Supreme Court of Ohio Clerk of Court - Filed December 14, 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**
	:	

REPLY BRIEF OF APPELLANT, JOSEPH McALPIN

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A capital defendant has no right of self-representation for 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). 2

Proposition of Law II

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, which constitutes structural error. McCoy v. Louisiana, 138 S.Ct. 1500 (2018). 8

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The introduction of testimony by the state of victim-impact testimony having no relevance to establishing the guilt of the defendant, but instead was 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. 14

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OVERVIEW OF REPLY BRIEF

In his reply brief, the Defendant-Appellant Joseph McAlpine will respond to the Appellee Brief on the Merits by addressing four propositions of law that were raised in his Brief on the Merits. These include the first two propositions of law which raise issues relating to a capital defendant's choice to self represent. In Proposition of Law I, the question raised is whether a defendant's right to self represent in a tradition "trial" under Faretta v. California is extended into the penalty phase of a capital trial. Proposition of Law II addresses the extent to which standby or shadow counsel may dictate how a case is investigated, prepared and presented. Specifically, McAlpin refutes the appellee's contention that there was no interference because standby counsel's allegedly actions occurred post-verdict or that the interference was harmless.

McAlpin also refutes the appellee's argument that his Propositions of Law relating to the challenged conduct of the prosecutor are without merit because the actions were asserted to be legally permissible. McAlpin in particular addresses the relevancy of victim-impact evidence in the first phase of trial for the purpose of proving the charges. Proposition of Law VI. Additionally, McAlpin disputes the range of latitude prosecutors are afforded in seeking to persuade a jury to return a sentence of death in a penalty phase closing argument. Proposition of Law XIII.

McAlpin rests on his arguments presented in his Brief on the Merits for the Propositions of Law not addressed below.

ARGUMENT

Proposition of Law I:

> **A capital defendant has no right of self-representation for 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). This is certainly the case in the penalty phase of a capital trial.

The State did not directly address the issue in its Brief. This is understandable to an extent as this is an issue of first impression in this state. Therefore, almost by definition, there is no direct precedent. Rather than address the issue directly (does Faretta apply to sentencing or death penalty related voir dire?), the State cited Faretta v. California, and this Court's precedent relating to a defendant's right to self-representation for the traditional "trial" as it existed when Faretta was decided. McAlpin has no issue with this precedent, other than it does not apply here. (See Proposition of Law II)

To properly address the question of sentencing self representation, it is necessary to closely review exactly what was decided and not decided in Faretta. In a nutshell, the Supreme Court decided that at trial, an individual's constitutional right to self-representation was

established by interpreting Bill of Rights as a whole, even though the right to autonomy is not specifically enumerated in the Sixth Amendment. The question of whether there is a right to self representation at sentencing was not before the Faretta Court. Faretta himself had been charged with grand theft, not a capital offense. The Supreme Court has not since expanded or even directly addressed self representation in sentencing, let alone a capital penalty phase hearing.

This issue here is not whether capital litigation is too complicated for a defendant to understand or negotiate the procedures or complex legal issues. It is also not whether McAlpin was properly represented in the penalty phase, as there is no ineffective assistance issue in a self representation case. Faretta, at 834 n. 46; Wilson v. Parker, 515 F.3d 682, 696-97 (6th Cir. 2008). The State is correct in arguing that a trial self representation challenge is generally a non-issue if a defendant has knowingly, intelligently and voluntarily waived his right the counsel. Neither of these elements is a component of McAlpin's issue. The issue is simply whether Faretta applies to a capital sentencing hearing, or any sentencing hearing for that matter.

In Faretta v. California, the Supreme Court held that an accused has a right to conduct their own defense in a criminal trial. In reading the opinion, it is clear that the Court was addressing a guilt-innocence procedure and not a sentencing procedure. Summing up its position, the Court instructed:

> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a *conviction*. (Emphasis added).

Faretta at 834.

