Ohio's Death Penalty Statute: The Good, the Bad, and the Ugly

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As of November 2001, 203 men sit on Ohio's death row. With the executions of Wilford Berry on February 19, 1999, Jay D. Scott on June 14, 2001, and John Byrd, Jr. on February 19, 2002, the death penalty in Ohio is a reality. The capital defense practitioner representing a client at trial or on appeal must be prepared to defend his or her client against that reality. To that end, this article examines the statutory framework within which capital cases are prosecuted with the express purpose of aiding defense practitioners and improving the quality of capital representation in Ohio. This article analyzes both the positive and negative aspects of Ohio's death penalty statute. To meet its twin objects, practical advice and suggested litigation strategies are intermingled with critical analysis of the law in Ohio.

I. INTRODUCTION

As a defense practitioner working in the death penalty field, it can feel as though every state law and every court decision works against your client's interest. We believe it is a good idea to step back from the battle and take a critical look at the statutory framework within which capital cases are litigated. For although the statutory scheme and judicial precedent in Ohio may appear converse to the capital defendant's interests, the Ohio Revised Code provides many substantive and procedural protections that are available to the defendant in a capital case, which we call "the good." Part II identifies and discusses these protections available to the capital defendant in the Ohio Revised Code. Along with "the good," however, comes "the bad": constitutionally suspect statutory provisions, unfavorable statutory revisions, and omissions from Ohio's capital statute. In Part III, we discuss these problem areas. Finally, adverse or constitutionally suspect interpretations of Ohio's statute can render the law down right "ugly." Part IV discusses "the ugly" in Ohio's statutory framework as well as offering recommendations on how to deal with some of the more hostile aspects of capital jurisprudence in Ohio.

Through awareness of "the good," "the bad," and "the ugly," we believe defense practitioners can better serve the interests of their capital clients. By taking advantage of "the good" and preparing to combat "the bad" and "the ugly," defense practitioners can more ably represent their capital clients at trial and in post-trial litigation. The purpose of this article is to highlight the important aspects of Ohio's death penalty statute and to enhance the quality of representation by defense attorneys at all stages of capital case litigation.

II. OHIO'S DEATH PENALTY STATUTE: THE GOOD

The United States Supreme Court has made clear that death penalty states have broad discretion to define capital crimes and to set up procedures to implement capital sentencing schemes.[1] As the Court stated in *Spaziano v. Florida*,[2] "[t]he Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws."[3] This is not to say, however, that death penalty states have free reign to implement capital sentencing schemes.

States must narrow death-eligible offenders into a subclass of all persons who commit murder. A valid state sentencing scheme must properly channel the sentencer's discretion to ensure that the death penalty is applied only to the worst types of murder and that it is not applied in an arbitrary or capricious manner.[4] Such a scheme must also provide for fully individualized sentencing of the defendant, as "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[5] Accordingly, a state's sentencing scheme must comport with the Eighth Amendment's "twin objectives . . . of measured, consistent application [of capital punishment] and fairness to the accused."[6] Other than these two Eighth Amendment requirements, however, the Supreme Court has placed very few "substantive limitations on the particular factors that a capital [sentencer] may consider in determining whether death is appropriate."[7]

With these constitutional principles in mind, we conclude that Ohio's death penalty statute is essentially favorable to the capital defendant (aside from the obvious fact that the statute allows the state to impose the death penalty). From the standpoint of the defense practitioner, Ohio's death penalty statute provides more substantive and procedural protections to the capital defendant than the Federal Constitution requires. We discuss these substantive and procedural protections in this section as

they pertain to the topics of death penalty eligibility factors, death penalty selection factors and procedures, jury participation in capital sentencing, available life sentences, and the function of appellate review of capital sentences.

A. *Eligibility Factors*

Eligibility factors are the criteria used to determine for whom the death penalty may be imposed under law.[8] Through eligibility factors, a state narrows all crimes of murder into a subclass of capital crimes.[9] Eligibility factors must therefore achieve the constitutional objective of channeling the sentencer's discretion so as to eliminate the standardless or arbitrary application of the death penalty.[10] In this respect, eligibility factors cannot be "too vague."[11] An impermissibly vague eligibility factor "fails adequately to inform juries what they must find to impose the death penalty and, as a result, leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*."[12]

In *Lowenfield v. Phelps*,[13] the United States Supreme Court made clear that states may establish death eligibility through two methods.[14] In the first method, death eligibility is achieved at the culpability phase of a bifurcated trial upon a finding of guilt of capital murder, as defined by the legislature.[15] In the second method, death eligibility is achieved when the defendant is found guilty of a broader class of murder and then, "at the penalty phase" of a bifurcated trial, the capital sentencer finds an additional fact of an aggravating circumstance that narrows the murder into a subclass of capital murder.[16]

The Ohio General Assembly, however, has enacted a third method for establishing death eligibility. In Ohio, the defendant becomes death-eligible at the culpability phase of a bifurcated proceeding in a two-step process. The defendant must first be found guilty of committing at least one of five types of aggravated murder.[17] The defendant must then be found guilty of at least one of nine aggravating circumstances.[18] A case may proceed to the penalty phase to determine if the defendant gets a life sentence or death only if the defendant has been found guilty of both aggravated murder and at least one aggravating circumstance at the culpability phase.[19]

The defense practitioner must keep Ohio's method for determining death eligibility in mind when litigating non-penalty phase issues to ensure that his or her client receives a heightened degree of judicial scrutiny on review. Judges must afford a heightened degree of reliability to capital cases as the result of the extreme finality of the death penalty.[20] This requirement of heightened scrutiny on review even extends to collateral proceedings on federal habeas corpus petitions.[21] Thus, the capital defense practitioner must realize that many culpability phase issues, such as instructional errors on the elements of an aggravated murder charge or an aggravating circumstance, may create defects in the constitutionally mandated process of narrowing the defendant into the class of death-eligible defendants. The practitioner must therefore be prepared to argue that culpability phase issues may demand the Supreme Court's "death is different" scrutiny.[22]

1. *Juveniles Are Ineligible for the Death Penalty*

With regard to juvenile offenders who commit murder, the Ohio Revised Code provides more substantive protection than does the Federal Constitution. In *Stanford v. Kentucky*,[23] the United States Supreme Court decided that the Eighth Amendment's "evolving standards of decency" are not infringed by the execution of juvenile offenders as young as age sixteen.[24] In light of *Stanford*, the minimum age of eighteen for death eligibility is a significant substantive protection provided by the Ohio Revised Code. Indeed, only fifteen of thirty-eight capital punishment states set eighteen as the minimum age for death eligibility.[25]

Although the Ohio Revised Code sets the minimum age for death eligibility at eighteen, the defense retains the burden of proving this restriction.[26] The defense has the burden of raising the issue of juvenile status, and also the burden of production to put forth evidence that the defendant was not yet age eighteen at the time of the offense.[27] Assuming the issue of age is then still in dispute, the prosecution carries the burden of persuasion at trial to establish by proof beyond a reasonable doubt that the defendant was at least age eighteen at the time of the offense.[28]

If the defendant did not raise the matter of age at trial and he or she is erroneously sentenced to death, then the defendant may seek to vacate the death penalty at any time after sentencing by filing a motion in the trial court.[29] The defendant must

establish by a mere preponderance of the evidence that he or she was not age eighteen at the time of the offense.[30] When a defendant files a post-sentencing motion to contest death eligibility on the matter of age, the trial court must hold a hearing on the defendant's motion as to whether it is supported by information to establish "probable cause" that the defendant was a juvenile when he or she committed the offense.[31]

The Ohio Revised Code provides this avenue for vacating a death sentence on the matter of age under the "Appellate review of death sentence" section.[32] If direct appeal counsel discovers this issue, however, he or she must litigate in the trial court, and not the appellate court.[33] Direct appeal counsel who are able to litigate this issue should also file a motion in the appellate court requesting to have the direct appeal held in abeyance for the trial court to review the defendant's motion to vacate the death sentence. Moreover, the doctrines of waiver and res judicata should be of no consequence if the defendant attempts to bring this claim after the time for litigating either the direct appeal or the state post-conviction has passed.[34] This is so because the Ohio Revised Code provides for a special statutory avenue to vacate a death sentence imposed improperly on an offender who was under age eighteen at the time of the offense. Such an avenue may be pursued "[a]t any time after a sentence of death is imposed . . . ."[35]

2. *Mens Rea Elements of Purpose to Kill and Prior Calculation and Design*

The Supreme Court has made clear that states have wide latitude to define criminal conduct, as the primary responsibility for enforcing the criminal laws lies with the states.[36] With one exception in which the Court prohibited the death penalty for the crime of felony murder simpliciter,[37] the Court has deferred to state legislatures with regard to the culpable mental state that is necessary to render a criminally accused person death-eligible. In *Tison v. Arizona*,[38] for example, the Court found no violation of the Cruel and Unusual Punishment Clause for the imposition of the death penalty on a defendant who did not kill or intend to kill, but who nevertheless was a major participant in the crime and who acted with a "reckless indifference to human life."[39]

In light of *Tison*, the Ohio Revised Code provides more substantive protection to a person accused of a capital crime regarding the culpable mental state for death eligibility than is required by the Federal Constitution. Four types of aggravated murder require the prosecution to prove beyond a reasonable doubt that the capital defendant purposely caused the victim's death.[40] A culpable mental state of purpose to kill is also included as an element of five of the nine aggravating circumstances.[41] One type of aggravated murder requires the prosecution to prove beyond a reasonable doubt that the capital defendant purposely and with prior calculation and design caused the victim's death.[42] Prior calculation and design is also an element of two of the nine aggravating circumstances.[43] Regarding these two aggravating circumstances, the element of prior calculation and design is applicable only if the defendant is not the principal offender or actual killer in the aggravated murder.[44] Culpability for aggravated murder may be established by the prosecution under a theory of complicity;[45] however, complicity to capital murder must be established by proof of the prior calculation and design element with regard to either the felony murder or the so-called "child killer" aggravating circumstances.[46]

With regard to the prosecution's proof, the defense practitioner must pay close attention to the culpability phase instructions on the mens rea elements of the alleged offenses and aggravating circumstances to protect the valued rights of the capital defendant on the question of death-eligibility. Especially crucial to this objective is how the trial court defines "purpose to kill" for the jury. The Ohio Revised Code defines "purpose" as follows:

> A person acts purposely when it is his specific intention to cause a certain result, *or*, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.[47]

By the use of the conjunction "or," the Ohio Revised Code separates this definition of purpose into alternatives for "result" situations and "conduct" situations. Only the first definition of purpose applies to an aggravated murder case, which is a "result" situation.[48] The Supreme Court of Ohio has expressed its view that use of the "conduct" definition of purpose is improper in capital cases.[49] Indeed, the conduct definition of purpose relieves the prosecution of its burden of proof to establish a defendant's purpose to kill. It renders a defendant guilty "regardless" of what the defendant intends to do, so long as

he or she intentionally engages in some type of prohibited conduct.[50] Thus, a defendant who causes the victim's death during a burglary, but does so without a specific purpose to kill, could be found guilty of aggravated murder under the "conduct" definition of purpose once the jury found that the defendant intended to commit the burglary.

Along these lines, the defense practitioner must ensure that the prosecution's burden of proof on the mens rea element has not been lightened in any way. Instructions that create a conclusive inference of the mens rea element or instructions that require the defendant to rebut a presumption of guilt as to the mens rea element are constitutionally infirm.[51] Of course, a jury may infer a defendant's purpose to kill from the facts¾such as the use of a deadly weapon¾so long as the jury is properly instructed that such an inference is only permissive.[52] The defense practitioner must ensure not only that any inference of mens rea is permissive, however, but also that such an inference is narrowly tailored to the defendant's culpability for acting with a specific purpose to kill. Thus, it is improper to instruct a jury to infer a purpose to kill from the use of a deadly weapon calculated to cause either the victim's death or great bodily harm.[53]

The defense practitioner must also be alert to issues that may arise when his or her client is charged with purposely causing the victim's death with prior calculation and design.[54] Unlike the element of purpose, the element of prior calculation and design is not defined by the statute. The Supreme Court of Ohio has made it clear, however, that the element of prior calculation and design is not satisfied by proof that the defendant committed a premeditated murder "conceived and executed on the spur of the moment."[55] Although no particular amount of time is required for the defendant to act with prior calculation and design, the prosecution must establish that the defendant "planned or analyzed with studied care a scheme 'designed to implement the calculated decision to kill' . . . and the means of doing so."[56]

The prosecution's burden of proof on the mens rea element may also be eased by improper instructions on the element of causation that is found in all five types of aggravated murder. In particular, an instruction that allows the jury to find that the defendant purposely caused the victim's death if the death was foreseeable may eviscerate the prosecution's burden of proof. Both the Supreme Court of the United States and the Supreme Court of Ohio have expressed disapproval of such "foreseeability" standards in capital cases.[57]

The defense practitioner must also ensure that his or her client is not made death-eligible under a theory of complicity without proof of the requisite mental state for a capital crime.[58] The instructions on complicity must make it clear to the jury that the defendant is not death-eligible unless he or she solicits or aids and abets with a specific purpose to kill the victim and not just that the defendant is guilty of purposely soliciting or aiding and abetting the principal offender generally. Moreover, a defendant charged under a complicity theory is entitled to have the jury instructed to view an alleged accomplice's testimony with "grave suspicion."[59]

Finally, the defense practitioner must ensure that the jury is instructed on all essential elements of death eligibility factors. The trial court's failure to instruct on an element is prejudicial when the defense contests the omitted element and the prosecution's proof of the omitted element is not overwhelming.[60] Under Ohio law, moreover, essential elements must be defined for the jury in addition to being set out in the jury instructions.[61]

3. *Proof of Aggravating Circumstances at the Culpability Phase*

As previously described,[62] the Ohio General Assembly has chosen to make capital defendants death-eligible by proof of an aggravating circumstance at the culpability phase.[63] Although we describe this procedure as one of the "good" aspects of Ohio's death penalty statute, there is certainly room for debate as to whether this is so. This method of establishing death eligibility is not a clear benefit to capital defendants, as is, for example, the statutory provision that makes juveniles ineligible for the death penalty.

In *Lowenfield v. Phelps*,[64] Justice Thurgood Marshall argued in his dissenting opinion that Louisiana's method of establishing death eligibility at the culpability phase created a bias in favor of the imposition of the death penalty that diminished the jury's sense of responsibility for its penalty phase verdict.[65] This concern is certainly worth noting as to Ohio's similar procedure of establishing death eligibility at the culpability phase. Additionally, it may be that the prosecution gains some advantage in seeking a conviction on an aggravated murder charge at the culpability phase by presenting additional arguments and evidence on the aggravating circumstances. Public perceptions—or misperceptions—about the highly charged question of capital punishment[66] may cause a juror to view, at least subconsciously, that a defendant facing capital specifications is more likely to be guilty.

These potential concerns do not remove Ohio's method of narrowing eligibility from the "good" category. Justice Marshall's concern of bias in favor of the death penalty is offset because the prosecution has the burden of persuasion at the penalty phase to prove beyond a reasonable doubt that the aggravating circumstance outweighs the mitigating factors.[67] Bias in favor of the prosecution at the culpability phase is likewise reduced by the prosecution's burden of persuasion, as well as by routine instructions informing the jury that it must decide factual questions as to criminal charges and specifications separately and without regard to the jury's verdict on any other charge or specification.

Further, in the many cases involving a felony murder aggravating circumstance, there is a substantial overlap between the evidence that the prosecution may offer to prove that aggravating circumstance and the evidence that the prosecution may offer to prove a substantive felony-based charge, such as aggravated robbery. Thus, jurors in many felony murder cases would be biased in favor of finding an aggravating circumstance at the penalty phase by virtue of their previous culpability phase verdicts on felony-based charges.[68] Moreover, jurors discover at voir dire that the defendant may become death-eligible. Accordingly, it is defense counsel's responsibility at voir dire to identify and to remove those prospective jurors¾by a challenge for cause or a peremptory challenge¾who harbor beliefs that death-indicted defendants are more likely to be guilty due to the severity of the state's allegations.

On balance, we believe that Ohio's procedure of litigating the issue of death eligibility at the culpability phase is more favorable than not to a capital defendant. Ohio's procedure places the focus on the defendant's mitigation at the penalty phase. Indeed, the penalty phase is oftentimes referred to as the mitigation phase by judges and capital litigators. If the prosecution had to prove death eligibility at the penalty phase, however, then the emphasis on mitigation at this phase would diminish. Instead, the penalty phase would become a mini-trial on the aggravating circumstance, with the attendant risk of improperly emphasizing the homicide itself as an aggravating circumstance.[69] In light of the current procedure, the penalty phase creates a line of demarcation where the focus shifts to the mitigating aspects of the offense and the offender's character and record.[70] Defense counsel at trial should seek a continuance of as long as possible between the culpability and penalty phases to further emphasize that line of demarcation.[71]

4. *Defendant May Try Prior Purposeful Murder Aggravating Circumstance to the Judge in a Jury Trial*

There is an exception to Ohio's procedure of determining death eligibility at the culpability phase. The Ohio Revised Code allows the defendant to elect to try an aggravating circumstance based on a conviction for a prior purposeful murder—or prior purposeful attempted murder[72]—to the judge at the penalty phase of a jury trial.[73] If the judge determines that the defendant is guilty of the prior murder aggravating circumstance, then the jury weighs the prior purposeful murder aggravating circumstance against the defendant's mitigating factors at the penalty phase, as in other cases.[74]

Again, Ohio's procedure regarding the prior purposeful murder aggravating circumstance affords more protection to capital defendants than the Federal Constitution requires.[75] This benefit of the Ohio Revised Code is significant because "evidence of a prior murder conviction is extraordinarily and overwhelmingly harmful to a capital defendant."[76] Such evidence is prejudicial because it may create an inference of guilt based on mere criminal propensity or bad character of the defendant.[77] The prejudice resulting from a conviction of a prior purposeful murder is deemed so significant by the Ohio General Assembly that the accused may elect to try this aggravating circumstance to a panel of three judges after the culpability phase if the accused waives his or her right to a jury trial. This is significant because judges are usually presumed to ignore matters that may be prejudicial or legally irrelevant.[78]

The defense practitioner should elect to try this aggravating circumstance after the culpability phase to reduce the risk of prejudice to his or her client regarding the other charges in the indictment.[79] Of course, in some cases the defense practitioner may, with the client's consent, try the prior purposeful murder aggravating circumstance to the jury as a matter of strategy. If the defendant is not contesting legal culpability and the defendant's only objective is to get a life sentence from the jury, then the defendant may want the prospective jurors at voir dire to be aware of a prior murder committed by the defendant. In such circumstances, it would be crucial for the defense to identify and to challenge the service of any prospective juror who would automatically impose the death penalty upon a person who has murdered before.

Additionally, the defense practitioner must ensure that the prior conviction involves a culpable mental state that meets the requirement of a prior purposeful killing or prior purposeful attempt to kill. In *State v. Johnson*,[80] the Supreme Court of Ohio vacated a death sentence erroneously based on this aggravating circumstance where the jurisdiction in which the prior conviction was obtained did not recognize the prior killing as purposeful.[81]

Based on *Johnson v. Mississippi*,[82] the defense practitioner may also raise a constitutional challenge to the prior purposeful murder aggravating circumstance if the conviction underlying the prior murder has been reversed.[83] As in *Johnson v. Mississippi*, evidence introduced at a capital trial to support a prior conviction aggravating circumstance becomes "irrelevant"[84] and "materially inaccurate"[85] once the prior conviction is itself reversed. *Johnson v. Mississippi* makes clear that a death sentence based on "materially inaccurate" information violates the Eighth Amendment's requirement of reliable and non-arbitrary capital sentencing.[86]

5. *The Requirement of a Unanimous Verdict on Statutory Alternatives Creating Death Eligibility*

The Ohio Revised Code sets out several alternative means of establishing death eligibility within particular definitions of aggravated murder.[87] Alternatives to death eligibility are also presented within several aggravating circumstances.[88] It is essential that the defense practitioner ensure that the triers of fact make unanimous findings as to any alternative elements of eligibility factors, whether those elements appear in the definition of aggravated murder or within the aggravating circumstances.

In *State v. Penix*,[89] the Supreme Court of Ohio vacated a death sentence in which the statutory alternatives of principal offender and prior calculation and design were both weighed as felony murder aggravating circumstances.[90] The court explained:

> The language of the statute provides that these are alternatives which are not to be charged and proven in the same cause. Thus, if the defendant is found to be the principal offender, then the aggravating circumstance is established, and the question of whether the offense was committed with prior calculation and design is irrelevant with respect to the death sentence.[91]

In later cases, the court modified the *Penix* rule by allowing the prosecution to charge both "principal offender" and "prior calculation and design" in a felony murder aggravating circumstance so long as these mutually exclusive elements are "given to the jury disjunctively."[92] The court has also stated, however, that error results when the triers of fact fail to make a unanimous finding on one of those alternatives even if they are stated in the disjunctive.[93] Thus, state case law interpreting eligibility factors provides authority for the defense practitioner to assert his or her client's right to a unanimous verdict on statutory alternatives found within the elements of aggravated murder or aggravating circumstances.

Federal constitutional law must also be considered to fully preserve the defendant's right to a unanimous verdict on statutory alternatives.[94] In *Schad v. Arizona*,[95] the United States Supreme Court considered a claim as to whether a unanimous verdict was required on a state's capital murder alternatives of premeditation or felony murder.[96] The Court rejected this claim by finding that premeditation and felony murder were merely different means to commit the same offense, and not separate offenses.[97] This logic would seem to apply to the alternatives of "principal offender" and "prior calculation and design," as they are alternate means to commit two of Ohio's aggravating circumstances.[98] *Schad* might be distinguished, however, when the prosecution relies on separate felonies to elevate a charge of simple murder to aggravated felony murder.[99] If a trier of fact must decide between aggravated arson or aggravated burglary to render a defendant death-eligible, then that trier of fact is necessarily deciding a factual question involving a separate offense. In that circumstance, the choice between one of two predicate felonies involves more than just a choice between separate means to commit aggravated murder.[100]

A better litigation approach than *Schad*, however, lies with the United States Supreme Court's recent decision in *Apprendi v. New Jersey*.[101] In *Apprendi*, the Court held that any fact, "[o]ther than the fact of a prior conviction . . . that increases the penalty for a crime beyond the prescribed statutory maximum[,] must be submitted to a jury, and proved beyond a reasonable doubt."[102] The application of *Apprendi* to the culpability phase of capital cases is quite clear, as the Court further stated that "[t]he person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all elements of the charge."[103]

In Ohio, the elements of aggravating circumstances are additional facts that the jury must find to elevate the statutory maximum penalty of aggravated murder from a prison sentence to the death penalty.[104] Thus, the rule in *Apprendi* requires

an Ohio jury to unanimously find all of the essential elements of an aggravating circumstance at the culpability phase by proof beyond a reasonable doubt.[105] With the exception of the prior purposeful murder aggravating circumstance,[106] a capital defendant's fundamental rights to a jury trial and to due process are infringed when the jury fails to make a unanimous finding of fact on a statutory element of an aggravating circumstance, such as "principal offender" or "prior calculation and design."[107]

6. *"Another Offense Committed by the Offender" is an Element of the "Escape" Aggravating Circumstance That Must Be Proved Beyond a Reasonable Doubt*

One path to death eligibility in Ohio arises if the aggravated murder was "committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender."[108] In *State v. Jones*,[109] the victim, a police officer, was shot to death as he pursued the defendant to arrest him on an outstanding warrant for a charge of aggravated robbery.[110] On appeal, the Supreme Court of Ohio held that the "another offense" component of the "escape" aggravating circumstance is an essential element of that aggravating circumstance.[111] The court held that the prosecution must establish that the defendant in fact committed the other offense by proof beyond a reasonable doubt.[112]

As a practical matter, the other offense committed by the defendant will often be a felony committed during a course of conduct murder.[113] Thus, the aggravated murder will be committed directly before or after the commission of the other offense, and the prosecution's proof of the other offense element will not be highly problematic.[114] An unusual case such as *Jones*, however, presents problems of proof for the prosecution of which the defense practitioner must be aware. When the other offense occurs before, and unassociated with, the aggravated murder, the prosecution must put forward sufficient evidence that the defendant actually committed each element of the other offense.[115] This requires the prosecution to put on a "mini-trial" for the other offense during the trial for aggravated murder.[116]

As a tactical matter, defense counsel may, with the defendant's consent, choose to seek a stipulation from the prosecution that the other offense was in fact committed by the defendant.[117] This tactic could be a reasonable one where, for example, the evidence of guilt (including all aspects of death eligibility) is overwhelming and the evidence that the prosecution could offer to prove the other offense would tend to prejudice the defendant at the penalty phase.[118] Otherwise, the defense practitioner should rely on *Apprendi* to require jury fact-finding on this element of the "escape" aggravating circumstance.[119]

B. *Selection Factors and Sentencing Procedures*

Selection factors are the criteria used by the capital sentencer to determine if death is proper in a particular case.[120] The Federal Constitution affords states wide latitude to structure the sentencer's consideration of selection factors.[121] The Supreme Court has stated that there is no "'specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding [that] is constitutionally required'. . . . Equally settled is the corollary that the Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer."[122]

The Eighth Amendment, however, mandates that the capital sentencer must consider and give full mitigating effect to all relevant mitigating evidence of the defendant's character, record, and the circumstances of the offense.[123] The Federal Constitution also prohibits the consideration of impermissibly vague aggravating circumstances in the sentencing process.[124] Moreover, the capital defendant has a constitutional right to rebut any information on which the sentencer may rely to impose death.[125]

With these constitutional principles in mind, we now discuss the selection factors and sentencing procedures in Ohio's death penalty statute. Ohio is a weighing state. The aggravating circumstances from the culpability phase serve as selection factors at the penalty phase. They are weighed against the sum of the defendant's mitigating factors. The death penalty is imposed if the aggravating circumstances outweigh all of the mitigating factors beyond a reasonable doubt. As discussed in the next section, the clear delineation and weighing of selection factors in aggravation and mitigation provides the Ohio capital

defendant with one of his or her most important statutory protections at the penalty phase.

1. *Statutory Selection Factors Are Carefully Circumscribed as Aggravation or Mitigation*

The United States Supreme Court has noted that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[126] Accordingly, the Eighth Amendment requires that the capital sentencer must be able to consider "*as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[127] The Court has made clear that "any barrier [to the sentencer's consideration of relevant mitigation] must . . . fail."[128]

The Court has also held, however, that this Eighth Amendment requirement is satisfied when mitigating evidence is within the sentencer's "effective reach."[129] Moreover, states may "structure the consideration of mitigating evidence"[130] without violating the rule in *Lockett v. Ohio*.[131] A state capital sentencer may therefore regard a potential mitigating factor, such as the youth of the defendant, as a fact that aggravates the crime in favor of the death penalty so long as the capital sentencer is at least able to effectively consider the evidence proffered by the defendant as a mitigating factor.[132] Simply put, the Federal Constitution does not require a mitigating result from the presentation of a capital defendant's mitigating evidence.

In this context, Ohio's death penalty statute provides one of the most significant protections to capital defendants. The Ohio Revised Code structures the presentation and consideration of selection factors so that the defendant's presentation of mitigating evidence can lead only to a mitigating result. The Ohio General Assembly has carefully circumscribed selection factors into mutually exclusive categories of aggravation and mitigation.[133] Designated factors, such as the circumstances of the offense and the youthful age of the defendant, must be considered only as mitigating factors.[134] In Ohio, a capital defendant's mitigating evidence either has weight as mitigation or has no weight at all.[135] Under the Ohio Revised Code, and unlike other schemes upheld by the United States Supreme Court,[136] the sentencer may not consider any proffered mitigating evidence for an aggravating purpose.[137]

2. *No Facially Vague Aggravating Factors in Selection*

Some states include facially vague aggravating selection factors in the sentencing calculus.[138] Facially vague aggravating circumstances permit the capital sentencer to consider nebulous issues such as the heinousness, coldness, vileness, cruelty, atrociousness, wantonness, depravity of the offense, or the offender's state of mind.[139] Vague selection factors inject arbitrariness into the capital sentencing calculus because they "leave[] [juries] and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia* . . . ."[140] An ordinary person sitting as a juror in a capital case may find that all murder is heinous, vile, or depraved.[141] Nevertheless, a state may salvage a facially vague selection factor by giving it a limiting construction that is sufficient to provide a "commonsense core of meaning . . . that criminal juries should be capable of understanding."[142]

The Ohio Revised Code does not include any facially vague aggravating circumstances.[143] This omission helps to reduce the risk that the sentencer may consider arbitrary factors in determining the issue of punishment. Further, a state appellate court's experiment to supply a sufficient limiting construction to a facially vague aggravator may prove unsatisfactory. Eventually, the exception of the limiting construction swallows the rule prohibiting vagueness, as more types of crimes are found to meet the language of the limiting construction or as the limiting construction itself broadens by the addition of new definitions.[144]

3. *No Consideration of Defendant's Propensity for Future Dangerousness as a Selection Factor*

Ohio's death penalty statute does not permit the sentencer to consider in aggravation the issue of whether the defendant

would pose a risk of danger to society in the future if given a life sentence.[145] This omission is a clear benefit to the defendant in light of United States Supreme Court precedent that permits a state to include the issue of future dangerousness within the capital sentencing calculus.[146] Justice Blackmun's plurality opinion in *Simmons v. South Carolina*,[147] however, muddied the waters on the issue of future dangerousness. In *Simmons*, Justice Blackmun observed that consideration of future dangerousness is permissible at the penalty phase even when it is not expressly authorized by statute.[148] Justice Blackmun observed that "[a]lthough South Carolina statutes do not mandate consideration of the defendant's future dangerousness in capital sentencing, the State's evidence in aggravation is not limited to evidence relating to statutory aggravating circumstances . . . . Thus, prosecutors . . . frequently emphasize a defendant's future dangerousness in their evidence and argument at the sentencing phase . . . ."[149]

Despite Justice Blackmun's pronouncements, the prosecution in Ohio may not properly raise the issue of future dangerousness at the penalty phase. First, Justice Blackmun's remarks were dictum, expressed within a non-controlling, plurality opinion.[150] Second, and most important to the Ohio defense practitioner, the prosecution's penalty phase evidence is limited to only the evidence supporting the aggravating circumstance that was admitted at the culpability phase and to rebuttal evidence of false or incomplete mitigation.[151] Thus, the prosecution may rely on evidence of future dangerousness only as rebuttal to false or incomplete evidence offered by the defendant that he or she would pose no threat of danger in the future. In other words, the prosecution may rebut false mitigating evidence as to the defendant's ability to adjust peacefully to incarceration, offered under *Skipper v. South Carolina*,[152] when the *Skipper* mitigating evidence is used to suggest a lack of future dangerousness.

