No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JAMES GOFF,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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THE STATE OF OHIO, APPELLEE, *v.* GOFF, APPELLANT.

[Cite as *State v. Goff*, 154 Ohio St.3d 218, 2018-Ohio-3763.]

Criminal law—Aggravated murder—Death sentence imposed after resentencing hearing affirmed.

(No. 2017-0021—Submitted June 12, 2018—Decided September 20, 2018.)

APPEAL from the Court of Appeals for Clinton County,

No. CA2015-08-017, 2016-Ohio-7834.

KENNEDY, J.

{¶ 1} Appellant, James R. Goff, was convicted of the aggravated murder of Myrtle Rutledge and sentenced to death. We affirmed his convictions and sentence on direct appeal. *State v. Goff*, 82 Ohio St.3d 123, 694 N.E.2d 916 (1998) ("*Goff I*").

{¶ 2} In 2010, concluding that Goff had received ineffective assistance of appellate counsel with respect to his right to allocution at trial, a federal court granted a writ of habeas corpus effective 120 days later "unless the Ohio courts reopen Goff's direct appeal * * * to permit his counsel to raise this issue." *Goff v. Bagley*, 601 F.3d 445, 482 (6th Cir.2010) ("*Goff II*"). In 2015, after Goff's direct appeal was reopened and the case was remanded for resentencing, the trial court conducted a resentencing hearing at which Goff offered a statement in allocution. The trial court again sentenced him to death. The court of appeals affirmed. 2016-Ohio-7834, 2016 WL 6875916 ("*Goff III*").

{¶ 3} In this appeal as of right, Goff asserts four propositions of law. For the reasons explained below, we reject each of Goff's propositions of law and affirm his death sentence.

Appendix A

I. FACTS AND PROCEDURAL HISTORY

A. The murder of Myrtle Rutledge

{¶ 4} In *Goff I*, this court set forth the facts of Rutledge's murder in detail. 82 Ohio St.3d at 124-127, 694 N.E.2d 916. For purposes of this opinion, we summarize those facts as follows.

{¶ 5} In September 1994, Rutledge, an 88-year-old woman, was in the process of moving out of her farmhouse and into a new home. On September 14, Rutledge purchased furniture for her new home from a store in Wilmington, Ohio. The next day, Goff and a coworker, Manuel Jackson, delivered the furniture to Rutledge's home and assembled a bed for her.

{¶ 6} Two days later, Rutledge's daughter went to her mother's house to pick her up for a family reunion and "found her mother's battered and naked body lying on the floor of the bedroom." *Id.* at 125. A deputy coroner determined that Rutledge had "died from blunt and sharp trauma to the head, neck, shoulders, and ankle." *Id.* Additionally, Rutledge had suffered "blood loss due to multiple stab wounds, one of which severed [her] carotid artery." *Id.*

B. Goff's trial and initial sentence

{¶ 7} A jury found Goff guilty of aggravated murder, aggravated robbery, aggravated burglary, and grand theft of a motor vehicle.

{¶ 8} At the mitigation phase of Goff's trial, the defense presented testimony from Goff's former teacher, his former landlord, and a psychologist, Dr. Jeffrey Smalldon. Dr. Smalldon had examined Goff and also compiled a social history.

{¶ 9} The jury recommended a sentence of death. After conducting its own independent weighing of the aggravating circumstance and mitigating factors, the trial court sentenced Goff to death.

C. Direct appeal and collateral review in state court

{¶ 10} Goff unsuccessfully appealed his convictions and death sentence to the Twelfth District Court of Appeals. *State v. Goff*, 12th Dist. Clinton No. CA95-09-026, 1997 WL 194898 (Apr. 21, 1997). We affirmed the appellate court's judgment. *Goff I*, 82 Ohio St.3d 123, 694 N.E.2d 916.