In the dissent of the 6-3 decision, Justice Blackman reasoned that unrepresented counsel may result in an "injury to society."

> The Court seems to suggest that so long as the accused is willing to pay the consequences of his folly, there is no reason for not allowing a defendant the right to self-representation. * * *That view ignores the established principle that the interest of the State in a criminal prosecution "is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935). *See also* Singer v. United States, 380 U.S., at 37. For my part, I do not believe that any amount of pro se pleading can cure the injury to society of an unjust result, but I do believe that a just result should prove to be an effective balm for almost any frustrated pro se defendant.

Id. 849.

It is understood that a dissent is not binding precedent. However, a death sentence was not a possible result or consequence of Faretta, himself, not knowing or understanding evidentiary rules and trial procedures. The government seeking to take the life of a defendant is a different element entirely. In a capital trial, the injury to society resulting from an inappropriate sentence of death outweighs the individual's right to autonomy to defend himself against the government's charges of a crime. A "just result" in sentencing should also prove to be "an effective balm for almost any frustrated pro se defendant," (Id.) especially one who has represented himself throughout the course of his trial and presented his defense to the criminal charges as he saw fit to do so.

In the few instances where this issue has been addressed, courts have struggled to define the extent of the right of self representation. Two federal appellate circuits have found a defendant's right to autonomy in sentencing does exist, albeit rather loosely. None of the cases addressed were death penalty cases. All were appeals of federal convictions. The precedential

value of these cases is limited at best as there is a federal statute that has been interpreted as providing the right to counsel at federal sentencing. There is no comparable statute in Ohio.

The federal statute in question, 28 U.S.C. § 1654 states that criminal defendants in federal courts also have a statutory right to "plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." 28 U.S.C. § 1654. Thus, Sixth Circuit concluded that it could "safely say that a criminal defendant in federal court has a right to represent himself or herself at sentencing." United States v. Jones, 489 at 243, 248 (6th 2007)

In United States v. Evans, 559 Fed. Appz. 475 (6th Cir. 2014), the court discerned that the issues involving right to self representation at trial and at sentencing are a different animal.

> Resolving the question in the context of sentencing rather than at trial may prove more difficult, because "[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." Martinez v. Court of Appeal of Cal., 528 U.S. 152, 162, 120 S. Ct. 684, 145 L. Ed. 2d 597 (2000) (distinguishing between a defendant's Sixth Amendment rights at trial and on appeal). Still, we have "safely s[aid] that a criminal defendant in federal court has a right to represent himself or herself at sentencing," because "[c]riminal defendants in federal courts [] have a *statutory right* to 'plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.'" See United States v. Jones, 489 F.3d 243, 248 (quoting 28 U.S.C. § 1654).

In Evans, the Sixth Circuit quoted Jones in finding that if there was no jury, the right to self-representation is "limited accordingly." It adhered to a kind of sliding scale right at sentencing, reinforcing the idea that the "contours of the right to self representation . . . depend on the nature of the proceeding." Id. 249. If this were the law, surely the ability of one to waive counsel would be lessened in a death penalty case in view of the state's interest in having a fair and reliable penalty phase hearing. Evans found the denial of counsel to be error, but by-passed

the issue of whether the error was structural with a remand for a new sentencing hearing.

In deciding whether to extend the right to self-representation to criminal defendants at sentencing, Jones cited a Fifth Circuit opinion holding the same. United States v. Shanklin, 193 Fed. Appx. 384, 387-88 (5th Cir. 2006); *see also* United States v. Davis, 285 F.3d 378, 385 (5th Cir. 2002). The Fifth Circuit later determined that the improper denial of the right to self-representation at sentencing is a structural error. United States v. Cano, 519 F.3d 512, 516 (5th Cir. 2008).

