IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	**CASE NO. 2016-1006**
Plaintiff-Appellee,	)	
vs.	)	On Appeal from the Cuyahoga County Court of Common Pleas, Cleveland, Ohio
MICHAEL MADISON,	)	Court of Common Pleas Case No. CR-13-579539-A
Defendant-Appellant,	)	

REPLY BRIEF OF APPELLANT MICHAEL MADISON

(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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTORY STATEMENT

Defendant Michael Madison maintains the facts and legal arguments as presented in his main brief. However, he takes the opportunity in this Reply Brief to point out specific arguments in response to the State's brief while maintaining he has not waived any arguments not specifically presented herein and reserves the right to respond to all the facts and arguments presented by the State at oral argument.

LEGAL ARGUMENT IN REPLY

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.**

The legality of any capital conviction and resulting death sentence is dependent upon compliance with basic principle of due process and fundamental fairness. The many constitutional and other doctrines that have developed in capital cases all demand this, and they must be scrupulously applied at every stage of the process, from beginning to end. They exist to guide the discretion of imperfect human beings—judges, prosecutors, jurors, counsel—to ensure, as best as the law will permit, that fairness prevails in a process convened to determine whether a fellow human being will live or die for his crime.

There are many legal deficiencies in the death-sentence-securing capital prosecution of Michael Madison, detailed at length in Madison's principal brief, but the most pervasive is this: The prosecution's overzealous and headstrong pursuit of a death sentence resulted in repeated and persistent disregard of basic rules of fairness, due process, and even-handed justice. The

disregard for Madison's constitutional rights was manifested most significantly in four interrelated ways:

(1) The prosecutor's court-tolerated obstruction and impairment of a searching voir dire, thereby enabling the seating of biased pro-death jurors and the exclusion of those willing to fairly consider life;

(2) The prosecutor's court-tolerated disregard of settled Ohio law on the scope of mitigation evidence, thereby enabling the State's introduction of a substantial quantity of irrelevant, inadmissible, and unduly prejudicial evidence of Madison's alleged "bad" character, lack of "remorse," absence of "brain damage," and other matters not relevant to Madison's mitigation presentation of a disadvantaged background and troubling family history;

(3) The prosecutor's court-tolerated obstruction and interference with Madison's presentation of mitigation evidence through his expert Dr. Mark Cunningham, thereby denying Madison's right to present relevant evidence that calls for a sentence less than death and denying his right to individualized sentencing; and

(4) The prosecutor's court-tolerated insistence upon its own Trojan-horse psychiatric exam even though Madison's mental status was *not* in issue during either phase of the trial, and thereby enabling the State, through Dr. Steven Pitt and his seven video clips, to present still more irrelevant, unduly prejudicial, and inadmissible evidence that placed the thumb more firmly on the side of death.

A death sentence that was obtained as a result of such a persistently unfair trial, characterized by these and other errors, cannot withstand proper scrutiny.

And it began with, and is typified by, the way in which jury selection was conducted. The Sixth Amendment and Ohio's counterpart guarantee Madison a trial before jurors who are impartial, which, in the death-penalty context, means jurors whom are not biased in favor of death and whom are able to fairly consider sentences other than death. The only way to know whether jurors can be impartial about the death penalty, and capable of fairly considering all sentencing options including life, is to engage them in searching, meaningful, and probing questioning. The Supreme Court's decision in Morgan v. Illinois, 504 U.S. 719 (1992), among other cases cited in Madison's principal brief, establishes a framework to facilitate the selection of impartial jurors. "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).

A sufficiently searching inquiry in a capital case demands that jurors be informed about *at least* those case-specific facts and circumstances which are likely to be so influential—based upon experience, reason, and common sense—as to impair if not disable at least some prospective jurors from being impartial in their determination of whether, upon conviction, the sentence should be life or death. And not just *informed* about those critical facts, but then subjected to *meaningful questioning* that probes the juror's biases and prejudices in a case where such facts are unquestionably at issue.

That is precisely what this Court recognized in Jackson in the context of a case where the murder victim is a child. 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."). The exact same principles apply, with equal if not greater force, in a case like Madison's

where the charges are of multiple serial killings of young women, with each murder accompanied by kidnapping and sexual assault or sexual motivation, committed by a convicted sex offender, and where the three victims' bodies were each disposed of in garbage bags.

It is not sufficient that the prospective jurors be informed only of some of those facts. The defense must be allowed to inform the prospects about *all* of them, via sufficiently broad Morgan questions, and then must be allowed to probe each juror's biases and prejudices, insofar as the death penalty is concerned, for a case that includes such facts. That is the *minimum* the Sixth Amendment and Ohio's counterpart require in order to ensure a sufficiently searching voir dire in a capital case. It will take a lot of time to conduct the jury selection correctly and ensure the accused's constitutional rights are protected. But that is what is required in capital cases. If the prosecutor and/or trial judge do not want to invest the necessary time, then the State should not be seeking death sentences and, if it still insists upon doing so, then any death sentence obtained in such a deficient process should be reversed and the State can start over and do it correctly the second time.

No matter how hard the State tries to spin a contrary narrative, any fair reading of the transcript of the jury selection proves that Madison was denied the minimally required meaningful and searching voir dire. The jury section was dominated by the prosecutor's repeated and stubborn objections to Madison's efforts to conduct the type of probing questioning that is essential in order for him to receive the constitutionally guaranteed impartial jury. Many of those objections were sustained, and, along with other rulings by the trial court, the result was an overt hostility to probing and meaningful questioning, and, in its place, an overreliance on vacuous inquiries and follow-the-law platitudes. Proper areas of inquiry were repeatedly disrupted and/or disallowed entirely, all as detailed in Madison's main brief.

