Supreme Court of Ohio Clerk of Court - Filed June 22, 2020 - Case No. 2019-0926

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	
	:	
Plaintiff - Appellee,	:	**CASE NO. 2019-0926**
	:	
v.	:	
	:	
Joseph McAlpin,	:	
	:	
Defendant - Appellant.	:	
	:	**CAPITAL CASE**
	:	

MERIT BRIEF OF APPELLANT, JOSEPH McALPIN

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A capital defendant has no right of self-representation at the unique death procedures of a capital trial, the penalty phase and the death qualification of prospective jurors, which are not part of the traditional "trial" and therefore not encompassed by Faretta v. California, 422 U.S. 806 (1975). 14

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CASE OVERVIEW

The Defendant-Appellant Joseph McAlpine represented himself at a capital trial. Predictably, it did not end well for him. This is believed to be the first capital trial that this Court will review where the defendant eschewed his Sixth Amendment right to counsel that resulted in a sentence of death. Therefore, numerous issues of first impression are being presented to this Court. These include whether a defendant has the right to waive counsel for the penalty phase of a capital case, as the Supreme Court of the United States has never held that the Faretta Right to self-representation extends to sentencing procedures. Faretta v. California, 422 U.S. 806 (1975) Faretta was decided three years prior to Lockett v. Ohio, 438 U.S. 586 (1978), the result of which was bifurcated capital trials.

In a related issue, if a defendant waives trial counsel, and accepts standby counsel, how much may standby counsel interfer with the defendants strategic trial decisions with out depriving the defendant of the right of self-representation. This is particulary germane after the relatively recent the United States Supreme Court decision in McCoy v. Louisiana, 138 S.Ct. 1500 (2018), reiterated that the defendant controls material decisions, even if represented by counsel, and even if the the defendant's decisions are detrimental to his case.

It is not a surprise that McAlpin, as *pro se* counsel, would miss objecting to or preserving meritorious issues. Paraphrasing the dissent of State v. Obermiller, 147 Ohio St.3d 175, 2016-Ohio-1594 (2016), if the record is barren of mitigation or the trial procedures full of legal errors, or both, at some point do we refuse to execute the defendant because the resultant verdicts are simply not reliable? As the dissenting justices argued, do we not need to know the whole story, from a trial without severe Due Process questions, before a person is executed? This is a

rhertorical question, as the answer should be no.

Where a defendant desires to exercise Faretta Rights, the solution consistent with existing Supreme Court of the United States precedent is that a capital defendant may represent himself in the traditional "trial" aspects of a capital trial, but not death qualification and the penalty phase, which is not part of a traditional "trial" portion of the procedures. In the capital aspects of a trial, the factors weighed in Faretta, the right to autonomy against the societal interest in due process, fails in favor of the latter interest.

Finally, because these issues are of first impression in this state, the independant Ohio Constutional protections are relevant. This Court has not been hesitant in the past to invoke our own protections where that Federal precedent is lacking or if this Court believed that greater protections for its citizens were owed. This is entirely proper in a federal system. In City of Mesquite v. Aladdin's Castle, Inc. 455 U.S. 283 (1982) the Supreme Court determined that a state court is entirely free to read its own state constitution more broadly than the Court reads the Federal Constitution, or to reject the mode of analysis used by the Court in favor of a different analysis of its corresponding constitutional guarantee. Moreover, the Supreme Court found in California v. Greenwood 486 U.S. 35, 43 (1988) that individual States may construe their own constitutions as imposing more stringent constraints on the government or prosecution than does the Federal Constitution.

This Court has recognized protections of individual's rights under the State Constitution beyond that required by the United States Supreme Court interpretation of the Federal Constitution. For instance, this Court rejected a United States Supreme Court Fourth Amendment decision, reached in New York v. Belton 453 U.S. 454 (1981). This Court in State

v. Brown, 63 Ohio.St.3d 349 (1992), held that if Belton and the Federal Constitution allows police officers to search the interior of a car anytime an occupant is arrested, regardless of the nature of the offense or the circumstances, the court would decline to adopt its rule. *See also* State v. Mole, 149 Ohio St.3d 215, 2016-Ohio-5124 (A state court is entirely free to read its own state's constitution more broadly than the United States Supreme Court reads the Federal Constitution).

As there is no established precedent for many of the raised issues here, this Court is urged to grant the protection sought under the Ohio Constitution on issues not yet decided by the Supreme Court of the United States or grant greater protections on those that issues that have federal precedents.

STATEMENT OF THE CASE

On November 20, 2017, a Cuyahoga County grand jury indicted the defendant-appellant Joseph McAlpin (hereinafter McAlpin) on three case numbers for various charges, including two alternative theory counts of capital murder surrounding the deaths of both Trina K. Tomola-Kuznik and Michael Kuznik. The original indictment, Case No. CR-17-618317, a 25-count indictment, was superseded by Case No. CR-17-620878. The subsequent indictment added capital punishment specifications to the four counts of Aggravated Murder; two theories for each victim. Case No. CR-17-623243-A added two co-defendants and five counts relating to the co-defendants only; Andrew Keener and Jerome Diggs.

The original indictment charged McAlpin with two counts of the purposeful killing of Ms. Tomola-Kuznik and Mr. Kuznik during an aggravated felony in violation of R.C.§ 2903.01(B) and two counts of the alternative homicide theory of Aggravated Murder with prior

calculation and design in violation of R.C. §2903.01(A). Each of these Aggravated Murder counts included four capital specifications; two specifications of R.C. §2929.04(A)(7) (during the course of an Aggravated Robbery and an Aggravated Burglary), a course-of-conduct specification in violation of R.C. §2929.04(A)(5), and one for a homicide committed while defendant was under Detention or an Escape in violation of R.C. §2929.04(A)(4).

The indictment additionally charged McAlpin with two counts of Aggravated Robbery in violation of R.C. §2911.01(A)(1) and two counts of Agravated Robbery in violation of R.C. §2911.01(A)(3); two counts of Aggravated Burglary in violation of R.C. §2911.11(A)(1) and two counts of Aggravated Burglary in violation of R.C. §2911.11(A)(2). McAlpin was charged with two counts of Kidnapping in violation of R.C. §2905.01(A)(2). The counts of Aggravated Murder, Aggravated Robbery, Aggravated Burglary, and Kidnapping all included a one-year firearm specification in violation of §2941.141(A), a three-year firearm specification in violation of R.C. §2941.145(A), a notice of prior conviction in violation of R.C. §2929.13(F)(6) and a repeat violent offender specification in violation of R.C. §2941.149(A).

Counts 15 and 16 charged the lesser charge of Murder in violation of R.C. §2903.02(B). The indictment also included two counts of Felonious Assault in violation of R.C. §2901.11(A)(1) and two counts of Felonious Assault in violation of R.C. §2903.11(A)(2). Each of these counts included the similar specifications that were attached to the previously addressed felony counts.

The final counts of the indictment against McAlpin included Having a Weapon Under Disability in violation of R.C. §2923.13(A)(2), two counts of Theft in violation of R.C. ®2913.02(A)(1), Injuring Animals in violation of R.C. §0959.02, and Cruelty to Animals in

violation of R.C. § 0959.131(C).

On July 19, 2018, the Court granted McAlpin's request to waive trial counsel. On August 20, 2018, the Court granted his motion for new standby counsel. On March 5, 2019, the Court dismissed the Under Detention capital specification to Counts 1 through 4 of the indictment in violation of R.C. §2929.04(A)(4). Three remained.

A jury trial began on March 26, 2019, with the death qualification process. On April 18, 2019, the jury found appellant guilty on all 26 counts and specifications, including the capital specifications.

Sentencing

Because the Aggravated Murder convictions merged, the prosecution elected to go forward with Counts One and Two, both felony-murder in violation of R.C. §2903.01(B) in the penalty phase. The penalty phase hearing began on May 13, 2019. On May 16, 2019, the jury reached a unanimous verdict of a recommendation of death.

The trial court sentenced McAlpin on May 16, 2019. In consideration of the death eligble counts, the trial court noted that in addition to the penalty phase testimony, the court had reviewed addtional information that had not been presented to the jury. This included a mitigation report from the local court pyschiatric clinic. The court found that McAlpin had a very tough childhood. He had been repeatedly raped by his mother's male friend at age 9, suffered from a chronic anger problem, attempted to commit suicide attempt while in jail in 2006, had been diagnosed with post-traumatic stress disorder, and had found his mother's body after she had overdosed on heroin when he was 19 years of age. (T. 4688)

After considering the mitigation, the trial court independently concluded that the

aggravating circumstances outweighed the mitigating circumstances. (T. 4689) McAlpin was sentenced to the death penalty on both Counts 1 and 2. The trial court filed its R.C. §2929.03(F) opinion on June 5, 2019.

The trial court also sententence McAlpin on the remaining counts. After the mergers, McAlpin was sentenced on the remaining Counts; 7, 8, 11, 12, 21, 23, 24 and 26. The court sentenced McAlpin to serve 11 years for Counts 7 and 8 (Aggravated Robbery) consecutively to each other and to a three year gun specification. The same sentence was provided for Counts 11 and 12 (Aggravated Burglary). McAlpin is serving 36 months for Count 21(Weapons Disability) and 18 months for Counts 23 and 24 (Theft). Finally, 12 months for Count 26 (Cruelty to Animals). All counts are being served consecutively to each other and consecutivel to the firearm specification.

McAlpin timely filed his Notice of Appeal to this Court on July 8, 2019.

STATEMENT OF THE FACTS

The jury convicted McAlpin for a double homicide which occurred in a Mr. Cars sales lot on East 185th Street in Cleveland, Ohio on April 14, 2017. Mr. Cars was a small pre-owned car business owned by the victims, Trina Tomola-Kuznik and Michael Kuznik. The State alleged that McAlpin, along with his brother Jerome Diggs Jr., and Diggs' friend, Andrew Keener, planned to steal cars and their titles for later sale on the streets. The homicides occurred during and the result of the car theft scheme.

The prosecution based its case on three factors. First, cell-tower "pings" placed a phone number attributed to McAlpin within an area that included the Mr. Cars business during the

period of the homicide/robbery. Second, co-defendant Keener entered a plea deal with the prosecution. In exchange for a guilty plea to lesser charges, he testified that he was part of the scheme to steal cars. McAlpin arrived in a car with his two co-defendants. He left the others and walked to Mr. Cars while the other two men waited in the cars. Third, DNA attributable to McAlpin was located in the location of the homicides, including the clothing of a victim, and in a vehicle stolen from the business.

McAlpin, who had waived counsel, argued that anyone could have used his phone. He argued the area of usage was not specific to the Mr. Cars. He also argued that Keener's testimony was not credible, as he originally lied to law enforcement to hide his involvement. When confronted on the lies by investigators, he implicated McAlpin to safe himself. Finally, McAlpin argued that the presence of DNA was not dispositive of his guilt. The DNA might have been found because McAlpin had visited Mr. Cars prior to April 14, 2017, or it may have been transferred from someone who had earlier with him. He denied his guilt entirely.

State's Case

Co-defendant Andrew Keener testified that on Good Friday, April 14, 2017, he was with Jerome Diggs Jr. when Joseph McAlpin pulled up to them in a white car. (T. 3546) Keener was friends with Diggs but did not know Diggs' brother McAlpin well. Diggs entered the car with McAlpin. After about 20-30 minutes, they called Keener over to the car. (T. 3547-3548). Diggs asked Keener if he wanted to make some money. They informed him of a plan to hit a spot for titles and car keys and then sell the cars. (T. 3549-3550) Keener testified that he agreed to go with them as he thought the scheme was just to steal cars. (T. 3551)

A phone registered to McAlpin called Mr. Cars around 4:09pm. At 5:21p.m., the

Kuzniks' began to close up shop and park the "blocker cars" in the parking lot exit lanes, which they did regularly to dissuade car thefts. This action could be viewed from the footage from security camera obtained from a business located across the street, Go Auto. (T. 4037) At the same time, a person alleged to be McAlpin was seen on video walking towards Mr. Cars in a dark hoodie, red brimmed ball cap and red sweat pants. The features of the people on the video were blurred. No positive identifications could be determined from the figures depicted on it. (T. 4038)

The last call to Mr. Cars occurred at 5:30 p.m. The call was placed by Daryl Sanders, a customer who had purchased a car earlier that day. (T. 4046) No calls were answered at business after this conversation. About this time, according to Keener, McAlpin drove Keener and Diggs to the location and parked on a side street near 185th Street. (T. 3558) Keener testified that McAlpin told them when he left that he was going to scope out the place while they waited. (T. 3560) As McAlpin exited the car, Keener saw the butt of a gun on McAlpin's hip. (T. 3561)

Keener and Diggs stayed in the car while McAlpin walked to Mr. Cars. (T. 3563) According to Keener, McAlpin and Diggs made multiple calls with one another on Keener's phone while McAlpin was inside Mr. Cars. (T. 3564-3565, 4047) McAlpin's phone records showed 13 calls between his and Keener's phone between 5:16 p.m. and 6:49 p.m., all pinging off of a cell phone tower near Mr. Cars. (T. 3451, 3453) Keener said he got out of the car and walked back and forth on 185th Street after waiting for about 40 minutes for a call from McAlpin. (T. 3566) He admitted on cross-examination of his walking began only a few minutes after McAlpin exited the car after being confronted with the security video rather than 40 minutes. (T. 3665)

According to Keener, McAlpin had called to tell him the car was on and ready. (T. 3573) When Keener arrived, McAlpin was in the parking lot. A BMW was running. Keener noticed McAlpin wore completely clothing than he has worn when he left the car. (T. 3574-3575) McAlpin no longer wore red pants. He wore a baseball cap that came very low over his face. (T. 3576) McAlpin was also carrying a dustpan, broom, and a blue gym bag. (T. 3575, 3577)

Keener entered the Mercedes and drove it onto the side street where Diggs had parked the white car. (T. 3578) Diggs climbed into the car with Keener. McAlpin pulled up in the BMW and led them to the freeway. (T. 3584) Kenner and Diggs followed to a parking lot on the west side of Cleveland where they abandoned the Mercedes. Keener and Diggs rode with McAlpin in the BMW. (T. 3587) They eventually ended up going to the west side of Cleveland. (T. 3584, 3587)

Keener testified that he had no idea what happened inside the dealership. He did not hear any gunfiire. He learned of the homicides about a week later. (T. 3595-3596)

Keener admitted that he lied to police in his orginal statement multiple times. (T. 3609, 3618-3620, 3626, 3676) He told the jury that when he made his statement he was using methamphetamine and K-2, a synthetic street drug that causes user hallucinations. (T. 3609-3610, 3612) Keener admitted that he was also high on K-2 and possibly meth on the day of the homicides. (T. 3703)

On that date, Colin Zaczkowski, the son of Trina Kuznik, became concerned when he noticed that his parents were not home by 9:00 p.m. (T. 2375) He asked his girlfriend to see if his parents were at the house they were remodeling in Leroy, Ohio. (Id.) His girlfriend did so and discovered they were not at the house. Zackowske suspected something was wrong. He decided to drove to Mr. Cars. (T. 2390)

When Zaczkowski entered the dealership, he noticed the door propped open, saw pictures and chairs sideways on the floor. When he saw a body laying behind the desk, Colin ran outside, yelled for help and called 911. (T. 2392).) Zaczkowski imediately noticed that the BMW was missing from the lot. (T. 2401)

Police Investigation

Detective Arthur Echols of the Cleveland Police Department responded to the call to investigate the Mr. Cars crime scene. (T. 3960) Echols canvassed the area and knocked on doors. (T. 3970) He found papers strewn everywhere, a dishelved couch and a computer modem with frayed wires. (T. 2728, 2743, 3963, 3969)

While canvassing the area, he looked for security cameras that might have record the events. (T. 3972) He found multiple cameras on the exterior of Mr. Cars, however they were inoperable. (T. 3974, 3987) Detective Echols did locate security cameras on the Go Auto building, a business diagonally across the street from Mr. Cars. He also located a camera inside of a Just Wireless store, another nearby business. (T. 3987) The Go Auto and Just Wireless video footage helped him determine that at least two suspects were involved in the double homicide. (T. 4002)

Officer Joshua McCoy of the Cleveland Police Department was on duty with his partner on April 20, 2017, when he spotted the stolen BMW stolenr. (T. 2664) In late September of 2018, Detective Echols learned that a Mercedes had been towed on April 16, 2017 from a location in Brooklyn, Ohio to a police inventory lot. A check of the VIN confirmed it was also stolen from Mr. Cars. (T. 4024)

Phone Records

Special Agent Brian Young of the FBI obtained a search warrant and examined McAlpin's cellphone records. (T. 3420) On the date of the offense, a call was placed from McAlpin's cell number to Mr. Cars at approximately 4:09 p.m.. (T. 3436) Thirteen minutes later a call was placed to Keener's phone. (T. 3437) The last phone call between these numbers was placed at 6:47 p.m. (T. 3438)

The viewing of the security videos revealed that after a suspect entered Mr. Cars at approximately 5:20 p.m., no one is seen entering or leaving the dealership for about an hour and seven minutes. (T. 3447) A total of thirteen calls were made to Andrew Keener from McAlpin's phone between 5:16 and 6:49 p.m. The calls pinged off the same cell tower located near the Mr. Cars location in that time period. (T. 3451) Young acknowledged that although McAlpin's cellphone calls was pinging off of the tower, he could only conclude that the phone was in the vicinity of the tower, not that McAlpin was there as well or even the person using the phone. (T. 3473)

Scientific Evidence

Buccal swabs were obtained from McAlpin, Keener, and Diggs in relation to this case. (T. 4019, 4032) Forensic analyst Laura Evans testified that DNA "matching" McAlpin's was found on the steering wheel and inside the driver's door of the recovered BMW. (T. 3239-3241, 3287) DNA consistent with McAlpin's was located on the inside of the back pocket of Michael Kuznik's jeans. (T. 3230-3231) McAlpin's DNA determined to be a major contributor to the DNA on the AT&T modem found in the back office of Mr. Cars. (T. 3235-3236)

When McAlpin was arrested, he was in possession of a cellphone. (T. 3419-3420) Special

Agent Jacob Kunkle of the FBI testified that he examined the search history of McAlpin's cell phone. (T. 3872) On April 5, 2017, several searches were found the subject of which were various calibers of handguns. (T. 3873) Agent Kunkle was unableto form an opinion about who actually conducted the searches. (T. 3873, 3884) The Google search information could cover any device that the account is logged into at that time, which means that more than one device could be conducting the searches at the same time. (T. 3882-3883)

On April 15, 2017, someone conducted searches on McAlpin's phone relating to a 2008 salvage BMW for sale. Multiple other searches were conducted for BMW's, including the procedure for switching car titles without the other party's permission. (T. 3875-3877) On April 22, 2017, searches were made about the car lot murder and the latest news on a stolen BMW from the car-lot murder. (T. 3878) According to Detective Echols, searches about Mr. Cars and the BMW were made within hours after the double homicide, before it was public knowledge. (T. 3878, 4012)

Erica Armstrong, the medical examiner, testified that Trina Tomola-Kuznik and Michael Kuznik died from a gunshot wound to the head. (T. 2619, 2641) Doctor Armstrong determined the manner of death to be homicide for both Michael and Trina. (T. 2619, 2641)

According to forensic analyst Kristen Koeth, bullets recovered from each victim were 9mm caliber ammunition. The bullets were fired from the same 9mm caliber firearm. (T. 3010-3011) Neither the weapon nor the cartridges were recovered. (T. 3014)

McAlpin invoked his Fifth Amendment protections and did not testify.

Penalty Phase Testimony

McAlpin called numerous family members on his behalf. After originally intending on

calling a mental health expert, Dr. James Rodio of the Court Psychiatric Clinic, McAlpin changed his mind and did not present the doctor or his mitigation report. The parties had comtemplated stipulating to the report, in addition to the relevant records from the Children Family and Services and the Ohio Department of Rehabilitation and Corrections. (T. 4571) McAlpin rejected the stipulations. He chose not to present any of the records for jury consideration. (T. 4572)

McAplin did call numerous family members in the penalty phase and provided an unsworn statement. The family members testified about McAlpin being raised in a broken home. The witnesses included his father, uncle, sister, brother, cousin and a nephew. They informed the jury of McAlpin's rough life and of his losing his drug addicted mother when he was the age of 19. Joseph McAlpin, Sr., not his father but his uncle, testified that McAlpin saw some things growing up that a young boy should not have seen because of the neighborhood and his mother's troubles. These included "gruesome" things. He did not elaborate the specifics of those "things".(T. 4551-52, 4556)

His oldest sister, Kimilah McAlpin, testified that their mother's issues forced her to raise McAlpin and his brothers the first five years of their lives. Their mother was always fighting demons, but raised her family "the best way she knew." It was not right, but it was all she knew. When their mother died, McAlpin became "lost". (T. 4557-58)

McAlpin's brother John explained that McAlpin grew up confused because he did not know the identity of his father. His father, John Mills, who testified, left the family and moved to North Carolina when the kids were young. Brother John went with Mills. Therefore, John and McAlpin were not all that close growing up.

According to John, McAlpin thought his father never loved him, but that was not the case. Regardless, it was a struggle. McAlpin had no guidance growing up. But he would not listen to others at some point because "you ain't the father or mother."(T. 4564-66, 4567) As the result, McAlpin had "normal trouble", which was fighting and running the streets as a kid. (T. 4577) But in retrospect, brother John realized that McAlpin just wanted to be in his shoes. (T. 4567)

His cousin Tunisha Jackson did grow up with McAlpin. She believed that he was verbally and physically abused by his mothers boyfriend. She believed that this affected him in a number of different ways. (T. 4576)

McAlpin made an unsworn statement. He spoke of always wanting his family to get back together. He spoke of the irony of the tragedy causing this to happen. He expressed sympathy for the victims' families, but denied that he was the killer. (T. 4584-86)

The facts will be further discussed in the following Propositions of Law.

ARGUMENT

Proposition of Law I:

> **A capital defendant has no right of self-representation at the unique death procedures of a capital trial, the penalty phase and the death qualification of prospective jurors, which are not part of the traditional "trial" and therefore not encompassed by Faretta v. California, 422 U.S. 806 (1975).**

The right to self-representation is indisputable. Faretta v. California, 422 U.S. 806, 818 (1975). But there are limits to this right, as there are to most other constitutional protections. Importantly, the Supreme Court of the United States has never found that the right to self-

representation has extended to sentencing, and particularly to the sentencing phase of a capital trial. While criminal defendants have a constitutional right to self-representation, "the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer," Martinez v. Court of Appeal, 528 U.S. 152, 162 (2000).

To move successfully to represent himself, a criminal defendant must "voluntarily and intelligently elect to conduct his own defense," and therefore the defendant must first be "made aware of the dangers and disadvantages of self-representation." Faretta, 422 U.S. at 835. For instance, the Court may terminate self-representation if the defendant lacks sufficient mental capacity to conduct the defense without representation. Indiana v. Edwards, 554 U.S. 164, 173-78 (2008) In viewing the spectrum of their decisions, it is clear that the right has not been extended to penalty phase hearings after a conviction of a capital offense. To that end, this includes not only the penalty phase of a capital trial, but also the death-qualification process in voir dire.

While it may appear that this argument conflicts with Faretta, it does not. Courts may allow a capital defendant to represent himself at the traditional trial stage of the proceedings. Counsel must be in charge of the death qualification of prospective jurors, then become standby counsel until the sentencing proceedings, should that be necessary.

McAlpin waived his Sixth Amendment right to have the assistance of counsel for trial. The trial court engaged McAlpin about his right to counsel and his right to represent himself, but there was no mention of any of the unique aspects of a capital trial, or if McAlpin understood he was also waiving assistance for that phase. The trial court should have granted McAlpin's motion

to represent himself at the traditional trial of his case, but required appointed standby counsel to conduct the death qualification of the prospective jurors and the penalty phase of the trial[1] This rule is evident from the language of the language of the Sixth Amendment and Martinez v. Court of Appeal, 528 U.S. at 154, which sets forth the framework for deciding when the right applies.

A. A Defendant's Right to Self-Represent under Faretta is Limited.

The Sixth Amendment expressly affords "the accused" the right "to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. Nearly 200 years after its adoption, a divided Supreme Court announced the Sixth Amendment also "implicitly" protects an accused's right to represent himself at trial. Faretta v. California, 422 U.S. at 807, 814. In its seminal Faretta decision, the Court found support for this implied right in the history of self-representation and structure of the Sixth Amendment, which grants rights to the accused personally. Id. at 818-19. It determining whether to grant the right, the court necessarily engaged in weighing respect for defendant autonomy against the recognition that legal counsel "is essential to assure the defendant a fair trial." The Court struck the balance in favor of autonomy. Id. at 832- 34.

Nevertheless, Faretta recognized limitations on the right to self-represent. It explained courts may deny the right when used to "abuse the dignity of the courtroom" or not "comply with

[1]McAlpin does not concede that his waiver of trial counsel was valid or knowingly intelligently made, but as evidence outside the record is necessary to establish this claim, it may not be raised on direct appeal without causing res judicata if he chooses to file a postconviction appeal pursuant to R.C 2953.21. Generally, if counsel's ineffectiveness is apparent from the appellate record then you must raise that issue on direct appeal. Conversely, if the ineffectiveness claim relies on evidence outside the record, the claim is not one that could properly be raised on direct appeal and must be raised in post conviction proceedings. See, State v. Pankey, 68 Ohio St.2d 58 (1981); State v. Jackson, 64 Ohio St.2d 107 (1980), syllabus. If there is evidence both on and off the record supporting the claim, the proper procedure is a petition to vacate. State v. Norman Smith, 17 Ohio St.3d 98 (1985).

relevant rules of procedural and substantive law"; and required a knowing, intelligent, and voluntary waiver of counsel following advice on "the dangers and disadvantages of self-representation." Id. at 834-36 n.46.

In a trio of later decisions, the Court endorsed additional limits on the implied Faretta right, emphasizing it "is not absolute." Indiana v. Edwards, 554 U.S. 164, 171 (2008); see Martinez v. Court of Appeal, 528 U.S. at 154 (2000); McKaskle v. Wiggins, 465 U.S. 168 (1984). In McKaskle, the Court approved appointment of, and active participation by, standby counsel over defendant objection. In Martinez, supra at 154, the Court confined exercise of Faretta Rights to the "trial" stage of proceedings. And in Edwards, it allowed courts to force counsel on defendants who are competent to stand trial but lack the mental capacity to conduct proceedings alone. The Court also stressed the "strong presumption against waiver of the right to counsel," and endorsed denying such waivers when not timely made. Martinez, at 161-62 (quotations omitted); see United States v. Singleton, 107 F.3d 1091, 1096 (4th Cir.1997) (explaining this Court favors counsel over self-representation because the former, "if denied, leaves the average defendant helpless" (quotations omitted)).

In each case, the Court acknowledged tension between defendant autonomy and counsel's role in ensuring a fair trial, and at times questioned the balance Faretta reached. Edwards, 554 U.S. at 176-79; Martinez, 528 U.S. at 160-61 & n.9; McKaskle, 465 U.S. at 177-78, 183-84.

B. The Supreme Court Holds a Defendant Need Not Waive Counsel to Control His Defense.

In McCoy v. Louisiana, 138 S.Ct. 1500 (2018), the Court harmonized the two interests

somewhat, relying on the Sixth Amendment's guarantee of attorney "assistance" to hold a defendant need not waive counsel to be master of his defense. McCoy explained, "[t]he choice is not all or nothing," and a defendant may enjoy the benefits of counseled representation while simultaneously exercising his "[a]utonomy to decide . . . the objective of the defense." Id. at 1508. Though counsel—"an assistant"—retains authority to make "[t]rial management" decisions, he cannot "negate [defendant] autonomy by overriding [a] desired defense objective." Id. at 1508-09.

Because the the trial court did not engage with McAlpin about his ability to control choices and strategies at trial, and particularly the penalty phase, it may be that McAlpin believed waiver of counsel was his only option. At no point did the court advise him that under the Constitution, a defendant who desires counsel's services "need not surrender control entirely" to "affirm [his] dignity and autonomy" interests. Rather, he retains control over "the objective of the defense," which counsel "must abide by" and "not override." McCoy, 138 S.Ct. at 1508-09 (quotations omitted). In essence, McAlpin knowingly waived his right to counsel for the traditional "trial" of his guilt or non-guilt, but non for the death penalty procedures of death-qualification or sentencing. This is, not ironically, consistent with the concept that he could not waive counsel for those unique capital proceedings.

B. Martinez establishes the test for when a defendant may self-represent

In Martinez v. Court of Appeal, 528 at 154-64, the Court held the right to self-represent does not extend to appeals. To reach that conclusion, the Court considered three factors underlying Faretta's contrary holding for trials. Id. at 156.