There is at least one contrary opinion. United States v. Hyman, No. 96-4855, 1998 U.S. App. LEXIS 8080, 1998 WL 200320, at *3 (4th Cir. Apr. 27, 1998)(unpublished opinion)(concluding that once a defendant has proceeded to trial with counsel, the decision whether to grant the defendant's request to proceed pro se at sentencing lies within the discretion of the district court).

Although the United States Supreme Court has not specifically addressed the expansion of Faretta into the sentencing phase of a capital hearing, it is clear that the Court distinguishes between the application of constitutional protections for trial and for sentencing. The Court specifically held that rights attaching to the trial do not necessarily attach to sentencing. In White v. Woodall, 572 U.S. 415, 134 S.Ct. 1697 (2014), the Sixth Circuit reversed a death sentence because the state commented on the defendants failure to testify at the sentencing hearing. The Court instructed that traditional trial application of constitutional protections do not always apply similarly in a sentencing procedure.

> But it is not uncommon for a constitutional rule to apply somewhat differently at the penalty phase than it does at the guilt phase. See, e.g., Bobby v. Mitts, 563 U.S. 395, 398-399, 131 S. Ct. 1762, 179 L. Ed. 2d 819 (2011) (per curiam). We have "never directly held that Carter [v. Kentucky, 450 U.S. 233 (1981)]applies at

> a sentencing phase where the Fifth Amendment interests of the defendant are different." United States v. Whitten, 623 F. 3d 125, 131-132, n. 4 (CA2 2010).

White v. Woodall, 134 S.Ct. at 1703.

The Supreme Court reversed because it had not yet decided whether the right to silence extended to the penalty phase of a death penalty hearing. It might in the future, but only that Court has the power to extend a constitutional protection to a sentencing hearing. Ultimately, the Court chose not to address that specific issue in White, and has not done so since.

Therefore, this issue is clearly one of first impression.[1] As such, it is urged that this Court find under both Article 1, Sec. 9 and 10 of the Ohio Constitution[2] and the Fifth, Eighth and Fourteenth Amendments of the United States Constitution, that the state's interest in ensuring the integrity and efficiency of the trial outweighs the defendant's interest in acting as his own lawyer in a capital sentencing phase hearing.

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[1] On December 11, 2020, the United States Supreme Court indirectly addressed this issue in United States v. Hasan, ARMY 20130781. Standby counsel has moved to present mitigation independent of the defendant. The appellant specifically objected. The court held that neither Congress nor the president had enacted any military rule to compel the presentation of mitigation in a military proceeding. The appellant chose not to introduce any evidence in mitigation. The decision did not address the appellant's ability to control the presentation of evidence pursuant to McCoy v. Louisiana, 138 S.Ct. 1500 (2018) even with counsel. See also State v. Roberts (2006), 110 Ohio St. 3d 71, 2006 Ohio 3665 (Client controls presentation of mitigation in Ohio)

[2] Three states have independent requirements of presentation of mitigation if defendant's are representing themselves pro se in penalty phase. *See* Marquadt v. State, 156 So.3d 464, 490 (Fla. 2015); Billings v. Polk, 441 F.3d 238, 252 (4th Cir. 2006) (North Carolina so requires); State v. Reddish, 859 A.2d 1173, 1203-04 (N.J. 2004)

Proposition of Law II

> **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, which 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.

If the State's argument is understood, it is arguing that trial counsel's interference constituted harmless error because the information McAlpin may have obtained from the expert would have been inadmissible anyway. No harm, no foul. The opposite is accurate. Even if the state's position on the rules of evidence and admissibility is correct, that would be irrelevant to the issue. Any interference with McAlpin's right to present or attempt to present a defense constitutes structural error.

The Supreme Court based its holding in Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975) in the following reasoning. The Sixth Amendment speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, "shall be an aid to a willing defendant--not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel

upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists." Id. at 820.

