based landscape the Supreme Court has established for capital mitigation in the courts of those states which insist upon continuing to use the death penalty. The prosecutor wanted the slides suppressed for that very reason: because he knew how effective they would be. The court should have resisted the prosecutor's obstruction. It should have allowed Dr. Cunningham to present all the mitigation evidence he was prepared to present, in the way he and Madison's counsel, in the exercise of their judgment and professional training, had chosen to present it. There is a reasonable probability it would have made a difference to at least one juror in the outcome of the sentencing proceeding.

C. Conclusion

Madison was denied his right to present the foregoing critical mitigation evidence to the jury, making his death sentence unreliable and its imposition a violation of his constitutional rights. At the very least, there is a reasonable probability that one or more jurors would have found such additional evidence sufficient to tilt the scales in favor of life, or make them equal, thus requiring a life sentence. Madison is entitled to a new sentencing proceeding at which all of his mitigation evidence can be considered. Moreover, this error cannot be harmless error, nor can it be corrected by re-weighing or by any other prophylactic corrective measures. The Sixth Amendment entitles Madison to a *jury* determination of the weighing of aggravating circumstances and mitigation factors, and of any other fact necessary to impose a sentence of death. Hurst v. Florida, 136 S. Ct. 616 (2016). Only a new sentencing proceeding will vindicate those rights.

<u>Proposition of Law No. 11.</u> The accused in a capital case may investigate, develop, and introduce, as mitigating evidence in the sentencing phase, expert testimony explaining the accused's childhood history and developmental adversity, without exposing himself to a compelled examination by the State's expert, and any evidence from any such improperly-compelled examination may not be used against the accused, all as required by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution, and Article I, Sections 5, 9, 10, and 16 of the Ohio Constitution.

At the prosecutor's overzealous demand, the court ordered Madison to be subjected to a mental health examination by the State's psychiatrist, Pitt. To make matters worse, Madison's counsel was not allowed to be present. The court's order requiring Madison to be subjected to the forced examination by the State, and the use of that examination against him at his capital trial, denied Madison his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution, and Article I, Sections 5, 9, 10, and 16 of the Ohio Constitution.

A. <u>Factual Background.</u>

The asserted basis for the forced examination was the prosecutor's desire to be able to rebut possible assertions of "brain damage" that appeared in some of the expert discovery provided to the State by Madison. (T. 432-33 ("He's claiming brain damage to this individual. We need a complete evaluation of this fellow, including the brain damage issue.").)

The defense responded that "[w]e are not placing the defendant's mental state into issue in either the trial or the mitigation phase." (T. 431.) The defense also filed a brief in opposition to the State-requested examination, making that same point:

> Although Mr. Madison reserves the right to present expert psychological evidence or other expert testimony in mitigation that does not call into question his mental state, neither his competency, nor his sanity or mens rea, will be an issue in either the trial or the penalty phase of this case. He is neither putting his mental state in issue, nor presenting a mental-status defense. The prosecution has no mental-status defense to rebut. Because the only purpose of a court-ordered mental examination would be to permit the State to rebut a mental-status defense, and Mr. Madison is presenting no such defense, the State is not entitled to a court-ordered mental evaluation.

(No. 204, Defendant's Response at pp. 3-4, filed June 2, 2014.)

The court nevertheless ordered the examination to occur, and also ordered Madison to cooperate with it. (T. 544-46.) In an effort to limit the damage caused to Madison's rights, the court ordered that the evidence garnered from that evaluation would only be used in the mitigation phase, and ordered that the "State may not inquire into the facts and circumstances of the case. Examination only relates to the brain damage of defendant." (No. 212, Order dated June 3, 2014 (see Appx. 022); T. 443-44.)

The examination was conducted by Dr. Pitt over 6.1 hours on two days. (T. 7384-85.) Much of his examination had *absolutely nothing* to do with "brain damage" or any credible effort to seek its existence. It was, instead, an effort by Pitt to undermine Madison's expected mitigation evidence about his childhood and developmental adversity, and to find clever ways to make Madison look bad in front of the jury and to ask about his alleged crimes. And, because Pitt was recording the "examination," it also enabled him to *show* the jury his clever efforts—with his fancy degrees—to help the State send the unrepresented and high-school dropout, Madison, to death row.

Any fair review of Pitt's examination—and *especially* the seven video clips of that examination which the State eagerly presented to the jury in the sentencing phase, and the court permitted (T. 7417-38; State Exh. 1103)—confirms that Pitt and the prosecutor abused the privilege they were erroneously given by the trial and appellate courts in permitting this unconstitutional, uncounseled, forced encounter between an agent of the State and an accused U.S. citizen, all alone, facing society's harshest punishment. Pitt's role, as confirmed by these video clips—and later by his testimony, including his telling the jury Madison is "depraved," that he engages in "chilling" behavior, that he is "twisted," and has "antisocial personality

disorder"—was to serve as a Trojan Horse investigator for the State, with the false face of a "doctor," to obtain as much harmful and inflammatory information as he could, by whatever clever means, and then present it to the jury with the sheen of "expertise" to help his employer obtain a death sentence.

Thus, on clip 1, Pitt asked Madison about his childhood, and his mood and concentration level. And his sleep habits and his energy. He also explored Madison's mood from age 18 to the arrest, eliciting from Madison that he had regrets about his life when the reality of the world started to kick in and he had not accomplished anything, and that this made him down. He asked Madison, on clip 2, about being incarcerated and what that is like, thereby, predictably, eliciting a response from the unrepresented Madison about the crime, and that it's like being in a fight with his hand behind his back, an unfair fight, and that few things could have been different, but if he dies now, nine times out of ten he'd be defined by these charges. And that he caught a raw deal in his childhood. (State Exh. 1103; T. 7428-30.)

In clips 3 and 4, Pitt is really warming up to his role as investigator for the State to undercut any expected mitigation, by asking about Madison's drinking and drug habits in the months leading up to his arrest. As if the 17 hours of police interrogation hadn't covered that topic enough, Pitt insisted upon inquiring too, though it had nothing to do with "brain damage." This inquiry was just another effort by Pitt to obtain for the State, from the criminal defendant himself, his own statements about facts relevant to the State's efforts to ensure Madison gets death. Madison told Pitt he probably had some liquor on the weekends, bourbon, vodka, a few shots, not the whole bottle. He may have drunken more, when he went to a party or bar. He said he started smoking marijuana at age 16 or 17, and it made him relax. He said he used marijuana maybe once a day or every other day, in the weeks leading up to the arrest. (State Exh. 1103; T. 7430-31.)

In clip 5, Pitt asked about sexual abuse, seeking again to obtain admissions from the unrepresented Madison about his expected mitigation evidence concerning developmental adversity. Madison denied that he had been sexually abused. He responded "no" to Pitt's cross-examination about whether any family members, any of his mother's boyfriends, or any member of the community had ever sexually abused him. He responded that he is sure. Now, never mind that any knowledgeable expert in the field of sexual abuse would or should know that the "overwhelming body of literature is that male victims of childhood sexual abuse **are reluctant to report their abuse**." Brenda V. Smith, Boys, Rape, And Masculinity: Reclaiming Boys' Narratives Of Sexual Violence In Custody, 93 N.C.L. Rev. 1559, 1586-1587 (2016). See also Guy R. Holmes, Liz Offen & Glenn Waller, See No Evil, Hear No Evil, Speak No Evil: Why Do Relatively Few Male Victims of Childhood Sexual Abuse Receive Help for Abuse-Related Issues in Adulthood?, 17 CLINICAL PSYCHOL. REV. 69, 70 (1997). And, they are ***especially*** reluctant to report such highly personal and deeply embarrassing information to an agent of the State, and one they don't know or trust (for good reason in Madison's case, as Pitt proved by his defiance of the court's order), during a forced jailhouse interview that is being recorded. But none of that mattered to Pitt: he got what he needed to help his employer send Madison to death row. And he eagerly told the jury all about it, with this clip. (State Exh. 1103; T. 7431-32.)

Clips 6 and 7 are equally or more egregious in their defiance of the court-imposed limitation on Pitt's interrogation. Here, Pitt asked Madison if he has any **"character defects**." (State Exh. 1103; T. 7432-33.) Madison offered that he couldn't think of anything right off the bat, but, with prodding by Pitt, he eventually responded that he was not focused on eating healthy. Pitt cleverly reframed Madison's answer to be demeaning and mocking, as he knew his employer would appreciate: "Making important dietary choices?" Madison said he couldn't think of anything else, but that maybe something would come to him later. Pitt pushed him by asking

if he is an honest guy. Madison responded that he is, to a certain extent, but does not care for people to be all in his business. He said he doesn't care for people who think they have him figured out. If it's none of their business, he said he might not be too truthful. It all depends on the situation. Nobody is perfect. Everybody lies. "You, him, everybody." He said no one tells the truth all day long, every day, all the time.

Pushing Madison some more to obtain helpful admissions for the State on "character defects," and defying the order not to ask about the charged crimes (such as, for example, the State's theory that Madison lied and deceived the victims, and especially Shirellda Terry, to lure her into his apartment), Pitt asked if it's a "character defect" if you lie repeatedly. Madison said being a pathological liar is a character defect. Further inquiring on matters relevant to the crime, Pitt asked Madison if he has a "temper." Madison said everybody does, and he agreed with Pitt that his answer means that he (Madison) does too. When asked by Pitt if his temper rises to the level of a character defect, Madison said no. When asked by Pitt if it's a character defect when Madison does not tell the truth, Madison said no again. (State Exh. 1103; T. 7433-34.)

Moving into Madison's "***sexual practices*,"** and again defiantly seeking information within the wheelhouse of the charged crimes which include sexual motivation specifications, Pitt asked Madison if he thinks his "sexual practices, [his] sexual interests rise to the level of a character defect." Madison said no. To be sure he covered every single aspect of the bad character Pitt's employer might want to present in his effort to send Madison to death row, Pitt asked Madison if he thinks someone who steals has a character defect. Madison agreed. Pitt then asked Madison if he thinks someone who traffics in the sale of drugs has a character defect. Madison said no again. Pitt pushed him: "Q. No matter how big the deal is, you don't think they do? A. No." At trial, bragging about his cleverness to the jury, Pitt said: "I asked him if El Chapo would have a character defect, and he said no." (T. 7535.)

When Madison tried to turn the tables, and asked Pitt if he would sell drugs if he was starving or homeless, Pitt glibly responded that it doesn't matter what he would do. "You are the person that's got themself in the predicament you're in right now. This is an evaluation of you." That flippant response angered Madison, who responded that there are "charges against me. You can have charges brought up against you and not have done anything." (State Exh. 1103; T. 7435-36.)

Pitt asked Madison how he would describe himself. Madison said he is "a cool customer," saying it was a "figure of speech." He said he is "pretty much laid back," and doesn't boast and brag about anything or accomplishments. He said "I think I'm a decent guy. I'm not really too high, not really too low. I like to have a good time. I like to laugh, like to joke, try not to be too serious." Pitt pushed him to identify his "weaknesses." Madison responded he was not really sure, off hand. Pitt asked him if he thinks he has any "weaknesses." Madison said: "I'm pretty sure I do." Pitt asked Madison if he holds "grudges." Madison said: "I can't really say that I am a person that holds grudges." Madison said he had let some stuff go with his brother in the past, and that maybe he should have held grudges.

Echoing the prosecutor's theory of the crimes ***to a tee***, and thus again defying the court's order with too-clever artifice, Pitt asked Madison if he is someone who can be really happy one minute, and then, like that, be in "a rage of hate and anger," ***and also asked if that had ever happened to him***. Madison denied that. He said he can go from happy to sad, but not happy to rage. Pushing still further in disregard of the court's order, Pitt asked if that was also true when Madison was in a "cruddy mood," and if he has a "hair-trigger temper" that can come out of nowhere. Madison said that is not him, there has to be a reason. Pitt asked if Madison's "temper" ever gets to a spot where he thought it was "serious overkill." Madison said no. (State Exh. 1103; T. 7433-35.) Pitt asked if Madison's "anger" ever got to the spot where it was "serious overkill."

Madison said he never felt his anger was just too much. He said he was "even keeled," "not too high, not too low." Madison said he may have broken something he could later replace, "but as far as like physical harm toward somebody**, I have never displayed physical harm toward somebody while I was upset**." (State Exh. 1103; T. 7437-38.)

Pitt's examination and resulting video clips were all completed long before trial. Sure enough, as truthfully represented to the court, the defense did not make *any* claim at trial—in the guilt/innocence phase or in the sentencing phase—that Madison had "brain damage," that he was suffering from any mental disease or defect, that he has "diminished capacity," or that he meets any of the requirements of the mitigating factor set forth in R.C. § 2929.04(B)(3) ("Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law."). (T. 6677-78, 6705-09, 7283-84.)

There was thus no "brain damage" for Pitt to rebut or comment upon. Pitt's testimony—including his reliance on Madison's own words from Pitt's interrogation—thus consisted almost entirely of non-statutory aggravating circumstances; irrelevant, inflammatory, and unfairly prejudicial evidence on mitigation factors that Madison was *not* raising; and efforts to undercut the mitigation evidence Madison *did* present, on his history and background, with more inadmissible allegations of "bad character" and other irrelevant matters. Through Pitt's testimony and his seven video clips (of some 25 minutes (T. 7438))—and the compelled, uncounseled interrogation by Pitt—Madison was forced to be a witness against himself in his fight to save his life.

B. Merits of the Proposition.

The trial and appellate courts eviscerated Madison's federal and state constitutional protections, at the overzealous urging of the prosecutor, by forcing Madison to speak with Pitt

and to cooperate in the interrogation by Pitt. Pretending the farce that Pitt conducted was some sort of medical or psychiatric "examination" was the first mistake, and certainly the courts were misled in that respect by the prosecutor as to what Pitt's purposes were. (See No. 402, Defendant's Motion in Limine re Pitt at pp. 4, filed May 17, 2016 ("[T]he State of Ohio misrepresented to this Court its true purpose.").) A "brain damage" examination? Hardly. Pitt was a paid agent of the State whose purpose and intent was to elicit damaging admissions from an unrepresented criminal defendant to help his employer obtain a death sentence. Pitt's seven video clips are overwhelming proof of that improper purpose. The reality that Ohio's lower courts *enabled* this to happen, in a capital case no less, is very troubling, and is a revealing snapshot of the degree to which constitutional protections were disregarded in Madison's prosecution.

1. The requirement to undergo the psychiatric examination violated Madison's constitutional rights.

a. A compelled psychiatric examination implicates multiple constitutional rights of critical importance in a capital case.

Madison has a right under the Fifth and Fourteenth Amendments, and Ohio's counterparts, to not be compelled in any criminal case to be a witness against himself. Kansas v. Cheever, 134 S. Ct. 596, 598 (2013); Section 10, Article I of the Ohio Constitution. Without question, Madison's privilege against self-incrimination applies to the penalty phase of a capital case. White v. Woodall, 134 S. Ct. 1697, 1703 (2014).