{¶ 11} Goff then pursued postconviction relief in state court without success. *See State v. Goff*, 12th Dist. Clinton No. CA2000-05-014, 2001 WL 208845 (Mar. 5, 2001) (petition for state postconviction relief); *State v. Goff*, 12th Dist. Clinton No. CA2000-10-026, 2001 WL 649820 (June 11, 2001) (motion for relief from judgment under Civ.R. 60(B)(5)); *State v. Goff*, 98 Ohio St.3d 327, 2003-Ohio-1017, 784 N.E.2d 700 (application to reopen direct appeal pursuant to App.R. 26(B)).

D. Collateral review in federal court

{¶ 12} In 2002, Goff filed a petition for habeas corpus relief in the United States District Court for the Southern District of Ohio, which was denied. *Goff v. Bagley*, S.D.Ohio No. 1:02-cv-307, 2006 WL 3590369 (Dec. 1, 2006). On appeal, however, the United States Court of Appeals for the Sixth Circuit determined that his appellate counsel had provided constitutionally ineffective assistance by not raising the trial court's failure to afford Goff his right to allocute before sentencing. *Goff II*, 601 F.3d at 464-467. The Sixth Circuit granted a writ of habeas corpus effective 120 days later "unless the Ohio courts reopen Goff's direct appeal * * * to allow Goff to raise his allocution argument." *Id.* at 473.

E. Reopening of Goff's direct appeal and resentencing

{¶ 13} In accordance with the Sixth Circuit's directive, the Twelfth District reopened Goff's direct appeal to permit him to raise his allocution claim. *State v. Goff*, 12th Dist. Clinton No. CA95-09-026, 2012-Ohio-1125, ¶ 12. The appellate court confirmed its prior affirmance of Goff's convictions. However, due to the trial court's failure to afford Goff his right to allocution, the court vacated its prior

affirmance of appellant's sentence and remanded the matter for resentencing. The court of appeals instructed the trial court, "[u]pon remand, * * * to personally address [Goff] and afford him his right to allocution before imposing its sentence." *Id.* at ¶ 20.

{¶ 14} On remand, the trial court granted Goff's motion to proffer new mitigation evidence and awarded him funds to hire a consulting psychologist.

{¶ 15} At the resentencing hearing, Goff's counsel proffered a report prepared by psychologist Dennis Eshbaugh, Ph.D., as representative of testimony Dr. Eshbaugh would have given had he been permitted to testify at the hearing. Counsel urged the court to impose a life sentence, emphasizing Goff's difficult childhood, his youth at the time of the offenses, his substance abuse at the time of the offenses, and his positive adjustment to prison life. The state advocated for a death sentence. Goff then made a statement in allocution. He noted that he had not been violent in prison, referred to his difficult childhood, and asked the court for leniency. The trial court sentenced Goff to death.

{¶ 16} The court of appeals affirmed Goff's sentence. *Goff III*, 2016-Ohio-7834. Goff appealed.

II. ANALYSIS

{¶ 17} Goff raises four propositions of law, urging reversal of his death sentence:

> 1. Defendant-Appellant Goff was denied his substantive and procedural due process rights to a fair trial when the trial court refused to empanel a new jury for the sentencing proceeding.
>
> 2. The trial court erred when it excluded testimony of additional mitigating evidence in the time between the two sentencing hearings, in violation of Goff's rights under [the United States and Ohio Constitutions].

3. Trial counsel rendered ineffective assistance by failing to adequately prepare their client for allocution and by failing to proffer available, mitigating information from Goff's institutional file, in violation of Goff's rights under [the United States and Ohio Constitutions].

4. The Defendant-Appellant was denied due process, freedom from cruel and unusual punishment, and a fair and reliable sentence when his death sentence was imposed, in part, on the basis of information that he had no opportunity to deny or explain.

We will address Goff's propositions out of order for ease of analysis.