First, Faretta "examined historical evidence identifying a right of self-representation that

had been protected by federal and state law since the beginning of our Nation," which supported a pro-se right at trial. *See* Faretta, 422 U.S. at 812-17. Martinez, 528 U.S. at 159, by contrast, found no historical justification for self-representing on appeal because "the right of appeal itself is of relatively recent origin" and was virtually unheard-of when the Sixth Amendment was enacted.

Second, Faretta "interpreted the structure of the Sixth Amendment, in the light of its English and colonial background," Martinez, at 156, and found in it "an implied right" to self-represent. Faretta, at 819, n.15. The combination of enumerated rights—to counsel, notice, confrontation, and compulsory process—suggested this right, because each was granted personally to the accused. Id. at 818-19. But the amendment's structure and history could not support the same right on appeal because its drafters did not recognize the right to appeal. Martinez, 528 U.S. at 159-60.

Third, Faretta "grounded [the right to self-representation] in part in a respect for individual autonomy." Id. at 160 (citing Faretta, 422 U.S. at 834). Martinez found that consideration also applied on appeal. But because the first two factors pointed against extending Faretta to appeal, it concluded such a right, should it exist to preserve autonomy, must be grounded in due process. Id. at 160-61. The Court rejected that possibility, though, because counsel invariably will perform better than a *pro se* appellant, self-representation is not "wise, desirable, or efficient," and counseled representation "is the standard, not the exception." Id.

That these factors pointed to different results in Martinez did not trouble the Court because Faretta itself "recognized[] the right to self-representation is not absolute," and "[e]ven at the trial level," the "government's interest in ensuring the integrity and efficiency of the

trial at times outweighs the defendant's interest in acting as his own lawyer." Id. at 161-62. Following conviction, "the balance between the two competing interests surely tips in favor of the State," for "[t]he status of the accused defendant, who retains a presumption of innocence throughout the trial process, changes dramatically when a jury returns a guilty verdict." Id. The defendant's "autonomy interests" become "less compelling," while "the overriding state interest in the fair and efficient administration of justice remains as strong as" at trial. Id. at 163.

C. Martinez confirms there is no penalty-phase right to self-representation Martinez establishes there is no right to waive counsel at capital penalty.

First, like the right to appeal, the right to a penalty hearing and the death qualification process, "is of relatively recent origin." Id. at 159. Whereas the appeal right first arose in the late nineteenth century, penalty and death qualification proceedings are an invention of the late twentieth. see Id. See Gregg v. Georgia, 428 U.S. 153, 190 - 95 (1976). Like Martinez but unlike Faretta, "the historical evidence does not provide any support for an affirmative constitutional right to" self-representation at penalty. Martinez, at 159.

Second, because there was no such thing as a capital penalty phase when the Sixth Amendment was adopted, this Court cannot infer a right to self-represent from the structure or origins of its text. The contrary is true, defendants historically have had little say about the evidence presented at sentencing. Payne v. Tennessee, 501 U.S. 808, 821 (1991)(recognizing courts "may appropriately conduct an inquiry broad in scope, largely unlimited" as to kind or source of evidence); Williams v. New York, 337 U.S. 241, 246 (1949)(describing historical exercise of "wide discretion in the sources and types of evidence used" at sentencing).

Indeed, the Sixth Amendment's text—that in "all criminal prosecutions" an "accused" shall have counsel's assistance "for his defence"—excludes penalty proceedings because they are sentencing hearings, not "prosecutions." Cf. State v. McGill, 213 Ariz. 147, 159 (2006) (holding "penalty phase is not a criminal prosecution"). The defendant is no longer "the accused"; he has been convicted. Martinez, 528 U.S. at 162- 63; Betterman v. Montana, 136 S.Ct. 1609, 1614 (2016)("At the founding, 'accused' described a status preceding 'convicted.'"). And, rather than presenting a "defence," he must establish mitigating factors that jurors weigh in making "a unique, individualized, and reasoned moral judgment." Lockett v. Ohio, 438 U.S. 586, 604 (1978). This reading is consistent with the Sixth Amendment's structure, listing other trial rights that do not apply at capital sentencing. United States v. Umaña, 750 F.3d 320, 346-48 (4th Cir.2014)(finding no confrontation right at penalty); cf. Betterman, 136 S.Ct. 1609 (finding no speedy trial right at sentencing).

D. Reasons why self-representation does not extend to penalty phase of capital case.

Because the first and second factors do not support a historical or structural right to self-representation at penalty, any limited autonomy right that survives conviction must be grounded in due process, not the Sixth Amendment. The reasons that precluded a due-process right on appeal apply with greater force at capital sentencing. The public's interest in fairness, efficiency, and reliability is at its apex, along with the risk self-representation will thwart those goals. Sumner v. Shuman, 483 U.S. 66, 72 (1987) (describing "heightened reliability" requirement in capital cases). Thus, allowing capital defendants to self-represent at penalty and voir dire, undermines rather than furthers, due process.

There are numerous reasons why a defendant "does not have a constitutional right to

self-representation at the penalty phase" of a capital case. Relying on Martinez, courts have distinguished sentencing as a proceeding where defendants historically "do not have the prerogative to select their sentence" and "judges are expected to gather information from a wide range of sources." Id. at 922.

The constitutional concerns of a capital sentencing, especially reliability, outweigh a defendant's autonomy rights. Id. at 923-30. The Supreme Court of the United States long ago recognized that the penalty phase of a death penalty trial is where a defendant is most in need of the assistance of counsel. In Ferguson v. Georgia, 365 U.S. 570 (1960), the United States Supreme Court found that restricting the ability of counsel to assist the defendant in making an unsworn statement violated the Fourteenth Amendment. Specifically, the Court found that the specific Georgia statute could not deny the defendant "the right to have his counsel question him to elicit his statement." Id. 595.

Ferguson relied upon the rational Powell v. Alabama, 287 U.S. 45 (1932). The Ferguson Court noted at p.594 that:

> The tensions of trial for an accused with life or liberty at stake might alone render him utterly unfit to give his explanation properly and completely. Left without the "guiding hand of counsel," (Powell v Alabama, p.69), he may fail properly to introduce, or to introduce at all, what may be a perfect defense.

Further, a capital defendant's right to penalty phase counsel initially was rooted in due process, not the Sixth Amendment. Gardner v. Florida, 430 U.S. 349, 358 (1977). Later cases extended the Sixth Amendment right to capital sentencing, even that extension was premised on due process. Strickland v. Washington, 466 U.S. 668, 686-67 (1984). The Sixth Amendment does not support an implicit right to self-represent at penalty. However, capital

defendants still have a right to counsel at that stage, just as criminal appellants are entitled to counsel on due process and equal protection grounds post-Martinez. Anders v. California, 386 U.S. 738 (1967).

There is no implied right to self-representation at capital sentencing or the death qualification aspects of a capital trial. These errors are structural, requiring reversal of McAlpin's convictions and sentence. McCoy, 138 S.Ct. at 1511.

Independent Ohio Constitutional Protections

This Court need not wait for federal precent. Ohio Constitution Article I, Section 5, provides for the right to trial by jury and reads as follows: "The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."

Similarly, Ohio Constitution Article I, Section 10 provides for the procedural and trial rights of criminal Defendants and reads in relevant part: "Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel . . ."

This Court has long recognized the principle of the primacy of the Ohio Constitutional protection in Direct Plumbing Supply Company v. City of Dayton, 138 Ohio 540 (1941). This Court that: "In dealing with the validity of an Ohio legislative enactment, state or municipal, it is

well to recall that, against the invasion of government upon their fundamental individual rights, the people of Ohio have been wont in the past to rely for their protection upon guaranties written into both the state and federal constitution" and importantly concluded that:

> If, in the midst of current trends toward regimentation of persons and property, this long history of parallelism (between state and federal constitutional rights) seems threatened by a narrowing federal interpretation of federal guaranties, it is well to remember that Ohio is a sovereign state and that the fundamental guaranties of the Ohio Bill of Rights have undiminished vitality.

Id., 545.

In State v. Robinette, 80 Ohio St.3d 234 (1997), this Court asserted that the Federal Constitution was the "primary mechanism to safeguard an individual's rights." From this assertion, the court drew the further proposition that "where the state and federal constitutional provisions are similar and there is no persuasive reason for a differing interpretation is presented, this court has determined that protections afforded by Ohio's Constitution are coextensive with those provided by the United States Constitution." Id., 238. This Court then noted that state courts may rely on their own constitutions to provide broader protection for individual rights, independent of protections afforded by the United States Constitution. *See* Arnold v. Cleveland, 67 Ohio St. 3d 35 (1993).

This is such an instance. In every capital conviction this Court exercises it independent weighing required by the Ohio Legislature to ensure the reliability and appropriatness of the sentence of death. The requirement of counsel for death penalty death qualification and the penalty phase is a big step in ensuring this goal is meet, at least as much as is humanly possible.

Proposition of Law Two:

> **If a defendant has elected to self-represent pursant to Faretta v. California, 422 U.S. 806 (1975), the interference of standby counsel with the defendant's trial preparation and strategy against the will of the defendant is a denial of the Sixth Amendment right of self-representation and therefore, constitutes structural error. McCoy v. Louisiana, 138 S.Ct. 1500 (2018)**

The right to self-representation is firmly established by the Supreme Court of the United States. Faretta v. California, 422 U.S. 806, 818 (1975). The accused must be allowed to conduct the organization and content of the defense. McKaskle v. Wiggins, 465 U.S. 168, 174 (1984). Once a defendant has knowingly and intelligently waived his right to counsel, he or she must be allowed to make and file motions, to argue points of law, to participate in voir dire, to question witnesses and to address the court and the jury at appropriate points in the trial.

In the present case, trial counsel interferred with McAlpin's right to make these important decisions. Specifically, standby counsel determined that a defense expert report would not be beneficial to McAlpin without allowing McAlpin to make the choice. Counsel failed to instruct the expert, who had been court appointed to the defense and had reviewed the DNA issues in the case, that all decisions regarding the DNA were that of McAlpin, not standby counsel. Left in the dark about the nature of the proceedings, the expert refused to talk to McAlpin and did not come to go over her finding with him in the jail. Because McAlpin was in jail at the time, his ability to meet with the expert or even consult with her via the telephone was already limited. Standby counsel apparently instructed the expert not to prepare a report after learning of the results of her findings. He failed to notify or consult with McAlpin about the decision.

It was not necessarily McAlpin's intention call the expert as a witness, but he wanted to

use the report for cross-examination purposes of the prosecution's DNA expert. Because standby counsel instructed the expert not to prepare a report or explain to the defense expert that McAlpin made the decisions in relation to her report, he was unable to educate himself on the issue.

Even if standby counsel's decision was an objectively reasonable strategy, the decision was not his to make. The interference would have constituted structural error even if McAlpin did not waive his right to assistance of counsel. McCoy v. Louisiana, 138 S.Ct. 1500 (2018). Therefore, this is improper interference with McAlpin's ability to exercise control over his own defense.

Present Case

After the trial, McAlpin filed a motion for a new trial. He addressed the trial court to complain about the conduct of standby counsel. He had been asking counsel for a report from a defense DNA expert during trial and also after trial. Standby counsel had informed McAlpin that he did not need the DNA expert because it would be harmful to the defense. McAlpin was also informed (inaccurately) that if he received a report, the prosecutor would automatically receive it and it would have "played bad in my favor." (T. 4593)

After trial, McAlpin read through the testimony of the state's DNA expert, Laura Evans. He believed that there were some problems with how the determination of the source of the DNA was conducted and with the accuracy of the conclusions from that process. He did not believe that the conclusion that the DNA was a "match" to his was accurate. McAlpin requested a report from his expert, Carrie Roland. He was told by standby counsel that he did not need a report as it was harmful. It was the advice of counsel that "we're not going to let them know that we had these DNA profiling." McAlpin told the trial judge that he thought "it was kind of odd and

weird." (T. 4594-95)

McAlpin did not think what standby counsel advised him about the expert and the report made sense. Standby counsel said he would provide it to him for a new trial hearing that was scheduled. Counsel failed to provide the report to McAlpin.

Standby counsel did arrange for a phone call with the appointed defense expert, Ms. Roland. McAlpin had believed another expert had been appointed pursuant to his original team of defense counsel. (T. 4596) It had not been explained to him that Ms. Roland worked for the person originally appointed, Dr. Crane. He expressed frustration because he was not able to make contact with his expert. (T. 4605)

Eventually, after the first phase verdict, both standby counsel came to the jail and made a call with McAlpin to Ms. Roland. After the Roland phone call, McAlpin wanted to talk to her without standby counsel being present. When he called, Ms. Roland purportedly informed him that she had not been paid, and whoever hired her did not want to pay her for a report. Therefore, she had not prepared a report. (T. 4597, 4605)

On May 15, 2019, on a three-way call with his family, McAlpin asked counsel why he had not receive a report. Counsel responded that he did not need one. McAlpin complained to the judge that the lack of access to the report disallowed him from cross-examining the state DNA expert. (T.4598)

Later, McAlpin called Ms. Roland. He asked when she had provided the reports to standby counsel. Ms. Roland refused to talk to McAlpin without permission of standby counsel. Roland stated that she was only allowed to talk to the person who paid her. Clearly standby counsel had not explained that McAlpin was representing himself and that he, standby counsel,

controlled the issue. Roland told McAlpin that said she could not talk to him without counsel present. (T. 4599) Counsel denied that he advised Roland not to talk to McAlpin without his presence. (T. 4605)

Whether counsel instructed the defense DNA expert not to talk to McAlpin is largely irrelevant. It is clear that counsel failed to explain to the defense expert that she needed to talk to McAlpin, that McAlpin was in charge of his own defense, and that McAlpin was the only person who could make decisions on the use of the DNA report, or even if a report should be drafted.

Whether that report would have been beneficial or helpful is irrelevant. Once standby counsel has interferred with a material aspect of self-representation without input of the defendant, structural error has occurred. The appointment of standby counsel is appropriate, particularly in a capital case. Standby counsel's role is to assist the defendant with basic courtroom mechanics. McKaskle, 465 U.S. at 183. This includes procedural and even evidentiary rules. However, if there is a dispute between the defendant in a strategical situation, the defendant's right to self-representation is satisfied "if the pro se defendant is allowed to address the court freely on his own behalf and if disagreements between counsel and the pro se defendant are resolved in the defendant's favor whenever the matter is one that would normally be left to the discretion of counsel." Id. 178 (footnote omitted)

Here, the dispute was not resolved in the defendant's favor. Instead, counsel made the decision without even consulting McAlpin. In McCoy v. Louisiana, supra, the Court unquivocally determined that the Sixth Amendment's guarantee of attorney "assistance" is just that, assistance and not control. It is the defendant who is to be master of his defense. McCoy explained, "[t]he choice is not all or nothing," and a defendant may enjoy the benefits of

counseled representation while simultaneously exercising his "[a]utonomy to decide . . . the objective of the defense." Id. at 1508. Though counsel—"an assistant"—retains authority to make "[t]rial management" decisions, he cannot "negate [defendant] autonomy by overriding [a] desired defense objective." Id. at 1508-09.

Because the the trial court did not engage with McAlpin about his ability to control choices and strategies at trial, and particularly the penatly phase, it may be that McAlpin believed waiver of counsel was his only option. At no point did the court advise him that under the constitution, a defendant who desires counsel's services "need not surrender control entirely" to "affirm [his] dignity and autonomy" interests. Rather, he retains control over "the objective of the defense," which counsel "must abide by" and "not override." McCoy, 138 S.Ct. at 1508-09 (quotations omitted).

The point is, if counsel's taking control of an material aspect of the defendant's case constitutes structural error even if counsel were appointed or retained, surely doing the same as standby counsel does also. McCoy would suggest that counsel's actions of making decisions without consult with the defendant would be contrary to the Sixth Amendment. Making such important strategical decisions as standby counsel is more intrusive and a violation of Faretta. The trial court erred by not granting the motion for mistrial.

Proposition of Law III

> **In a charge of Aggravated Murder, R.C. §2903.01(A) and as contained in the death specification of R.C. §2929.04(A)(7), the fact that fatal gunshots are fired from close range establishes the element of purposeful, but not prior calculation and design. The manner of the homicide is on only one factor. There must be evidence establishing the "design" in addition to the formation of the intent to kill in well in advance of the commission of the offense.**

The standard of review for the determination of the existence of the element of prior calculation and design challenge was summed in State v. Jackson (2001) 92 Ohio St.3d 436. "There is no bright-line test to determine whether prior calculation and design is present. State v. Taylor (1997), 78 Ohio St.3d 15, 20. Instead, each case must be decided on a case-by-case basis. Id." The review here reveals that the prosecution failed to meet its burden.

The evidence is insufficient to prove that the murders of Trina Tomola and Michael Kuznik were committed with prior calculation and design. Viewed in a light most favorable to the state, the evidence establishes that McAlpin, Andrew Keener, and Jerome Diggs planned to steal cars from the lot of Mr. Cars to obtain car titles, car keys along with the vehicles for later sale for profit. (T. 3549) There is no evidence of a discussion of even the possibility of a homicide. (T. 3551) Co-defendant Keener did testify that McAlpin possessed a gun, but this is entirely consistent with a plan to commit an aggravated robbery. (T. 3561)

There is little evidence as to conduction of the homicides. The order of the offense can only be speculation. The fact that the shots were fired from close proximity establishes an element of purposeful, but not prior calculation and design. There may have been an argument, a struggle, or simply a change in intend based upon a perceived lack of cooperation which resulted

in a spur of the moment shooting.

There is evidence consistent with a momentary decision. For instance, the offenses occurred in the early evening hours, approximately 5:30 p.m., when people in the neighborhood would be returning home from work or going out to eat. There was a risk that people may be walking on the sidewalk outside of the establishment. There was no attempt to conceal or hide the bodies after the killings. There was no pre-planned blocking of security cameras, cutting of wires, or lookouts planted. There was no evidence that McAlpin knew the victims personally, let alone had any prior animosity for them. Therefore, the evidence establishes only that there was very little planning for the aggravated robbery, let alone the homicides.

The elements of "prior calculation" and "design" are distinct from each other. The state establish the necessary elements to a conviction of aggravated murder under R.C. §2903.01, the prosecution must prove both "prior calculation" and "design." The evidence here does not sufficiently support either element.

Sufficiency Standard

Under the Due Process Clause of the Fourteenth Amendment, a defendant in a criminal case is protected against conviction except upon proof beyond a reasonable doubt of every element necessary to constitute the crime with which he is charged. In re Winship, 397 U.S. 358, 364 (1970); Davis v. United States, 160 U.S. 469, 487-88 (1895). The United States Supreme Court set forth the standard for sufficiency review in Jackson v. Virginia, 443 U.S. 307 (1979). The reviewing court is to view all the evidence in the light most favorable to the prosecution. In doing so, the court must then determine whether any reasonable trier of fact could find the essential elements of the crime proven beyond a reasonable doubt. The state must prove each and

every element of the offense charged by evidence beyond a reasonable doubt in order to sustain a conviction. State v. Jenks (1991), 61 Ohio St. 3d 259. Furthermore, "circumstantial evidence alone, if substantial and competent, may support a verdict and need not remove every reasonable hypothesis except that of guilt." United States v. Talley, 194 F.3d 758, 765 (6th Cir. 1999).

However, if the judgment is not supported by "substantial and competent evidence" upon the record as a whole, the judgment must be reversed. *See* United States v. Khalil, 279 F.3d 358, 368 (6th Cir. 2002). The Supreme Court has held that "mere modicum" of evidence is not sufficient to support a finding of guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. at 320 (1979)

Prior Calculation and Design Requires the Presence of Two Distinct Elements

This Court recently clarified that "the elements of purpose and of prior calculation and design are distinct, and the state must prove both to support a conviction of aggravated murder under R.C. §2903.01." State v. Walker, 150 Ohio St.3d 409, 2016-Ohio-409 when it amended the aggravated-murder statute, R.C. §2903.01(A), to provide that "[n]o person shall purposely, and with prior calculation and design, cause the death of another," the General Assembly explicitly rejected the notion that brief premeditation prior to a murder could establish prior calculation and design:

> [R.C. 2903.01(A) employs] the phrase, "prior calculation and design," to indicate an act of studied care in planning or analyzing the means of the crime, as well as a scheme compassing the death of the victim. Neither the degree of care nor the length of time the offender takes to ponder the crime beforehand are critical factors in themselves, but they must be sufficient to meet the proposed test of "prior calculation and design." In this context, momentary deliberation is considered insufficient to constitute a studied scheme to kill.

(Emphasis added.) Ohio Legislative Service Commission, Proposed Ohio Criminal Code: Final

Report of the Technical Committee to Study Ohio Criminal Laws and Procedures, at 71 (1971). *See also* State v. Taylor, 78 Ohio St. 3d at 18-19, 1997-Ohio-243.

The phrase "prior calculation and design" by its own terms suggests advance reasoning to formulate the purpose to kill. Evidence of an act committed on the spur of the moment or after momentary consideration is not evidence of a premeditated decision or a studied consideration of the method and the means to cause a death. The General Assembly has determined that it is a greater offense to premeditate or to plan ahead to purposely kill someone. All prior-calculation-and-design offenses will necessarily include purposeful homicides; not all purposeful homicides have an element of prior calculation and design. Walker at P. 18.

In Walker, this Court noted that there was no evidence that Walker and his friends devised a scheme to shoot Shannon and then carried it out. The plan that existed among the members of Walker's group that evening was a plan to commit felonious assault, not murder. Id. P.24. Similarly, the plan here was to commit a robbery. In Walker, the evidence showed that intent to commit the felonious assault escalated into a purposeful killing. The evidence in McAlpin is not clear as to what happened in the Mr. Cars offices, but the absence of any clear evidence cannot allow speculation or hypothecals.

Courts have struggled with the previously blurred distinction between purposeful and prior calculation and design. To the end, Walker is consistent with this Court's earlier observation in State v. Coley, 93 Ohio St.3d 253 (2001). In Coley, the Court recognized the importance of the difference.

> Yet " 'prior calculation and design' is a more stringent element than the 'deliberate and premeditated malice' * * * required under prior law." State v. Cotton (1978), 56 Ohio St.2d 8, 10 O.O.3d 4, 381 N.E.2d 190, paragraph one of the syllabus.

"Instantaneous deliberation is not sufficient * * *." Id., paragraph two of the syllabus. " '[P]rior calculation and design' requires 'a scheme designed to implement the calculated decision to kill.' " State v. D'Ambrosio (1993), 67 Ohio St.3d 185, 196, 616 N.E.2d 909, 918, quoting State v. Cotton, 56 Ohio St.2d at 11, 10 O.O.3d at 6, 381 N.E.2d at 193.

In view of this Court's now firmly established precedent, the evidence in McAlpin's case did not prove that the homicides were committed with prior calculation and design rather than purposeful.

Proposition of Law IV

A prosepective juror who is unable to promise "100%" that he can sign a death verdict in a properly proven case but is otherwise able to follow the law is substantially impaired warranting a dismissal for cause persuant to Wainwright v. Witt, 469 U.S. 412 (1985).

A juror who reveals during the death qualification of a capital voir dire that he "leans" toward life is not necessarily substantially impaired in his ability to sit as a capital juror. No juror can commit one hundred percent that their life experiences and moral code may not have some influence on how they assess evidence. In fact, it is expected. The question is not whether a juror can promise they will sign a verdict "one hundred percent", but whether that juror can set aside any bias they might have and follow the law, which is, to consider and give effect to the factors that he must weigh, not whether he will find a particular sentencing verdict. Abdul-Kabir v. Quarterman, 550 U.S. 233, 246 (2007)

In the present case, the trial court excused Juror 30 over defense objections based upon his pre-instruction "lean" for a life sentence rather than a death sentence. Juror 30 had some hestitation about the death penalty when questioned by the judge, but even though he was

Catholic, and he acknowledged that the church had an moral stance on the subject, he thought he could objectively follow the law as to the sentencing options. Because he had never been faced with that decision before, "I don't know how I would feel." (T. 960) Even if he felt badly, that did not mean he could not do it.

Upon questioning from the prosecutor, Jury 30 conceded that he might struggle with the concept of signing a death verdict. It was something he struggled with "both ways." (T. 965) The juror noted that he would have no problem with the first phase of trial but the punishment aspect would bother him. (Id.) He said he might let his religion get in the way, but it was not clear if he meant it might have some influence on how he weighed the evidence, and not that he would not follow the law. As the prosecutor phrased it, he "might start out with your finger on the scale for the mitigation *instead* the agravation . ." (T. 969) (emphasis added)

The problem with this is that the prosecutor instructed the juror that if he did not start with his finger favoring aggravation, that would be in contravention of the law. This is the clear implication of the word "instead". This set the stage for Juror 30's later answers. Even at that, the juror said it would only make a "slight difference." When asked if he could sign a death verdict, the juror required that he was not one hundred percent certain that he could. He thought a sentence of death would be a difficult decision for anyone. (T. 970) He could not commit to being open to signing a death verdict. But at no time did the juror say that he would not follow the law, or that he would not sign a death verdict, just that he could not commit to it with one hundred percent certainty without hearing the evidence. He would have "some reservation." (T. 972)

Juror 30 also acknowledged the other "side of the coin", that is, "I do believe that, you

know, punishment should follow the crime, you know. And justice for the victims." He believed that he was a little "wishy washy" on the subject. (T. 974) He explained that "Well, I think like I said in speaking to the prosecutor, you know, whether - - could I, if in my mind believe that the aggravating circumstances outweigh the mitigating circumstances, obviously by law, I would have to, but how I arrived to that, I don't know. You know, it's a subjective." (T. 977)

The fact that Juror 30 was predisposed to favor life over death does not calculate to being substantially impaired in his ability to follow the law. Jurors all bring in their values and life experiences to a jury. These experience naturally affect how they would place weight on mitigation and aggravation factors. The issue is not whether the juror tended to favor or disfavor the death penalty, but whether that bias or lean would affect the jurors ability to follow the law, not if the bais or lean would cause the juror to give more or less weight to a factor, which is totally subjective to the individual prospective juror. The trial court granted a state motion for cause. (T. 983)

Death Qualification Standards

The history of selecting capital jurors commenced with the seminal case of Witherspoon v. Illinois, 391 U.S. 510 (1968). In Witherspoon's trial, Illinois improperly excluded all prospective jurors who expressed any concerns over the death penalty, which then resulted in a jury "uncommonly willing to condemn a man to die." Id. at 521. The Court suggested that the focus of questioning during voir dire should be to determine if jurors are willing to consider all penalties that may be applicable even if they have conscientious scruples against the death penalty. Id. at 522, n.21.

Witherspoon recognized that the Sixth Amendment's guarantee of an impartial jury

confers on capital defendants the right to a jury not "uncommonly willing to condemn a man to die." 391 U.S., at 521. But the Court with equal clarity has acknowledged the State's "strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes." Uttecht v. Brown, 551 U.S. 1, 9 (2007). To ensure the proper balance between these two interests, only "a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause." Ibid. As the Court explained in Wainwright v. Witt, 469 U.S. 412 (1984) a juror may be excused for cause "where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." Witt, 469 U.S., at 425-426. *See also*, Adams v. Texas, 448 U.S. 38 (1980).

In White v. Wheeler, 136 S.Ct. 456, 459 (2015), the Supreme Court allowed the dismissal for cause of a juror who was not absolutely certain whether he could realistically consider the death penalty as a sentence. It is a similar situation as McAlpin, with an important difference. In White, the prospective juror said that it was an accurate assessment that he could not consider death. Juror 30 in McAlpin never made such a statement.

In White, during voir dire, Juror 638 gave equivocal and inconsistent answers when questioned about whether he could consider voting to impose the death penalty. In response to the judge's questions about his personal beliefs on the death penalty, Juror 638 said, "I'm not sure that I have formed an opinion one way or the other. I believe there are arguments on both sides of the—of it." When asked by the prosecution about his ability to consider all available penalties, Juror 638 noted he had "never been confronted with that situation in a real-life sense of having to make that kind of determination." "So it's difficult for me," he explained, "to judge

how I would I guess act, uh." The prosecution sought to clarify Juror 638's answer, asking if the juror meant he was "not absolutely certain whether [he] could realistically consider" the death penalty. Juror 638 replied, "I think that would be the most accurate way I could answer your question." Id.

During defense counsel's examination, Juror 638 described himself as "a bit more contemplative on the issue of taking a life and, uh, whether or not we have the right to take that life." Later, however, he expressed his belief that he could consider all the penalty options.

The prosecution moved to strike Juror 638 for cause based on his inconsistent replies, as illustrated by his statement that he was not absolutely certain he could realistically consider the death penalty. The defense opposed the motion, arguing that Juror 638's answers indicated his ability to consider all the penalty options, despite having some reservations about the death penalty. Although originally denying a prosecution motion to strike, the judge changed her mind because when the judge reviewed the juror's entire testimony, the prosecution concluded with asking the juror, "Would it be accurate to say that you couldn't, couldn't consider the entire range?" The juror responded, "I think that would be pretty accurate."