The essence of this basic constitutional principle "is the requirement that the State . . . produce the evidence against [the defendant] by the independent labor of its officers, not by the simple, ***cruel*** expedient . . . of forcing it from his own lips." Culombe v. Connecticut, 367 U.S. 568, 581-82 (1961) (emphasis supplied). See also Estelle v. Smith, 451 U.S. 454, 462 (1981);

State v. Goff, 128 Ohio St. 3d 169, 177-78 (2010). "Just as the Fifth Amendment prevents a criminal defendant from being made "'the deluded instrument of his own conviction,'" it protects him as well from being made the ***'deluded instrument' of his own execution***." Estelle, 451 U.S. at 462 (citations omitted and emphasis supplied).

Because the State was seeking his death, Madison also has the right, under the Eighth and Fourteenth Amendments, and Ohio's counterparts, to have his jury consider any appropriate mitigation evidence he may choose to offer, in consultation with his counsel, that may call for a sentence less than death. Eddings; Lockett; Wiggins; Penry. Madison's constitutional right to present mitigation evidence, and to have his jury consider that evidence, also, of course, includes Madison's related constitutional rights to have his counsel, and any experts his counsel may choose to utilize, conduct a thorough investigation to gather all such mitigation evidence, and then make judgments, as counsel performing under the Sixth Amendment, about what mitigation evidence to present to the jury at the trial. Wiggins; Strickland. Indeed, counsel in capital cases have a well-established duty to conduct a *thorough investigation*—in particular, of mental health evidence—in preparation for the sentencing phase of a capital trial. See American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. 2003) (2003 ABA Guidelines); Bobby v. Van Hook, 558 U.S. 4, 16 (2009) (discussing 2003 ABA Guidelines for capital defense counsel); Rompilla v. Beard, 545 U.S. 374, 387 (2005).

Due to the uniquely severe and irrevocable nature of the death penalty, Madison is promised "wide latitude in introducing evidence alleged to be mitigating." State v. Eley, 77 Ohio St. 2d 174, 185 (1996). The scope of the evidence he may introduce is comprehensive and includes "expert psychiatric or psychological testimony, details from his social history,

education, medical and mental health, as well as other things." State v. Were, 118 Ohio St. 3d 448 (2008).

It is well established that a criminal defendant cannot be compelled to forfeit one constitutional right in order to assert another. Simmons v. United States, 390 U.S. 377, 393-94 (1968) ("we find it intolerable that one constitutional right should have to be surrendered in order to assert another"); Kercheval v. United States, 274 U.S. 220, 223-24 (1927). But that is exactly what happened here. The lower courts compelled Madison to surrender one constitutional right—to remain silent—because he also insisted upon his equally important constitutional rights, applicable only in the context of a death-penalty case, to gather, in consultation with counsel, comprehensive mitigation evidence that may call for a sentence less than death, and to be able to choose, in further consultation with counsel, which of such evidence to present to his jury. This is intolerable.

The constitution requires Madison to be able to exercise all three rights. Moreover, Estelle makes clear that if a criminal defendant neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, the Fifth Amendment prohibits any party from compelling him to submit to a psychiatric evaluation if his statements could later be used against him at a capital sentencing proceeding. Estelle, 451 U.S. at 468-69. See also Buchanan v. Kentucky, 483 U.S. 402, 422-24 (1987) (defendant waived his Fifth Amendment privilege by raising a mental-status defense). Thus, as in Madison's case, where there had been no Fifth Amendment waiver and no mental-status defense, the courts could not compel Madison to submit to a psychiatric evaluation where his statements could later be used against him at a capital sentencing proceeding. Yet that was exactly what the State intended to do, as confirmed by Pitt's video clips: use the compelled evaluation to generate evidence it would then use to

rebut any evidence Madison might present during the second phase of the trial, thereby making Madison "the 'deluded instrument' of his own execution." Estelle, 451 U.S. at 462.

b. Court-ordered psychiatric examinations, which infringe upon a defendant's right against self-incrimination, are only permitted in very narrow circumstances.

Any conclusion by the trial and appellate courts that Madison was required to submit to *this examination* was erroneous, and was made in disregard of the foregoing vital constitutional protections that must be scrupulously maintained in a capital case.

There are narrow situations where the government can compel a criminal defendant to submit to a state-requested mental evaluation, but not here. Such cases apply only in the narrowly-confined situation where the defendant intends to introduce psychiatric evidence that *places his state of mind directly in issue*. Only then can the court compel him to submit to a psychiatric examination that requires waiver of his right against self-incrimination. See Kansas v. Cheever, 134 S. Ct. 596, 602-03 (2013) (defendant introduced psychiatric evidence that he lacked requisite mental state to commit the offense); State v. Goff, 128 Ohio St. 3d 169, 182 (2010) ("By putting her ***mental state directly at issue*** and introducing expert testimony based upon her own statements to the expert, the defendant opens the door to a limited examination by the state's expert concerning battered-woman syndrome and its effect on the defendant's behavior.") (emphasis supplied).

Indeed, the Court in Cheever acknowledged that such circumstances are limited to mental status diagnoses, which it defined as those involving "a defendant's *mens rea*, mental capacity to commit a crime, or ability to premeditate." Cheever, 134 S. Ct. at 602. Goff is consistent, requiring that the defense must have placed the defendant's mental state directly at issue with expert testimony, thereby necessitating the State being able to rebut that mental state evidence.

c. Such court-ordered examinations should not be permitted for the sentencing phase of an Ohio capital trial *even if* the defendant has placed his mental state in issue.

These cases are *not* capital cases and thus do not address whether their holdings apply to the sentencing phase of a capital trial. They should *not* apply in the capital sentencing context *even if* the defendant had placed his mental state at issue.

This Court has recognized that any "limitation on a defendant's bedrock constitutional right against self-incrimination must be *carefully tailored* to avoid any more infringement than is necessary to ensure a fair trial." Goff, 128 Ohio St. 3d at 182. That need for *careful tailoring* is most acute in the capital sentencing context. "Death is different" and requires greater reliability. Gardner v. Florida, 430 U.S. 349, 357 (1977) (plurality opinion).

If properly done, any careful tailoring in this context must consider the structure of Ohio's death penalty statute insofar as it already sharply limits the State's ability to force a death-eligible defendant to respond to questions unle*ss the defendant chooses to do so*. For example, Section 2929.03(D)(1) gives the defendant the option to seek a pre-sentence investigation and mental examination—if the defendant says no, then no examination occurs. Pursuant to Section 2929.03(D)(1), even when it is only the impartial court controlling who conducts the pre-sentence investigation and mental examination (as opposed to the State), it is the *defendant's choice* whether to go forward with it: "A pre-sentence investigation or mental examination shall not be made except upon request of the defendant." Id.

This suggests that the General Assembly wanted the capital defendant to be able to control whether he would undergo a mental evaluation and whether the court and the State would see the expert's conclusions. Also, the death penalty statute allows the defendant to make an unsworn statement to the jury, and the State may not cross-examine the defendant on that

statement. "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." R.C. § 2929.03(D)(1).

Thus, Ohio's statute intentionally restricts the State's ability to force a death-eligible defendant to respond to questions by the State. The Court has recognized a very narrow exception to this broad policy. If a death-eligible defendant misrepresents his criminal record in his unsworn statement, then the State may present evidence to correct that misrepresentation. The prosecutor's right to rebut false or incomplete testimony is "limited, however, to those instances where the defense offers a specific assertion, by a mitigation witness or by the defendant, that misrepresents the defendant's prior criminal history." State v. DePew, 38 Ohio St. 3d 275, 287 (1988). "It is only when the defendant falsely claims in his unsworn statement that he has little or no prior criminal history that a prosecutor can be permitted to demonstrate this inaccuracy." State v. Henness, 79 Ohio St. 3d 53, 67 (1997).

These statutes and principles all compel that any rule permitting the trial court to order a State-requested psychiatric examination, as in Cheever and Goff, should *not* apply in the capital sentencing context *even if* the capital defendant has placed his mental status in issue by, for example, intending to present expert evidence in mitigation under (B)(3). That conclusion is further compelled, in the capital sentencing context, in order *not* to force a capital defendant to choose between equally important constitutional rights.

There are less constitutionally burdensome means of preserving the State's right to a fair trial, in this context, that do not require the defendant to submit to a compelled examination by a State psychiatrist. For example, if a defendant asserts such mental-capacity mitigation, the State may, at the very least, use the entirety of the defense psychiatric report to rebut the defense position. See, e.g., Buchanan v. Kentucky, 483 U.S. 402, 422-23 (1987). Moreover, in Madison's

case, the State and its expert had the same opportunity to view the 17-hours of police interrogation as Madison's experts did. The State also had access to the same CFS and other documents about Madison, and the same forensic psychology research papers. The State hardly needed its own compelled psychiatric examination in order to ensure a fair trial. **Pitt's clips are the best proof of that**: to receive a fair trial, the State had no need whatsoever to be asking Madison about "character defects," and whether he's a liar, and whether he has a temper, and whether he holds "grudges," and about his "sexual practices," and what he can do to improve himself, and what he thinks of El Chapo, and on and on with Pitt's defiance of the court's order.

d. But Madison's case is an easy one because he did *not* place his mental state in issue.

The trial and appellate courts in Madison's case had no need to decide what the principles of "carefully tailoring" required. That is because Madison had *not* placed his mental status in issue and was *not* intending to present any expert evidence in mitigation under (B)(3).

His case was an easy one: any compelled State-requested examination would violate his right against self-incrimination and must not be permitted. Where, as here, Madison disclaimed any intent to present any expert evidence in mitigation under (B)(3), and to not place his mental condition in issue, the State's right to a fair trial is not implicated at all by the denial of a compelled examination by the State's psychiatric expert. See, e.g., State v. Harris, 142 Ohio St. 3d 211, 222 (2015). See also Fed. Crim. R. 12.2(b), (c) (permitting trial court to order expert examination, in its discretion for capital sentencing, but only if "defendant intends to introduce expert evidence relating to a ***mental disease or defect or any other mental condition*** of the defendant.") (emphasis supplied); United States v. Taylor, 320 F. Supp. 2d 790, 792 (N.D. Ind. 2004) ("The case before the Court is distinguishable from Estelle since, unlike the defendant

in Estelle, Thomas has declared his intention to introduce expert evidence regarding his mental health as it relates to the issue of punishment.").

The lower courts' orders permitting Madison's examination by Pitt overstepped what is permitted under, for example, Cheever and Goff, and disregarded the additional constitutional concerns presented in the capital sentencing context. In so doing the lower courts unconstitutionally compelled Madison to forego his Fifth Amendment protections, and permitted the State to violate those protections, all because Madison had simultaneously insisted upon invoking his equally important constitutional rights under the Sixth and Eighth Amendments, and Ohio's counterparts.

2. Because the compelled examination violated Madison's constitutional rights, Dr. Pitt's testimony at the sentencing phase should have been barred in its entirety.

The court's violation of Madison's constitutional rights, by unlawfully forcing him to participate in Pitt's interrogation, required the exclusion of the *entirety* of Pitt's testimony at the sentencing phase. The State should not have been allowed to use any of Pitt's testimony against Madison. Estelle.

There was no way to know for certain how much of Pitt's testimony was infected by the statements Pitt was able to unconstitutionally compel Madison to make in violation of Madison's rights, although most of Pitt's testimony certainly was so infected. The fact that the State chose to highlight the seven video clips, and to use 25 minutes to play those clips with the ***final*** witness of this multi-week trial, confirms how much Madison's unconstitutionally compelled statements infected Pitt's opinions, and on matters far beyond the narrow topic of "brain damage" Pitt was supposed to be evaluating. Pitt's role was "essentially like that of an agent of the State

recounting unwarned statements made in a post-arrest custodial setting." Estelle, 451 U.S. at 467. The whole thing was inadmissible against Madison.

3. At the very least, the admission of the unconstitutionally compelled statements by Madison to Pitt violated Madison's constitutional rights.

At the very least, any statements Madison made to Pitt were inadmissible, including all of the video clips comprising State Exhibit 1103. All of Madison's statements to Pitt were involuntary. They were unconstitutionally compelled by the court's unlawful order requiring Madison to submit to that examination and to cooperate with it.

Because he was forced to participate, Madison's statements were not the "product of a rational intellect and a free will." Townsend v. Sain, 372 U.S. 293, 307 (1963); see also Blackburn v. Alabama, 361 U.S. 199, 208 (1960). By virtue of the court's order to cooperate, Madison was "deprived of his 'free choice to admit, to deny, or to refuse to answer.'" Garrity v. New Jersey, 385 U.S. 493, 496 (1967) (quoting Lisenba v. California, 314 U.S. 219, 241 (1941).)

Compelled or involuntary testimony or statements made by a criminal defendant are inadmissible against that defendant at trial as violative of due process and the privilege against self-incrimination. See, e.g., New Jersey v. Portash, 440 U.S. 450 (1979) (compelled incriminating statements inadmissible even for impeachment purposes); Mincey v. Arizona, 437 U.S. 385, 398 (1978) (holding that a defendant's involuntary statements could not be used to impeach his credibility at trial); Harris v. New York, 401 U.S. 222 (1971); Simmons v. United States, 390 U.S. 377 (1968). "The prosecution must not be allowed to build its case against a criminal defendant with evidence acquired in contravention of constitutional guarantees and their corresponding judicially created protections." Michigan v. Harvey, 494 U.S. 344, 351 (1990).

Especially in a capital case.

4. The death sentence is unconstitutional in these circumstances and must be vacated.

Regardless of how much of Pitt's testimony was inadmissible at the sentencing phase because of the foregoing violations of Madison's constitutional rights, the consequences are the same: the death sentence imposed upon Madison cannot stand, and must be set aside. Estelle, 451 U.S. at 468; Satterwhite v. Texas, 486 U.S. 249, 260 (1988) (relief granted against death sentence for Estelle violation, under Sixth Amendment); Powell v. Texas, 492 U.S. 680 (1989); Battie v. Estelle, 655 F.2d 692, 703 (5th Cir. 1981) ("petitioner's death sentence must be set aside").

This error is not harmless error. Pitt was the final witness of the trial, and, with his video clips and inflammatory testimony, had a strong message. See, e.g., Satterwhite, 486 U.S. at 260 (finding against harmlessness and noting: "Dr. Grigson was the State's final witness. His testimony stands out both because of his qualifications as a medical doctor specializing in psychiatry and because of the powerful content of his message."). Pitt's seven video clips were highly inflammatory and unfairly prejudicial, as any fair review of them confirms. (State Exh. 1103.) Like his employer the prosecutor, Pitt enjoyed using epithets against Madison, calling him "depraved" and "evil, mean, twisted, warped, vicious, deviant" (T. 7399, 7445-46, 7544-46, 7541-42, 7461), hardly the behavior of a dispassionate psychiatrist in the sentencing phase of a capital trial. He claimed Madison has "anti-social personality disorder," and insisted Madison's childhood adversity wasn't really all that bad, only a 2.5 on a scale of 10, in Pitt's opinion. (T. 7463-64.) Pitt's disdain for Madison was palpable and was totally unprofessional: he acted more like a prosecutor, both in his interview (as revealed in the seven video clips) and in his testimony at trial.