A. Exclusion of new mitigation evidence

{¶ 18} Goff's second proposition of law asserts that the trial court violated his Eighth Amendment rights by excluding testimony that he sought to present as additional mitigating evidence, including evidence of Goff's good behavior in prison since the first sentencing hearing. Goff argues that he "should have been permitted to present any and all relevant mitigation evidence at the time of resentencing." In support of this argument, he relies on the United States Supreme Court's decisions in *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion) (a sentencer may "not 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" [emphasis sic]); *Eddings v. Oklahoma*, 455 U.S. 104, 114, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (a sentencer may not "refuse to consider, *as a matter of law*, any relevant mitigating evidence" [emphasis sic]); *Skipper v. South Carolina*, 476 U.S. 1, 7-8, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (testimony about a defendant's good behavior in jail pending trial was relevant mitigation evidence that should not have been excluded).

{¶ 19} We have previously rejected claims similar to Goff's argument, and we find the argument unpersuasive in the current procedural context of this case.

{¶ 20} We have held that when "the errors requiring resentencing occur[ ] after the close of the mitigation phase of the trial"—after the jury has returned its verdict and made a sentencing recommendation—"the trial court is to proceed on remand from the point at which the error occurred." *State v. Chinn*, 85 Ohio St.3d 548, 565, 709 N.E.2d 1166 (1999). We reaffirmed this holding in *State v. Roberts*, 137 Ohio St.3d 230, 2013-Ohio-4580, 998 N.E.2d 1100, ¶ 25, 35-36, in rejecting a capital defendant's argument that she was entitled to a full presentation of mitigation at her resentencing hearing. In *Roberts*, we explained that *Lockett*, *Eddings*, and *Skipper* were distinguishable in that each "involved the trial court's exclusion of, or refusal to consider, evidence in the *original* sentencing proceeding. None of these cases involved a proceeding on remand." (Emphasis added.) *Roberts* at ¶ 34. By contrast, *Roberts* "involve[d] a proceeding on remand for the limited purpose of correcting an error that occurred *after* the defendant had had a full, unlimited opportunity to present mitigating evidence to the sentencer." (Emphasis sic.) *Id.* We concluded that the *Lockett* line of cases did not "require[ ] the trial court to reopen the evidence after an error-free evidentiary hearing had already taken place." *Roberts* at ¶ 35, citing *Chinn* at 564-565. And we recently stated that "[n]o binding authority holds that the Eighth Amendment requires a resentencing judge to accept and consider new mitigation evidence at a limited resentencing when the defendant had the unrestricted opportunity to present mitigating evidence during his original mitigation hearing." *State v. Jackson*, 149 Ohio St.3d 55, 2016-Ohio-5488, 73 N.E.3d 414, ¶ 73.

{¶ 21} The underlying error currently at issue is the trial court's failure to provide Goff an opportunity to allocute at his initial sentencing hearing. Crim.R. 32(A)(1) requires a trial court to ask the defendant whether he "wishes to make a statement in his * * * own behalf" "[a]t the time of *imposing* sentence." (Emphasis

added.) This cannot occur until after the defendant has had an opportunity to present mitigation evidence and the factfinder has made its sentencing recommendation. *See State v. Mason*, 153 Ohio St.3d 476, 2018-Ohio-1462, 108 N.E.3d 56, ¶ 11-12 (providing sequential description of imposition of a death sentence in Ohio). On remand for Goff's resentencing, the trial court had to proceed from the point of providing Goff an opportunity to allocute, which occurred after his opportunity to present mitigation evidence. Therefore, the trial court did not err in excluding testimony that Goff sought to present as additional mitigation evidence.

{¶ 22} Goff urges us to apply—instead of the above caselaw—the Sixth Circuit's holding in *Davis v. Coyle* that "at resentencing, a trial court must consider any new evidence that the defendant has developed since the initial sentencing hearing," 475 F.3d 761, 774 (6th Cir.2007), citing *Skipper*, 476 U.S. at 8, 106 S.Ct. 1669, 90 L.Ed.2d 1.