The defense practitioner must also be mindful of the type of rebuttal evidence offered by the prosecution as to any mitigating evidence offered to show a lack of future dangerousness under *Skipper*. The prosecution may not present any rebuttal evidence to *Skipper* mitigation that is wholly unrelated to the particular defendant's character or record. This is so because any assessment of future dangerousness must be tailored to the "individual defendant."[153] Therefore, any attempt by the prosecution to assert a generalized threat of future dangerousness posed by prison inmates as the result of prison riots or escapes that do not involve the individual defendant is improper.

Finally, the Ohio defense practitioner must be aware that the prosecution cannot force the defendant to submit to psychological evaluations on the issue of future dangerousness. Unlike the capital sentencing scheme in Texas, psychological evaluations on the issue of future dangerousness are not permitted because the future dangerousness issue itself is not included as a selection factor in Ohio.[154] Moreover, pursuant to the Ohio Revised Code, only the defendant may order a psychological examination during the penalty phase.[155]

4. *Sentencer Does Not Consider Information About Post-Sentencing Contingencies*

Similar to the preceding discussion on future dangerousness, Ohio, unlike other states, does not allow for the capital sentencer to take into account information about post-sentencing contingencies, such as the availability of pardons, commutations, or parole.[156] Parole availability is considered by the capital sentencer only with regard to two of the three life sentences authorized by the current version of the statute.[157] We believe that information in capital sentencing as to post-sentencing contingencies is prejudicial to the accused, as it necessarily involves undue speculation and considerations of "the defendant's probable future dangerousness."[158]

5. *Prosecution Has the Burden of Persuasion Beyond Reasonable Doubt in the Weighing of Selection Factors*

The Ohio Revised Code provides the capital defendant with an important protection in assigning the burden of persuasion to the prosecution to prove beyond a reasonable doubt that an aggravating circumstance outweighs all mitigating factors.[159] This standard of proof regarding the sentencer's weighing process is a benefit that is not required by the Federal Constitution.[160]

The defense practitioner must be aware of three types of instructional errors that undermine this right. First, the jury cannot weigh aggravating circumstances for separate counts of aggravated murder charges collectively against the defendant's mitigation. Instead, the aggravating circumstances as to each count of an aggravated murder conviction must outweigh the

mitigating factors beyond a reasonable doubt.[161] The sentencer, for example, would have to weigh the selection factors under the proper standard of proof three separate times if there were aggravating circumstances for three separate counts of aggravated murder.[162]

The second instructional error on the burden of proof occurs when the jury is permitted to weigh an aggravating circumstance against mitigating factors one by one. The sentencer must find that an aggravating circumstance outweighs the collective weight of the mitigating factors.[163] Thus, a mitigating factor cannot be parsed out from other mitigating factors with regard to the statutorily mandated weighing process.[164]

The third instructional error results when the trial court repeats the culpability phase instructions on the prosecution's burden of persuasion at the penalty phase. At the culpability phase, the jury must find proof beyond a reasonable doubt of the "truth of the charge" of aggravated murder. This language should not be repeated at the penalty phase because it is misleading. At the penalty phase, the jury must find by proof beyond a reasonable doubt that the aggravating circumstance outweighs the mitigating factors before it can recommend the death penalty. The "truth of the charge" language creates a presumption in favor of death that undermines the prosecution's burden of persuasion at the penalty phase. By the time the case reaches the penalty phase, the jury has already been convinced of the "truth of the charge" of aggravated murder by virtue of its guilty verdict at the culpability phase. The "truth of the charge" language is thus irrelevant to the selection process and its use should be avoided when the jury is instructed on the prosecution's burden of persuasion at the penalty phase.[165]

6. *The Capital Defendant Has Significant Latitude in the Presentation of Mitigating Factors*

The Ohio Revised Code sets forth mitigating factors to include the "nature and circumstances of the offense," and the defendant's "history, character and background."[166] Also included are seven additional statutory factors: the victim's inducement or facilitation of the offense;[167] whether the defendant was provoked or coerced to commit the offense and whether the offender committed the offense under duress;[168] whether the offender had a mental disease or defect at the time of the offense that caused the offender to lack the "substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law;"[169] the youthful age of the offender;[170] the offender's lack of prior criminal convictions or juvenile adjudications;[171] the offender's relatively minor role in the crime when the offender is not the principal offender;[172] and the catch-all of any other factors "relevant to the issue of whether the offender should be sentenced to death."[173]

The plain text of the catch-all factor defines relevant mitigation more broadly than does the capital jurisprudence of the United States Supreme Court. In *Lockett v. Ohio*,[174] the Court held that the capital sentencer must consider all "relevant" mitigation proffered by the defendant.[175] The Court has indicated that the constitutional definition of "relevant" for the purposes of mitigation is limited by the three mitigating factors specified in *Lockett*: the defendant's character, the defendant's record, and the circumstances of the offense.[176] Of course, the three *Lockett* factors have a broad reach so as to include mitigating factors, such as the defendant's lack of intent to kill,[177] the defendant's relatively minor degree of participation in the murder,[178] and predictions about the defendant's ability to adjust to incarceration that are based on the defendant's character or record.[179]

Nevertheless, the plain text of Ohio's catch-all mitigating factor expands the definition of relevance by permitting the sentencer to consider any other mitigating factors in addition to the "nature and circumstances of the offense" and the defendant's "history, character, and background."[180] The Ohio Revised Code also directs the trial court to afford the defendant "great latitude" in the presentation of statutory mitigating factors and "any other factors in mitigation of the imposition of the sentence of death."[181] Accordingly, the application of the Ohio Rules of Evidence is relaxed at the penalty phase with regard to the presentation of mitigating factors.[182]

7. *The Defendant May Make an Unsworn Statement to the Sentencer at Penalty Phase*

The Ohio Revised Code allows the defendant to address the sentencer in an unsworn statement.[183] It directs the sentencer to consider any statement made by the defendant and further provides that the defendant "is subject to cross-examination only if [he or she] consents to make the statement under oath or affirmation."[184] Implicit in this provision is the policy decision of the Ohio General Assembly to afford the defendant "great latitude" in the presentation of mitigating factors by removing the threat of cross-examination with its chilling effect. By providing the right to make an unsworn statement, the General Assembly has facilitated the presentation of important mitigating factors, such as an expression of remorse by the defendant.[185]

One related issue bears discussion at this point. In addition to his or her right to make an unsworn statement at the penalty phase, the capital defendant has a right to allocution at the time of sentencing. [186] By the rules of criminal procedure, the trial court has a duty to address the defendant to determine if he or she wishes to make a statement to the court before it imposes the sentence.[187] The failure to comply with this rule may be reversible error, unless the error is invited by the defendant.[188]

8. *Limitations on Preparation and Use of Pre-Sentence Investigation Reports*

Under the Ohio Revised Code, only the defendant may order the preparation of a pre-sentence investigation report (PSI) for capital sentencing.[189] The defense practitioner must be aware that it is error for the trial court to sua sponte order a PSI for capital sentencing.[190] In addition to the error that results from the mere preparation of a PSI without the defendant's consent, constitutional error may also result when the defendant is interviewed in preparation of an unwanted PSI without the defendant having received warnings as to his or her right against self-incrimination.[191] Likewise, the preparation of an unwanted PSI may violate the defendant's right to counsel if the defendant is interviewed in preparation of an unwanted PSI without having received the opportunity to consult with his or her counsel.[192] Finally, the defense practitioner should be aware of the statutory provision that prohibits the prosecution from using any statement or information provided by the defendant in preparation of a PSI as evidence of guilt in any retrial of the defendant.[193]

9. *Funds Available to the Defense for Expert Assistance*

The Ohio statute provides indigent capital defendants with funding for expert assistance that is "reasonably necessary for the proper representation of a defendant charged with aggravated murder at trial or at the sentencing hearing."[194] The trial court must authorize both "fees and expenses" for any necessary expert services, which are to be paid to the expert in the same manner as appointed counsel is paid.[195] Defense counsel may obtain necessary expert services without the trial court's prior approval if exigent circumstances require defense counsel to seek authorization of funds after the use of the expert's "necessary services."[196] When the trial court considers any request for expert assistance made under this statutory provision, it is to consider within its "sound discretion . . . (1) the value of the expert assistance to the defendant's proper representation . . . and (2) the availability of alternative devices that would fulfill the same function."[197]

The defense practitioner representing an indigent client should rely on section 2929.024 of the Ohio Revised Code, rather than section 2929.03(D)(1), when requesting the assistance of a mental health expert for services rendered at the penalty phase.[198] Expert assistance provided under section 2929.024 "[is] available to the indigent defendant solely for his own purpose in mounting a defense."[199] Unlike section 2929.024, all reports prepared by a mental health expert at the request of the defense pursuant to section 2929.03(D)(1) are submitted to the trial court, to the jury, and to the prosecution.

Finally, the defense practitioner also has a constitutional right to expert assistance under both the Due Process Clause of the Federal Constitution and article I, section 16 of the Ohio Constitution.[200] The Supreme Court of Ohio has interpreted *Ake v. Oklahoma*[201] to require¾as a matter of due process¾funding for expert assistance when such expert assistance is "necessary to present an adequate defense."[202]

C. *The Defendant's Substantive Right to Jury Participation in Capital Sentencing*

The Ohio Revised Code provides for a jury's participation at the penalty phase.[203] This substantive state right to jury participation at the penalty phase guarantees the defendant greater protection than is provided under the Federal Constitution. The United States Supreme Court has repeatedly interpreted the Sixth Amendment right to a trial by jury as inapplicable to capital sentencing proceedings.[204] The Court has further held that a jury's participation in the capital sentencing proceeding may be advisory.[205] Moreover, the trial judge may disregard an advisory jury's sentencing recommendation without affording it any weight.[206]

1. *Important Features of Ohio Jury's Penalty Phase Role*

The Ohio Revised Code provides for the jury to make a recommendation of punishment to the trial court.[207] The term "recommendation," however, is a misnomer, as the trial court is bound to accept the jury's recommendation of a life sentence.[208] If the jury recommends the death penalty, then the trial court must independently weigh the selection factors without deference to the jury's recommendation of punishment.[209] Although trial courts rarely override a jury's death penalty recommendation, this statutory feature is nevertheless a significant benefit for the few defendants who have received judicial overrides of a jury's death penalty recommendation.[210]

The United States Supreme Court has held that jurors cannot be required to reach unanimous agreement on the existence of a particular mitigating factor.[211] The Ohio Revised Code provides an even greater benefit to capital defendants by permitting a "solitary juror" to prevent the imposition of the death penalty "by finding that the aggravating circumstances . . . do not outweigh the mitigating factors."[212] An Ohio jury need not be unanimous to reject the imposition of the death penalty, but it must be unanimous in order to recommend the death penalty to the trial court:

> 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 [life sentences].[213]

In light of the statute and United States Supreme Court precedent, the defense practitioner must ensure that a capital jury has been guided in its penalty phase instructions according to three important principles: first, jurors need not be unanimous to determine the factual existence of any particular mitigating factor;[214] second, a "solitary juror" may prevent the imposition of the death penalty by finding that the aggravating circumstance does not outweigh, beyond a reasonable doubt, the sum of the mitigating factors;[215] and third, in order to recommend the death penalty, the jury must unanimously find, beyond a reasonable doubt, that the aggravating circumstance outweighs the sum of the mitigating factors.[216] Thus, a properly instructed juror should fully understand that he or she acting alone may prevent the imposition of the death penalty based on the weight of a single mitigating factor.

The Federal Constitution does not require twelve-person juries in state criminal trials to be unanimous in their verdicts.[217] Further, the United States Supreme Court held in *Jones v. United States*[218] that the Federal Constitution does not mandate that capital juries be instructed as to the consequences of their inability to agree on a sentencing verdict.[219] Nevertheless, we believe that the defendant's substantial rights under the Eighth and Fourteenth Amendments are violated when an Ohio jury is instructed to be unanimous in order to reject the imposition of the death penalty, as illustrated by the following analysis.

A capital jury cannot be "affirmatively misled regarding its role in the sentencing process."[220] The jury's role in the capital sentencing process is defined by a state's capital sentencing scheme.[221] In Ohio, the jury's fundamental role at the penalty phase is defined by section 2929.03(D)(2) of the Ohio Revised Code. The jury's role under this statute does not require it to be unanimous in rejecting the death penalty. This is so because a "solitary juror" may prevent the imposition of the death penalty by finding that the aggravating circumstances do not outweigh the mitigating factors.[222] Accordingly, it would violate a defendant's constitutional rights to affirmatively mislead the jury as to its fundamental role at the sentencing phase by misinforming the jury to be unanimous in rejecting the death penalty.[223] Ohio has chosen these sentencing procedures to guide the sentencing jury's discretion. It would thus render a defendant's death sentence arbitrary and unreliable to eviscerate this critical guidance provided to capital juries by the Ohio General Assembly.[224]

Another issue of constitutional import arises when there is a purported jury deadlock at the penalty phase on the issue of whether to impose the death penalty. In *Lowenfield v. Phelps*,[225] the United States Supreme Court found no violation of the Eighth and Fourteenth Amendments when a deadlocked jury was given a supplemental instruction or an *Allen* charge designed to break the impasse in the penalty phase deliberation.[226] The Court reasoned that "[t]he State has in a capital sentencing proceeding a strong interest in having the jury 'express the conscience of the community on the ultimate question of life or death.'"[227] The Court also assumed that, "even in capital cases," the trial court "had the authority to insist [on further deliberations]."[228]

Unlike *Lowenfield*, Ohio has expressed a "strong interest" in permitting a "solitary juror" to reject the death penalty through the enactment of section 2929.03(D)(2) of the Ohio Revised Code.[229] This policy choice of the General Assembly is made clear by the omission of the word "unanimous" in describing the role of the jury when the jury finds that the aggravating circumstance does not outweigh the mitigating factors.[230] Moreover, the Court's reasoning in *Lowenfield* is distinguished from a coerced juror claim made under the Ohio statute because it would be improper for a trial judge to order further deliberations after a "solitary juror" has rejected the death penalty.[231]

The defense practitioner should object to any instruction by the trial court that directs the jury to deliberate further on the choice between a life sentence or the death penalty after one or more jurors indicate that they wish to impose a life sentence.

An *Allen* charge is proper at the penalty phase only if the jury is at an impasse regarding the choice between one of the life sentencing options.[232] The defense practitioner should request the imposition of one of the life sentencing options as soon as the jury indicates that there is an impasse on the choice between a life sentence and the death penalty.

2. *Statutory Standard for Jury Selection in Capital Cases*

In *Wainright v. Witt*,[233] the United States Supreme Court established a standard for whether a prospective juror may be found qualified to sit in a capital case.[234] Under the *Witt* standard, a prospective juror may be removed for cause if his or her views on capital punishment would "prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his [or her] instructions and . . . oath."[235]

Ohio provides a statutory standard that, by its plain text, is more favorable to the capital defendant than the *Witt* standard.[236] Section 2945.25(C) of the Ohio Revised Code provides that a prospective juror is unfit for service in a capital case if "under no circumstances [would the prospective juror] consider fairly the imposition of [the death penalty]."[237] This strict statutory standard excludes only those prospective jurors who would never impose the death penalty. In contrast, the *Witt* standard excludes prospective jurors who would agree to impose the death penalty only in rare cases.

D. *Punishments for Aggravated Murder with Aggravating Circumstances*

In addition to the death penalty, a defendant may be sentenced to life in prison without the possibility of parole for either twenty-five or thirty years or life without the possibility of parole (LWOP).[238] The availability of LWOP is a significant improvement to the statute from the perspective of the defense practitioner.[239] The availability of LWOP may alleviate the sentencer's concerns about the defendant's propensity for future dangerousness if the defendant is returned to society.[240] LWOP may also be viewed by the sentencer as an appropriate expression of "society's moral outrage" over the crime,[241] whereas a lesser prison term may not be deemed sufficient. Nevertheless, the Ohio death penalty statute is flexible so as to give the sentencer the option to impose a prison term with the possibility of parole. Some states eschew this flexible response by providing LWOP as "the only available alternative sentence to death . . . ."[242] Ohio's flexible sentencing options allow the sentencer to take into account the individual defendant's potential for rehabilitation.

Data suggests that the availability of LWOP has had a significant effect on reducing the imposition of death sentences in Ohio. In the 2000, only four death sentences were imposed, whereas seventeen death sentences were imposed in 1995¾the year before LWOP became effective. Indeed, between January 1, 1999 and June 15, 2001, only seventeen death sentences were imposed. This is in stark contrast to the thirty-three death sentences imposed in 1994 and 1995. Although the availability of LWOP is not dispositive of this marked decrease in the imposition of death sentences, its significance is nevertheless readily apparent.

E. *Mandatory Appellate Review of Death Sentences*

The availability of meaningful appellate review is a key consideration by the United States Supreme Court in determining whether a state's death penalty scheme passes constitutional muster.[243] The Court has not mandated, however, that state appellate courts independently weigh selection factors as part of appellate review of a death sentence. Indeed, the Court does not even require reweighing by state appellate courts to correct constitutional weighing errors made by the original sentencer.[244] In *Pulley v. Harris*,[245] moreover, the Supreme Court held that state appellate courts are not constitutionally required to conduct a comparative proportionality analysis of the death sentence imposed in a particular case.[246] In light of this precedent, it is clear that death penalty states have a fair amount of discretion in providing for "meaningful appellate review."[247]

Appellate review of a death sentence in Ohio is mandated by section 2929.05(A) of the Ohio Revised Code.[248] This review encompasses three steps. First, the appellate court reviews the case for legal error as it would in a non-capital case.[249] Second, the appellate court determines if the death sentence imposed is appropriate.[250] This appropriateness review requires the appellate court to determine whether the original sentencing court properly weighed the selection factors. The appellate court must also independently review the record to determine if there is sufficient evidence to support the aggravating

circumstance. Additionally, the appellate court must independently weigh the selection factors and decide if it finds the death sentence to be appropriate based on the record before it. Third, the appellate court must compare the case before it to "similar cases" to determine if the death penalty imposed is either "excessive or disproportionate" when compared to those other "similar cases."[251]

The appellate court sits as a thirteenth juror when it independently weighs the selection factors.[252] The Ohio Revised Code requires that the appellate court itself must be "persuaded" that the death penalty is appropriate based on all of the record facts and evidence and the offense and offender.[253] The Supreme Court of Ohio has vacated death sentences in three cases pursuant to this statutory appropriateness review.[254] It has never vacated a death sentence pursuant to its proportionality review.[255]

III. OHIO'S DEATH PENALTY STATUTE: THE BAD

Although we believe that the Ohio death penalty statute is for the most part favorable to a defendant, these statutes are not without flaws from the perspective of the defense practitioner. In this section, we set forth what we believe to be the unfavorable aspects of the text of the death penalty statute with regard to eligibility factors, selection factors, the role of the jury in sentencing, and appellate review. These unfavorable aspects of the death penalty statute result from poor draftsmanship, omissions, and revisions by the Ohio General Assembly.

A. *Eligibility Factors*

1. *Mentally Retarded Defendants Are Death-Eligible in Ohio*

The Federal Constitution does not prohibit the execution of mentally retarded persons.[256] By contrast, state legislators in eighteen of the thirty-eight death penalty states prohibit the execution of the mentally retarded.[257] Unfortunately, the Ohio General Assembly has not acted to include Ohio as a capital punishment state that exempts mentally retarded persons from death-eligibility.

The standards used by other states to exempt the mentally retarded from the death penalty vary. Some require an onset of mental retardation by age eighteen, while some use age twenty-two.[258] Some states set a threshold functional intelligence quotient (IQ) at sixty-five to establish mental retardation while other states set the threshold IQ at seventy.[259] Still other states do not specify any threshold IQ.[260]

2. *An Amendment to the Ohio Revised Code Removed Specific Intent to Kill as an Element of Aggravated Murder*

Culpability for aggravated murder used to include a requirement that the offender had a specific intent to kill the victim at the time of the commission of the offense.[261] This specific intent to kill requirement was removed by legislative amendment and is no longer applicable to aggravated murder committed on or after July 1, 1998.[262] Although this statutory amendment is unfavorable to the capital defendant, we believe this change is not especially detrimental to the defendant's interests.

Unlike *Tison v. Arizona*,[263] Ohio does not permit a capital conviction upon a mental state such as a reckless indifference to life.[264] The defendant must have a purpose to kill the victim to be guilty of any of the five types of aggravated murder.[265] The statutory definition of "purpose" requires the trier of fact to find that the defendant acted with the specific intent to cause the certain result of the victim's death.[266] This equation from purpose to intent has been widely incorporated into jury instructions in Ohio. Indeed, intent and purpose are synonymous terms in the Ohio Jury Instructions.[267]

3. *Redundant Eligibility Factors*

The Ohio Revised Code is unduly redundant with regard to death eligibility factors. Since the current version of Ohio's death penalty statute was enacted in 1981, the types of aggravated murder have increased from two to five, and the types of aggravating circumstances have increased by one.[268] Although these additions to the Revised Code have technically expanded the subclass of murderers who are death-eligible, as a practical matter this expansion has achieved the anomalous result of making Ohio's eligibility criteria more redundant.

The original version of the 1981 death penalty statute contained a redundant felony murder eligibility factor. The elements of aggravated felony murder under section 2903.01(B) of the Ohio Revised Code may operate to be essentially redundant of the felony murder aggravating circumstance in section 2929.04(A)(7). It is true that aggravated felony murder and the felony murder aggravating circumstance are not literally repetitive. The aggravating circumstance requires an additional finding of fact as to whether the defendant was either the "principal offender" or killed with "prior calculation and design."[269] Further, only the aggravated forms of arson, burglary, and robbery appear as predicate felonies in the aggravating circumstance, unlike in the substantive offense of aggravated felony murder, which includes plain arson, burglary, and robbery as elements. Nevertheless, the substantive offense and the aggravating circumstance provide no genuine narrowing in the case of a defendant who acts alone and is charged with the aggravated form of the predicate felony. Thus, a defendant acting alone who is found guilty of purposely causing the victim's death while committing aggravated arson is necessarily guilty of the "principal offender" and "aggravated arson" elements of the felony murder aggravating circumstance. In such cases, the felony murder aggravating circumstance is wholly redundant of the substantive felony murder charge.[270]

Amendments to the original death penalty statute have created even more redundancy. Under section 2903.01(C) of the Ohio Revised Code, a defendant is guilty of aggravated murder when he or she purposely causes the death of a victim "who is under thirteen years of age at the time of the commission of the offense."[271] The aggravating circumstance in section 2929.04(A)(9) merely repeats the elements of the substantive offense.[272] The offender must "purposefully" cause the death of a child under age thirteen "at the time of the commission of the offense" and the defendant must be either the "principal offender" or kill with "prior calculation and design."[273] Similar to the felony murder situation, there is complete redundancy in the case of a child killer who acts alone, as the element of "prior calculation and design" does not apply to the actual killer.[274] When the defendant acts alone and is found guilty of committing aggravated murder, then he or she is necessarily guilty of being the principal offender.[275] A finding of the "principal offender" element of the aggravating circumstance does not genuinely narrow for the purpose of establishing death eligibility.

Another redundant aspect of Ohio's death eligibility criteria arises from the addition of the aggravated murder offense found in section 2903.01(D) of the Ohio Revised Code, which provides that "[n]o person who is under detention as a result of having been found guilty of or having pleaded guilty to a felony or who breaks that detention shall purposely cause the death of another."[276] This offense is redundant when it is paired with the section 2929.04(A)(4) aggravating circumstance, which, in pertinent part, provides that "[t]he offense was committed while the offender was under detention or while the offender was at large after having broken detention."[277] No genuine narrowing for death eligibility occurs when this offense and this aggravating circumstance are paired.[278]

Redundancy also results from the addition of aggravated murder under section 2903.01(E) of the Ohio Revised Code. Under subdivision (E), a person is guilty of aggravated murder when he or she purposely causes the death of a "law enforcement officer whom the offender knows or has reasonable cause to know is a law enforcement officer" and the victim is performing the duties of a law enforcement officer, or the defendant had a "specific purpose to kill a law enforcement officer."[279] This offense simply repeats the elements of the section 2929.04(A)(6) aggravating circumstance.[280]

The addition of redundant eligibility factors undermines the constitutional imperative that states must genuinely narrow the class of offenders for whom the death penalty may be imposed.[281] These amendments to the Ohio Revised Code further emphasize the use of the death penalty as a political tool, as legislators seek to capitalize on the public's anti-crime sentiment by broadening the availability of capital punishment. By the addition of new, yet redundant eligibility factors, the General Assembly drifts from the imperative of genuine narrowing as it pays "fealty to the death penalty."[282]

B. *Selection Factors and Procedures*

1. *Consideration of "Nature and Circumstances of Aggravating Circumstance" May Render Selection Guidance Vague*

We believe that one of the most important statutory benefits to capital defendants in Ohio is the clear delineation of selection factors as either aggravating or mitigating.[283] This benefit is undermined, however, by a statutory provision that injects vagueness into the sentencer's weighing process. Section 2929.03(D)(1) of the Ohio Revised Code refers to "the nature and circumstances of the aggravating circumstance."[284] That reference incorporates the nature and circumstances of the offense into the factors that are weighed in favor of death. The nature and circumstances of any offense, however, are statutory mitigating factors under section 2929.04(B). Section 2929.03(D)(1) may render Ohio's death penalty weighing scheme unconstitutionally vague because it gives the sentencer unfettered discretion to weigh a statutory mitigating factor as an aggravating circumstance.

The Ohio Revised Code definitively states that the nature and circumstances of the offense are selection factors in mitigation. Moreover, because the nature and circumstances of the offense are listed in section 2929.04(B) of the Ohio Revised Code and not section 2929.04(A), they must be weighed only as selection factors in mitigation.[285] The clarity and specificity provided by section 2929.04(B), however, are eviscerated by section 2929.03(D)(1). Section 2929.03(D)(1) states that "[t]he court . . . and the trial jury . . . shall hear testimony and evidence that is relevant to *the nature and circumstances of the aggravating circumstances* the offender was found guilty of committing . . . ."[286] Through section 2929.03(D)(1), selection factors that are strictly mitigating under section 2929.04(B) become part and parcel of the aggravating circumstance. It is impossible for a "person of ordinary sensibility" to understand how a statutory mitigating factor can support an aggravating circumstance.[287]

Despite the wide latitude that states have under the Eighth Amendment to make their death penalty selection factors either aggravating or mitigating so long as the factors are "evenhanded, rational, and consistent,"[288] Ohio has carefully circumscribed its selection factors into mutually exclusive categories of aggravating circumstances and mitigating factors. Under Ohio law, therefore, the "nature and circumstances" of any offense derive their "common-sense core of meaning" from the context of this statutory dichotomy.[289] Under section 2929.04(B), the terms "nature and circumstances"[290] lose their "common-sense core of meaning" as the result of section 2929.03(D)(1).[291] Section 2929.03(D)(1) makes section 2929.04(B) vague because it incorporates the nature and circumstances of an offense into the aggravating circumstances. The sentencer cannot reconcile the incorporation of a specific statutory mitigating factor into the aggravating circumstances, as mitigating factors and aggravating circumstances are mutually exclusive selection factors under Ohio law.[292]

Section 2929.03(D)(1) is also unconstitutionally vague on its face because it makes the selection factors in aggravation in subsections 2929.04(A)(1) to (8) "too vague."[293] Through subsections 2929.04(A)(1) to (8), the sentencer is given clear and specific guidance as to the selection factors that may be weighed against the defendant's mitigation. Section 2929.03(D)(1) eviscerates the narrowing achieved by section 2929.04(A). By referring to the "nature and circumstances" of the aggravating circumstance, section 2929.03(D)(1) gives the sentencer "open-ended discretion" to impose the death penalty.[294] That reference allows the sentencer to impose death based on the subsections 2929.04(A)(1) to (8) selection factors plus any other fact in evidence arising from the nature and circumstances of the offense that the sentencer considers aggravating.

The defense practitioner should challenge this statutory vagueness defect both on its face and as applied to a specific case. Further, the defense practitioner at trial should seek to diminish the harm caused by this statutory defect by requesting clear and specific jury instructions that direct the jury to weigh the circumstances of the offense only as a mitigating factor. The jury instructions should also identify the aggravating circumstances applicable to the specific case and inform the jury that only those aggravating circumstances may be weighed against the mitigating factors. The jury should also be instructed that the murder itself is not a selection factor in aggravation to reduce the potential for vagueness in the weighing process.[295]

2. *The Misleading Statutory Definition of a Catch-All Mitigating Factor*

Section 2929.04(B)(7) of the Ohio Revised Code defines "catch-all mitigation" as "[a]ny other factors that are relevant to the issue of whether the offender should be *sentenced to death*."[296] This definition is misleading. It places the focus on whether the defendant should be sentenced to death, which is the function of an aggravating circumstance. The definition of mitigation found in section 2929.04(C) more clearly defines "catch-all mitigation" as "any other factors *in mitigation of the*

imposition[297] of the death sentence."[298] The defense practitioner at trial should request that the definition in section 2929.04(C) be given when defining "catch-all mitigation."

3. *Ohio's Statute Requires the Sentencer to Consider Irrelevant Mitigation Unsupported by Evidence and Not Proffered by the Defendant*

Ohio's former death penalty statute was invalidated in *Lockett* because the sentencer's consideration was limited to three mitigating factors.[299] In response to *Lockett*, the Ohio General Assembly retooled the death penalty statute to afford the defendant "great latitude" in the presentation of mitigating factors.[300] Despite the good intentions of the General Assembly in attempting to comport the death penalty statute to *Lockett*, we believe that section 2929.04(B) of the Ohio Revised Code contains a provision that is contrary to *Lockett*.