C. Conclusion.

Madison's death sentence must be reversed, and he is entitled to a new sentencing-phase trial.

Proposition of Law No. 12. When a trial court compels a capital defendant—who has no intention of presenting mitigation evidence about his mental condition in the sentencing phase of his trial—to submit to a psychiatric examination by the State's expert for sentencing purposes, the defendant's right to counsel is denied if the court forbids defendant's counsel to be present during that compelled examination, and any testimony about that examination is therefore inadmissible, all as required under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 5, 9, 10, and 16 of the Ohio Constitution.

The Sixth Amendment guarantees a criminal defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86 (1984). This right to effective counsel is especially vital during and in preparation for the sentencing phase of a capital case. Wiggins.

"It is central to [the Sixth Amendment] principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." United States v. Wade, 388 U.S. 218, 226 (1967). The right to counsel extends to "critical stages" of the criminal proceeding. Id. at 228. To constitute a "critical stage" of the proceedings, "the accused must find himself 'confronted, just as at trial, by the procedural system, or by his expert adversary, or by both.'" United States v. Byers, 740 F.2d 1104, 1117-18 (D.C. Cir.1984) (quotations omitted).

Several critical stages have been identified. See, e.g., Mempa v. Rhay, 389 U.S. 128 (1967) (right to presence of counsel at sentencing hearing); White v. Maryland, 373 U.S. 59 (1963) (right to presence of counsel at preliminary hearing); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to presence of counsel at trial); Hamilton v. Alabama, 368 U.S. 52

(1961) (right to presence of counsel at arraignment). Indeed, more recently in Montejo v. Louisiana, 556 U.S. 778, 786 (2009), the Court reiterated that "interrogation by the State is such a stage."

"Whether or not the accused has a right to have counsel present during a psychiatric examination, it is clear that there is a Sixth Amendment right to consult with counsel prior to submitting to the examination." Michigan v. Harvey, 494 U.S. 344, 360 (1990) (Stevens, J., dissenting, joined by Marshall, Brennan, and Blackmun, JJ.). As for counsel during the examination itself, courts sometimes conclude counsel is not required because the examination is not a critical stage. Williams v. State, 555 N.E.2d 133, 136 (Ind. 1990); Commonwealth v. Trapp, 668 N.E.2d 327 (Mass. 1996).

However, those cases involve circumstances where the defendant has placed his mental condition squarely at issue, such as by a claim of insanity. In those circumstances, the notice of the psychiatric examination, and the defendant's ability to consult with counsel before the examination, are sufficient to protect the Sixth Amendment interests at stake. Madison's case is much different. He totally *disclaimed* any intention to rely upon any mental status defense or to present any mitigation evidence under (B)(3). There was therefore, in his case, a very real risk that the examination, if allowed to proceed, would inevitably cross the line from being, on the one hand, a permissible psychiatric examination to enable the State to rebut a (unclaimed) mental condition, to becoming, on the other hand, government interrogation conducted by a doctor-turned-prosecutor. That risk is why the trial court strictly limited the examination to brain damage, and barred any inquiry about the crimes.

But those restrictions—which, despite Pitt's and the State's defiance of them, are actually *court orders*—were completely inadequate. They were totally ignored, as Pitt's seven video clips prove. Pitt's role was a Trojan Horse prosecutor who eagerly played his part, luring Madison to

become "the 'deluded instrument' of his own execution," Estelle, 451 U.S. at 462, helping the State obliterate Madison's constitutional right to have the jury meaningfully consider the mitigation evidence Madison and his counsel had *chosen to present*, as opposed to that which they had disclaimed. As with the "expert" in Estelle, Pitt became the "agent of the State," doing its bidding by conducting an unconstitutional interrogation of the unrepresented Madison. Id. at 467. Like in Powell v. Texas, Madison's counsel did not know that the examiner would steer the examination into impermissible areas. Powell, 492 U.S. at 685 ("counsel did not know that the [State's] examinations would involve the issue of future dangerousness").

Interrogation by the State—regardless of the face the interrogator wears—is a critical stage at which counsel is required to be present. Montejo, 556 U.S. at 786. Madison's counsel demanded to be present, but the court erroneously denied that request. (T. 534-35.) Madison tried to take an immediate appeal of that denial, because of his justifiably immense fear that the examination would, despite the court's limiting orders, devolve into exactly the unconstitutional interrogation it became. The prosecutor successfully resisted that effort, in part by representing to the appellate court that Madison would be able to raise his Sixth Amendment claim on direct appeal. The prosecutor also represented that, on direct appeal, the court would be able to conduct the necessary analysis to determine the prejudice from the claimed constitutional violation. (State v. Madison, Case No. 103950, Eighth App. Dist., Appellee's Reply in Support of Motion to Dismiss for Lack of a Final Appealable Order at pp. 2-6 (filed January 17, 2016).)

Now is that time. Madison's right to counsel was denied at this critical stage. His remedy for that constitutional violation is a new trial, as the prosecutor admitted in his appellate filings resisting Madison's immediate appeal. (Id. at 5-6 ("The remedy for a violation of the Sixth Amendment right to have counsel present is a new trial. . . . [The] Court has the ability to grant Madison a new trial on direct appeal, and that appeal is therefore sufficient to protect the legal

remedy to which Madison would be entitled.") (citing United States v. Morrison, 449 U.S. 361, 365 (1981).) Indeed, the prosecutor helpfully previewed part of Madison's argument now offered in support of his new trial:

> [O]ne can easily imagine a situation in which Madison could at least argue prejudice. For example, the trial court's order states that Dr. Pitt 'may not inquire into the facts and circumstances of the case.' If Dr. Pitt exceeds the scope of that limitation on his questioning, Madison could then argue that this resulted in prejudice.

(Id. at pp. 6 (citations omitted).) Echoing the prosecutor's own analysis, the trial court's order also limited the examination to "brain damage," and Pitt ignored that limitation too. With the presence of his counsel at Madison's side, none of these violations of Madison's rights—as reflected, for example, in Pitt's seven video clips—would have been allowed to happen.

The unconstitutional denial of counsel's presence with Madison during the Pitt interrogation is not harmless error in the circumstances of this case, for all of the same reasons addressed above and in Proposition of Law No. 11, which is incorporated here too. See also Satterwhite, 486 U.S. at 260 (applying harmless error analysis, but holding that deprivation of counsel during a psychiatric examination later used as evidence during death penalty sentencing proceeding was fundamental error); Powell, 492 U.S. at 686 ("Because the evidence of future dangerousness was taken in deprivation of petitioner's right to the assistance of counsel, and because there is no basis for concluding that petitioner waived his Sixth Amendment right, we now hold that [Estelle v.] Smith and Satterwhite control and, accordingly, reverse the judgment of the Court of Criminal Appeals.").

Madison's death sentence must be reversed, and he is entitled to a new sentencing-phase trial.

<u>Proposition of Law No. 13.</u> The trial court in the sentencing phase of a capital trial denies the defendant's rights to a fair trial and reliable sentencing proceeding, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 5, 9, 10, and 16 of the Ohio Constitution, when the court allows, over the defendant's objections, the State to introduce testimony by the State's expert about an interview with the defendant that was conducted by the expert in violation of the court's order limiting the scope of that interview to only certain topics.

None of Pitt's testimony was admissible against Madison in the sentencing phase because of the constitutional violations which occurred in forcing Madison to participate in the interview, in disregard of his rights to counsel, against compulsory self-incrimination, and to investigate and present mitigation evidence. <u>See</u> Proposition of Law Nos. 11 and 12. But the evidence was also improper for another reason too: Pitt greatly exceeded the limitation the trial court had placed on the interview, specifically, that Pitt shall not inquire into the facts and circumstances of the crimes, and that the examination shall only relate "to the brain damage of defendant." (No. 212, Order dated June 3, 2014; T. 443-44.)

In order to limit the testimony the State was permitted to offer from Pitt about the interview, Madison filed a motion in limine. He requested that Pitt's testimony should be limited to the issue of brain damage. (<u>See</u> No. 402, Defendant's Motion in Limine re Pitt, filed May 17, 2016; T. 7392-96.) The court denied the motion.

The court committed prejudicial error in doing so. Pitt's interview of Madison greatly exceeded the scope of the court's order, as already addressed in Proposition of Law Nos. 11 and 12, which are incorporated here too. The State and its retained experts are required to abide by the court's orders, and the failure to do so must result in consequences, especially when the violation of the order occurs in a capital case, causes unfair prejudice to the defendant, and involves a violation of his constitutional rights.

Madison's death sentence must be reversed, and he is entitled to a new sentencing-phase trial.

<u>Proposition of Law No. 14.</u> A criminal defendant is denied a fair trial and a reliable sentencing proceeding, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 5, 9, 10, and 16 of the Ohio Constitution, when the trial court allows the introduction of unfairly prejudicial and/or inflammatory testimony, of minimal if any relevance, during the sentencing phase of a capital trial.

The same principles that apply in the trial phase, as identified in Proposition of Law No. 7, also apply in the sentencing phase to the introduction of evidence that is unfairly prejudicial, inflammatory, and/or of minimal if any relevance. <u>See</u> Proposition of Law No. 7. There must be even greater diligence in the sentencing phase to ensure that only relevant evidence is admitted and, at the same time, to also ensure that evidence which is irrelevant, unfairly prejudicial, and/or inflammatory is kept out, and that proper balancing is conducted under Rule 403, especially for evidence of dubious or minimal relevance. These principles were violated by the trial court in multiple ways during the sentencing phase.

The following evidence was improperly admitted against Madison in the sentencing phase:

1. The State presented inflammatory and unfairly prejudicial testimony, about Madison's alleged bad character. (T. 7283-84, 7285-87, 7288-92, 7294-96, 7296-98, 7313-30, 7399-7412, 7428-29, 7432-37, 7445-46, 7455-56.) ***Much* of the evidence offered by Dr. Pitt was of this variety, simply arguing that Madison has a bad character and no redeeming qualities, and that he is "depraved" and "twisted," and has "antisocial personality disorder."** (T. 7399-7412, 7428-29, 7432-37, 7445-46, 7455-56; State Exh. 1103.) <u>See also</u> Proposition of Law Nos. 11-13. All such evidence of Madison's alleged bad character was totally improper and was unfairly prejudicial. The defense tried to keep it out, but the court rejected those efforts at the prosecutor's overzealous urging. (T. 7301-04, 7392-96, 7448-54; No. 402, Motion in Limine re Dr. Pitt, filed May 17, 2016.)

All of this evidence of alleged bad character has the effect of being a non-statutory aggravating circumstance that is not a proper consideration for sentencing under R.C. § 2929.04(B). "[M]itigating factors are facts about the defendant's character, background, or record, or the circumstances of the offense, *that may call for a penalty less than death*." State v. White, 85 Ohio St. 3d 433, 448 (1999). State v. Belton, 149 Ohio St. 3d 165, 181 (2016). "Character" can be a *mitigating factor* which the defendant may choose to rely upon to weigh "*against* the aggravating circumstances proved beyond a reasonable doubt." R.C. § 2929.04(B) (emphasis supplied). See, e.g., State v. Hutton, 100 Ohio St. 3d 176, 190 (2003) (treats character as mitigating factor); State v. Holloway, 38 Ohio St. 3d 239, 241 (1988) (same). However, if the defendant does not seek to rely upon his character as mitigation, *then the State cannot present evidence on that factor*. That is hornbook law, but it was repeatedly disregarded by the prosecutor and the court. See Belton, 149 Ohio St. 3d at 183 ("'If the defendant chooses to refrain from raising some of or all of the factors available to him, those factors not raised ***may not be referred to or commented upon by the trial court or the prosecution***. When the *purpose* of these sections is understood, it is clear that such comment is appropriate only with regard to those factors ***actually offered*** in mitigation by the defendant.'") (quoting State v. DePew, 38 Ohio St. 3d 275, 289 (1988) (some emphasis supplied)).

Madison did not offer any evidence in mitigation about his character. His entire mitigation presentation was focused upon his traumatic childhood, developmental history, and family background, as specifically identified in R.C. § 2929.04(B) and as also permitted under (B)(7), and upon his likelihood of adapting to prison. Therefore, all the inflammatory and unfairly prejudicial evidence the State presented about Madison's alleged bad character and "depravity"—mainly through Dr. Pitt, but also in cross-examining Dr. Cunningham, and in the

prosecutor's comments and arguments—was improperly admitted and should not have been presented to the jury.

The State should not have been permitted to present any of Pitt's seven video clips. (State Exh. 1103; T. 7438.) Nor should it have been permitted to present Dr. Pitt's "opinion" that Madison meets the diagnostic criteria for "anti-social personality disorder" (T. 7441-45), or to cross-examine Dr. Cunningham about Dr. Pitt's "diagnosis" of that disorder (T. 7313-30). Such evidence was simply an effort to argue "bad character" and "criminal character" with the sheen of a mental health "diagnosis." Madison was not arguing his "character" as a mitigation factor, nor was he claiming he suffered from a mental disease or defect, nor was he making any argument under (B)(3) that he lacked "substantial capacity to appreciate the criminality" of his conduct. This evidence was thus totally improper.

For the same reasons, the State should not have been permitted to present Dr. Pitt's irrelevant and inflammatory opinions that Madison is "depraved" or "twisted" or a "serial philanderer" (T. 7399-7401, 7404-05, 7445-46), or to present evidence that Madison had requested a jail pen-pal in a letter to send him dirty pictures, writing "I don't remember exactly what I wrote last time about the female pics. But did I say fat? . . . I meant like thick with big tits and asses, black, white, Latin" (T. 7404-05):

> Q. . . . Then he went on to write: I caught this case better than I've ever done as an adult. That's what makes this kind of even harder to deal with. I had a lot of females. I love to F the ladies. That was my hobby. They were out there finding out about each other since I've been in here. In addition he wrote –
>
> MR. GRANT: Continuing objection, your Honor.
>
> THE COURT: The objection is sustained. Move on, please, Mr. McGinty.
>
> Q. Did he ask: Do you have pics out there with legs wide open, ones where their tits damn near about to pop out of their top?

(T. 7290-91; see also T. 7288-91, 7402-05.) Nor should the State have been permitted to address some of these same alleged "character" defects with Dr. Cunningham. (T. 7283-92, 7294-98.)