{¶ 23} We have already rejected similar claims based on *Coyle*: "To hold, as *Coyle* does, that a new mitigation hearing must be held, even though no constitutional error infected the original one, would transform the right to present relevant mitigation into a right to *update* one's mitigation. Such a right has no clear basis in *Lockett* or its progeny." (Emphasis sic.) *Roberts*, 137 Ohio St.3d 230, 2013-Ohio-4580, 998 N.E.2d 1100, at ¶ 36. "Establishing a right to update mitigation could result in arbitrary distinctions between similarly situated capital defendants" because a defendant's ability to update his mitigation evidence would turn on whether or not a posthearing sentencing error took place that required a remand. *Id.* at ¶ 37. Because Goff fails to present a persuasive argument to depart from this analysis, we decline to do so.

{¶ 24} We reject proposition of law No. 2.

B. Denial of jury for resentencing

{¶ 25} As his first proposition of law, Goff contends that the trial court violated his substantive- and procedural-due-process rights by refusing to empanel a new jury for the resentencing hearing. He presents both statutory and constitutional arguments in support of this proposition.

1. R.C. 2929.06(B)

{¶ 26} Goff asserts that R.C. 2929.06(B) directs the trial court on remand " 'to empanel a new jury and conduct a fresh penalty hearing,' " Goff's brief at 5, quoting *State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583, 972 N.E.2d 534, ¶ 2, because he was originally tried by a jury and his initial death sentence was vacated.

{¶ 27} R.C. 2929.06(B) provides:

> Whenever any court of this state or any federal court sets aside, nullifies, or vacates a sentence of death imposed upon an offender because of error that occurred in the sentencing phase of the trial and if division (A) of this section does not apply, the trial court that sentenced the offender shall conduct a new hearing to resentence the offender. If the offender was tried by a jury, the trial court shall impanel a new jury for the hearing.

{¶ 28} We have previously considered and rejected Goff's argument. In *State v. Roberts*, 150 Ohio St.3d 47, 2017-Ohio-2998, 78 N.E.3d 851, we had vacated Donna Roberts's death sentence because the trial court failed to consider her allocution at her initial resentencing, *id.* at ¶ 21. On remand for a second resentencing, the trial court considered Roberts's allocution and again sentenced her to death without empaneling a new jury. *Id.* at ¶ 23-25. On appeal, Roberts urged this court to conclude that "R.C. 2929.06(B) should apply to the resentencing and require a de novo penalty-phase hearing before a new jury." *Id.* at ¶ 43.

{¶ 29} We found Roberts's argument unpersuasive. We reasoned that there was "no indication in R.C. 2929.06(B) that the General Assembly intended to abrogate" in capital cases the general rule that required the trial court on remand to proceed from the point at which the error occurred. *Id.* at ¶ 45. Because the error was the trial court's failure to consider Roberts's allocution, which occurred after the jury was discharged, on remand the "trial court was required to proceed from the point of error, not from an earlier point in the sentencing proceedings." *Id.* We further stated, "Because a legally valid penalty-phase jury verdict has already been rendered in this case, there is no reason to empanel a jury and retry the evidentiary portion of either the guilt or penalty phases of the proceeding." *Id.* at ¶ 46.

{¶ 30} As in *Roberts*, the sentencing error at issue in this case occurred after the verdict and R.C. 2929.06(B) did not require the trial court to empanel a new jury for resentencing.

2. Constitutional right to trial by jury

{¶ 31} Relying on *Hurst v. Florida*, 577 U.S. __, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), Goff next argues that the trial court's failure to empanel a new jury for resentencing violated his Sixth Amendment and due-process rights.

{¶ 32} The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." The right to a jury extends to determinations of guilt and to "any fact that increases the penalty for a crime beyond the prescribed statutory maximum." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). This includes the finding of a statutory aggravating circumstance in a capital case, which is " 'the functional equivalent of an element of a greater offense.' " *Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), quoting *Apprendi* at 494, fn. 19.