The trial court's errors in allowing such a constitutionally inadequate voir dire in a capital case are not reviewed for "abuse of discretion," as the State claims. The trial court does not have the "discretion" to disregard Madison's constitutional rights as it did. Those rights are paramount, and the trial court had a duty to protect them. It failed in that duty at the overzealous urging of the prosecutor. The trial court's errors, as detailed in Madison's first proposition of law, are errors of law which infected the entire voir dire and denied Madison an impartial jury. "When a court's judgment is based on an erroneous interpretation of the law, an abuse-of-discretion standard is not appropriate." Med. Mut. of Ohio v. Schlotterer, 122 Ohio St. 3d 181, 183 (2009). However, even if an abuse of discretion standard applied, the trial court abused its discretion because it acted arbitrarily, unreasonably, and unconscionably insofar as denying Madison the searching voir dire to which he is entitled in a capital case.

The State is mistaken in contending that the Morgan questioning that Madison's counsel sought to conduct was "confusing," "emotionally-laden," or "legally inaccurate." The questions were, instead, exactly of the type Morgan permits and requires, as does this Court's decision in Jackson. If they were "confusing" or "inaccurate," it was because of all the objections and interruptions, and/or because the trial court kept changing the ground rules to accommodate the prosecutor's obstructive tactics and unseemly zeal for death.

Nor were the questions designed to "indoctrinate" jurors or "extract commitments" to vote a certain way. That is all hyperbole. The purpose and intent of Madison's attempted questioning was to *meaningfully* explore with the prospective jurors their biases and attitudes about the death penalty, as those biases and attitudes may be impacted by the case-specific facts and circumstances most likely to impair that impartiality. Just as such an inquiry was, for example, compelled in Timothy McVeigh's trial to explore whether sentences other than death could be meaningfully considered if the defendant was found to have murdered some 168

people, so too was Madison permitted to inquire whether sentences other than death could be meaningfully considered if the defendant was found to have murdered three women in serial fashion, accompanied by kidnapping, sexual assault, and/or sexual motivation, and with the bodies disposed of in garbage bags.

The State was *afraid* to let the prospective jurors know of these essential case-specific facts, and was even more adamant to ensure the prospects were not subjected to meaningful questioning that would probe their biases about the death penalty in a case with such facts. At the urging of the prosecutor, Madison was thus repeatedly blocked by the trial court from making inquiries that revealed the salient facts likely to reveal bias, and to then ask the probing questions that might actually confirm that such biases do indeed exist. The result was a formulaic and wooden voir dire, overwhelmed by objections and arguments, and with insufficient opportunity to meaningful explore the jurors' views.

This Court should ask itself: What were the State and trial court afraid of in placing so many unreasonable and arbitrary restrictions on the voir dire that Madison sought to conduct? In a *fair trial*, the court and parties should *want* to know the answers to the questions Madison's counsel so doggedly tried to ask but was denied more times than not. The State's theory was that Madison is a "serial killer" for whom the aggravating circumstances had the weight of a locomotive as compared to the feathers that would be presented in mitigation. (T. 970-71, 1214, 1246, 2921, 3043, 3891, 6555.) That overconfidence and unseemly zeal in the pursuit of death is all the more reason to ensure that Madison was given the chance to seat a jury that could provide the fair consideration the prosecutor had abandoned. The fact that the State was so insistent on obstructing the process, and interrupting meaningful dialogue with incessant objections, reveals a troubling hostility to Madison's right to a fair trial.

The State's unsustainable view, adopted by the trial court in practice and perpetuated by the State in its Brief on appeal, is that questions by defense counsel which are most effective at revealing bias are, by definition, always seeking to "predispose" the jury or to seek its commitment to vote a certain way. Relying upon such semantic gamesmanship, the State contends such questions cannot be asked. Which means the defense is virtually powerless to see behind the jurors' masks which hide their biases, which means too many useless "follow the law" questions are ultimately used, which means many biased jurors are able to hide behind their biases, just as happened here. Indeed, the trial court used or allowed "follow the law" questions with some 33 jurors, 11 of whom sat on the jury or were alternates. (Madison's Main Brief at 74-75). This included using such questions to permit the retention of 13 prospective 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. Three of those jurors sat on Madison's jury (Juror Nos. 5, 40, and 43). (Madison's Main Brief at 75).

Madison is not claiming that follow-the-law questions are always improper. But what is improper, and which denied Madison an impartial jury, is a voir dire so restrictive that "follow the law" questions predominated and were relied upon to insulate from deserved removal jurors whose biases had been revealed despite the State's incessant obstruction. 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.").

This Court should take the opportunity this case presents, with a defendant accused of the most horrific crimes, to reaffirm that the trial court is duty-bound—by the Sixth and Fourteenth Amendments and Ohio's counterparts, by Morgan and its progeny, and, in Ohio, also by Jackson—to permit the meaningful inquiry of prospective jurors that Madison's counsel sought to conduct. This includes allowing proper and complete "Morgan" questions which reveal those case-specific critical facts most likely—based on reason, experience and common sense—to impair a reasonable person's ability to meaningfully consider sentences other than death. And it also includes, once the "Morgan" question has been asked and answered, allowing counsel to engage in a dialogue with the prospective juror about his/her answers to determine whether such juror can keep an open mind about the death penalty and can fairly consider sentences other than death.

These are minimum constitutional requirements in a capital case. They were not met in Madison's case due to the trial court's erroneous rulings as urged on by the overzealous prosecution.

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.**

The pervasive disregard for a capital defendant's rights as urged on by the overzealous prosecution was further manifested in the trial court's rulings on Madison's challenges for cause. The trial court's errors, as detailed in Madison's main brief, unquestionably resulted in the seating of a biased jurors. That result is, of course, to be expected—and, indeed, was the prosecutor's intent—when the basic constitutional protections which have developed to facilitate

the selection of impartial jurors are so thoroughly undermined as they were here by the prosecutor's incessant objections and its court-tolerated disruptions of Madison's efforts to expose biased jurors.