For the same reasons, the State should not have been permitted to offer Dr. Pitt's irrelevant and inflammatory opinions that Madison has a "victimization" mentality and does not accept responsibility for his actions (T. 7428-29), or that he is deceitful in his charm (T. 7455-56), or that his temper is a character defect. (T. 7432-37.)

2. The State presented evidence that Madison is "fully responsible" for his conduct as an adult, that Madison does not suffer from "diminished capacity," and that Madison does not satisfy the requirements of the mitigating factor set forth in R.C. § 2929.04(B)(3). (T. 6677-78, 6705-09, 7283-84.) The State also improperly presented the evidence of Pitt's diagnosis of Madison with "anti-social personality disorder," as already addressed. (T. 7313-30, 7441-45.)

This evidence was highly improper because the issue of criminal responsibility had already been determined, Madison was not alleging diminished capacity, and Madison was *not* making any claim that the (B)(3) factor applied in his case. (T. 7450-54 ("We're not raising (B)(3) as a mitigating factor. We're not going to ask for an instruction on (B)(3) as a mitigating factor.").) As addressed above in paragraph number 1, the State is not allowed to present evidence on mitigating factors that were not raised. See, e.g., Belton, 149 Ohio St. 3d at 183; DePew, 38 Ohio St. 3d at 289. This is just another example of the court and the prosecutor disregarding that settled rule.

3. In addition to the improper testimony of Dr. Pitt already addressed, the State presented Dr. Pitt's testimony on other matters that were inflammatory, unfairly prejudicial, and irrelevant to any issue in the sentencing phase, and also presented testimony from Dr. Pitt that exceeded the scope of what the trial court's order of June 3, 2014, and the order of the court of

appeals affirming that order, had allowed Dr. Pitt to cover in his interview with Madison. (T. 7386-95; No. 212, Order of June 3, 2014 ("The state may not inquire into the facts and circumstances of the case, examination only related to the brain damage of defendant."); State v. Madison, 2015-Ohio-4365 at ¶ 31 ("[W]e do not see anything in the trial court's order — limiting the psychiatric evaluation to the issue of brain damage, and disallowing any questioning regarding the facts or circumstances of the case — that jeopardizes Madison's Fifth Amendment right against self-incrimination.").)

This enabled the State to improperly present non-statutory aggravating circumstances, to present irrelevant and unfairly prejudicial evidence on mitigation factors that Madison was not raising, and to otherwise inflame the jury against Madison. *Most* of Dr. Pitt's testimony was irrelevant and/or inflammatory in one or more of these three respects, and some of which is also identified above in paragraph numbers 1 and 2. (T. 7398-7406, 7408-12, 7411-15, 7428-38, 7441-45, 7445-46, 7455-59, 7460-61, 7466-72, 7514-16, 7567-72, 7582-84; State Exh. 1103.) Dr. Pitt's testimony in these respects was totally unnecessary to assist the jury in understanding any relevant issues of forensic psychiatry. It was, instead, improperly and prejudicially presented *solely* to inflame the jury about the facts of the crime under a gloss of "expertise," and to enable Pitt to tell the jury his opinions that Madison, for committing these crimes, is "depraved," and "twisted," and "evil, mean, warped, vicious, deviant." (T. 7445-46, 7460-61, 7543-46, 7570-71, 7576.) Belton, 149 Ohio St. 3d at 183; DePew, 38 Ohio St. 3d at 289.

4. The State improperly presented testimony about Madison's alleged lack of "remorse" and "regret" for the killings. (T. 7298-7306, 7310-13, 7329-30.) An alleged lack of remorse is not an aggravating circumstance, and Madison never sought to claim remorse as a

mitigating factor. This evidence was thus improper, irrelevant, and inflammatory. Belton, 149 Ohio St. 3d at 183; DePew, 38 Ohio St. 3d at 289.

5. Beyond the improper non-statutory aggravating circumstances presented through Dr. Pitt, the State presented other evidence about the circumstances of the crime in the cross-examination of Dr. Cunningham that went well beyond what was permissible for the two aggravating circumstances at issue. (T. 7246-55, 7295-97, 7304-08, 7317-20, 7351-52, 7354-55, 7359-61.) This had the effect of making these circumstances non-statutory aggravating factors, in violation of Madison's rights and Ohio's death penalty statute.

6. The State referred to Madison again as a "serial killer," and "serial murderer," during the evidence presentation in the sentencing phase. (T. 6644, 6649, 6653-54, 6661, 6674, 6703-04, 6707-08, 7216, 7228-29, 7232-33, 7464-65.)

7. The State improperly referenced irrelevant details of Madison's prior conviction for attempted rape (T. 6686-94, 6721, 7280-82, 7405-12), of Madison's violations of his reporting obligations resulting from that sex offense, and of Madison's prior drug offense. (T. 6699, 7242, 7285.)

The admission of each of the foregoing seven categories of evidence denied Madison a fair trial and a reliable sentencing proceeding, in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments and Ohio's counterparts. None of this evidence was properly admissible in the sentencing phase because the evidence was irrelevant, inflammatory, and/or unfairly prejudicial. To the extent any was minimally relevant, any proper Rule 403 balancing would have kept it out. Proper objections were made by the defense to most if not all of this improperly admitted evidence, but, even for any instances where an objection was not made, the error is plain error in the circumstances of this case because Madison's substantial rights were denied in a way that affected the outcome of his sentencing proceeding. See Ohio

Crim. R. 52(B); State v. Thomas, 2017-Ohio-8011, ¶¶ 32-34 (2017). Absent these errors, there is a reasonable likelihood Madison would not have been sentenced to death. He is entitled to a new sentencing proceeding.

Proposition of Law No. 15. Prosecutorial misconduct during both phases of a capital trial denies the criminal defendant his rights under Article I, Sections 5, 9, 10, and 16 of the Ohio Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution.

A criminal defendant is entitled to a determination of his guilt in a trial free from prosecutorial misconduct which renders the proceeding fundamentally unfair. Donneley v. DeChristoforo, 416 U.S. 637 (1974). As the government's representative, the prosecutor has a special duty "whose obligation to govern impartially is as compelling as its obligation to govern at all." Berger v. United States, 295 U.S. 78, 88 (1935).

The test for prosecutorial misconduct is whether the challenged conduct and/or remarks were improper and, if so, whether they prejudicially affected the accused's substantial rights so as to deny him a fair trial. State v. Lott, 51 Ohio St. 3d 160, 165 (1990); State v. Apanovitch, 33 Ohio St. 3d 19, 24 (1987). The touchstone of this analysis "is the fairness of the trial, not the culpability of the prosecutor." Smith v. Phillips, 455 U.S. 209, 219 (1982). As this Court has said: "While we realize the importance of an attorney's zealously advocating his or her position, we cannot emphasize enough that prosecutors of this state must take their roles as officers of the court seriously. As such, prosecutors must be diligent in their efforts to stay within the boundaries of acceptable argument and must refrain from the desire to make outlandish remarks, misstate evidence, or confuse legal concepts." State v. Fears, 86 Ohio St. 3d 329, 332 (1999). State v. Smith, 14 Ohio St. 3d 13, 13-15 (1984) (conviction reversed because of prosecutorial misconduct).

In addition to the prosecutorial misconduct that occurred during jury selection (see Proposition of Law No. 5), there was also prosecutorial misconduct in both phases of Madison's trial.

A. Misconduct in the Trial Phase.

The prosecutorial misconduct in the trial phase includes the following actions and/or comments:

1. There was improper victim impact evidence presented to the jury in the trial phase. This included during the testimony of the family members of the victims. (See, e.g., 3988-90, 4024-26). The testimony went beyond what was proper or necessary for any relevant issue, and it violated the court's pretrial ruling against improper victim impact testimony. (T. 55-56.) The prosecutor's elicitation of this testimony was unfairly intended to inflame the jury.

2. The prosecutor introduced the video-recorded interrogation of Madison without making necessary redactions that would remove the detectives' improper statements and opinions including the specific instances identified in Proposition of Law No. 6, to wit: **(a)** comments and opinions about claims of excessive drug and alcohol use; **(b)** opinions and statements suggesting the possibility of more victims; and **(c)** opinions and statements about remorse, cooperation, and guilt of sexual predation.

3. The prosecutor repeatedly introduced inflammatory and unfairly prejudicial testimony and evidence, of minimal if any relevance, during the trial phase, including the specific instances identified in Proposition of Law No. 7, to wit: (**a**) Madison's video statement to the extent he expressed a lack of knowledge or awareness of the number of victims, including if there were more homicides than the three victims for which he was charged; **(b)** the testimony of Quiana Baker of Madison's alleged statement to her about his annoyance with women and that they made him "want to Anthony Sowell a bitch"; **(c)** the testimony of Eugenia Thomas of

Madison's alleged statements to her about hitting women and tying them up during sex, about "watching the bitches" at the mall, and about supposedly wanting to kill his "baby mama" because she would not let him see his children; and **(d)** the video interrogation insofar as depicting Madison's interaction with the female who brought him coffee on July 21 and of the episode, also on July 21, when he was alone in the room and used some profanity. The presentation of this testimony and evidence was totally unnecessary and was introduced only to inflame the jury.

4. The prosecutor in closing argument repeatedly referred to Madison as a "serial killer," a "depraved serial killer," and a "professional" killer. (T. 6223, 6244, 6281, 6330.) <u>See also</u> Proposition of Law No. 8. The prosecutor also referenced Madison's alleged "Anthony Sowell" comment. (T. 6198.) The prosecutor also argued that Madison lacks remorse. (T. 6265, 6280-81.) These arguments were all improper and were made only to inflame the jury.

B. <u>Misconduct in the Sentencing Phase.</u>

The prosecutorial misconduct in the sentencing phase includes the following actions and/or comments:

1. The State referred to Madison again as a "serial killer," and "serial murderer," during the evidence presentation in the sentencing phase. (T. 6644, 6649, 6653-54, 6661, 6674, 6703-04, 6707-08, 7216, 7228-29, 7232-33, 7464-65.) He also unfairly emphasized the "grotesque manner" of the killings, and the graphic autopsy photos, when none of those matters were relevant in sentencing. (T. 6658, 6670.) And he again referenced Anthony Sowell. (T. 7221.)

2. The prosecutor frequently used the cross-examination of Dr. Cunningham to make speeches and arguments, and not for the purpose of proper cross-examination. Many of the "questions" were not proper questions at all, they speechified about circumstances of the killings

and other non-aggravating circumstances, and/or they were designed to be argumentative and derogatory about the witness, about Madison, and/or about Madison's mitigation case. (T. 7228-29, 7230-33, 7235-37, 7244-46, 7251-52, 7254, 7282-84, 7292-93, 7305-10, 7317-22, 7352, 7356-58, 7360-65.)

3. The prosecutor improperly sought to discredit Madison's expert witness, Dr. Cunningham, by calling him a "professional testifier in these cases," and otherwise frequently challenging his integrity in front of the jury. (T. 6647, 6721, 7245-46, 7293-94, 7296-97, 7307-08, 7323-25, 7252-60.) Then, in closing argument, the prosecutor disparaged Dr. Cunningham again by misrepresenting his testimony and calling it "ridiculous" and its proponent "irresponsible":

> And it certainly isn't true that everybody is damaged and therefore did these things. There's no heredity to murder. There's no DNA to murder. There's a heredity to drinking alcohol and being an alcoholic or drug -- susceptible to drug addiction certainly, but there's no DNA to rape, ladies and gentlemen. There's no DNA to murder. It's a ridiculous proposition, and it was – it's never been even claimed by anybody, by anybody responsible that I've ever heard of, or irresponsible for that matter, to my knowledge.

(T. 7704-05.) The prosecutor made similar derogatory accusations against Dr. Davis, challenging him as being "very loyal to your client here" (T. 6654), suggesting that his testimony was guided by what he perceives as a "strategic advantage" (T. 6655-56), and alleging he is being "used" as a "tool to aid in [Madison's] defense." (T. 6694-95.)

4. The prosecutor interfered with Madison's efforts to present his mitigation evidence by making groundless objections, including as referenced in Proposition of Law No. 10. The prosecutor engaged in misconduct in seeking to exclude: **(a)** testimony and evidence about "moral culpability" and the development of that critical concept in capital sentencing, its significance to a forensic psychologist, and what it means and how it is applied by such mental

health professionals in this context; **(b)** testimony and evidence about the connection between, on the one hand, adverse development factors in a person's upbringing, and, on the other, the "choices" available to that person and/or the impairment or limitation of such choices; and **(c)** testimony and evidence about certain of the adverse development factors, including available research and other learned authorities that support the presence of those factors in Madison's case.

5. The prosecutor repeatedly and improperly commented on witnesses the defense did not call to testify in the sentencing phase, and especially Madison's mother, Diane, and Madison's "baby mama," Tenia Plummer. (T. 6667-68, 6673-74, 6682-83, 6685-86, 6691-92, 6721-26.) He also improperly commented, during closing argument, on Madison's right to remain silent by criticizing Drs. Davis and Cunningham for not asking Madison how the crimes happened and why he committed them. (T. 7677-78.) He also cross-examined on that same improper topic. (T. 7232-33, 7239-40, 7304-06, 7319-20.)

6. The prosecutor disparaged Madison in front of the jury, in a very prejudicial way, when Madison was using an iPad. During the cross-examination of Dr. Cunningham, and referring to Madison, the prosecutor said: "Do you see the guy here on the iPad looking at pictures of ladies here and other objects here --." (T. 7223.) Defense counsel objected and sought a mistrial, and, in doing so, described the misconduct in greater detail:

> The basis for that motion, your Honor, is the fact that at one point during his cross-examination Mr. McGinty came right up to our table, right up to Mr. Madison and pointed out what he was looking at on an iPad. And even went so far as to say he is looking at women. That is a premeditated, calculated, inflammatory statement, prosecutorial misconduct in every sense of the word. He did that for the sole purpose of inflaming this jury. Prosecutor misconduct can be singular or cumulative. I think singularly that was a violation which denied my client a constitutional right to fair trial based on his conversations about non-evidentiary items he knows is not evidentiary.

(T. 7262.) The court denied the motion.

7. The prosecutor then introduced inflammatory and unfairly prejudicial testimony and comments, of no relevance, during the sentencing phase, about salacious letters between Madison and a pen pal in which Madison requested dirty pictures of women, as noted above in Proposition of Law No. 14. (T. 7288-91, 7402-05.)

8. The prosecutor improperly referenced details of Madison's prior conviction for attempted rape and called Madison a "con artist" in his descriptions of that offense (T. 6686-94, 6721, 7280-82, 7405-12), and he referenced that offense again in closing argument. (T. 7673-75, 7688.) The prosecutor also prejudicially referenced Madison's violations of his reporting obligations resulting from that sex offense, and he referenced Madison's prior drug offense. (T. 6699, 7242, 7285.)