Nowhere in Faretta or it progeny does it say that the pro se defendant's presented defense must be reasonable or legally correct. It is the defendant's decision alone to determine what to present, no matter how unreasonable the argument or unlikely of success that argument might be with the chosen defense. This would include a defendant's right to argue a defense that might not even warrant an instruction. An example might be that the defendant might want to argue an affirmative defense such as self-defense. However, the evidence clearly established that the defendant started the affray or used disproportionate force, thus not warranting an instruction. Regardless, the Sixth Amendment allows the defendant to make the argument, however wrong, and perhaps preserve the issue for appeal.

In this example, had standby counsel interfered by refusing to issue a subpoena to a witness, or refuse to let the defendant interview a doctor for the purpose of arguing the injuries were consistent with his self-defense argument, even though objectively the injuries did not support a self-defense theory, would such interference be harmless? This is why such interference is structural error, to obviate the reviewing courts need to judge whether such error was harmless. There was either interference of the defendant's right to present his defense his way, no matter how unsupported by law or evidence, or there was not.

While standby counsel is free to provide guidance and advice to a defendant, the ultimate decision is that of the defendant and the defendant alone. Adams v. U.S. ex rel. McCann, 317 U.S. 269, 279, 63 S. Ct. 236 (1942) ("The right to assistance of counsel and the correlative right

to dispense with a lawyer's help are not legal formalisms."). Pro se defendants are "entitled to preserve actual control over the case [they] choose[] to present to the jury"; therefore, "[i]f standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak instead of the defendant on any matter of importance, the Faretta right is eroded." McKaskle, 465 at 178. Ultimately, in considering whether the right to self representation was violated, the court's "primary focus [is] on whether the defendant had a fair chance to present h[er] case in h[er] own way." Id. at 177.

State v. Fisher, 99 Ohio St.3d 127, 2003-Ohio-2761, ¶7, cited by the state to support a standard of outcome-determinative, is inapposite. Fisher addressed the practice of jurors submitting questions to a witness, not the interference with the right of self representation. But even if it was applicable, the decision has been effectively overruled by McCoy v. Louisiana.

The State is correct in arguing that the judge has the discretion to appoint standby counsel. The need to appoint standby counsel for the purposes of assisting in basic courtroom mechanics is proper. McKaskle v. Wiggins, 465 U.S. at 184. In other words, it is entirely proper for standby counsel to assist with courtroom procedure and rules of evidence. Id. 183. But that does not allow standby or shadow counsel to *make* the decisions or interfere with a pro se defendant's ability to prepare or investigate. McCoy. This would improperly interfere with the defendant's right to invoke whatever trial strategy he chose. U.S. v. Jones, 489 F.3d at 248-49. (standby counsel did not interfere with defendant's pro se representation because no evidence of disagreement with defendant's strategy).

Review of Pertinent Facts

It is irrelevant if the improper standby counsel interference occurred in front of or outside the view of the jury. The inteferrence could result from actively preventing the defendant from preparing his defense, as occurred here. The appellee bases a large portion of it's argument on the fact the McAlpin did not complain about the interference until after the trial. The fallacy of this argument is that McAlpin's counsel did not disclose his interference in a timely manner. In fact, he did not disclose it at all until McAlpin's hearing on the new trial. McAlpin discovered the problem on his own.

The defense request for a DNA expert was granted pre-trial. On September 19, 2018, the prosecutor addressed the court about the need for the State to have the defense expert report before the twenty-one day discovery rule requirement. (T. 262-63) McAlpin informed the court that he had not been able to get in touch with his expert in response.

On November 11, 2018, McAlpin complained that he still had been unable to communicate with his expert after having attempted to call the expert repeatedly. (T. 285-86) On February 7, 2019, the prosecutor again complained that McAlpin may not meet his twenty-one day disclosure requirement for expert reports under Crim. R. 16. McAlpin responded again that he had no access to the assigned expert. The judge acknowledged that McAlpin had consistently brought his lack of acccess to the court's attention. All these instances occurred well before trial.