White was a federal habeas case, meaning that the federal court is required to give defererence to the state court conclusions. The federal appellate court had granted the writ because it did not believe that the totality of the voir dire exchange established that the juror was substantially impaired. Under 28 U.S.C. §2254(d)(1), "'a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" White v. Woodall, 572 U.S. 415, 134 S. Ct. 1697, 1702, (2014)

(*quoting* Harrington v. Richter, 562 U.S. 86, 103 (2011). The Supreme Court found that because of the deference due, the appellate court erred.

But even under that standard of deference, the juror in White had actually stated that he would not consider the entire range of the sentencing possibilities. Because of this statement, the Court concluded that the trial court had a reasonable basis for striking the juror. In McAlpin, as addressed above, the juror said the opposite. First that he could, that it would be difficult, and that he could not be one hundred percent certain that his moral code would not have some affect on how he considered the weighing factors. He could not estimate what percentage of certainty that he would when asked by the prosecutor, just that he had "some reservation". (T. 970, 972)

The Witt standard is satisfied when a juror indicates an unwillingness to set aside personal objections to the death penalty and follow the law as instructed at sentencing. This question was never specifically presented to Juror 30. The prosecutor instead confused the influence of one's life experience on weight assessment of the factors as opposed to one's ability to follow the law and fairly consider and give effect to all factors before assigning weight to any factor. Juror 30 was never asked this question or had the law adequately explained to him. It was not explained that he may have a bias as long as he can set it aside and follow that law, which he understood, and assigned what weight he subjectively thought it deserved.

The evidence does not establish that he was substantially impaired in his abilty to follow the law in either the trial or penalty phases of a capital trial. The judge dismissed Juror 30 for cause in error. (T. 983)

Proposition of Law V

The State's pattern of exercising peremptory challenges to dismiss woman during jury selection violates the Equal Protection Clause of the Fourteenth Amendment.

In McAlpin's case, the prosecutor passed on one of their six alloted peremptory challenges. On four of the five exercised challenges, they excused prosective jurors that were women. Thus, there existed a prima facie case that the state was using gender as a basis for these challenges. McAlpin, trying the case pro se, failed to object to these dismissals. However, as the right to sit as a juror is that of the juror and not of either party, it was incumbent upon the trial judge to protect the interests of the juror.

Women are a Protected Class for Jury Selection

The use of peremptory challenges to exclude persons from the jury based on their race or gender voilates the Equal Protection Clause of the Fourteeth Amendment. This principle was established in Batson v. Kentucky, 476 U.S. 79, 96-98 (1986). Although Batson primarily addresses the use of peremptory challenges on prospective jurors of color, this protection includes those of cognizable group. This issue is based upon the juror's right to serve and is distinct for the right of the defendant to have the jury consist of a cross-section of the community. Duren v. Missouri, 439 U.S. 357, 364-65 (1979).

Since Batson, the Court has loosened the requirements for establishing a prima facie case in three respects:

1) A criminal defendant may object to race-based peremptory challenges on equal protection grounds regardless of whether the defendant and the excluded juror are of the same race. Powers v. Ohio, 499 U.S. 400, 415 (1991). Thus it does not matter if McAlpin is a black male and the excluded jurors were white women;

2) Because it is a prospective juror's right to sit, the prosecution may challenge the defendant's use of a peremptory challenge on equal protection grounds. Georgia v. McCollum, 505 U.S. 42, 55-56 (1992), and;

3) Either party may challenge gender-based exclusion. J.E.B. v. Alabama, ex rel. T.B., 511 U.S. 127, 129 (1994).

It is the latter respect that applies here as the prosecutor improperly utilized four of the five peremptory challenges against women. The Supreme Court in J.E. B. V. Alabama, supra, explained the harm of using gender based peremptory challenges. The Court explained that discrimination in jury selection, whether based on race or on gender, "causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process." Id., The litigants are harmed by the risk that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings. See Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991) (discrimination in the courtroom "raises serious questions as to the fairness of the proceedings conducted there"). The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders.

The Court further explained that when state actors exercise peremptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women. Because these stereotypes have wreaked injustice in so many other spheres of our country's public life, active discrimination by litigants on the basis of gender during jury selection "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law." Powers v. Ohio, 499 U.S. 400, 412 (1991). Discriminatory use of peremptory challenges may

create the impression that the judicial system has acquiesced in suppressing full participation by one gender or that the "deck has been stacked" in favor of one side. See Id., at 413 ("The verdict will not be accepted or understood [as fair] if the jury is chosen by unlawful means at the outset").

The unfairness here is based upon the possible belief by the prosecution that women, as a whole, may not be as eager to invoke the death penalty as men. However, it is understood that this is unnecessary speculation, as the Court's decisions since J.E.B v. Alabama have emphasized that individual jurors themselves have a right to nondiscriminatory jury selection. Georgia v. McCollum, supra. Striking individual jurors on the assumption that they hold particular views simply because of their gender is "practically a brand upon them, affixed by the law, an assertion of their inferiority." Strauder v. West Virginia, 100 U.S. 303, at 308 (1879). It denigrates the dignity of the excluded juror, and, for a woman, reinvokes a history of exclusion from political participation. The message it sends to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than gender, are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree. J.E.B. v. Alabama.

State Peremptory Challenges in Present Case

Four of the five state exercised peremptory challenges in the present case were invoked against women. The state exercised its first peremptory on Juror 6, a woman. (T. 2211) The state passed on its second peremptory challenge. (T. 2212) The state exercised its third peremptory challenge on juror 54, a woman. (T. 2254) Its fourth peremptory was exercised on a woman. (T. 2256) The fifth state peremptory was exercised on a male, but the sixth was used to dismiss a

woman. (T. 2273)

There was no neutral explantion for the pattern of the exercising of peremptorary challenges on women.

Proposition of Law VI

> **The introduction of testimony by the state of victim-impact testimony having no relevance to establishing the guilt of the defendant, but instead introduced for the sole purpose of raising antipathy against the defendant, is prohibited as it tends to encourage a verdict on matters other than evidence of the offense. In a capital trial, the unfair prejudice is heightened because of the possible carry-over effect into the penalty phase.**

In Ohio, victim-impact evidence, that is evidence designed to establish for the jury the effect the victims' deaths have had on the lives of surviving friends and family, is prohibited in the penalty phase of a capital trial. State v. Post, 32 Ohio St.3d 380 (1987). Its admissibilty in the penalty phase under the federal constitution is very much in debate, as Booth v. Maryland, 482 U.S. 496, 507 (1987) has not been fully overruled, but Payne v. Tennessee, 501 U.S. 808, 825 (1991) has loosened these restrictions and makes allowance for some victim-impact information in the sentencing phase. *But see* Bosse .v. Oklahoma, 137 S.Ct. 1, 2 (2016) (prohibiting family member characterizations and opinions about the crime, the defendant and appropriate sentence).

Here, the prosecutor avoided the legal debate about the admissibilty in the penalty phase and introduced victim-impact testimony in the first phase. This was achieved through the testimony of family and friends with testimony having no relevance to establishing timelines or any other relevant factors for the state to establish its case. Such testimony not only violated

Ohio's prohibition of such evidence in the guilt-non-guilt determination phase, but also in the penalty phase because of the acknowledge carry-over effect to the penalty phase. State v. Thompson, 33 Ohio St.3d 1 (1987)

Victim-Impact/Sympathy Testimony

The prosecutor is under an obligation to govern impartially. The United States Supreme Court emphasized the special responsibility and status of the government's attorney in Berger v. United States (1935), 295 U.S. 78. Justice Sutherland wrote that the obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. Berger, at 88. Impartiality forms the basis of the integrity of our justice system. A court must be careful not to allow the state's representative's desire to win a particular case erode this essential foundation.

The following of this obligation was particularly important to the integrity of the trial here where McAlpin represented himself pro se. Therefore, the injection of improper unfairly prejudicial testimony was likely to go unchecked by a defense objection. The prosecutor took full advantage of this and elicited improper-victim impact testimony in the first phase of the capital trial wherever possible.

In voir dire, the prosecutor prepped the jurors for anticipated testimony by instructing them that its verdict would impact the family members, but added that "it's so important that this case be about the facts and not about any internal bias or sympathy." (T. 2083) The prosecutor added that both the State of Ohio and the victims deserve a fair trial. (T. 2135) While it often argued by the prosecutor that the State of Ohio and the defendant must be afforded a fair trial, it is not permissible to stress the the State and the victims deserve a fair trial. Cleverly, the

prosecutor pointed to the impact to the victims as a basis why sympathy would not be permitted.

If the prosecutor had limited their discussion to the above alone, the comment might not warrant a finding of reversible error. However, during the trial, the prosecutor elicited testimony designed to evoke sympathy by the jury for the victims and the families of the victims. Throughout the trial, the prosecutor elicited testimony from state witnesses, such as family members and customers of the business, that was not designed to help prove the case, but was designed to create sympathy for the family and antipathy against McAlpin. By doing so, he tempted the jurors to decide the case not from "law and reason, but [from] passion and bias." State v. Fautenberry, 72 Ohio St.435 (1995).

Because this was a capital trial, the prosecutors used this strategy to frontload a non-statutory aggravator, the impact of the homicides on the families and friends of the victims, which they would not have been allowed, and in fact did not attempt, to introduce into the penalty phase of the trial. State v. Thompsons, supra.

First Phase Victim-Impact Testimony

Colin Zaczkowski, Trina's son, testified that his biological dad died in 2008 and about how Trina and Michael were high school sweethearts. (T. 2366) While it is important to discuss that Michael Kuznik is not his biological father and set straight the timeline of the relationship between Trina and Michael, the testimony about his biological father dying and his mom and Michael being high school sweethearts is not relevant to the State's case. Colin testified about their Doberman, Axel, who was also shot and killed by McAlpin. Colin also testified about Trina having always wanting a dog and thus she was constantly bugging Michael for one until he came home with a puppy as a surprise. (T. 2371) This testimony does nothing to further the

State's case and the extra details surrounding Axel are unnecessary sympathy testimony that should have been objected to.

After testimony surrounding the incident, the Prosecutor circled back to asking Colin about his biological father and asking him how he died, which Colin testifies that his father died of an overdose when he was 11 years old. (T. 2395) Colin's relationship with his parents and Michael were already discussed in the beginning of his testimony and there was no reason to discuss his biological father's overdose.

Albert Martin III testified that at that time of his testimony he was unable to work and was on disability. The Prosecutor has Martin explain that the disabilty resulted from a tree falling on him while he was enlisted in the Marine Corps. The Navy hospitals apparently commited medical malpractice which resulted in nine more surgeries. These difficulties caused Martin to be fired five times from jobs before finally obtaining disability. (T. 3041) The prosecutor asked Martin if he had had an easy life. Martin responded and informed the jury about his battle with drugs because of his surgeries and pain. (T. 3041) He had struggled with heroin and cocaine for an extended period of time. (T. 3042)

Martin's testimonty about his struggles was a set-up for the prosecutor to inform the jury the stellar character of the victims, Micheal in particular. Martin testified about having them over for dinners and Christmas, spending New Year's with them, how they were good and hardworking people, and how Michael and Trina helped him with his drug addiction. (T. 3044) It is unarguably admirable that the victims would reach out to assist a struggling addict. It is also unfairly prejucial and entirely irrelevant to whether McAlpin was the perpetrator of their deaths.

Finally, the prosecutors asked Martin what he did when he learned of the deaths. Martin

poingently told the jury that when he found out about the murders, he went there right away, and he looked into the window. Michael had been in the army, too. (T. 3058)

Barbara Bonnes, Michael's older sister explained the events that occurred after Michael and Trina's death. When asked by the prosecutor about meeting with Corrine and the rest of the family after finding out about the murders, Bonnes testified how her mom became hysterical and just laid on the kitchen floor, and that her father being in shock. Corrine was also in in shock. Everyone was concerned for the children and the effect the tragedy would have on them. (T. 2861)

Ms. Bonnes also testified how Corrine spoke to her about the last time she spoke with her mother and continued to talked about the last time she spoke with her mother many times. (T. 2862) While it might be relevant to introduce testimony addressing when Corrine last spoke with her mother for the purpose of the establashing a timeline for the events, the impact on the families has no relevance to the issues to be decided by the jury.

To further this theme, the prosecutor showed co-defendant Andrew Keener Exhibit 86, a picture of Trina Kuznik and asked what he thought when he sees such pictures. Over objection, Keener testified that he feared that the same thing would happen to his family that happened to the Kuzniks. (T. 3714)

Victim-Impact Trial Prohibition in Capital Cases

The rule against victim impact evidence being used to determine guilt dates back to State v. White, 15 Ohio St.2d 146 (1968), syllabus paragraph 2. In White, this Court held that reliance on evidence of the victim's background or family by the state in its argument for the death penalty is improper and constitutes reversible error if relied upon in arriving at judgment.

Victim-impact evidence is excluded from Ohio capital trials "because it is irrelevant and immaterial to the guilt or innocence of the accused and the penalty to be imposed. The principal reason for the prejudicial effect is that it serves to inflame the passion of the jury with evidence collateral to the principal issue at bar." White, 15 Ohio St. 2d at 151, 239 N.E.2d at 70.[2]

Because Ohio's rule barring victim impact evidence is based on independent state grounds, it survives the limitations of Payne v. Tennessee (1991), 501 U.S. 808. State v. Post, 32 Ohio St. 3d 280 (1987). The Supreme Court of the United States in Payne backtracked from earlier rulings forbidding any victim impact evidence under the Eighth Amendment to the United States Constitution. Payne cannot be interpreted as a blanket allowance of victim-impact evidence. The Supreme Court ruled that victim impact evidence was admissible for the limited purpose of determining whether the death penalty was appropriate. Id. at 827. It should be noted that the Court expressly left open Fourteenth Amendment due process attacks as opposed to the earlier prohibitions which were based upon the Eighth Amendment.

For this reason, in State v. Fautenberry , 72 Ohio St.3d at 440, this Court reasoned, "True victim-impact evidence pursuant to the terms of R.C. 2930.13, 2930.14 and 2947.051, shall be considered by the trial court prior to imposing sentence upon a defendant, *not during the guilt phase of the proceedings*," (emphasis added). Fautenberry noted that if the victim impact evidence depicts both the circumstances surrounding the crime and the impact that the crime had on the victim's family, it could be admissible in both the guilt and penalty phase. *Id.* However, when the victim impact evidence impacts only on the affect of the crime on the victim's family

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[2] Although White was decided before the advent of bifurcated culpability and sentencing phases, its pronouncements on the perils of victim-impact evidence apply today with equal force.

and not on the circumstances surrounding the commission of the crime, it is not admissible during the guilt phase of the trial. As Justice Souter stated: "[I]n each case there is a traditional guard against the inflammatory risk, in the trial judge's authority and responsibility to control the proceedings consistently with due process, on which ground Walters' may object and, if necessary appeal." Payne, 501 U.S. at 836.

The state circumvented the victim-impact testimony penalty phase prohibition by introducing it in the first phase, although most had no relevance to the purpose of that phase. It is not surprising that a *pro se* non-lawyer would not know that this evidence was impermissible. Had the State attempted to introduce this testimony in the penalty phase, it is likely the judge would have prohibited such testimony. Nevertheless, the amount and nature of such testimony that was introduced requires a reversal of the convictions, or minimally, a reversal of the sentence of death.

The prosecuters conduct in the above noted incidents are in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

Proposition of Law VII

> **A criminal defendant is denied a fair trial and reliable sentencing proceeding if the trial court allows the introduction of unfairly prejudicial information, of minimal if any relevance, during the guilt determination and/or phase of a capital trial.**

During the trial, prosecutor introduced the list of Google searches linked to McAlpin's email account (Exhibit 1433) included unfairly prejudicial, irrelevant, and inflammatory information that should not have been admitted into evidence or seen by the jury. While the

expert witness focused on search terms relating to automobiles and news about the crime itself, the State introduced the entire 50+ page printout of searches into evidence, without redaction. (T. 3824, 3875).

The exhibit was also admitted at the penalty phase. (T. 4550); *see also* Proposition of Law XII. Those searches included strip clubs, gentlemen's clubs, and pornographic websites. Ex. 1433, p. 10-14, 22-24, 28, 50-52, 54. These searches had absolutely no evidentiary value, and they only served to make McAlpin look bad or unsympathetic.

Unlike in State v. Obermiller, 2016-Ohio-1594, ¶¶73-76, there is no dispute that the listing of searches was admitted into evidence, or that the factfinder considered it. The prosecutor repeatedly urged the jury to carefully review the records of McAlpin's phone and internet usage. *See, e.g.,* (T. 3826, 4342, 4349-50, 4353, 4368, 4408-09). The jury was not provided with any limiting instructions to mitigation the danger or jury misuse.

Relevancy Considerations

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." Evidence is unfairly prejudicial when it may result in an improper basis for the jury's decision. State v. Crotts, 104 Ohio St. 3d 432, 437 (2004). 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. The determination of whether a piece of evidence is inadmissible under this standard is left to the sound discretion of the trial court. Id.

Although McAlpin failed to object to this improper information, there is a need for heightened reliability in a capital trial. (*see* Proposition of Law XVI) The evidence of his guilt was not overwhelming, and the danger too great the jury considered this prejudicial information during its deliberations, both at the trial and mitigation phases.

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). Here, the State introduced irrelevant and unfairly prejudicial evidence regarding McAlpin's character through evidence of internet searches.

The admission of these unfairly prejudicial, irrelevant, and inflammatory searches denied McAlpin due process, invaded the province of the jury, prevented a fair and reliable sentencing proceeding, violated the Rules of Evidence, and constitutes plain error, in violation of McAlpin'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.

Proposition of Law VIII

An unfair restriction of *pro se* defendant's cross-examination of a state expert witness on the extent of the witness' background investigation that established the foundation of the witness' testimony is a violation of the defendant's right to Confrontation.

The Sixth Amendment's Confrontation Clause provides that in all criminal prosecutions, the accused has the right to be confronted with the witnesses against him. That guarantee includes the right to cross-examine witnesses. Pointer v. Texas, 380 U.S. 400, 404 (1965) (applying the Sixth Amendment to the states through the Fourteenth Amendment). Cross-examination has been characterized as the "greatest legal engine ever invented for the discovery of truth." White v. Illinois, 502 U.S. 346, 356 (1992).

The right of confrontation is primarily directed at ensuring the "reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Maryland v. Craig, 497 U.S. 836, 845 (1990).

Ultimately, the Confrontation Clause serves two objectives. First, it gives a criminal defendant the right to confront his or her accusing witness face-to-face in open court for truth-testing cross-examination. Second, it allows the jury an opportunity to judge the credibility of the witness through observation of the witness's demeanor. Id., *citing* Mattox v. United States, 156 U.S. 237, 242-43 (1895).

A key witness for the state was Special Agent Brian Young of the F.B. I. Agent Young testified about the science and techology of cell phones and cell towers. He established for the state the cell phones that were used and communicated with each other during the time before, during and after the suspected timeline for the homicides. (T. 3435-37) Young determined that a

cell phone with a number assigned to McAlpin communicated or connected to the numbers associated with Mr. Cars and co-defendant Keenan. (T. 3447, 3451)

Of key interest to McAlpin was that Young testified that the cell tower of which the calls "pinged" was located near the Mr. Cars location near 185th Street. (T. 3453). This was of importance to the state's theory of the case because it was strong circumstantial evidence that McAlpin was in the area of the business within the time period the offenses occurred.

McAlpin attempted to cross-examine Young on the point that one could be in that area and not be at the Mr. Cars location. McAlpin attempted to establish that he lived in that area, so that if he were at home, his calls would ping off the same tower. However, the trial court sustained prosecution objections to this testimony.

Q. .... Were you aware that Joseph McAlpin lives in the residence (sic) of East 185th?

A. I'm sorry?

Q. Were you aware that Joseph McAlpin lived inside - - excuse me - - within a quarter mile of the closest tower?

MR. RADIGAN: Objection.

THE COURT: Sustained.

Q. Were you aware that Joseph McAlpin stayed in the vicinity - -

MR. RADIGAN: Objection.

THE COURT: Sustained.

(T. 3478-79)

At this point, McAlpin dropped this line of questioning and move on to another subject.

There was nothing improper about McAlpin's line of questioning. The state called

Young to make determinations of from where the calls emanated to establish the defendants were in the area of Mr. Cars. Young investigated the source of the calls, including the owners of the phones in question. It is not unreasonable that this investigation would have include where the owners of the phone resided, and if that factored into that conclusion. If Young did not know, he simply could have said he had no information as to Young's residency. If he did know, he could have answered appropriatly.

The restriction precluded McAlpin from presented the jury with a reasonable explanation as to why his cell phone was pinging of an area cell tower. The court's ruling deprived McAlpin in his ability to examine the state witness as to a material component of the state's case. McAlpin's right to confrontation was violated under both the Ohio and Federal Constitutions.

Proposition of Law IX

Prosecutorial misconduct during the guilt determination phase closing arguments deprives a defendant Due Process rights to a fair trial and reliable sentencing hearing.

During closing arguments of the trial phase of McAlpin's capital trial, the prosecutor, on multiple occasions, struck foul blows and exploited the court's latitude by injecting prejudicial evidence, in the form of victim character evidence, emotionally laden testimony, and disparaging remarks. The remarks urged the jury to base its verdict on matters other than the facts of the case properly introduced at trial. These improper statements so thoroughly permeated the state's case that they cannot be deemed to be harmless.

A. Substantive law on prosecutor misconduct

The test for prosecutorial misconduct is whether the prosecutor's statements were

improper and, if so, whether the remarks prejudicially affected Defendant's substantive right to a fair trial. State v. Twyford, 94 Ohio St.3d 340, 354-355, 2002-Ohio-894; State v. Lott, 51 Ohio St.3d 160, 165 (1990); State v. Smith, 14 Ohio St.3d 13, 14 (1984). The relevant inquiry is whether the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974).

Prosecutors are granted wide latitude in closing argument, and the effect of any conduct of the prosecutor during closing argument must be considered in light of the entire case to determine whether the accused was denied a fair trial. State v. Maurer, 15 Ohio St.3d 239, 266, 269 (1984). While the Prosecution is entitled to a reasonable degree of latitude in opening and closing remarks, making inferences that are prejudicial and outside the scope of the record constitutes an abuse of this privilege. State v. Treesh, 90 Ohio St.3d 460, 466, 2001-Ohio-4. A prosecutor "may strike hard blows, [but] he isn't at liberty to strike foul ones." Berger v. United States, 295 U.S. 78, 88 (1935). "The touchstone of the analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" State v. Gapen, 104 Ohio St.3d 358, 2004-Ohio-6548, ¶ 92, *quoting* Smith v. Phillips, 455 U.S. 209, 219 (1982).

The reviewing court should not give inordinate weight to the strength of the evidence. *See* Boyle v. Million, 201 F.3d 711, 717-18 (6th Cir. 2000); (the Sixth Circuit Court of Appeals reversed a habeas petitioner's conviction based on a finding of prosecutorial misconduct even though the evidence of guilt was quite strong). *See also* United States v. Carter, 236 F.3d 777, 791 (6th Cir. 2001) (granting habeas relief on grounds of prosecutorial misconduct despite sufficiency of evidence).

B. Substantive law on the admissibility of evidence

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid. R. 401. The admissibility of relevant evidence rests within the sound discretion of the trial court. State v. Drummond, 111 Ohio St. 3d 14, 28 (2006).

Even relevant evidence is not admissible "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. Evid. R. 403(A). The trial court determines whether a piece of evidence is inadmissible under this standard. 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. 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. 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, Rule 403 evidence requires heightened scrutiny in capital cases. State v. Morales, 32 Ohio St. 3d 252, 257-58 (1987). Whereas exclusion under Evid. R. 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.

C. Standard of Review

Crim.R. 52 distinguishes between errors to which a defendant objected at trial and errors that a defendant failed to raise at trial. If the defendant failed to raise an error affecting substantial rights at trial, an appellate court reviews the error under the narrower plain error standard articulated in Crim.R. 52(B). Under that rule, the defendant bears the burden of demonstrating that a plain error affected his or her substantial rights. *See* United States v. Olano, 507 U.S. 725. An appellate court has the discretion to correct the error in order to "'prevent a manifest miscarriage of justice.'" State v. Barnes (2002), 94 Ohio St.3d 21, 27, quoting State v. Long (1978), 53 Ohio St.2d 91, paragraph three of the syllabus.

Alternatively, if the defendant has objected to an error in the trial court, an appellate court reviews the error under the "harmless error" standard in Crim.R. 52(A). Under that rule, the government bears the burden of demonstrating beyond a reasonable doubt that the error did not affect the substantial rights of the defendant. Olano, 507 U.S. at 741; State v. Gross, 97 Ohio St.3d 121, 2002-Ohio-5524, ¶ 136 ("Once [the defendant] objected [to the error], the burden shifted to the state to demonstrate an absence of prejudice"). *See also* Chapman v. California, 386 U.S. 18, 26 (1967).

D. Instances of prosecutor misconduct in trial phase closing argument

1. Victim character evidence introduced through Albert B. Martin

One of the State's witnesses, Albert B. Martin, was used to establish victim character evidence during trial. See Proposition of Law VI. When asked to tell the jury about the relationship that Martin had with Mike and Trina, he responded "they were good people. They were hardworking people." (T. 3044). When asked to expound upon what they did to "keep him

busy," Martin responded:

> Moral, they was like a moral support, you know. They were caring, you know. They liked people in general. I mean, they were good people. I mean, you know good people when you -- it's hard to find good people. But when you meet them, you try to open up to them.

(T. 3045). Not only is this answer non-responsive to the question posed, it's impermissible character evidence. When the prosecutor asked Martin what he did when he found out about Mike and Trina, he answered:

> I was disappointed, sad, broken up. Lost buddies, I lost friends. That was my brother. I used to call Mike my brother from another mother. You know, heserved in the Army, too, so, you know, he knew what life was all about. He was a hard working individual, and Trina was, too.

(T. 3058). Once again, Martin went beyond the scope of the question asked and introduced character evidence in his answer.

Martin, a disabled veteran and recovering drug addict, had numerous struggles throughout his life. Aside from establishing victim character evidence, Martin was used to establish business practices and was familiar with the property itself, something that could have been established without any reference to Mike or Trina's character. Instead, the State used Martin to appeal to the jurors' sympathy.

In addition to improperly introducing this evidence at trial, the Prosecutor referred back to Martin's testimony during closing argument, once again to evoke emotion from the jury.

> You can say what you want about Albert. Albert lost two people that he loved dearly. Albert has his own problems. Albert's not a killer. That's why Albert was in here. You got to see Albert. Brought a bone for Axel the next day and left it at the front.

(T. 4334).

Other than to appeal to the sympathy of the jury, this statement did nothing to advance the State's case and was not probative argument.

Emotionally charged evidence

In addition to referencing Martin, the Prosecution's entire closing argument was laden with inappropriate remarks containing victim impact evidence intended to evoke an emotional response from the jurors and prejudice McAlpin. While victim impact evidence can, at times, serve a legitimate purpose in the sentencing phase to assess the culpability of a defendant, its tendency to arouse a jury's passions makes it is unfairly prejudicial when determining guilt or innocence. Here, the prosecution first emphasized the young age and vulnerability of the victims' surviving daughter, Corrine, and justified the State's decision not to call her as a conscientious one, protecting her from speculative harm:

> These are the last two times that anybody speaks to Michael and Trina. 5:28:30, with the defendant already in there, 13-year-old girl talks to her parents for the last time, not knowing that it was going to be the last time.
>
> Sometimes you have to make a decision as a professional, as a human being, as a father, on what you're going to put a child through. I'm not putting that child through this.
>
> We allowed the evidence of what time she thinks she talked to her parents to come in because it was the right thing to do, because that's what the facts as she believed them to be were. We presented it to you. Put on witnesses that had no business testifying about what she said. But we put it on because it was the right thing to do.
>
> It wasn't the right thing to do to traipse her into this courtroom and have her face the man that's accused of killing her parents.
>
> * * *
>
> And he wants to tell you in the next breath you should have wanted to hear from

> Corrine, this 13-year-old daughter who lost her parents tragically, drastically, horrifically at his hands.
>
> * * *
>
> Yet, we're supposed to put her on the stand? Absolutely not. Not only does Brian take responsibility for it, so do I. I am not putting a little girl through that. For her to be questioned by him? That's unimaginable, ladies and gentlemen.

(T. 4337, 4044).

The prosecutor's rhetoric improperly aligned the State with the role of a parent, appealing to the paternalistic instinct of the jurors and calling on them to protect and sympathize with the victims' surviving daughter. Additionally, the Prosecutor made a moralistic determination about the "right" thing to do and disparaged McAlpin for suggesting that the State could have called Corrine as a witness. The Prosecutor also pontificated about the harm that Corrine would have experienced having to face McAlpin, her parent's accused killer, and then conclusively stated that McAlpin was responsible.