9. The prosecutor improperly sought to elicit testimony in the sentencing phase that Madison is "fully responsible" for his conduct as an adult, that Madison does not suffer from "diminished capacity," and that Madison does not satisfy the requirements of the (B)(3) mitigating factor, as detailed more fully above in Proposition of Law No. 14. Such matters were irrelevant and not properly before the jury since Madison was not raising any mitigation factor under (B)(3). See Belton, 149 Ohio St. 3d at 183; DePew, 38 Ohio St. 3d at 289.

10. As detailed more fully above in Proposition of Law Nos. 13 and 14, the prosecutor improperly presented testimony of Dr. Pitt on matters that exceeded the proper scope of the compelled uncounseled examination the trial court has allowed.

11. As detailed more fully above in Proposition of Law No. 14, the prosecutor presented the testimony of Dr. Pitt on matters that were inflammatory, unfairly prejudicial, and irrelevant to any issue in the sentencing phase. In addition, after the prosecutor had successfully

obstructed Dr. Cunningham's efforts to explain the foundation for the nexus the research shows between adversity and impaired choices, and after the prosecutor had receiving a warning from the court that he could likewise only explore "choice" in a "limited manner" with Dr. Pitt (T. 7423-24), the prosecutor ignored the court's limitation:

> Q. Talking about this concept of choice, do you discuss some of the choices Michael Madison made in your report?
>
> A. I discuss -- yes, I do.
>
> Q. Specifically at the bottom of page of your report?
>
> A. Yes, I do.
>
> Q. Did Michael Madison have a choice to wrap each victim in construction grade plastic bags and some of them in multiple bags?
>
> A. Yes.
>
> Q. Did he have a choice to hide each body?
>
> A. Yes.
>
> Q. Did he have a choice to dump Angela Deskins's body in the basement of an abandoned house?
>
> A. Yes.
>
> MR. GRANT: Objection.
>
> THE COURT: Overruled.
>
> Q. Did he have a choice to burn incense to hide the odors?
>
> A. Of Shirellda Helen Terry's corpse, he burned incense, yes.
>
> Q. Did he have a choice two days prior to his arrest with odor emanating from the garage to abruptly close the door when the neighbor made eye contact with him?
>
> A. Yes.

Q. Did he have a choice after he moved Shirellda Terry's body from his apartment to the garage and in an effort to get rid of the odor clean up the scene in his apartment?

A. Yes.

Q. Did he have a choice to use a makeshift sleigh to move Shetisha Sheeley's body from the garage to behind the garage?

A. Yes.

Q. Did he have a choice to not put any bodies in a neighbor's dumpster so as to avoid drawing the attention of his neighbor, Shaeaun Childs, with whom he had a previous run-in?

A. Yes.

Q. Did he have a choice to refuse to comply with Nikki Stovall's requests to return to his apartment and open the garage to determine the source of the odor that was emanating from the garage?

A. Yes.

Q. Did he have a choice to drive by the crime scene following the discovery of Shirellda Terry?

A. Yes.

Q. Did he have a choice to refuse to turn himself in into the police when he knew there was a warrant out for his arrest?

A. Yes.

Q. Did he have a choice to hide from the police in an attempt to avoid being arrested?

A. Yes.

Q. And, by the way, Doctor, did he have a choice where he hid from the police?

A. Yes.

Q. Where did he hide from the police?

> A. Mom's house. He also had a choice to use a saw-like implement on Shirellda Terry.

(T. 7567-70.)

11. As also detailed above in Proposition of Law No. 14, the prosecutor improperly commented upon, and sought to elicit testimony about, Madison's alleged lack of "remorse" and "regret" for the killings. (T. 7298-7306, 7310-13, 7329-30.) Improper comments on lack of remorse were made again during the State's initial closing argument. (T. 7628-29.) An alleged lack of remorse is not an aggravating circumstance, and Madison never sought to claim remorse as a mitigating factor. It was thus improper and inflammatory for the prosecutor to discuss or reference any alleged lack of remorse or regret. See Belton, 149 Ohio St. 3d at 183; DePew, 38 Ohio St. 3d at 289.

12. During the final closing argument, the prosecutor improperly told the jury they could not consider mercy (T. 7700), just as he had improperly done during jury selection. (See Proposition of Law No. 5.) This is a misstatement of the law since "mercy" can be factored in during the deliberation process according to Kansas v. Carr, 136 S. Ct. 633, cited earlier. The prosecutor also, again, improperly argued that Madison had failed to show remorse. (T. 7628-29, 7685-88.) And, as with much of his questioning of Dr. Pitt and his cross-examination of Dr. Cunningham, the prosecutor used the final closing argument to address again facts of the crime which were not among the aggravating circumstances. (T. 7690-93.) Finally, at the very end, he prejudicially and improperly offered his opinion on the weighing, he suggested there was no reasonable dispute and that it would be "dishonest," "immoral," and "deluded" to find differently, and he told the jurors they "owe" the victims to "do what is right" and provide the "justice [the case] deserves":

> You took an oath to follow the law. It is not easy. These are not easy jobs. This is the toughest job. **But when you come to the**

weighing, there is no question here, there's no reasonable question whatsoever as to weight. You took an oath to follow it, to respect our democracy, to put emotion aside, and you took an oath that you would put it aside, you would make your decision without bias, sympathy, or prejudice. You would act in a dispassionate manner. Your personal feelings towards capital punishment are irrelevant, and you promised to put them aside and not to sneak or find or saboteur a way in injecting this because that would be wrong. That would not be moral. That would not be honest. The law has already been decided by our democratic system and the democratic process and the rule of the law.

You must act and make an honest judgment. **It would not be an honest judgment if you say you morally believe that a bush is bigger than a giant Sequoia tree. You can say it, but you can't believe it. You can admit you believe it if you deluded yourself**.

Mercy is not part of your options.

Without bias, without sympathy or prejudice. You cannot have bias against the State of Ohio or the defendant. You must put them aside and act in a logical, reasonable fashion.

It would be –

MS. TYLEE: Objection.

THE COURT: Overruled.

MR. McGINTY: -- dishonest morally to violate your oaths. This country is dependent on it. This country is dependent on the honesty of its citizens. . . .
. . . .

We have faith in the people. We have faith in you to do the right thing.

What happened to these women is so difficult to deal with. It's so difficult to us, and none of us in this room -- in this part of the room knew these women, never saw them for one second, and were -- and we can get emotional at the thought, **but we owe them. We owe society. We owe our community.** We owe our country to do what is right, to follow our oath. And I thank you, ladies and gentlemen, for following yours. And I appreciate it sincerely, everything you have done, everything you have endured, the long and lengthy trial this has been, and the weight you will

> carry, the weight you will carry the rest of your life thinking about **this case and the justice it deserves**.

(T. 7700-04 (emphasis supplied).)

C. Conclusion

Prosecutorial misconduct throughout the trial, and including in jury selection (Proposition of Law No. 5), deprived Madison of a fair trial and reliable sentencing proceeding as guaranteed under the Fifth, Sixth, Eighth and Fourteenth Amendments and Ohio's counterparts. None of the evidence, argument, or comment was proper. It was done merely to inflame the jury and make a death sentence more likely. Proper objections were made by the defense to much of the misconduct at issue. But, even for any instances where an objection was not made, the error is plain error in the circumstances of this case because Madison's substantial rights were denied in a way that affected the outcome of his sentencing proceeding. See Ohio Crim. R. 52(B); State v. Thomas, 2017-Ohio-8011, ¶¶ 32-34 (2017). Absent the misconduct, there is a reasonable likelihood Madison would not have been sentenced to death. He is entitled to a new trial or, at least, a new sentencing proceeding.

Proposition of Law No. 16. The right to effective assistance of counsel in a capital case is denied when counsel's deficient performance results in prejudice to the defendant, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 5, 9, 10, and 16 of the Ohio Constitution.

The Sixth Amendment guarantees a capital defendant the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). When ineffective performance implicates the fairness of the sentencing proceeding in a capital case, the defendant's rights under the Eighth Amendment are also involved.

The focus of an ineffective assistance of counsel inquiry is whether defense counsel's performance was such as to undermine the integrity of the adversarial process. Defense counsel's performance must be so deficient that there is a reasonable probability that, had counsel

performed effectively, the outcome would have been different. Id.; Williams v. Taylor, 529 U.S. 362, 393-99 (2000); Wiggins v. Smith, 539 U.S. 510 (2003); Rompilla v. Beard, 545 U.S. 374 (2005).

Defense counsel performed deficiently in the following respects:

A. Trial Phase.

Defense counsel's deficient performance during the trial phase includes the following:

1. Defense counsel objected to the admission of some of the improper opinions and comments by the detectives that were part of Madison's video-recorded interrogation that was presented to the jury (State Exh. 301), as set forth in Proposition of Law No. 6. To the extent counsel *failed* to object to, and request redaction of, any of these improper opinions and comments, then in that event counsel's performance was deficient, under applicable prevailing standards, for failing to preserve these meritorious issues.

2. Defense counsel objected to the admission of most of the unfairly prejudicial and irrelevant testimony that is the subject of Proposition of Law No. 7. However, counsel failed to object to Ms. Thomas's testimony about Madison's supposed statements about "watching the bitches" (T. 5954-55, 5958) or supposedly wanting to kill his "baby mama" (T. 5959.) There were also no objections to the State's use of Madison's interaction with the woman bringing coffee and about the episode where Madison was left alone and was swearing. Also, with respect to the video tape, there was apparently no specific objection to questions and statements about the number of victims. Counsel's failure to object, and fully preserve these meritorious issues, was deficient performance under applicable prevailing standards.

3. Defense counsel objected to some of the instances of prosecutorial misconduct that are the subject of Proposition of Law No. 15, Part A. However, counsel failed to object to some of those instances of prosecutorial misconduct. Counsel's failure to object, and fully

preserve these meritorious issues, was deficient performance under applicable prevailing standards.

B. Sentencing Phase.

Defense counsel's deficient performance during the sentencing phase includes the following:

1. Defense counsel objected to the admission of most of the unfairly prejudicial and irrelevant testimony that is the subject of Proposition of Law No. 14. However, for any instances to which defense counsel is deemed to have failed to object or failed to have made a proper objection, counsel's failure in that respect is deficient performance under applicable prevailing standards. Objections would have been well-founded and/or were necessary to preserve such meritorious issues.

2. Defense counsel objected to the some of the instances of prosecutorial misconduct that are the subject of Proposition of Law No. 15, Part B. However, counsel failed to object to some of those instances of prosecutorial misconduct. For any instances to which defense counsel failed to object or is deemed to have failed to make a proper objection, counsel's failure in that respect is deficient performance under applicable prevailing standards. Objections would have been well-founded and/or were necessary to preserve such meritorious issues.

3. Defense counsel objected when the prosecutor commented on the failure of the defense to call Diane Madison as a witness. (T. 6724-26.) At one point, to address the objection, the court offered to give a curative instruction to the jury that defendant is not required to call Diane Madison. The defense was given the evening to craft an appropriate instruction for the court to consider. (T. 6726.) The record reflects that defense counsel failed to follow up on this issue the next day, and the curative instruction was never given.

4. The court disallowed Madison's expert witness, Dr. Cunningham, to present testimony and evidence about the legal landscape from which the concept of "moral culpability" as used in forensic psychology has developed and been applied, by that profession, for purposes of conducting evaluations for capital mitigation. (See Proposition of Law No. 10.) Defense counsel should have requested a jury instruction that provided some of that same information to the jury. There is, or could be, no dispute that the U.S. Supreme Court in Roper, Atkins, Wiggins, and many other cases, recognizes an offender's moral culpability, as distinct from criminal responsibility, to be the relevant consideration on whether the death sentence is an appropriate punishment for that offender. The Court has also identified some of the factors that bear upon a reduced "moral culpability" for these purposes, including youth, immaturity, intellectual disabilities, severe privation, abuse in childhood, absentee mother, physical or mental torment in younger years, and troubled upbringing. Wiggins, 539 U.S. at 535; Roper, 543 U.S. at 570-71; Atkins, 536 U.S. at 306.

The jury did not know any of this factual background, and Madison was entitled to make sure they did, especially since it was so important to the analysis and opinions Dr. Cunningham sought to present to the jury in mitigation. The jury should not have been allowed to be left with the impression that "moral culpability" is a concept the defense made up for this case, a very likely impression given the court's simultaneous error of also allowing the prosecutor to tell the jury that mercy cannot even be considered. That wrong impression is certainly one the prosecutor aggressively encouraged. (T. 6789 ("Let me put on for the record, everything [Dr. Cunningham] does is to confuse the jury. There is no high end or purpose here. This is purposely to confuse the jury. That's what this is all about. This is what that moral thing is about. This is what the scales are about.").)

Given that the court, at the overzealous urging of the prosecutor, would not allow Dr. Cunningham to explain this background—on which no factual dispute whatsoever could exist—, then Madison was entitled to a jury instruction from the court setting out that same information. Defense counsel did not seek such an instruction, and the failure to do so is deficient performance in the circumstances of this case. With such an instruction to the jury, Madison's counsel would have been able to argue in closing argument that "moral culpability's" role, at the heart of mitigation, comes right from the top, the U.S. Supreme Court. And, would have also been able to make the other statements and assertions supporting its primacy as mitigation, and its distinction from criminal responsibility, as were set forth in Dr. Cunningham's report, but which the court limited him from testifying about. (Def. Proffer Exh. P-16, Cunningham Report at 5-6, 13, 18, 84-90.)

C. Conclusion

Madison was prejudiced by his counsel's deficient performance in all of these above respects. There is a reasonable probability that, absent this deficient performance, both individually and cumulatively, the result of the proceeding would have been different and Madison would not have been convicted and/or sentenced to death. He is entitled to a new trial or, at least, a new sentencing proceeding.

Proposition of Law No. 17. The trial court violates Lockett, Eddings, and the Eighth and Fourteenth Amendments when, in its required capital sentencing opinion, it gives no or minimal weight to, or unreasonably discounts, accepted mitigation evidence.

The trial court issued its sentencing opinion where it imposed a sentence of death but either gave no or minimal weight to, or unreasonably discounted, accepted mitigation in violation of Lockett, Eddings, their progeny, and the Eighth Amendment. A new penalty phase hearing or a remand for the trial court to perform a proper analysis is necessary.

The U.S. Supreme Court has held that courts may not preclude the sentencer from considering any mitigating factor. Also, the sentencer may not, as a matter of law, refuse to consider relevant mitigating evidence. One may not give no weight to mitigating evidence by excluding it from consideration. Eddings, 455 U.S. at 113-14. Otherwise the rule in Lockett is violated. As the U.S. Supreme Court stated in footnote 10 of Eddings, "Lockett requires the sentencer to listen."

The relatively recent U.S. Supreme Court decision, per curiam, in Porter v. McCollum, 558 U.S. 30 (2009), is instructive. The U.S. Supreme Court held that the Florida Supreme Court "either did not consider or unreasonably discounted the mitigation evidence" adduced in a post-conviction hearing. Citing to Eddings, supra, the Court held that the sentencer must be permitted to consider relevant mitigating factors. Porter, 558 U.S. at 42-43.