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 to serve (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). 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).

None of the State's efforts to justify or excuse the trial court's denial of Madison's for-cause challenges has merit. The purported expression by any of the challenged jurors of a willingness to put aside their personal beliefs, or to consider sentences other than death, generally occurred, if it occurred all, only after their biases had been exposed, after further inquiry by Madison about such biases had been shut down or interrupted by incessant objections, and the biased juror had proceeded to give a "correct" answer to the prosecutor or court's formulaic catechism of follow-the-law platitudes. But the bell of disabling bias in a death-penalty

case cannot be un-rung by such superficial inquiry. The constitutional and statutory provisions that exist to ensure an impartial jury in a death penalty case compelled the exclusion of these challenged jurors. What Madison's counsel urged at trial also applies here too: "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." (T. 2074-75.)

Juror No. 5 sat in judgment of Madison and voted for death. In any fair trial she would have been consensually excluded for cause. A fair review of the transcript leaves no doubt that she is and was completely unable to impose any sentence other than death in this case. She was totally dismissive of a sentence of life with parole eligibility after 25 years, T. 978-81, 993-94, and agreed death would be the only appropriate sentence for a murderer who committed murder with no provocation, not in self-defense, and in the course of a kidnapping, rape or multiple homicide. T. 978-81. And, with three victims who were kidnapped, mutilated and/or raped, and then murdered, Juror No. 5 made it clear it would be the death penalty for that offender. T. 985-86. The trial court erred in not excusing her for cause.

Juror No. 12, the police officer with a son who is also a police officer, did not ultimately sit on Madison's jury, but Madison was forced to expend one of his rare six peremptory challenges to excuse him. The State's defense of the trial court's denial of Madison's for-cause challenge to this obviously biased juror is a revealing snapshot of the impossibly unfair standards the State advocates, and which the trial court repeatedly applied, in Madison's trial. A juror who knew five of the police officers involved in the subject criminal investigation, who expressed the

view that the death penalty should be imposed in all cases where someone is convicted of murder, who believes that anyone who murders a police officer should be executed, and who told the judge in one of their exchanges that he'd impose the death penalty in this case if it got to a sentencing phase, is absolutely unqualified by bias to serve on a capital jury in the State of Ohio. That this police officer was able to nevertheless mouth the platitude that he'd "follow the law," is totally meaningless. He may not know or care how biased he is; that is the problem with bias. But the court and the prosecutor should have known, based on his many statements, and they had ample opportunity to properly excuse him for cause as urged by Madison's counsel. Piddling formality prevailed over damning substance, to Madison's obvious prejudice.

The Court should again ask itself what this episode reveals about this prosecution. It is unconscionable that the State actually advocated for Juror No. 12's inclusion and that the trial court found him "qualified." Neither of those things should occur in a capital trial in which the constitutional rights of the accused are being given due respect. Those rights were repeatedly disregarded here at the overzealous urging of the prosecution.

In addition to Juror Nos. 5 and 12, there were several other jurors also found "qualified" under the trial court's deficient standards despite having obvious biases in favor of death and against life. They too should have been excused for cause, as detailed in Madison's main brief. Their biases—and grounds for compelled exclusion—are apparent from any fair reading of the transcript. None of the State's arguments seeking to justify their retention has any merit.

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.**

This proposition concerns three broad categories of unfairly prejudicial comments and opinions that the jury was able to hear because of insufficient redactions to the extensive video-and-audio recording of Madison's interrogation: (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.

The State says Madison "invited" any error by agreeing to certain redactions from the recording. The invited error doctrine does not apply here. The videotape of the police interrogation was not the defendant's exhibit and it was not offered by the defense. It is a State exbibit, offered by the State in its case-in-chief. The defense invited no error that occurred due to the State's presentation and use of this State exhibit. To be sure, defense counsel should have objected to, and sought to have the court also redact, the objectionable statements that are the basis of this proposition of law. But in failing to object to the State's evidence—and thus failing to ensure that only properly admissible, and not unfairly prejudicial, evidence reached the jury—Madison cannot now be said to be "tak[ing] advantage of an error which [Madison] himself invited or induced the trial court to make." Lester v. Leuck, 142 Ohio St. 91 (1943), paragraph one of the syllabus. If that were the case, the invited error doctrine would apply every time a criminal defendant's counsel failed to object to inadmissible or otherwise improper testimony offered by the State against the defendant.

The State also argues that many of the objectionable comments by the investigators were necessary to provide "context." (State Brief at 66.) That is not the case. The objectionable comments and statements could have easily been fully redacted without any material impairment to the "context" of the lengthy interrogation.

The State defends its presentation of the police-induced discussions purportedly showing Madison's alleged lack of "remorse" as being mandated under R.C. § 2929.04(B). This argument is one of the more audacious made by the State and typifies its overzealous and unfair approach to this capital prosecution. According to the State, section 2929.04(B) requires the jury to consider remorse regardless of whether the defendant raises remorse because it allegedly "reflects" upon the defendant's "character." The State says the statute's language makes that consideration mandatory because it uses "shall": the court or trial jury "shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors [as listed in (B)(1) to (7)]."

The State is wrong for at least five reasons. The evidence should have been redacted and excluded.

First, the video of the interrogation was presented by the State in the guilt phase during the State's case-in-chief. The back-and-forth about remorse that occurred between Madison and the detectives had absolutely nothing to do with any issues relevant to guilt or innocence. The evidence was intended only to further demonize Madison in the eyes of the jury, and to help secure a sentence of death.