It was not until later that McAlpin discovered the reason he had been unable to communicate with the defense expert. At no time did standby counsel assist him in arranging a meeting pre-trial between the expert and McAlpin, who was in jail. It was only later that standby counsel informed McAlpin that in standby counsel's opinion, McAlpin 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 from the expert, the prosecutor would automatically receive a copy of the report and it would have “played bad in my favor.” (T. 4593)

The key here is that counsel without consulting McAlpin, and not McAlpin, made the decision on whether a report should be prepared. Because standby counsel made that decision before discussing it with McAlpin, and before the commencement of trial or at least the conclusion of trial, this alone constituted improper interference. The record is not clear if counsel ever showed any test results or documents prepared by the defense DNA expert to McAlpin, depriving McAlpin the ability to make an informed decision.

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. When McAlpin requested the report from his expert, standby counsel informed him that he did not need a report because it was harmful. It was the advice of counsel that “we’re not going to let them know that we had these DNA profilings.”

McAlpin told the trial judge that he thought “it was kind of odd and weird.” (T. 4594-95) It is clear that this decision, not to have the expert prepare a report, had already been made by standby counsel before this discussion was had with McAlpin. 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 at any point.

Standby counsel had not even explained to McAlpin that his original expert had been substituted by another, albeit from the same company. (T. 4596). An exasperated McAlpin again

told the trial judge that he had not been able to make contact with his expert. (T. 4605)

As noted above, it appears that standby counsel actually acted to prevent communication between McAlpin and the defense expert. It is clear that standby counsel informed the expert not to prepare a report before he consulted with McAlpin about the issue. When, after the first phase verdict, McAlpin was able to have a phone conversation with the expert without the presence of his counsel, he learned that the expert 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)

This alone is enough to constitute the interference with McAlpin's right to self representation. Counsel literally made a strategic choice, not hiring the expert, or at least, not paying the expert to prepare a report, before trial. This action directly interfered with McAlpin's right to present the case as he saw fit to do so. The fact that it was not learned of until after trial does not transform the incident to a post-trial interference, as argued by the state.

The extent of that interference was exemplified by the fact that the expert refused to talk to McAlpin without permission of standby counsel. The expert, Carrie Roland informed McAlpin 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 she could not talk to him without counsel present. (T. 4599) This is unusual as there was no "counsel". Standby counsel denied that he advised Roland not to talk to McAlpin without his presence. (T. 4605)

Conclusion

Faretta explained that the Sixth Amendment right to self-representation thus "must impose some limits on the extent of standby counsel's unsolicited participation." The following

limitations were thus placed on advisory or standby counsel:

> First, the pro se defendant is entitled to preserve actual control over the case he chooses to present to the jury. This is the core of the Faretta right. If standby counsel's participation over the defendant's objection *effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses,* or to speak instead of the defendant on any matter of importance, the Faretta right is eroded.

Id. at 178. (Emphasis added)

McAlpin was not able to make tactical decisions and thus present his defense in his "own way." Because of the actions of standby counsel, McAlpin was unable to review all available evidence to make the choice of how he wanted to present his defense or question the state witnesses. The key is, McAlpin must have been able to have had a fair chance to have presented his case as he wanted. United States v. Hendrickson, 822 F.3d. 812 (6th Cir. 2016) (. . . the relevant inquiry is whether a pro se defendant had a "fair chance to present her case in a manner of her own choosing.") Standby counsel's purposeful restriction of McAlpin's access to the court appointed DNA expert violated his right to self representation.

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.**

This Court's well-reasoned and more pertinent than ever holding in State v. White, 15 Ohio St.2d 146 (1968), syllabus paragraph 2, needs to be invoked not only in this case, but others in which prosecutors are circumventing penalty phase restrictions against arguing victim-

impact by introducing it in the first phase of a capital trial. In White, this Court held unequivocally that the use of such evidence for the purposes of determining guilt or non-guilt was prohibited. This Court held that reliance on evidence of the victim's background or family by the state in its argument for proving the charges of the indictment is improper and constitutes reversible error if relied upon in arriving at judgment. The decision further held that victim-impact evidence is excluded "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.