In Madison's case, the trial court recounted the "mitigating factors" at pages 6-9 of its sentencing opinion. (No. 414, Sentencing Opinion at 6-9.) These are: (1) Madison's relationship with his children; (2) adaptability to prison; (3) substance abuse; and (4) Madison's background and childhood. The court gave the four factors the "weight" noted below:

(1) Relationship with children: "no weight."

(2) Adaptability to prison: "minimal weight."

(3) Substance abuse: "some very slight weight."

(4) Madison's background and childhood: "greater weight than the other factors, but it is not given great weight."

(No. 414, Sentencing Opinion at 6-9.)

As confirmed by the Opinion, the trial court gave no weight, "minimal," or "slight" weight to well accepted mitigating factors, and it unreasonably discounted the weight to be given to the developmental adversity which plagued Madison's upbringing and youth. The trial court

thus gave either no weight to, or "unreasonably discounted," well accepted mitigation evidence, in violation of the Eighth and Fourteenth Amendments.

The trial court, and certainly the jury, misunderstood the role of mitigation. This misunderstanding was in part reflected in, and contributed to by, the court's rulings noted above in this Brief, including: (1) the court's failure to allow an adequate voir dire on issues relevant to the mitigation phase, and the court's seating of biased jurors (Proposition of Law Nos. 1-4); (2) the court's refusal to allow any consideration of mercy (Proposition of Law No. 9); (3) the court's unfair restriction of Dr. Cunningham's testimony and its exclusion of relevant mitigation evidence (Proposition of Law No. 10); and (4) the court's allowance in mitigation of so much irrelevant, inflammatory, and unfairly prejudicial evidence (Proposition of Law No. 14). With so many errors impacting the mitigation phase, it is little wonder the court's Sentencing Opinion also displays a misunderstanding of mitigation evidence.

The court's failure to give any weight to the fact that Madison has two young children who love him, and whom he loves, is contrary to controlling law. There can be no question that the evidence supported this mitigation factor. A number of witnesses testified during trial that Madison cared deeply for his children and was a good father. (T. 4194 ("And how was he with the kids? A. Good. They loved being with him."); T. 5609 ("Q. Did you have an opportunity to see the children interacting with their father? A. Yes. Q. And how would you describe those interactions? A. Good. His daughter worshipped the ground he walked on. She loved him. His son was -- was hyper. They were great kids. . . . He loved his kids. And they loved him back."); T. 5964-65, 5974.) Madison himself expressed these sentiments during his lengthy video interrogation. The love of family, and of young children, is entitled to weight in mitigation and it cannot be ignored, as the trial court did, nor can the court ignore the impact of Madison's

execution on his children. See Lockett; State v. Fox, 69 Ohio St. 3d 183 (1994); State v. Conway, 109 Ohio St. 3d 412, 438 (2006).

The evidence about Madison's good behavior in jail up to that point, and his likely successful adaptability to prison, is also well-established mitigation evidence. That mitigation evidence was firmly grounded in the trial record and the court's experience with Madison. Indeed, Madison had been in the County Jail almost *three years* by the time of trial, and he had only a few minor infractions despite being detained in a highly restrictive setting. (T. 6893 ("Q. Did you see anything in his county jail record or prison record that gave you pause or concern about his future dangerousness in a penal setting? A. No, sir. I'll be frank with you, I don't think I would be sitting on the stand if I saw something and told you what I believe.").) The testimony of Mr. Aiken and Dr. Cunningham further suggested that Madison would adjust similarly well in a prison setting. (T. 6769-73, 6869-6908, 7166-72.) Such "Skipper" evidence is significant mitigation, but was given minimal weight by the trial court. Skipper v. South Carolina, 476 U.S. 1 (1986). The fact that Madison would never be released from prison was erroneously given no weight. See State v. Campbell, 90 Ohio St. 3d 320, 327 (2000).

Most significant though was the degree to which the court discounted and dismissed the evidence of Madison's background and development, and the expert testimony of Drs. Davis and Cunningham, confirmed by authoritative sources in their field, about how such adversity impairs and limits choices, often leading to criminal activity. As summarized earlier, the evidence reflects that Madison's life from birth up to the conduct underlying these offenses was marked by profound familial dysfunction. For generations, the culture of Madison's family has been an unstable and toxic mix of neglect and abuse of both a physical and sexual nature.

By the time Madison was born, he was assured to undergo a horribly abusive upbringing. Evidence documents that abuse from the time Madison was only two years old. The CFS records

reflect that Madison's mother shoved food down his throat, scalded him in hot water, pulled his hair, punched his face, and regularly beat him with an extension cord. When Madison was three years old, his mother's boyfriend, William Miller, beat him with a belt and threw him into a mantel causing a traumatic head injury. After two hours, Madison began to vomit and pass out. Medical records indicate that there were marks and abrasions and contusions on the right or left side of his body as well as in the penis shaft that was swollen, and contusions with abrasions in the proximal portion of the glans penis. Madison lost hearing due to this beating. (T. 6602-04, 6597, 7078-83.) It was described as a potentially life-threatening event. (T. 7128-29.) He was hospitalized and removed from his mother's custody as a result.

The evidence further demonstrates that the abuse persisted after Madison was returned to his mother, herself a victim of terrible childhood abuse. As Madison and his brother grew older, the abuse evolved into something more like torture. Throughout Madison's childhood, his mother, already incapable of remaining in a stable relationship due to her own personal history, exposed him to a series of violent substance-abusing boyfriends. No one growing up in an environment like that could emerge unscathed. Certainly, no one in Madison's family had. By the time of these offenses, Madison was a badly damaged person.

The trial court failed to afford this and other evidence the significance to which it is entitled in mitigation of a death sentence. The court misunderstood Dr. Cunningham's testimony as suggesting a "foregone trajectory leading up to the murders" (Sentencing Op. at 8) based on the toxic background. But that was *not* Dr. Cunningham's testimony at all. The court's description, instead, reflects the trial court's acceptance of the way in which the prosecutor had *repeatedly mischaracterized* Dr. Cunningham's testimony, by way of his belittling it. (T. 6809 ("And then he has the nerve to claim this is DNA, it's heredity. Heredity made him do it. His DNA makes him a cold-blooded murderer who bags women."); T. 6856 ("If there's some DNA

that causes you to be a murderer or serial murderer or mutilate women like this guy does, let's see that study. I would love to see it."); T. 6977 ("If he wants to say his childhood affected his decision making, that's speculation. Let him do it. Abe Lincoln grew up in a tough household. He didn't decide to become a serial murderer."); T. 6990 ("That last conclusion, just listen to, there is no study anywhere that says if you've got risk factors you are very likely to engage in this kind of violent behavior. That's crazy. How many serial murderers do we have in the history of this county or this country?"); T. 7010 ("The next slide is to go into an argument of heredity and murder -- that cause you to be a serial murderer, I suppose."); T. 7704-05 ("There's no DNA to murder. It's a ridiculous proposition.").)

The defense did not suggest that Madison's background *excused* his crimes, nor suggest that these crimes were "inevitable" (or "foregone") for one with his background, just as the 17-year old offender in Roper did not claim that the adversity of youth made the murder *he* committed inevitable, or served to "excuse" that crime. Abe Lincoln was young once too. To the contrary, Madison had choices and chose poorly, to be sure, but his choices were those of a profoundly damaged person whose developmental adversity, and total absence of protective factors in his life, make him *less morally culpable* for those poor choices, even if still criminally responsible, in an analogous way that Christopher Simmons was less morally culpable for his crimes. This is what mitigation is supposed to assess under established constitutional doctrine, and the court completely overlooked that aspect of mitigation's role.

The court's misapprehension of the role of mitigation evidence in a capital case, and its misunderstanding of Dr. Cunningham's testimony, was further demonstrated by its reliance on the State's expert, Dr. Pitt. The court cited Dr. Pitt *only* to establish the straw-man propositions that there is not a "foregone trajectory necessarily resulting in the aggravated murder of three victims," and that "there is no hereditary component to murder." (Sentencing Opinion at 9.) But

those issues, of course, were never part of Madison's evidence in mitigation. What his mitigation evidence *did* establish, though, is that there *are* hereditary aspects to some of the developmental adversity Madison faced (much of which the court wrongly *excluded*); that persons subjected to developmental adversity to the degree Madison encountered, and without the benefit of protective factors, experience different and more difficult choices than those not similarly burdened (much of which the court also wrongly excluded); and that those damaged persons victimized by such adversity—into which no one *chooses* to be born, or to be raised amidst—will more often also be involved in victimized relationships, drug dependency, criminal activity, and have psychological disorders, *all* of which happened with Madison. And, therefore, will be less morally culpable for a serious criminal offense than those offenders not similarly burdened. Madison's was, indeed, a mitigation case soundly grounded in an assessment of relative moral culpability, *precisely* like that the Supreme Court endorsed in Roper, Adkins, Wiggins, and many other cases.

The trial court's deficient analysis not only is inconsistent with these Supreme Court cases, but it also contradicts Lockett, insofar as the court discounted the mitigation to the extent the court viewed the evidence as not establishing a causal connection to Madison's conduct in committing the murders. However, Lockett has made clear that mitigation does not have such a limited role. Each defendant must be treated as an individual with his personal circumstances as part of the decision as to whether the defendant lives or dies; the sentence must be a "reasoned moral response" to Madison's background, history, and crime. Abdul-Kabir, 550 U.S. at 252. The Supreme Court has specifically rejected attempts by the states to restrict mitigation evidence. Skipper evidence, for example, does not causally relate to the crime but is *still* significant mitigation evidence. In fact, the Court has specifically rejected a requirement that

there need be a link or nexus between the evidence relevant for mitigation and the capital murder. Smith v. Texas, 543 U.S. 37 (2004) (per curiam).

The trial court's weighing in its Sentencing Opinion resulted from a misunderstanding of the law and a lack of sufficient appreciation of the purpose and role of mitigation evidence in a capital case. These errors can only be corrected by a remand for a new penalty phase jury trial or at least a new hearing before the trial court so she may properly weigh the mitigation presented and any mitigation able to be presented now. See Smith v. Texas, Eddings, Lockett, supra.

Proposition of Law No. 18. The death penalty may not be sustained where the cumulative errors that occurred in the trial deprived the defendant of a fair trial and fair consideration of the appropriateness of the death penalty.

The combination of errors by the trial court, the prosecution, and the ineffectiveness of the defense counsel deprived Madison of a fair trial. The errors, if not individually, combined to cause the trial and sentencing proceeding to be constitutionally infirm. State v. DeMarco, 31 Ohio St. 3d 191 (1987). These errors, as addressed in the Propositions of Law in this brief, combined to violate the Fifth, Sixth, Eighth and Fourteenth Amendments, and to also violate the Ohio Constitution.

Madison incorporates all other Propositions of Law into this argument. The cumulative effect of all the errors resulted in a verdict and/or death sentence that is not reliable.

Proposition of Law No. 19. The death penalty is unconstitutional as presently administered in Ohio, and as applied in Madison's case.

Madison preserved his constitutional challenges to the death penalty as administered in Ohio, on its face and as applied to him.

On December 10, 2013, he filed an omnibus constitutional challenge to the death penalty, as violative of the constitution and also international law, in multiple respects. (No. 52, Motion of Dec. 10, 2013.) The trial court denied that motion. (T. 38-39.)

Later, after the U.S. Supreme Court's decision in Hurst v. Florida, 136 S. Ct. 616 (2016), Madison filed a supplemental motion on May 12, 2016, arguing that Ohio's death penalty scheme, and specifically R.C. § 2929.03, violates the Sixth and Fourteenth Amendments under the reasoning articulated in Hurst. (No. 394, Motion of May 12, 2016.) The State opposed the supplemental motion. (No. 399, State's Opposition.) The trial court never specifically addressed the Hurst issue. However, it denied Madison's motion by implication by proceeding to conclusion of the sentencing phase and by not dismissing the portions of the indictment that elevated Madison's possible penalty to death.

The Ohio death penalty scheme is unconstitutional in the following ways:

A. Unconstitutionally cruel and unusual punishment.

The Eighth Amendment 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 a death penalty 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).

Madison believes that Ohio's death penalty is, as Justice William M. O'Neill has written, "inherently cruel and unusual and is barbaric in the way that it has been carried out. Wogenstahl, 134 Ohio St. 3d 1437, 2013-Ohio-164, 981 N.E.2d 900 (O'Neill, J. dissenting); State v. Broom, 146 Ohio St. 3d 60, 2016-Ohio-1028, 51 N.E.3d 620, ¶ 92(O'Neill, J. dissenting); see also In re Ohio Execution Protocol Litigation, S.D. Ohio, No. 2:11-cv-1016, 2017 U.S. Dist. LEXIS

11019, 2017 WL 378690 (Jan. 26, 2017)." State v. Lott, 148 Ohio St. 3d 1429, 1430 (2017) (concurring in denial of motion).

Whether execution is imposed in Ohio by lethal injection, or by "any different manner of execution prescribed by law," R.C. § 2949.22, it is unconstitutionally cruel and barbaric in violation of the Ohio and U.S. Constitutions.

B. Defendant's right to a jury trial is denied and/or burdened.

Ohio's death penalty statute violates Madison's right to a trial by jury, as those rights were articulated and applied by the U.S. Supreme Court in Hurst v. Florida, 136 S. Ct. 616 (2016). Hurst held that Florida's capital-sentencing scheme violates the Sixth Amendment right to a jury trial because it "[did] not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts." Id. at 622. See also Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002).

Hurst forbids a state from imposing the death penalty when a judge herself, rather than the jury, makes the factual determinations necessary to impose the death sentence, after receiving merely a "recommendation" from the jury. "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." Hurst, 136 S. Ct. at 619.

The decision in Hurst applies equally to the Ohio capital sentencing scheme because the trial judge in Ohio is required to make and articulate additional "specific findings" in order to impose a sentence of death after receiving the jury's recommendation that death be imposed. Therefore, Ohio's capital sentencing scheme, as set out in R.C. § 2929.03, violates the Sixth, Eighth, and Fourteenth Amendments, and Ohio's analogous constitutional provisions.

At least one Ohio state trial judge, in the case of State v. Maurice Mason, has concluded that the same constitutional defects, identified in Hurst as to Florida's scheme, also exist in Ohio:

> The Ohio death penalty statutes in effect at the time of the murder in this case had no provision for the jury making specific findings which would authorize the imposition of the death penalty. Rather, the trial court, and not the jury, is required to make the specific findings, under former Ohio R.C. 2929.03 (F). Also, the jury's recommendation for a death penalty does not authorize the death penalty; only the trial judge's weighing of the mitigating and aggravating factors, and the trial judge's specific findings, authorize the imposition of the death penalty. For this reason also, the Ohio death penalty statute in effect in February, 1993 is unconstitutional.