There was no legitimate purpose for the State to indulge this line of argument. All the State needed to do to defend their decision not to call Corrine was to refer to the phone records which establish when the last call was made from Corrine to the Mr. Car's landline. Instead, the prosecutor used emotionally charged rhetoric to appeal to the jurors' emotions and prejudice McAlpin by distracting the jury with issues collateral to their determination of his guilt or innocence on speculation not contained within the record. Reference to evidence not presented at trial is improper and may merit reversal. State v. Stephens, 24 Ohio St.2d 76 (1970).

In addition to playing on the jurors' sympathies, the Prosecutor's argument was also laden with testimony intended to arouse another response from the jurors: fear.

> And I was just thinking about those final moments and what fear, what could it

> be, whether it was Michael first or Trina first. Not only fear for yourself, but the absolute devastation of knowing that your loved one, your partner, is dead.

(T. 4355).

In addition to improperly arousing fear in the jury, asking the jury to consider what the victims experienced and felt in their final moments improperly "'invites the jury to speculate on facts not in evidence.'" State v. Lynch, 98 Ohio St.3d 514, 2003-Ohio-2284, ¶122, quoting State v. Wogenstahl, 75 Ohio St.3d 344, 352, 357, 1996-Ohio-219; State v. Combs, 62 Ohio St.3d 278, 283 (1991). There was no evidence in the record that either victim experienced fear or had time to process their fate. In fact, the State attempted and failed to establish this evidence through its witness, Daryl Sanders. Mr. Sanders was the last person to speak to Trina, minutes before her death. On direct examination, the State engaged in the following line of leading questioning, intending to elicit testimony about Trina's demeanor on their final call:

> Q. What do you mean by that?
>
> A. She was talking very low and quiet like she was kind of nervous and scared, like she was just talking real low, like she didn't want somebody to hear her talking.
>
> Q. So more like a whisper?
>
> A. Yeah.
>
> Q. Was that normally how you all conducted business?
>
> A. No. We talked very loud. She was a very loud speaking woman. She talks loud. She doesn't whisper.
>
> Q. Okay. And did that strike you as strange?
>
> A. Yes, it did.

(T. 3794).

When cross-examined on this line of questioning, Sanders contradicted his earlier statement and made explicitly clear that he was not suggesting Trina was afraid in their conversation.

> Q. When you called Ms. Trina at 5:30 to get your paperwork correct, you said she seemed a little nervous and talking low as she was scared of something, correct?
>
> A. She was talking low and quiet. I figured I didn't say it was fear. I said it was just talking quiet.
>
> Q. As if she was scared?
>
> A. No. She was talking low, like she didn't want somebody to hear me talking to her.

(T. 3803).

The medical testimony describing the victims' injuries further undermines the prosecution's claim that the victims experienced fear. Both victims sustained serious head injuries that were incompatible with survival and would have incapacitated them quickly. (T. 2608, 2616, 2634). The prosecutor conceded that himself in closing argument, claiming that the victims' liberty was restrained for however long they were still alive "which I don't believe was very long." (T. 4323). Thus, the prosecution's suggestion that Mike and Trina experienced fear in their final moments is based on supposition and unsupported by evidence in the record.

The prosecutor's improper remarks did not stop there. In addition to personifying the victims' final moments, the State further intimated to the jurors that McAlpin was someone to be feared and injected needlessly graphic imagery intended to evoke an emotional response:

> You want to believe that [Keener] was afraid? You want to know what he was afraid of, the pictures I showed him? He was afraid of this. He was afraid of what happened to the two people that were inside Mr. Cars.
> This is what he was afraid of. Because when he saw these pictures, he didn't see Michael and Trina. He saw his mother and his brothers and his sisters and his

nieces and his nephews. You want to know what fear is like? Think of that.

(T. 4345).

Showing the photos of Mike and Trina was intended to elicit a visceral response from the jurors. In addition, using the photos in this manner improperly intimated to the jurors that McAlpin posed a threat to Keener's entire family, a fact not in evidence. This was not the only place where the prosecution resorted to fear-mongering and graphic details to strengthen its case.

> See, the video tells some of the story, but it doesn't describe [Colin's] pain.... In what condition was he in discovering his mother on the floor with a gunshot wound to her head. What he thought was his mother was actually Michael, his stepdad, with two bullets going from the top of his head exiting out his left ear, and then a cheek contact wound going out his right side of his brain, this way. You saw the anatomical.

(T. 4405).

Immediately following this graphic appeal, the prosecution stated "The evidence speaks for itself. So does the video." (T. 4406). Yet, this directly contradicts both the previous statement and the strategy the prosecution employed. On multiple occasions, the prosecutor interjected his own perspective, editorializing his argument until it became impossible to extricate evidence from opinion.

> Until we see somebody calmly and coolly, not rushed, taking his time walking up to a BMW and putting the license plates on the back of the car. Like he belongs there. Like there's nothing to worry about. Knowing that two people had gunshot wounds to their head in the building right behind him. No cares in the world.

(T. 4340).

Rather than allow the jurors to reach a verdict based on the evidence, the prosecution deliberately infused the closing argument with inflammatory and prejudicial statements that were so pervasive that it was impossible for the jury to deliberate objectively.

Improper remarks implicating McAlpin's decision not to testify

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." State v. Allen, 8th Dist. No. 93372, 190 Ohio App.3d 240, 2010-Ohio-3999 ¶31. The protections of the Fifth Amendment apply to the states through the Fourteenth Amendment. State v. Leach, 102 Ohio St.3d 135, 2004-Ohio-2147 ¶ 11 (2004); citing Malloy v. Hogan, 378 U.S. 1, 6, (1964). The Fifth Amendment generally prohibits a prosecutor from arguing for a conviction because the Defendant did not testify. State v. Twyford, 94 Ohio St.3d 340, 355, 2002-Ohio-894 citing Griffin v. California, 380 U.S. 609 (1965). A prosecutor may not indirectly comment on Defendant's silence through a comment either manifestly intended to reflect on the Defendant's silence or of such character that a jury would naturally and reasonably take it to be a comment on the failure of the accused to testify. United States v. Wells, 623 F.3d 332, 338 (6th Cir. 2010); State v. Cooper, 52 Ohio St. 2d 163, 173 (1977).

During its trial-phase rebuttal closing argument, the prosecution made the following statement:

> And I guess when he's testifying and he's cross-examining, he might as well have been testifying, and he's cross-examining Laura Evan

(T. 4410).

The prosecution argued that this was an acceptable exception under the law because it was an isolated incident and because the prosecution is allowed latitude to remark on arguments that McAlpin attempted to get before the jury during cross-examination. Both arguments are disingenuous. First, while the State may have legitimate reason to comment on McAlpin's

demonstration while cross-examining Laura Evans, the prosecution need only remind the jurors that the actions and statements made by counsel are not to be considered evidence. A curative remark could easily be made without implicating McAlpin's constitutional right not to testify. Further, this was not an isolated incident, but rather a continuing abuse of the courts' latitude in closing argument.

Informing the jurors that McAlpin "might as well have been testifying" is not the only comment that violated his Fifth Amendment Right. The prosecution also stated:

> I heard from the opening statement that again he told you that he was involved in a crime. I'm going to be honest with you. I am going to put it all out there.
>
> I am going to tell you that some lady said that I came behind her and put a knife up to her throat and robbed her.

(T. 4395).

Referencing what McAlpin told the jurors during his opening statement can only serve two purposes and they are both improper. First, the prosecution highlighted McAlpin's unfulfilled promise that he was "going to tell [them]" these things as a way to intentionally draw the jurors' attention to the fact that McAlpin did not testify. Here, the jurors could both naturally and necessarily construe the prosecutions' remark as a comment on McAlpin's failure to testify. The other purpose the prosecution might have referenced McAlpin's opening statement is to imply his propensity for violent crime, which is also improper. See, e.g., Statev. Williams 38 Ohio St.3d 346, 351 (1988); State v. Wickline, 50 Ohio St.3d 114, 120 (1990.)

Comments disparaging the defense and denigrating the defendant

The prosecution further compounded the cited errors by disparaging defense counsel and thereby denigrating the defendant. This Court has disfavored remarks that denigrate defense

counsel for doing his or her job because they implicitly denigrate the defendant. State v. Keenan, 66 Ohio St.3d 402 (1993). This should trigger greater concern when a defendant is acting as his own counsel, as McAlpin was here. During the trial-phase rebuttal closing argument, the prosecution made numerous disparaging remarks.

> I want you to ask yourself, is it reasonable to expect that his DNA flew all over the place, that it transferred from spot to spot? It just happened to be in a spot where two people were executed? It happened to be next to the head of a woman that was killed, in the back pockets of a dead man, into a car that was stolen?
>
> * * *
>
> It's not a reasonable expectation, It's not likely, It's ridiculous. (Tr. 4348
>
> * * *
>
> You're all smarter than that, folks. It's not reasonable. It's not likely. *It's all fraudulent.*

(T. 4352) (emphasis added).

> * * *
>
> When you look at that flag, nobody has to tell you how many stripes are on that flag, or how many stars exist.
>
> * * *
>
> He can come in here and tell you that's not the American flag. That's just a replica. But would that be based on your reason and common sense, that we're in a court of law, here seeking the truth, here seeking justice, and you believe that nonsense that that flag is something else other than the United States flag?
>
> * * *
>
> This is what he's trying to sell to all of you. Well, justice is not for sale, ladies and gentlemen. (T. 4401)
>
> Lies, lies, lies he tell you about Keener. (T. 4401-4402)
>
> * * *
>
> And he wants to tell you in the next breath you should have wanted to hear from Corrine, this 13-year-old daughter who lost her parents tragically, drastically, horrifically at his hands. (T. 4403)
>
> * * *
>
> And he wants to argue about testing the inside pockets as if he's an expert. As if he works at the crime lab. (T. 4406)
>
> You see, ladies and gentlemen, what I've learned in examining this evidence, and hopefully you did, too, that some people think they smarter than everybody.
>
> * * *

> Some people think that they can tell anybody anything they want. And all they've got to do is get one or two people to believe them, and that's it.

(T. 4406-4407).

> And I guess when he's testifying and he's cross-examining, he might as well have been testifying, and he's cross-examining Laura Evans. He said isn't it possible if I gave this card to Mr. Luskin and he puts it in his pocket and your DNA could be in there? Really?
>
> * * *
>
> It's possible that I may wake up tomorrow and have a physical or medical miracle and all of a sudden, I'm 6'4". Really? Really? Who all believes that?
>
> * * *
>
> At almost 50 years old, overnight. Anything is possible. That's what I heard from him. Anything is possible. Right? Laura Evans? No, it's not, ladies and gentlemen.That defies logic. It defies reason and it absolutely defies your common sense.

(T. 4410-4411

In addition, the prosecution mocked McAlpin's closing argument and no less than twenty-one times during rebuttal, scornfully belittled his argument and responded by prefacing claims with "what a coincidence." The comments denigrating McAlpin's performance as counsel are pervasive and compound all other instances of prosecutorial misconduct. The jury easily could have construed these comments as remarks on McAlpin's personal character as well as his guilt or innocence and therefore cannot be deemed harmless.

Cumulative effect of improper statements cannot be harmless

To determine whether the remarks were prejudicial, this Court must review the closing argument in its entirety. State v. Slagle, 65 Ohio St.3d 597, 607 (1992); State v. Moritz, 63 Ohio St.2d 150, 157 (1980). This court must consider all of the prosecutor's remarks, irrespective of whether the defense preserved an objection. State v. Keenan, 66 Ohio St.3d at 410(1993) ("even though the defense waived objection to many remarks, those remarks still form part of the

context in which we evaluate the effect on the jury of errors that were not waived.").

McAlpin respectfully submits that but for each improper statement made by the prosecution, the outcome of the trial would have been different. But even if this Court declines to agree, the record demonstrates that the prosecutor's misconduct was pervasive and "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). The cumulative weight of the prosecution's improper comments prejudicially affected McAlpin's substantive right to a fair trial.

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

Proposition of Law X

> **In a capital trial, if the actions of a defendant in the commission of multiple aggravating factors are inextricably intertwined, that is, involved the same motives and conduct, the factors must be merged for penalty phase sentencing considerations.**

The trial court failed to merge the capital specifications found by the jury. Because the same conduct which resulted out of the attempts to steal automobiles, the court should have merged the capital specifications into a single specification. In other words, because the motives for carrying out of each offense were inextricably intertwined, the specification should have been merged for presentation to the jury in the penalty phase.

McAlpin will address the course of conduct specifications merger into the felony merger, then address the two felony murder specifications requirement to be merged with each other.

A. R.C.§ 2929.04(A)(7) Must Merge with R.C.§ 2929.04(A)(5) if the Force involved to effectuate the Aggravated Felony is the Underlying Homicide

McAlpine was convicted of Aggravated Robbery and Aggravated Burglary, in addition to two Aggravated Murders. Thess offenses formed the basis of the three capital specification. While it was proper for the jury to make findings as to each specification in the first phase of trial, because the homicides were a request element, force, in the felony-murder specification, all three should have been merged into a single specification.

This Court has established precedent for the requirement that the felony-murder specification, R.C. §2929.04(A)(7) and court-of-conduct specification R.C. §2929.04(A)(5) merge if the defendant's motive and intent is the same for both acts. In State v. Tibbetts, (2001) 92 Ohio St.3d. 146, 172, this Court merged capital specifications in a similar situation. In Tibbetts, the jury found Tibbetts guilty of two aggravating circumstances: (1) a course of conduct involving the purposeful killing of two or more persons by the offender, R.C. §2929.04(A)(5); and (2) a murder committed while the principal offender in an aggravated robbery, R.C. §2929.04(A)(7). Tibbetts had killed two people while stealing money from one of the victims in one of the victims residence. This Court merged the aggravating specifications in its independent weighing of the factors.

Similarly, in State v. Garner, 74 Ohio St.3d 49, 53-55 (1995) the specifications based on R.C. §2929.04 (A)(3) and (7) arose from an indivisible course of conduct, i.e., Garner's actions in burglarizing and setting fire to a residence. After reviewing the record in detail, this Court

rejected the state's factual contention that Garner had completed the theft offense and then initiated a second, separate course of conduct in setting the fires. The record instead justifies the conclusion that Garner set the fires before exiting the apartment for the final time with the last stolen item, the television. His actions in burglarizing the residence and attempting to cover up his conduct by setting the fires were *inextricably intertwined*, and thereby constituted one indivisible course of conduct. Id., 54. (Emphasis added)

The fact that Garner may have had multiple motives in setting the fire, i.e., did not required multiple specifications. He may have intended both to eliminate possible witnesses as well as to destroy fingerprints or other evidence of his presence. Similarly, the fact that the children did not actually die until sometime after Garner left the premises does not require a finding that the specifications were non-duplicative, as the cause of the deaths, i.e., the ignition of the fires, occurred in conjunction of time and place with the burglary and arson. This Court concluded that the defendant's motion to merge the specifications in this case for purposes of sentencing should have been granted.

This Court in State v. Jenkins (1984), 15 Ohio St.3d 164, 194-200, *cert. denied*, 472 U.S. 1032 (1985), paragraph five of the syllabus, held as follows:

> 'In the penalty phase of a capital prosecution, where two or more aggravating circumstances arise from the same act or indivisible course of conduct and are thus duplicative, the duplicative aggravating circumstances will be merged for purposes of sentencing... .'

As in Jenkins, in the appellant's case, the "...multiple aggravating circumstances were applied at the sentencing phase in an overzealous manner to the same act or indivisible course of conduct." Id. at 197.

Merely because three specifications can be indicted and found from the facts does not mean that they represent separate aggravating circumstances for purposes of determining the appropriateness of death as a sentence. Aggravating circumstances in a capital case are required in order to narrow the class of aggravated murders to those eligible for death. Zant v. Stephens, 462 U.S. 862 (1983); Barclay v. Florida, 463 U.S. 939 (1983).

Proving two or more specifications out of the same course of conduct does not additionally proscribe any more severe conduct but merely loads the scales in the weighing process so that no amount of mitigation could outweigh the specifications.

The Jenkins court recognized that the duplication of aggravating circumstances impermissibly tipped the weighing process in favor of death and defeated the constitutional requirement of reliability in capital sentencing determinations:

> The use in the penalty phase of both these special circumstance allegations thus artificially inflates the particular circumstances of the crime and strays from the high court's mandate that the state tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.' (*Godfrey v. Georgia* v. Georgia, 466 U.S. 420 (1980) at p. 428...) The United States Supreme Court requires that the capital-sentencing procedure must be one that 'guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death.' (*Jurek v. Texas,* 428 U.S. 262 (1976), at pp. 273-274...) That requirement is not met in a system where the jury considers the same act or an indivisible course of conduct to be more than one special circumstance.

B. The Two R.C. §2929.04(A) (7) Specifications Also Merge

In the alternative, the two felony-murder specification should have merged. Here, the jury found McAlpin guilty of two felony-murder specifications pursuant to R.C. §2929.04(A)(7). McAlpin was convicted of committing an aggravated murder in the commission of an aggravated robbery and an aggravated burglary, in addition to a course of conduct specification pursuant to

R.C. §2929.04(A)(5). During the penalty phase, the trial court failed to merge the two specifications into a single specification. Therefore, the jury considered three statutory aggravating factors instead of two, thus artificially inflating the weighing of the aggravating factors.

Merger Required Here

The determination of whether felony/murder capital specifications are distinct of must merge is necessarily determined by the facts of the underlying case. This Court has held that aggravated-burglary and aggravated-robbery specifications are not subject to merger when they are "dissimilar in import and committed with a separate animus." State v. Jackson, 149 Ohio St.3d 55, 2016-Ohio-5488, ¶ 129 (2016). The rule in Jackson outlining merger of specifications also governs merger of offenses. Id. at ¶ 130. Thus, the rule outlining those offenses cannot merge when "(1) the offenses are dissimilar in import or significance—in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, or (3) the offenses were committed with separate animus or motivation" applies to the merger of specifications. State v. Ruff, 143 Ohio St.3d 114, 2015-Ohio-995 (2015), ¶ 25.

McAlpin's two felony/murder specifications for each count of aggravated murder should have been merged. Here, McAlpin's actions were committed with the same motivation or animus. The burlary occured when he entered the offices of Mr. Cars to effectuate the robbery. The original purpose for the entry was to obtain the titles and keys for the vehicles he intended to steal. He did not, for instance, steal the cars and then return to commit an additional offense unrelated to the car thefts. Had that happened, a separate animus and separate identifiable harm would have been established.

Failure to merge specifications

"[W]here two or more aggravating circumstances arise from the same act or indivisible course of conduct and are thus duplicative, the duplicative aggravating circumstances will be merged for purposes of sentencing." State v. Jenkins (1984), 15 Ohio St.3d 164, paragraph five of the syllabus.; State v. Spisak (1988), 36 Ohio St.3d 80, 84. If, for example, aggravated burglary and kidnapping are allied offenses of similar import, merger is required. *See* Jenkins, 15 Ohio St.3d at 197, fn. 27. "Allied offenses of similar import are those offenses whose elements correspond to such a degree that the commission of one offense will result in the commission of the other." State v. Mitchell (1983), 6 Ohio St.3d 416, 418. If a defendant is convicted of allied offenses of similar import, the court must examine his conduct to determine "whether the offenses were committed separately or with a separate animus as to each." Id., at 418.

Merely because two specifications can be indicted and found from the facts does not mean that they represent separate aggravating circumstances for purposes of determining the appropriateness of death as a sentence. Aggravating circumstances in a capital case are required in order to narrow the class of aggravated murders to those eligible for death. Zant v. Stephens, supra; Barclay v. Florida, supra.

Proving two or more specifications out of the same course of conduct does not additionally proscribe any more severe conduct but merely loads the scales in the weighing process so that no amount of mitigation could outweigh the specifications.

The Jenkins court recognized that the duplication of aggravating circumstances impermissibly tipped the weighing process in favor of death and defeated the constitutional requirement of reliability in capital sentencing determinations:

> The use in the penalty phase of both these special circumstance allegations thus artificially inflates the particular circumstances of the crime and strays from the high court's mandate that the state tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.' (*Godfrey v. Georgia* v. Georgia, 466 U.S. 420 (1980) at p. 428...) The United States Supreme Court requires that the capital-sentencing procedure must be one that 'guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death.' (*Jurek v. Texas*, 428 U.S. 262 (1976), at pp. 273-274...) That requirement is not met in a system where the jury considers the same act or an indivisible course of conduct to be more than one special circumstance.

Present Case

In the case at bar, the trial court assessed two separate aggravating circumstances. The R. C. §2929.04(A)(7) specification and the R. C. §2929.04(A)(5) specifications must merge. McAlpin possessed the same animus for both specifications. The homicide was one act and one intent. According to one prosecutor's theory, the felony for the Aggravated Burglary was the killing of a witness. The specifications arise from the same indivisible course of conduct and are impermissibly duplicative.

The Supreme Court of the United States has instructed that appellate courts should hesitate to assert confidence that "elimination of improperly considered aggravating circumstances could not possibly affect the balance." Barclay v. Florida, 463 U.S. at 958. Adding the overlapping aggravators to the other penalty errors cannot result in a finding here that "'it would have made no difference if the thumb had been removed from death's side of the scale." Stringer v. Black, 503 U.S. 222, 232 (1992).

The duplication of an aggravation circumstance is unconstitutional when one aggravating circumstance is necessarily subsumed by another, causing one factor to be considered multiple times. Jones v. United States, 527 U.S. 373, 397-98 (1999) If a jury is able to provide weight to

both aggravated burglary and aggravated robbery as separate and distinct aggravating circumstances despite the fact that they should have been merged, the single circumstance is wrongfully expanded into two. *See* State v. Spivey, 81 Ohio St.3d 405, 420 (1998) fn. 2; State v. Davis, 38 Ohio St.3d 361, 367-373 (1988).

Therefore, the failure of the trial court to address and merge the felony-murder specifications pursuant to R.C. §2929.04(A)(5) and R.C. §2929.04(A)(7) resulted in a sentence that was in violation of the Fifth, Eighth and Fourteenth Amendments of the United States Constitution.

Proposition of Law XI

In a capital trial, only exhibits relevant to the capital specifications found by the jury in the trial phase may be admitted for penalty phase consideration by the jury.

McAlpin did not raise the nature and circumstances of the offense as a mitigating factor in this case. Consequently, the State's evidence and exhibits in the trial phase admitted to prove the facts and circumstances of the crimes charged were not admissible to rebut any mitigation that will be offered in the penalty phase. Under State v. DePew (1988), 38 Ohio St. 3d 275, only those exhibits and photos relevant to the specific aggravating circumstances which were charged and proved in the trial phase can be introduced by the State in the penalty phase. This rule was confirmed in State v. Gillard (1988), 40 Ohio St. 3d 226, and State v. Davis (1988), 38 Ohio St. 3d 361.

At the close of the mitigation hearing, the state moved that all exhibits from the first phase or trial phase of trial be admitted into the penalty phase so that the jury could consider

them during its deliberations. The court granted the request. (T. 4610) Very few of the exhibits should have been admitted, as the danger of unfair prejudice from the jury's consideration of those exhibits far outweighed any direct relevance they might have had to the capital specifications. Prosecutors cannot argue that the nature and circumstances of an offense are aggravating circumstances. State v. Wogenstahl, 75 Ohio St.3d344 (1996), paragraph two of the syllabus. Because the nature and circumstances of the crime can only be considered in support of mitigation, the admission of exhibits allows those documents to circumvent this rule, unless directly relevant to a proven aggravating factor.

Therefore, the trial court is charged with the responsibility of determining the admissibility of evidence. Evid. Rule 104(A); State v. Heinish, 50 Ohio St.3d 231(1990). It is error for the court to allow into evidence matters introduced in the first phase of trial but are irrelevant in the second phase of trial. In State v. Campbell, 90 Ohio St.3d 320 (2000), this Court held:

> Although we have recognized that R.C. 2929.03(D)(1) permits reintroduction of much or all of the guilt-phase evidence, State v. Woodard (1993), 68 Ohio St.3d 70, 78, 623 N.E.2d 75, 81, we have also recognized that some guilt-phase evidence should be excluded as irrelevant to the penalty determination. State v. Getsy (1998), 84 Ohio St.3d 180, 201, 702 N.E.2d 866, 887. Thus, a trial court's admission of all guilt-phase evidence en bloc is error, for "it is the trial court's responsibility, during the penalty phase, to identify and admit only the evidence relevant to that phase." State v. Lindsey (2000), 87 Ohio St.3d 479, 485, 721 N.E.2d 995, 1003.

At the close of the state's case, it moved to have exhibits from trial admitted. The state should have been permitted to introduce evidence relevant to the proven capital specifications. In other words, only evidence relevant to the fact that 1) both victims were killed in the same course of conduct; 2) McAlpin was the principle offender in the Aggravated Murder that occurred

during an Aggravated Robbery or Aggravated Burglary; and 3) McAlpin committed the Aggravated Murder with prior calculation and design.

Further, when determining what was relevant to the proven aggravating factors, Evidence Rule 403 should have been considered because of the danger that whatever relevance an exhibit may have had to establishing an element in the first phase, may be far outweighed by the danger of unfair prejudice in the penalty phase, as the jury may consider some exhibits as a non-statutory aggravator.

None of the following items should have been admitted as they were not relevant to the aggravating factors of R.C. §2929.04(A)(5) (course of conduct) or R.C. §2929.04(A)(7) (felony murders during commission of Aggravated Robbery and Aggravated Burglary).

The trial court admitted the following exhibits:

State's Exhibits 1 through 187 are photographs of the crime scene taken by Detective Raynard, which depict the office but also show the victims and the dog Axel. The inclusion of the photograph of the dog has no conceivable relevance and could serve only to raise the ardor of the jurors. There is a great danger that this was evidence was used to inflate the weight provided to the aggravating factors by the juror. It might be classified as part of the nature and circumstance of the case, but such is admissible only as mitigation. State v. Wogenstahl , supra.

Exhibits 201-204 are crime scene photographs depicting suspected blood spatter. Exhibit 221 is a photograph where Trina Tomolo's body was discovered. Exhibit 262-264, 271-273, and 292-294 are photographs of suspected blood and measurements of blood spatter on the walls of Mr. Cars. Exhibits 394-457 are photographs of the crime scene as the detectives walked through it.

State's Exhibit 641, 645, and 646 are the videos from body cam footage from detectives receiving the dispatch call and walking through the crime scene at Mr. Cars. Exhibit 651 is Colin Zaczkowski's 911 call to report what happened at Mr. Cars that night. Exhibits 1000-1091 are autopsy photographs of Michael Kuznik. Exhibit 1092 is the trace evidence report of Michael Kuznik. Exhibits 1080-1091 are photographs of the bullet fragments from the victims' bodies. Exhibits 1092-1106 are photographs of the clothing from Mr. Kuznik's body.

Exhibit 1191 is Mr. Kuznik's autopsy report. State's Exhibits 1200-1270 are autopsy photographs of Trina Tomola. Exhibits 1271-1297 are photographs of Ms. Tomola's clothing from her body that day depicting bullet holes and blood stains. Exhibit 1298 and 1299 are photographs of Ms. Tomola in the body bag. State's Exhibit 1333 is Ms. Tomola's autopsy report. Exhibit 1401 is the trace evidence report for Trina Tomola. Exhibit 1405 is a lab report containing the bullet fragment findings from Trina, Michael and Axel. Finally, Exhibit 1678 is an envelope containing the bullet fragments from the morgue.

Particularly prejudicial was the introduction of the coroner's material and the photographs of the scene where the decedents were shot. The murder itself is not an aggravating factor. Therefore, these photographs of the victims and their pet at the crime scene, in addition to the autopsy had little relevance to the capital specification.

Finally, the State introduced the entire 50+ page printout of searches into evidence, without redaction. (T. 3824, 3875) see Proposition of Law.. Tr. 4550; *see also* Proposition of Law VII. Those searches included strip clubs, gentlemen's clubs, and pornographic websites. Ex. 1433, p. 10-14, 22-24, 28, 50-52, 54. These searches had absolutely no evidentiary value, and they only served to make McAlpin look bad or unsympathetic and constituted non-statutory

aggravators.

Every erroneous admission had the same tendency: to urge the jury to consider the most emotional aspects of the crime as if those aspects were legitimate aggravating circumstances. See State v. Keenan (1993), 66 Ohio St.3d 402, 407-409. There was no limiting instruction. The trial court did not instruct the jury how the exhibits were to be used. The court did not instruct the jury that the the exhibits from the first phase could not be considered as and independent aggravator but were limited only to their consideration of the weight to be assigned to that aggravator. State v. Stojetz, 84 Ohio St.3d 452 (1999); 464; R.C. §2929.03(D)(1).