The dangers of introducing the highly inflammatory evidence is which a slight relevance is outweighed by the unfair prejudice or misuse of the evidence in the first phase of a capital trial was first articulated by this Court in State v. Thompson, 33 Ohio St.3d 1 (1987). In Thompson, the Court reversed and remanded a sentence of death because the combination of the prosecutions argument and use of gruesome photographs from the first phase caused the penalty phase to be "fundamentally flawed and prejudicially unfair." Id. at 40.

The decision was strongly based upon the recognition by this Court that it was:

> . . . aware, of course, that the statutory scheme for the trial of aggravated capital cases is one of bifurcation. We would be naive 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. The type and magnitude of any error then becomes the issue. In the case before us, the prosecutor's persistent references to the appellant's silence, continuing even after the trial court had sustained an objection to such comments, are errors so egregious that *regardless of where they occurred in the overall trial*, they cannot be ignored or overlooked.

Id. 40-41. (Emphasis added)

Recently, in State v. Madison, 160 Ohio St.3d 232, 2020-Ohio-3735, this Court although

not specifically citing Thompson, again acknowledged the necessity to consider trial court errors and relevancy issues based upon the trial as a whole. Although Madison's convictions and sentence of death were ultimately affirmed, in doing so the opinion in numerous instances concluded that the carry-over effect of trial or first phased issues was not unfairly prejudicial. Madison at ¶144 (evidence of other murders in first-phase is not sufficiently prejudicial to undermine confidence in jury's sentencing verdict) and ¶ 186 (no carryover prejudice to the penalty phase of prosecutor arguing Madison's lack of remorse in first-phase).

In the state's brief, this Court's general position on victim-impact relevancy from State v. McKnight, 107 Ohio St.3d 1010, 2005-Ohio-6046 was correctly posited, but not correctly applied. In McKnight, this Court did find that if the disputed evidence was necessary to assist the state establishing its proof against the defendant even that is included victim-impact, it was nevertheless admissible under a relevancy evaluation. The wisdom of this position is not disputed. In almost any homicide case, there is apt to be evidence which includes a victim-impact effect. For instance, a family member testifying, as occurred here, that a victim had not returned home or called as was the usual practice, cannot help but contain an element of victim-impact, but if it is necessary for the prosecution to establish a time line of the events and victims movements, it is admissible. The probative value in this type of situation outweighs the prejudice that may result from the introduction of the testimony.

Contrast this situation with what occurred in McAlpin's trial. A few of the comments raised in the merit brief will be discussed here, but not all. The discussion reveals the difference between the parties as to how victim-impact admissibility should be evaluated. For example, the State argues that knowledge that the testimony that the two victims were high school sweethearts

was introduced to allow it to establish them as the owners of the car lot. (T. 2366, State's brief p. 28) Such evidence was not necessary for the state to establish ownership. The probative value of the jury knowing that they were high school sweethearts was minimal, if any at all, to establishing ownership of the business. The effect of such testimony naturally would be to invoke sympathy for the victims and families of the victims, which is not a proper consideration for either phase of trial.

Another example of the State's position was the testimony that Colin Zackowski's biological father had died of an overdose. (T. 2395, State's brief p. 29) This again would cause a juror to have great sympathy for the witness, having lost his both his biological father and the victims in this case. Sympathy for a witness, of course, may improperly affect how a jury evaluates the testimony of the witness, if not subconsciously attributing the undoubted extra grief suffered by Colin to McAlpin. A similar argument may be made as to the tough life suffered by state witness Albert Martin. (T. 3041-42). His sympathetic background was not necessary for the purposes of his testimony and what the State sought to establish with his testimony. All may have been improperly considered by the jury in the penalty phase when assessing the weight to be assessed to either the proven aggravating factors or mitigation present in the case.