{¶ 33} In *Hurst*, the United State Supreme Court considered the constitutionality of Florida's capital-punishment scheme, which provided that " '[a]

person who has been convicted of a capital felony shall be punished by death' only if an additional sentencing proceeding 'results in findings by the court that such person shall be punished by death.' " *Hurst* at __, 136 S.Ct. at 620, quoting former Fla.Stat. 775.082(1), C.S.H.B. No. 3033, Ch. 98-3, Laws of Fla. The law provided for the jury to render an " 'advisory sentence' " recommending death but did not require the jury to specify the aggravating circumstances that influenced its decision. *Id.*, quoting former Fla.Stat. 921.141(2). The sentencing judge then imposed a death sentence after independently determining and weighing the aggravating and mitigating circumstances. *Id.*, citing former Fla.Stat. 921.141(3).

{¶ 34} Relying on *Apprendi* and *Ring*, the Supreme Court determined that Florida's scheme violated the Sixth Amendment because it "required the judge alone to find the existence of an aggravating circumstance," *Hurst*, 577 U.S. at __, 136 S.Ct. at 624, 193 L.Ed.2d 504, and the jury was "not require[d] * * * to make the critical findings necessary to impose the death penalty," *id.* at __, 136 S.Ct. at 622. The jury's advisory sentence was immaterial for Sixth Amendment purposes because it did not include " 'specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation [was] not binding on the trial judge.' " *Id.*, quoting *Walton v. Arizona*, 497 U.S. 639, 648, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990).

{¶ 35} We have previously concluded that "Ohio's death-penalty scheme * * * does not violate the Sixth Amendment" because it "requires the critical jury findings that were not required by the laws at issue in *Ring* and *Hurst*." *Mason*, 153 Ohio St.3d 476, 2018-Ohio-1462, 108 N.E.3d 56, at ¶ 21, citing R.C. 2929.03(C)(2). Nevertheless, Goff contends that a jury should have been empaneled for his resentencing hearing to perform the weighing required under R.C. 2929.03(D)(2). He asserts that for Sixth Amendment purposes, the weighing of aggravating circumstances and mitigating factors is itself a factual finding necessary to impose a death sentence.

{¶ 36} Again, Goff's argument fails. The weighing that occurs in the sentencing phase " 'is *not* a fact-finding process subject to the Sixth Amendment.' " (Emphasis added in *Belton*.) *Mason* at ¶ 29, quoting *State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319, ¶ 60. "The Sixth Amendment was satisfied once the jury found [Goff] guilty of aggravated murder and a felony-murder capital specification." *Mason* at ¶ 29.

{¶ 37} Goff also contends that he was entitled to a jury at resentencing because the trial court imposed his 2015 death sentence not only "based upon a jury recommendation made twenty-two years ago but also recent independent factfinding by the trial court." He characterizes these "critical findings" as ones "necessary to impose the death penalty."

{¶ 38} In its sentencing opinion, the trial court noted:

> The Court has reviewed and considered all of the trial transcripts of this matter, as well as all of the mitigating factors presented at the original trial, in addition to those that were presented or re-presented with regard to the resentencing hearing. The Court has further searched the entire record for any further evidence as to mitigation. Although parts of this opinion are similar to the Court's original opinion herein, it has considered anew, the evidence, testimony, arguments of counsel as well as the Defendant's allocution.

The court "also reviewed the proffered evidence (report of Dr. Eshbaugh, Ph.D.) by the Defendant." After considering all these materials, the court "found additional mitigating evidence as of the date of this hearing."