The Supreme Court of the United States has consistently condemned the consideration of factors not permitted under a state's statutory scheme. Barclay v. Florida, 463 U.S. 939 (1983), rehearing denied, 464 U.S. 874; Espinosa v. Florida, 505 U.S. 1079, 1081 (1992) (per curium). Misguiding a jury during the sentencing phase invites arbitrary and capricious sentencing Gregg v. Georgia, 428 U.S. 153, 193-195 (1976); Stringer v. Black, 503 U.S. at 231-235. Boyde v. California, 494 U.S. 370, 380-81 (1990).

The introduction of the irrelevant and unfairly prejudicial trial exhibits violated of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

Proposition of Law XII

> **During the penalty phase of a capital trial, comments by the trial judge that inform the jury that the defendant's out of court actions were the cause of an unnecessary delay and that he changed his mind about a stipulation to the admission of a mental health report and other records which the jury did not received, deprived the defendant of a fair penalty phase hearing.**

In the course of McAlpin's presentation of his penalty phase witnesses, the parties were unable to agree upon a stipulation to mitigation reports and documentation. In particular, a mental health expert was unavailable and on vacation. McAlpin decided not to stipulate to this report, and others, because he wanted the expert to testify in person. This required a cessation of the proceedings until the experts return. The judge instructed that not only was the case being delayed for a couple of days, but informed them what testimony and documentation was to be provided in McAlpin's defense by McAlpin. It was made clear that the delay was due to McAlpin's refusal to engage in stipulations for the testimony and evidence.

Upon reconvening, McAlpin decided not to present the evidence in his defense. Thus, the jury knew that the delay was caused by McAlpin, that had decided not to place on the evidence the existence of which they had been made aware, including mental health information. In the midst of the penalty phase deliberations, the jury requested access to the reports and were refused. This left them to dangerously speculate why McAlpin had decided not to introduce the evidence. The speculation or imagination would reasonably be that the unknown information was negative.

Failure to Maintain the Appearance of Neutrality

In the exercise of his or her duty, the judge must be cognizant of the effect of any judicial

comments upon the jury. State v. Thomas,, 36 Ohio St. 2d 68, 71 (1973). In Thomas, this Court commented:

> It must be noted that no absolute prohibition exists to preclude comment by a court during trial. It must also, however, be borne in mind that '* * * the influence of the trial judge on the jury is necessarily and properly of great weight * * *.' Starr v. United States (1894), 153 U.S. 614, 626."

Thus, it is well-settled that a trial judge is not precluded from making comments during trial and, in fact, must do so at times to control the proceedings. State v. Plaza, Cuyahoga App. No. 83074, 2004-Ohio-3117; State v. Jackson, Cuyahoga App. No. 82724, 2004-Ohio-2332. *See also*, Evid.R. 611(A). However, a trial judge should be cognizant of the influence his or her statements have over the jury and, therefore, a trial judge must remain impartial and avoid making comments that might influence the jury. Jackson, supra, *citing* State v. Boyd, 63 Ohio App.3d 790 (1989). *See also*, State v. Allen, 102 Ohio App.3d 696 (1995). When a judge's comments express his or her opinion of the case or of a witness' credibility, prejudicial error results. Plaza, supra, and Jackson, supra, *citing* State v. Kay, 12 Ohio App.2d 38 (1967).

In determining whether a trial judge's comments in the presence of the jury require reversal, an appellate court's analysis is guided by five factors: "(1) The burden of proof is placed upon the defendant to demonstrate prejudice, (2) it is presumed that the trial judge is in the best position to decide when a breach is committed and what corrective measures are called for, (3) the remarks are to be considered in light of the circumstances under which they are made, (4) consideration is to be given to their possible effect upon the jury, and (5) to their possible impairment of the effectiveness of counsel." State v. Wade, 53 Ohio St. 2d 182, 188 (1978), *vacated and remanded on other grounds by* 438 U.S. 911 (1978).

Present Case

During the penalty phase proceedings, at sidebar, the state proposed a stipulation that the parties were willing to stipulate to the authenticity of a mental health examination by Dr. Rodio prepared by the Cuyahoga County Psychiatric Clinic so that the doctor would not be required to personally appear and testify. In addition, the parties were stipulating to the authenticity and admissibility of the Children and Family Service records and the prison records received from the Ohio Department of Rehabilitation and Corrections. (T. 4570-71) McAlpin decided not to accept the stipulations and preferred that Dr. James Rodio appear to testify. (T. 4572)

The trial court noted that Dr. Rodio was out of the country. Therefore, it would be necessary to delay the penalty phase hearing for a few days, including the replacing of a juror with an alternate juror. (T. 4572-73)

After McAlpin made his unsworn statement, the court made the following statement to the jury.

> Okay. Ladies and gentlemen of the jury, we had kind of a development. The Court Psychiatrist Clinic had prepared a mitigation report, which has, in fact, been prepared. There was an agreement offered that the defendant has rejected, so we're going to bring Dr. Rodio in live. Here's the problem. Dr. Radio is out of the country as we speak. He is expected to be able to be contacted on Wednesday night.
>
> I'm not sure what that means. I don't know if he went down to Cancun, he's just coming back Wednesday morning, and I'm not sure because I don't know and so does that mean that he's going to be available on Thursday morning? I don't know.
>
> All right. So, what we're going to do is this: We're going to recess this case until Thursday morning. We'll bring him back here. We'll see if we've got Dr. Rodio. We'll get him on the stand subject to the cross-examination of Mr. McAlpin and the cross-examination of the State of Ohio. And I *apologize* for that break. (Emphasis added)

(T. 4587-88)

The above comments violated the courts duty of the appearance of neutrality. There was no need for the Court to make the above comments to the jury. The implication was that the state was being reasonable and McAlpin unreasonable. There was going to be an inconvenience to the jury and to Dr. Rodio, who was on vacation, that was due to the actions of McAlpin. In essence, the judge apologized for McAlpin's actions, none of which should have been shared with the jury. The court needed only have stated that there was an unexpected delay that could not be helped.

When the jury came back, McAlpin indicated that he was resting without calling Dr. Rodio. The court responded, with the jury present, "Your serious?", to which McAlpin responded that he was very serious. The judge then told Dr. Rodio he was not being called and was free to leave. (T. 4606-07)

Later, before penalty phase arguments, the court instructed the jury that he would ask McAlpin if he received the copies of the presentence report, as well as the mitigation report and if there were any corrections or additions. (T. 4678) There was no reason for the jury to have been aware of reports and information that it would not receive.

It is very clear that the jury was aware that evidence was kept from them. During penalty phase deliberations, the jury asked if it had access to the report the defense requested. (T. 4669) The danger here is that the jury was aware that McAlpin requested a report and then chose not to use it. It is logical to conclude that the jury would presume the reports contained negative information or it would have been introduced. In fact, the judge wrote a response the the jury that the defendant declined to place the reports into evidence, not that the jury should not consider its

unavailability for any reason in its deliberations. (Id.)

The judge's remarks were made to the jury near the close of the mitigation and unsworn statement of McAlpin. The jury could literally hear the frustration of the judge when McAlpin chose not to present additional evidence and that the delay which inconvenienced everyone, particularly the sitting jurors, was the fault of McAlpin. There is a great danger that the jury might have allowed the comments of the judge to affect how it considered the weight afforded to the weighing factors. This "thumb" on the aggravation side of the weighing process violated Fifth, Eighth and Fourteenth Amendment protections of McAlpin.

The trial court's comments deprived McAlpin his protections undèr the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

Proposition of Law XIII

Prosecutorial misconduct during the mitigation phase closing arguments deprived Mr. McAlpin of his substantive and procedural due process rights to a fair trial and reliable sentencing hearing.

During closing arguments of the mitigation phase of McAlpin's capital trial, the prosecutor: (1) continued to make improper remarks; (2) on multiple occasions, struck foul blows; (3) exploited the court's latitude by emphasizing the nature and circumstances of the offense as aggravating circumstances; (4) impermissibly commented on McAlpin's unsworn statement; and (5) made disparaging remarks about the defense. These improper statements so thoroughly permeated the state's closing argument that they cannot be deemed to be harmless. Further, this Court would be remiss "not to recognize that those matters which occur in the guilt phase carry over and become part and parcel of the entire proceeding as the penalty phase is

entered." State v. Thompson, 33 Ohio St.3d 1, 15 (1987). The prosecution's improper and inflammatory remarks infected the jury's decision with passion and prejudice; the result was an unreliable outcome.

When added to the prosecutor's improper conduct and remarks at the guilt determination phase, the only proper conclusion is that the mitigation phase of appellant's trial was both fundamentally flawed and prejudicially unfair.

A. Substantive Law on Prosecutor Misconduct

The test for prosecutorial misconduct is whether the prosecutor's statements were improper and, if so, whether the remarks prejudicially affected Defendant's substantive right to a fair trial. State v. Twyford, 94 Ohio St.3d at 354-355, 2002-Ohio-894; State v. Lott, 51 Ohio St.3d 160, 165 (1990); State v. Smith, 14 Ohio St.3d 13, 143 (1984). The relevant inquiry is whether the prosecutor's *comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process.*" Donnelly v. DeChristoforo, 416 U.S. at 643. (Proposition of Law IX, sections A-C, hereby incorporated by reference).

1. Arguing the nature and circumstances of the offense as aggravating factors

Though the prosecutor was careful in his explicit recitation of the law, his closing argument during the sentencing phase was infused with improper and prejudicial argument concerning the nature and the circumstances of the offense. "It is improper for prosecutors in the penalty phase of a capital trial to make any comment before the jury that the nature and circumstances of the offense are 'aggravating circumstances.'" State v. Wogenstahl, 75 Ohio at 352 1996-Ohio-219, syllabus ¶ 2. While he instructed the jurors to only consider the statutory aggravating factors, the prosecutor's repeated reference to prejudicial details about the nature and

circumstances of the offense inextricably conflated those non-statutory aggravating circumstances with the aggravating circumstances alleged in the indictment and found at the guilt determination phase.

One instance of this misconduct occurred when the prosecutor unnecessarily expounded on the "occupied structure" element of the aggravated burglary aggravating factor. To prove this element, the prosecutor need only show that Mike and Trina were in Mr. Cars when McAlpin purportedly trespassed by force, stealth, or deception. Instead, the prosecutor presented a lengthy and needlessly sentimental narrative of Mr. Cars.

> Let's talk about Mr. Cars for a minute. What do you know about Mr. Cars? Colin Zaczkowki was the first witness who testified in this case. He's Trina's son. Michael's adopted son or stepson.
>
> * * *
>
> Colin told you that Michael's father, Randy Kuznik, original started Mr. Cars in 1977, so it had been a family business for 40 years at the time Michael and Trina were killed.
>
> He told you that Mr. Cars opened in 1977, and he told you that when Michael took over the business in 2000, he renamed it or converted it to Mr. Cars II. And he specifically told you about what Mr. Cars meant to them.
>
> He said that Mr. Cars was, quote, the definition of a mom and pop shop. It was our family lifeline. It was what our family lived around, was based around.
>
> I worked there from the time I was old enough to turn a wrench, and up until when I was working full-time. I always helped out at the car lot. It was more of a home than a business.
>
> Mr. Cars wasn't just a crime scene. It was a place that Michael and Trina went to work every day. It was a place where the bits and pieces of their lives collected over the years.
>
> It was a place that they felt safe and it had meaning to them, and it had meaning to Colin, and meaning to Corrine, and meaning to Randy, and everyone else who knew them, who worked there.

> That's where he trespassed into. So when we talk about a trespass, this murder, these murders, they didn't happen out on the street. They didn't happen in a place where Michael and Trina felt unsafe. They happened inside Mr. Cars, what they considered to be their home.
>
> That's what you're weighing there. That he trespassed into that structure where they felt safe as they were closing up for the day.

(T. 4616-4617) (emphasis added).

That the murders took place in a family-owned business is not a statutory aggravating circumstance, nor is what that business meant to the surviving victims. The prosecution's emotional argument is misleading and intended to sway the jurors and affect their deliberations. This happened on multiple occasions.

Under the guise of proving the element of "recklessly inflicting harm" and later, "serious physical harm," the prosecutor used graphically laden detail and inflammatory language to once again implicitly argue the nature and circumstances of the crime as aggravating circumstances.

> So you will be considering the harm that was actually inflicted upon them in this case with respect to the aggravated burglary specification... And the harm was that they were both killed. They were both shot in the head. Michael once in the side of the head and again at a much closer range, right at the top of the head.
>
> And Trina in the back of the head as she tried to run. That's the harm that was done.

(T. 4618-4619).

> Which means, again, you will consider the fact that he shot them both in the head execution style in cold blood.

(T. 4622).

> They were executed in cold blood with gunshots to the head... Trina to the back of the head and Michael, twice in the head. Once to the side and once in the top of his head.

(T. 4628).

The "cold-blooded" manner in which the victims were harmed is not, as the prosecution suggests, a statutory aggravating circumstance for the jury to consider. Rather, the prosecution's editorializing of the murders and continued reference to them as "executions" is deliberately inflammatory rhetoric intended to evoke outrage from the jurors and influence their deliberations. The prosecutor continued to use this strategy as he pontificated about the circumstances that satisfied the "theft offense" element of the aggravated robbery aggravator, and the "course of conduct" specification of killing two or more people:

> Two innocent people are dead for what? For what? For a couple of used cars? For an 11-year older Mercedes and a nine-year old BMW and whatever cash Michael had in his pocket as he was closing up for work that day.
>
> For that, he took two innocent lives? That's pathetic. It really is. It's pathetic. You've heard a lot of pathetic things in this courtroom over the last two months.
>
> Don't forget that's the most pathetic of them all. That that was enough to motivate him to kill two innocent people. A theft of two used cars and a little bit of money.

(T. 4621-4622).

Appealing to either the jury's sense of outrage or sympathy for the victim is improper but it is particularly troublesome when made after the jury has already determined the defendant's guilt, and the only remaining task is to decide his fate. State v. Mills, 62 Ohio St.3d 357, 373 (1992); *citing* State v. Bedford, 39 Ohio St.3d 122, 134–135 (1988).

In addition to deliberately appealing to the juror's emotions, the prosecutor also

exceeded the scope of proper argument when he assumed what Trina experienced in her final moments.

> Trina tried to run away. She tried to get out of that compression room door, and he shot her in the back of the heard just as she got to that door.
>
> So, Trina heard the first gunshot that killed Michael, and she tried to run and he shot her before she could even get to that door.

(T. 4626).

Prosecutorial comments referring to what the victim felt are improper because they ask the jury to speculate on facts not in evidence. State v. Combs , 62 Ohio St.3d 278, 283 (1991). Here, not only were the facts not in evidence, but they would be irrelevant for the jury to weigh in mitigation.

2. Comment on McAlpin's unsworn statement

This court has previously addressed the limitations on what the prosecution can say about a defendant's unsworn statement. "[T]he prosecution may comment that the defendant's statement has not been made under oath or affirmation, but such comment must be limited to reminding the jury that the defendant's statement was not made under oath in contrast to the testimony of all other witnesses." State v. DePew, 38 Ohio St.3d 275, 285, (1988). Here, the prosecution started in a manner that comported with the law:

> The defendant gave an unsworn statement, and I'm not going to spend much time talking about the unsworn statement. What I can say to you about the unsworn statement under the law is that it was not under oath like every other witness in this case.

(T. 4631).

But the prosecution's remarks quickly exceeded what's lawful and referred not only

to the credibility of his statement, but also to McAlpin's silence on particular issues.

> It was not subject to cross-examination like every other witness in this case.
>
> And let's talk about what he actually said in the unsworn statement. This was his opportunity to tell you anything that he wanted about his history, his character, his background that might have been a reason not to impose the death penalty.
>
> And what did he actually tell you? He told you that he stands on his innocence...
>
> And the other thing he told you is that this brought his family together. Whether you give that any weight, I suppose is a personal decision that's left up to you.
>
> But I would submit to you that that statement shows a complete lack of understanding and appreciation for the severity of why we're here...
>
> So when it comes to that unsworn statement, I submit to you that you give that unsworn statement absolutely no weight because that's what it deserves. No weight, whatsoever.

(T. 4631-4634).

The prosecution improperly undermined McAlpin's unsworn statement by emphasizing that it was not subjected to cross-examination. *See* State v. Lorraine, 66 Ohio St.3d 414 (1993). Further, the prosecutor's opinion that McAlpin's sworn statement not be given any weight implied to the jurors that he was insincere, particularly when his appreciation for the severity of the situation was called into question. This was not an isolated incident, and only escalated in rebuttal, immediately before the jurors were dismissed for sentencing deliberation.

3. Prosecutor's comments disparaging defense

This Court has disfavored remarks that denigrate defense counsel for doing his or her job because they implicitly denigrate the defendant. State v. Keenan, 66 Ohio St.3d

402, 405–406 (1993). The idea that due process prohibits a prosecutor from ad hominem attacks against defense counsel is well established. "Defense Counsel, *like his adversary,* must not be permitted to make unfounded and inflammatory attacks on the opposing advocate." *See also* United States v. Young, 470 U.S. 1, 9 (1985) (emphasis added), citing Berger v. United States, 295 U.S. 78, 88 (1935). This prosecutorial misconduct should trigger greater concern when a defendant is acting as his own counsel (as McAlpin was here), when the misconduct occurs after the jury has already determined the defendant's guilt, and the only remaining task is to decide his fate.

Nonetheless, the prosecution openly employed this tactic in rebuttal when responding to McAlpin's closing argument:

> During opening statements and again during his closing argument, this man had the audacity to compare what happened to Trina and Michael to what he's going through in this courtroom. He had the nerve to compare what they went through to what he's going through.
>
> Don't compare what he's going through to what they went thought. You know, he sat here during his unsworn statement, and there's times again where you can't believe what you're hearing.
>
> And he gives this—excuse my language—half ass respect to the family. "I know what you're going through." You have no idea what they went through.

(T. 4646-4647).

By making these comments, the prosecutor made his outright disdain for McAlpin evident to the jurors. Such comments are inherently prejudicial; they are inappropriate for the jurors to have considered when weighing the aggravating circumstances and mitigating factors of the case. That misconduct cannot be considered harmless. *See* 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) ("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.'").

4. Cumulative effect of the prosecutor's improper comments

To determine whether the remarks were prejudicial, this Court must review the closing argument in its entirety. State v. Slagle, 65 Ohio St.3d 597, 607 (1992); State v. Moritz, 63 Ohio St.2d 150, 157 (1980). This court must consider all of the prosecutor's remarks, irrespective of whether the defense preserved an objection. State v. Keenan, 66 Ohio St.3d 410 ("even though the defense waived objection to many remarks, those remarks still form part of the context in which we evaluate the effect on the jury of errors that were not waived.").

McAlpin respectfully submits that but for each improper statement made by the prosecution, the sentencing outcome could have been different. But even if this Court declines to agree, the record demonstrates that the prosecutor's misconduct was pervasive and "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. at 643. The cumulative weight of the prosecution's improper comments prejudicially affected McAlpin's substantive right to a fair trial.

These acts of misconduct resulted in a violation of McAlpin's rights as guaranteed under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution as well as Article I, §§ 9 and 16 of the Ohio Constitution. Thus, McAlpin's convictions and sentence must

be reversed.

Proposition of Law XIV

Residual doubt is a proper factor for a jury to consider when determining the appropriate sentence in penalty phase deliberations.

In his unsworn statement at the penalty phase, McAlpin argued that he was not the perpetrator of the offenses. In other words, he asked the jury to consider residual doubt as a reason not to sentence him to death. However, because Ohio prohibits this consideration by a capital jury, the trial court did not so instruct the jury. This not only resulted in the failure of the jury to consider and give effect to this issue, but had an additional negative effect McAlpin because this was an aspect of his unsworn statement. Roper v. Simmons, 543 U.S. 551, 568 (2005); Brewer v. Quarterman, 550 U.S. 286, 289 (2007) (sentencer cannot be precluded from "giving meanful effect to mitigating evidence").

In Ohio, residual doubt is not currently a factor the defense may argue, or the jury may consider, when determining the appropriate sentence during penalty phase deliberations. McAlpin argues here that this Court should reconsider its position on this issue. In McGuire, this Court stressed the fact that at the sentencing phase a defendant's guilt has already been determined and thus, should not be revisited. *See* State v. McGuire, 80 Ohio St.3d 390, 403 (1997). However, this view does not recognize that while our system is a strong one, it is not infallible. The Court has "emphasized that the Constitution guarantees a defendant facing a possible death sentence not only the right to introduce evidence mitigating against the death penalty but also the right to consideration of that evidence by the sentencing authority." Franklin

v. Lynaugh, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring).

Residual doubt is a lingering uncertainty about facts, a state of mind that exists somewhere between "beyond a reasonable doubt" and "absolute certainty." Franklin v. Lynaugh, 487 U.S. at 188. The Supreme Court has not foreclosed the presentation of residual doubt evidence or jury instructions during the sentencing phase of capital trials. *See* Oregon v. Guzek, 546 U.S. 517, 525 (2006) (deciding only that the evidence in that particular case need not be admitted and declining to address the issue of the admissibility of residual doubt evidence generally). The Court has had the opportunity to decide that the Eighth Amendment does not require allowing residual doubt arguments and declined to make such a decision. In Guzek, Justice Scalia wrote:

> In this case, we have the opportunity to put to rest, once and for all, the mistaken notion that the Eighth Amendment requires that a convicted capital defendant be given the opportunity, at his sentencing hearing, to present evidence and argument concerning residual doubts about his guilt. . . . I would . . . reject all Eighth Amendment residual-doubt claims.

Id. at 528 (Scalia, J., concurring). Justice Scalia's dissent demonstrates that the Court could have agreed with his opinion and prohibited residual doubt claims once and for all. However, his opinion is a concurrence. The Court declined his interpretation, opting to leave open the door for residual doubt arguments and even jury instructions. This Court should definitively declare residual doubt is a constitutionally recognized mitigating factor.

Other courts have recognized the importance of residual doubt and allowed residual doubt arguments and jury instructions. In United States v. Davis, the court noted:

> [B]eing convicted "beyond a reasonable doubt" does not mean a person is in fact guilty. Innocent people have been convicted and many, hopefully most, were eventually exonerated. This is possible as long as the person is alive, even if

imprisoned. Capital punishment does not allow for that correction.

132 F.Supp. 2d 455, 467 (E.D. La. 2001).

Louisiana is not alone. The Northern District of Iowa fully endorsed Davis, adopting its reasoning completely in determining that a defendant is entitled to utilize residual doubt arguments during the sentencing phase. *See* United States v. Honken, 378 F.Supp. 2d 1040 (N.D. Ia. 2004). Capital defendants, including the wrongfully convicted, are unconstitutionally restricted if they cannot present a residual doubt argument.

A. Residual Doubt Must Be Admissible Because It Is Highly Relevant

The death penalty is "unique in its severity and irrevocability." Gregg v. Georgia, 428 U.S. 153, 187 (1976). The Supreme Court of the United States has declared there is a "qualitative difference between death and other penalties [that] calls for a greater degree of reliability when the death sentence is imposed." Lockett v. Ohio, 438 U.S. at 604. To this end and as a matter of law, the sentencer may not refuse to consider, nor may the state preclude, evidence of mitigating factors. Eddings v. Oklahoma, 455 U.S. 105, 114–15 (1982). Under the Eighth Amendment, mitigating evidence includes the defendant's age, mental capacity and health, and evidence of coercion, character, criminal history and *all other mitigating factors*. *See* Lockett v. Ohio, at 606. Residual doubt is the ultimate mitigating factor.

i. Residual Doubt Is the Most Relevant Evidence Because It Is the Most Effective Evidence

In multiple studies, capital sentencing jurors have said that the residual doubt argument, *above all else*, is likely to make them choose a life sentence over death penalty. According to a 1998 study, 77.2% of jurors said they would be at least slightly less likely to sentence a

defendant to death if the defendant raised residual doubt. Further, 60.4% said they would be much less likely to sentence a defendant to death in the face of residual doubt evidence. The study concluded residual doubt "over the defendant's guilt is *the most powerful 'mitigating' fact*." Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1563 (1998) (emphasis added).

Another study found 69% of jurors point to "lingering doubt" as a reason they refused to vote for death. William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 Am. J. Crim. L. 1, 28 (1988). In fact, the jurors worried that future exculpatory evidence would be found and their decision would be irreversible. *Id.* at 28–29. Jurors on one case in that study even admitted, "they knew he was guilty of something, but they did not know what, and on that they could not sentence him." *Id.* at 32 (for the first and only time, the jury recommended a life sentence, unanimously, and the judge overrode and sentenced to death). When defending against the ultimate irrevocable punishment, the evidence statistically most likely to change a juror's mind on the appropriate sentence is highly relevant evidence.

This reality must be combined with the reality of the composition of death penalty juries. Death penalty juries are more likely to convict. Justice John Paul Stevens has noted this disparity, stating that the ability to remove jurors who express qualms about the death penalty "creates a risk that a fair cross-section of the community will not be represented on the jury." Justice John Paul Stevens, Address to the American Bar Association, Thurgood Marshall Awards Dinner (Aug. 6, 2005). If the court does not make an attempt to include all viewpoints on the death penalty on a death-qualified jury, it is impossible for the jury to be a representation

of the community.

As far back as 1968, the United States Supreme Court noted that in "a nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community." Witherspoon v. Illinois, 391 U.S. 510, 520 (1968). At the same time, the Court noted that the number of Americans who approve of the death penalty was a "distinct and dwindling minority." Id. The Court was prescient: a 2010 Death Penalty Information Center poll shows that a majority of Americans prefer other penal alternatives over the death penalty. *Poll Shows Growing Support for Alternatives to the Death Penalty*, Death Penalty Info. Ctr., http://www.deathpenaltyinfo.org/public-opinion-about-death-penalty (last visited Mar. 22, 2013). Although the number of Americans who do not support the death penalty is rising, death-qualified juries still favor the death penalty, making these juries neither an accurate nor fair cross-section of the community they purport to represent. If a jury is already predisposed to sentence a defendant to death, a defendant must be allowed to present all possible arguments in his defense.

ii. Residual Doubt Elevates the Other Mitigating Factors

Under the Ohio death penalty statute, the jury is obligated to consider all of the mitigating factors in their totality. R.C. 2929.04 (stating the jury shall "weigh against the aggravating circumstances . . . the nature and circumstances of the offense, the history, character, and background of the offender, *and* all of the following [mitigating] factors. . . ." (emphasis added)); *see also* 2 Ohio Jury Instructions 503.011. Any single mitigating factor may outweigh the aggravating factors, and the cumulative effect of mitigating factors may outweigh the aggravating factors. 2 Ohio Jury Instructions 503.011.

Juries need not be unanimous in finding a mitigating factor unanimous in order to consider that mitigating factor. Mills v. Maryland, 486 U.S. 367 (1988). The power of residual doubt is in changing the mind of a single juror. If one juror finds residual doubt compelling, then that juror might be enough to stop the imposition of the death penalty. *Cf.* State v. Brooks, 75 Ohio St. 38 148, 160–61 (1996) (discussing the importance of ensuring every juror knows that their vote matters and that if one juror holds out against a death sentence, death cannot be imposed); Mills, 486 U.S. at 375 (emphasizing the importance of jury instructions that ensure "respect [of] a single juror's hold out vote"). Alternatively, while residual doubt alone might not be compelling to a juror, it might induce a juror to weigh the current statutory mitigating factors more heavily. If residual doubt causes one juror to view the evidence differently, it is highly relevant and therefore constitutionally required.

In State v. McGuire, 80 Ohio St. 3d at 403-04, this Court reached the conclusion that residual doubt from the culpability phase is irrelevant to the question of whether death is the appropriate sentence for a person convicted of a capital crime. Maintaing this precedent would violate his federal constitutional rights under the Sixth, Eighth, and Fourteenth Amendments.

2. The United States Supreme Court implicitly overruled McGuire.

In Oregon v. Guzek, 546 U.S. 517 (2006), the United States Supreme Court clarified that, a capital defendant can argue residual doubt during the mitigation phase based on facts adduced during the culpability phase. In Guzek, the defendant faced a mitigation-phase only jury trial after an appellate court reversed his sentence but affirmed his convictions. He wanted to admit alibi evidence that had not been presented at his original culpability-phase trial. Although the Supreme Court held that Guzek did not have a constitutional right to admit new evidence of innocence, it

did so based on the fact "Oregon law gives the defendant the right to present to the sentencing jury all evidence of innocence from the original trial." Id. at 526. This ruling depended in part on the fact that the defendant did not claim that the alibi evidence had not been available at his first trial; thus, Guzek implies evidence of innocence that had not been available earlier could be admitted during the mitigation phase.