Second, even if *arguendo* it was relevant at all—to guilt/innocence or to sentencing—the evidence was substantially more prejudicial than probative as to any such issue. It could and should have been redacted and disallowed on that basis alone.

Third, the State is not permitted, in the sentencing phase of a capital trial, to present evidence of the capital defendant's alleged lack of remorse, with the only exception being that it may do so if the defendant himself seeks to rely upon his remorse in support of a sentence less than death. That unquestionably never happened here, and thus there was never any permissible basis for the State to seek to rebut any such defense evidence with contrary evidence about remorse. That is the plain import of this Court's holding in cases like State v. DePew, 38 Ohio St. 3d 275 (1988) and State v. Belton, 149 Ohio St. 3d 165 (2016), and the State does not make any persuasive arguments for disregarding that well-established rule. See also 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 DePew, 38 Ohio St. 3d at 289) (some emphasis supplied)).

Fourth, the State's reliance on section 2929.04(B) is plainly wrong and exemplifies the freewheeling ways the State was repeatedly willing to trample on Madison's constitutional rights. The statute says nothing about "remorse," so the State's statutory argument fails right out of the gate. But beyond that deficiency, the State's statutory argument conflates the issues of, on the one hand, what the jury may properly "consider" in the weighing process during the sentencing phase with, on the other, the legally distinct question of whether and when the State may present evidence or argument on such issues as relevant to the weighing process, whether in rebuttal to the defendant's mitigation evidence or otherwise. Even if the jury is permitted to consider "remorse," that does not also mean that the State is permitted to present evidence on an alleged *lack of* remorse when the defendant has not claimed remorse as a mitigating factor and/or has not presented false or misleading evidence about the professed existence of remorse. See DePew, Belton.

It may well be, as the State contends, that this Court has permitted prosecutors to point out if remorse does *not* exist, because, as the State notes, "where remorse does not exist, it is entitled to no weight." (State's Brief at 70). But being allowed to "point out" in argument that remorse does *not* exist as a mitigation factor is very different from the State being allowed, in a case where the defendant does *not* claim remorse as mitigation, to *present evidence* seeking to establish that the defendant supposedly *lacks remorse and/or refuses to express remorse*.

Fifth, by suggesting that "remorse" is relevant to "character" the State's argument fares no better and highlights how expansive and unconstrained the State's proposed rule is, both on its face and in practice. The State's argument is that remorse "reflects" on "character" and is thus properly presented as evidence of defendant's "character." But the State is applying the term "character" in an impermissibly expansive way, using a lay definition, not a legal one. See, e.g., Evid. R. 404 and 405. The lay definition of "character" defines the term broadly as "one of the attributes or features that make up and distinguish an individual." See Merriam-Webster Online Dictionary (available at: https://www.merriam-webster.com/dictionary/character). That is the way the State is using the term. If that broad definition is used, and the State's statutory argument were upheld, then virtually no evidence would be off limits—during the guilt or sentencing phase—for the State to present as allegedly "reflecting" on the defendant's "character" for purposes of the weighing process in favor of death. That has never been the law. Not only does it ignore the Rules of Evidence, but such a rule would eviscerate a capital defendant's right to a fair trial, to the fair consideration of mitigation evidence that may call for a sentence less than death, and to an individualized sentencing determination.

In this capital prosecution where the State has already repeatedly exhibited its disregard for Madison's constitutional rights, the Court should readily see the State's "lack of remorse" argument as just more of the same. The State here is cleverly seeking to covert an alleged lack of

"remorse" into a non-statutory aggravating factor that is to be weighed in favor of death. Admittedly, the State does not *openly* admit to engaging in that tactic because it knows it would be condemned. So, instead, it does the exact same thing, only with artifice and clever labels, hoping no one will notice or care. So instead of claiming the State's "evidence" from the interrogation showing an alleged "lack of remorse" is to be weighed in favor of death on the "aggravation" side of the equation, the State pretends that matter will instead only be weighed *against* mitigation on the mitigation side. (State's Brief at 71.) For the State, it is "minus M" instead of "plus A." But that is silly. *Those are the exact same things*. No matter which "side" of the equation you conduct the weighing on, the effect is the same: The State is arguing that an alleged lack of remorse is properly presented and weighed in *favor of death*, and it is doing so in a case where the defendant did not claim remorse, or good character, as mitigation. That is converting an absence of a mitigation factor—and the Court's narrow accommodation allowing prosecutors to point out when the statutory mitigation of remorse does not exist—into a non-statutory aggravating factor in favor of death, and one on which the State is supposedly permitted to gather and present evidence, even in its case-in-chief in the guilt phase. This is directly contrary to DePew and Belton, among other cases.

Finally, the State argues that the admission of the "lack of remorse" and the other objectionable unredacted evidence is harmless error, including because Madison conceded responsibility for certain killings at trial and did not dispute his guilt on any of the counts or specifications. But whether the evidence is supposedly "harmless" in the guilt phase ignores its devastating prejudice to Madison in the *sentencing phase*. The impact of this and other improperly admitted evidence (see Proposition of Law No. 14) had a sufficiently prejudicial impact on Madison's mitigation phase such that his death sentence cannot stand.

The State's evidence and arguments about "lack of remorse" certainly had that prejudicial effect, and they are a companion to the prejudice caused due to the State's overzealous use, and the court's erroneous allowance, of so much other irrelevant, inadmissible, and unduly prejudicial evidence of Madison's purported "bad character" and other non-statutory aggravators which the State improperly introduced—through Dr. Pitt and in the cross-examination of Dr. Cunningham—under the exact same flawed reasoning the State now uses in seeking to justify its evidence of "lack of remorse." (See also Proposition of Law No. 14 and State Brief at 116-20.) But there was also significant prejudice in the sentencing phase from the repeated—and, by the time of trial, totally unnecessary—questions about the number of bodies, and from Det. Cardilli's profanity-laced tirade about Madison's crimes. (State Exh. 301 (July 21/22) at 00:25:10 to 00:26:209 [see also pp. 105-06].)