Section 2929.04(B), in pertinent part, provides that "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 . . . ."[301] Thus, the sentencer is required by this provision to consider all statutory mitigating factors, such as the circumstances of the offense. This is contrary to *Lockett*, in which the United States Supreme Court held that the capital sentencer cannot "be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense *that the defendant proffers* as a basis for a sentence less than death."[302]

Lockett contemplates that the decision of whether to present a particular mitigating factor to the sentencer necessarily rests within the discretion of the defense as a matter of strategy.[303] Under *Lockett*, the sentencer must consider all relevant mitigation, but only if the defense has "introduced" it to the sentencer or "proffered" it to the sentencer as a matter of trial strategy.[304] Accordingly, the provision of section 2929.04(B) that mandates, by the use of the word "shall," the sentencer's consideration of all statutory mitigating factors interferes with the capital defendant's strategic choice of whether to present particular statutory mitigating factors to the sentencer.[305]

In reliance on *Lockett* and *Penry*, the defense practitioner at trial should request the redaction of inapplicable mitigating factors from jury instructions and from the sentencing court's consideration.[306] This is especially so when the "nature and circumstances" of the offense lack any mitigating value. Another provision of the Ohio Revised Code creates a risk that the nature and circumstances of the offense will be vaguely construed as an aggravating selection factor, and this risk is exacerbated when the nature and circumstances of the offense lack any mitigating value.[307] A jury instruction that mandates the consideration of mitigation not proffered by the defense should be challenged as a violation of the defendant's Sixth Amendment right to counsel by state interference, as well as under *Lockett* and the Due Process Clause.

C. *The Role of the Jury in Capital Sentencing*

1. *The Defendant Cannot Plead Guilty to Aggravated Murder with Aggravating Circumstances and Retain the Jury for the Penalty Phase*

Pursuant to section 2945.06 of the Ohio Revised Code, only a three-judge panel has jurisdiction on the question of whether to impose capital punishment if a defendant wishes to plead guilty to the charge of aggravated murder with an aggravating circumstance.[308] We believe that a capital defendant should be able to plead guilty to the death eligibility factors and still retain the option of having the penalty phase before a jury. Ohio's current procedure is flawed because "capital punishment rests not on a legal but on an ethical judgment . . . . And if the decision that capital punishment is the appropriate sanction in extreme cases is justified because it expresses the community's moral sensibility . . . it follows . . . that a representative cross-section of the community [should] be given the responsibility for making that decision."[309]

Ohio's current procedure of accepting guilty pleas in capital cases places a defendant at an unfair disadvantage. A defendant who does not contest legal culpability must nonetheless plead not guilty if he or she wishes to put his or her life in the hands of a jury on the issue of punishment. This puts the defense in the unenviable position of having its credibility diminished by entering a disingenuous plea. Thus, the jury may view credible mitigating evidence with greater skepticism than it deserves because the defense has lost its credibility at the culpability phase by contesting uncontestable charges.

A statutory change to allow a guilty defendant to preserve a jury's participation at the penalty phase would be manageable as a matter of procedure. The procedure would be quite similar to that which is used when an appellate court vacates a death sentence for penalty phase error and the trial court must "impanel a new jury for the hearing" under section 2929.06(B) of the Ohio Revised Code.[310] Further, the Revised Code already permits a jury to consider and weigh a selection factor that has been proven to the trial judge alone, as the defendant may try the prior purposeful murder aggravating circumstance to a judge in a jury trial.[311] A change to the statute permitting a defendant to admit legal culpability while taking his or her case to a jury on punishment would be a rational, manageable change. This change would also further emphasize the legitimacy of the imposition of a life or death sentence by reinforcing the role of the jury as "the conscience of the community on the ultimate question of life or death."[312]

2. *A New Jury May Be Seated on Remand from the Appellate Court for Penalty Phase Error*

In the 1981 version of the Ohio Revised Code, a sentence of death could be imposed only upon a recommendation of death made by the original "trial jury."[313] Accordingly, if an appellate court vacated a death sentence based on error at the penalty phase, the defendant could not be sentenced to death by the trial court on remand.[314] This was so because the original "trial jury" had been discharged and its death penalty recommendation rendered without legal effect by the appellate court's finding of error.[315]

Effective July 1, 1996, however, this so-called "loophole" in the sentencing provisions was closed by the enactment of section 2929.06(B) of the Ohio Revised Code.[316] As the result of section 2929.06(B), the Revised Code now provides for the trial court to seat a new jury for a new penalty phase whenever an appellate court vacates the original death sentence based on penalty phase error.[317]

Although section 2929.06(B) is a negative addition to the statute because it permits the imposition of death without the recommendation of the original trial jury, it may have some positive effect for defense practitioners. Section 2929.06(B) may make it more palatable for appellate courts to vacate death sentences more readily when error infects the original penalty phase because the defendant no longer gets the windfall of an automatic life sentence upon remand, as in *State v. Penix*.

D. *Review by Ohio Courts of Appeals Has Been Eliminated*

Under the 1981 version of Ohio's death penalty statute and the Ohio Constitution, a capital defendant convicted and sentenced to death had an appeal as of right both to the courts of appeals and the state supreme court. Now, for cases in which the date of the alleged offense occurs on or after January 1, 1995, the capital defendant may appeal only to the Supreme Court of Ohio, as changes to the law have eliminated review by the courts of appeals. As the Supreme Court of Ohio explained in *State v. Smith*: [318]

> On November 8, 1994, Ohio voters approved Issue I, which amended Section 2(B)(2)(c), Article IV of the Ohio Constitution to provide for direct appeal to the court "as a matter of right in cases in which the death penalty has been imposed." Concurrently, Section 3(B)(2), Article IV of the Ohio Constitution was amended to eliminate any jurisdiction of the courts of appeals "to review on direct appeal a judgment that imposes a sentence of death." The General Assembly enacted implementing statutory changes, *e.g.*, amendment to R.C. § 2953.02 by 1995 An. Sub. H.B. No. 4. These changes applied only to offenses committed on or after January 1, 1995. Defendant's convictions and sentences are the first case to be considered by this court under the 1994 amendments to the Ohio Constitution. Accordingly, the first issue before this court is whether the constitutional amendments to the Ohio Constitution allowing for the direct appeal of capital cases from the trial court to the Supreme Court of Ohio pass constitutional muster. After thoroughly reviewing this issue, we conclude that they do.[319]

This amendment to the appellate provisions of the Ohio Constitution is reflected in section 2929.05(A) of the Ohio Revised Code.[320] As this change reflects an attempt to give less review and less scrutiny to the imposition of a death sentence, we consider it to be an imprudent change to the law. The extreme finality of the death penalty should warrant the availability of every avenue of judicial scrutiny.

Doubtlessly, the elimination of review by the court of appeals was motivated by the desire to reduce delay in the review of capital cases and thereby move defendants along to the executioner more quickly. Here and again we see how public servants "profess their fealty"[321] to the death penalty for political gain. In her annual report on death penalty cases, the Attorney

General of Ohio credits her role in eliminating review by the court of appeals, noting that "[a]s a state senator, Betty D. Montgomery was instrumental in the passage of legislation that sought to reduce needless delay in death penalty appeals. In 1994, State Issue I eliminated one level of direct appeal by moving capital cases directly to the Ohio Supreme Court after sentencing."[322]

Ironically, this change to the law, motivated by both political and legal expediency, has had the opposite effect on the review of capital cases. Now the burden of appellate review rests entirely with the Supreme Court of Ohio.[323] For various legitimate reasons, the review of capital appeals has slowed by the funneling of all direct appeals to the Supreme Court of Ohio.

In addition to reviewing the merits of each capital case, the Supreme Court of Ohio must now shoulder the burden of reviewing motions for the correction or supplementation of records, among other ancillary issues attendant to review. In the bulk of death penalty appeals, the Supreme Court of Ohio now bears the full burden of resolving these issues that were once spread out among the various districts of the court of appeals. Further, the records in capital cases are often quite lengthy¾records up to ten thousand pages are not unusual¾and briefs filed in capital appeals are often lengthy and involve the complexities of death penalty jurisprudence. This reality necessarily slows down the review process, especially when only one court bears the brunt of this lengthy and complex review. Most important, review on direct appeal of capital cases requires exceptional vigilance by the reviewing court due to the extreme finality of the death penalty.[324] This is true not only for the review of legal errors raised on appeal, but also for the supreme court's statutory duty to independently review each death sentence.

Each of these concerns comes to the fold as the Supreme Court of Ohio seeks in good faith to balance the need for careful review of capital cases with concerns of undue delay. Focusing only on the latter, however, the Attorney General of Ohio now criticizes the supreme court for taking too long to fulfill its statutory obligations under section 2929.05(A) of the Ohio Revised Code.[325] Ironically, those who complain of delays in the supreme court's review fail to grasp the critical nexus between any such delay and the elimination of the court of appeals in the review of capital cases.

IV. OHIO'S DEATH PENALTY STATUTE: THE UGLY

Thus far we have discussed both "the good" and "the bad" aspects of Ohio's death penalty statute. The application of Ohio's capital statutory framework¾even "the good" in it¾can also be downright ugly. We thus conclude our discussion of Ohio's death penalty statute with a critical analysis of case law that undermines the plain text of Ohio's statutory framework and with recommendations to the practitioner for combating "the ugly" in Ohio's death penalty jurisprudence.

As a general rule, the defense practitioner must be vigilant in his or her efforts to preserve error for review by the appellate courts. Although a motion in limine does not preserve error for appellate review,[326] we recommend making such motions so that the defense can gain advance knowledge of how the trial or sentencing phase will proceed. Because a motion in limine does not preserve error, the defense practitioner must ensure preservation either through a motion or an objection.[327]

On appeal, defense practitioners should challenge unfavorable rulings by motions and objections. Practitioners must raise claims of ineffective assistance if trial counsel failed to preserve an issue through a motion or objection. This is necessary for a federal court to excuse the defendant's procedural default of an issue.[328] Moreover, we strongly encourage defense practitioners to raise multi-faceted challenges to errors. Certain issues can be appropriately raised as a substantive claim of error, ineffective assistance of counsel, and prosecutorial misconduct. Consider every aspect of an issue when crafting claims on your client's behalf.

The defense practitioner should not shy away from raising issues the Supreme Court of Ohio has previously rejected. It is both proper and ethical for the defense practitioner to raise settled issues of law.[329] Moreover, this is essential to preserve these issues for federal review. We suggest that the defense practitioner identify for the court any issue that is settled and indicate that the court may summarily dispose of this issue.[330]

If the appellate court rejects the defendant's claims, the defense practitioner should preserve objections to factual inaccuracies or omitted facts via a motion for reconsideration and should identify any inconsistent application of the law or the court's rules in the motion. Further, contradictory case law requiring a different outcome should be presented to the court in a motion for reconsideration.

A. *Eligibility Factors*

1. *Only Very Weak Evidence of Prior Calculation and Design Is Necessary to Prove Section 2903.01(A)*

Aggravated Murder

Prior to 1974, the State could convict a defendant of capital murder if it proved that the defendant committed the murder with "deliberate and premeditated malice."[331] The defendant needed only to form a "malicious purpose" prior to committing the homicide, the formation of which could occur at the "spur of the moment."[332] In 1974, the Ohio General Assembly eliminated this type of "instantaneous deliberation" from the capital murder statute by replacing the element of "deliberate and premeditated malice" with "prior calculation and design."[333] Prior calculation and design is a "more stringent element" that requires more than momentary deliberation.[334] Now, to prove that a defendant is guilty of aggravated murder pursuant to section 2903.01(A) of the Ohio Revised Code, the State must establish that the defendant killed with prior calculation and design—that he or she employed "a scheme designed to implement the calculated decision to kill."[335]

Despite the change in the law, the Supreme Court of Ohio has treated some intentional killings as though the defendant committed the murder with prior calculation and design. Two unfortunate examples of this are *State v. Goodwin*[336] and *State v. Keenan*.[337] In both cases, the court found the presence of prior calculation and design despite records that suggested spur of the moment killings.[338]

In *Goodwin*, the court relied on the purposeful nature of the killing, the defendant "rais[ing] a gun to the victim and pull[ing] the trigger," and the planning of a robbery to substantiate the presence of prior calculation and design.[339] Thus, the court based its finding of prior calculation and design on Goodwin's purpose to kill, the mere act of drawing and firing a weapon, and the planning of the robbery.[340] None of these facts, however, either separately or together, demonstrate that Goodwin developed a "scheme designed to implement the calculated decision to kill."[341] Moreover, setting such a low threshold of proof means that nearly every intentional killing would meet the criteria for prior calculation and design.[342]

In *Keenan*, the court found prior calculation and design because Keenan drove the victim around in a truck interrogating him while two men held the victim at knifepoint.[343] Unsatisfied with the victim's lack of information, Keenan slit his throat and then ordered an accomplice to finish him.[344] Nevertheless, Keenan's actions appear to be a spur of the moment crime, as he did not have a weapon with him, he did not strike or threaten the victim prior to the murder, and there was no evidence that Keenan felt any animosity towards the victim prior to the murder.[345] Rather than establishing prior calculation and design, the entire sequence of events could have occurred in a matter of minutes and "appears to have erupted on the spur of the moment" out of Keenan's frustration.[346] Confronted with a plainly intentional killing in both *Keenan* and *Goodwin*, a majority of the court converted the defendant's intent, or purpose to kill, into a rather questionable finding of prior calculation and design.

For the defense practitioner, preservation of this issue through requests for any appropriate lesser-included offense instruction is essential, whether it is murder or voluntary manslaughter. Finally, the element of prior calculation and design should be challenged in a motion for acquittal.[347]

2. *Only the Most Minimal Connection Is Required Between the Felony and the Murder to Prove Aggravated Felony Murder and Its Companion Aggravating Circumstance*

Section 2903.01(B) of the Ohio Revised Code provides that a defendant is guilty of aggravated murder if he or she "purposely cause[s] the death of another . . . while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit," certain felonies.[348] The same language is repeated as an aggravating circumstance in section 2929.04(A)(7).[349] The key word, "while," implies that the predicate felony and the murder must be causally connected. However, the Supreme Court of Ohio has not interpreted sections 2903.01(B) and 2929.04(A)(7) to require more than an attenuated connection between the predicate felony and the murder.

The murder does not need to occur at the same time as, or be caused by, the underlying felony in order for the defendant to be found guilty of aggravated murder pursuant to section 2903.01(A) and its corresponding aggravating circumstance.[350] In fact, the defendant need not have considered the commission of the predicate felony prior to the murder.[351] Even the technical completion of the felony prior to the murder, or the murder prior to the felony, does not remove the defendant from

the reach of sections 2903.01(B) and 2929.04(A)(7).[352]

Instead, the Supreme Court of Ohio has permitted some findings of aggravated felony murder and of the felony murder aggravating circumstance to stand with only the weakest of connections between the felony and the murder. In *State v. McNeill*,[353] for example, the defendant attempted to rob the victim, removed the victim's car keys, and then fled the scene.[354] The underlying felony¾attempted robbery¾was complete when McNeill left. Subsequently, McNeill returned and shot the victim.[355] McNeill argued that this was a new and separate crime, removing the necessary "while" connection between the felony and the murder.[356] The Supreme Court of Ohio rejected McNeill's arguments, finding that the killing need only be "directly associated with the predicate felony as part of one continuous occurrence."[357] Because the attempted robbery and the murder were closely connected in time and place, and because the "murder would not and could not have occurred but for the attempted robbery," the requirements of aggravated felony murder and its specification were met.[358]

Similarly, only the most minimal of connections tied the defendant's murder to the felony charged in *State v. Berry*.[359] Berry and an accomplice killed his employer, placed the body in the employer's van, removed his wallet, and then buried him.[360] The theft of the van and wallet were not the impetus of the murder, but rather were incidents to the cover up. Indeed, Berry killed the victim to retaliate for his employer's near collision with Berry's sister and niece.[361] Nevertheless, the connection between the murder and the felony was sufficient to find Berry guilty of aggravated felony murder and the accompanying felony murder aggravating circumstance.

If the causal connection between the charges of aggravated murder and the predicate felony are weak, they must be challenged at trial. Trial counsel should challenge the sufficiency of the evidence in a motion for acquittal.[362] If the trial court denies the motion, counsel should argue to the jury that the "while" element required to connect the charged felony and the murder is not present.

3. *A Capital Defendant May Be Indicted Under Mutually Exclusive Statutory Alternatives When Charged with the Felony Murder Aggravating Circumstance*

Pursuant to section 2929.04(A)(7) of the Ohio Revised Code, a defendant who murders during the commission of a felony is eligible for the death penalty only if the defendant "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."[363] Simply put, a capital defendant can be the principal offender in a murder, or he or she can commit aggravated murder with prior calculation and design, but never both under Ohio law. If there was any debate on this issue, the Supreme Court of Ohio resolved it in *State v. Penix*.[364]

In *Penix*, the trial court instructed a capital jury on both section 2929.04(A)(7) alternatives. As a result, the jury and the trial court considered both alternatives when sentencing Penix. The Supreme Court of Ohio reversed, holding that "principal offender" and "prior calculation and design" are not to be charged and proven in the same cause.[365]

Despite the clarity of the statute and the *Penix* decision, capital defendants continued to be charged, and capital juries to be instructed on, both section 2929.04(A)(7) alternatives. Confronted with this issue again in *State v. Moore*,[366] the Supreme Court of Ohio modified *Penix* and sanctioned charging capital defendants with both alternatives, so long as the indictment is crafted in the disjunctive "or."[367] The court did find error in *Moore*¾albeit harmless error¾as a result of the trial court's failure to instruct the jury to be unanimous with respect to which alternative was present.[368]

To the defense practitioner, the danger inherent in cases such as *Moore* is obvious: the sentencer could consider *both* section 2929.04(A)(7) alternatives as aggravating circumstances. This is precisely what happened in *State v. Chinn*.[369] In its sentencing opinion, the trial court found that Chinn was both the principal offender in the charged murder *and* that Chinn committed the murder with prior calculation and design.[370] The trial court then proceeded to consider both alternatives when assessing Chinn's sentence.[371]

On appeal, Chinn urged the Supreme Court of Ohio to recognize that, if the trial court made this error, it was likely that the jury did as well. The court rejected Chinn's "unsupported speculation."[372] It was "clear" to the court that Chinn's jury found that he was the principal offender; the only trial issue was identity and, consequently, Chinn was either the principal offender or he was not guilty of the charges.[373]

Chinn is an unfortunate example of how the review of a death sentence can be "qualitatively different" in Ohio.[374] A trial judge, who presumably has more legal knowledge and is more familiar with statutory interpretation than the jury, incorrectly weighed both section 2929.04(A)(7) alternatives when it sentenced Chinn. Indeed, somehow the court credited the jury with more legal capability than the trial court. We believe it is likely that Chinn's jury made the same mistake as the trial court.

There are ways for the defense practitioner to protect the client from the court's hostile interpretation of the section 2929.04(A)(7) specification. *Penix*, for example, remains good law and should be relied upon. In addition, the practitioner should make efforts to have the prosecution elect the section 2929.04(A)(7) theory it wants to proceed under at sentencing. If the prosecution refuses to so elect, the practitioner must insist on a unanimous verdict on one of the alternatives. This is the constitutionally mandated narrowing that must occur in every capital case.[375] Counsel should rely on *Apprendi v. New Jersey*[376] when making these requests. Per *Apprendi*, the jury must find any facts, excluding a prior conviction, that render a defendant eligible for death.[377] Finally, the defense practitioner should emphasize in closing argument that the jury must unanimously find that only one of the alternatives exists¾both cannot be present.[378]

If practitioners on appeal find themselves without findings on either alternative at sentencing, they should review the facts and determine if the case can be distinguished from *Chinn*. The court held that Chinn had to be the principal offender, or not involved in the crime, because identity was the only issue in the case.[379] The evidence will not be so tidy in every capital case, however, and can aid the defense practitioner in establishing prejudicial error. This error would be prejudicial, for example, if your client and a co-defendant are both charged with committing an aggravated felony murder and the prosecution presents evidence to support both section 2929.04(A)(7) alternatives. In this instance, failure to have fact-findings as to which alternative is present is especially prejudicial. The jury could simply arrive at a patchwork verdict, with six jurors believing that the defendant is the principal offender and the other six believing that the defendant committed the murder with prior calculation and design.

On appeal, the defense practitioner should be vigilant in his or her review of the transcript. Beyond making typical challenges to denied motions, overruled objections, and lack of unanimity, the practitioner should challenge as misconduct any suggestion by the prosecutor that both section 2929.04(A)(7) alternatives may be considered.

4. *A Capital Defendant May Be Convicted of Multiple Homicide Counts for a Single Murder*

Under Ohio law, capital defendants can face more than one aggravated murder charge for a single killing. This does not violate section 2941.25(A) of the Ohio Revised Code[380] because the Supreme Court of Ohio has interpreted "conviction" to require both a guilt determination and an imposition of sentence.[381] Surprisingly, however, the court permits the jury to consider more than one count of aggravated murder for a single killing at the sentencing phase.[382]

The Supreme Court of Ohio has consistently rejected capital defendants' claims of prejudice.[383] The court refuses to find that the consideration of multiple counts by the jury "unfairly affect[s] the penalty hearing."[384] Even where an actual violation of section 2941.25(A) occurs—where the trial court sentences the defendant on multiple aggravated murder counts for a single killing—the court holds that this is merely "procedural" error and "harmless beyond a reasonable doubt."[385] In fact, the court's independent review can cure this error.[386]

The defense practitioner should be concerned over presenting multiple aggravated murder counts to the jury at sentencing for several reasons. First, the jury may weigh the aggravating circumstances from each count "collectively and improperly," rather than treating each count separately.[387] Second, presenting multiple counts might cause jurors to believe that the crime or crimes proven are particularly "heinous because of the number of charges stemming from the death[]."[388] Third, the jury could consider the multiple counts as non-statutory aggravating circumstances.[389]

To avoid the prejudice of multiple aggravated murder counts at sentencing, the defense practitioner should request that the prosecution elect the count with which it wishes to proceed. The practitioner should articulate how the client will be prejudiced if an election is not made, as speculation will not suffice to prove prejudice on appeal.

5. *Duress Is Not a Defense to Aggravated Murder*

Arguing that someone else forced the defendant to commit the act in question is the essence of "duress," which can be a

defense to the commission of a crime. To establish the defense of duress, the defendant must demonstrate that he or she possessed "a sense of immediate death or serious bodily injury" if he or she failed to perform the directed acts.[390] The use of force must control the defendant's will "during the entire time he or she commits the act," such that he or she "cannot safely withdraw."[391]

Duress is recognized as an affirmative defense to all crimes.[392] The common law excluded this defense, however, where the charge was murder of an innocent person.[393] It was not until *State v. Getsy*[394] that the Supreme Court of Ohio addressed whether duress could be asserted by a capital defendant against charges of aggravated murder.

In *Getsy*, the defendant claimed that a third party with mob connections coerced him into committing murder via threats. Although the trial court held that duress could properly be asserted to defend against both the underlying felony and the felony aggravated murder charge, the court did not charge the jury on duress based on its finding of insufficient evidence.[395] Getsy then raised this failure to instruct on direct appeal. The Supreme Court of Ohio recognized that duress is a defense to "certain felonies."[396] Moreover, the court noted that if duress may validly be asserted as a defense to the underlying felony in a felony murder case, then the defendant could not be convicted of aggravated murder.[397] The court incorrectly rejected duress as a defense to aggravated murder[398] through reliance on the common law prohibition against asserting duress to defend against the murder of an innocent person.[399] The court found additional support for its decision in section 2929.04(B)(2) of the Ohio Revised Code,[400] in which the General Assembly included duress as a mitigating factor.[401] The court thus reasoned that the General Assembly did not intend for duress to be a defense against aggravated murder.[402]

Nevertheless, we believe *Getsy* does not completely preclude assertion of duress as a defense in a capital murder case. *Getsy* precluded only defending against the charge of aggravated murder with duress. There may be additional charges that the defendant faces where duress may be appropriately presented as a defense. Further, the defendant can use duress to defend against the aggravating circumstances that elevate his or her crime to a capital offense. In *Getsy*, the court indicated that duress "arguably" could have been presented as a defense to the murder-for-hire aggravating circumstance.[403] Additionally, the defense practitioner cannot forget that being charged with a crime gives the defendant numerous powerful rights¾the right, for example, to be heard in his or her defense.[404] Moreover, the defendant must have a "meaningful opportunity to present a complete defense."[405] If, but for *Getsy*, the facts of the defendant's case dictate a defense of duress, the defense practitioner should argue that the defendant's Sixth and Fourteenth Amendment rights are violated if he or she is precluded from presenting evidence of duress.

6. *Capital Defendants May Not Present Expert Psychological Testimony During the Trial Phase to Disprove Specific Intent*

As previously discussed,[406] aggravated murder is a specific intent crime.[407] Absent the presence of specific intent or purpose to kill, a defendant cannot be guilty of aggravated murder. The Supreme Court of Ohio, however, limits the criminal defendant's ability to disprove intent to kill. Expert testimony respecting the impact of alcohol, drugs, or mental illness on a defendant's ability to form a specific intent to kill is not permitted in Ohio.[408]

As to purpose, the trial court in *State v. Cooey*[409] precluded the presentation of expert testimony that Cooey was so impaired by the effects of alcohol, drugs, and a mental disorder that he did not have the capacity to form specific intent.[410] The Supreme Court of Ohio rejected Cooey's challenge to the trial court's ruling, reiterating its holding in *State v. Wilcox*[411] that psychiatric testimony in a capital case, unrelated to insanity, may only be offered at the mitigation phase.[412] The court based its decision to reject such testimony on two grounds. First, the court distrusted the psychiatric expert's ability to "fine-tune" a sane offender's "degree of capacity."[413] Second, Ohio does not recognize the defense of diminished capacity[414] and permitting such evidence would be permitting that defense¾albeit under a different name.[415]

The outcome was no different when the defendant sought to proffer similar evidence to disprove the element of prior calculation and design. In *State v. Huertas*,[416] the defendant sought to offer expert testimony regarding the effects of intoxication and the possibility of blackouts to negate the element of prior calculation and design.[417] The defendant argued

that he was precluded from presenting evidence that would have demonstrated his inability to form the statutorily required specific intent to kill[418] as permitted by *State v. Fox*.[419] Citing *Cooey*, the court reiterated that expert psychiatric testimony in a capital case may only be offered if it relates to sanity or is offered at the sentencing phase.[420] It is permissible, however, to present lay testimony that the defendant was, for example, too intoxicated to have formed specific intent.[421] Nevertheless, such evidence is a poor substitute for the testimony that an expert psychiatrist would present.

We believe that the Supreme Court of Ohio should modify *Wilcox* and adopt diminished capacity as a defense to aggravated murder. In *State v. Scott*,[422] the court addressed and rejected the question of whether a mentally ill, but competent person could be executed.[423] Although not impacting on legal culpability, permitting the defense of diminished capacity would provide the jury with an additional vehicle to address the death eligibility of a severely mentally ill defendant. For a defendant such as Scott, who suffered from the biologically-based illness of chronic, undifferentiated schizophrenia,[424] such a consideration could have spared his life. Thus, Ohio should reevaluate whether it wants to engage in the practice of executing men and women who suffer from serious mental illness.[425]

If a defense practitioner learns from an expert that the defendant was unable to form the specific intent necessary to prove him or her guilty of aggravated murder, it is essential that evidence be offered to the trial court. The defendant has a right to be heard in his or her defense.[426] Moreover, the opportunity to defend must be "meaningful" and "complete."[427] The defense practitioner must exercise those rights for the client.

We suggest that the defense practitioner make efforts to gain a working knowledge of psychological disorders. Such knowledge will allow the practitioner to "think outside the box" about the defendant's psychological problems in the context of the facts presented in his or her case. If the defendant suffers from battered woman's syndrome, battered child syndrome, post-traumatic stress disorder, or a paranoid personality, expert testimony regarding those disorders may be proper to support a theory of self-defense at trial given the circumstances of the crime.[428] The defense practitioner should talk to the expert about the facts of the case and how those circumstances may have interacted with the defendant's mental condition.

An unfortunate example of a missed opportunity for such litigation is found in *State v. Stojetz*.[429] Stojetz, an inmate at Madison Correctional Institute, was charged with killing a juvenile inmate. There was testimony presented at trial that the victim attacked another juvenile just prior to the murder and that he threatened to kill Stojetz.[430] What the jury did not learn during the trial phase was that Stojetz suffered from post-traumatic stress disorder (PTSD).[431] The interplay of the victim's violent actions, his threats, the prison environment, and Stojetz's PTSD should have been utilized as a defense during the trial phase.[432]

B. *Selection Factors and Sentencing Procedures*

1. *A Capital Defendant May Not Present Residual Doubt as a Mitigating Factor*

In her concurring opinion in *Franklin v. Lynaugh*,[433] Justice O'Connor defined residual doubt as "[a] lingering uncertainty about facts, a state of mind that exists somewhere between 'beyond a reasonable doubt' and 'absolute certainty.'"[434] Although residual doubt can be an effective argument in certain cases,[435] it is not a constitutionally required mitigating factor.[436]

We believe the effectiveness of residual doubt as a mitigating factor can be seen in Ohio's case law. Residual doubt was part of the Supreme Court of Ohio's rationale for reversing the death sentence in *State v. Watson*.[437] Before 1998, moreover, the court repeatedly recognized residual doubt as a mitigating factor in capital cases.[438]

However, residual doubt did not survive the Supreme Court of Ohio's review in *State v. McGuire*.[439] In *McGuire*, the court removed what can be one of the capital defendant's most compelling weapons at sentencing. Because residual doubt is unrelated to the "nature and circumstances of the offense[] and the history, character, and background" of the offense, it is not a proper mitigating factor.[440]

Despite *McGuire*, we believe that residual doubt is not necessarily dead and buried. Although residual doubt may not be offered as a mitigating factor, it may sometimes be offered as rebuttal evidence by the defense. The prosecution frequently argues that the capital defendant deserves the death penalty¾at least in part¾because of his or her *legal* guilt, as opposed to the

defendant's *moral* guilt. Such an argument triggers a powerful right for the defendant. Capital defendants have a recognized right to rebut the factors the prosecution relies on at sentencing.[441] If the prosecution argues that the defendant's legal guilt makes him or her deserving of death, the defense practitioner can appropriately argue residual doubt as part of the defendant's due process right to rebut the sentencing factors relied on by the prosecution.