{¶ 39} As explained above, the weighing process is not fact-finding subject to the Sixth Amendment. Moreover, to the extent that the trial court improperly

considered Dr. Eshbaugh's report as new mitigation evidence in its sentencing determination, Goff fails to explain how the court's consideration of the report as new mitigation evidence prejudiced him. *See Washington v. Recuenco*, 548 U.S. 212, 215, 221, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) (*Apprendi* claims are subject to harmless-error analysis).

{¶ 40} We reject proposition of law No. 1.

C. Ineffective assistance of counsel

{¶ 41} Goff asserts as his third proposition of law that trial counsel were ineffective at the resentencing hearing for inadequately preparing Goff for his allocution and failing to proffer mitigating information from Goff's institutional file.

{¶ 42} To prevail on a claim of ineffective assistance of counsel, Goff must (1) show that counsel's performance "fell below an objective standard of reasonableness," as determined by "prevailing professional norms," and (2) demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). When performing a *Strickland* analysis, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

1. Inadequate preparation for allocution

{¶ 43} Goff acknowledges that he made a statement when the trial court, in accord with Crim.R. 32(A)(1), invited him to allocute at his resentencing hearing. He argues, however, that the "brief, detached" nature of his statement proves that trial counsel did not adequately prepare him for allocution. Goff contends that counsel should have helped him make "a coherent, compelling presentation," guided him by asking questions, encouraged him to apologize to the victim's family, and explained to Goff "the importance of his statements to the court."

{¶ 44} Goff has failed to satisfy *Strickland*. First, there is nothing in the record detailing what steps counsel did or did not take to prepare Goff for allocution. To prove that counsel's performance was deficient, Goff would need to rely on evidence outside the record, which is " 'not appropriately considered on a direct appeal,' " *State v. Spaulding*, 151 Ohio St.3d 378, 2016-Ohio-8126, 89 N.E.3d 554, ¶ 102, quoting *State v. Madrigal*, 87 Ohio St.3d 378, 391, 721 N.E.2d 52 (2000).

{¶ 45} Second, even if counsel had performed deficiently in preparing Goff for his allocution, Goff has not demonstrated "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052, 80 L.Ed.2d 674. While asserting that "allocution is a significant opportunity for the defendant and can impact the outcome of the proceedings," Goff fails to make the crucial argument that his sentence would have been different had counsel better prepared him to allocute.

2. Failure to proffer evidence from Goff's institutional file

{¶ 46} Goff argues that his trial counsel were also ineffective for failing to "attempt to proffer testimony of prison staff or information from prison records" at the resentencing hearing and that he was prejudiced by that failure.

{¶ 47} As discussed above, the trial court correctly denied Goff's request to present new mitigation evidence, including evidence of his positive adjustment to incarceration in the 20 years since his initial sentence; he did not have a right to present new mitigation evidence at his resentencing. *See Jackson*, 149 Ohio St.3d 55, 2016-Ohio-5488, 73 N.E.3d 414, at ¶ 73. Therefore, Goff was not prejudiced by trial counsel's failure to proffer the testimony as new mitigation evidence. *See State v. Clowers*, 134 Ohio App.3d 450, 457, 731 N.E.2d 270 (1st Dist.1999) (rejecting claim of ineffective assistance based on counsel's failure to proffer

evidence when, even if counsel had preserved the objection, the evidence would have been inadmissible).

{¶ 48} We reject proposition of law No. 3.

D. Denial of opportunity to deny or explain evidence

{¶ 49} In his fourth proposition of law, Goff asserts that his constitutional rights were violated because he was sentenced to death based, in part, on information that he had no opportunity to deny or explain. Specifically, he claims that he was denied the opportunity to introduce evidence of his behavior while incarcerated to rebut the prosecutor's "argument that he was too dangerous for a life in prison."

{¶ 50} A defendant is denied due process of law when the death sentence is "imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 362, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (plurality opinion). Goff, however, has not been denied this opportunity. After defense counsel argued in favor of a life sentence for Goff, the prosecutor stated, "[Goff] comes in here today, after he's spent all this time in jail, and to be blunt about it, if the death penalty really worked, he should have been put to death already!—And he asks for a chance to live?"