The rule on victim-impact evidence in the first phase should be tightened. It should be permitted only if the state was otherwise unable to establish the relevance to its case without its inclusion. In a capital case, because of the recognized danger if misuse by the jury, regardless of how it is instructed, such testimony must be prohibited.

Proposition of Law XIII

> **Prosecutorial misconduct during the mitigation phase closing arguments deprive a capital defendant of his substantive and procedural due process rights to a fair trial and reliable sentencing hearing.**

1. Improper Reference to McAlpin's Lack of Remorse

The absence of a mitigator cannot be argued to be an aggravator. Although prosecutors are sophisticated enough at this point of capital litigation not to refer to anything other than the proven aggravator as the aggravating factor, that does preclude the jury from improperly applying the evidence in the sentencing deliberation.

In State v. Depew (1988), 38 Ohio St.3d 275, 288-89, *reversed* Depew v. Anderson, 311 F.3d 742 (6th Cir 2002) (on prosecutor misconduct in closing argument), this Court found that R.C. §§ 2929.04(B) and (C) were designed to enable the defendant to raise issues in mitigation and to facilitate his presentation thereof. If the defendant chooses to refrain from raising some of or all of the factors available to him, those factors not raised may not be referred to or commented upon by the trial court or the prosecution.

This Court found that it is clear that comments on the strength of mitigation is appropriate only with regard to those factors actually offered in mitigation by the defendant. This is especially apparent when the purpose is considered in conjunction with the mandate found in R.C. §2929.04(B) that "* * * the court, trial jury, or panel of three judges shall consider, and weigh Against the aggravating circumstances * * *" (emphasis added) the listed factors that are presented by way of mitigation. If evidence on any of the factors is not offered by the defendant or if any of the factors would not, in fact, be useful in mitigation, then it would be impossible to weigh those factors against the aggravating circumstances. Therefore, no mention of factors not

present should be made by the prosecutor or judge, for that matter.

This Court further found support for this conclusion which may be found by reading R.C. §2929.04(C) in conjunction with R.C. §2929.04(B). Subsection (C) provides that "[t]he defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section * * *." (Emphasis added.) Thus, it is the defendant who has the right to present and argue the mitigating factors. *If he does not do so, no comment on any factors not raised by him is permissible*. Depew at 289. (Emphasis added)

The prosecutor's argument that lack of remorse negates character is erroneous. This Court has recognized that a defendant's remorse may be a factor in mitigation that the jury may consider in determining the appropriateness of the death penalty. State v. Ashworth, 85 Ohio St.3d 56, 72, 1999 Ohio 204 (willingness to step forward and accept responsibility without leniency from state is mitigating); State v. Gapen, 104 Ohio St.3d 358, 2004-Ohio-6548 (Gapen's apologies to the victims' families are entitled to weight in mitigation). The fact that remorse is not a specifically listed as a mitigating factor in the statute is irrelevant. Because McAlpin did not argue remorse as a mitigator, no comment could be made in reference to his lack of remorse in relation to his unsworn statement. Rebuttal is limited to those instances where the defense offers a specific assertion, by a mitigating witness or by the defendant, that misrepresents the purported factor in mitigation. State v. Henness, 79 Ohio St.3d 53(1997).

In its brief, the state argues that R.C. §2929.04(B) requires a capital jury to consider the "history, character and background of a defendant regardless if he raised those issues as mitigation. This is incorrect. This Court has held that those matter can only be considered by the jury as mitigation, and for no other purpose. State v. Wogenstahl, 75 Ohio St.3d 344 (1996).

The danger of allowing the absence of a factor in mitigation to be argued by the prosecutor is that it creates the danger that the jury will think the missing factor must be important, and that death is more appropriate because of its absence. In other words, the absence of a mitigation factor might be used by a juror to improperly assign more weight for the proven aggravator or less for established mitigation factors. If the defendant had argued that he was remorseful, then the prosecutor would be fully within his or her rights to rebut this assertion from evidence in record. But McAlpin did not at any point argue his good character or express remorse for his actions as he denied his guilt.