3. It is logical and consistent to permit arguments or evidence of residual doubt in mitigation after a guilty verdict at the trial phase.

In McGuire, the Court rejected residual doubt as a mitigating factor, reasoning that residual doubt of guilt was "illogical" following a verdict of guilty beyond a reasonable doubt. McGuire, 80 Ohio St. 3d at 403. This reasoning overlooks the essential distinction between residual doubt as mitigation and the State's burden of proof at trial. At trial, the issue for the trier of fact is whether the accused is legally culpable on each essential element beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). A proper standard of proof beyond a reasonable doubt must direct the trier of fact to decide the legal, and not moral, culpability of the accused. *See* Victor v. Nebraska, 511 U.S. 1, 21 (1994).

At the end of the culpability phase of a capital trial in Ohio, courts read a statutory definition of "reasonable doubt" that instructs jurors that "Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt." R.C. §2901.05(D). For purposes of death-eligible culpability, then, the jurors do not determine whether the accused is guilty beyond all doubt. By definition, "residual doubt" exists in the measurable distance between "proof beyond a reasonable doubt" and "proof beyond all doubt." It is this identifiable measure of proof that gains

force and relevance during the mitigation phase when jurors must finally ask themselves whether their culpability-phase verdict supports taking the defendant's life: Does the proof of legal guilt support a death verdict?

If a defendant is found guilty by proof beyond a reasonable doubt, which by law *is not* proof beyond all "possible or imaginary doubt," R.C. §2901.05(D), there remains by definition some distance between the quantum of evidence legally necessary to establish guilt and 100% certainty of the defendant's guilt (*i.e.*, proof beyond all possible doubt). And in that distance, that space between legal guilt and absolute certainty of guilt, lies the possibility of residual doubt that operates as a mitigating factor in favor of a life sentence. Death is 100% final; proof beyond a reasonable doubt is not.

4. Residual doubt of guilt offered in mitigation must be considered under the reliability component of the Eighth Amendment.

Death is different in kind from lesser punishments because of its extreme finality. Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Due to the unique nature of death as a punishment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Id. Accordingly, the Supreme Court of the United States held in Woodson that there is a reliability component to capital jurisprudence under the Eighth and Fourteenth Amendments. The objective of the reliability component is to eliminate the risk of a non-reversible, fatal mistake in the imposition of the death penalty. See Woodson, 428 U.S. at 305. McGuire's prohibition of residual doubt in mitigation violates this reliability component of capital jurisprudence.

5. Franklin v. Lynaugh, 487 U.S. 164 (1988), did not expressly hold that residual doubt could be completely excluded from a capital sentencer's consideration.

This Court in McGuire relied on Franklin v. Lynaugh, 487 U.S. 164 (1988), for the proposition that a state could completely exclude residual doubt from the capital sentencer's consideration. McGuire, 80 Ohio St. 3d at 403. This reading of Franklin is too broad. Admittedly, the Franklin Court questioned whether residual doubt was constitutionally required. 487 U.S. at 172-75. The Court assumed no constitutional error in Franklin, however, because "[t]he trial court placed no limit whatsoever on [Franklin's] opportunity to press the 'residual doubts' question with the sentencing jury." Id. at 174. Thus, McGuire stretched dicta from Franklin to reach the conclusion inimical to Defendant's rights under the Eighth and Fourteenth Amendments.

6. Evidence of residual doubt is relevant as mitigation when considered as part of the nature and circumstances of the offense under O.R.C. § 2929.04(B).

In McGuire, this Court held that residual doubt is irrelevant to the nature and circumstances of the offense. Id., at 403-04. This was not the Court's original position on the subject arbitrary reversal of its own precedent. In State v. Watson, 61 Ohio St. 3d 1 (1991), the Court vacated the death sentence because the facts adduced at trial created residual doubts. Four disinterested witnesses saw someone other than Watson run away from the crime scene. Id. at 18. Further, the shooter pumped his shotgun at the crime scene, which ejected a live shell. Id. at 2, 572 N.E.2d at 101. Another suspect's fingerprint was found on that ejected shotgun shell. Id. The nature and circumstances of the offense in Watson provided mitigation as residual doubt. Id. at 17. Accordingly, residual doubt can be and is often found within the facts of an offense.

7. McGuire's prohibition on residual doubt will interfere with the reasonable strategic choices of the defense in mitigation.

State v. Goodwin, 84 Ohio St. 3d 331 (1999), held that it was a reasonable strategy for defense counsel at the mitigation phase to forego presenting additional evidence in favor of relying on residual doubt. In State v. Gillard, 40 Ohio St. 3d 226, 234-35 (1988), this Court found no error in trial counsel's reliance on residual doubt in mitigation, saying: "This strategy was within the 'wide range of reasonable professional assistance.' Strickland v.. Washington, supra, at 689. 'Residual doubts' of a capital defendant's guilt are properly considered in mitigation. Lockhart v. McCree, 476 U.S. 162, 181 (1986); *accord* State v. Buell, 22 Ohio St. 3d 124, 142 (1986)."

McGuire forecloses this strategy in violation of Defendant's Eighth Amendment rights. In addition, McGuire infringes on a capital defendant's Sixth and Fourteenth Amendment rights to the effective assistance of counsel by state interference. *See* United States v. Cronic, 466 U.S. 648 (1984).

8. The McGuire Court's interpretation of the O.R.C. § 2929.04(B)(7) mitigating factor unduly restricts the capital sentencer's consideration of nonstatutory mitigation.

In McGuire, this Court stated that mitigation under R.C. §2929.04(B)(7) "must be read in relation to R.C. §2929.04(B)." 80 Ohio St. 3d at 403. Thus, the decision restricted the scope of (B)(7) "catch all" mitigation to the O.R.C. §2929.04(B) factors to exclude residual doubt. This interpretation of R.C. §2929.04(B)(7) unduly restricts the sentencer's consideration of constitutionally required non-statutory mitigation. Hitchcock v. Dugger, 481 U.S. 393, 398-99 (1987).

In Hitchcock, the Supreme Court vacated a capital sentence because the trial court limited the jury's consideration to statutory mitigating factors. Id. at 398. The Court held that the restriction of non-statutory mitigation "did not comport with the requirements of Eddings v. Oklahoma, and Lockett v. Ohio]." Id. at 398-99. As in Hitchcock, McGuire's restrictive view of the (B)(7) non-statutory, catch all factor is unconstitutionally preclusive.

9. When the State relies on arguments or evidence of legal guilt to seek the death penalty, a capital defendant has a due process right to rebut such arguments or evidence.

It is well-established that a capital defendant has Eighth Amendment and due process rights to rebut any information on which the mitigation-phase fact-finder may rely to impose death. Roper v. Simmons, 512 U.S. at 169 (capital defendant denied due process; unable to rebut evidence of future dangerousness); Skipper v. South Carolina, 476 U.S. 1, 5 (1986) n. 1., n.1 (capital defendant denied due process right of rebuttal; unable to rebut evidence of future dangerousness); id. at 9-11; Gardner v. Florida, 430 U.S. 349, 362 (1977) (capital defendant denied due process; unable to address presentence information report).

When the mitigation phase begins, the prosecution starts by relying on the fact that it has, to the jurors' satisfaction, proven beyond a reasonable doubt the aggravating circumstances that make the defendant guilty of a death-eligible murder. The defendant must offer evidence in mitigation to prevent the State from proving beyond a reasonable doubt that these aggravating circumstances outweigh by proof beyond a reasonable doubt the defendant's mitigation. McGuire unconstitutionally precludes a capital defendant from rebutting and confronting the State's evidence in favor of death with evidence of residual doubt.

Proposition of Law XV

> **In a capital case, if the cumulative errors in the penalty phase instructions, including the omission of necessary instructions, materially effect the jury's ability to properly engaged in its duty to fairly weigh the proven aggravating factors against the available evidence in mitigation, the defendant's right to a fair penalty phase hearing has been denied.**

In the present case, the penalty phase instruction included erroneous instructions, but also omitting instructions necessary for the jury to properly determine the appropriate penalty. McAlpin, representing himself pro se, not surprisingly failed to object to or request the relevant instructions. Nevertheless, because death requires a closer scrutiny by the Courts, the jury instructions on the whole resulted in an unreliable result.

In examining errors in a jury instruction, a reviewing court must consider the jury charge as a whole and""must determine whether the jury charge probably misled the jury in a matter materially affecting the complaining party's substantial rights." Kokitka v. Ford Motor Co., 73 Ohio St. 3d 89, 93, 1995-Ohio-84, *quoting* Becker v. Lake Cty. Mem. Hosp. W., 53 Ohio St.3d 202, 208 (1990). Therefore, reviewing court may not reverse a conviction in a criminal case due to jury instructions unless it is clear that the jury instructions constituted prejudicial error, *citing* State v. Adams, 62 Ohio St.2d 151, 154 (1980).

In order to determine whether an erroneous jury instruction was prejudicial, a reviewing court must examine the jury instructions as a whole. State v. Van Gundy, 64 Ohio St.3d 230, 233-234, 1992 -Ohio-1082). As explained in State v. Hardy, 28 Ohio St.2d 89, 92 (1971), this Court held:

> In determining the question of prejudicial error in instructions to the jury, the charge must be taken as a whole, and the portion that is claimed to be erroneous

> or incomplete must be considered in its relation to, and as it affects and is affected by the other parts of the charge. If from the entire charge it appears that a correct statement of the law was given in such a manner that the jury could not have been misled, no prejudicial error results.

Id.

A jury instruction constitutes prejudicial error where it results in a manifest miscarriage of justice." State v. Hancock, 12th Dist. Warren No. CA2007-03-042, 2008-Ohio-5419, ¶ 13. Conversely, "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Crim.R. 52(A).

A. Errors in Instructions

1. No Sympathy

This Court has held that sympathy is not a relevant sentencing criteria, and "there is no practical difference between 'mere sympathy' and 'any sympathy' in this context." State v. Taylor, 78 Ohio St. 3d at 30. The court's instruction to the jury not to consider sympathy or prejudice was a correct statement of the law. State v. Tibbetts, 81 Ohio St.3d 223, (1998) *citing* State v. Allen, 73 Ohio St. 3d 626, 638 _(1995) and State v. Jenkins, 15 Ohio St. 3d 164 (1984), at paragraph three of the syllabus.

McAlpin acknowledges this Courts precedent but believes that it is in conflict with that of the Supreme Court of the United States. The key is that the jury cannot considered "untethered" sympathy or sympathy not naturally emanating from the evidence in support of a sentence less than death. 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., sympathy tethered or engendered by the penalty phase evidence.

2. Mercy

The trial court failed to instruct the jury that it could consider mercy in determining the appropriateness of the death penalty. The court has previously found that mercy is not an factor in mitigation. But in Kansas v. Marsh, 548 U.S. 163 (2006), the Court recognized the importance of a mercy instruction in "weighing states" like Kansas and Ohio (*i.e.*, a state with a capital scheme wherein jurors weigh aggravators against mitigators when determining whether death is the appropriate sentence for the individual defendant). Marsh upheld a Kansas law that instructed jurors to sign a death verdict if the aggravating and mitigating evidence was in equipoise.

This law passed constitutional muster, in part, because the Kansas statute gave jurors the following instruction: "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. 548 U.S. at 176. "The 'mercy' jury instruction alone forecloses the possibility of Furman-type error as it eliminate[s] the risk that a death sentence will be imposed in spite of facts calling for a lesser penalty." Id. at footnote 3 (internal quotation and citation omitted). Under Marsh, since Ohio, like Kansas, is a "weighing" state, a mercy instruction is required to foreclose constitutional error.

It should be noted that the entire Court joined either the majority or the dissent on the

mercy issue. Thus, all nine Justices recognized the importance of avoiding Furman v. Georgia 408 U.S. 238, 241 (1972) (proportionality of punishment to offense) error and five specifically said that a mercy instruction is the key protection against Furman error.

The fundamental issue in a capital sentencing proceeding involves the determination of the appropriate punishment to be imposed on an individual. Spaziano v. Florida, 468 U.S. 447 (1984). "Mercy" is a valid factor for jurors to consider when weighing whether death is the appropriate penalty for the person they convicted of a death-eligible murder offense.

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

This Court has long recognized the role of mercy in capital mitigation hearings. In State v. Rogers, 28 Ohio St. 3d 427, 434 (1986), the Court stated, "Defense counsel certainly has the right to plead for mercy and, indeed, has the very duty to cause the jury to 'confront both the gravity and the responsibility of calling for another's death.'" (Citation omitted.) In State v. Zuern, 32 Ohio St. 3d 56, 63-64 (1987), the Court rejected as without merit the defendant's argument that "the imposition process does not permit the extension of mercy," saying: "Moreover, a jury is not precluded from extending mercy to defendant."

In State v. Garner, 74 Ohio St.3d 49, 57 (1995), this Court explained:

> In this case the trial judge adequately instructed the jury that it might consider the mitigating factors to be those circumstances which "in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability." Such a charge constitutes adequate instruction concerning the extension of mercy to a capital defendant. *State v. Grant*, 67 Ohio St.3d at 481, 620 N.E.2d at 67, ...

The failure to provide the jury with an instruction similar to the Supreme Court approved instruction on mercy violates McAlpin's constitutional rights under the Fifth, Eighth and Fourteenth Amendments of the United States Constitution and; Ohio Const. art. I, §§ 1, 5, 9, 10, 16 and 20.

3. Residual doubt

This issue was fully addressed in Proposition of Law XIV. It is acknowledged that this Court has held that residual doubt is not a factor which the jury is permitted to consider. This Court stressed the fact that at the sentencing phase a defendant's guilt has already been determined and thus, should not be revisited. See State v. McGuire, 80 Ohio St.3d 390, 403 However, the Supreme Court of the United States has not prohibited states from allowing jurors to consider this factor. Oregon v. Guzek, 546 U.S. 517 (2006), the Supreme Court held that Guzek did not have a constitutional right to admit new evidence of innocence, it did so based on the fact "Oregon law gives the defendant the right to present to the sentencing jury all evidence of innocence from the original trial." Id. at 526. In other words, a capital defendant may argue, and the jury may consider, actual innocence, or residual doubt claims based on evidence introduced at the trial phase, but not introduce new evidence to that effect.

McAlpin did not attempt to introduce new evidence. He merely insisted on his innocence based on the evidence the jury had already heard and had been introduced at trial. Without an instuction from the court that the jury could consider the argument, even if were ultimately reject

it, the jury would not consider and give effect to the statement and assign it appropriate weight.

4. Omission of Explanation of Equipoise

In the penalty phase instructions, the trial court did not explain to the jury how to proceed if an one of the jurors determined that the aggravating factors were in equipoise with the mitigation. What should have been explained is that if a juror were believed that the weight of the evidence for the factors was in equipoise, death was off the table and the jury must then consider one of the three life options. It is not necessary that a jury decide one way in finality, for the weight was equal, the state failed to prove the aggravating factors outweighed the mitigation beyond a reasonable doubt.

Juries need not be unanimous in finding a mitigating factor unanimous in order to consider that mitigating factor. Mills v. Maryland, 486 U.S. 367 (1988). If a single jurror is unsure of whether the prosecution has met its burden, then the death penalty may not be the appropriate sentence. State v. Brooks, 75 Ohio St. 38 148, 160–61 (1996) (discussing the importance of ensuring every juror knows that their vote matters and that if one juror holds out against a death sentence, death cannot be imposed); Mills, 486 U.S. at 375 (emphasizing the importance of jury instructions that ensure "respect [of] a single juror's hold out vote").

Jury instructions must not only have been erroneous, but also, taken as a whole, so infirm that they rendered the entire trial fundamentally unfair. Doan v. Carter, 548 F.3d 449, 455 (6th Cir. 2008) (quoting Austin v. Bell, 126 F.3d 843, 846-47 (6th Cir. 1997) (internal quotation marks omitted)) (emphasis added); Estelle v. McGuire, 502 U.S. 62, 72 (1991). "When a court makes an error in instructing the jury, the proper inquiry is 'whether there is a reasonable likelihood that the jury' applied the instruction 'in an unconstitutional manner.'" Doan, 548 F.3d

at 455 (quoting Victor v. Nebraska, 511 U.S. 1, 6 (1994)).

A conviction may be reversed if the cumulative effect of the errors deprives the defendant of a fair trial. State v. DeMarco, 31 Ohio St.3d 191 (1987), paragraph two of the syllabus; State v. Moore, 81 Ohio St.3d 22, 41 (1998). Under this Proposition McAlpin urges that the effect of cumulative error deprived him of a fair penalty phase hearing. Pursuant to the cumulative error doctrine, the existence of multiple errors, which may not individually require reversal, may violate a defendant's right to a fair trial. State v. Madrigal (2000), 87 Ohio St.3d 378, 397. The same concept must apply to the penalty phase, and is consistent with the established principal that instructions are infirm, if taken as a whole, they rendered the trial unfair. Estelle v. McGuire, 502 U.S. at 72.

The penalty phase jury instruction, taken as a whole, deprived McAlpin of a fair penalty phase hearing and violated his's constitutional rights under the Fifth, Eighth and Fourteenth Amendments of the United States Constitution and; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16 and 20.

Proposition of Law XVI

> **In a capital trial where a *pro se* defendant receives a sentence of death, if a review of the proceedings establishes that the cumulations of error, plain or preserved, combined with other improper trial irregularites renders the sentence to be unreliable, the Due Process clauses of both the Ohio and United State Constitution require a reversal of the death sentence.**

In United States v. Farhad, 190 F.3d 1097 (9th Cir. 1999), the Ninth Circuit Court of Appeals concurring opinion observed:

> First, may a defendant waive his right to a fair trial? In other words, may he agree to a process that is likely to result in an unfair proceeding? To put it more bluntly, may he agree to an unfair trial?... [P]ermitting waivers of the right to a fair trial would be contrary to the public interest.

Id., at 1108 (Reinhardt, J., concurring)

The above dilemma is apparent in McAlpin's case. McAlpin essentially waived due process and Eighth Amendment protections on multiple occasions throughout both phases of his capital trial. Under established law in this state, a plain error standard is invoked for the review of error. That standard is nearly impossible to meet, and indeed, McAlpin concedes that he cannot prove on this appeal that the result would have been otherwise, or that he would have been acquitted.

A. Overview of Issue

The question here is whether, in a capital trial, the procedure below is so unfair that the result of the trial, here the death penalty, is rendered unreliable. The Supreme Court of the United States has long recognized that "death is different," Woodson v. North Carolina, 428 U.S. 280, 322-3 (1976) Therefore, capital litigation has numerous additional safeguards compared to the rest of the criminal justice system to decrease the chance of arbitrary and capricious sentencing.

The death penalty's irreversibility still encourages "specially careful review of the fairness of the trial, the accuracy of the fact-finding process, and the fairness of the sentencing procedure where the death penalty is imposed." Id. Some of these safeguards include class exclusion, narrowing mechanisms at the penalty phase, bifurcating the guilt and penalty phases of a proceeding, giving juries discretion to recommend mercy, the penalty phase being its own trial, and allowing individualized sentencing and mitigating evidence, and requiring a lesser sentence be imposed when there is a hung jury[3]. Other safeguards that minimize the risk of arbitrary and capricious sentencing include the limited number of chargeable capital crimes and the requirement that at least one aggravating circumstance be found to exist.

The General Assembly incorporated the mentioned safeguards into Ohio's death penalty statutes, as well as proportionality review to reduce the arbitrary and capricious imposition of death sentences[4]. Without these safeguards, the capital process is constitutionally defective because it would lead to illegal executions.

Because McAlpin failed to effectively represented himself at trial. It is acknowledged that this, in an of itself, is not a colorable claim. Not unexpectedly, McAlpin failed to raise meritorious claims, which will be listed below, and thereby waived any review other than a plain error review. In a capital case, even if defendants have the right to self-represent, whether the trial the ultimately resulted in a reliable result in a capital case is reviewable. Where appellate review reveals the result of trial and/or the sentence is unreliable, the failure to reverse the verdict violates not only the Fifth, Eight and Fourteenth Amendments of the Federal Constitution, but

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[3] R.C. 2929.03

[4] R.C. 2929.04, 2929.03,

also the independent, and perhaps greater protections, afforded by Ohio's Constitution.

The Eighth Amendment imposes a "high requirement of reliability" on death sentences because "society [has] an interest in executing only those who meet the statutory requirements as long as they have been protected by the safeguards designed to shield defendants from arbitrary sentencing." State v. Ashworth, 85 Ohio St.3d 56, 64 (1999). Here, Ohio's interest in ensuring all issues surrounding the death sentence are resolved before killing the defendant are high enough that McAlpin's due process rights and would inflict cruel and unusual punishment upon him because under the Eighth Amendment "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." California v. Ramos, 463 U.S. 992, 998–999 (1983) Once capital defendants go through the full process either with effective counsel or the opportunity to rectify errors due to ineffective assistance of counsel, the State has a high enough interest in executing him to make the punishment no longer cruel and unusual nor arbitrary. State v. Berry, 80 Ohio St.3d 371, 383 (1997)

Ohio's interest in properly implementing the death penalty is high enough that *pro se* defendants' appeals require more leniency than what plain error review offers. Without this more lenient appellate review, "an unacceptably high percentage of criminal defendants would be wrongfully executed - 'wrongfully' because they were innocent of the crime, undeserving of the severest punishment relative to similarly situated offenders, or denied essential procedural protection of the State." Whitmore v. Arkansas, 495 U.S. 149, 171 (1990).

B. Omissions and Violations in McAlpin's Case

As addressed previously in the brief, their are multiple errors in all aspects of this case.

Some were objected to and preserved, most were not. And some aspects were not technically error, but because McAlpin was pro se, not adequately developed and preserved. These include:

1. Voir Dire

McAlpin is an African-American. The victims were white. McAlpin's jury was not adequately questioned in a manner which would protect his right to an impartial jury. In Turner v. Murray, 476 U.S. 28, 35-37 (1986), Murray was a black man sentenced to death for the murder of a white storekeeper. The question presented to the Supreme Court was whether the trial judge committed reversible error at voir dire by refusing petitioner's request to question prospective jurors on racial prejudice. The judge did ask the venire whether any person was aware of any reason why he could not render a fair and impartial verdict, to which all answered no. At the time the question was asked, the prospective jurors could not have known that the murder victim was white.

The Supreme Court of the United States found that the risk that racial prejudice may have infected petitioner's capital sentencing unacceptable in light of the ease with which that risk could have been minimized. By refusing to question prospective jurors on racial prejudice, the trial judge failed to adequately protect petitioner's constitutional right to an impartial jury. The court held that a capital defendant accused of an interracial crime was entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias. The inadequacy of voir dire required that petitioner's death sentence be vacated.

The Court held:

> . . .a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias. The rule we propose is minimally intrusive; as in other cases

> involving "special circumstances," the trial judge retains discretion as to the form and number of questions on the subject, including the decision whether to question the venire individually or collectively. See Ham v. South Carolina, 409 U.S., at 527.

Id. 36.

The caveat to this holding is, unfortunately here, that "a defendant cannot complain of a judge's failure to question the venire on racial prejudice unless the defendant has specifically requested such an inquiry." Id., 37. Thus, the voir dire of the jury, was, by United States Supreme Court standards, inadequate. See also Mu'un v. Virginia, 500 U.S. 415, 424 (1991)

McAlpin failed to question the jury about the ability to understand and follow State v. Brooks, 75 Ohio St. 3d 148 (1996) (A single juror may prevent a death penalty recommendation by finding that the aggravating circumstances do not outweigh the mitigating factors). McAlpin failed to object when the prosecutor asked prosepective juror if that juror he "might start out with your finger on the scale for the mitigation *instead* the agravation . ." (T. 969) see Proposition of Law IV.

McAlpin failed to object or call to attention the State's pattern of exercising peremptory challenges on women. J.E.B. v. Alabama, ex rel. T.B., 511 U.S. 127, 129 (1994). See Proposition of Law V.

As a whole, the jury selection was wholly inadequate, again supporting Proposition of Law I, the self-representation should not include the unique capital procedures. Indeed, the weighing of interests for these falls opposite of conclusion reached by the Court in Faretta. The importance of a capital voir dire was emphasised by this Court in State v. Bates, 2020-Ohio-634. Had counsel for McAlpin performed in a similar matter, a new trial most likely would have been

mandated.

2. Guilt Determination Phase

McAlpin failed to object to the consistent introduction of unfairly prejudicial evidence of victim-impact and the prosecutor's commentary and argument regarding such evidence. See Proposition of Law VI and IX. McAlpin did file and new trial motion based on such testimony, but this objection occurred after the guilty verdicts. The evidence was already implanted in the minds of the jury when they heard penalty phase evidence. The same applies to the introduction of the inventory of the phone dump, which McAlpin failed to have redacted so that only relevant calls were placed before the jury. See Propostion of Law VII.

3. Penalty Phase

McAlpin failed to object to the failure of the court to merge the specifications. See Proposition of Law X. He did not object to the prosecutor moving all first phase exhibits into the penalty phase for consideration by the jury during its deliberations, thus allowing the State to have a large thumb on the side of aggravation during the deliberations. McAlpin failed to request proper jury instructions an object to improper instructions. Proposition of Law XV.

Maybe most harmful, McAlpin failed to object to the prosecutor's model closing argument of how to improperly imflame the jury with victim-impact and other improper references. Proposition of Law XIII. This is inspite of just arguing for a mistrial for the very same actions during the previous phase of trial.

4. Mitigation Witheld from Jury Consideration.

Although McAlpin called numerous family members on his behalf, he very much limited the content of the testimony. Most of his witnesses answer only a few general questions. After

originally intending on calling a mental health expert, Dr. Rodio of the Court Psychiatric Clinic, McAlpin changed his mind and did not present the doctor or his mitigation report. The parties had comtemplated stipulating to the report, in addition to the relevant records from the Children Family and Services and the Ohio Department of Rehabilitation and Corrections. McAlpin did not ultimately present any of the records for jury consideration. (T. 4572)

But the trial court at sentencing had review some of the material withheld from the jury by McAlpin. This included a mitigation report from the local court clinic. The court found that McAlpin had a very tough childhood. He had been repeatedly raped by his mother's male friend at age 9, suffered from a chronic anger problem, attempted to commit suicide attempt while in jail in 2006, had been diagnosed with post-traumatic stress disorder, and had found his mother's body after she had overdosed on heroin when he was 19 years of age. (T. 4688) The little the family did testify about in the penalty phase was consistent with the above. It is clear the the jury, objectively, only saw what McAlpin wanted them to see.

But does this Court's duty to ensure death penalty is appropriate include ensuring the Due Process was applied in the trial to ensure a reliable death verdict. Does McAlpin's right to engage is a unreliable trial out weigh this Court's requirement to see that the result comported with Due Process and the Eight Amendment protections?

In the dissent in State v. Obermiller, 147 Ohio St.3d 175, 2016-Ohio-1594 (2016), two justices opined the inability of the Court to conduct and independent weighing to "cure" defects when it did not have all the evidence it needed to make a proper determination. In Obermiller, the defendant refused to allow counsel to conduct a mitigation hearing, which is indisputably his righ. The dissent argued;

> The record here cries out for bringing in the social workers, the neighbors, the teachers, the probation officers, and any other persons who could help the court understand what happened in this case. The defendant's permission to do that is not necessary. If the trial court fails to perform its duty, we at the Supreme Court simply cannot perform our duty. How can we, the 11 million people of Ohio, be convinced, beyond a reasonable doubt, that justice has been done if we do not know the whole story before we decide to end someone's life?
>
> Whether the defendant chooses to participate in his defense or not is his right. However, this court has an independent duty to weigh mitigating factors regardless of the defendant's participation in that process. As Supreme Court justices, we are being asked to sign the death warrant for this defendant. This is impossible to do without having all of the pertinent facts at our disposal. Due process demands no less.

(¶ 175)

McAlpin did not waive his mitigation. He did not want the death penalty. It is at this point that the advice and guidance of counsel is most needed. Ferguson v. Georgia, 365 U.S. at 5934.

C. Safeguards Protecting Defendants from Arbitrary Sentencing

Although there are safeguards against arbitrary sentences in place, *pro se* defendants are never fully protected at the trial level, mandating a more lenient standard of review on appeal. Without this leniency, errors made at the trial level will not be rectified and the sentence will be unreliable. If the sentence is unreliable, the State cannot legally execute the defendant. Because *pro se* defendants will always have unreliable sentences, the appellate standard of review needs to be more lenient for the State to comply with constitutional requirements. Some of the safeguards meant to protect defendants' right to fair trial are discussed below.