{¶ 51} Contrary to Goff's assertion, the prosecutor's statement did not portray Goff's behavior while incarcerated or his adjustment to death row as support for imposing the death penalty. Instead, the statement was an observation regarding the significant period of time that Goff had been incarcerated without being executed.

{¶ 52} We reject proposition of law No. 4.

E. Independent sentence evaluation

{¶ 53} Having considered Goff's propositions of law, we must now independently review his death sentence for appropriateness and proportionality, as R.C. 2929.05(A) requires. This review requires weighing all the facts and other

evidence to determine whether the aggravating circumstance outweighs the mitigating factors and whether Goff's sentence of death is appropriate. We previously completed much of the independent sentence evaluation when we affirmed Goff's original death sentence on direct appeal. *See Goff I*, 82 Ohio St.3d at 141-143, 694 N.E.2d 916.

1. Aggravating circumstance

{¶ 54} The evidence at trial established beyond a reasonable doubt that Goff committed the aggravated murder of Rutledge in the course of an aggravated burglary. *See* R.C. 2929.04(A)(7). The evidence also established beyond a reasonable doubt that Goff was the principal offender in the aggravated murder. *See id.*

2. Mitigation evidence

{¶ 55} We must weigh the above aggravating circumstance against the mitigating factors contained in R.C. 2929.04(B). We must consider the mitigation evidence from Goff's trial in 1995 and any mitigating information presented during Goff's allocution at his resentencing hearing.

{¶ 56} In *Goff I*, this court found nothing in mitigation with respect to the nature and circumstances of the murder. 82 Ohio St.3d at 141, 694 N.E.2d 916. Instead, our primary focus was on Goff's "history, character, and background." *Id.*; R.C. 2929.04(B). Goff was significantly affected by his father's death when Goff was only four years old. Goff was left to be raised by a mother who "was a failure at motherhood, providing very little supervision." *Goff I* at 142. Goff's mother did not "provide even the basic needs of food, clothes and school," and Goff began shoplifting when he was six years old. *Id.* at 143. The family subsisted on welfare benefits and often lived in condemned housing, frequently lacking even toilet facilities. He skipped school often and never graduated from high school. Goff was eventually removed from his mother's custody and placed in foster care. We

concluded that Goff's "history, character, and background [were] entitled to some mitigating weight." *Id.*

{¶ 57} The court identified three additional mitigating factors in *Goff I*: Goff's age of 19 at the time of the crime; his voluntary abuse of alcohol, marijuana, speed, inhalants, and crack cocaine; and the testimony of Dr. Smalldon, the defense psychologist, that Goff likely would adjust well to life in prison. *See* R.C. 2929.04(B)(4) and (7). The court afforded little weight to any of these additional mitigating factors.

{¶ 58} We now, however, afford some weight to Goff's adjustment to prison life. In his allocution, Goff stressed that he had not "shown any violence" since he was imprisoned. Goff's statement supports Dr. Smalldon's testimony at the initial trial that he would likely adjust well to life in prison.

{¶ 59} Goff also implied during his allocution that he did not accept a plea deal because he did not know what the deal entailed. While it is unclear how this information is mitigating, a reasonable interpretation is that Goff may have been willing to accept responsibility for the murder if he had understood the plea deal. We assign this evidence no weight.

{¶ 60} Finally, Goff referred to his troubled childhood. His statement, however, failed to provide information that was not presented at the 1995 sentencing hearing. Therefore, we maintain the view that Goff's "history, character, and background" is "entitled to some mitigating weight." *Id.*, 82 Ohio St.3d at 143, 694 N.E.2d 916.

{¶ 61} Upon independent weighing, we again find that the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt. *See id.* Goff identified Rutledge, an 88-year-old woman, as a potential burglary victim while delivering furniture to her. He returned to Rutledge's home and murdered her in the course of the burglary. In contrast, Goff's mitigation evidence has little significance.