This Court has specifically held as argued here. State v. Fears, 86 Ohio St.3d 329 (1999) directly held that a state may not turn lack of remorse into aggravating factor but may rebut if brought forth by the defense. *See also* State v. Awkal, 76 Ohio St.3d 324, 1996-Ohio-395 (distinguishing comments made in reference to a defendant's remorse at time of the offense as opposed to decision not to testify, and proper because made in rebuttal of the evidence of remorse presented by defendant).

2. Comment on Unsworn Statement and Lack of Cross-examination

This Court has previously considered this issue in State v. DePew, 38 Ohio St.3d at 285, held that "the 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." The prosecutor's comment's here went well beyond those limits, specifically addressing the inability of the state to cross-examine him, referring to his credibility and addressing his silence on particular matters. All of these subjects have been enumerated as improper by this Court. State

v. Lorraine, 66 Ohio St.3d 414, 419 (1993).

To reiterate, in his closing argument, the prosecutor made the following comments to the jury regarding McAlpin's unsworn statement:

> 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).

Every aspect of the prosecutor's above argument is improper. His comments directly brought to the jury's attention mitigation that McAlpin could have discussed or presented as mitigation, but did not. The comment on McAlpin's lack of understanding as to "the severity of why we're here. ." is another comment on his lack of remorse. Depew; Awkal.

Victim's Last Moments

The state argues that because counsel is entitled to latitude in closing argment, it was not improper to argue what he assumed 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).

Such direct attempts to play on the emotions of the jury in the penalty phase of a capital trial are prohibited. State v. Combs, 62 Ohio St.3d 278, 283 (1991). (In penalty-phase closing argument, prosecutor's asking of the jury to "imagine" victim's feelings, and his "terror" and "desperation" was improper).

Members of the Supreme Court of the United States have advised us to remember that "death is different" -- that "the taking of life is irrevocable," so that "it is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights," Reid v. Covert, 354 U.S. 1, 45-46, (1957) and that "in death cases doubts . . . should be resolved in favor of the accused." Andres v. United States, 333 U.S. 740, 752, 68 S. Ct. 880 (1948). In Caldwell v. Mississippi, 472 U.S. 320, 329, 105 S. Ct. 2633 (1985), the Court decided that a prosecutor's prejudicial statements in closing argument rendered the death sentence invalid. It applied a stricter standard in assessing the validity of closing argument in death cases relying on the Court's admonition in California v. Ramos, 463 U.S. 992, 998-99, 103 S. Ct. 3446 (1983), that under the Eighth Amendment "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny in capital sentencing determinations."

The combinations of the improper comments here poisoned the penatly phase procedure and deprived McAlpin of a fundamentally fair consideration of the appropriate penalty by he jury. Because the comments violated not only federal constitutional protections, but also Article 1, Sec. 9 and 10 of the Ohio Constitution, a new penalty phase hearing is required.

CONCLUSION

Pursuant to Propositions of Law I, II, IV, V, VI, VIII, and IX, the defendant-appellant Joseph McAlpin requests that this Court reverse his convictions and remand this case with a new trial order. Pursuant to Proposition of Law III, the element of prior calculation and design must be dismissed from Counts 3 and 4 and the corresponding death specifications in all four counts of Aggravated Murder. In the alternative, pursuant the remaining propositions of law, McAlpin respectfully requests that this Honorable Court reverse the sentence of death remand this case for a new penalty phase hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief was served upon Michael O'Malley, Cuyahoga County Prosecutor and/or Callista N. Plemel, Esq., Esq. Assistant Cuyahoga County Prosecutor, the Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, by Regular U. S. mail/email on this 14th day of December, 2020.

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