On appeal, defense practitioners must continue to challenge *McGuire* and the limitations it places on the defense practitioner. Moreover, the Supreme Court of Ohio has held that *McGuire* can be applied retroactively.[442] If *McGuire* is retroactively applied, a challenge based on the Ex Post Facto Clause might be appropriate.[443]

Efforts respecting residual doubt should not stop at the courthouse. The Supreme Court of Ohio does not necessarily have the final word on residual doubt. This is one area in which a difference can be made by contacting local legislators and asking that they incorporate residual doubt into the list of mitigating factors enumerated in section 2929.04(B) of the Ohio Revised Code. Indeed, although the Federal Constitution may not require juries to consider residual doubt, the authority to do so is within the province of the Ohio General Assembly.

2. *Ohio's Catchall Mitigating Factor Is Limited Only to Those Factors Specifically Enumerated in Section 2929.04(B)*

The Supreme Court of Ohio has severely limited the reach of section 2929.04(B) of the Ohio Revised Code. In *McGuire*, the court adopted the restrictive interpretation of section 2929.04(B)[444] first found in Justice Resnick's dissenting opinion in *State v. Watson*.[445] In *Watson*, Justice Resnick protested the recognition of residual doubt as a mitigating factor. Because residual doubt was not mentioned in section 2929.04(B), it could not be a mitigating factor.[446] Justice Resnick argued that residual doubt could not be considered under the section 2929.04(B)(7) catchall because it had to be read in relation to section 2929.04(B).[447] Section 2929.04(B) "allows consideration only of those other factors relevant to the issue of whether the offender should be sentenced to death," which are the nature and circumstances of the offense and the history, character, and background of the offender.[448] Essentially, "any other factor" means only those factors specifically identified elsewhere in section 2929.04(B).[449]

Justice Pfeifer's concurrence in *McGuire* notes the strained logic adopted by the court to rid Ohio of residual doubt. Indeed, there is a simple, logical meaning to section 2929.04(B)(7). "Any other factor" requires consideration of those factors that are not considered in "any other portion of [section] 2929.04(B)."[450] Support for Justice Pfeifer's position can be found in the Ohio Revised Code itself. Pursuant to section 2929.04(C), "[t]he 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."[451] *McGuire* gives no latitude and renders section 2929.04(B)(7) meaningless surplusage. "Any other factors that are relevant to . . . whether the offender should be sentenced to death"[452] does not mean *any* other factor according to *McGuire*. Instead, only those factors that are already specifically enumerated elsewhere are "any other factors."[453]

McGuire's restrictive interpretation of section 2929.04(B)(7) might seem to severely limit the capital defendant's ability to present mitigating evidence. This interpretation, however, is an anomaly. Although the Supreme Court of Ohio has limited the weight it has given to many mitigating factors in its independent sentence review, residual doubt is the only mitigating factor that the court has rejected in its entirety.

The court's independent review in *State v. Murphy*[454] also suggests that its restrictive interpretation of section 2929.04(B)(7) in *McGuire* is an anomaly. In *Murphy*, the court considered and weighed requests by the victim's family that Murphy be given a life sentence when assessing the appropriateness of Murphy's death sentence.[455] These requests were weighed as mitigation despite the fact that they were not a part of the defendant's character, the record, or the circumstances of the offense.

As a result, the defense practitioner should continue to present *any* legitimate factor they deem will mitigate the death penalty in their client's case. The practitioner should rely on *Murphy* and section 2929.04(C) to support the broadest presentation of mitigation possible, noting that the factors weighed by the court in *Murphy* can defeat *McGuire*'s restrictive interpretation of section 2929.04(B)(7).

3. *The Mitigating Factor of Age Only Refers to Chronological Age*

Pursuant to Section 2929.04(B)(4) of the Ohio Revised Code, a capital defendant's youth is a factor that mitigates against the imposition of the death penalty.[456] In *State v. Rogers*,[457] the defendant was a forty-two year old man and, consequently, would be seemingly precluded from asserting section 2929.04(B)(4) as a mitigating factor. The defendant presented expert psychological testimony, however, that although his chronological age was forty-two, certain psychological deficits resulted in a mental age equivalent to a ten or twelve year old child.[458] Thus, the defendant argued that "youth," as used in section 2929.04(B)(4),[459] refers to the defendant's mental rather than chronological age.[460]

The Supreme Court of Ohio did not interpret "age" so broadly. Finding no contrary indications, the court gave "age" its plain meaning¾chronological age.[461] The court noted, however, that Rogers's mental age would be a "weighty factor mitigating against the death penalty"[462] that could appropriately be considered under section 2929.04(B)(3).[463]

The defense practitioner representing a client who is not chronologically youthful, but who has a youthful mental age, must present this mitigating evidence to the sentencer. The practitioner should also request that the jury be instructed on youth as a mitigating factor. *Rogers* is contrary to *Eddings v. Oklahoma*,[464] which held that the mitigating factor of youth "is more than a chronological fact[,]"[465] and the practitioner should rely heavily on this contradiction. Additionally, there are several alternative routes through which the sentencer can appropriately consider this type of mitigation. Per *Rogers*, this evidence can be considered under section 2929.04(B)(3) of the Ohio Revised Code. If the evidence presented does not rise to the level of section 2929.04(B)(3), evidence of the defendant's mental deficits can also be appropriately considered as part of the defendant's history, character, and background[466] or under the catchall mitigating factor.[467] Moreover, since the Supreme Court of Ohio found that a mental age of ten or twelve was an "extremely weighty factor"[468] in mitigation of the death penalty, emphasis should be placed on mental age in arguments respecting the appropriateness of the death penalty before a jury or under the appellate court's independent sentence review. Although the court did not vacate the death sentence in *Rogers*, combining the "extremely weighty"[469] factor of the defendant's youthful mental age with the other mitigating factors may give the practitioner a compelling argument to spare the defendant's life in another case.

4. *A Capital Defendant Can Waive His or Her Presentation of Mitigating Evidence*

The Supreme Court of Ohio first confronted a convicted capital defendant who wished to waive the presentation of mitigating evidence in *State v. Tyler*.[470] In *Tyler*, the defendant would not allow defense counsel to call any mitigation witnesses.[471] Thus, the only "mitigation" presented was the defendant's unsworn statement in which he told the jurors to sentence him to death if they believed him to be guilty.[472] In reviewing *Tyler*, the court recognized that the defendant's right to present mitigating evidence stemmed from his or her right to be treated with dignity.[473] That right to be treated with dignity, however, also allows the defendant to chose not to present mitigating evidence.[474] *Tyler* thus provides capital defendants with the right to preclude the presentation of all mitigating evidence.

Several years later, the court confronted a twist to the issue in *Tyler* in *State v. Ashworth*.[475] Ashworth pled guilty to capital murder and waived the presentation of mitigating evidence for the express purpose of being sentenced to death.[476] In response, the court developed the procedures to be followed when a capital defendant wishes to waive the presentation of mitigating evidence. First, there must be an inquiry on the record into whether the waiver is knowing and voluntary.[477] Second, the trial court must determine that the defendant is competent and understands his right to present mitigation.[478] To ensure complete understanding, the defendant must be informed of several things, including his or her right to present mitigating evidence, how the sentencer uses such evidence, and the resultant effect should the defendant fail to present mitigating evidence.[479] Finally, the trial court should inquire as to whether the defendant wants to waive his or her right to present mitigating evidence.[480] The trial court must then make findings of fact as to the defendant's understanding of his or her rights and the waiver.[481]

Beyond explaining the right to present mitigation and the effects of foregoing the presentation of such evidence, the trial court in *Ashworth* also ordered that a competency evaluation be conducted on the defendant.[482] Prior to *Ashworth*, the Supreme Court of Ohio held that the mere fact of waiver does not call a defendant's competency into question.[483]

Moreover, the court indicated that a competency evaluation was not a necessary precondition to accepting the defendant's waiver of the presentation of mitigating evidence.[484] Although the court did not fault the trial court in *Ashworth* for conducting a competency hearing and advised trial courts to be cognizant of any actions that might call the defendant's actions into question, the court reaffirmed that a competency hearing was not a necessary prerequisite to waiving presentation of mitigating evidence.[485]

The battle waged by defense counsel in *Tyler* and *Ashworth* is the battle of who in society may decide what penalty is appropriate in a capital case. Society has an interest in executing only those persons who meet the requirements of Ohio's death penalty statute.[486] There is also a societal interest that criminal defendants not use the death penalty as a form of state-assisted suicide.[487] Beyond these interests, the Eighth Amendment to the United States Constitution places a high premium on the reliability of the decision to sentence a capital defendant to death.[488]

Despite the myriad of concerns against allowing a capital defendant to determine the punishment that will be meted out, the court found in *Ashworth* that there are sufficient safeguards to ensure that the societal and Eighth Amendment interests are protected.[489] So long as a capital defendant is not automatically sentenced to death upon conviction, the absence of mitigation in a given case does not render the death penalty unconstitutional.[490] The court refused to move away from its contention that, because Ohio's death penalty statute did not expressly require the presentation of mitigating evidence, it had to include the right not to present such evidence.[491]

We believe that the *Ashworth* decision creates significant problems with regard to the court's statutory obligation to reweigh the aggravating circumstances and mitigating factors, as well as its obligation to address the proportionality of the death penalty in every capital case.[492] The court cannot fulfill this function if the capital defendant can withhold from it the information necessary for that review. The Supreme Court of Florida has recognized that it cannot fulfill its duty to engage in a "thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases" if a capital defendant precludes the presentation of mitigating evidence.[493] The necessity to consider mitigation "applies with no less force when a defendant argues in favor of the death penalty[] and even when the defendant asks the court not to consider mitigating evidence."[494]

Based on this necessity, Florida now requires that a pre-sentence investigation report (PSI) be generated in every case in which the defendant does not challenge the death penalty and refuses to present mitigating evidence.[495] Included within that report is evidence relating to mental health problems, family background, and school records.[496] The Supreme Court of Florida has placed on the prosecutor the affirmative duty to place in the record all evidence in its possession that is of a mitigating nature.[497] If either the pre-sentence report or the records submitted by the prosecutor alert the trial court to the "probability of significant mitigation," the trial court can call its own witnesses to testify regarding mitigating evidence.[498] The trial court also has the ability to appoint counsel to present such mitigating evidence.[499] Florida is not alone, as similar procedures have been adopted in New Jersey and Georgia.[500] The Supreme Court of Ohio should have endorsed similar suggestions made in both *Tyler* and *Ashworth*.

Despite *Tyler* and *Ashworth*, however, the defense practitioner still has options when his or her client refuses to permit the presentation of mitigating evidence. The defense practitioner should look carefully at the defendant, his or her history, and his or her current behavior so as to alert the trial court to any suggestion of incompetency. Although a defense attorney should generally not request a PSI,[501] the practitioner should try to gain the defendant's consent to such a request if the defendant will not permit the presentation of mitigating evidence. Indeed, at the very least, a PSI will provide the court with something to consider when assessing penalty. The defense practitioner should look to the facts of the case and alert the trial court to any potential mitigating evidence already found in the record and in the trial phase evidence.[502] Finally, either counsel or standby counsel should proffer for the record available mitigation, witnesses, and any additional mitigation inquiry.

5. *The Jury Need Not Be Instructed on Specific Mitigating Factors*

At the conclusion of the mitigation phase in *State v. Goff*,[503] the defendant requested that the trial court instruct the jury on several specific mitigating factors.[504] The defendant's logic was that the capital sentencer cannot "refuse to consider, as a matter of law, any relevant mitigating evidence."[505] The Supreme Court of Ohio rejected the defendant's contentions,

however, and held that the trial court does not have to instruct the jury on non-statutory mitigating factors.[506] Citing to *Buchanan v. Angelone*,[507] the court indicated that the failure to provide such instruction violates neither the Eighth nor Fourteenth Amendment to the United States Constitution.[508] So long as the court's instructions do not foreclose the consideration of relevant mitigating evidence, there will be no error in refusing to instruct the jury on specific mitigating factors.[509]

Although the Constitution may not require such instructions, there is no reason why the defense practitioner cannot request that the court give them. The Constitution provides merely a threshold level of protection¾one that a trial court can exceed if it deems appropriate. Moreover, although *Buchanan* forecloses some success in litigating this type of claim, we believe it does not foreclose all success, particularly if practitioners are creative in their arguments. The defense practitioner must evaluate the circumstances of the case to determine if it is distinguishable from *Buchanan*. Indeed, the Supreme Court's decision to uphold the instructions given in *Buchanan* was based on a variety of factors. First, the instructions did not foreclose consideration of any mitigating evidence.[510] Second, the context of the instructions¾several days of testimony on mitigating evidence and extensive arguments of both counsel¾resolved any doubt in favor of a finding that the jury was not foreclosed from considering mitigation.[511] Alternatively, the defense practitioner should look for indications of juror confusion expressed in the form of a written question. If the jurors do not understand what is, or is not, mitigating evidence, counsel should request additional instructions that provide more specific guidance.[512]

6. *The Prosecutor May Comment That the Defendant's Statement Is Not Given Under Oath and the Prosecutor Has Wide Latitude in Rebutting the Defendant's Unsworn Statement*

As previously discussed,[513] one of the shining stars of Ohio's capital statute is the defendant's ability to make an unsworn statement at the penalty phase pursuant to section 2929.03(D)(1) of the Ohio Revised Code. This opportunity allows the defendant to speak to the sentencer without subjecting him or herself to cross-examination¾a powerful tool for the defense. However, the Supreme Court of Ohio's interpretation of section 2929.03(D)(1) is eroding its purpose.

In *Griffin v. California*,[514] the Supreme Court of the United States reversed a defendant's conviction and death sentence after the prosecutor commented on the defendant's Fifth Amendment right to silence.[515] Such commentary imposed an impermissible penalty for the exercise of a constitutional right.[516] By penalizing the defendant for the exercise of his rights, the right itself is decimated.[517] Thus, the court set aside the defendant's conviction and sentence.

State v. DePew[518] shares many similarities with *Griffin*. DePew exercised his statutory right to make an unsworn statement and indicated in his statement that he did not have a criminal record prior to the present charges.[519] In response at closing, the prosecutor told the jury that if DePew had testified he would have asked him if he had been subsequently convicted of any offenses.[520] Although the court recognized that extensive commentary on the nature of the defendant's unsworn statement affected both his statutory right to make such a statement and his Fifth Amendment rights, it refused to completely preclude the prosecutor from making *any* comment to avoid being unfair to the State.[521] The result was a compromise: the court permitted the prosecutor to comment on the unsworn nature of the defendant's statement, but required that such commentary be limited to stating that the defendant's statement was not made under oath or affirmation like other witnesses.[522]

The *DePew* decision has several problems. First, there is no room for compromise in *Griffin*; its prohibition is absolute. There is to be no penalty imposed on a criminal defendant for exercising his or her rights.[523] Second, prosecutors often refuse to limit their commentary to the confines of *DePew*.[524]

At the trial level, there are several steps that the defense practitioner can take to protect the defendant's statutory right to make an unsworn statement. By motion, the defense practitioner should request that the prosecutor be precluded from commenting on the unsworn nature of the defendant's statement. Indeed, *Griffin*'s language is absolute, despite the Supreme Court of Ohio's deviation from it. If the trial court denies the motion, the practitioner should object to any commentary made by the prosecutor that exceeds the strict confines of *DePew*. Two capital appellants have had success on this issue in federal court, and it is vital that defense practitioners continue to raise it.[525]

Unfortunately, the problems that can result when the defendant exercises his or her right to make an unsworn statement are not limited to comment on the unsworn nature of the statement. Beyond being able to tell the jury that the defendant was not under oath when he or she spoke, the prosecutor also has an extensive right to rebut the information presented in the defendant's unsworn statement. Prosecutors may present evidence that rebuts any false or incomplete mitigating evidence presented by the defendant.[526] On the surface, the presentation of rebuttal evidence appears reasonable enough, but the Supreme Court of Ohio stretched the right of rebuttal too far in *State v. Jalowiec*.[527]

In *Jalowiec*, the defendant made an unsworn statement in which he discussed his arthritis, its effects on him, and his positive relationship with his girlfriend and her children.[528] The defendant indicated that he did not have a drug problem and that there were no criminal cases pending against him.[529] Jalowiec resumed the stand and presented additional information after the trial court ruled that his statement demonstrated that he was a "great guy," which permitted the prosecutor to rebut that trait, even with evidence of prior violent crimes.[530] In rebuttal, the prosecution presented seven witnesses who testified that Jalowiec sold and used drugs.[531] The prosecution also presented extensive testimony about an alleged felonious assault and arson.[532] The Supreme Court of Ohio agreed with the trial court that Jalowiec's very limited statement opened the door for the prosecution's entire rebuttal.[533]

In dissent, Justice Stratton agreed that Jalowiec opened the door to the rebuttal drug evidence.[534] However, Justice Stratton rejected the court's opinion that Jalowiec opened the door to the testimony respecting the felonious assault and arson charges, as this evidence did not rebut the issues raised in his unsworn statement.[535] Justice Stratton saw the prosecution's

actions for what they were: a "blatant attempt to discredit a person who . . . was without a criminal record."[536] The real fear emanating from *Jalowiec* is that the decision has put the defendant in a position where "almost any positive comment a defendant could make about himself or herself would open the door to every possible or even speculative misdeed he or she ever committed or was even alleged to have committed."[537]

On the surface *Jalowiec* appears to give the prosecutor an unlimited right to rebuttal. *Jalowiec*, however, did not overrule *DePew*. Thus, it is still the law in Ohio that the prosecutor may only rebut materially *false or incomplete* mitigation evidence.[538] What was significant about *Jalowiec* was that the defendant took the stand and lied.[539] Moreover, the false evidence that the defendant presented related to evidence of "good character," which is a very broad mitigating factor. Apparently, the court would not have permitted such an extensive rebuttal but for the fact that the defendant presented false evidence of good character.

For an example of *DePew*'s application after *Jalowiec*, assume a capital defendant is convicted of committing aggravated murder along with the section 2929.04(A)(7) specification that the murder was committed while the offender was committing rape. The defendant has no significant criminal history and intends to present as mitigating evidence his lack of a criminal record pursuant to section 2929.04(B)(5).[540] In this circumstance, the prosecutor could not properly rebut the section 2929.04(B)(5) mitigating factor with evidence of uncharged sex crimes allegedly committed by the defendant. It would be impermissible under *DePew* for the prosecutor to rebut the defendant's section 2929.04(B)(5) mitigating evidence with evidence of this allegation, as such a mitigating factor is based on a lack of prior convictions.[541]

We believe preparation is the key at trial to controlling the prosecution's rebuttal. The defendant must prepare his or her unsworn statement in advance. The defense practitioner must make sure that the defendant does not open the door to damaging information on rebuttal. The defense practitioner must also ensure that the defendant's unsworn statement is accurate to avoid any attempt by the prosecution to engage in *Jalowiec*'s wide-ranging rebuttal. Additionally, we suggest filing a motion in limine to determine the admissibility of the prosecutor's rebuttal evidence before it is put before the jury. The defense practitioner will be better prepared to make strategic decisions respecting the presentation of mitigation evidence with advance knowledge of what the trial court will permit the prosecutor to do.

7. *Upon Appellate Reversal of the Defendant's Death Sentence and Remand to the Trial Court for Resentencing, the Defendant Cannot Present Additional Mitigation Evidence*

In *State v. Davis*,[542] the Supreme Court of Ohio reversed a defendant's death sentence and remanded the case for resentencing as a result of errors that occurred "after all available mitigating evidence had been heard."[543] At resentencing, the defendant offered additional mitigation relying on *Lockett v. Ohio*[544] and *Skipper v. South Carolina*,[545] which preclude the sentencer from refusing to consider any relevant mitigation.[546] The trial court refused to consider Davis's mitigation, a decision with which the Supreme Court of Ohio agreed.[547]

In rejecting the defendant's arguments, the court noted that there was no relevant evidence excluded during the mitigation hearing.[548] Since the trial court proceeds from the point of the error on remand,[549] the supreme court reasoned that the defendant's additional mitigating evidence should not have been considered. In dissent, Justice Wright recognized that *Lockett*'s directives do not disappear at resentencing.[550] The Federal Constitution requires more than simply a technical rewrite of the trial court's sentencing opinion. Nevertheless, there was a glimmer of hope in *Davis*. The court noted that its consideration of this issue might have been different if the mitigation the defendant attempted to present at resentencing was available, but not presented, at the time of the original sentencing hearing.[551]

Confronted squarely with the question it reserved in a footnote of *Davis*,[552] the court extinguished that glimmer in *State v. Chinn*.[553] Chinn's death sentence was vacated and his case remanded to the trial court for errors that occurred after the jury's sentencing recommendation.[554] Chinn attempted to present additional mitigation, making the same arguments under *Lockett* and *Skipper* as in *Davis*. Unlike *Davis*, however, the mitigation that Chinn attempted to present was available, but not presented, at the time of his original mitigation hearing.[555] Without even a passing reference to the footnote in *Davis*, the court held that the trial court appropriately refused to consider Chinn's mitigation; it made no difference that the mitigation evidence could have been presented at the time of Chinn's original sentencing hearing.[556]

We believe that *Davis* and *Chinn* are contrary to *Lockett* and *Skipper*. Thus, the defense practitioner should proffer any

new mitigation in reliance on *Lockett* and *Skipper* on remand for resentencing. If the defendant is resentenced to death and the trial court follows *Davis*, appellate counsel can raise this as a settled issue under *State v. Poindexter*.[557] As Justice Wright recognized in *Davis*, the sentencer is required to consider *all* mitigation in a capital sentencing hearing.[558]

8. *The Supreme Court of Ohio Places Too High a Burden on the Defendant to Show Need Under* Ake v. Oklahoma *and* State v. Mason

As previously discussed,[559] the Supreme Court of Ohio has broadly interpreted *Ake v. Oklahoma*.[560] The capital defendant in Ohio is entitled to expert assistance in broad-ranging areas of expertise.[561] The high burden placed on the defendant to show need, however, hinders the capital defendant's chances of receiving the necessary expert assistance.

In *State v. Campbell*,[562] the defendant requested that a chest CT be performed based upon a medical report, which indicated that there was a mass on his lung and that a "malignant process [could not] be excluded."[563] In reviewing this issue, the Supreme Court of Ohio recognized that cancer would be a mitigating factor.[564] The court rejected Campbell's claim, however, because it found that he had not presented anything to indicate that such evidence would aid his defense or that his physical health would be a "critical issue" at sentencing.[565] Review of *Campbell* demonstrates that the court set an insurmountable burden for the capital defendant to meet.

First, the evidence Campbell sought to develop would have been extremely important for sentencing purposes. He attacked a sheriff's deputy, escaped from jail, and then kidnapped and killed a young man. Given these facts, "counsel could reasonably fear that future dangerousness would be on the jurors' minds."[566] Evidence of cancer, which would demonstrate a shortened life expectancy and deteriorating physical health, would have alleviated fears of future dangerousness. Campbell's physical health was an essential component of the mitigation defense that needed to be fully investigated.

Campbell's request for expert assistance was not a fishing expedition in search of all conceivable, but unknown, mitigation. He presented the report of a disinterested physician indicating that he might suffer from cancer based on the presence of a mass on his lung. Absent additional medical testing, Campbell could not determine if he suffered from cancer. To expect more from an indigent lay person is unreasonable.

Despite the high burden the Supreme Court of Ohio placed upon the defendant in *Campbell*, the defense practitioner should continue to request, both at the trial and sentencing phases, expert assistance that will aid the client. Counsel must object to any denials of assistance and proffer what assistance is needed, how it will aid the defense, and the prejudice that will result to the defendant if such assistance is denied.

C. *Jury Participation*

1. *A Defendant's Jury Waiver May Need Be Knowing, Voluntary, and Intelligent*

The valid waiver of a constitutional right must be voluntary, knowing, and intelligent.[567] Moreover, the act of waiver must be done with "sufficient awareness of the relevant circumstances and likely consequences."[568] For a criminal defendant to waive a fundamental right, the defendant must be apprised of the "relevant circumstances and likely consequences" of that waiver in order to determine if such waiver is freely and intelligently made.[569]

In *State v. Jells*,[570] the Supreme Court of Ohio inexplicably failed to require that a capital defendant's waiver of his right to a jury trial be knowing, intelligent, and voluntary.[571] The trial court's colloquy that was prior to accepting Jells's jury waiver consisted of two questions. First, was Jells waiving his right to a jury of his own free will?[572] Second, had anyone forced Jells into waiving his right to a jury?[573] With both questions answered to the court's satisfaction and a signed jury waiver, the trial court accepted the defendant's jury waiver.[574] On appeal, Jells argued that the court's insufficient inquiry rendered his jury waiver insufficient. In rejecting Jells's argument without even a passing reference to the Federal or Ohio Constitutions, the Supreme Court of Ohio announced that it does not require that the defendant be questioned to assess "whether he or she is fully apprised of the right to a jury trial."[575] *Jells* holds that the waiver of the fundamental right to a jury trial can occur regardless of whether such a waiver is knowing, intelligent, and voluntary.

The *Jells* decision is plainly at odds with the requirements of the Federal Constitution.[576] However, the analysis employed by the court in *State v. Baston*[577] is in line with the requirements of the Federal Constitution. The court identified the appropriate standard for assessing a valid waiver of a fundamental right. The court then detailed the extensive colloquy that was conducted, which included asking defense counsel if they discussed the differences between a jury trial and a panel trial,

explaining the right to a jury trial comprised of twelve persons, the unanimity requirement, and the sentencing recommendation.[578] The trial court also informed Baston that if he waived that right, he would be tried before a panel of three judges and that the panel had to be unanimous on any sentence it would impose.[579]

We first want to emphasize that a jury should be waived only in the rarest of circumstances. Although both the jury and the panel need to be unanimous in a death penalty recommendation,[580] the defense practitioner's odds at finding a person to vote for life are better with a pool of twelve rather than three persons. Beyond sheer numbers, proceeding with a panel limits the issues that can be raised on appeal because judges are "presumed to have considered only relevant, competent and admissible evidence in its deliberations."[581] We believe this is a false assumption,[582] as judges are only human and can be affected by prejudicial conduct or evidence. Further, judges are elected officials and thus may be subject to pressures that are not felt by the layperson who sits on a jury.[583]

In the wake of *Jells* and *Baston*, the requirements for a valid jury trial waiver in Ohio are unclear. Although *Jells* is technically still good law, we believe the court recognized in *Baston* that the *Jells* procedure does not pass constitutional muster. Should a jury waiver be necessary, the defense practitioner must ensure that this fundamental right is not waived unless the defendant makes a knowing, intelligent, and voluntary decision to do so.

2. *Capital Juries Do Not Have To Be Both Life and Death Qualified by the Trial Court at Voir Dire*

In Ohio, the ultimate responsibility is on the trial court to "examine . . . prospective jurors . . . as to their qualifications to serve as fair and impartial jurors."[584] In *State v. Stojetz*,[585] the appellant argued that the trial court's conduct at voir dire failed to satisfy such a requirement and violated the Due Process and Equal Protection Clauses. The trial court sua sponte death-qualified all prospective jurors. Stojetz argued on appeal that this action then required the court to sua sponte life-qualify all prospective jurors as well.[586] Relying on *Morgan v. Illinois*,[587] the Supreme Court of Ohio rejected Stojetz's arguments. *Morgan* requires such inquiry only when the defense requests it¾a request Stojetz's trial counsel did not make.[588] Additionally, the court noted that the voir dire of the two jurors that served without being life-qualified demonstrated that they were not automatic death penalty jurors.[589]

The defense practitioner should request that the trial court life-qualify the jury at voir dire pursuant to *Morgan*. If the trial court refuses this request, counsel should object. Additionally, the supreme court's opinion failed to address Stojetz's Due Process and Equal Protection Clause challenges. Thus, we urge defense practitioners to continue to raise these arguments. First, the Due Process Clause does not permit state court proceedings that provide an unfair advantage to the prosecution.[590] Both the accused and the accuser are entitled to justice.[591] Consequently, there must be an equitable balance maintained between the State and the defendant.[592] Due process also requires that state-created procedures be administered in a meaningful manner.[593] We believe a strong due process argument can be made that, when the trial court sua sponte ensures that a juror can be fair to the prosecution by ensuring that the juror can impose the death penalty, such action obligates the trial court to similarly ensure that the juror can be fair to the defendant by assuring that the juror can also impose a life sentence.

Second, the Equal Protection Clause prohibits state action that impinges on fundamental rights[594] and is violated when seemingly neutral legislation is applied in an unequal and oppressive manner.[595] Section 2945.27 of the Ohio Revised Code places upon the trial court the obligation to examine prospective jurors for fairness and impartiality.[596] In the capital context, an impartial and indifferent juror is a juror capable of considering both life and death sentencing options.[597] By only questioning jurors with respect to their ability to impose the death penalty, the trial court unequally applies neutral legislation in violation of the Equal Protection Clause. In *Harris v. Alabama*,[598] the United States Supreme Court noted that the appellant failed to raise an equal protection claim in his arguments respecting the state courts' failure to treat advisory verdicts uniformly.[599] Thus, a challenge under the Equal Protection Clause could ripen in the proper case.