1. Fourteenth and Eighth Amendment Legal Standards

The Fourteenth Amendment prohibits inflicting the death penalty so arbitrarily and capriciously that this particular defendant receiving a death sentence would be analagous to "being struck by lightning." Furman, at 309-310. Although the death penalty is not unconstitutional per se, if there is a substantial risk that the sentencing procedures will inflict the death penalty in an arbitrary and capricious manner, then that defendant's death sentence is invalid. Gregg, at 188. States may constitutionally impose the sentence of death as long as the discretion of the sentencing authority is "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action" in imposing the sentence. Zant v. Stephens, 462 U.S. 862 (1983) A defendants' sentence could entirely turn on whether they are represented by a counsel or self-represent, making death sentences for *pro se* defendants arbitrary and capricious because appellate review of *pro se* claims is too stringent to give *pro se* defendants reliable sentencing.

There are various mechanisms to lessen the likelihood that the punishment is arbitrarily imposed, and therefore not cruel and unusual. First, using juries to decide punishment instead of judges decreases arbitrary and capricious sentencing since they reflect community values. Second, capital proceedings are also the only instance in our system where guilt/innocence and sentencing are two separate trials. Death penalty sentencing does not just get its own proceeding, but an entire trial, rather than the factfinder sentencing the defendant during the same proceeding.

Third, the scope of mandatory review provided by this Court in capital cases is extensive in order to guard against arbitrary, capricious and disproportionate sentencing. Specifically, under R.C. §2929.05(A), their function parallels a jury's role when imposing the death sentence,

because they must "independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate."

Equally important is the fact that in his charge to the jury, the trial judge does not suggest that "the presence of more than one aggravating circumstance should be given special weight." Zant v. Stephens. *Pro se* litigants subject to capital punishment will always be subject to arbitrary and cruel sentencing. First, there is a possibility they failed to put on evidence that they are not culpable enough under the Eighth Amendment, such as not putting on evidence about their intellectually disablity or their age. Second, the penological goals of retribution and deterrence are not met if the defendant is *pro se*, so the crime cannot be proportional to the punishment. Finally, the safeguards required by the Fourteenth Amendment fail because the claims are not reviewed favorably enough at the appellate level to give them a reliable sentence.

2. Role of the Capital Jury

There are no standards to guide a capital jury in deciding whether to be merciful in sentencing. A capital case jury may have death-scrupled jurors,, and may consider any and all mitigating evidence, weighing and valuing it as it pleases. But mercy is not a consideration in Ohio. See Proposition of Law XV. Therefore, that is no safety valve for the jury such as the mercy instuction in Kansas v. Marsh, supra.

It generally has been agreed that the sentencing judge's "possession of the fullest information possible concerning the defendant's life and characteristics" is "highly relevant, *if not essential*, to the selection of an appropriate sentence ." Williams v. New York, 337 U.S.241, 247

(1949). The Court pointed out that the qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed. Lockett v. Ohio, 438 U.S. 586, 604 (1978). When the litigant is pro se, there is always the possibility that the sentence is not individualized because the litigant failed to put forward mitigating evidence or object properly. The considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases.

Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. Lockett at 605. Allowing a more lenient standard than plain error review when reviewing a case of pro se litigant is required because in capital cases, allowing consideration of all relevant and other mitigating circumstances not previously brought before the court helps avoid miscarriages of justice.

D. The Appellate Court Should Review *Pro Se* Defendants Claims More Leniently to Avoid a Miscarriage of Justice.

This Court is urged to allow a standard of review of miscarriage of justice instead of the traditional plain error review in capital cases involving pro se defendants resulting in a sentence of death. If capital defendants are permitted to represent themselves through the penalty phase, plain error issues will be the norm, essentially negating any kind of review of otherwise meritorious issues. At some point, as here, the number of departures from effective jury selection, presention of evidence, questioning of witnesses, recognizing errors of the prosecutor

and court and erroneous jury instructions will be offensive to what a capital trial and sentencing strives to be. Because the state has an independent interest in have sentences of death stem from a reliable determination based a trial comporting with Due Process. Allowing appellate review, even under the tough miscarriage standard, is far better than little or no review at all.

In Schlup v. Delo, 513 U.S. 298 (1995), the Supreme Court in a federal habeas case,expanded the ability to reopen a case in light of new evidence of innocence. In that opinion, the Court defined "actual innocence" in the context of a petitioner's claim that his death sentence was inappropriate and concluded it "must focus on those elements which render a defendant eligible for the death penalty." In addition to defining what it means to be "innocent" of the death penalty, the Court adopted a more exacting standard of proof to govern these claims: The Court held that a habeas petitioner "must show by *clear and convincing* evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty." Id. 336.

Thus, Court has recognized innocence of death panalty within the rare miscarriage of justice exceptions and consistently reaffirmed the existence and importance of the exception for fundamental miscarriages of justice. Sawyer v. Whitley, 505 U.S. 333, 339–340 (1992) While recognizing that successive petitions are generally precluded from review, the Court expressly noted that there are "limited circumstances under which the interests of the prisoner in relitigating constitutional claims held meritless on a prior petition may outweigh the countervailing interests served by according finality to the prior judgment." Kuhlmann v. Wilson, 477 U.S.436, 452 (1986)

The fundamental miscarriage of justice exception seeks to balance the societal interests in

finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case. The overriding importance of this greater individual interest merits protection is "a standard of proof that represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." In re Winship, 397 U.S. 358, 370 (1970) ; *see also* Addington v. Texas, 441 U.S. 418, 423 (1979) The standard of proof thus reflects "the relative importance attached to the ultimate decision." The fact that the Sawyer standard exists in the first reflects how important claims concerning erroneous sentences are, especially considering how the issues surrounding finality within the capital system already are a tinder pile. The potential for these erroneous sentences are enough to overcome procedural default, even when *pro se* issues are not on the table.

Applying the Sawyer standard to *pro se* defendants prevents miscarriages of justice. There is an even greater likelihood that there will be a miscarriage of justice because *pro se* defendants tend to not represent themselves effectively enough to avoid these miscarriages. By allowing McAlpin to bring mitigating circumstances or make appropriate objection, but depending on the evidence, he could show that in the light of those mitigating circumstances, no juror, acting reasonably would have voted to have him sentenced to death. The miscarriage of justice exception being every narrow, nevertheless, it should allow for cases like McAlpin which otherwise would result in unjust outcome.

E. Conclusion

A more lenient standard is required because although the defendant is *pro se* and has the right to self-represent, the defendant's effectiveness is prejudicial enough that imposing death

would be cruel and unusual amounting to a miscarriage of justice. The State is under an obligation to administer the death penalty in a way that does not violate that defendant's Eight Amendment rights—i.e., guard against arbitrary and discretionary sentencing. Allowing a capital *pro se* defendant to not receive the benefits of ineffective assistance of counsel claims by way of a higher appellate standard of review inherently violates the defendant's Eighth and Fourteenth Amendment rights to a fair and non-arbitrary death penalty proceeding.

Proposition of Law XVII

> **Ohio's death penalty law is unconstitutional as written and as applied. Ohio Rev. Code Ann. §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 do not meet the prescribed constitutional requirements and are unconstitutional on their face and as applied to McAlpin. U.S. Const. Amends. V, VI, VIII and XIV; Ohio Const. Art. I, §§ 2, 9, 10, And 16.**

The Eighth Amendment to the Constitution and Article I, § 9 of the Ohio Constitution prohibit the infliction of cruel and unusual punishment. The Eighth Amendment's protections are applicable to the states through the Fourteenth Amendment. Robinson v. California, 370 U.S. 660 (1962). Punishment that is "excessive" constitutes cruel and unusual punishment. Coker v. Georgia, 433 U.S. 584 (1977). The underlying principle of governmental respect for human dignity is the Court's guideline to determine whether this statute is constitutional. See Furman v. Georgia, 408 U.S. 238 (1972); Rhodes v. Chapman, 452 U.S. 337, 361 (1981); Trop v. Dulles, 356 U.S. 86 (1958). The Ohio scheme offends this bedrock principle in the following ways:

A. Arbitrary and unequal punishment in Cuyahoga County is a violation of the equal protection clause.

The Equal Protection Clause of the Fourteenth Amendment commands that no state shall

"deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "The Supreme Court has stated that this language 'embodies the general rule that States must treat like cases alike but may treat unlike cases accordingly.' The states cannot make distinctions which either burden a fundamental right, target a suspect class, or intentionally treat one differently from others similarly situated without any rational basis for the difference." Radvansky v. City of Olmsted Falls, 395 F.3d 291, 312 (6th Cir. Ohio 2005) (citing Vacco v. Quill, 521 U.S. 793, 799 (1997))

In other words, to establish a claim for relief under the Equal Protection Clause, a person must demonstrate that the government treated him disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis. When that disparate treatment involves a fundamental right, strict scrutiny applies. Miller v. City of Cincinnati, 622 F.3d 524, 538 (6th Cir. 2010). The fundamental right involved in McAlpin's claim is the right to be free from cruel and unusual punishment.

Prosecutors' virtually uncontrolled indictment discretion allows arbitrary and discriminatory imposition of the death penalty, and it creates a disparate impact on people in Cuyahoga County. Cuyahoga County alone accounted for half of the death sentences handed down in Ohio in 2019, matching the total for the entire state of California. https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report. In fact, "[w]hile most of the nation saw near-historic lows in death sentences and executions, a few jurisdictions bucked the national trend. Death sentences spiked in Cuyahoga County (Cleveland), Ohio to three in 2019 and five in the last two years,

more than in any other county in the country." *Id.* (emphasis added).

Ohio must apply it laws equally to all similarly situated persons. It does not, and it will not with McAlpin. Ohio's capital punishment scheme, based on unfettered prosecutorial discretion, allows the death penalty to be imposed in an arbitrary and discriminatory manner in violation of *Furman* and its progeny. See also Woodson v. North Carolina, 428 U.S. 280 (1976). Because the disparate treatment and/or impact burdens a fundamental right—McAlpin's fundamental right to be free from cruel and unusual punishment—it must serve a compelling government interest.

Cuyahoga County's desire to execute people is not a compelling state interest. The Supreme Court has used "national consensus" to determine whether an interest is compelling. United States v. Stevens, 130 S. Ct. 1577, 1600 (2010) (citing Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991)). It follows that the opposite is true. If a "State's compelling interest 'in ensuring that victims of crime are compensated by those who harm them' is "evidenced by fact that '[e]very State has a body of tort law serving exactly this interest,'" then the lack of a compelling interest is evidenced by the fact that not every state has capital punishment. Stevens, 130 S. Ct. at 1600 (internal citations omitted). Moreover, as mentioned above, more people have been sentenced to death in Cuyahoga County during the last two years than any other county in the nation, according to the study by the Death Penalty Information Center. https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report

Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to

constitutional law. City of Boerne v. Flores, 521 U.S. 507, 534 (1997). A state may have a legitimate interest in meting out punishments to those found guilty of a crime, but execution is not the only punishment for a murder conviction. Furthermore, in referencing the States' interest in enforcing their death sentences, the Supreme Court has referred to it as the "States' legitimate interest in providing for a *quick, certain death.*" Baze v Rees, 553 U.S. 35, 58 (2008)(emphasis added). Thus, the State could not meet its burden even under the standard of a "legitimate" interest.

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

B. Unreliable sentencing procedures

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

The statutory scheme is unconstitutionally vague, which leads to the arbitrary imposition of the death penalty. The language "that the aggravating circumstances ... outweigh the mitigating factors" invites arbitrary and capricious jury decisions. "Outweigh" preserves reliance on the lesser standard of proof by a preponderance of the evidence. The statute requires only that the sentencing body be convinced beyond a reasonable doubt that the aggravating circumstances were marginally greater than the mitigating factors. This creates an unacceptable risk of arbitrary

or capricious sentencing.

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

Ohio courts continually hold that the weighing process and the weight to be assigned to a given factor are within the individual decision-maker's discretion. State v. Fox, 69 Ohio St. 3d 183, 193 (1994). Giving so much discretion to juries inevitably leads to arbitrary and capricious judgments. The Ohio open discretion scheme further risks that constitutionally relevant mitigating factors that must be considered as mitigating [youth or childhood abuse (Eddings v. Oklahoma, 455 U.S. 104 (1982)), mental disease or defect (Penry v. Lynaugh, 492 U.S. 302 (1989) *rev'd on other grounds* Penry v. Johnson, 532 U.S. 782 (2001)), level of involvement in the crime (Enmund v. Florida, 458 U.S. 782 (1982)), or lack of criminal history (Delo v. Lashley, 507 U.S. 272 (1993))] will not be factored into the sentencer's decision. While the federal constitution may allow states to shape consideration of mitigation, see Johnson v. Texas, 509 U.S. 350 (1993), Ohio's capital scheme fails to provide adequate guidelines to sentencers, and fails to assure against arbitrary, capricious, and discriminatory results.

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

scheme does not meet the requirements of Furman and its progeny.

C. Defendant's right to a jury is burdened

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

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

D. Mandatory submission of reports and evaluations

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

E. O.R.C. §§ 2929.03(d)(1) and 2929.04 Are Unconstitutionally Vague.

O.R.C. § 2929.03(D)(1)'s reference to "the nature and circumstances of the aggravating circumstance" incorporates the nature and circumstances of the offense into the factors to be weighed in favor of death. The nature and circumstances of an offense are, however, statutory

mitigating factors under O.R.C. § 2929.04(B). O.R.C. § 2929.03(D)(1) makes Ohio's death penalty weighing scheme unconstitutionally vague because it gives the sentencer unfettered discretion to weigh a statutory mitigating factor as an aggravator.

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

F. Proportionality and appropriateness review

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

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

individual and the circumstances of the crime. Id.

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

The comparison method is also constitutionally flawed. Review of cases where the death penalty was imposed satisfies the proportionality review required by O.R.C. § 2929.05(A). State v. Steffen, 31 Ohio St. 3d 111 (1987). However, this prevents a fair proportionality review. There is no meaningful manner to distinguish capital defendants who deserve the death penalty from those who do not.

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

The cursory appropriateness review also violates the capital defendant's due process

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

H. Ohio's capital sentencing statutes are unconstitutional under *Hurst v. Florida.*

Hurst v. Florida, __ U.S. __, 136 S.Ct. 616 (2016), held without qualification that "[t]he 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." 136 S.Ct. at 619. Although the Ohio Supreme Court determined in State v. Mason, 153 Ohio St. 3d 476 (2018) that Ohio's capital sentencing statutes were distinguishable from Florida's and therefore constitutional, the unique circumstances of McAlpin's case make his death sentence unconstitutional after Hurst. 153 Ohio St. 3d 476, 2018-Ohio-1462.

Ohio's capital sentencing scheme requires a jury recommendation for death **and** then requires a judge to independently determine whether that sentence is appropriate. R.C. 2929.03. A jury's verdict for a death sentence is not final. Id. Rather, a recommendation for death only triggers the second step of the process: the trial judge conducting his own independent weighing of the aggravating circumstances and mitigating factors that were presented. Id. Only if the trial judge independently determines that the aggravating circumstances outweigh the mitigating factors, then the judge will impose a sentence of death. Id.

Though by law the jury's verdict at the mitigation hearing is only a recommendation, the

trial court must not diminish the jury's sense of responsibility in making their determination. Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985). "[I]t 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." Id. at 328-329. A capital sentencing jury is comprised of ordinary citizens being asked to make a "very difficult and uncomfortable choice." Id. at 333. "They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community." Id. Because of the grave position that capital sentencing jurors are put in, "the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." Id.

It is permissible for the trial court to make accurate statements of the law regarding the jury's role, Dugger v. Adams, 489 U.S. 401, 407, 109 S.Ct. 1211 (1989), and the Ohio Supreme Court has a long history of upholding the practice of telling jurors their verdict is a mere "recommendation" because that was an accurate statement of Ohio law before Hurst. State v. Williams, 23 Ohio St.3d 16, 21-22, (1986); State v. Scott, 26 Ohio St.3d 92, 103-104 (1986); State v. Thompson, 33 Ohio St.3d 1, 6 (1987); State v. Williams, 38 Ohio St.3d 346, 356-357 (1988); State v. Bradley, 42 Ohio St.3d 136, 147, 538 N.E.2d 373 (1989); State v. Steffen, 31 Ohio St.3d 111, 113-114 (1987); State v. DePew, 38 Ohio St.3d 275, 280 (1988); State v. Beuke, 38 Ohio St.3d 29, 34-35 (1988); State v. Poindexter, 36 Ohio St.3d 1 (1988); State v. Johnson, 46 Ohio St.3d 96, 105-106 (1989); State v. Durr, 58 Ohio St.3d 86, 93-94 (1991); State v. Mills, 62 Ohio St.3d 357, 375 (1992); State v. Grant, 67 Ohio St.3d 465, 472 (1993); State v. Carter, 72

Ohio St.3d 545, 559 (1995); State v. Keith, 79 Ohio St.3d 514, 517-519 (1997). Those cases, however, predate Hurst's holding that "[a] jury's mere recommendation is not enough." Hurst, 136 S.Ct. at 619. The evolving standards of decency required by the Eighth Amendment are in line with a reading of Hurst and Caldwell together to conclude that the practice of using language to diminish the seriousness of the jury's verdict by reminding them that their verdict is only a recommendation is unconstitutional.

This Court expressed that policy even before McAlpin's trial. "Because of the risk of diminishing jury responsibility, '* * * we prefer that in the future no reference be made to the jury regarding the finality of their decision * * *.'" State v. Williams, 23 Ohio St.3d 16, 22 (1986) *quoting* State v. Jenkins, 15 Ohio St.3d 164, 202-203 (1984). "As we stated in *Jenkins*, * * * and we now emphatically emphasize, the better procedure would be to have no comment by the prosecutor or the trial judge on the question of who bears the ultimate responsibility for determining the penalty." State v. Buell, 22 Ohio St. 3d 124, 144 (1986).

CONCLUSION

Pursuant to First Propositions of Law, the defendant-appellant Josephs McAlpin requests that this Cour reverse his convictions and remand this case with a new trial order. In the altenative, Pursuant to respectfully requests that this Honorable Court reverse the sentence of death and find a life sentence to be appropriate. In the alternative, pursuant to Propositions of Law . . . June 19, 2020.

Respectfully submitted,

/s/David L. Doughten
DAVID L. DOUGHTEN

Counsel for Appellant McAlpin

/s/ John B. Gibbons
JOHN B. GIBBONS

Counsel for Appellant McAlpin

CERTIFICATE OF SERVICE

A copy of the foregoing Motion was served upon Michael O'Malley, Cuyahoga County Prosecutor and/or Jennifer Myer, Esq. Assistant Cuyahoga County Prosecutor, the Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, by Regular U. S. mail/email on this

22nd day of June, 2020.

/s/David L. Doughten
DAVID L. DOUGHTEN

Counsel for Appellant McAlpine

APPENDIX

Supreme Court of Ohio Clerk of Court - Filed July 08, 2019 - Case No. 2019-0926

IN THE SUPREME COURT OF OHIO
No.

State of Ohio,	:	From the Cuyahoga County Common Pleas Court Case No. 2017 CR 623243- A
Appellee,	:	
-v-	:	**DEATH PENALTY APPEAL**
Joseph McAlpine,	:	
Appellant.	:	

NOTICE OF APPEAL OF APPELLANT, JOSEPH McALPINE

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Notice of Appeal of Appellant Joseph McAlpine

Now comes the appellant, Joseph McAlpine, and hereby gives Notice of Appeal to the Supreme Court of Ohio from the Cuyahoga Cuyahoga County Common Pleas Court, R.C. §2929.03(F) opinion journalized on June 5, 2019. The appellant is appealing the denial of his conviction and sentence of death for Aggravated Murder in violation of R.C. §2903.01 with capital specifications.

This is an appeal of right pursuant to S. Ct R. 5.01, section 1(A) as provided for in S. Ct. Prac. R. 11.01.

Respectfully submitted,

S/David L. Doughten
David L. Doughten

Counsel for Appellant

S/John Gibbons
John B. Gibbons

Counsel for Appellant

Proof of Service

A copy of the foregoing Petitioner's Notice of Appeal was served upon Michael O'Malley, Cuyahoga County Prosecutor and/or Christopher Schroeder, Esq. Assistant Cuyahoga County Prosecutor, the Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, by Regular U. S. mail/email on this 8th day of July, 2019.

S/David L. Doughten
David L. Doughten

Counsel for Appellant

108843031

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff

JOSEPH MCALPIN
Defendant

Case No: CR-17-623243-A

Judge: BRIAN J CORRIGAN

INDICT: 2903.01 AGGRAVATED MURDER /FRM1 /FRM3 /CCS /FMS /MWDD
2903.01 AGGRAVATED MURDER /FRM1 /FRM3 /CCS /FMS /MWDD
2903.01 AGGRAVATED MURDER /FRM1 /FRM3 /CCS /FMS /MWDD
ADDITIONAL COUNTS...

JOURNAL ENTRY

COURT DETERMINES THAT COUNTS 1 AND 3 MERGE; COUNTS 2 AND 4 MERGE; COUNTS 5 AND 7 MERGE; COUNTS 6 AND 8 MERGE; COUNTS 9 AND 11 MERGE; COUNTS 10 AND 12 MERGE; COUNTS 13 THROUGH 20 MERGE WITH COUNTS 1 AND 2; COUNT 25 MERGES WITH COUNT 26 FOR PURPOSES OF SENTENCING. STATE OF OHIO ELECTS TO PROCEED ON COUNTS 1, 2, 7, 8, 11, 12, 21, 23, 24 AND 26. ALL 1 AND 3 YEAR FIREARM SPECIFICATIONS IN COUNTS 1, 2, 7, 8, 11 AND 12 MERGE. STATE ELECTS TO PROCEED UNDER THE 3 YEAR SPECIFICATIONS.
DEFENDANT IN COURT. COUNSEL JOHN P LUSKIN AND KEVIN CAFFERKEY PRESENT.
COURT REPORTER ELLEN RASSIE PRESENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF AGGRAVATED MURDER 2903.01 B UN WITH FIREARM SPECIFICATION(S) - 1 YEAR (2941.141), FIREARM SPECIFICATION(S) - 3 YEARS (2941.145), COURSE OF CONDUCT SPECIFICATION(S), FELONY MURDER SPECIFICATION(S) UNDER COUNT(S) 1, 2 OF THE INDICTMENT.
ON A FORMER DAY OF COURT, THE COURT DISMISSES MURDER WHILE DEFT UNDER DETENTION 2929.04 (A)(4) AS CHARGED ON COUNT(S) 1, 2 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF AGGRAVATED MURDER 2903.01 A UN WITH FIREARM SPECIFICATION(S) - 1 YEAR (2941.141), FIREARM SPECIFICATION(S) - 3 YEARS (2941.145), COURSE OF CONDUCT SPECIFICATION(S), FELONY MURDER SPECIFICATION(S) UNDER COUNT(S) 3, 4 OF THE INDICTMENT.
ON A FORMER DAY OF COURT, THE COURT DISMISSES MURDER WHILE DEFT UNDER DETENTION 2929.04 (A)(4) AS CHARGED ON COUNT(S) 3, 4 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF AGGRAVATED ROBBERY 2911.01 A(1) F1 WITH FIREARM SPECIFICATION(S) - 1 YEAR (2941.141), FIREARM SPECIFICATION(S) - 3 YEARS (2941.145) UNDER COUNT(S) 5, 6 OF THE INDICTMENT.
ON A FORMER DAY OF COURT, THE COURT FOUND THE DEFENDANT GUILTY OF NOTICE OF PRIOR CONVICTION SPECIFICATION(S) AS CHARGED IN COUNT(S) 5, 6 OF THE INDICTMENT.
ON A FORMER DAY OF COURT, THE COURT FOUND THE DEFENDANT GUILTY OF REPEAT VIOLENT OFFENDER SPECIFICATION(S) 2941.149 AS CHARGED IN COUNT(S) 5, 6 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF AGGRAVATED ROBBERY 2911.01 A(3) F1 WITH FIREARM SPECIFICATION(S) - 1 YEAR (2941.141), FIREARM SPECIFICATION(S) - 3 YEARS (2941.145) UNDER COUNT(S) 7, 8 OF THE INDICTMENT.
ON A FORMER DAY OF COURT, THE COURT FOUND THE DEFENDANT GUILTY OF NOTICE OF PRIOR CONVICTION SPECIFICATION(S) AS CHARGED IN COUNT(S) 7, 8 OF THE INDICTMENT.
ON A FORMER DAY OF COURT, THE COURT FOUND THE DEFENDANT GUILTY OF REPEAT VIOLENT OFFENDER SPECIFICATION(S) 2941.149 AS CHARGED IN COUNT(S) 7, 8 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF AGGRAVATED BURGLARY 2911.11 A(1) F1 WITH FIREARM SPECIFICATION(S) - 1 YEAR (2941.141), FIREARM SPECIFICATION(S) - 3 YEARS
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(2941.145) UNDER COUNT(S) 9, 10 OF THE INDICTMENT.
ON A FORMER DAY OF COURT, THE COURT FOUND THE DEFENDANT GUILTY OF NOTICE OF PRIOR CONVICTION SPECIFICATION(S) AS CHARGED IN COUNT(S) 9, 10 OF THE INDICTMENT.
ON A FORMER DAY OF COURT, THE COURT FOUND THE DEFENDANT GUILTY OF REPEAT VIOLENT OFFENDER SPECIFICATION(S) 2941.149 AS CHARGED IN COUNT(S) 9, 10 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF AGGRAVATED BURGLARY 2911.11 A(2) F1 WITH FIREARM SPECIFICATION(S) - 1 YEAR (2941.141), FIREARM SPECIFICATION(S) - 3 YEARS (2941.145) UNDER COUNT(S) 11, 12 OF THE INDICTMENT.
ON A FORMER DAY OF COURT, THE COURT FOUND THE DEFENDANT GUILTY OF NOTICE OF PRIOR CONVICTION SPECIFICATION(S) AS CHARGED IN COUNT(S) 11, 12 OF THE INDICTMENT.
ON A FORMER DAY OF COURT, THE COURT FOUND THE DEFENDANT GUILTY OF REPEAT VIOLENT OFFENDER SPECIFICATION(S) 2941.149 AS CHARGED IN COUNT(S) 11, 12 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF KIDNAPPING 2905.01 A(2) F1 WITH FIREARM SPECIFICATION(S) - 1 YEAR (2941.141), FIREARM SPECIFICATION(S) - 3 YEARS (2941.145) UNDER COUNT(S) 13, 14 OF THE INDICTMENT.
ON A FORMER DAY OF COURT, THE COURT FOUND THE DEFENDANT GUILTY OF NOTICE OF PRIOR CONVICTION SPECIFICATION(S) AS CHARGED IN COUNT(S) 13, 14 OF THE INDICTMENT.
ON A FORMER DAY OF COURT, THE COURT FOUND THE DEFENDANT GUILTY OF REPEAT VIOLENT OFFENDER SPECIFICATION(S) 2941.149 AS CHARGED IN COUNT(S) 13, 14 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF MURDER 2903.02 B UN WITH FIREARM SPECIFICATION(S) - 1 YEAR (2941.141), FIREARM SPECIFICATION(S) - 3 YEARS (2941.145) AS CHARGED IN COUNT(S) 15, 16 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF FELONIOUS ASSAULT 2903.11 A(1) F2 WITH FIREARM SPECIFICATION(S) - 1 YEAR (2941.141), FIREARM SPECIFICATION(S) - 3 YEARS (2941.145) UNDER COUNT(S) 17, 18 OF THE INDICTMENT.
ON A FORMER DAY OF COURT, THE COURT FOUND THE DEFENDANT GUILTY OF NOTICE OF PRIOR CONVICTION SPECIFICATION(S) AS CHARGED IN COUNT(S) 17, 18 OF THE INDICTMENT.
ON A FORMER DAY OF COURT, THE COURT FOUND THE DEFENDANT GUILTY OF REPEAT VIOLENT OFFENDER SPECIFICATION(S) 2941.149 AS CHARGED IN COUNT(S) 17, 18 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF FELONIOUS ASSAULT 2903.11 A(2) F2 WITH FIREARM SPECIFICATION(S) - 1 YEAR (2941.141), FIREARM SPECIFICATION(S) - 3 YEARS (2941.145) UNDER COUNT(S) 19, 20 OF THE INDICTMENT.
ON A FORMER DAY OF COURT, THE COURT FOUND THE DEFENDANT GUILTY OF NOTICE OF PRIOR CONVICTION SPECIFICATION(S) AS CHARGED IN COUNT(S) 19, 20 OF THE INDICTMENT.
ON A FORMER DAY OF COURT, THE COURT FOUND THE DEFENDANT GUILTY OF REPEAT VIOLENT OFFENDER SPECIFICATION(S) 2941.149 AS CHARGED IN COUNT(S) 19, 20 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF GRAND THEFT - MV 2913.02 A(1) F4 AS CHARGED IN COUNT(S) 23, 24 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF INJURING ANIMALS 959.02 - M2 AS CHARGED IN COUNT(S) 25 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF CRUELTY AGAINST COMPANION ANIMAL 0959.131 (C) F5 AS CHARGED IN COUNT(S) 26 OF THE INDICTMENT.
ON A FORMER DAY OF COURT THE COURT FOUND THE DEFENDANT GUILTY OF HAVING WEAPONS WHILE UNDER DISABILITY 2923.13 A(2) F3 AS CHARGED IN COUNT(S) 21 OF THE INDICTMENT.
DEFENDANT ADDRESSES THE COURT, PROSECUTOR BRIAN RADIGAN, RUSS TYE, CHRIS SCHROEDER ADDRESSES THE COURT, ASSISTANT PROSECUTING ATTORNEY CARL MAZZONE ADDRESSES THE COURT
THE COURT CONSIDERED ALL REQUIRED FACTORS OF THE LAW.
THE COURT FINDS THAT PRISON IS CONSISTENT WITH THE PURPOSE OF R. C. 2929.11.
THE COURT IMPOSES A PRISON SENTENCE AT THE LORAIN CORRECTIONAL INSTITUTION OF 69 YEAR(S).
ON NON-DEATH COUNTS. THE COURT DECLINES TO IMPOSE AN ADDITIONAL PRISON TERM UNDER THE REPEAT VIOLENT OFFENDER SPECIFICATIONS THAT WERE PROVEN IN COUNTS 7, 8, 11 AND 12. WITH REGARD TO COUNTS 1 AND 2: IN ADDITION TO THE COURSE OF CONDUCT SPECIFICATION, DEFENDANT WAS CONVICTED OF 3 FELONY MURDER SPECIFICATIONS. THEY ARE FELONY MURDER (KIDNAPPING); FELONY MURDER

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(AGGRAVATED BURGLARY) AND FELONY MURDER (AGGRAVATED ROBBERY). THE FELONY MURDER (KIDNAPPING) MERGED INTO FELONY MURDER (AGGRAVATED ROBBERY) FOR SENTENCING PURPOSES. THE DEFENDANT IS SENTENCED AS FOLLOWS:

COUNT 1: THE COURT IMPOSES THE SENTENCE OF DEATH.
COUNT 2: THE COURT IMPOSES THE SENTENCE OF DEATH.
COUNT 7: 11 YEARS
COUNT 8: 11 YEARS
COUNT 11: 11 YEARS
COUNT 12: 11 YEARS
COUNT 21: 36 MONTHS.
COUNT 23: 18 MONTHS
COUNT 24: 18 MONTHS
COUNT 26: 12 MONTHS.