State v. Mason, 2016-Ohio-8400, ¶ 18 (Ohio App. 2016) (quoting trial court's decision in State v. Mason). Although the trial court's decision in Mason was concerned with the *1993* version of Ohio's death penalty statue, that court's reasoning applies with equal force to the version of the statute in effect for Madison's capital trial.

Moreover, there is no material distinction between the Florida scheme at issue in Hurst and Ohio's scheme, for any purpose relevant to the constitutional analysis under the Sixth Amendment. Indeed, this Court has long recognized that Ohio's scheme is "remarkably similar" to Florida's. See State v. Rogers, 28 Ohio St. 3d 427, 430 (1986), rev'd on other grounds, 32 Ohio St. 3d 70 (1987). In Ohio, as in Florida, the jury's verdict is a recommendation and it is advisory only. The verdict does not require the jury to enumerate its factual findings as to the existence of statutory aggravating circumstances or mitigating factors, or to explain why the aggravating circumstances outweigh the mitigating factors. There is no distinction between a capital sentencing scheme that classifies a jury's decision as "advisory" (Florida) or "a recommendation" (Ohio). Neither affords the capital defendant his Sixth Amendment right to trial by jury because the trial court then has to make and articulate independent "specific findings" before it can impose a sentence of death. Because no death sentence can be imposed in Ohio without a trial judge making independent factual determinations, Ohio's death penalty violates the Sixth Amendment right to trial by jury.

The trial court's decision in Mason was reversed by a panel of the Third Appellate District in an opinion issued on December 27, 2016. State v. Mason, 2016-Ohio-8400 (Ohio App. 2016). However, on July 5, 2017, this Court allowed Mason's discretionary appeal. State v. Mason, 149 Ohio St. 3d 1462 (2017). The constitutional issues as relevant to Ohio's death penalty statute—as presented by Hurst—are thus now pending for resolution in this Court.

For all the reasons articulated above and by the trial court in Mason, and in Mason's merit brief before this Court, Madison is entitled to relief on this constitutional issue. The decision of the appellate panel, reversing the trial court in Mason, did not properly apply the principles arising from Hurst and compelled by the Sixth Amendment, and, therefore, that decision is in error and should not be followed in this Court.

In addition to the Hurst error, the Ohio scheme is also 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 the Supreme Court's decision in Lockett, this infirmity has not been cured and Ohio's statute remains unconstitutional on this basis too.

C. Arbitrary and unequal punishment.

Ohio's system imposes death in a racially discriminatory manner. African-Americans and those who kill white victims are much more likely to get the death penalty. While African-

Americans are approximately 14% of Ohio's population, the percentage of African-Americans on Ohio's death row, as of July 1, 2017, is **55%** (79 of 144). See Death Penalty Information Center, Current Death Row Populations by Race (https://deathpenaltyinfo.org/race-death-row-inmates-executed-1976). While few Caucasians are sentenced to death for killing African-Americans, over thirty African-Americans sit on Ohio's death row for killing a Caucasian.

The Report of this Court's Joint Task Force to Review the Administration of Ohio's Death Penalty, issued in April 2014, included as Recommendation 29, the following:

> RECOMMENDATION 29: Mandate through the Rule 20 Committee that all attorneys who practice capital litigation must take a certain number of CLE hours on the issue of racial bias. Mandate mandatory CLE for prosecutors who prosecute death penalty cases to educate them on how to protect against racial bias in the arrest, charging and prosecution of death penalty cases. Mandate that Judges assigned to death penalty cases must also attend specialized training regarding racial bias in death cases and how to protect against it.

As the basis for Recommendation 29, the Task Force explained:

> In 1999, The Ohio Commission on Racial and Ethnic Fairness recognized that "a perpetrator is geometrically more likely to end up on death row if the homicide victim is white rather than black". Despite these statements, the ABA Ohio Assessment Team found that the State of Ohio has not further studied the issue of racial bias in capital sentencing or implemented reforms designed to help eliminate the impact of race on capital sentencing. **The ABA Ohio Assessment Team conducted a racial and geographic disparity study confirming the existence of racial bias in the State's capital system, finding that those who kill whites are 3.8 times more likely to receive a death sentence than those who kill blacks.**

Task Force Report at pp. 14 (available at:

https://www.supremecourt.ohio.gov/Boards/deathPenalty/resources/finalReport.pdf).

Due process prohibits the taking of life unless the state can show a legitimate and compelling state interest. Commonwealth v. O'Neal II, 339 N.E.2d 676, 678 (Mass. 1975)

(Tauro, C.J., concurring); Utah 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 (1960). The U.S. Supreme Court has recognized that the fundamental right to "life" deserves the highest protection possible under the Fourteenth Amendment's protection of "life, liberty and property." Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998) (five Justices recognized a distinct "life" interest protected by the Due Process Clause in all stages of a capital case, above and beyond protected liberty and property interests). Death is different; for that reason, more process is due, not less. See Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976). To imperil this protected, fundamental life interest, the State must show that it is the "least restrictive means" to a "compelling governmental end." O'Neal, 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.

D. 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).

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

E. Induced ineffective assistance of counsel and denial of an impartial jury.

Ohio's capital statutory scheme provides for a sentencing recommendation by the same jury which determines the facts at trial if the defendant is found guilty. This procedure violates defendant's rights to effective assistance of counsel and to a fair trial before an impartial jury as guaranteed by the state and federal constitutions.

Ohio's bifurcated capital trial process with the same jury violates defendant's right to effective assistance of counsel as guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution. McMann v. Richardson, 397 U.S. 759, 771, n.14 (1970); Powell v. Alabama, 287 U.S. 45, 47 (1932); Ohio Const. art. I §§ 10 & 16; State v. Hester, 45 Ohio St. 2d 71 (1976).

First, under the operation of the current statute, if counsel argues to the jury a defense which loses at the guilt phase of the trial, in effect he is forced to simultaneously destroy defendant's credibility prior to the start of the trial's sentencing phase. By invoking the defendant's right to strenuously argue for his innocence in the first phase, a loss for the defense in the first phase means that counsel will have significantly reduced the credibility desperately needed to successfully argue for a life sentence.

The legislature should have eliminated this constitutional dilemma by providing for two separate juries, the first for determining guilt and the second for determining punishment. It is respectfully suggested that at the second trial the prosecuting attorney would be allowed to reiterate the specific evidence of aggravating circumstances. The State essentially has "prevented (counsel) from assisting the accused during a critical stage of the proceeding." United States v. Cronic, 466 U.S. 648, 659, n.25 (1984). This creates constitutional error without any showing of prejudice necessary. Id.

Under Ohio's death penalty statutory scheme, an intolerable risk exists that a defendant's life may be put in the hands of a hostile venire, which in effect creates uncertainty in the reliability of the determination reached. Such a risk cannot be tolerated in a capital case. Beck v. Alabama, 447 U.S. 625, 638 (1980). Therefore, the statute must be struck down as an unconstitutional violation of defendant's right to an impartial jury under the state and federal constitutions.

F. Lack of individualized sentencing.

The Ohio statutes are unconstitutional because they require proof of aggravating circumstances in the trial phase of the bifurcated proceeding. The Supreme Court of the United States has approved schemes that separate the consideration of aggravating circumstances from the determination of guilt. Those schemes provide an individualized determination and narrow

the category of defendants eligible for the death penalty. See Zant v. Stephens, 462 U.S. 862 (1983); Barclay v. Florida, 463 U.S. 939 (1983). Ohio's statutory scheme cannot provide for those constitutional safeguards.

The jury must be free to determine whether death is the appropriate punishment for a defendant. Requiring proof of the aggravating circumstances simultaneously with proof of guilt effectively prohibits a sufficiently individualized determination in sentencing as required by post-Furman cases. See Woodson, 428 U.S. at 961. This is especially prejudicial because this is accomplished without consideration of any mitigating factors.

G. Mandatory submission of reports and evaluations.

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

H. Mandatory death penalty and failure to require appropriateness analysis.

The Ohio death penalty statutory scheme purports to preclude a mercy option, either in the absence of mitigation or when the aggravating circumstances "outweigh" the mitigating factors. The statutes in those situations mandate that death shall be imposed. R.C. §§ 2929.03, 2929.04. The sentencing authority is impermissibly limited in its ability to return a life verdict by this provision.

In Gregg, the United States Supreme Court stated, "nothing" in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. 428 U.S. at 199. Gregg held only that, "in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided

by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant." Id. Gregg requires the State to establish, according to constitutionally sufficient criteria of aggravation and constitutionally mandated procedures, that capital punishment is appropriate for the defendant. Nothing requires the State to execute defendants for whom such a finding is made.

Indeed, the Georgia statute, approved in Gregg as being consistent with Furman, permits the jury to make a binding recommendation of mercy even though the jury did not find any mitigating circumstances in the case. Fleming v. Georgia, 240 S.E.2d 37 (Ga. 1977); Hayes v. Georgia, 282 S.E.2d 208 (Ga. 1981). Subsequent to Lockett, the Fifth and Eleventh Circuits repeatedly reviewed and remanded cases for error in the jury instructions when the trial court failed to clearly instruct the jury that they had the option to return a life sentence even if the aggravating circumstances outweighed mitigation. Chenault v. Stynchcombe, 581 F.2d 444 (5th Cir. 1978); Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1981); Westbrooke v. Zant, 704 F.2d 1487 (11th Cir. 1983); Tucker v. Zant, 724 F.2d 882 (11th Cir. 1984); Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982); Prejean v. Blackburn, 570 F. Supp. 985 (D. La. 1983).

Capital sentencing that is constitutionally individualized requires a mercy option. See also Proposition of Law No. 9. An individualized sentencing decision requires that the sentencer possess the power to choose mercy and to determine that death is not the appropriate penalty for this defendant for this crime. In Barclay v. Florida, 463 U.S. at 950, the Court stated that the jury is free to "determine whether death is the appropriate punishment." See also Kansas v. Carr, 136 S. Ct. 633, 642 (2016); Kansas v. Marsh, 548 U.S. 163 (2006).

Absent the mercy option, the defendant faces a death verdict resulting from a Lockett-type statute, i.e., a statute that mandated a death verdict in the absence of one of three specific

mitigating factors. Under current Ohio law, the sentencer lacks the option of finding a life sentence appropriate in the face of a statute which requires that when aggravating circumstances outweigh mitigating factors “it shall impose a sentence of death on the offender.” R.C. § 2929.03(D)(3).

A non-mandatory statutory scheme that affords the jury the discretion to recommend mercy in any case “avoids the risk that the death penalty will be imposed in spite of factors ‘too intangible to write into a statute’ which may call for a less severe penalty, and avoidance of this risk is constitutionally necessary.” Conner v. Georgia, 303 S.E.2d 266, 274 (Ga. 1983). Other state courts have also required a determination of “appropriateness” beyond mere weighing of aggravating circumstances and mitigating factors. California v. Brown, 726 P.2d 516 (Cal. 1985), rev’d on other grounds, 479 U.S. 538 (1987).

In California v. Brown, 479 U.S. 538, 543 (1987), the Supreme Court repeated “the Eighth Amendment’s need for reliability in the determination that death is the appropriate punishment in a specific case.” In Brown, the Court agreed that jurors may be cautioned against reliance on “extraneous emotional factors,” and that it was proper to instruct the jurors to disregard “mere sympathy.” Id. This instruction referred to the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase. The Court’s analysis clearly approved and mandated that jurors be permitted to consider mercy, i.e., mercy tethered or engendered by the penalty phase evidence. Marsh; Carr.

The Ohio statute does not permit an appropriateness determination; a death sentence is mandated after a mere weighing. Finally, while the Court has said that a “jury is not precluded from extending mercy to a defendant,” State v. Zuern, 32 Ohio St. 3d 56, 64 (1987), Ohio jurors are not in fact informed of this capability. In fact, the Court has permitted penalty phase jury instructions in direct contradiction to this extension of mercy capability. The Ohio “no-

sympathy" instructions to juries do not in any way distinguish between "mere" sympathy (untethered), and that sympathy tied to the evidence presented in the penalty phase, and therefore commit the very violation of the Eighth Amendment which the California instruction had narrowly avoided.

While this Court has said extending mercy is permissible in Ohio, and acknowledges that "[s]entencing discretion is an absolute requirement of any constitutionally acceptable capital punishment statute," id. at 65, there is in fact no such indication on the statute's face, and no state court assurance that jurors are so informed. Bald, unsupported assertions of compliance with the constitution are inadequate.

I. Ohio's "beyond a reasonable doubt" standard.

1. The statutes fail to require proof beyond all doubt as to guilt that aggravating circumstances outweigh mitigating factors, and the appropriateness of death as a punishment before the death sentence may be imposed.

The burden of proof required for capital cases should be proof beyond all doubt. The jury should be instructed during both phases that the law requires proof beyond all doubt of all the required elements. Most importantly, death cannot be imposed as a penalty except upon proof beyond all doubt of both the crime itself and the fact that the aggravating circumstances outweigh the mitigating factors.

Insistence on reliability in guilt and sentencing determination is a vital issue in the United States Supreme Court's capital decisions. This emphasis on the need for reliability and certainty is a product of the unique decision that must be made in every capital case – the choice of life or death. The Supreme Court has consistently emphasized the "qualitative difference" of death as a punishment, stating that "death profoundly differs from all other penalties" and is "unique in its

severity and irrevocability." Woodson, 428 U.S. at 305; Lockett, 438 U.S. at 605; Gardner v. Florida, 430 U.S. 349 (1977); Gregg, 428 U.S. at 187.

Proof beyond all doubt, a higher standard than the statutory proof beyond a reasonable doubt, should be required in a capital case because of the absolute need for reliability in both the guilt and penalty phases. The irrevocability of the death penalty demands absolute reliability. Absent such a safeguard, a defendant may be subject to a sentence of death in violation of his Eighth and Fourteenth Amendment rights.

The proof beyond a reasonable doubt standard is required in criminal cases "to safeguard men from dubious and unjust convictions." In re Winship, 397 U.S. 358, 363 (1970). The petitioner in Winship was a juvenile facing a possible six years imprisonment. Crucial to the Court's decision was its assessment of the importance of the defendant's right not to be deprived of his liberty. Proof beyond a reasonable doubt was demanded in recognition that "the accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the convictions." Id. Only this standard of proof adequately commanded "the respect and confidence of the community in applications of the criminal law." Id. at 364.

In a capital case, far more than liberty and stigmatization are at issue. The defendant's interest in his life must be placed on the scales. Only then can an appropriate balancing of the interests be performed; only then can one know whether the "situation demands" a particular procedural safeguard. Given the magnitude of the interests at stake in a capital case and the necessity that the community "not be left in doubt whether innocent men are being condemned" a high standard is required which reduces the margin of error "as much as humanly possible," id.; Eddings, 455 U.S. at 878. This is all the more so when a petitioner's "life" interest (protected

by the "life, liberty and property" language in the Due Process Clause) is at stake in the proceeding. Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998) (five Justices recognized a distinct "life" interest protected by the Due Process Clause in capital cases, above and beyond liberty and property interests). The most stringent standard of proof that is "humanly possible" is proof beyond all doubt.