3. *A Capital Defendant Need Not Be Permitted to Question the Jury During Voir Dire on Specific Mitigating Factors*

An adequate voir dire assists in assuring the criminal defendant's right to an impartial jury.[600] Its function is critical in

that regard.[601] Although the Federal Constitution might not "dictate a catechism for voir dire," the opportunity afforded must permit the defendant to "identify unqualified jurors."[602]

For capital trial counsel, the goal at voir dire is often two-fold. First, counsel seeks jurors who will hold the prosecution to its burden of proving the defendant's guilt on every element of the charge beyond a reasonable doubt.[603] Second, counsel seeks jurors who are willing to consider the mitigating evidence and who are capable of imposing a life sentence. Nevertheless, "weighing aggravating circumstances against mitigating factors is a complex process."[604] Discovering jurors that meet the second criteria can thus be quite difficult, particularly if the court limits counsel's inquiry into the jurors' capacity to consider potential mitigating factors. Specifically, if the court precludes counsel from explaining mitigation and potential mitigating factors, jurors cannot accurately indicate if they can properly weigh and consider that evidence during the mitigation phase.

In *State v. Lundgren*,[605] for example, counsel sought to question prospective jurors as to whether they "would consider and give weight" to the statutorily mandated mitigating factors.[606] The court did not permit this line of questioning, but permitted counsel to ask in general if the prospective jurors "would consider mitigating factors and evidence as instructed."[607] We believe it was correct for the court to preclude counsel from asking the jurors if they could "give weight" to a mitigating factor, which asks the jury to prejudge an issue and is a different inquiry from whether to "consider and weigh" mitigation. However, the question permitted by the trial court failed to give counsel any indication as to whether a prospective juror would consider and weigh the mitigating factors relevant to the defendant.

On appeal, the defendant argued that the trial court's unfair restrictions on voir dire prevented him from discovering biased jurors and effectively exercising peremptory challenges.[608] The Supreme Court of Ohio rejected the challenge, relying on the discretion afforded to trial courts at voir dire.[609] Further, the court indicated that a juror could not respond to the questions counsel sought to ask, which was whether the juror could consider and weigh a specific mitigating factor without hearing all of the evidence and receiving instructions of law.[610] Moreover, evidence relating to the defendant's history, character, and background "need be given little or no weight against the aggravating circumstances" if the jury does not find such evidence to be mitigating.[611]

The court found additional support for its *Lundgren* decision when it rejected the appellant's arguments in *State v. Wilson*.[612] Wilson argued that the trial court's refusal to allow him to individually question prospective jurors with regard to their ability to consider the statutory mitigating factors, as well as fourteen additional non-statutory mitigating factors, denied him due process.[613] Citing to *Mu'Min v. Virginia*,[614] the court noted that trial courts are to be given "great latitude in deciding what questions should be asked on voir dire."[615] If the United States Supreme Court saw no reason to require that a trial court individually question jurors during voir dire on the content of exposure to pretrial publicity,[616] then certainly the Constitution did not require Ohio trial courts to conduct voir dire on specific mitigating factors.

Thus, there is no obligation on Ohio trial courts to permit counsel to question jurors during voir dire on specific mitigating factors. However, the court failed to address whether the issue would be resolved differently if it became apparent that general questions completely confused prospective jurors about their consideration of mitigating factors and evidence. The Supreme Court of Ohio answered in the negative in *State v. Jones*.[617] Regardless of juror confusion, trial courts are not obligated to discuss, or to permit counsel to discuss, specific mitigating factors during voir dire.[618]

Lundgren, *Wilson*, and *Jones* do not foreclose voir dire on individual mitigating factors at trial. Although the Supreme Court of Ohio refused to require trial courts to include such questioning during voir dire,[619] the court did not preclude the inquiry. As a result, the defense practitioner may request such questioning at his or her discretion.[620]

A strong point in the defendant's favor is that the prosecution will often spend a significant amount of time during voir dire discussing aggravating circumstances. The Due Process Clause does not permit state court proceedings that provide an unfair advantage to the prosecution.[621] Moreover, the Equal Protection Clause prohibits the application of neutral legislation in an unequal and oppressive manner.[622] Thus, to permit the prosecution to ensure that jurors are willing to consider and weigh case-specific aggravating circumstances while denying the defendant the same opportunity is to deny the defendant his rights to due process and equal protection.

If the court will not permit questioning on mitigating factors, the defense practitioner should let the jurors indicate what mitigation they will consider. For example, rather than asking the jurors if they will consider and weigh the defendant's alcohol dependence at sentencing, the defense practitioner should ask the jurors what information they believe would be

important to know about the defendant and his or her life before the jury decides what sentence is appropriate. This will give insight into how the jurors will weigh and consider mitigating evidence. There is an added benefit to this type of open-ended questioning. It is not unusual for a juror to respond that he or she would want to know if the killing was the result of self-defense. Of course, the defendant's case would not proceed to the mitigation phase if the jury determined that he or she acted in self-defense. Thus, this reply provides an opportunity to explain what is not mitigation. Additionally, if the only mitigating evidence a prospective juror will consider is a complete defense to the crime, then the juror is an automatic death penalty juror that should be removed for cause.[623]

Finally, the defense practitioner should be alert to any confusion among prospective jurors. If the questions posed only serve to leave the jurors befuddled as to what their task will be at the mitigation phase, then the defense practitioner should make efforts to clarify the issues. If the court precludes such clarification, counsel should ensure that the record is clear that the juror is confused and that the court will not permit clarification of the issues for the juror.

4. *The Supreme Court of Ohio Does Not Require Courts to Adhere to Section 2945.25*

As previously discussed,[624] section 2945.25 of the Ohio Revised Code provides a benefit to the defendant during jury selection by making it more difficult to remove a death-scrupled juror than under the *Wainwright v. Witt*[625] standard. However, capital defendants do not receive the benefit of section 2945.25. Ignoring this section, the Supreme Court of Ohio has repeatedly applied the less cumbersome *Witt* standard.[626] In *State v. Treesh*,[627] the court identified section 2945.25 as the correct standard to evaluate the removal of a juror. Several months later, however, the court reverted back to *Witt* as the appropriate standard for reviewing errors arising from jurors' opinions on the death penalty.[628]

Once a state confers "procedural protections of liberty interests that extend beyond those minimally required by the Constitution of the United States," the Constitution's minimal requirements are no longer controlling.[629] The defense practitioner must ensure that jurors are excused only if they satisfy the criteria found in section 2945.25. Additionally, a capital defendant has a liberty interest in the proper application of a state's capital sentencing scheme,[630] which is protected by the Due Process Clause. Thus, the defense practitioner should assert any deviation from the statutory mandate as a due process violation.

D. *Appellate Review*

1. *Proportionality Review in Ohio Is Meaningless*

As a traditional concept, "proportionality" review is an "abstract evaluation of the appropriateness of a sentence for a particular crime."[631] In the death penalty context, the proportionality inquiry is slightly different. Such review assumes that the death penalty "is not disproportionate to the crime in the traditional sense."[632] Rather, the review asks whether death is unacceptable in a given case because it is "disproportionate to the punishment imposed on others convicted of the same crime."[633] Numerous states provide for such review, including Ohio; however, such review is not required by either the Eighth or Fourteenth Amendments to the Federal Constitution.[634]

Incorporation of proportionality review into capital sentencing schemes arose as a response to the arbitrariness found by the United States Supreme Court in *Furman v. Georgia*.[635] There was "no meaningful basis for distinguishing the few cases in which [death was] imposed from the many cases in which it [was] not."[636] Ohio provides for proportionality review pursuant to section 2929.05(A) of the Ohio Revised Code, which states that the reviewing court must assess "whether the sentence [of death] is excessive or disproportionate to the penalty imposed in similar cases."[637]

The Supreme Court of Ohio set out the requirements of Ohio's proportionality review in *State v. Steffen*.[638] The court used *Steffen* as a vehicle to limit proportionality review to only the reviewing court's own cases in which death was imposed.[639] This can be particularly detrimental to the capital defendant whose case is reviewed by the court of appeals because many of those courts have reviewed only a minute number of capital cases and, therefore, the comparison universe is virtually nonexistent.

Beyond the limited universe of cases considered, the court has further weakened its statutorily mandated proportionality review. The court has reduced its review to the simple identification of other death penalty cases where the same aggravating circumstances were present and the statement that death in the present case was not disproportionate. Consequently, *Steffen* ensures that there is no meaningful proportionality review in Ohio.

Ohio is one of only four states that limit proportionality review to a universe of cases in which death was imposed.[640] The Supreme Court of Ohio selected this as the appropriate universe for two express reasons. First, only death penalty cases are considered because they are "qualitatively different" from other cases and, consequently, any comparison of other cases would be useless.[641] Second, review is limited to only those cases passed upon by the reviewing court because a court lacks familiarity with the circumstances of cases that it has not previously reviewed.[642]

The court's reasoning, however, is not logical. First, the plain language of the Ohio Revised Code suggests that the General Assembly intended a much larger pool for comparison. Pursuant to section 2929.03(F) of the Revised Code, the trial

court must draft an opinion when sentencing the capital defendant to a life sentence.[643] Thus, the General Assembly must have included this requirement for the sole reason of ensuring a comparison to other cases.

Second, a capital aggravated murder case is not qualitatively different from every other aggravated murder case. The crime of aggravated murder is the same.[644] Moreover, the facts and circumstances can be very similar.[645] This would be markedly true for the capital aggravated murder conviction in which the defendant is sentenced to life rather than death.

Third, reviewing courts can easily achieve the necessary familiarity with similar cases. There is no need to limit review to only those death penalty cases that the appellate court has previously evaluated. Law clerks, paralegals, staff attorneys, master commissioners, computer assistants, and court administrators "can eliminate the need to unduly limit the comparison pool."[646]

The restrictive interpretation of section 2929.05(A) excludes many aggravated murder cases that are both similar and relevant to the proportionality of the capital defendant's sentence. The review required by the court fails to answer the real question that proportionality review is meant to answer. In Ohio, we do not know if the "case under review [can] be meaningfully distinguished from the many similar cases that resulted in sentences less than death."[647]

If there were any doubt that the proportionality review in Ohio is meaningless, the actual practice of review in the Supreme Court of Ohio removes it. The court often reviews proportionality by rote. Cases in which death was previously imposed are simply cited as support for the court's finding that death is neither excessive nor disproportionate. There is no real comparison of facts, circumstances, aggravating circumstances, or mitigating factors.

Some more notable examples include *State v. Goodwin*,[648] *State v. Stojetz*,[649] *State v. Benge*,[650] and *State v. Spivey*.[651] In *Goodwin*, the defendant was convicted of two counts of aggravated murder for a single homicide.[652] Goodwin's indictment included the lone aggravating circumstance of aggravated robbery.[653] Included among the cases deemed "similar" by the Supreme Court of Ohio was *State v. Clemons*,[654] in which the defendant killed three people and was sentenced to death based on an entirely different aggravating circumstance;[655] *State v. Palmer*,[656] in which the defendant killed two people and was sentenced to death based on the felony murder aggravating circumstance present in *Goodwin*, but also on the two additional circumstances of prior murder and murder to escape detection;[657] and *State v. Wilson*,[658] in which the defendant was sentenced to death based on the presence of three aggravating circumstances, including murder to escape detection, murder during a kidnapping, and murder during arson—none of which were present in *Goodwin*.[659] Indeed, except for the fact that all four men were sentenced to death in Ohio, the similarities between these cases are nonexistent.

In *Stojetz*, the court's proportionality review was equally superficial. Stojetz was convicted of killing an inmate while incarcerated in an Ohio prison.[660] Stojetz faced one aggravating circumstance of murdering while a prisoner.[661] At mitigation, evidence was presented that Stojetz did not have a history of violent offenses, that he had a troubled childhood, that he suffered from post-traumatic stress disorder and a paranoid schizoid personality, that the victim threatened Stojetz, and that he felt remorse and sorrow.[662] The court cited *State v. Carter*[663] as a "similar" case despite the fact that Carter faced an additional aggravating circumstance for having committed a prior murder and the fact that Carter failed to present any mitigation beyond his own unsworn statement.[664] The court also cited *State v. Zuern*[665] despite the fact that Zuern killed a law enforcement agent and faced two additional aggravating circumstances for killing a peace officer.[666] Moreover, Zuern provided almost no mitigating factors at his sentencing hearing.[667] Thus, the only similarity between *Stojetz*, *Zuern*, and *Carter* is that the killings occurred in a penal institution. Indeed, any capital defendant should receive more review of the facts and circumstances than that which is currently performed by the court pursuant to its proportionality review.

In *Benge*, moreover, the appellant identified and discussed twenty-three aggravated murder cases that were "similar" to the crime committed.[668] Utilizing the Bills of Particulars, Benge argued that his sentence of death was disproportionate to the sentences in other "similar" cases.[669] Benge was charged and convicted of aggravated murder for killing his girlfriend and of the aggravating circumstance of aggravated robbery for stealing her ATM card.[670] Evidence was presented at trial suggesting that Benge and the victim shared the ATM card and, more generally, their money.[671] Moreover, the victim had jewelry, a checkbook, and cash still in her possession when her body was found.[672] Thus, there was weak evidence of the aggravating circumstance. Additionally, Benge presented considerable mitigation, including the fact that he lacked a significant criminal history, he had a troubled family background, he was a loving father, he was a hard-worker, and his

violent act was out of character.[673] Benge also informed the court that his case was not originally capitally indicted.[674]

Benge then compared the facts in his case to numerous aggravated murders prosecuted in Butler County that did not result in a death sentence.[675] In *State v. Moore*,[676] for example, the defendant married the victim and convinced her to sell her mobile home for $12,000.[677] He then shot her in the head while she slept and absconded with her money.[678] In *State v. McIntosh*,[679] the defendant was convicted of strangling his girlfriend. In a death penalty case involving Bradford Gill, the defendant raped and killed a young girl and then assisted in the search and communicated with the family about the missing child.[680] In *State v. Fryman*,[681] the defendant lured the victim to his home, shot her in the head, and then mutilated her body on a satanic altar.[682] Each of these men received a life sentence for their crimes while Benge received death. Indeed, there was a meaningful basis to distinguish Benge's case from these other "similar" crimes: Benge's crime was far less heinous, and yet he was sentenced to death. Nevertheless, the court failed to address Benge's arguments when it assessed proportionality.[683]

Spivey may be the most telling example of the Supreme Court of Ohio's perfunctory proportionality analysis. Without citation to a single case and without even a half-hearted semblance of comparison, the court simply proclaimed that it had undertaken a review of proportionality and determined that Spivey's sentence of death was not excessive or disproportionate.[684] As *Spivey*, *Benge*, *Goodwin*, and *Stojetz* demonstrate, the statutorily mandated proportionality review has become a meaningless endeavor.

Section 2929.05(A) of the Ohio Revised Code directs the sentencer to compare the penalty to "similar cases." We believe this pool should logically include all aggravated murders consisting of, at a minimum, those cases in which the defendant received a life sentence. On appeal, the defense practitioner should include in his or her arguments on proportionality a discussion of any similar cases in which the defendant did not receive death. Absent such comparison, courts cannot truly assess whether death is proportionate in the defendant's case. Additionally, counsel should include a constitutional challenge to the statute, as interpreted by the Supreme Court of Ohio and applied in the defendant's case, because the defendant has a due process liberty interest in the proper application of a state's capital sentencing scheme.[685]

Appellate counsel can be greatly aided in their efforts respecting proportionality review by trial counsel. Trial counsel should present or proffer expert testimony with respect to the proportionality of the death penalty in the defendant's case. Counsel should attempt to call the defendant's co-defendants or co-conspirators as witnesses during the mitigation phase if they were not sentenced to death. This is legitimate mitigating evidence that can be used to make a proportionality argument.[686]

Attacking the proportionality of the defendant's sentence and the manner in which the Supreme Court of Ohio will conduct that review is not a fruitless endeavor. Ohio is one of only four states to limit its universe of cases to only those cases in which the death penalty was imposed. Moreover, Ohio further limits the universe by directing the reviewing court to consider only those cases it has previously reviewed, which can create a very limited pool for comparison at the court of appeals level because some counties impose an extremely small number of death sentences. These restrictions are illogical, particularly when consideration is given to section 2929.03(F) of the Ohio Revised Code.[687]

Requiring the trial court to write an opinion when it imposes a life sentence strongly suggests that such data is to be considered during the appellate proportionality review. The principal theme of Justice Pfeifer's dissent in *State v. Murphy*[688] was his disagreement with the present manner in which the Supreme Court of Ohio conducts its proportionality review. To that end, Justice Pfeifer stated that "[w]hen 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."[689]

2. *Appellate Reweighing Is Used as a Cure-All for Penalty Phase Error*

In *Clemons v. Mississippi*,[690] the United States Supreme Court held that a state appellate court may use harmless error analysis or reweighing to correct constitutional error that results when the capital sentencer relies on an invalid aggravating circumstance. One of the two aggravating circumstances considered by the jury in *Clemons* at sentencing was held to be invalid, but rather than vacating his death sentence, the state court independently reweighed the evidence and affirmed the death sentence.[691] The question before the Court was simply whether an appellate court can reweigh the aggravating circumstances and mitigating factors when one aggravating circumstance had been invalidated. The Court approved the use of appellate reweighing where one of multiple aggravating circumstances was invalidated.

Several years ago in *State v. Davis*,[692] the Supreme Court of Ohio refused to use appellate independent review as a "cure all."[693] Because the three-judge panel that sentenced Davis considered non-statutory aggravating circumstances, the court could not know if, after considering the proper factors, the panel would arrive at the same sentence.[694] Since *Davis*, however, the Supreme Court of Ohio has used appellate reweighing, or independent review, to cure numerous errors. Independent review, according to the court, can cure everything from instructional errors to the exclusion of mitigating evidence.[695] In fact, the *Jones* court held that it can cure *any* sentencing phase error with its independent review.[696]

However, such far-reaching use of appellate reweighing to cure error is improper. Instructional errors, for example, cannot be reweighed. Rather, *Boyde v. California*[697] requires that the appellate court address "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."[698] Further, *Clemons* does not authorize a state appellate court to reweigh the constitutional error that results under *Lockett* and its progeny when mitigation is excluded from the sentencer's consideration.[699] The Supreme Court of Ohio has taken its independent review well beyond the parameters of *Clemons*.

Contrary to the court's assertions, we do not believe that its independent review can "cure" every sentencing phase error. *Clemons* only spoke to reweighing after one aggravating circumstance was invalidated. The defense practitioner must confront the overuse of appellate reweighing head-on. Only if the court reweighs an invalid aggravating circumstance should this process go unaddressed. The defense practitioner should identify to the court those sentencing phase errors that cannot be reweighed. Counsel should include arguments that capital sentencing proceedings are subject to the Due Process Clause.[700] Counsel should also identify the client's liberty interest in having both the jury and the judge make findings of fact relative to the appropriate sentence.[701] If the court proceeds to reweigh an error that should not be reweighed, the defense practitioner should object to this in a motion to reconsider.

3. *The Court Inconsistently Applies Retroactivity Rules*

In *State v. Cowans*,[702] the defendant argued that the Supreme Court of Ohio should vacate his death sentence because the trial court did not comply with the procedural requirements for the waiver of mitigation set out by the court in *State v. Ashworth*.[703] The court, however, rejected Cowans's arguments and announced that the procedural requirements of *Ashworth* were only to be applied prospectively.[704] Thus, Cowans would not receive the benefit of those procedural rules.

The court's decision broke with constitutional precedent. Generally, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."[705] Thus, a criminal defendant should receive the benefit of any procedural change that occurs prior to his or her conviction becoming final. The definition of "final" is significant for *Cowans*. A conviction is not final until a defendant is convicted, he or she exhausts his or her direct appeal, and the time for requesting a petition for certiorari has passed.[706] Although Cowans's trial occurred prior to the *Ashworth* decision, Cowans's appeal was pending at the time *Ashworth* was decided. As a result, Cowans's conviction was not final and he should have received the benefit of *Ashworth*'s procedural changes.[707]

When a change in law inures to the capital defendant's detriment, however, the Supreme Court of Ohio has not hesitated to retroactively apply that change. In *State v. McGuire*,[708] for example, the court removed residual doubt as a non-statutory mitigating factor under Ohio law.[709] Subsequently, the court has repeatedly held that *McGuire* is to be retroactively applied, despite the fact that residual doubt was a valid mitigating factor at the time the defendants were convicted and sentenced.[710]

Thus far we have suggested ways to address the retroactive application of *McGuire*.[711] Although changes made by the Anti-Terrorism and Effective Death Penalty Act (AEDPA) question the continued vitality of *Teague v. Lane*,[712] the *Teague* maxim that issues decided while a defendant's appeal is pending apply to his or her case on appeal remains a well-recognized principle of appellate practice. The defense practitioner should always argue that the defendant should receive the benefit of a change in the law that occurs during the pendency of his or her appeal.

E. *Collateral Review*

1. *Ohio's Post-Conviction Process Is Futile*

In *Case v. Nebraska*,[713] Justice Brennan described the essentials of a state post-conviction proceeding:

> The procedure should be swift and simple and easily invoked. It should be sufficiently comprehensive to embrace all federal constitutional claims. In light of *Fay v. Noia*, it should eschew rigid and technical doctrines of forfeiture, waiver, or default. It should provide for full fact hearings to resolve disputed factual issues, and for compilation of a record to enable federal courts to determine the sufficiency of those hearing. It should provide for decisions supported by opinions, or fact findings and conclusions of law, which disclose the grounds of decision and the resolution of disputed facts. Provision of counsel to represent prisoners, as in § 4 of the Nebraska Act, would enhance the probability of effective presentation and a proper disposition of prisoners' claims.[714]

Additionally, the plaintiff must have a reasonable opportunity to have the claim discovered, heard, and determined by the state court.[715]

Ohio's post-conviction procedures, found in section 2953.21 of the Ohio Revised Code, resemble these requirements in theory through the provision of numerous guarantees. Section 2953.21 provides for the filing of a petition requesting that the petitioner's judgment or sentence be set aside.[716] Unless the pleadings filed show that "the petitioner is not entitled to relief," the petitioner is to receive a hearing.[717] Moreover, a capital post-conviction petitioner is entitled to appointed counsel to assist him or her in preparing the petition.[718]

In practice, however, the process afforded to the capital post-conviction petitioner does not resemble Justice Brennan's ideals. A capital post-conviction petitioner is not entitled to an evidentiary hearing until he or she produces sufficient documentary evidence *dehors* the record to show that he or she is entitled to relief.[719] However, a capital post-conviction petitioner has no right to discovery until he or she establishes entitlement to an evidentiary hearing.[720] Access to the avenues required to develop materials necessary to secure the right to a hearing are not made available until that hearing is granted.

Without access to discovery, most avenues to secure information to support the capital post-conviction petition have been cut off. Public records requests were once a fruitful source of much needed extra-record materials.[721] In *State* ex. rel *Steckman v. Jackson*,[722] however, the Supreme Court of Ohio precluded the criminal appellant access to such materials. In denying this access, the court specifically noted that "[d]eath penalty cases now routinely include, at some point, [a section] 149.43 demand," which can add "up to two years to the delay in final determination of these cases."[723] Concerned with fairness to the prosecution, which does not have a "reciprocal right . . . to obtain additional discovery beyond [Criminal Rule] 16(C)," the court ruled that a criminal defendant may only use Criminal Rule 16 to secure discovery materials.[724] It is apparent that *Steckman* was aimed¾at least in part¾at limiting capital post-conviction petitioners' ability to pursue post-conviction relief.

The statute's promise of counsel is as hollow as its promise of a hearing. The capital post-conviction petitioner's statutory right to appointed post-conviction counsel is rarely honored. Moreover, even if counsel is appointed, the funding available is deplorable. In Cuyahoga County, a post-conviction counsel receives a maximum of $100.00 where there is no evidentiary hearing and a maximum of $170.00 where there is an evidentiary hearing.[725] In Franklin County, a post-conviction counsel receives a flat fee of $150.00, regardless of whether there is an evidentiary hearing.[726] In less populous Stark County, post-conviction counsel's fees are $300.00 without a hearing and $750.00 when a hearing is granted.[727] Even Stark County's significantly increased fees will not go far when counsel is to receive $30.00 an hour for out-of-court work and $40.00 an hour for work done in court.[728] If counsel is appointed, he or she will be paid for only minimal work on a capital post-conviction case. This puts counsel in an ethical quandary because their financial interests are pitted against the client's interests. If counsel does the necessary work, he or she will not be paid. Alternatively, if counsel does not do the work, his or her client's constitutional rights will be forfeited.

The implications of Ohio's post-conviction process can be easily assessed by the progress of capital post-conviction cases in Ohio's courts. As of April 2000, 219 capital post-conviction petitions were filed. Relief has only been granted one time.[729] Thus, there is less than a one percent reversal rate. Moreover, post-conviction petitioners have submitted 120 Memorandums in Support of Jurisdiction to the Supreme Court of Ohio. The court has yet to grant review in a capital post-conviction case.[730]

The outlook for success on a capital post-conviction petition is dismal. Moreover, the capital defendant has no recourse against ineffective post-conviction counsel under Ohio's statute[731] or the Federal Constitution.[732] Post-conviction appeals

must be done right the first time or the client will face a losing battle. To that end, the defense practitioner should investigate and present all claims available when filing the petition. Furthermore, the Ohio Public Defender has centralized available resources, which capital post-conviction counsel should take advantage of when needed. The defense practitioner should also file motions for discovery, funds for experts, and a request for an evidentiary hearing to preserve avenues for fact development in federal court.[733] Finally, the defense practitioner should continue to assert the futility of Ohio's post-conviction procedures. Indeed, the post-conviction process in Ohio clearly does not function in an equitable manner and, as evidence to support this continues to mount, appellate courts will have to act to rectify the problems.

V. CONCLUSION

The defense practitioner representing a capital client is in a truly unique position. The client entrusts to the practitioner his or her very life. By accepting that responsibility, the defense practitioner owes exceptional vigilance to the capital client. We believe the client¾and society as a whole¾are best served by defense practitioners that are informed, skilled, and ardent in their representation of the capital client.

The defense practitioner should recognize "the good" in Ohio's death penalty framework. In addition, the practitioner should know what statutory provisions assist the client and utilize them. Moreover, the defense practitioner should be familiar with "the bad" and "the ugly." Through awareness of the statutory obstacles at trial and on appeal, the practitioner can better represent the capital client. The gravity and finality of the death penalty requires exceptional attention to detail. Nevertheless, knowing "the good," "the bad," and "the ugly" is just the beginning.

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[1] Spaziano v. Florida, 468 U.S. 447, 464 (1984); Jurek v. Texas, 428 U.S. 262, 270–72 (1976) (plurality opinion); Gregg v. Georgia, 428 U.S. 153, 195 (1976) (plurality opinion).

[2] 468 U.S. 447 (1984).

[3] *Id.* at 464.

[4] *Gregg*, 428 U.S. at 189. In *Woodson v. North Carolina*, the Court held that the sentencer's discretion may not be channeled by imposing the death penalty automatically upon a guilty verdict of capital murder. 428 U.S. 280, 304–05 (1976) (plurality opinion).

[5] *Woodson*, 428 U.S. at 304.

[6] Eddings v. Oklahoma, 455 U.S. 104, 110–11 (1982) (citation omitted); *see Spaziano*, 468 U.S. at 459–60 (citations omitted).

[7] California v. Ramos, 463 U.S. 992, 1000 (1983). In addition to constitutional limitations against "vague sentencing standards" and denial of individualized sentencing by preclusion of the sentencer's consideration of mitigating factors, the Court noted that a defendant has the right to "explain or deny" information used to impose the death penalty. *Id.* at 1000–01 (citing Gardner v. Florida, 430 U.S. 349 (1977) (plurality opinion)); Lockett v. Ohio, 438 U.S. 568, 604 (1978); *Woodson*, 428 U.S. at 302; *Gregg*, 428 U.S. at 195 n.46.

[8] *See* Tuilaepa v. California, 512 U.S. 967, 971–72 (1994).

[9] *Id.* at 972; *see* Zant v. Stephens, 462 U.S. 862, 875 (1983).

[10] *See Tuilaepa*, 512 U.S. at 973 (citing *Gregg*, 428 U.S. at 189).

[11] *Id.* (quoting Walton v. Arizona, 497 U.S. 639, 654 (1990)).

[12] Maynard v. Cartwright, 486 U.S. 356, 361–62 (1988) (discussing Furman v. Georgia, 408 U.S. 238 (1972) (per curiam)); *see Tuilaepa*, 512 U.S. at 973 (quoting Jurek v. Texas, 428 U.S. 262, 279 (1976) (White, J., concurring) (stating that an eligibility factor is "too vague" if it lacks a "common-sense core of meaning . . . that criminal juries should be capable of understanding")).

[13] 484 U.S. 231 (1988).

[14] *Id.* at 244–46.

[15] *Id.* at 246.

[16] *Id.*

[17] OHIO REV. CODE ANN. § 2903.01(A) (West 1997) (purposely and with prior calculation and design cause death); *id.* § 2903.01(B) (purposely cause death or unlawful termination of pregnancy while committing/attempting to commit or fleeing immediately after committing/attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, or escape); *id.* § 2903.01(C) (purposely cause death of victim under age thirteen at time of offense); *id.* § 2903.01(D) (purposely cause death while under detention or breaks detention); *id.* § 2903.01(E) (purposely cause death of law enforcement officer, offender knows or has reasonable cause to know victim is law enforcement officer, and victim engaged in duties at time of offense, or offender has specific purpose to kill law enforcement officer); *see id.* § 2929.02 (penalties for murder).