These errors are plain error and entitle Madison to at least a new sentencing proceeding. See Ohio Crim. R. 52(B); State v. Thomas, 2017-Ohio-8011, ¶¶ 32-34 (2017).

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 State relies upon outdated case law to argue that mercy may not properly be considered by jurors in weighing the aggravating circumstances and mitigating factors. See State v. O'Neal, 87 Ohio St. 3d 402 (2000), and State v. Lorraine, 66 Ohio St. 3d 414 (1993). Those cases are no longer good law on that issue, and the Court should now make that clear.

Lorraine said that "[m]ercy, like bias, prejudice, and sympathy, is irrelevant to the duty of the jurors." 66 Ohio St. 3d at 418. Its analysis was premised on analogizing "mercy" to

"sympathy." The issue of precluding jurors from considering "sympathy" in capital sentencing had been addressed a few years before Lorraine in California v. Brown, 479 U.S. 538, 543 (1987). There the U.S. Supreme Court held it was proper to preclude capital juries from relying upon sympathy because it is an "extraneous emotional factor[]" that is "far more likely to turn the jury against a capital defendant than for him." Id. The Lorraine Court held that the same reasoning also applied to "mercy." 66 Ohio St. 3d at 417-18.

That analysis is flawed and should no longer be followed. To begin with, sympathy and mercy are different things. "Sympathy" is "sharing the feelings or interests of another, . . . the feeling or mental state brought about by such sensitivity." Mercy, by contrast, is "compassion or forbearance . . . shown especially to an offender or to one subject to one's power; also lenient or compassionate treatment." See Merriam-Webster Online Dictionary (available at: https://www.merriam-webster.com/dictionary.) Mercy is to act in a certain way, with compassion; sympathy is to share another's feelings.

Feelings of sympathy, like biases, are extraneous emotional factors—indeed, "feelings" and "emotions" are the flip side of the same coin—and, when they are interjected into sentencing in a capital case, they are indeed "far more likely to turn the jury against a capital defendant than for him." But mercy is not an "extraneous emotional factor" at all. It is not even an emotion but is a way of acting. It is simply not true that a person who considers mercy is "far more likely to turn the jury against a capital defendant than for him."

The *very purpose* of capital sentencing in a weighing state like Ohio, with the weighing of aggravating circumstances against mitigating factors, is to determine whether mercy is appropriate for the offender or not. The gauge is the jury; each juror will make that determination based upon his or her own unique expression of mercy's role. Some will reflect that judgment by giving more or less weight to an aggravating circumstance, some by giving more or less weight

to a mitigating factor. Each juror's unique weighing calculus is an expression of that person's assessment of whether or not to extend compassion. The Supreme Court bluntly recognized this obvious reality of the jury's role when it said in Kansas v. Carr that "*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. . . . [J]uror 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) (emphasis supplied). See also Kansas v. Marsh, 548 U.S. 163 (2006).

After Carr there should no longer be any question that Lorraine and similar cases are wrongly decided insofar as those decisions permitted juries to be instructed, by the trial court or prosecutor, that the jurors may not consider mercy. Capital jurors *are* permitted to consider mercy; indeed, they always must do so. It is at the core of what they have been summoned to determine in our names. Carr, 136 S. Ct. at 642 ("Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not.").

The State says that this Court's decision in State v. Wilkes, 2018-Ohio-1562 (2018), has already determined that Carr did not approve of mercy as a mitigating factor. (State Brief at 80.) The State is mistaken. Wilkes did not involve the issue presented here, but the very different question of whether the prosecutor misled the jury in describing its sentencing determination as an "evidence-based" determination. Wilkes, 2018-Ohio-1562, ¶ 181.

The more pertinent recent authority in Ohio is State v. Mason, 2018-Ohio-1462 (2018). There, this Court held that the jury's role as "sentencer" in making sentencing determinations in Ohio capital cases is not a fact-finding process subject to the Sixth Amendment. Id. at ¶29. In

discussing the "nature of the weighing process," as crucial to the Court's analysis and conclusion under the Sixth Amendment, the Court acknowledged mercy's central role:

> "The selection decision, on the other hand, requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure [sic] an assessment of the defendant's culpability." Tuilaepa at 973. This, the Supreme Court has said, "is mostly a question of mercy," involving an exercise of judgment. Carr at 642. See also Tuilaepa at 978 ("at the selection stage, the States are not confined to submitting to the jury specific propositional questions"). Thus, the selection decision does not obviously involve a determination of fact.

Mason, 2018-Ohio-1462, ¶ 24. See also Commonwealth v. Lawlor, 95 Va. Cir. 250, 275 (Cir. Ct. 2017) ("While Virginia's death penalty sentencing scheme is not identical to the one at issue in Kansas v. Carr, the Supreme Court's recognition of the role of mercy and discretion in the exercise of the jury's ultimate sentencing judgment is equally applicable in the instant case.").

Capital jurors in Ohio may, indeed must, consider mercy. Jurors in Ohio should be instructed to that effect, and trial courts and prosecutors should no longer be permitted to tell jurors that they may not consider mercy. Such an instruction is confusing, contrary to common sense, misinforms the jury about its role, and serves no purpose other than to place the thumb more firmly on the side of death. That flawed instruction's pervasive and persistent use in Madison's case, by the prosecutor and the trial court, prejudiced Madison by forcing jurors to remove from their thinking, and their weighing calculus, that factor which is the essence of their role and whose proper consideration most ensures that death is not imposed despite facts calling for a lesser penalty.

This critical error denied Madison a fair trial and reliable sentencing proceeding. A new penalty phase must be ordered.