ALL NON DEATH SENTENCES ARE TO BE SERVED CONSECUTIVELY TO EACH OTHER. THE 3 YEAR FIREARM SPECIFICATIONS IN COUNTS 1, 2, 7, 8, 11 AND 12 TO RUN CONSECUTIVE TO EACH OTHER AND PRIOR TO THE SENTENCES IN THE BASE CHARGE FOR A TOTAL OF 69 YEARS. POST RELEASE CONTROL IS PART OF THIS PRISON SENTENCE FOR 5 YEARS MANDATORY ON COUNTS 7, 8, 11 AND 12 AND FOR A TERM OF UP TO 3 YEARS ON COUNTS 21, 23, 24 AND 26. POST RELEASE CONTROL DOES NOT PERTAIN TO COUNTS 1 AND 2.
THE COURT IMPOSES PRISON TERMS CONSECUTIVELY FINDING THAT CONSECUTIVE SERVICE IS NECESSARY TO PROTECT THE PUBLIC FROM FUTURE CRIME OR TO PUNISH DEFENDANT; THAT THE CONSECUTIVE SENTENCES ARE NOT DISPROPORTIONATE TO THE SERIOUSNESS OF DEFENDANT'S CONDUCT AND TO THE DANGER DEFENDANT POSES TO THE PUBLIC; AND THAT, THE DEFENDANT COMMITTED ONE OR MORE OF THE MULTIPLE OFFENSES WHILE THE DEFENDANT WAS AWAITING TRIAL OR SENTENCING OR WAS UNDER A COMMUNITY CONTROL OR WAS UNDER POST-RELEASE CONTROL FOR A PRIOR OFFENSE, OR AT LEAST TWO OF THE MULTIPLE OFFENSES WERE COMMITTED IN THIS CASE AS PART OF ONE OR MORE COURSES OF CONDUCT, AND THE HARM CAUSED BY SAID MULTIPLE OFFENSES WAS SO GREAT OR UNUSUAL THAT NO SINGLE PRISON TERM FOR ANY OF THE OFFENSES COMMITTED AS PART OF ANY OF THE COURSES OF CONDUCT ADEQUATELY REFLECTS THE SERIOUSNESS OF DEFENDANT'S CONDUCT, OR DEFENDANT'S HISTORY OF CRIMINAL CONDUCT DEMONSTRATES THAT CONSECUTIVE SENTENCES ARE NECESSARY TO PROTECT THE PUBLIC FROM FUTURE CRIME BY DEFENDANT.
POST RELEASE CONTROL IS PART OF THIS PRISON SENTENCE FOR 5 YEARS MANDATORY FOR THE ABOVE FELONY(S) UNDER R.C.2967.28. DEFENDANT ADVISED THAT IF/WHEN POST RELEASE CONTROL SUPERVISION IS IMPOSED FOLLOWING HIS/HER RELEASE FROM PRISON AND IF HE/SHE VIOLATES THAT SUPERVISION OR CONDITION OF POST RELEASE CONTROL UNDER RC 2967.131(B), PAROLE BOARD MAY IMPOSE A PRISON TERM AS PART OF THE SENTENCE OF UP TO ONE-HALF OF THE STATED PRISON TERM ORIGINALLY IMPOSED UPON THE OFFENDER.
DEFENDANT TO RECEIVE JAIL TIME CREDIT FOR 708 DAY(S), TO DATE.
DEFENDANT DECLARED INDIGENT.
COSTS WAIVED
DEFENDANT ADVISED OF APPEAL RIGHTS.
DEFENDANT INDIGENT, COURT APPOINTS DAVID L DOUGHTEN AS APPELLATE COUNSEL.
TRANSCRIPT AT STATE'S EXPENSE.
COURT APPOINTS JOHN GIBBONS AS CO-APPELATE COUNSEL. SENTENCING OPINION PURSUANT TO R.C. 2929.03(F) TO FOLLOW AND WILL BE FILED WITHIN 15 DAYS FROM THE DATE OF SENTENCING.
ALL MOTIONS NOT SPECIFICALLY RULED ON PRIOR TO THE FILING OF THIS JUDGMENT ENTRY ARE DENIED AS MOOT.
DEFENDANT REMANDED.
SHERIFF ORDERED TO TRANSPORT DEFENDANT JOSEPH MCALPIN, DOB: 05/02/1987, GENDER: MALE, RACE: BLACK.

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Judge Signature 05/23/2019

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

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CUYAHOGA COUNTY

STATE OF OHIO,	)	JUDGE BRIAN J. CORRIGAN
Plaintiff,	)	CASE NO. CR-17-623243-A
vs.	)	**OPINION OF THE TRIAL JUDGE PER O.R.C. §2929.03(F)**
JOSEPH MCALPIN,	)	
Defendant.	)	

BRIAN J. CORRIGAN, JUDGE:

PROCEDURAL HISTORY AND TRIAL

Defendant Joseph McAlpin was indicted under three case numbers. In Case No. CR-17-618317, he was the subject of a 25 count indictment. None of the counts were subject to capital punishment. This indictment was superseded by Case No. CR-17-620878, wherein the State added capital punishment specifications. This indictment was in turn superseded by Case No. CR-17-623243-A, which added two co-defendants and five counts. The co-defendants were added to most of the original counts, and five counts were added covering the new co-defendants only. It is this case that proceeded to trial.

On March 5, 2019, the Court conducted a hearing on the Defendant's waiver of a jury trial as to Count 21, having a weapon under disability, and all repeat violent offender specifications and notices of prior convictions. The jury waiver was accepted by the Court and found to be knowingly, voluntarily and intelligently entered into by the Defendant.

Jury selection commenced on March 18, 2019. The first week was spent in qualifying the jurors for a possible death penalty case. On March 25, 2019, the jury was seated and opening statements heard.

Testimony commenced following the jury view and opening statements on March 26, 2019. The case was tried, presented and completed. Arguments were heard on Crim. R. 29 at the close of the State's case and after the Defendant's case. Argument about evidence admissibility were also heard. Thereafter, the jury was charged and closing arguments were presented. Closing arguments were completed on April 11, 2019. The jury charge was completed on Monday, April 15, 2019.

Following jury charge completion on April 15, 2019, the jury retired to deliberate. The following day, April 16, 2019, the jury returned a verdict of Guilty of all counts and specifications that they were to consider. The Court announced its decision of Guilty as to the bifurcated count and specifications.

The penalty phase of the trial commenced May 13, 2019. In the trial phase, the jury convicted of Counts 1, 2, 3 and 4. The Court merged Count 3 into Count 1 and Count 4 into Count 2. The Felony Murder specification involving kidnapping merged into the Felony Murder specification of Aggravated Robbery. Thus, the jury was presented with 2 counts for deliberation and 3 specifications on each count.

The State reintroduced its evidence and rested. The Defendant was then given the opportunity to present its mitigation evidence.

MITIGATION PHASE

It must be noted that on many prior occasions, the Defendant insisted he was not going to present any mitigating evidence. The Court on two occasions advised Mr. McAlpin of his rights in his regard pursuant to *State vs. Ashworth*, 85 Ohio St.3d 56, 706 N.E.2d 1231 (1999). On March 6, 2019, the Court conducted a colloquy with the Defendant to determine whether the Defendant's waiver of mitigating evidence was knowing, intelligent and voluntary. The

Defendant was advised of his right to present mitigating evidence. He was advised as to what mitigating evidence is and its importance. The Court discussed with the Defendant how mitigating evidence is used to offset aggravating circumstances. The Defendant was advised as to what happens if he fails to present mitigating evidence. The Court, once again, finally inquired as to his wishes. The Court further determined he was competent. The Court found the Defendant had the mental capacity to fully understand this life and death decision. The Court further observed he was rational and logical in his approach to the case.

The Defendant refused to cooperate with previously appointed mitigation experts. Upon conviction, pursuant to O.R.C. §2927.03(D)(1), the Court inquired of Mr. McAlpin if he wanted a presentence investigation report and mental examination. He answered affirmatively, notwithstanding his previous declinations. Having previously refused to cooperate with mitigation experts and repeatedly stating he would not present mitigation evidence, the Court prevailed upon its psychiatric clinic to prepare a report as well as it could, given the circumstances. At the first meeting with the psychiatrist, it took three hours to secure the Defendant's consent. At the second meeting, the Defendant refused to leave his pod. He ultimately left his pod, and Dr. James Rodio conducted his interview of the Defendant and issued his report. Dr. Rodio is associated with the Court psychiatric clinic on a part-time basis. He went to great lengths to rearrange his private practice schedule to accommodate the Court and the Defendant. Ultimately, both reports were prepared and were available on May 13, 2019.

On Monday, May 13, 2019, Mr. McAlpin presented six family member witnesses who all testified that he had a rough childhood. His biological father, John Mills, said the Defendant, his mother and he were together until he returned to North Carolina and "didn't know after that."

The most insightful testimony was from his sister Kimilah McAlpin. She offered that the Defendant had a rough childhood and still loved him. He was their mother's favorite. He seemed to "get away" with more than she. She also said that when the Defendant was five years old he found his mother's gun and shot himself in the leg.

His brother John lived mostly with the father in North Carolina while the Defendant resided with their mother.

Tanisha Jackson, a cousin, testified the Defendant was generally a good child. Then was the subject of cross-examination. The State delved into the Defendant's juvenile and adult records.

The Defendant's Aunt Josephine testified about their strong love. Following the family witnesses, the Defendant gave his unsworn statement where he expressed his belief that things happen for a reason and that he was innocent. He mentioned how this seemed to have brought his family together for the first time in a long time.

The Court recessed until Thursday, May 16, 2019, in order to secure Dr. James Rodio for testimony. Dr. Rodio was out of the country, but made himself available on May 16, 2019. The Court reconvened on May 16, 2019, to hear further mitigation testimony.

The Court asked the Defendant for his next witness and, to the surprise and chagrin of the Court, he rested. A sidebar was held and the Defendant stood by his desire.

The Defendant offered no exhibits, including his presentence investigation report and mitigation report.

Closing arguments were completed.

The jury was charged and they deliberated.

The jury returned a verdict of death.

After the jury was excused, the Court inquired of the Defendant if he wanted the Court to consider the presentence investigation report and mitigation report. He acquiesced in this regard.

Thus, the Court considered the testimony of family members, the Defendant's unsworn statement, the presentence investigation report, and the mitigation report, as well as the statutory consideration pursuant to O.R.C.§2929.04(B).

On May 16, 2019, the jury returned a verdict finding that the aggravating circumstance that the Defendant was found guilty of committing outweighed the mitigating factors with proof beyond reasonable doubt and unanimously found that the sentence of death should be imposed upon Joseph McAlpin.

During both the trial phase deliberations as well as the sentencing phase deliberations, the jury was sequestered overnight.

COURT'S FINDING AND OPINION

Ohio Revised Code Chapter §2929 requires that the penalty imposed in a capital murder trial where a jury has recommended a sentence of death be determined by the trial jury AND the trial judge. The jury's verdict of death on the aggravated murder involved the death of Trina K. Tomola-Kuznik and Michael Kuznik is a recommendation to the Court. The law requires the Court to conduct an independent analysis and weigh the aggravating circumstances against the Mitigating Factors presented.

In making its determination in this case, the Court considered the three aggravating circumstances unanimously found by the jury beyond a reasonable doubt involving the aggravated murder of Trina K. Tomola-Kuznik and Michael Kuznik. The Court has not considered the aggravated murder an aggravating circumstance.

The first aggravating circumstance found by the jury beyond a reasonable doubt involved the Course of Conduct specification. The jury found beyond reasonable doubt that during the course of his criminal enterprise, Mr. McAlpin purposely killed two people, namely Trina K. Tomola-Kuznik and Michael Kuznik.

The second aggravating circumstance found by the jury with proof beyond reasonable doubt involved the commission of the offense of aggravated murder during the commission of an aggravated burglary.

The third aggravating circumstance found by the jury with proof beyond reasonable doubt involved the commission of murder during the commission of the offense of aggravated robbery.

The first aggravating circumstance was strongly supported by the crime scene photos and medical examiner's testimony. The second and third aggravating circumstances were strongly supported by video from across the street (Go Cars video), testimony of a co-defendant, the two stolen cars, missing money, as well as DNA, a cellphone and Google location data.

Thus, the Court accepts and adopts the findings of aggravating circumstances.

The Court considered as a matter of law any relevant mitigating factor and has applied the type of individual consideration of mitigating factors as required by the Eighth and Fourteenth Amendment in a capital case. *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869 (1982) *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954 (1978); *State v. Williams*, 23 Ohio St. 3d 16, 490 N.E.2d 906 (1986). The Court had, in its evaluation of mitigating factors, considered the factor O.R.C. §2929.04(B), the testimony of six family members, the unsworn statement of the Defendant, the presentence investigation report and the mitigation report of Dr. James Rodio.

OHIO REVISED CODE §2929.04(B)

O.R.C. §2929.04(B) factor O.R.C. §2929.04(B)(1): No evidence was introduced during trial to indicate in any way the victim induced or facilitated the offense.

O.R.C. §2929.04(B)(2): There was no testimony or evidence presented to indicate the Defendant was under duress, coercion or strong provocation at the time.

O.R.C. §2929.04(B)(3): There is no evidence to suggest the Defendant had a mental disease or deficit and thereby lacked substantiated capacity to appreciate the criminality of his conduct. There was no indication that due to a mental disease or deficit the Defendant lacked substantial capacity to confirm his conduct to be the requirement of the law.

O.R.C. §2929.04(B)(4): At the time of the commission of the offense, the Court finds the Defendant was 29 years of age and was about three weeks shy of turning 30. Thus, the Court cannot consider his youth as a possible mitigating factor.

O.R.C. §2929.04(B)(5): A review of the presentence investigation report shows an extensive criminal history.

O.R.C. §2929.04(B)(6): The Court finds the Defendant was the principal offender in the instant offense.

O.R.C. §2929.04(B)(7): Any other factor: the Court then considered the testimony of relatives, the unsworn statement of the Defendant, presentence investigation report and mitigation of penalty report.

With the exception of the further consideration as mentioned under O.R.C. §2929.04(B)(7), the Court finds nothing mitigating under O.R.C. §2929.04(B).

TESTIMONY OF THE DEFENDANT'S RELATIVES AND UNSWORN STATEMENT

The Defendant presented six family members for purposes of mitigation. They were: John McAlpin Sr., John Mills, Kimilah McAlpin, John McAlpin, Tanisha Jackson and Josephine Evans.

The gist of the family testimony was that the Defendant had a tough childhood. They further stated they love him. His father, John Mills, stated that due to problems with the Defendant's mother, he left Cleveland and returned to North Carolina when the Defendant was young. Mr. Mills stated that he took the Defendant's brother John with him. He stated he "didn't know after that."

The Defendant's brother John McAlpin, more or less, echoed his father's testimony saying that he lived with his father whereas the Defendant lived with their mother.

The Defendant's sister Kimilah McAlpin testified about the family including the birth years of the siblings. Thus, the Court understood the Defendant to be the second oldest of five children. Kimilah, too, echoed prior testimony that the Defendant had a rough childhood. She further recounted that the Defendant, at about age 5, found his mother's gun and shot himself in the leg.

The Defendant's cousin Tanisha Jackson stated that the Defendant was generally a good child. She was cross-examined on the Defendant's prior criminal history.

Josephine Evans, the Defendant's aunt, further opined a strong love for her nephew.

The Defendant then took the stand to give his unsworn statement. The thrust of his statement was that this is God's will. He stated this has brought his family together for the first time in a long time. He harbors no ill will toward anyone, juror, prosecutor, witness, involved in this affair.

This represents the testimony and evidence the jury heard. At the Defendant's request, the Court also considered the presentence investigation report and mitigation report.

PRESENTENCE INVESTIGATION REPORT AND MITIGATION REPORT

As one might imagine, there was very little mitigation to be found in the presentence investigation report. It contained the Defendant's criminal history and a recap of the case, plus some personal information. The Court found nothing mitigatory therein. The mitigation report, however, is different.

The mitigation report did offer some evidence in mitigation. The Court found that the mitigation report adds some more significant insight:

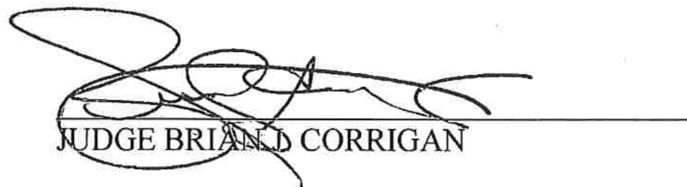
- The Defendant grew up in a household where drug use, violence and sibling disability was common;
- The Defendant found his mother's body after she overdosed on heroin. He was 19 ½ years old;
- The Defendant was hit on the head with a brick at age 12 and suffers from seizures;
- At age 9, he was repeatedly raped by his mother's male friend;
- According to a 2008 psychiatric evaluation, the Defendant has a chronic problem with anger and has little regard for authority;
- The Defendant attempted suicide at the Euclid Jail in 2006;
- The Defendant is considered for diagnosis of PTSD; and
- At a 2018 evaluation of the Monitz Forensic Unit at Twin Valley Behavioral Health Care, it was observed the Defendant interacted appropriately and logically with staff and others;

- The Defendant suffers from intrusive recall of traumas and depressive/anxious symptoms; and
- Finally, the Defendant eschews use of medications so as to be alert and not live an artificial existence.

COURT CONCLUSION

Notwithstanding these mitigating observations, the Court, after carefully weighing the statutory mitigation elements, the testimony of the Defendant's witnesses, the unsworn statement of the Defendant and the presentence investigation report and psychiatric report, the Court finds that the aggravating circumstances outweigh the mitigating factors with proof beyond reasonable doubt.

This determination was made by the Court separately and distinctly from consideration of all the evidence in the adjudication and sentencing phase of the trial. Accordingly, the Court sentenced the Defendant, Joseph McAlpin, to death on May 21, 2019. So pronounced.



JUDGE BRIAN J. CORRIGAN

Date: 6-5-2019

SERVICE

A copy of the foregoing has been sent this 5th day of June, 2019 to:

Office of the Clerk
Supreme Court of Ohio
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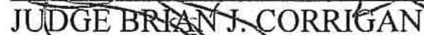

JUDGE BRIAN J. CORRIGAN

UNITED STATES CONSTITUTION

FIRST AMENDMENT
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peace- ably to assemble, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT
No person shall be held to answer for a capital, or other- wise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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

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

FOURTEENTH AMENDMENT
SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO CONSTITUTION

I.05 Trial by jury (1851, amended 1912)
The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three--fourths of the jury.
(As amended September 3, 1912.)

I.10 Trial for crimes;; witness (1851;; amended 1912)

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury;; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel;; to demand the nature and cause of the accusation against him, and to have a copy thereof;; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed;; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself;; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense. (As amended September 3, 1912.)

I.16 Redress in courts (1851, amended 1912)
All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.
[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law.
(As amended September 3, 1912.)

2929.021 Notice to supreme court of indictment charging aggravated murder with aggravating circumstances.

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

(1) The name of the person charged in the indictment or count in the indictment with aggravated murder with a specification;

(2) The docket number or numbers of the case or cases arising out of the charge, if available;

(3) The court in which the case or cases will be heard;

(4) The date on which the indictment was filed.

(B) If the indictment or a count in an indictment charges the defendant with aggravated murder and contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code and if the defendant pleads guilty or no contest to any offense in the case or if the indictment or any count in the indictment is dismissed, the clerk of the court in which the plea is entered or the indictment or count is dismissed shall file a notice with the supreme court indicating what action was taken in the case. The notice shall be filed within fifteen days after the plea is entered or the indictment or count is dismissed, shall be in the form prescribed by the clerk of the supreme court, and shall contain at least the following information:

(1) The name of the person who entered the guilty or no contest plea or who is named in the indictment or count that is dismissed;

(2) The docket numbers of the cases in which the guilty or no contest plea is entered or in which the indictment or count is dismissed;

(3) The sentence imposed on the offender in each case.

Effective Date: 10-19-1981.

§2929.03 Imposing sentence for a capital offense; procedures; proof of relevant factors; alternative sentences

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose sentence on the offender as follows:
(1) Except as provided in division (A)(2) of this section, the trial court shall impose one of the following sentences on the offender:
(a) Life imprisonment without parole;
(b) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty years of imprisonment;
(c) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;
(d) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;
(e) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (A)(1)(a) of this section, the trial court shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that shall be served pursuant to that section.
(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard. The instruction to the jury shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but the instruction shall not mention the penalty that may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section

2929.023 of the Revised Code, the trial court shall impose sentence on the offender as follows:

(a) Except as provided in division (C)(1)(b) of this section, the trial court shall impose one of the following sentences on the offender:
(i) Life imprisonment without parole;
(ii) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving twenty years of imprisonment;
(iii) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;
(iv) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;
(v) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (C)(1)(a)(i) of this section, the trial court shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.
(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.
(2)(a) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be one of the following:
(i) Except as provided in division (C)(2)(a)(ii) or (iii) of this section, the penalty to be imposed on the offender shall be death, life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment.
(ii) Except as provided in division (C)(2)(a)(iii) of this section, if the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of death or life imprisonment without parole on the offender pursuant to division (C)(2)(a)(i) of this section, the penalty to be imposed on the offender shall be an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that shall be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code and served pursuant to that section.
(iii) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the penalty to be imposed on the offender shall be death or life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.
(b) A penalty imposed pursuant to division (C)(2)(a)(i), (ii), or (iii) of this section shall be

determined pursuant to divisions (D) and (E) of this section and shall be determined by one of the following:
(i) By the panel of three judges that tried the offender upon the offender's waiver of the right to

trial by jury;
(ii) By the trial jury and the trial judge, if the offender was tried by jury.

(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A presentence
investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or the offender's counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, the offender is subject to crossexamination
only if the offender consents to make the statement under oath or affirmation.
The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.
(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall

determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to one of the following:

(a) Except as provided in division (D)(2)(b) or (c) of this section, to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of

imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(b) Except as provided in division (D)(2)(c) of this section, if the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the jury does not recommend a sentence of life imprisonment without parole pursuant to division (D)(2)(a) of this section, to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code and served pursuant to that section.

(c) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, to life imprisonment without parole.

If the trial jury recommends that the offender be sentenced to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, life imprisonment with parole eligibility after serving thirty full years of imprisonment, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code, the court shall impose the sentence recommended by the jury upon the offender. If the sentence is an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment imposed as described in division (D)(2)(b) of this section or a sentence of life imprisonment without parole imposed under division (D)(2) (c) of this section, the sentence shall be served pursuant to section 2971.03 of the Revised Code. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Except as provided in division (D)(3)(b) of this section, one of the following:

(i) Life imprisonment without parole;
(ii) Subject to division (D)(3)(a)(iv) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;
(iii) Subject to division (D)(3)(a)(iv) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;
(iv) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (D)(3)(a)(i) of this section, the court or panel shall sentence the offender pursuant to division

(B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.
(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:
(1) Except as provided in division (E)(2) of this section, one of the following:
(a) Life imprisonment without parole;
(b) Subject to division (E)(2)(d) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;
(c) Subject to division (E)(2)(d) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;
(d) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (E)(2)(a) of this section, the court or panel shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.
(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating

factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. For cases in which a sentence of death is imposed for an offense committed before January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. For cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the court or panel shall file the opinion required

to be prepared by this division with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G)(1) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed before January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

(2) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed on or after January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the supreme court.

CREDIT(S)

(2007 S 10, eff. 1-1-08; 2004 H 184, eff. 3-23-05; 1996 H 180, eff. 1-1-97; 1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1-96; 1995 S 4, eff. 9-21-95; 1981 S 1, eff. 10-19-81; 1972 H 511)

Wilks

§2929.04 Criteria for imposing death or imprisonment for a capital offense

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

(1) The offense was the assassination of the president of the United States or a person in line of succession to the presidency, the governor or lieutenant governor of this state, the president-elect or vice president-elect of the United States, the governor-elect or lieutenant governor-elect of this state, or a candidate for any of the offices described in this division. For purposes of this division, a person is a candidate if the person has been nominated for election according to law, if the person has filed a petition or petitions according to law to have the person's name placed on the ballot in a primary or general election, or if the person campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was under detention or while the offender was at large after having broken detention. As used in division (A)(4) of this section, "detention" has the same meaning as in section 2921.01 of the Revised Code, except that detention does not include hospitalization, institutionalization, or confinement in a mental health facility or mental retardation and developmentally disabled facility unless at the time of the commission of the offense either of the following circumstances apply:

(a) The offender was in the facility as a result of being charged with a violation of a section of the Revised Code.

(b) The offender was under detention as a result of being convicted of or pleading guilty to a violation of a section of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer, as defined in section 2911.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be a law enforcement officer as so defined, and either the victim, at the time of the commission of the offense, was engaged in the victim's duties, or it was the offender's specific purpose to kill a law enforcement officer as so defined.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated

arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent the victim's testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for the victim's testimony in any criminal proceeding.

(9) The offender, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense, and either the offender was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design.

(10) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit terrorism.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

CREDIT(S)

(2002 S 184, eff. 5-15-02; 1998 S 193, eff. 12-29-98; 1997 H 151, eff. 9-16-97; 1997 S 32, eff. 8-6-97; 1981 S 1, eff. 10-19-81; 1972 H 511)

Wilks

RULE 104. Preliminary Questions

(A) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (B). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

RULE 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Undue Delay

(A) Exclusion mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.
(B) Exclusion discretionary. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.
[Effective: July 1, 1980; amended effective July 1, 1996.]

RULE 611. Mode and Order of Interrogation and Presentation

(A) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

OHIO RULES

Crim R **11** Pleas, rights upon plea

(A) Pleas

A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant's attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) Effect of guilty or no contest pleas

With reference to the offense or offenses to which the plea is entered:
(1) The plea of guilty is a complete admission of the defendant's guilt.
(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.
(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under **Crim**. R. 32.

(C) Pleas of guilty and no contest in felony cases

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to **Crim**. R. 44 by appointed counsel, waives this right.
(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:
(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.
(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.
(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.
(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant

shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting a plea of guilty or no contest the court shall so advise the defendant and determine that the defendant understands the consequences of the plea.
If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.
If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.
If the indictment contains one or more specifications that are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.
(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no

Crim R **52** Harmless error and plain error

(A) Harmless error

Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(B) Plain error

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

CREDIT(S)

(Adopted eff. 7-1-73)