[18] An aggravating circumstance must be included in the indictment as part of the count alleging aggravated murder or as a specification attached to the count alleging aggravated murder. *Id.* § 2929.022. The Ohio Revised Code provides the aggravating circumstances in section 2929.04(A). *See, e.g.*, *id.* § 2929.04(A)(1) (assassination of president, person in line of succession to presidency, Ohio governor or lieutenant governor, president-elect or vice president-elect, Ohio governor-elect or lieutenant governor-elect, or candidate for any of those offices); *id.* § 2929.04(A)(2) (murder for hire); *id.* § 2929.04(A)(3) (murder to escape "detection, apprehension, trial, or punishment for another offense"); *id.* § 2929.04(A)(4) (offense committed while offender under detention as in section 2921.01; excludes detention in mental health facility unless offender was in mental health facility as result of charge, conviction, or guilty plea to violation of the Ohio Revised Code); *id.* § 2929.04(A)(5)

(purposeful murder or attempt to kill with purpose before offense at bar, or offense at bar involves purposeful killing or purposeful attempt to kill more than one victim); *id.* § 2929.04(A)(6) (victim was law enforcement officer, as defined in section 2911.01, offender had reasonable cause to know victim was law enforcement officer and victim was engaged in duties or offender had specific purpose to kill law enforcement officer); *id.* § 2929.04(A)(7) (offender was either principal offender or acted with prior calculation and design in causing death while committing/attempting to commit or fleeing immediately after committing/attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary); *id.* § 2929.04(A)(8) (victim was witness, purposely killed to prevent testimony and victim not killed during commission/attempt of offense that victim witnessed, or victim killed in retaliation for previous testimony); *id.* § 2929.04(A)(9) (victim under age thirteen at time of offense and offender is either principal offender or caused death with prior calculation and design).

[19] *See id.* §§ 2929.02, 2929.022, 2929.04(A).

[20] *See* Woodson v. North Carolina, 428 U.S. 280, 304–05 (1976) (plurality opinion).

[21] *See* Burger v. Kemp, 483 U.S. 776, 785 (1987). *But see* 28 U.S.C. § 2254(d)(1)–(2) (1994).

[22] *See, e.g.*, Beck v. Alabama, 447 U.S. 625, 646 (1980) (requiring instruction on lesser-included offense in capital cases).

[23] 492 U.S. 361 (1989).

[24] *Id.* at 369–77, 380 (1989) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

[25] CAL. PENAL CODE § 190.5 (West 1999); COLO. REV. STAT. § 16-11-103(1)(a) (2000); CONN. GEN. STAT. ANN. § 53a-46a(h) (West Supp. 2001); 720 ILL. COMP. STAT. ANN. 5/9-1(b) (West 1993); KAN. STAT. ANN. § 21-4622 (1995); MD. ANN. CODE art. 27, § 412(g) (1996); MONT. CODE ANN. § 45-5-102(2) (1999); NEB. REV. STAT. ANN. § 28-105.01 (Michie Supp. 2000); N.J. STAT. ANN. § 2C:11-3(g) (West 1995); N.M. STAT. ANN. § 31-18-14(A) (Michie 2000); N.Y. PENAL LAW § 60.06 (McKinney 1998) (reading in conjunction with section 125.27, which states that crimes subject to section 60.06 sentencing can only be committed by offenders over the age of eighteen); OHIO REV. CODE ANN. § 2929.02(A) (West 1997); OR. REV. STAT. § 161.620 (Supp. 1998); TENN. CODE ANN. § 37-1-134(1) (1996); State v. Furman, 858 P.2d 1092, 1102–03 (Wash. 1993); *see* 18 U.S.C. § 3591 (1994).

[26] OHIO REV. CODE ANN. § 2929.02 (West 1997).

[27] *Id.* § 2929.02.

[28] *Id.*; *see id.* § 2929.03(E) (providing penalties for defendants who were juveniles at the time of the offense).

[29] *Id.* § 2929.05(C).

[30] *Id.*

[31] *Id.*; *cf.* State v. Scott, 748 N.E.2d 11, 13 (Ohio 2001) (describing the "probable cause" standard in the context of a hearing on competence to be executed).

[32] OHIO REV. CODE ANN. § 2929.05(C) (West 1997).

[33] *See id.* Counsel handling a defendant's direct appeal could, of course, litigate an ancillary claim alleging the ineffective assistance of trial counsel who failed to raise the matter of age, assuming that the appellate record was adequate to support such a claim. *See* Strickland v. Washington, 466 U.S. 668, 701 (1984); State v. Ishmail, 423 N.E.2d 1068, 1070 (Ohio 1981).

[34] The defendant may not, however, relitigate the matter of age by motion under section 2929.05(C) of the Ohio Revised Code when a challenge to age was unsuccessfully made at trial.

[35] OHIO REV. CODE ANN. § 2929.05(C) (West 1997).

[36] *See* Patterson v. New York, 432 U.S. 197, 201 (1977).

[37] Tison v. Arizona, 481 U.S. 137, 147–50 (1987) (citing Enmund v. Florida, 458 U.S. 782, 786–98 (1982)). In *Enmund*, the Court held that the Eighth Amendment's prohibition against disproportionate and excessive punishments was infringed by the death sentence of a defendant who did not kill, attempt to kill, or intend to kill. 458 U.S. at 797–801 (citations omitted).

[38] 481 U.S. 137 (1987).

[39] *Id.* at 158.

[40] OHIO REV. CODE ANN. § 2903.01(B), (C), (D), (E) (West 1997); *see In re* Winship, 397 U.S. 358, 378 (1970).

[41] *Id.* § 2929.04(A)(3) (offense committed for purpose of escape); *id.* § 2929.04(A)(5) (offender convicted of prior purposeful murder/attempt); *id.* § 2929.04(A)(6) (specific purpose to kill law enforcement officer); *id.* § 2929.04(A)(8) (victim killed for purpose of preventing victim from testifying, or victim killed for purpose of retaliation for victim's testimony given); *id.* § 2929.04(A)(9) (purposely cause death of victim under age thirteen).

[42] *Id.* § 2903.01(A).

[43] *Id.* § 2929.04(A)(7) (felony murder); *id.* § 2929.04(A)(9) (victim under age thirteen at time of offense).

[44] State v. Penix, 513 N.E.2d 744, 746 (Ohio 1987) (holding principal offender and prior calculation and design are mutually exclusive statutory alternatives and defendant cannot be charged, convicted, and sentenced for both). *But see* State v. Moore, 689 N.E.2d 1, 17 (Ohio 1998) (holding no reversible error to charge defendant as either principal offender or with prior calculation and design, so long as defendant is convicted and sentenced on only one of the statutory alternatives).

[45] OHIO REV. CODE ANN. § 2923.03 (West 1997).

[46] *See* OHIO REV. CODE ANN. § 2929.04(A)(7), (9) (West 1997); State v. Taylor, 612 N.E.2d 316, 325 (Ohio 1993) (stating that the principal offender element applies only to a defendant who actually kills victim).

[47] OHIO REV. CODE ANN. § 2901.22(A) (West 1997) (emphasis added).

[48] *See* OHIO JURY INSTRUCTIONS § 409.01 cmt.

[49] State v. Wilson, 659 N.E.2d 292, 305 (Ohio 1996) (citing State v. Carter, 651 N.E.2d 965, 973–74 (Ohio 1995)).

[50] *See* Francis v. Franklin, 471 U.S. 307, 314–15 (1985); Sandstrom v. Montana, 442 U.S. 510, 515 (1979); *In re* Winship, 397 U.S. 358, 364 (1970).

[51] *See Francis*, 471 U.S. at 316; *see also Wilson*, 659 N.E.2d at 306 (finding mens rea element of kidnapping charge improperly shifted to defendant). *But see* Rose v. Clark, 478 U.S. 570, 582 (1986) (holding that burden shifting instructional errors are subject to harmless error analysis by reviewing court).

[52] *See* Coe v. Bell, 161 F.3d 320, 331–32 (6th Cir. 1998) (finding no error when a Tennessee jury instructed that it "may" infer malice for capital murder).

[53] State v. Stallings, 738 N.E.2d 159, 172–73 (Ohio 2000).

[54] OHIO REV. CODE ANN. § 2903.01(A) (West 1997); *see id.* § 2929.04(A)(7), (9).

[55] State v. Keenan, 689 N.E.2d 929, 950 (Ohio 1998) (Moyer, C.J., concurring in part and dissenting in part) (citing State v. Taylor, 676 N.E.2d 82, 88 (Ohio 1997)).

[56] *Id.* at 951 (Moyer, C.J., concurring in part and dissenting in part) (quoting State v. Cotton, 381 N.E.2d 190, 193 (Ohio 1978)).

[57] Tison v. Arizona, 481 U.S. 137, 150–51 (1987) ("[T]he Arizona Supreme Court attempted to reformulate 'intent to kill' as a species of foreseeability . . . . The Arizona Supreme Court's attempted reformulation of intent to kill amounts to little more than a restatement of the felony-murder rule itself."); State v. Getsy, 702 N.E.2d 866, 883 (Ohio 1998) (citing State v. Burchfield, 611 N.E.2d 819, 821 (Ohio 1993) (stating that a foreseeability instruction is improper in an aggravated murder case)).

[58] OHIO REV. CODE ANN. § 2923.03 (West 1997). A person found guilty of complicity of aggravated murder may be punished as if he or she was the principal offender. *Id.* § 2923.03(F).

[59] *Id.* § 2923.03(D).

[60] Neder v. United States, 527 U.S. 1, 16–17 (1999) (holding that the failure to instruct on an essential element may be harmless error where proof of uninstructed element is not contested). *Neder* was not a capital case and therefore it was not subject to the Eighth Amendment's imperative of heightened reliability due to the qualitative difference of the death penalty. *See* Woodson v. North Carolina, 428 U.S. 280, 304–05 (1976) (plurality opinion); *cf.* Simmons v. South Carolina, 512 U.S. 154, 172 (1994) (Souter, J., concurring) ("That same need for heightened reliability also mandates recognition of a capital defendant's right to require instructions on the meaning of the legal terms used to describe [sentencing procedures] . . . .").

[61] *See* State v. Chinn, 709 N.E.2d 1166, 1187 (Ohio 1999) (stating that the trial court should have defined "principal offender").

[62] *See supra* Part II.A.

[63] In *Lowenfield v. Phelps*, the United States Supreme Court held that states could establish death penalty eligibility by narrowly defining capital crimes at the culpability phase or by broadly defining capital crimes at the culpability phase and then narrowing eligibility by requiring proof of an aggravating circumstance at the penalty phase. 484 U.S. 231, 238 (1998). Since *Lowenfield*, the Court has not addressed the merits of Ohio's third method of establishing death eligibility. The Supreme Court of Ohio, however, has rejected Eighth Amendment challenges to Ohio's method of establishing death eligibility made on reliance of *Lowenfield*. State v. Henderson, 528 N.E.2d 1237, 1242–43 (Ohio 1988).

[64] 484 U.S. 231 (1998).

[65] *Id.* at 257–58 (Marshall, J., dissenting) (citing Caldwell v. Mississippi, 472 U.S. 320, 341 (1985)).

[66] *Cf.* Harris v. Alabama, 513 U.S. 504, 519–20 n.5 (1995) (Stevens, J., dissenting) (noting the pressures on elected judges to "profess their fealty to the death penalty" and death penalty issues generally are highly politicized).

[67] OHIO REV. CODE ANN. § 2929.03(D)(2), (3) (West 1997).

[68] A felony aggravated murder charge and a felony aggravating circumstance do not, however, have "a complete overlap" as was the case in *Lowenfield v. Phelps*, 484 U.S. 231, 258 (1998) (Marshall, J., dissenting). This is so because the felony aggravating circumstance includes the additional element of either "principal offender" or "prior calculation and design." *Id.* Moreover, only the "aggravated" versions of arson, robbery, and burglary are included in the felony murder aggravating circumstance. *Id. Compare* OHIO REV. CODE ANN. § 2929.04(A)(7) (West 1997), *with id.* § 2903.01(B).

[69] State v. Jenkins, 473 N.E.2d 264, 280 (Ohio 1984) (ruling homicide cannot be weighed as an aggravating circumstance).

[70] *See* Lockett v. Ohio, 438 U.S. 586, 604–05 (1978).

[71] If defense counsel is able to obtain a continuance, then it is crucial to have the jury instructed not to discuss the case, not to conduct any independent fact-finding, and to avoid media exposure about the case. Defense counsel should promptly request a hearing if he or she has grounds

to suspect that any juror has been exposed to extraneous contacts or information regarding the case during the continuance between the two phases of a capital trial. Remmer v. United States, 350 U.S. 377, 382 (1956). Of course, defense counsel should prepare for the penalty phase long before even the trial phase begins. The penalty phase investigation should never be delayed until a continuance between phases has been granted.

[72] OHIO REV. CODE ANN. § 2929.04(A)(5) (West 1997).

[73] *Id.* § 2929.022(A). The defendant may also elect to try the section 2929.04(A)(5) aggravating circumstance to a three-judge panel at the penalty phase if the defendant waives his or her right to a jury trial. *Id.*

[74] *Id.*; *see id.* § 2929.03(D)(2).

[75] *See* Gregg v. Georgia, 428 U.S. 153, 164–66 n.9 (1976) (plurality opinion) (upholding Georgia's scheme that allows the jury to find an aggravating circumstance based on the "prior record of conviction for a capital felony").

[76] State v. Erazo, 594 A.2d 232, 253 (N.J. 1991) (Handler, J., concurring in part and dissenting in part); *cf.* Ferrell v. State, 680 So. 2d 390, 391 (Fla. 1996) (noting that prior murder aggravator is "weighty").

[77] *Cf.* OHIO R. EVID. 404(B).

[78] *See* State v. Post, 513 N.E.2d 754, 759 (Ohio 1987).

[79] The defendant may not elect to try the mass murder element of the section 2929.04(A)(5) aggravating circumstance after the culpability phase.

[80] 643 N.E.2d 1098 (Ohio 1994).

[81] *Id.* at 1103–04.

[82] 486 U.S. 578 (1988).

[83] *Id.* at 585.

[84] *Id.*

[85] *Id.* at 590.

[86] *Id.* In *Johnson*, the claim was first raised on post-conviction instead of direct appeal. The state court found a procedural bar because the claim had not been raised on direct appeal. The Court found that the state's procedural bar was not regularly followed and therefore inadequate to preclude federal review. *Id.* at 580–83, 587.

[87] *See* OHIO REV. CODE ANN. § 2903.01(A) (West 1997) (purposefully and with prior calculation and design cause death or unlawful termination of pregnancy); *id.* § 2903.01(B) (cause death or unlawful termination of pregnancy while committing a felony; nine felonies listed as predicate to aggravated felony murder); *id.* § 2903.01(D) (under detention because of guilty verdict/plea or breaks detention); *id.* § 2903.01(E)(1)–(2) (purposely cause death of law enforcement officer when either victim engaged in duties or offender's specific purpose is to kill law enforcement officer).

[88] *Id.* § 2929.04(A)(5) (prior purposeful murder/attempt or multiple murder); *id.* § 2929.04(A)(6) (law enforcement officer engaged in duties or specific purpose to kill law enforcement officer); *id.* § 2929.04(A)(7) (felony murder offender either principal offender or committed offense with prior calculation and design); *id.* § 2929.04(A)(8) (victim kills to prevent testimony or in retaliation for testimony given); *id.* § 2929.04(A)(9) (victim under age thirteen; offender either principal offender or committed offense with prior calculation and design).

[89] 513 N.E.2d 744 (Ohio 1987).

[90] *Id.* at 747.

[91] *Id.* at 746.

[92] State v. Moore, 689 N.E.2d 1, 17 (Ohio 1998); *see* State v. Goodwin, 703 N.E.2d 1251, 1266 (Ohio 1999).

[93] *Moore*, 689 N.E.2d at 17; *cf.* State v. Chinn, 709 N.E.2d 1166, 1187 (1999) (holding that the failure to provide instructions for a unanimous verdict on felony murder alternatives is not plain error; the defendant did not request a unanimous finding instruction, alternatives were presented to the jury disjunctively, and the jury found the evidence supported only the "principal offender" element).

[94] *See* Freeman v. Lane, 962 F.2d 1252, 1259 (7th Cir. 1992) (finding that appellate counsel was ineffective for abandoning viable federal claims in state court proceedings).

[95] 501 U.S. 624 (1991) (plurality opinion).

[96] *Id.* at 627.

[97] *Id.* at 630.

[98] *See* OHIO REV. CODE ANN. § 2929.04(A)(7), (A)(9) (West 1997).

[99] *Compare id.* § 2903.01(B), *with id.* § 2903.02.

[100] *See Schad*, 501 U.S. at 630.

[101] 530 U.S. 466 (2000).

[102] *Id.* at 490.

[103] *Id.* at 497 (quoting Almendarez-Torres v. United States, 523 U.S. 224, 257 n.2 (1998) (Scalia, J., dissenting) (emphasis deleted)).

[104] *See* Esparza v. Anderson, No. 3:96-CV-7434 (N.D. Ohio Oct. 13, 2000).

[105] *See* State v. Jones, 744 N.E.2d 1163, 1178 (Ohio 2001) (holding that "another offense" committed by offender is essential element of section 2929.04(A)(3) aggravating circumstance); *see also In re* Winship, 397 U.S. 358, 362–63 (1970).

[106] OHIO REV. CODE ANN. § 2929.04(A)(5) (West 1997).

[107] In light of *Apprendi*, Ohio's procedure of determining the existence of aggravating circumstances at the culpability phase is indeed a benefit to the defendant. This is so because capital jurisprudence from the United States Supreme Court establishes that the Sixth Amendment right to a jury trial does not extend to penalty phase proceedings. *See infra* Part II.C. *Apprendi* does not "render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death." 530 U.S. at 496 (citing Walton v. Arizona, 497 U.S. 639, 647–49 (1990) (Stevens, J., dissenting)). *But see id.* at 538 (O'Connor, J., dissenting) ("If the Court does not intend to overrule *Walton*, one will be hard pressed to tell from the opinion it issues today . . . ."); Ring v. Arizona, 122 S. Ct. 865 (2002) (granting certiorari to re-examine the holding in *Walton*). Accordingly, a capital defendant in Ohio gains the benefit of the *Apprendi* rule regarding the right to a jury trial because fact-finding for death eligibility questions is made at the culpability phase when the Sixth Amendment right to a jury trial attaches.

[108] OHIO REV. CODE ANN. § 2929.04(A)(3) (West 1997).

[109] 744 N.E.2d 1178 (Ohio 2001).

[110] *Id.* at 1169.

[111] *Id.* at 1178.

[112] *Id.*

[113] *See, e.g.*, State v. Jenkins, 473 N.E.2d 264, 294–95 (Ohio 1984) (stating that duplicative felony and escape aggravating circumstances should merge).

[114] In such cases, however, the defense practitioner must ensure that the section 2929.04(A)(3) "escape" aggravating circumstance and any section 2929.04(A)(7) "felony murder" aggravating circumstance merge into each other before the start of the penalty phase. *See Jenkins*, 473 N.E.2d at 294–95 (requiring the merger of duplicative aggravating felony and escape aggravating circumstances).

[115] *See Jones*, 744 N.E.2d at 1186–87 (Cook, J., concurring).

[116] *See id.*

[117] *See* State v. Goodwin, 703 N.E.2d 1251, 1258–59 (Ohio 1999) (citing Clozza v. Murray, 913 F.2d 1092, 1099–00 (4th Cir. 1990) (holding that tactical concession may be reasonable attorney performance)).

[118] The jury may consider culpability phase evidence introduced at the penalty phase "that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing." OHIO REV. CODE ANN. § 2929.03(D)(1) (West 1997); *see infra* Part II.B.1.

[119] *See supra* Part II.A.5. The section 2929.04(A)(3) element of "another offense committed by the offender" does not fall into *Apprendi*'s exception of a fact of a prior conviction. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The Supreme Court of Ohio's disposition of this issue in *Jones* makes it clear that the state's proof is not limited to journal entries demonstrating proof of a prior conviction of the "other offense committed by the offender." *Jones*, 744 N.E.2d at 1178 (holding that the testimony of the other offense by defendant's cousin was sufficient to prove the element).

[120] *See* Tuilaepa v. California, 512 U.S. 967, 972 (1994).

[121] *See id.* at 974; Johnson v. Texas, 509 U.S. 350, 362 (1993); Zant v. Stephens, 462 U.S. 862, 890 (1983).

[122] Harris v. Alabama, 513 U.S. 504, 512 (1995) (quoting Franklin v. Lynaugh, 487 U.S. 164, 179 (1988)).

[123] Penry v. Lynaugh, 492 U.S. 302, 317–18 (1989); Skipper v. South Carolina, 476 U.S. 1, 8 (1986); Eddings v. Oklahoma, 455 U.S. 104, 113–14 (1982); Lockett v. Ohio, 438 U.S. 586, 604–05 (1978).

[124] *Tuilaepa*, 512 U.S. at 973–75; Espinosa v. Florida, 505 U.S. 1079, 1081 (1992) (per curiam); Sochor v. Florida, 504 U.S. 527, 538 (1992); Stringer v. Black, 503 U.S. 222, 228 (1992).

[125] *Skipper*, 476 U.S. at 5 n.1; *id.* at 9 (Powell, J., concurring); Gardner v. Florida, 430 U.S. 349, 362 (1977) (plurality opinion).

[126] Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion) (citation omitted).

[127] *Lockett*, 438 U.S. at 604. The court in *Lockett* held that the sentencer must consider all relevant mitigation "in all but the rarest kind of capital case." *Id.* Thus, the Court suggested¾albeit without deciding¾that a mandatory death sentence might be permissible in the case "when a prisoner—or escapee—under a life sentence is found guilty of murder." *Id.* at 604 n.11. In *Sumner v. Shuman*, however, the Court closed this loophole to the rule in *Lockett*. 483 U.S. 66, 81–82 (1987). *See* Johnson v. Texas, 509 U.S. 350, 367 (1993) (citing *Sumner*, 483 U.S. at 81–82).

[128] McKoy v. North Carolina, 494 U.S. 433, 442 (1990).

[129] *Johnson*, 509 U.S. at 368 (quoting Graham v. Collins, 506 U.S. 461, 475–76 (1993)).

[130] *Id.* at 373.

[131] 438 U.S. 586 (1978).

[132] *See* Tuilaepa v. California, 512 U.S. 967, 976–77 (1994) (holding that California's unitary list of weighing factors is not vague; the sentencer is allowed to consider "competing arguments" as to the statutory factor of "age"); *Johnson*, 509 U.S. at 373 (holding that under the Texas special issues, the defendant's youth could be mitigating or aggravating); Zant v. Stephens, 462 U.S. 862, 878–79 (1983) (concluding that Georgia's non-weighing scheme permits the jury to consider a myriad of factors once the death eligibility threshold is crossed by proof of an aggravating circumstance). A *Lockett* claim challenging an alleged preclusive jury instruction on mitigation is reviewed by the court to determine if there is a "reasonable likelihood" that the jury applied the instruction to prevent its consideration of mitigating evidence. Boyde v. California, 494 U.S. 370, 380 (1990). The Supreme Court does not limit its review of a *Lockett* claim to the language of the jury instructions provided on selection factors. It also takes into account the context of the entire sentencing proceedings in light of the jury instructions, including testimony of the mitigation witnesses and the arguments of counsel. *See* Buchanan v. Angelone, 522 U.S. 269, 279 (1998); *Johnson*, 509 U.S. at 368 (quoting *Boyde*, 494 U.S. at 381) (noting that the Court does not engage in "technical parsing" of jury instructions; rather, the review should be conducted with "commonsense understanding of the instructions in the light of all that has taken place at the trial"); *id.* at 368 (stating that even on "cold record" jurors "cannot be unmoved" by a father's testimony on the mitigating factor of his son's youth, and it "strains credulity to suppose [youth as mitigation was viewed as beyond the jury's effective reach]").

[133] *Compare* OHIO REV. CODE ANN. § 2929.04(A) (West 1997), *with id.* § 2929.04(B).

[134] *See* State v. Wogenstahl, 662 N.E.2d 311, 321 (Ohio 1996) (stating that "[a]ny . . . suggestion" by the prosecution that the nature and circumstances of the offense is anything other than mitigating factor is "wholly improper").

[135] The capital sentencer must of course consider all mitigating evidence regardless of what weight it deserves. *See Lockett*, 438 U.S. at 604.

[136] *See Johnson*, 509 U.S. at 362–63 (citing Jurek v. Texas, 428 U.S. 262, 270 (1976) (plurality opinion)).

[137] *But see infra* Part III.B.1.

[138] *See, e.g.*, Espinosa v. Florida, 505 U.S. 1079, 1081 (1992) (per curiam); Maynard v. Cartright, 486 U.S. 356, 358–59 (1988). Vague aggravating circumstances are also included in some states' death penalty schemes as eligibility factors. *See, e.g.*, Godfrey v. Georgia, 446 U.S. 420, 433 (1980).

[139] *See, e.g.*, Sochor v. Florida, 504 U.S. 527, 537 (1992); *Maynard*, 486 U.S. at 362.

[140] *Maynard*, 486 U.S. at 361–62; *see id.* at 364 ("To say that something is 'especially heinous' merely suggests that the individual jurors should determine that the murder is more than just 'heinous,' *whatever that means* . . . ." (emphasis added)).

[141] *See id.* at 364 (citation omitted).

[142] Tuilaepa v. California, 512 U.S. 967, 973 (1994) (quoting Jurek v. Texas, 428 U.S. 262, 279 (1976) (White, J., concurring)).

[143] *See* OHIO REV. CODE ANN. § 2929.04(A) (West 1997); *id.* § 2929.022.

[144] *See* Walton v. Arizona, 497 U.S. 639, 694–99 (1990) (Blackmun, J., dissenting).

[145] *See* OHIO REV. CODE ANN. § 2929.04(A) (West 1997).

[146] *See Jurek*, 428 U.S. at 275 (plurality opinion).

[147] 512 U.S. 154 (1994) (plurality opinion).

[148] *Id.* at 162–63 (plurality opinion) (citations omitted) (stating that future dangerousness is one of "many factors . . . that a jury may consider in fixing appropriate punishment").

[149] *Id.*

[150] *See* Shafer v. South Carolina, 121 S. Ct. 1263, 1270–71 (2001); O'Dell v. Netherland, 521 U.S. 151, 158–59 (1997) (noting that *Simmons* was controlled by Justice O'Connor's concurrence).

[151] OHIO REV. CODE ANN. § 2929.03(D)(1) (West 1997); State v. DePew, 528 N.E.2d 542, 551–52 (Ohio 1988). Evidence of future dangerousness cannot be injected into the penalty phase by the readmission of culpability phase evidence that is relevant to the aggravating circumstance. As Justice Blackmun explained, evidence of future dangerousness is irrelevant to legal culpability. *Simmons*, 512 U.S. at 163 (plurality opinion).

[152] 476 U.S. 1, 8 (1986).

[153] *See* California v. Ramos, 463 U.S. 992, 1002–03 (1983) (quoting Jurek v. Texas, 428 U.S. 262, 274–76 (1976)).

[154] *See* Estelle v. Smith, 451 U.S. 454 (1981) (discussing a violation of the capital defendant's Fifth and Sixth Amendment rights; psychological evaluation for future dangerousness took place without warnings of the right against self-incrimination and the defendant had no opportunity to consult with counsel regarding the evaluation).

[155] OHIO REV. CODE ANN. § 2929.03(D)(1) (West 1997).

[156] *See Ramos*, 463 U.S. at 995–97.

[157] *See infra* Part II.D.

[158] *See Ramos*, 463 U.S. at 1003.

[159] OHIO REV. CODE ANN. § 2929.03(D)(2), (3) (West 1997).

[160] *See, e.g.*, United States v. Flores, 63 F.3d 1342, 1376 (5th Cir. 1995) (rejecting petitioner's claim that the proof beyond a reasonable doubt standard in balancing selection factors is constitutionally required; the Supreme Court does not require a "specific method for balancing . . . [selection] factors") (quoting Franklin v. Lynaugh, 487 U.S. 164, 179 (1988)); Foster v. Strickland, 707 F.2d 1339, 1345 (11th Cir. 1983) (rejecting petitioner's claim that the *Winship* standard of proof applies to the penalty phase in capital sentencing; selection factors are "not elements of the crime itself") (citation omitted).

[161] State v. Cooey, 544 N.E.2d 895, 916–17 (Ohio 1989).

[162] A defendant may not be sentenced to death on more than one count of aggravated murder with aggravating circumstances, as separate counts of aggravated murder must be merged for sentencing. State v. Moore, 689 N.E.2d 1, 17 (Ohio 1998); State v. Huertas, 553 N.E.2d 1058, 1066 (Ohio 1990).

[163] *See* State v. Smith, 731 N.E.2d 645, 654 (Ohio 2000).

[164] The defense practitioner at trial should guard against error by proposing proper jury instructions. However, either proposed jury instructions or contemporaneous objections are sufficient to preserve an error for appeal. State v. Brooks, 661 N.E.2d 1030, 1041 (Ohio 1996) (citing State v. Wolons, 541 N.E.2d 443, syl. ¶ 1 (Ohio 1989)). *But see* State v. Brown, 528 N.E.2d 523, 533 (Ohio 1988) (stating that motion in limine does not preserve issues for appeal).

[165] *See* State v. Jones, 739 N.E.2d 300, 316 (Ohio 2000) (citing State v. Taylor, 676 N.E.2d 82, 96 (Ohio 1997)).

[166] OHIO REV. CODE ANN. § 2929.04(B) (West 1997).

[167] *Id.* § 2929.04(B)(1).

[168] *Id.* § 2929.04(B)(2).

[169] *Id.* § 2929.04(B)(3).

[170] *Id.* § 2929.04(B)(4).

[171] *Id.* § 2929.04(B)(5).

[172] *Id.* § 2929.04(B)(6).

[173] *Id.* § 2929.04(B)(7).

[174] 438 U.S. 586 (1978).

[175] *Id.* at 604.

[176] *See* Franklin v. Lynaugh, 487 U.S. 164, 185–86 (1988) (O'Connor, J., concurring) (citations omitted); *Lockett*, 438 U.S. at 604 n.12.

[177] *See Lockett*, 438 U.S. at 608.

[178] *Id.*

[179] Skipper v. South Carolina, 476 U.S. 1, 6–8 (1986).

[180] *See* State v. McGuire, 686 N.E.2d 1112, 1124 (Ohio 1997) (Pfeifer, J., concurring). *Compare* OHIO REV. CODE ANN. § 2929.04(B)(7) (West 1997), *with id.* § 2929.04(B). *But see infra* Part IV.B.2.

[181] OHIO REV. CODE. ANN. § 2929.04(C) (West 1997).

[182] State v. Landrum, 559 N.E.2d 710, 721 (Ohio 1990).

[183] OHIO REV. CODE ANN. § 2929.03(D)(1) (West 1997).