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 stands on the discussion in his main brief that the trial court, again at the overzealous urging of the prosecutor, erroneously barred Madison's expert witness, Dr. Cunningham, from presenting relevant mitigation evidence in support of Madison's request for a sentence less than death. Just as the voir dire was obstructed with incessant objections, so too was Madison's critically-important mitigation presentation disrupted in a similar way. The excluded evidence is evidence that "diminish[es] the appropriateness of the death sentence," and, because of the many objections and the trial court's flawed rulings, the jury was never able to hear much of that evidence and in the way Madison wanted it presented.

The State claims the proffered evidence of "moral culpability" was properly excluded, as was the use of that term, because moral culpability is not relevant in capital sentencing. But that is plainly wrong. Just as mercy is at the core of the jury's function, so too is each juror making a moral judgment when it decides whether the offender should live or die. The U.S. Supreme Court's seminal case law applying the Eighth Amendment in capital cases references the moral aspect of the weighing process and frequently acknowledges that the determination involves an assessment of "moral culpability." See, e.g., Roper v. Simmons, 543 U.S. 551, 570 (2005); Atkins v. Virginia, 536 U.S. 304, 306 (2002); Wiggins v. Smith, 539 U.S. 510, 535 (2003); Penry v. Lynaugh, 492 U.S. 302, 319 (1989).

As a pioneer in the field of applying forensic psychology in the capital sentencing context, Dr. Cunningham should not have been barred from using the terminology that his field routinely uses to explain and educate about relevant concepts within his expertise. His use of

"moral culpability" was well grounded in the peer-reviewed literature, and it accurately describes the concepts he was called upon to testify about. The term "moral culpability," and the evolution and usage of those concepts in Cunningham's field as the central psycho-legal focus of mental health evaluations for capital sentencing, were squarely within his expertise and were proper subjects of expert testimony. If the prosecutor disagreed with Dr. Cunningham's discussion of those topics, he was free to cross-examine.

Dr. Cunningham was not seeking to tell the jurors how to conduct their weighing calculus. At no time did he render an opinion as to how much weight a juror should give any mitigating factor or aggravating circumstance. His proffered testimony sought to provide additional relevant information about Madison's background and family history and to help the jury understand the significance of that information from the perspective of a skilled forensic psychologist. The weighing was exclusively up to them.

Finally, the excluded and interrupted testimony was not a "backdoor" effort to present a "diminished capacity" defense. Madison and his counsel disclaimed any reliance on the (B)(3) mitigator—"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," R.C. § 2929.04(B)(3)—and on any evidence of any alleged impairment or diminishment of Madison's mental state or mental capacity. (See, e.g., T. 431, 6583-84, 6643, 6677-78, 6691, 6705-09, 7283-84.) Instead, the excluded evidence is standard mitigation about a troubled background and the demonstrated impact it has when there are so many adverse development factors and no protective factors. What *was* "backdoored" was the State's cynical mischaracterization of this traditional mitigation about a troubled background—and which establishes Madison's greatly reduced moral culpability—as purportedly being about his "mental status," and thus

necessitating a state-mandated *psychiatric exam* which was then misused by the State to force Madison to be a witness against himself in the fight to spare his life. (See also Propositions of Law Nos. 11 to 14.)

As with the other Propositions of Law, the errors here are the result of the State having hardly any regard for Madison's constitutional rights and of the trial court erroneously allowing those tactics to again succeed. The prosecutor who bragged that the aggravating circumstances have the weight of a "locomotive" was too afraid to allow that confidence to be tested by Madison's mitigation case, as Madison and his counsel wanted to present it. The prosecutor thus did not allow Dr. Cunningham to present his opinions without incessant objections, did not allow the jury to hear the opinions in the manner Dr. Cunningham wanted to explain them, and did not allow the jury to see and engage with the doctor's slides and demonstrative exhibits. Madison's mitigation presentation was disrupted because the prosecutor *knew* how effective it could be in persuading at least one juror to spare Madison's life, a risk that State was unwilling to permit, as confirmed by its similar disruption of the voir dire.

The State's disruption of Madison's presentation of mitigation evidence, and the tolerance of that disruption by the trial court with rulings that barred relevant evidence, denied Madison his right to present evidence that calls for a sentence less than death. Madison's death sentence is unreliable and its imposition a violation of his constitutional rights.

Proposition of Law No. 11. **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.**

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.**

Proposition of Law No. 13. **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.**

These three related propositions are extensively addressed in the parties' respective briefs. Madison stands on the points and authorities submitted in his main brief and adds the following additional points in reply to arguments made by the State.

There was no relevant issue in dispute concerning Madison's "mental status" or mental state. Not in the guilt phase, and not in the sentencing phase. The professionals who examined Madison before trial, at defense counsel's request, were all attuned to look for any indications of any major mental illness, mental disease, or impaired capacity, but no such issues were apparent, and none was pursued in Madison's case. (T. 6584-87, 6592, 6642-43.) The defense made that position clear on multiple occasions, including:

> MR. GRANT: It's not diminished capacity. Under no circumstances has that ever been considered diminished capacity. We're not saying he has a mental disease or defect. We're not

> saying he didn't know the difference. Again, right and wrong. He is going to acknowledge that. We're not making those allegations or not even saying he couldn't appreciate the wrongfulness of his conduct. That's diminished capacity under (B)(3). We are making no arguments under (B)(3) he has got diminished capacity. What we are saying is these adverse conditions impact the resources he brings to the table in terms of making good decisions essentially.
>
> . . . .
>
> MR. GRANT: If I might add, the law is clear in Depew. As the state acknowledges, the state is not allowed to present evidence on mitigating factors that were not raised. We are not raising under (B)(3) whether at the time of admitting the offense the offender because of a mental disease or defect lacked substantial capacity to appreciate the criminality of his construct or conform the offender's conduct to the requirement of law. Cunningham repeatedly said that we're not claiming the man is insane. 7452
>
> We're not claiming that he didn't know the right -- wrongfulness of his conduct. 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. And to present myriad of evidence that the state is producing here is directly contrary to the decision in Depew because we're not raising it as a mitigating factor.
>
> I also add that's precisely what the state asked this witness, Dr. Pitt, to go into, to a mitigating fact by their own letter sent to him in February -- sorry, January, 2016, I believe, telling him to evaluate a mitigating factor, that is simply not being raised by the defense.