The American Law Institute's Model Penal Code, cited by the United States Supreme Court as a statute "capable of meeting constitutional concerns," adopts the beyond-all-doubt standard at the sentencing phase. See Gregg v. Georgia, 428 U.S. 153, 191-195 (1976). The Model Penal Code mandates a life sentence if the trial judge believes that "although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt." Model Penal Code §210.6(1)(f). If the trial judge has any doubt of the defendant's guilt, life imprisonment is automatically imposed without a sentencing hearing. The words used are "all doubt," not merely "doubt" or "reasonable doubt."

2. Ohio's definition of proof "beyond a reasonable doubt" results in a burden of proof insufficiently stringent to meet the higher reliability requirement in capital cases at the guilt phase, and this has not been cured by appellate courts in their review of convictions or death sentences.

Ohio law provides standard jury instructions of "reasonable doubt" and "proof beyond a reasonable doubt" as the applicable burden of proof in capital cases. R.C. § 2901.05(D). However, Ohio's definition actually articulates the standard for the lower burden of proof by a preponderance of the evidence; thus unconstitutionally diluting defendant's rights to a fair trial. See Cross v. Ledford, 161 Ohio St. 469 (1954); Holland v. United States, 348 U.S. 121 (1954); Scurry v. United States, 347 F.2d 468, 470 (D.C. Cir. 1965) ("[I]mportant affairs is the traditional test for clear and convincing evidence ... The jury ... is prohibited from convicting

unless it can say beyond a reasonable doubt that defendant is guilty as charged. ... To equate the two in the juror's mind is to deny the defendant the benefit of a reasonable doubt."). State v. Crenshaw, 51 Ohio App. 2d 63, 65 (1977); cf. State v. Nabozny, 54 Ohio St. 2d 195 (1978), vacated on other grounds, Nabozny v. Ohio, 439 U.S. 811 (1978); State v. Seneff, 70 Ohio App. 2d 171 (1980).

The Ohio reasonable doubt instructions fail to satisfy the requirement of reliability in a capital case. Even in Winship, when considering the reasonable doubt standard, the Court stated that the fact finder must be convinced of guilt "with utmost certainty," and that the court must impress on the trier of fact the necessity of reaching a subjective state of certitude. Winship, 397 U.S. at 363, 364. Ohio's definition of a reasonable doubt is inadequate to meet even these standards.

3. The Ohio death penalty statutes fail to require that the jury consider as a mitigating factor pursuant to Ohio Rev. Code §2929.04(B) that the evidence fails to preclude all doubt as to the defendant's guilt.

The language of Ohio Rev. Code §§ 2929.04(D)(2) contemplates a balancing process focusing upon the mitigating factors present in the case as compared to the offender's "guilt" with respect to the aggravating circumstances. In determining the appropriateness of the death penalty, the fact that the evidence presented failed to foreclose all doubt as to guilt must be considered as a relevant mitigating factor. "The jury should have before it not only the prosecution's unilateral account of the offense but the defense version as well. The jury should be afforded the opportunity to see the whole picture ... ." California v. Terry, 390 P.2d 381 (Cal. 1964). The failure to require jury consideration of the fact that the evidence does not foreclose all doubt as to guilt violates the constitutional standards established for the imposition of the death penalty.

J. Sentencing an individual to death in violation of treaties to which the United States of America is a signatory violates the Supremacy Clause of the United States Constitution.

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, a defendant cannot be subjected to the possibility of the death penalty.

1. International law binds the State of Ohio.

"International law is a part of our law[.]" The Paquete Habana, 75 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); Clark v. Allen, 331 U.S. 503, 508 (1947); United States v. Pink, 315 U.S. 203, 230 (1942); Kansas v. Colorado, 206 U.S. 46, 48 (1907). The Paquete Habana, 175 U.S. at 700; The Nereide, 13 U.S. (9 Cranch) 388, 422 (1815); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924). 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).

2. Ohio's obligations under charters, treaties, and conventions.

The United States' membership and participation in the United Nations and the Organization of American States 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 United Nations. Art. 55-56. The United States again proclaimed the

fundamental rights of the individual when it became a member of the Organization of American States. OAS Charter, Art. 3.

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.

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

The United Nations has adopted, and the U.S. has ratified, both the International Covenant on Civil and Political Rights (adopted by the General Assembly on December 19, 1966, and hereinafter "ICCPR") and the International Convention on the Elimination of All Forms of Racial Discrimination (adopted on December 21, 1965, and hereinafter "ICERD"). Both 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 including: 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. Ohio's statutory scheme denies equal protection and due process in several ways. It allows for arbitrary and unequal treatment in punishment. See discussion supra Section C. Ohio's sentencing procedures are unreliable. See discussion supra Section D. Ohio's statutory scheme fails to provide individualized sentencing. See discussion supra Section F. Ohio's statutory scheme burdens a

defendant's right to a jury. See discussion supra Section B. Ohio's requirement of mandatory submission of reports and evaluations precludes effective assistance of counsel. See discussion supra Section G. Ohio's proportionality and appropriateness review is wholly inadequate. See discussion supra Section H. As a result, Ohio's statutory scheme violates the ICCPR's and the ICERD's guarantees of equal protection and due process.

This is a direct violation of international law and of the Supremacy Clause of the United States Constitution.

b. Ohio's statutory scheme violates the ICCPR's protection against arbitrary execution.

The ICCPR speaks explicitly to the use of the death penalty. The ICCPR guarantees the right to life and provides that there shall be no arbitrary deprivation of life. Art. 6(1). It allows the imposition of the death penalty only for the most serious offenses. Art. 6(2). Juveniles and pregnant women are protected from the death penalty. Art. 6(5). Moreover, the ICCPR contemplates the abolition of the death penalty. Art. 6(6).

However, several aspects of Ohio's statutory scheme allow for the arbitrary deprivation of life. Punishment is arbitrary and unequal. See discussion supra Section A. Ohio's sentencing procedures are unreliable. See discussion supra Sections B and C. Ohio's statutory scheme lacks individualized sentencing. See discussion supra Section F. Ohio's proportionality and appropriateness review fails to distinguish those who deserve death from those who do not. See discussion supra Section H. As a result, executions in Ohio result in the arbitrary deprivation of life and thus violate the ICCPR's death penalty protections.

This is a direct violation of international law and a violation of the Supremacy Clause of the United States Constitution.

c. Ohio's statutory scheme violates the ICERD's protections against race discrimination.

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

d. Ohio's statutory scheme violates the ICCPR's and the CAT's prohibitions against cruel, inhuman or degrading punishment.

The ICCPR prohibits subjecting any person to torture or to cruel, inhuman or degrading treatment or punishment. Art. 7. Similarly, the CAT requires that states take action to prevent torture, which includes any act by which severe mental or physical main 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, in violation of both the ICCPR and the CAT. Thus, there is a violation of international law and the Supremacy Clause of the United States Constitution.

e. Ohio's obligations under the ICCPR, the ICERD, and the CAT are not limited by the reservations and conditions placed on these conventions by the Senate.

While conditions, reservations, and understandings accompanied the United States' ratifications of the ICCPR, the ICERD, and the CAT, those conditions, reservations, and understandings cannot stand for two reasons. Article 2, Section 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 United States Constitution makes no provision for the Senate to modify, condition, or make reservations. The Senate is not given the power to determine what aspects of the treaty the United States will and will not follow. Their role is to simply advise and consent.

However, 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 United States 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 treat. Art. 19(a)-(c). The ICCPR specifically precludes derogation of Articles 6-8, 11, 15-16, and 18. Pursuant to the Vienna Convention, the United States' reservations to these articles are invalid under the language of the treaty. See id. Further, it is the purpose of the ICCPR to protect the right to life and any reservation inconsistent with that purpose violates the Vienna Convention. Thus, United States reservations cannot stand under the Vienna Convention as well.

f. Ohio's obligations under the ICCPR are not limited by the Senate's declaration that it is not self-executing.

The Senate indicated that the ICCPR is not self-executing. However, the question of whether a treaty is self-executing is left to the judiciary. Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370 (7th Cir. 1985) (citing 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 the treaty by refusing to pass the necessary legislation. However, Article 2, Section 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, 417 U.S. at 438.

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. 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 Organization of American States, which may because of the sheer number of countries that subscribe to them, codify customary international law. See id. Included among these are:

1. The American Convention on Human Rights, drafted by the Organization of American States and entered into force in 1978. It provides numerous human rights guarantees, including: equal protection (Art. 1, 24), the right to life and precludes the arbitrary deprivation of life (Art. 4(1)), allows for the imposition of the death penalty only for the most serious crimes (Art. 4(2)), prohibits re-establishing the death penalty once abolished (Art. 4(3)), prohibits torture, cruel, inhuman or degrading punishment (Art. 5(2)), and guarantees the right to a fair trial (Art. 8).

2. The United Nations Declaration on the Elimination of All Forms of Racial Discrimination proclaimed by U.N. General Assembly resolution 1904 (XVIII) in 1963. It prohibits racial discrimination and requires that states take affirmative action in ending racial discrimination.

3. The American Declaration of the Rights and Duties of Man adopted by the Ninth International Conference of American States in 1948. It includes numerous human rights guarantees, including: the right to life (Art. 1), equality before the law (Art. 2), the right to a fair trial (Art. 16), and due process (Art. 26).

4. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the U.N. General Assembly in Resolution 3452 (XXX) in 1975. It prohibits torture, defined to include severe mental or physical pain intentionally inflicted by or at the instigation of a public official for a purpose included punishing him for an act he has committed, and requires that the states take action to prevent such actions. Art. 1, 4.

5. Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty adopted by the U.N. Economic and Social Council in Resolution 1984/50 in 1984. it provides numerous protections to those facing the death penalty, including: permitting capital punishment for only the most serious crimes, with the scope not going beyond intentional crimes with lethal or other extremely grave consequences (1), requiring that guilt be proved so as to leave no room for an alternative explanation of the facts (4), due process, and the carrying out of the death penalty so as to inflict the minimum possible suffering (9).

6. The Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, adopted and proclaimed by the U.N. General Assembly in Resolution 44/128 in 1989. This prohibits execution (Art. 1(1)) and requires that states abolish the death penalty (Art. 1(2)). These documents are drafted by the people Smith contemplates and are subscribed to by a substantial segment of the world. As such they are binding on the United States as customary international law. A comparison of the Sections A - J clearly demonstrates that Ohio's statutory scheme is in violation of customary international law.

K. 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 United States Constitution and Article I, §§ 2, 5, 9, 10, and 16 of the Ohio Constitution. Furthermore, subjecting Madison to the prospect of capital punishment violates international law and the Supremacy Clause of the United States Constitution.

Proposition of Law No. 20. The trial court commits prejudicial error, and denies a capital defendant's right to due process, when it imposes judgment against him, in the sentencing journal entry, for the cost of prosecution, but fails to address the issue of costs at sentencing and thus does not allow him to seek a waiver of costs based on his indigent status.

Madison is indigent and has been at all relevant times. The trial court's sentencing journal entries impose judgment against Madison "in an amount equal to the costs of this prosecution." (Journal Entry of June 8, 2016; Journal Entry of October 19, 2016.) Yet, at the sentencing proceeding, the court never addressed the issue of costs at all, and never gave Madison any opportunity to seek a waiver of costs due to his indigent status. (T. 7754-95.)

The relevant statute requires trial courts to enter judgment for court costs against all criminal defendants. See R.C. § 2947.23(A); State v. White, 103 Ohio St. 3d 580 (2004). However, that requirement does not obviate the need for the trial court to address the issue of court costs with the defendant on the record at sentencing so that, for example, an indigent defendant can seek a waiver of costs as permitted by R.C. §§ 2947.23(C) and/or 2949.092. State

v. Joseph, 125 Ohio St. 3d 76 (2010); State v. Luna, 126 Ohio St. 3d 53 (2010); White, 103 Ohio St. 3d at 583.

Madison is indigent, and, accordingly, he was required to be given the opportunity to seek a waiver of costs. The trial court denied him that opportunity, in violation of due process, by failing to address the issue of costs, in any way, during the sentencing hearing. It is reasonably likely, given Madison's indigent status, that the court would have permitted the waiver of costs.

The court's failure in this respect is clear error. "[A] court errs in imposing court costs without so informing a defendant in court but that . . . error does not void the defendant's entire sentence. Instead, upon remand, the trial court must address the defendant's motion for waiver of payment of court costs." State v. Joseph, 125 Ohio St. 3d at 76. See also Luna, 126 Ohio St. 3d at 53 (reversing judgment of the court of appeals "to the extent [the court] held that the trial court could impose court costs in the sentencing entry when the defendant had not been informed at the sentencing hearing that those costs would be imposed as part of his sentence.").

Under the authority of Joseph and Luna, and in addition to any other relief the Court may order in Madison's favor in this appeal, the Court should vacate the entry for costs of prosecution in the sentencing journal entry and remand to the trial court, with proper notification to Madison, so that he may seek waiver of the costs of prosecution. See also State v. Jones, 2011-Ohio-453, ¶¶ 18-22 (Ohio App. Cuyahoga County 2011). Alternatively, the Court should order that all such costs are waived.

CONCLUSION

Pursuant to the preceding Propositions of Law, Michael Madison respectfully requests that this Honorable Court reverse the convictions and remand for a new trial and/or reverse Madison's death sentence and remand with an order for a new sentencing hearing.

Respectfully submitted,

/s/ Timothy F. Sweeney

Timothy F. Sweeney (0040027)
COUNSEL OF RECORD
LAW OFFICE OF TIMOTHY FARRELL SWEENEY
The 820 Building, Suite 430
820 West Superior Avenue
Cleveland, Ohio 44113
216-241-5003
216-241-3138 (fax)
Email: tim@timsweeneylaw.com

John B. Gibbons (0027294)
Attorney at Law
55 Public Square
Suite 2100
Cleveland, Ohio
216-363-6086
Email: jgibbons4@sbcglobal.net

Counsel for Appellant Michael Madison

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MERIT BRIEF OF APPELLANT MICHAEL MADISON (Volume I: Brief Only, Without Appendix) was served by regular U.S. Mail, first-class postage pre-paid on Michael O'Malley, Cuyahoga County Prosecutor, and Christopher Schroeder, Assistant Prosecuting Attorney, Cuyahoga County Prosecutor's Office, 1200 Ontario Street, 8th Floor, Cleveland, Ohio 44113, this 9th day of January 2018, and also by email to cschroeder@prosecutor.cuyahogacounty.us this same date.

/s/ Timothy F. Sweeney

Timothy F. Sweeney
One of the Attorneys for Appellant Madison