[184] *Id.*

[185] *See id.* § 2929.04(C).

[186] State v. Green, 738 N.E.2d 1208, 1208 (Ohio 2000); State v. Campbell, 738 N.E.2d 1178, 1178 (Ohio 2000).

[187] OHIO R. CRIM. P. 32(A)(1); *Green*, 738 N.E.2d at 1208; *Campbell*, 738 N.E.2d at 1178.

[188] *Campbell*, 738 N.E.2d at 1190.

[189] OHIO REV. CODE ANN. § 2929.03(D)(1) (West 1997).

[190] State v. Campbell, 630 N.E.2d 339, 346 (Ohio 1994).

[191] *Cf.* Estelle v. Smith, 451 U.S. 454, 463 (1981) (finding a violation of the Fifth Amendment when the defendant was not warned that participation in a psychological examination on future dangerousness could later be used to incriminate him).

[192] *See id.* at 470–71 (discussing a Sixth Amendment violation by uncounseled psychological examination on future dangerousness).

[193] OHIO REV. CODE ANN. § 2929.03(D)(1) (West 1997). This provision, however, does not expressly prohibit the prosecution from using any such statement or information provided by the defendant as impeaching evidence in a retrial. *Cf.* Harris v. New York, 401 U.S. 222, 226 (1971) (holding that an improperly obtained statement may be used for impeachment, so long as voluntarily made, even when the statement must be suppressed for use in prosecution's case-in-chief). The prosecution is also prohibited from using information or a statement given by the defendant during a mental examination conducted under section 2929.03(D)(1) of the Ohio Revised Code as evidence of guilt in a retrial of the defendant.

[194] OHIO REV. CODE ANN. § 2929.024 (West 1999).

[195] *Id.*

[196] *Id.*

[197] State v. Mason, 694 N.E.2d 932, 943–44 (Ohio 1998) (quoting State v. Jenkins, 473 N.E.2d 264, syl. ¶ 4 (Ohio 1984)).

[198] Section 2929.03(D)(1) of the Ohio Revised Code, which permits defendants to obtain a mental health expert, applies to all capital defendants regardless of whether they are indigent. State v. Esparza, 529 N.E.2d 192, 195 (Ohio 1988).

[199] *See Esparza*, 529 N.E.2d at 195; *see also* Glenn v. Tate, 71 F.3d 1204, 1211 (6th Cir. 1995) (discussing ineffective assistance of counsel).

[200] *Mason*, 694 N.E.2d at 944.

[201] 470 U.S. 68 (1985).

[202] *Mason*, 694 N.E.2d at 943. The Ohio court's interpretation of *Ake* is now "generally recognized." *Id.* A minority of jurisdictions, however, limit *Ake* to expert assistance on the issue of sanity at the culpability phase of a trial. *See, e.g.*, Kordenbrock v. Scroggy, 919 F.2d 1091, 1119 (6th Cir. 1990). A narrow interpretation of *Ake* seems illogical, as *Ake* extends the general principle of due process that indigent criminal defendants must be afforded the "basic tools of an adequate defense." *Ake*, 470 U.S. at 77 (quoting Britt v. North Carolina, 404 U.S. 326, 327 (1971)).

[203] *See* OHIO REV. CODE ANN. § 2929.03(D)(2) (West 1997). The defendant may waive his right to a jury trial in a capital case and proceed before a three-judge panel. *Id.* § 2945.06.

[204] *See, e.g.*, Walton v. Arizona, 497 U.S. 639, 648 (1990) (plurality opinion); Cabana v. Bullock, 474 U.S. 376, 385–86 (1986); Spaziano v. Florida, 468 U.S. 447, 465 (1984). *But see* Ring v. Arizona, 122 S. Ct. 865 (2002) (granting certiorari to re-examine the holding in *Walton*).

[205] *Spaziano*, 468 U.S. at 466.

[206] Harris v. Alabama, 513 U.S. 504, 515 (1995). This is not to say that a jury's participation in a capital sentencing proceeding is beyond the reach of the Federal Constitution. The Eighth Amendment, for example, prohibits the capital sentencer, whether judge or jury, from weighing invalid aggravating circumstances. Espinosa v. Florida, 505 U.S. 1079, 1081 (1992); Stringer v. Black, 503 U.S. 222, 232 (1992). Further, the Double Jeopardy Clause prohibits a successive penalty phase after a defendant has been "acquitted" of the death penalty by a jury at an original penalty phase that resembles a culpability trial. Bullington v. Missouri, 451 U.S. 430, 444–45 (1981). Additionally, the service of a juror at the penalty phase of a capital trial who cannot consider mitigating factors would infringe a defendant's right to due process. Morgan v. Illinois, 504 U.S. 719, 728–29 (1992).

[207] OHIO REV. CODE ANN. §§ 2929.03(D)(2)–(3) (West 1997).

[208] *Id.* § 2929.03(D)(3).

[209] *Id.* The Supreme Court of Ohio has stated that "the better procedure" is for judges and prosecutors to avoid use of the statutory term "recommend" when addressing the jury because the term may undermine the jury's sense of responsibility for its verdict of death. *See* State v. Buell, 489 N.E.2d 795, 813 (Ohio 1986) (citing Caldwell v. Mississippi, 472 U.S. 320, 341 (1985)).

[210] *See, e.g.*, State v. Fuller, No. CR00-03-0369 (Ohio C.P. Butler County Oct. 18, 2001).

[211] McKoy v. North Carolina, 494 U.S. 433, 444 (1990); Mills v. Maryland, 486 U.S. 367, 374 (1988).

[212] State v. Brooks, 661 N.E.2d 1030, 1042 (Ohio 1996); *see* OHIO REV. CODE ANN. § 2929.03(D)(2) (West 1997).

[213] OHIO REV. CODE ANN. § 2929.03(D)(2) (West 1997) (emphasis added); *Brooks*, 661 N.E.2d at 1042. After one or more jurors reject the death penalty, the jury is then to deliberate to reach a unanimous verdict on one of the life sentences.

[214] *Mills*, 486 U.S. at 374.

[215] *Brooks*, 661 N.E.2d at 1042.

[216] OHIO REV. CODE ANN. § 2929.03(D)(2) (West 1997).

[217] *See* Apodaca v. Oregon, 406 U.S. 404, 406 (1972); Johnson v. Louisiana, 406 U.S. 356, 362 (1972) (finding no requirement of a unanimous jury verdict with a twelve-person jury); *cf.* Schad v. Arizona, 501 U.S. 624, 631 (1991) (plurality opinion) (concluding that a unanimous verdict on alternative pathways to committing a capital murder is not required). *But see* Burch v. Louisiana, 441 U.S. 130, 139 (1979) (stating that a unanimous verdict is required for a six person jury in a trial of a non-petty offense).

[218] 527 U.S. 373 (1999).

[219] *Id.* at 381.

[220] *Id.* at 381–82 (quoting Romano v. Oklahoma, 512 U.S. 1, 9 (1994)).

[221] *Id.* at 389 (noting that statutory analysis precedes Eighth Amendment analysis).

[222] State v. Brooks, 661 N.E.2d 1030, 1042 (Ohio 1996).

[223] *Jones*, 527 U.S. at 381–82 (citing *Romano*, 512 U.S. at 9).

[224] *See* Simmons v. South Carolina, 512 U.S. 154, 172 (1994) (Souter, J., concurring) (stating that essential sentencing terms must be made

clear to the jury to comport with the requirement of reliable capital sentencing); Mills v. Maryland, 486 U.S. 367, 377 n.10 (1988) (concluding that capital juries must be properly instructed in order to understand sentencing issues); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (finding that heightened reliability is required for capital cases).

[225] 484 U.S. 231 (1988).

[226] *Id.* at 237 (citing Allen v. United States, 164 U.S. 492 (1896)); *see* State v. Howard, 537 N.E.2d 188 (Ohio 1989).

[227] *Lowenfield*, 484 U.S. at 238 (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 (1968)).

[228] *Id.* at 238–39.

[229] *Compare id.* at 238, *with* State v. Brooks, 661 N.E.2d 1030, 1042 (Ohio 1996).

[230] *See* OHIO REV. CODE ANN. § 2929.03(D)(2) (West 1997); *Brooks*, 661 N.E.2d at 1042.

[231] *Compare Lowenfield*, 484 U.S. at 237–38, *with Brooks*, 661 N.E.2d at 1042.

[232] In *State v. Springer*, the Supreme Court of Ohio held that a life sentence must be imposed if the jury becomes deadlocked on the choice between life and death. 586 N.E.2d 96 (Ohio 1992). In light of *Brooks*, however, a single juror's choice to reject the death penalty at any time during penalty phase deliberations should result in the imposition of a life sentence. *Brooks*, 661 N.E.2d at 1042.

[233] 469 U.S. 412 (1985).

[234] *Id.* at 424.

[235] *Id.*; *see* Adams v. Texas, 448 U.S. 38, 45 (1980).

[236] *But see infra* Part IV.C.4.

[237] OHIO REV. CODE ANN. § 2945.25(C) (West 1997).

[238] OHIO REV. CODE ANN. § 2929.022 (West 1997); *id.* § 2929.03(B)(C)(2)(a)(i). Before July 1, 1996, the penalties for aggravated murder with an aggravating circumstance were the death penalty and life in prison without the possibility of parole for either twenty or thirty years. The availability of LWOP applies only to offenses committed on or after July 1, 1996. State v. Raglin, 699 N.E.2d 482, 489 (Ohio 1998).

[239] Three of the thirty-eight capital punishment states do not provide for LWOP as a sentencing choice. *See* KAN. STAT. ANN. § 21-4635 (1995); N.M. STAT. ANN. § 31-10-14 (Michie 2001); TEX. PENAL CODE ANN. § 12.31 (Vernon 2000).

[240] *See* California v. Ramos, 463 U.S. 992, 1002–03 (1983) (stating that a *Briggs* instruction informing the jury of the possibility of parole focuses the jury on the issue of the defendant's future dangerousness if returned to society).

[241] *See* Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion) (footnote omitted).

[242] Simmons v. South Carolina, 512 U.S. 154, 176–78 (1994) (O'Connor, J., concurring).

[243] Parker v. Dugger, 498 U.S. 308, 321 (1991); Whitmore v. Arkansas, 495 U.S. 149, 171–72 (1990) (Marshall, J., dissenting); *Gregg*, 428 U.S. at 204–06 (plurality opinion).

[244] Clemons v. Mississippi, 494 U.S. 738, 748 (1990) (stating that state appellate courts may reweigh or use harmless error analysis to cure imposition of death penalty tainted by an invalid aggravating factor).

[245] 465 U.S. 37 (1984).

[246] *Id.* at 50.

[247] *See Parker*, 498 U.S. at 321.

[248] Both the Supreme Court of Ohio and the court of appeals review capital cases in which the date of the offense preceded January 1, 1995. In other cases, the review is conducted by only the Supreme Court of Ohio. OHIO REV. CODE ANN. § 2929.05(A) (West 1997); *see infra* Part III.D.

[249] OHIO REV. CODE ANN. § 2929.05(A) (West 1997).

[250] *Id.*

[251] *Id. But see infra* Part IV.D.1.

[252] *See* State v. Apanovitch, 514 N.E.2d 394, 405 (Ohio 1987) (Brown, J., dissenting).

[253] *See* OHIO REV. CODE ANN. § 2929.05(A) (West 1997); *Apanovitch*, 514 N.E.2d at 405 (Brown, J., dissenting).

[254] State v. Claytor, 574 N.E.2d 472, 481–82 (Ohio 1991); State v. Watson, 572 N.E.2d 97, 111 (Ohio 1991); State v. Lawrence, 541 N.E.2d 451, 460 (Ohio 1989).

[255] *See infra* Part IV.D.1. The defense practitioner should not confuse the case by case proportionality review rejected in *Pulley v. Harris* with a strand of Eighth Amendment analysis arising from the excessive or disproportionate use of the death penalty. 465 U.S. 37, 50 (1984). A death sentence violates the Cruel and Unusual Punishment Clause when it imposes the death penalty on a class of offenders in a manner that is excessive or disproportionate to the values underlying the Eighth Amendment. *See* Stanford v. Kentucky, 492 U.S. 361, 382 (1989) (O'Connor, J., concurring); *id.* at 383 (Brennan, J., dissenting); Enmund v. Florida, 458 U.S. 782, 888 (1982); Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion).

[256] Penry v. Lynaugh, 492 U.S. 302, 335 (1989). The Supreme Court, however, has granted certiorari in *Atkins v. Virginia* to revisit its decision in *Penry* as to whether a national consensus exists to make mentally retarded persons death penalty ineligible. 510 S.E.2d 445 (Va. 1999), *cert. granted sub. nom.* Atkins v. Virginia, 70 U.S.L.W. 3232 (U.S. Sept. 25, 2001) (No. 00-8452), *cert. grant amended* 70 U.S.L.W. 3233. Accordingly, this unfortunate omission to the Ohio death penalty statute may yet be corrected as a matter of constitutional law.

[257] ARIZ. REV. STAT. § 13-3982 (West 2001); ARK. CODE ANN. § 5-4-618 (Michie 1993); COLO. REV. STAT. § 16-9-403 (Michie 2000); GA. CODE ANN. § 17-7-131(i) (1997); IND. CODE ANN. § 35-36-9-6 (1998); KAN. STAT. ANN. § 21-4623 (1995); KY. REV. STAT. ANN. § 532.140 (Michie 1999); MD. CODE ANN. Art. 27, § 412 (1996); NEB. REV. STAT. ANN. § 28-105.01 (Michie 2000); N.M. STAT. ANN. § 31-20A-2.1 (Michie 2001); N.Y. CRIM. PRO. LAW § 400.27(12) (McKinney 2001); N.C. GEN. STAT. § 15A-2005 (2000); S.D. CODIFIED LAWS § 2.3A-27A-26.1 (Michie 2000); TENN. CODE ANN. § 39-13-203 (1997); WASH. REV. CODE ANN. § 10.95.030 (West 2001); 2001 Conn. Legis. Serv. P.A. 01-151 (West); 2001 Fla. Sess. Law Serv. ch. 2001-202 (West); 2001 Mo. Legis. Serv. S.B. 267 (West); *see* 18 U.S.C. § 3596 (1994).

[258] *Compare* ARK. CODE ANN. § 5-4-618 (Michie 1993), *with* IND. CODE § 35-36-9-1 to -7 (1998).

[259] *Compare* ARK. CODE ANN. § 5-4-618 (Michie 1993), *with* KY. REV. STAT. ANN. § 532.130-140 (Michie 1999).

[260] *See, e.g.*, COLO. REV. STAT. § 19-9-401-403 (2000).

[261] *See* OHIO REV. CODE ANN. § 2903.01(D) (West 1997) (effective before August 6, 1997); *id.* § 2903.01(E) (effective before June 30, 1998).

[262] *See id.* 2903.01(E).

[263] 481 U.S. 137 (1987).

[264] *Id.* at 157.

[265] *See supra* Part II.A.2.

[266] *See id.*

[267] OHIO JURY INSTRUCTIONS § 503.01(2) (2000).

[268] *See* OHIO REV. CODE ANN. § 2903.01(C), (D), (E) (West 1997); *id.* § 2929.04(A)(9).

[269] Principal offender and prior calculation and design are disjunctive elements and the defendant may be guilty of only one. *See* State v. Penix, 513 N.E.2d 744, 746 (Ohio 1987).

[270] In certain cases, the felony murder aggravating circumstance would genuinely narrow for the purposes of death eligibility. For example, a defendant found guilty of felony murder under a complicity theory of culpability would be guilty of purposely causing the victim's death during the commission of a felony. To render such a defendant death-eligible, the prosecution would have to prove a different and more stringent mental state¾prior calculation and design¾as an element of the felony murder aggravating circumstance. Further, the felony murder charge and aggravating circumstance would not be redundant in a case in which different felonies were used as the predicate felonies for the aggravated murder charge and the aggravating circumstance¾for example, rape in the felony murder charge and aggravated arson in the aggravating circumstance.

[271] OHIO REV. CODE ANN. § 2903.01(C) (West Supp. 2001).

[272] *See id.* § 2929.04(A)(9).

[273] *Id.*

[274] State v. Taylor, 612 N.E.2d 316, 325 (Ohio 1993). As with the felony murder situation, the child killer aggravating circumstance is not redundant when the defendant is guilty of the aggravated murder under a theory of complicity, as the aggravating circumstance requires the additional finding of "prior calculation and design" in such cases.

[275] *See Taylor*, 612 N.E.2d at 325 (stating that the principal offender is the actual killer).

[276] OHIO REV. CODE. ANN. § 2903.01(D) (West 1997).

[277] *Id.* § 2929.04(A)(4).

[278] There is also some redundancy between the substantive offenses defined in subsections 2903.01(B) and (D) of the Ohio Revised Code, as one of the predicate felonies for felony murder under subdivision (B) is "escape," and purpose to kill is the mens rea element in both subdivisions (B) and (D).

[279] *Id.* § 2903.01(E).

[280] Section 2929.04(A)(6) of the Ohio Revised Code provides:

> The victim of the offense was a law enforcement officer, as defined in § 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.

OHIO REV. CODE ANN. § 2929.04(A)(6) (West Supp. 2001).

[281] *See* Zant v. Stephens, 462 U.S. 862, 877 (1983).

[282] *See* Harris v. Alabama, 513 U.S. 504, 519–20 (1995) (Stevens, J., dissenting); *id.* at 519 n.5 ("As one commentator has written, '[m]ost

experts on penal systems agree that capital punishment does not deter capital crimes. But the public believes it does, and politicians have been switching longstanding positions to accommodate that view . . . . This . . . is the democratic system.'" (citing Garry Wills, *Read Polls, Heed America*, N. Y. TIMES, Nov. 6, 1994, § 6 (Magazine), at 48)).

[283] *See supra* Part II.B.1.

[284] OHIO REV. CODE ANN. 2929.03(D)(1) (West 1997).

[285] *See* State v. Wogenstahl, 662 N.E.2d 311, 321–22 (Ohio 1996).

[286] OHIO REV. CODE ANN. 2929.03(D)(1) (West 1997) (emphasis added).

[287] *See* Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

[288] *See* Jurek v. Texas, 428 U.S. 262, 274–76 (1976).

[289] *See* Tuilaepa v. California, 512 U.S. 967, 973 (1994) (quoting *Jurek*, 428 U.S. at 279) (White, J., concurring).

[290] *See Wogenstahl*, 662 N.E.2d at 321–22.

[291] OHIO REV. CODE ANN. 2929.03(D)(1) (West 1997).

[292] *See supra* Part II.B.1.

[293] *See* Walton v. Arizona, 497 U.S. 639, 654 (1990).

[294] *See* Maynard v. Cartwright, 486 U.S. 356, 362 (1988).

[295] *See* State v. Jenkins, 473 N.E.2d 264, 279–80 (Ohio 1984) (stating that the homicide cannot be weighed as an aggravating circumstance).

[296] OHIO REV. CODE ANN. 2929.04(B)(7) (West Supp. 2001) (emphasis added).

[297] The misleading definition in section 2929.04(B)(7) of the Ohio Revised Code may cause the sentencer to give catch-all mitigation less than its "full consideration." *See* Penry v. Lynaugh, 492 U.S. 302, 327–28 (1989).

[298] OHIO REV. CODE ANN. § 2929.04(C) (West Supp. 2001) (emphasis added).

[299] Lockett v. Ohio, 438 U.S. 586, 604–05 (1978).

[300] OHIO REV. CODE ANN. § 2929.04(C) (West Supp. 2001); *see supra* Part II.B.7.

[301] OHIO REV. CODE ANN. § 2929.04(B) (West Supp. 2001) (emphasis added).

[302] Lockett v. Ohio, 438 U.S. 586, 604–05 (1978) (second emphasis added); *see Penry*, 492 U.S. at 327 ("[T]here is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on mitigating evidence *introduced* by a defendant." (emphasis added)).

[303] *Cf.* Cone v. Bell, 243 F.3d 961, 979 (6th Cir. 2001) (stating that failure to present any mitigation to capital sentencer was not a reasonable strategic decision).

[304] *See Lockett*, 438 U.S. at 604; *accord Penry*, 492 U.S. at 327.

[305] *See Lockett*, 438 U.S. at 604; *cf.* Delo v Lashley, 507 U.S. 272, 275 (1993) (holding no due process violation when state refuses to instruct on the mitigating factor when defendant has not presented evidence to establish it).

[306] In *State v. DePew*, the Supreme Court of Ohio made clear that no comment should be made on statutory mitigating factors not raised by the defense. 528 N.E.2d 542, 557 (Ohio 1988).

[307] *See supra* Part III.B.1.

[308] State v. Green, 689 N.E.2d 556, 559 (Ohio 1998); *see* OHIO R. CRIM. P. 11.

[309] Spaziano v. Florida, 468 U.S. 447, 481 (1984) (Stevens, J., dissenting).

[310] OHIO REV. CODE ANN. § 2929.06(B) (West 1997); *see infra* Part III.C.2.

[311] *See supra* Part II.A.4.

[312] Witherspoon v. Illinois, 391 U.S. 510, 519 (1968) (footnote omitted).

[313] State v. Penix, 513 N.E.2d 744, 747–48 (Ohio 1987).

[314] *See id.*

[315] *Id.*

[316] OHIO REV. CODE ANN. § 2929.06(B) (West Supp. 2001).

[317] This provision only applies to resentencing for penalty phase error after a death recommendation by the jury has been invalidated on appeal. The Double Jeopardy Clause would prohibit resentencing if the original sentence of life had been predicated on a legal error, as the defendant would have been acquitted of the death penalty after a sentencing phase that resembles a trial. *See* Arizona v. Rumsey, 467 U.S. 203, 211 (1984) (holding that the trial court misapplied the "pecuniary gain" selection factor but that the Double Jeopardy Clause barred resentencing because the trial court acquitted the defendant of the death penalty); Bullington v. Missouri, 451 U.S. 430, 444–45 (1981).

[318] 684 N.E.2d 668 (Ohio 1997).

[319] *Id.* at 678 (citations omitted).

[320] OHIO REV. CODE ANN. § 2929.05(A) (West Supp. 2001).

[321] Harris v. Alabama, 513 U.S. 504, 519 (1995) (Stevens, J., dissenting).

[322] OHIO ATTORNEY GENERAL'S CAPITAL CRIMES SECTION, THE STATUS OF DEATH PENALTY CASES IN OHIO, CAPITAL CRIMES 2000 ANNUAL REPORT 1, ¶ 3 (2000), *available at* http://www.ag.state.oh.us/capcrime/2000Report.pdf [hereinafter ANNUAL REPORT].

[323] As of June 30, 2001, only three death penalty appeals were pending in the various districts of the Ohio Court of Appeals.

[324] *Cf.* Burger v. Kemp, 483 U.S. 776, 785 (1987) (requiring heightened scrutiny in death cases even on collateral review).

[325] *See* ANNUAL REPORT, *supra* note 322, at 14, 25–28.

[326] *See* State v. Grubb, 503 N.E.2d 142, 147 (Ohio 1986) (stating that the party must introduce by proffer or alternative means evidence precluded by motion in limine in order to preserve the objection for appeal).

[327] *See* State v. Brooks, 661 N.E.2d 1030, 1041 (Ohio 1996) (citing State v. Wolons, 541 N.E.2d 443, syl. ¶ 1 (Ohio 1989) ("A party does not waive his objections . . . by failing to formally object thereto (1) where the record affirmatively shows that a trial court has been fully apprised of the correct law governing a material issue in dispute, and (2) the requesting party has been unsuccessful in obtaining the inclusion of that law in the trial court's charge to the jury.")).

[328] *See* Murray v. Carrier, 477 U.S. 478, 488 (1986) (stating that ineffective assistance of counsel is cause that excuses procedural default).

[329] *See* State v. Poindexter, 520 N.E.2d 568, 570 (Ohio 1988) (recognizing that "certain issues of law must be raised to preserve a party's right of appeal in federal court"). *Compare* Penry v. Lynaugh, 492 U.S. 302, 340 (1989) (holding that the Eighth Amendment does not prohibit the execution of the mentally retarded), *with* Atkins v. Virginia, No. 00-8452, 2001 U.S. LEXIS 5463 (Oct. 1, 2001) (granting certiorari to revisit the holding in *Penry*).

[330] *See Poindexter*, 520 N.E.2d at 570 (noting that courts should summarily dispose of settled issues of law).

[331] State v. Cotton, 381 N.E.2d 190, 193 (Ohio 1978).

[332] *Id.* (citing State v. Stewart, 198 N.E.2d 439 (Ohio 1964)).

[333] *See id.*

[334] *Id.*

[335] *Id.*

[336] 703 N.E.2d 1251 (Ohio 1999).

[337] 689 N.E.2d 929 (Ohio 1998).

[338] *Goodwin*, 703 N.E.2d at 1268 (Moyer, C.J., concurring in part and dissenting in part); *Keenan*, 689 N.E.2d at 951 (Moyer, C.J., concurring in part and dissenting in part).

[339] *Goodwin*, 703 N.E.2d at 1269 (Moyer, C.J., concurring in part and dissenting in part).

[340] *Id.*

[341] *Cotton*, 381 N.E.2d at 193.

[342] *Goodwin*, 703 N.E.2d at 1269 (Moyer, C.J., concurring in part and dissenting in part).

[343] *Keenan*, 689 N.E.2d at 950 (Moyer, C.J., concurring in part and dissenting in part).

[344] *Id.*

[345] *Id.* at 950–51.

[346] *Id.*

[347] OHIO R. CRIM. P. 29.

[348] OHIO REV. CODE ANN. § 2903.01(B) (West Supp. 2001).

[349] *Id.* § 2929.04(A)(7) (West Supp. 2001).

[350] State v. McNeill, 700 N.E.2d 596, 602 (Ohio 1998).

[351] State v. Palmer, 687 N.E.2d 685, 709 (Ohio 1997).

[352] *McNeill*, 700 N.E.2d at 602.

[353] 700 N.E.2d 596 (Ohio 1998).

[354] *Id.* at 601.

[355] *Id.*

[356] *See id*. at 602.

[357] *Id*. (citing State v. Cooey, 544 N.E.2d 895, 903 (Ohio 1989)).

[358] *Id*. at 602.

[359] 650 N.E.2d 433 (Ohio 1995).

[360] *Id*. at 435.

[361] *See id*. at 438.

[362] OHIO R. CRIM. P. 29.

[363] OHIO REV. CODE ANN. § 2929.04(A)(7) (West Supp. 2001).

[364] 513 N.E.2d 744 (Ohio 1987).

[365] *Id.* at 746.

[366] 689 N.E.2d 1 (Ohio 1998).

[367] *Id.* at 17 (citing State v. Cook, 605 N.E.2d 70, 82–83 (Ohio 1992)).

[368] *Id.* The error was harmless in *Moore* because the jury convicted Moore of committing the murder with prior calculation and design in the first count of his indictment. *Id.*

[369] 709 N.E.2d 1166 (Ohio 1999).

[370] *Id.* at 1176.

[371] *Id.*

[372] *Id.*

[373] *Id.*

[374] *See* Eddings v. Oklahoma, 455 U.S. 104, 117 (1982) (citing Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (Stewart, Powell, & Stevens, JJ.)).

[375] *See* McCleskey v. Kemp, 481 U.S. 279, 305 (1987).

[376] 530 U.S. 466 (2000).

[377] *Id.* at 488–89.

[378] *See* Buchanan v. Angelone, 522 U.S. 269, 278–79 (1998); Simmons v. South Carolina, 512 U.S. 154, 174 (1994) (Ginsburg, J., concurring) (noting that counsel's argument was relevant consideration when the instructional error is raised).

[379] *Chinn*, 709 N.E.2d at 1177.

[380] Section 2941.25(A) of the Ohio Revised Code provides that "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." OHIO REV. CODE ANN. § 2941.25(A) (West 1997).

[381] State v. Poindexter, 520 N.E.2d 568, 572 (Ohio 1998) (citing State v. Henderson, 389 N.E.2d 494, 498 (Ohio 1972)); *see* OHIO REV. CODE ANN. § 2941.25(A) (West 1997).

[382] *See* State v. O'Neal, 721 N.E.2d 73, 87 (Ohio 2000); State v. Goff, 694 N.E.2d 916, 926 (Ohio 1998); State v. Moore, 689 N.E.2d 1, 17 (Ohio 1998); State v. Palmer, 687 N.E.2d 685, 709 (Ohio 1997); State v. Waddy, 588 N.E.2d 819, 836 (Ohio 1992).

[383] *See, e.g.*, *O'Neal*, 721 N.E.2d at 87; *Moore*, 689 N.E.2d at 17; *Palmer*, 687 N.E.2d at 709; State v. Woodard, 623 N.E.2d 75, 83 (Ohio 1993); *Waddy*, 588 N.E.2d at 836.

[384] *O'Neal*, 721 N.E.2d at 87 (citing *Woodard*, 623 N.E.2d at 81).

[385] State v. Brown, 528 N.E.2d 523, 539 (Ohio 1998); *see Moore*, 689 N.E.2d at 17.

[386] *Moore*, 689 N.E.2d at 17 (citing State v. Cook, 605 N.E.2d 70, 82 (Ohio 1992)) (stating that independent review "can cure any errors that taint the jury's sentencing verdict"). *But see infra* Part IV.D.2.

[387] *Waddy*, 588 N.E.2d at 838.

[388] *Palmer*, 687 N.E.2d at 709.

[389] *Id.*

[390] State v. Getsy, 702 N.E.2d 866, 885 (Ohio 1998) (citing State v. Cross, 391 N.E.2d 319, 323 (Ohio 1979)).

[391] *Id.* (citing State v. Good, 165 N.E.2d 28 (Ohio Ct. App. 1960)).

[392] *Id.* at 884 (citing State v. Sappienza, 95 N.E. 381 (Ohio 1911)).

[393] *Id.*

[394] 702 N.E.2d 866 (Ohio 1998).

[395] *Id.*

[396] *Id.* at 884.

[397] *Id.* (citing State v. Woods, 357 N.E.2d 1059, 1065 (Ohio 1976)).