(T. 6852-53, 7451-52). See also T. 413, 431 ("We are not placing the defendant's mental state into issue in either the trial or the mitigation phase. We provided the prosecutor on Friday with our expert reports. [Kansas v.] Cheever applied to a situation where the State -- where the defense was placing a person's mental state in issue as an affirmative defense relative to his culpability in the trial phase of the case. It's not the case here. We're not placing mental culpability into issue, and the Fifth Amendment privilege would clearly be violated in terms of

the interview of our client."); T. 435 ("Your Honor, we are not claiming brain damage."); No. 204, Defendant's Response to State's Motion for Exam at pp. 3-4, filed June 2, 2014.

There was plainly no relevant issue in the case concerning Madison's mental state, mental status, mental condition, brain damage, mental illness, competency or the like. See, e.g., Kansas v. Cheever, 134 S. Ct. 596, 602 (2013) (mental status diagnoses are those involving "a defendant's *mens rea*, mental capacity to commit a crime, or ability to premeditate"); State v. Goff, 128 Ohio St. 3d 169 (2010). Madison's "mental condition" was not "in controversy" in any relevant respect. His counsel repeatedly disclaimed reliance on any such matters for any purpose, including mitigation. The mitigation case was concerned only with Madison's background and family history.

The State's conception of when a "mental condition" is "in controversy," for purposes of a capital case, is so broad and unconstrained by any limiting principles that it will virtually always be "in controversy" from the State's perspective (see State's Brief at 92-96), even when it plainly is not. Such facts as a long-ago visit to a mental health professional, a difficult family background, exposure to trauma, substance abuse, and on and on, are all allegedly sufficient to place the defendant's mental condition "in controversy" under the State's expansive view. That view should be rejected.

Insofar as determining whether the State is entitled to compel the accused to submit to a psychiatric or psychological examination, the defendant *must* at a minimum have placed his mental status in direct controversy, by, for example, alleging a mental disease or defect or other mental condition, or by alleging a mental condition that implicates the defendant's *mens rea*, mental capacity to commit a crime, ability to premeditate, and, in a capital case, "lack[] of substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law." The mere facts that a defendant has had past

life experiences that might be interesting to mental health professionals, and/or which can sometimes be relevant to diagnosing mental health conditions, are alone insufficient unless the defendant also claims that he possesses a mental health condition and he chooses to rely upon its existence in his case. See, e.g., Cheever; Goff; ; Buchanan v. Kentucky, 483 U.S. 402 (1987) (evidence of mental condition of "extreme emotional disturbance"). Madison did no such thing. He did not allege any mental health condition and he did not place his state of mind in issue. Madison did not, contrary to what the lower appellate court suggested, "present expert evidence of his mental condition." State v. Madison, 2015-Ohio-4365, ¶ 22 (2018). That conclusion is contrary to the facts and the controlling law.

What the State is really arguing, and it tips its hand at page 97 of its Brief, is that when a defendant speaks to his own expert, the State must be permitted to compel the defendant to speak to the State's expert too. But that collapses the relevant inquiry and ignores the dispositive issue of whether the defendant, even though speaking to an expert, has placed his mental status in issue. Madison did not do so and disclaimed any intent to do so. The State was perfectly free to rebut the evidence presented about Madison's background and family history, even though such defense evidence is presented with the assistance of an expert witness, but it has innumerable ways to do so that did not also unconstitutionally compel Madison to speak with the State's psychiatrist and to do so without counsel.

Because Madison did not place his mental status at issue for any relevant purpose, the lower courts were mistaken in ordering the examination. The defense did not "open the door" to even a limited examination. See, e.g., Cheever, 134 S. Ct. at 602. By improperly compelling the examination in these circumstances, the lower courts compelled Madison to be "the 'deluded instrument' of his own execution," Estelle v. Smith, 451 U.S. 454, 462 (1981), and the State

shamelessly exploited the error it induced by making prominent use of Dr. Pitt's video clips from the improperly compelled and uncounseled examination. See T. 7417-38; State Exh. 1103.

The State's suggestion that the rules of *civil* procedure make this compelled examination a permissible one borders on frivolity. This is a capital case, where a man's freedom and life are literally at stake. The constitutional and statutory provisions, and doctrines thereunder, which exist and have developed to ensure the protection of the constitutional rights of the accused in a capital case are what control, not rules of "procedure" that are applicable to cases involving such relatively trivial matters as money disputes arising from claims of products liability, personal injury, breach of contract, and the like.

The rules of civil procedure cannot be applied, as they were here, to override hallowed constitutional protections in capital cases—including the right to remain silent, the right to the assistance of counsel, the right against cruel and unusual punishments, the right to develop and present evidence that may call for a sentence less than death, and the right to individualized sentencing. Proper application of *those* rules, and of the Ohio Revised Code provisions applicable to capital cases (e.g., § 2929.03(D)(1)), and this Court's own case law in the capital arena (e.g., DePew, Belton) all easily compelled the denial of the State's requested examination. There was no need to "look to" the civil rules for "guidance": the existing rules, statutes, and doctrines that apply in the capital context compelled denial of the State's requested examination. The civil rules do not supersede any of those rules, statutes, and doctrines. Plus, "death is different" and requires greater reliability. Gardner v. Florida, 430 U.S. 349, 357 (1977) (plurality opinion).