[398] *But cf.* Montana v. Egelhoff, 518 U.S. 37, 58–59 (1996) (plurality opinion) (Ginsburg, J., concurring) ("Defining *mens rea* to eliminate the exculpatory value of voluntary intoxication does not offend a 'fundamental principle of justice.'").

[399] *Getsy*, 702 N.E.2d at 885.

[400] Section 2929.04(B)(2) of the Ohio Revised Code provides that the trier of fact may consider "[w]hether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation." OHIO REV. CODE ANN. § 2929.04(B)(2) (West Supp. 2001).

[401] *Id.*

[402] In *Lockett v. Ohio*, the Supreme Court of the United States reversed the appellant's death sentence in part because Ohio's statutory framework limited the consideration of the defendant's lack of specific intent to kill as a mitigating factor. 438 U.S. 586, 608 (1978). Of course, lack of a specific intent to kill would also be a defense against aggravated murder in Ohio. The Supreme Court of Ohio's reasoning that because a factor is mitigating, it cannot also be a defense to the crime, is inconsistent with *Lockett*.

[403] 702 N.E.2d at 886; *see* OHIO REV. CODE ANN. § 2929.04(A)(2) (West Supp. 2001) ("The offense was committed for hire.").

[404] *In re* Oliver, 333 U.S. 257, 273 (1948).

[405] Crane v. Kentucky, 476 U.S. 683, 690 (1986) (citing California v. Trombetta, 476 U.S. 479, 485 (1984)).

[406] *See supra* Part II.A.2.

[407] *See* State v. Coleman, 525 N.E.2d 792, 796 (Ohio 1988).

[408] State v Huertas, 553 N.E.2d 1058, 1065 (Ohio 1990); State v. Cooey, 544 N.E.2d 895, 906 (Ohio 1989).

[409] 544 N.E.2d 895 (Ohio 1989).

[410] *Id.* at 906.

[411] 436 N.E.2d 523, 528 (Ohio 1982).

[412] *Cooey*, 544 N.E.2d at 906 (citing *Wilcox*, 436 N.E.2d at 533).

[413] 544 N.E.2d at 906.

[414] *See Wilcox*, 436 N.E.2d at 530.

[415] *Cooey*, 544 N.E.2d at 906.

[416] 553 N.E.2d 1058 (Ohio 1990).

[417] *Id.* at 1065.

[418] *Id.*

[419] 428 N.E.2d 410 (Ohio 1981).

[420] *Huertas*, 553 N.E.2d at 1065 (citing *Cooey*, 544 N.E.2d at 895).

[421] *Cooey*, 544 N.E.2d at 906 (citing *Fox*, 428 N.E.2d at 412).

[422] 748 N.E.2d 11, 12 (Ohio 2001).

[423] *See id.*

[424] *See id.* at 19 (Pfeifer, J., dissenting) (noting that the defendant has chronic, undifferentiated schizophrenia). "Schizophrenia is an inability to recognize reality in some way, marked by delusions and perceptual distortions. There is no cure for schizophrenia . . . ." Estates of Morgan v. Fairfield Family Counseling Ctr., 673 N.E.2d 1311, 1314 (Ohio 1997).

[425] *See Scott*, 748 N.E.2d at 20 (Pfeifer, J., dissenting); *see also* State v. Berry, 650 N.E.2d 433, 444 (Ohio 1995) (Wright, J., dissenting).

[426] *In re* Oliver, 333 U.S. 257, 273 (1948).

[427] Crane v. Kentucky, 476 U.S. 683, 690 (1986) (citing California v. Trombetta, 467 U.S. 479, 485 (1984)).

[428] *See* OHIO REV. CODE ANN. § 2901.06(B) (West 1997) (permitting expert testimony respecting battered woman's syndrome to support a claim of self-defense); State v. Nemeth, 694 N.E.2d 1332, 1341 (Ohio 1998) (allowing expert testimony respecting battered child syndrome where self-defense is asserted); State v. Purcell, 669 N.E.2d 60, 63 (Ohio Ct. App. 1995) (permitting expert testimony respecting post-traumatic stress disorder where self-defense is asserted); State v. Thomas, 468 N.E.2d 763, 765 (Ohio Ct. App. 1983) (finding error in the court's exclusion of expert testimony respecting paranoid personality where self-defense is asserted).

[429] 705 N.E.2d 329 (Ohio 1999).

[430] *Id.* at 345.

[431] *See id.* at 334, 346.

[432] Stojetz argued that his trial counsel was ineffective for failing to present such evidence. Although the Supreme Court of Ohio did not address this specific issue, the court rejected Stojetz's ineffective assistance of counsel (IAC) claim. *Id.* at 337.

[433] 487 U.S. 164 (1988).

[434] *Id.* at 188 (O'Connor, J., concurring).

[435] Lockhart v. McCree, 476 U.S. 162, 181 (1986) (citing Grigsby v. Mabry, 758 F.2d 226, 247–48 (8th Cir. 1985) (Gibson, J., dissenting) (citations omitted)).

[436] *Franklin*, 487 U.S. at 174.

[437] 572 N.E.2d 97, 111 (Ohio 1991).

[438] *See, e.g.*, *id.*; *see also* State v. Richey, 595 N.E.2d 915, 931 (Ohio 1992); State v. Gillard, 533 N.E.2d 272, 281 (Ohio 1988).

[439] 686 N.E.2d 1112 (Ohio 1997).

[440] *Id.* at 1123.

[441] Skipper v. South Carolina, 476 U.S. 1, 5 n.1 (1986); *id.* at 9 (Powell, J., concurring) (citing Gardner v. Florida, 430 U.S. 349, 362 (1977)).

[442] State v. Bey, 709 N.E.2d 484, 503 (Ohio 1999).

[443] *See* Booth-El v. Nuth, 140 F. Supp. 2d 495, 517 (D. Md. 2001) (holding that Maryland's removal of intoxication-induced diminished capacity as a mitigating factor violated the Ex Post Facto Clause).

[444] *McGuire*, 686 N.E.2d at 1112, 1122–23.

[445] 572 N.E.2d 97, 111–13 (Ohio 1991) (Resnick, J., dissenting).

[446] *Id.* at 112.

[447] *Id.*

[448] *Id. But see* State v. Murphy, 747 N.E.2d 765, 800 (Ohio 2001) (weighing the victim's family's request that the defendant be sentenced to life without the possibility of parole in its independent review).

[449] OHIO REV. CODE ANN. § 2929.04(B) (West 1997).

[450] *McGuire*, 686 N.E.2d at 1124 (Pfeifer, J., concurring).

[451] OHIO REV. CODE ANN. § 2929.04(C) (West 1997).

[452] *Id.* § 2929.04(B)(7).

[453] *Id.*

[454] 747 N.E.2d 765 (Ohio 2001).

[455] *Id.* at 800.

[456] OHIO REV. CODE ANN. § 2929.04(B)(4) (West 1997).

[457] 478 N.E.2d 984 (Ohio 1985).

[458] *Id.* at 993.

[459] *Rogers* made the identical arguments with respect to the use of "age" in sections 2929.02(A) and 2929.023 of the Ohio Revised Code. *Id.*

[460] *Id.*

[461] *Id.*

[462] *Id.*

[463] Section 2929.04(B)(3) provides that "[w]hether, 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." OHIO REV. CODE ANN. § 2929.04(B)(3) (West 1997).

[464] 455 U.S. 104 (1982).

[465] *Id.* at 115.

[466] *See* OHIO REV. CODE ANN. § 2929.04(B) (West 1997).

[467] *See id.* § 2929.04(B)(7); *see also* State v. Otte, 660 N.E.2d 711, 722 (Ohio 1996) (stating that the potential of addiction can be considered as mitigating under either section 2929.04(B)(3) or 2929.04(B)(7)).

[468] State v. Rogers, 478 N.E.2d 984, 997 (Ohio 1985).

[469] *Id.*

[470] 553 N.E.2d 576, 583 (Ohio 1990).

[471] *Id.*

[472] *Id.*

[473] *Id.* at 585 (citing Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363, 1383 (1988)).

[474] *Id.*

[475] 706 N.E.2d 1231 (Ohio 1999).

[476] *Id.* at 1236.

[477] *Id.* at 1237.

[478] *Id.*

[479] *Id.*

[480] *Id.*

[481] *Id.* The procedures announced in *Ashworth* are not to be retroactively applied. State v. Cowans, 717 N.E.2d 298, 314 (Ohio 1999); *see infra* Part IV.D.3.

[482] *Ashworth*, 706 N.E.2d at 1236.

[483] State v. Tyler, 553 N.E.2d 576, 585 (Ohio 1990).

[484] *Id.* at 585 (citing Autry v. McKaskle, 727 F.2d 358 (5th Cir. 1984)).

[485] *Ashworth*, 706 N.E.2d at 1237.

[486] *Id.* at 1238.

[487] *Id.*

[488] *Id.*

[489] *Id.*

[490] *Id.* at 1239 (citing Blystone v. Pennsylvania, 494 U.S. 299, 305 (1990)).

[491] *Id.*

[492] Section 2929.05(A) provides:

> Whenever a sentence of death is imposed . . . the supreme court shall review upon appeal the sentence of death at the same time that they review the other issues in the case. The . . . supreme court shall review the judgment in the case and the sentence of death imposed . . . in the same manner that they review other criminal cases, *except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate . . . the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases.*

OHIO REV. CODE ANN. § 2929.05(A) (West 1997) (emphasis added).

[493] Florida v. Muhammed, 782 So. 2d 343, 364–65 (Fla. 2001) (quoting Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990)).

[494] *Id.* at 363 (quoting Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993)).

[495] *Id.*

[496] *Id.* at 363–64.

[497] *Id.* (footnote omitted).

[498] *Id.* at 364.

[499] *Id.*

[500] *See Muhammed*, 782 So. 2d at 364 (citing State v. Koedatich, 548 A.2d 983, 992 (N.J. 1988)); Morrison v. Georgia, 373 S.E.2d 506, 509 (Ga. 1988).

[501] Section 2929.03(D)(1), in pertinent part, provides that "[w]hen death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made . . . ." OHIO REV. CODE ANN. § 2929.03(D)(1) (West 1997). The defense practitioner should generally not request a PSI because it may include information that is harmful to the client, such as a prior record. Moreover, any mitigation that can be provided by a PSI can also be obtained through a proper investigation by defense counsel.

[502] *See* OHIO REV. CODE ANN. § 2929.03(D)(1) (West 1997). For example, mitigating evidence may be any suggestion that the client was drinking at the time of the offense, State v. Campbell, 738 N.E.2d 1178, 1192 (Ohio 2000), that the victim induced or facilitated the crime, State v. Ashworth, 706 N.E.2d 1231, 1243 (Ohio 1999), or that the victim provoked the offense, State v. Lawrence, 541 N.E.2d 451, 459–60 (Ohio

1989).

[503] 694 N.E.2d 916 (Ohio 1998).

[504] *Id.* at 922.

[505] *Id.* (quoting Eddings v. Oklahoma, 455 U.S. 104, 113–14 (1982)).

[506] *Id.* at 923.

[507] 522 U.S. 269, 279 (1998).

[508] *Id.* at 923 (citing *Buchanan*, 522 U.S. at 279).

[509] *Id.*

[510] *Buchanan*, 522 U.S. at 277.

[511] *Id.* at 278–79.

[512] *But see* State v. Jones, 744 N.E.2d 1163, 1171 (Ohio 2001) (noting that it is not erroneous to preclude the questioning of jurors at voir dire concerning specific mitigating factors in hopes of reducing the chance of juror confusion).

[513] *See supra* Part II.B.8.

[514] 380 U.S. 609 (1965).

[515] *See id.* at 611, 615.

[516] *Id.* at 614.

[517] *See id.*

[518] 528 N.E.2d 542 (Ohio 1988).

[519] *Id.* at 553.

[520] *See id.*

[521] *Id.* at 554. *But see* Lorraine v. Coyle, No. 4:96 CV 0801, slip op. at 92–93 (N.D. Ohio Mar. 30, 2001) (granting petitioner relief from a death sentence in part because of the prosecutor's comment on unsworn statement).

[522] *Id.* Subsequently, DePew received relief in federal court based on prosecutor misconduct committed during the penalty phase of his trial, including a comment on his unsworn statement. *See* DePew v. Anderson, 104 F. Supp. 2d 879, 885 (S.D. Ohio 2000).

[523] Griffin v. California, 380 U.S. 609, 614 (1965).

[524] Even in *DePew*, the prosecutor's comments exceeded the scope of permissible commentary. *See DePew*, 528 N.E.2d at 554.

[525] *See Lorraine*, No. 4:96 CV 0801, at 92–93; *DePew*, 104 F. Supp. 2d at 885.

[526] *See* State v. Getsy, 702 N.E.2d 866, 887 (Ohio 1998).

[527] 744 N.E.2d 163 (Ohio 2001).

[528] *Id.* at 176.

[529] *Id.*

[530] *Id.*

[531] *Id.* at 184–85.

[532] *Id.*

[533] *Id.* at 177.

[534] *Id.* at 185.

[535] *Id.*

[536] *Id.*

[537] *Id.*

[538] *DePew*, 528 N.E.2d at 554–55.

[539] *See Jones*, 744 N.E.2d at 177.

[540] Section 2929.04(B)(5) provides that "[t]he offender's lack of a significant history of prior criminal convictions and delinquency adjudications" shall be considered by the trier of fact under certain circumstances. OHIO REV. CODE ANN. § 2929.04(B)(5) (West 1997).

[541] *See DePew*, 528 N.E.2d at 554.

[542] 584 N.E.2d 1192 (Ohio 1992).

[543] *Id.* at 1193 (citing State v. Davis, 528 N.E.2d 925 (Ohio 1988)).

[544] 438 U.S. 586 (1978).

[545] 476 U.S. 1 (1986).

[546] *Davis*, 584 N.E.2d at 1194.

[547] *Id.* at 1195.

[548] *Id.* at 1194–95.

[549] *Id.*

[550] *Id.* at 1199 (Wright, J., dissenting).

[551] *Id.* at 1195 n.2.

[552] *Id.*

[553] 709 N.E.2d 1166 (Ohio 1999).

[554] *Id.* at 1180.

[555] *Id.* at 1181.

[556] *Id.*

[557] 520 N.E.2d 568 (Ohio 1988).

[558] State v. Davis, 584 N.E.2d 1192, 1199 (Ohio 1992) (Wright, J., dissenting).

[559] *See supra* Part II.B.10.

[560] 470 U.S. 68 (1985).

[561] *See* State v. Mason, 694 N.E.2d 932, 943 (Ohio 1998) (citing *Ake*, 470 U.S. at 77).

[562] 738 N.E.2d 1178 (Ohio 2000).

[563] *Id.* at 1190.

[564] *Id.* (citing State v. Bradley, 538 N.E.2d 373, 385 (Ohio 1989)). In *Bradley*, the court considered the defendant's advanced age, which made it unlikely that he would be released from prison, as a mitigating factor. *Bradley*, 538 N.E.2d at 385.

[565] *Campbell*, 738 N.E.2d at 1191.

[566] *Id.* at 1199. *But see supra* Part II.B.4.

[567] *See, e.g.*, Brady v. United States, 397 U.S. 742, 748 (1970). *But see* Schneckloth v. Bustamonte, 412 U.S. 218, 249 (1973) (holding that waivers of Fourth Amendment rights need only be voluntary).

[568] *Brady*, 397 U.S. at 748.

[569] *Id.*

[570] 559 N.E.2d 464 (Ohio 1990).

[571] *See id.* at 468 (declining to require a trial court to make an interrogation into whether the defendant's waiver was knowing, intelligent, and voluntary).

[572] *Id.* at 468.

[573] *Id.*

[574] *Id.*

[575] *Id.*

[576] *See Brady*, 397 U.S. at 748.

[577] 709 N.E.2d 128 (Ohio 1999).

[578] *Id.* at 133.

[579] *Id.*

[580] OHIO REV. CODE ANN. §§ 2929.03(D)(2), (3) (West 1997).

[581] State v. Eley, 672 N.E.2d 640, 653 (Ohio 1996) (citing State v. Davis, 584 N.E.2d 1192, 1195 (1992)).

[582] In *State v. Allard*, for example, the trial court sua sponte ordered and then considered a presentence investigation report (PSI) when it sentenced Allard to death, despite the fact that section 2929.03(D)(1) of the Ohio Revised Code provides for a PSI only at the defendant's request. 663 N.E.2d 1277, 1284 (Ohio 1996).

[583] *See* Harris v. Alabama, 513 U.S. 504, 519–20 (1995) (Stevens, J., dissenting); *see also id.* at 519 n.5 (citation omitted).

[584] OHIO REV. CODE ANN. § 2945.27 (West 1997).

[585] 705 N.E.2d 329 (Ohio 1999).

[586] *Id.* at 335.

[587] 504 U.S. 719 (1992).

[588] *Stojetz*, 705 N.E.2d at 335–36 (citing *Morgan*, 504 U.S. at 729–734); State v. Allard, 663 N.E.2d 1277, 1288 (Ohio 1996).

[589] *Stojetz*, 705 N.E.2d at 336.

[590] *See* Wardius v. Oregon, 412 U.S. 470, 479 (1973) (concluding that the State must reciprocate the defendant's obligation to provide discovery); Washington v. Texas, 388 U.S. 14, 22 (1967) (noting that the defendant must have the same capability to present witnesses as the State); Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (stating that a defendant charged with a serious offense must be represented by counsel).

[591] Snyder v. Massachusetts, 291 U.S. 97, 122 (1934), *overruled in part by* Malloy v. Hogan, 378 U.S. 1, 14 (1964).

[592] *Wardius*, 412 U.S. at 475.

[593] *See* Evitts v. Lucey, 469 U.S. 387, 401 (1985).

[594] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[595] Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886).

[596] OHIO REV. CODE ANN. § 2945.27 (West 1997).

[597] Morgan v. Illinois, 504 U.S. 719, 739 (1992); Wainwright v. Witt, 469 U.S. 412, 435 (1985).

[598] 513 U.S. 504 (1995).

[599] *Id.* at 515.

[600] *See Morgan*, 504 U.S. at 729.

[601] *Id.*

[602] *Id.*; *see* Dennis v. United States, 339 U.S. 162, 171–72 (1950); Morford v. United States, 339 U.S. 258, 259 (1950).

[603] *See In re* Winship, 397 U.S. 358, 361 (1970).

[604] State v. Lundgren, 653 N.E.2d 304, 315 (Ohio 1995).

[605] 653 N.E.2d 304 (Ohio 1995).

[606] *Id.* at 314.

[607] *Id.*

[608] *See id.* at 315.

[609] *Id.*; *see* State v. Bedford, 529 N.E.2d 274, 285 (Ohio 1988); Rosales-Lopez v. United States, 451 U.S. 182, 194 (1981).

[610] *Id.*

[611] *Id.* (quoting State v. Stumpf, 512 N.E.2d 598, 605 (Ohio 1987)).

[612] 659 N.E.2d 292 (Ohio 1996).

[613] *Id.* at 300.

[614] 500 U.S. 415 (1991).

[615] *Wilson*, 659 N.E.2d at 300 (citing *Mu'Min*, 500 U.S. at 424).

[616] *Id.*

[617] 744 N.E.2d 1163 (Ohio 2001).

[618] *Id.* at 1171.

[619] *See id.*

[620] *See Wilson*, 659 N.E.2d 292, 300 (Ohio 1996); State v. Lundgren, 653 N.E.2d 304, 315 (Ohio 1995).

[621] *See* Wardius v. Oregon, 412 U.S. 470, 479 (1973) (concluding that the State must reciprocate the defendant's obligation to provide discovery); Washington v. Texas, 388 U.S. 14, 23 (1967) (noting that the defendant must have the same capability to present witnesses as the State); Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (stating that a defendant charged with a serious offense must be represented by counsel).

[622] Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886). The relevant legislation is found in section 2945.27 of the Ohio Revised Code, which provides that "[t]he judge of the trial court shall examine the prospective jurors under oath or upon affirmation as to their qualifications to serve as fair and impartial jurors, but he shall permit reasonable examination of such jurors by the prosecuting attorney and by the defendant or his counsel." OHIO REV. CODE ANN. § 2945.27 (West 1997).

[623] *See* Morgan v. Illinois, 504 U.S. 719, 729 (1992).

[624] *See supra* Part II.C.2.

[625] 469 U.S. 412 (1985).

[626] *See* State v. Stallings, 731 N.E.2d 159, 169 (Ohio 2000); State v. White, 709 N.E.2d 140, 149 (Ohio 1999); State v. McNeill, 700 N.E.2d 596, 605 (Ohio 1998); State v. Williams, 679 N.E.2d 646, 653 (Ohio 1997); State v. Rogers, 478 N.E.2d 984, 990 (Ohio 1985).

[627] 739 N.E.2d 749 (Ohio 2001).

[628] State v. Jones, 744 N.E.2d 1163, 1171 (Ohio 2000).

[629] Mills v. Rogers, 457 U.S. 291, 300 (1982).

[630] *See* Evitts v. Lucey, 469 U.S. 387, 401 (1985); *see also* Fetterly v. Paskett, 997 F.2d 1295, 1299 (9th Cir. 1993).

[631] Pulley v. Harris, 465 U.S. 37, 42–43 (1984).

[632] *Id.* at 43.

[633] *Id.*

[634] *Id.* at 44.

[635] 408 U.S. 238, 313 (1972); *see* Steven M. Sprenger, *A Critical Evaluation of State Supreme Court Proportionality Review in Death Sentence Cases*, 73 IOWA L. REV. 719, 722–23 (1988).

[636] Zant v. Stephens, 462 U.S. 862, 908–09 (1983) (Marshall, J., dissenting) (citing *Furman*, 408 U.S. at 313 (White, J., concurring)).

[637] OHIO REV. CODE ANN. § 2929.05(A) (West 1997).

[638] 509 N.E.2d 383 (Ohio 1987).

[639] *See id.* at 395.

[640] *See* Sprenger, *supra* note 635, at 731.

[641] *See* State v. Steffen, 509 N.E.2d 383, 395 (Ohio 1987).

[642] *Id.*

[643] Section 2929.03(F) of the Ohio Revised Code, in pertinent part, provides:

> The court or panel, when it imposes 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.

OHIO REV. CODE ANN. § 2929.03(F) (West 1997).

[644] *See* Sprenger, *supra* note 635, at 731.

[645] *Id.*

[646] *Id.* at 732.

[647] *Id.* (footnote omitted).

[648] 703 N.E.2d 1251 (Ohio 1999).

[649] 705 N.E.2d 329 (Ohio 1999).

[650] 661 N.E.2d 1019 (Ohio 1996).

[651] 692 N.E.2d 151 (Ohio 1998).

[652] 703 N.E.2d at 1256.

[653] *Id.* at 1255.

[654] 696 N.E.2d 1009 (Ohio 1998).

[655] *See id.* at 1009.

[656] 687 N.E.2d 685 (Ohio 1997).

[657] *See id.* at 685.

[658] 659 N.E.2d 292 (Ohio 1996).

[659] *See id.* at 292.

[660] *Stojetz*, 705 N.E.2d at 334.

[661] *Id.*

[662] *Id.* at 344–45.

[663] 594 N.E.2d 595 (Ohio 1992).

[664] *Id.* at 602.

[665] 512 N.E.2d 585 (Ohio 1987).

[666] *Id.* at 587.

[667] *Id.* at 595–96.

[668] *See* Merit Brief of Appellant at 53–59, State v. Benge, 661 N.E.2d 1019 (Ohio 1996) (No. 95-0112).

[669] *See id.*

[670] *Benge*, 661 N.E.2d at 1023–24.

[671] *Id.* at 1029.

[672] *Id.* at 1022.

[673] *Id.* at 1029.

[674] *See* Merit Brief of Appellant at 58, 87, State v. Benge, 661 N.E.2d 1019 (Ohio 1996) (No. 95-0112).

[675] *See id.* at 57–59.

[676] No. CA 85-04-035, 1986 WL 12097 (Ohio Ct. App. Oct. 27, 1986).

[677] *Id.* at *1.

[678] *Id.*

[679] No. CA87-02-027, 1987 WL 18840, at *1 (Ohio Ct. App. Oct. 26, 1987).

[680] *See* Preferred Risk Ins. Co. v. Gill, No. CA85-08-085, 1986 WL 4233, at *1 (Ohio Ct. App. Apr. 7, 1986).

[681] No. CA87-10-125, 1988 WL 141683 (Ohio Ct. App. Dec. 30, 1988).

[682] *Id.* at *2.

[683] 661 N.E.2d at 1029.

[684] State v. Spivey, 692 N.E.2d 151, 170 (Ohio 1998).

[685] *See* Evitts v. Lucey, 469 U.S. 387, 401 (1998); Fetterly v. Paskett, 997 F.2d 1295, 1299 (9th Cir. 1993).

[686] *See* State v. Getsy, 702 N.E.2d 866, 892 (Ohio 1998) ("In *Parker v. Dugger*, the United States Supreme Court implicitly recognized that co-defendant's sentence could be considered a non-statutory mitigating factor.") (citation omitted)).

[687] Section 2929.03(F) of the Ohio Revised Code, in pertinent part, provides:

> The court or panel, when it imposes 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.

OHIO REV. CODE ANN. § 2929.03(F) (West 1997).

[688] 747 N.E.2d 765 (Ohio 2001).

[689] *Id.* at 813 (Pfeifer, J., dissenting).

[690] 494 U.S. 738 (1990).

[691] *Id.* at 747.

[692] 528 N.E.2d 925 (Ohio 1988).

[693] *Id.* at 936.

[694] *Id.*

[695] *See e.g.*, State v. Chinn, 709 N.E.2d 1166, 1176 (Ohio 1999) (consideration of duplicative aggravating circumstances); State v. Sheppard, 703 N.E.2d 286, 295 (Ohio 1998) (prosecutor misconduct); State v. Reynolds, 687 N.E.2d 1358, 1373 (Ohio 1998) (trial court opinion failed to properly articulate why the aggravating circumstances outweighed mitigating factors); State v. Davie, 686 N.E.2d 245, 263 (Ohio 1997) (prosecutor misconduct); State v. Dennis, 683 N.E.2d 1096, 1108 (Ohio 1997) (trial court determined sentence before allocution & counsel's statements); State v. Awkal, 667 N.E.2d 960, 970 (Ohio 1996) (failure to instruct jury); State v. Wilson, 659 N.E.2d 292, 308 (Ohio 1996) (jury instruction that limited consideration of mitigation); State v. Lundgren, 653 N.E.2d 304, 323 (Ohio 1995) ("any instructional defect"); State v. Cooey, 544 N.E.2d 895, 916 (Ohio 1989) (double count aggravating circumstances).

[696] State v. Jones, 739 N.E.2d 301, 317 (Ohio 2000) (citing State v. Cook, 605 N.E.2d 70, 82 (Ohio 1992)) ("Moreover, merger of the death sentences as part of our independent assessment can readily cure any error that taints the jury's sentencing verdict.").

[697] 494 U.S. 370 (1990).

[698] *Id.* at 380.

[699] *See* Paxton v. Ward, 199 F.3d 1197, 1220 (10th Cir. 1999) (stating that there is no reweighing where jury was precluded from considering relevant mitigating evidence pursuant to Skipper v. South Carolina, 476 U.S. 1, 9 (1986)).

[700] Clemons v. Mississippi, 494 U.S. 738, 747 (1990) (citing Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality opinion)).

[701] *Id.* (citing Hicks v. Oklahoma, 447 U.S. 343 (1980)).

[702] 717 N.E.2d 298 (Ohio 1999).

[703] 706 N.E.2d 1231, 1243 (Ohio 1999).

[704] *Cowans*, 717 N.E.2d at 314.

[705] Teague v. Lane, 489 U.S. 288, 310 (1989).

[706] *Id.* at 295.

[707] *Id.* at 310.

[708] 686 N.E.2d 1124 (Ohio 1997).

[709] *Id.* at 1123.

[710] *See* State v. Treesh, 739 N.E.2d 749, 781 (Ohio 2001); State v. Smith, 731 N.E.2d 645, 657 (Ohio 2000); State v. Bey, 709 N.E.2d 484, 503 (Ohio 1999).

[711] *See supra* Part IV.B.1.

[712] 489 U.S. 288 (1989). As a result of the AEDPA, relief will be granted via federal habeas corpus only where (1) the decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) the decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2) (West 1997 & Supp. 2001).

[713] 381 U.S. 336 (1965).

[714] *Id.* at 346–47 (Brennan, J., concurring) (citations omitted).

[715] Michel v. Louisiana, 350 U.S. 91, 93 (1955); Parker v. Illinois, 333 U.S. 571, 574 (1948).

[716] OHIO REV. CODE ANN. § 2953.21(A)(1) (West 1997).

[717] *Id.* § 2953.21(E).

[718] *Id.* § 2953.21(I)(1).

[719] State v. Kapper, 448 N.E.2d 823, 826 (Ohio 1983); State v. Cole, 443 N.E.2d 169, 171 (Ohio 1982); State v. Jackson, 413 N.E.2d 819, 822–23 (Ohio 1982).

[720] State v. Zuern, No. B-842052, 1991 WL 256497, at *2 (Ohio Ct. App. Dec. 4, 1991); State v. Smith, 506 N.E.2d 1203 (Ohio 1986).

[721] *See* OHIO REV. CODE ANN. § 149.43 (West 1997).

[722] 639 N.E.2d 88 (Ohio 1994).

[723] *Id.* at 89.

[724] *Id.* at 90.

[725] OHIO CT. C.P.R. 33(B).

[726] OHIO CT. C.P.R. 77.04.

[727] OHIO CT. C.P.R. 17.02.

[728] *Id.*

[729] State v. Barnes, No. CR83-5911 (Ohio C.P. Lucas County May 17, 1991).

[730] OHIO SUP. CT. R. PRAC. III.

[731] *See* OHIO REV. CODE ANN. § 2953.21(I)(2) (West 1997) ("The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal.").

[732] *See* Pennsylvania v. Finley, 481 U.S. 551, 556–57 (1987).

[733] *See* Williams v. Taylor, 529 U.S. 362, 395–96 (2000).