What's more, Madison cannot be compelled, as he was here, 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.").

Thus, even assuming *arguendo* that Madison had placed his "mental status" in issue, which he had *not* done, the fact that the State's request for an examination arose in a capital case should itself have barred the examination in the circumstances here. There were less constitutionally burdensome means of preserving the State's right to a fair trial that did not require Madison to submit to a compelled examination by a State psychiatrist. The State and its expert had access to the entirety of the defense psychological reports to rebut any such matters. See, e.g., Buchanan, 483 U.S. at 422-23. Moreover, the State and its expert had the same opportunity to view the 17-hours of police interrogation as Madison's experts did and it had access to the same CFS and other documents about Madison and his background and family history. The State can still present expert testimony, but its expert does not get to "interview" the capital defendant himself.

This was hardly a situation where the State was denied "fair access" to evidence. The State did not need its own compelled psychiatric examination in order to ensure a fair trial. Dr. Pitt's clips are the best proof of that: to receive a fair trial, the State had no need to ask 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 similar irrelevant topics that were explored by Dr. Pitt in defiance of the court's order limiting the scope of the examination.

The lower courts' violations of Madison's constitutional rights, by unlawfully forcing him to participate in Dr. 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. At the very least, any statements Madison made to Pitt were

inadmissible, including all 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, to cooperate with it, and to do so all alone and without his counsel present.

The death sentence imposed upon Madison cannot stand and must be set aside. Madison is entitled to a new sentencing-phase trial.

Proposition of Law No. 14. 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 State relies upon the same expansive statutory argument here, to defend the erroneous admission of "bad" character evidence and evidence of other non-statutory aggravating circumstances, as it made regarding the evidence of "lack of remorse" that is at issue in Proposition of Law. No. 6. For the same reasons which Madison addressed earlier in this Reply Brief concerning that Proposition, supra at pp. 12-17, the State's argument is groundless.

Madison did not rely in his mitigation presentation upon any evidence of "good" character or upon any pertinent traits of his character. He did not claim that he had any particular character traits that are mitigating and/or that such traits called for a sentence less than death, nor did he present false or misleading evidence that he has any such good character traits—e.g., charity, kindness, generosity, diligence, fairness, patriotism—such as would provide something for the prosecutor to rebut. And, because Madison did not present any evidence of good character or of any pertinent traits of his character, the Rules of Evidence bar rebuttal evidence by the prosecutor, see Evid. R. 404, as does this Court's death penalty jurisprudence. See, e.g., DePew, Benton. There was no evidence of good character, or of alleged pertinent traits of

character, for the prosecutor to rebut. Nor was there any false or misleading evidence about Madison's "character" that would have opened the door for the State to seek to contradict such evidence or to correct any alleged misimpression created by it.

Madison's mitigation case was, instead, exclusively reliant upon his poisonous background and troubling family history. He relied only upon mitigation evidence of his "history" and "background." He did not present any evidence or argument about "character" or "lack of remorse," as already noted. He did not present any evidence or argument about "brain damage" or of any alleged diminished capacity, and, indeed, disclaimed reliance on any and all such "mental status" evidence. He did not present any evidence or argument about any of the seven factors listed in subsections 1 through 7 of section 2929.04(B), with the possible exception of subsection (7) to the extent his evidence and argument about history and background also relied upon the (B)(7) mitigator concerning "any other factors that are relevant to the issue of whether [he] should be sentenced to death."

As a result, the State was barred by this Court's precedent from introducing all the irrelevant, inadmissible, and unduly prejudicial evidence about "bad" character, and "lack of remorse," and "mental status," and other irrelevant matters not pertinent, or in rebuttal, to Madison's evidence of family history and background. All this improper State's evidence had the effect of being non-statutory aggravating circumstances that are not properly considered for sentencing under R.C. § 2929.04(B). The State's evidence was not evidence that "***may call for a penalty less than death***," State v. White, 85 Ohio St. 3d 433, 448 (1999), and it was not evidence that is to be weighed "***against*** the aggravating circumstances proved beyond a reasonable doubt." R.C. § 2929.04(B) (emphasis supplied).

Indeed, as the State acknowledges in its Brief, its audacious contention is that such evidence may be presented by the State for the express purpose of having it be weighed ***in favor***

of death. However, the State pretends that this does not violate the statute and the Court's precedent because the weighing will supposedly only be conducted on the *mitigation* side of the ledger—as "minus M"—instead of on the aggravation side—as "plus A." But that is a mathematically-pure example of form over substance: the result is the same, on the weighing calculus, regardless of which side of "A vs. M" the State's improper evidence in favor of death is addressed in the weighing calculus. Taking 2 points away from the mitigation side has exactly the same effect, on the ultimate balancing, as adding 2 points to the aggravation side.

The proper approach, and one the State and trial court failed to follow, is that the State's evidence of alleged "bad" character, "lack of remorse," "mental status," and other irrelevant matters was inadmissible as non-statutory aggravating circumstances that was not relevant to, nor proper to rebut, the mitigation case about family history and background that Madison chose to present. 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 at 289 (some emphasis supplied)).

The erroneous admission of the subject categories of evidence denied Madison a fair trial and a reliable sentencing proceeding. To the extent any of the subject evidence was minimally "relevant," any proper Rule 403 balancing would have kept it out. Absent these errors, there is a reasonable likelihood Madison would not have been sentenced to death. He is entitled to a new sentencing proceeding.

CONCLUSION

For these reasons, and those set forth in Madison's main brief and in the interest of justice, 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 REPLY BRIEF OF APPELLANT MICHAEL MADISON 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 18th day of June 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