{¶ 62} Finally, we hold that Goff's death sentence is proportionate to death sentences that we have affirmed in similar cases. *See State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31; *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, 857 N.E.2d 547; *State v. Thomas*, 97 Ohio St.3d 309, 2002-Ohio-6624, 779 N.E.2d 1017.

{¶ 63} Accordingly, we affirm Goff's sentence of death.

Judgment affirmed.

O'CONNOR, C.J., and O'DONNELL, FRENCH, FISCHER, DEWINE, and DEGENARO, JJ., concur.

Richard M. Moyer, Clinton County Prosecuting Attorney, and Andrew McCoy, Assistant Prosecuting Attorney, for appellee.

Marshall G. Lachman and Angela Wilson Miller, for appellant.

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLINTON COUNTY

STATE OF OHIO,	:	
		CASE NO. CA2015-08-017
Plaintiff-Appellee,	:	
		OPINION
	:	11/21/2016
- vs -		
	:	
JAMES R. GOFF,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLINTON COUNTY COURT OF COMMON PLEAS
Case No. CRI 95-5-008

Richard W. Moyer, Clinton County Prosecuting Attorney, Andrew T. McCoy, 103 East Main Street, Wilmington, Ohio 45177, for plaintiff-appellee

Marshall G. Lachman, 75 North Pioneer Boulevard, Springboro, Ohio 45066, for defendant-appellant

Angela Wilson Miller, 322 Leeward Drive, Jupiter, Florida 33477, for defendant-appellant

M. POWELL, P.J.

{¶ 1} Defendant-appellant, James Goff, appeals a decision of the Clinton County Court of Common Pleas resentencing him to death for the murder of an elderly woman.

{¶ 2} Appellant was indicted in 1995 for the murder of 88-year-old Myrtle Rutledge. A jury found appellant guilty of aggravated murder with a death penalty specification,

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aggravated burglary, aggravated robbery, and grand theft. On August 11, 1995, after hearing extensive mitigating evidence during the penalty-phase hearing, the jury recommended that appellant be sentenced to death. On August 18, 1995, after weighing the mitigating and aggravating factors, but without first providing appellant with an opportunity to exercise his right of allocution, the trial court accepted the jury's recommendation and sentenced appellant to death. Appellant was sentenced to three consecutive prison terms on the other charges.

{¶ 3} Appellant's conviction and death sentence were affirmed by this court in 1997 and by the Ohio Supreme Court in 1998. *State v. Goff*, 12th Dist. Clinton No. CA95-09-026, 1997 WL 194898 (Apr. 21, 1997); *State v. Goff*, 82 Ohio St.3d 123 (1998). The United States Supreme Court then denied appellant's petition for certiorari. *Goff v. Ohio*, 527 U.S. 1039, 119 S.Ct. 2402 (1999).

{¶ 4} In 2002, following a series of unsuccessful attempts at postconviction relief, appellant filed a petition for a writ of habeas corpus with the United States District Court for the Southern District of Ohio, alleging 25 constitutional errors. The District Court denied the petition but certified 17 claims for appellate review. *Goff v. Bagley*, S.D.Ohio No. 1:02-CV-307, 2007 WL 2601096 (Sept. 10, 2007). Included within those claims was whether appellant had received ineffective assistance of counsel as a result of his appellate counsel's failure to raise on direct appeal the issue of appellant's right to allocution before sentencing.

{¶ 5} On April 6, 2010, the United States Court of Appeals for the Sixth Circuit issued a decision, finding appellant had received ineffective assistance of counsel as a result of his appellate counsel's failure to raise the issue of appellant's right to allocution. *Goff v. Bagley*, 601 F.3d 445, 467 (6th Cir.2010). The Sixth Circuit conditionally granted the writ of habeas corpus "unless the Ohio Courts reopen [appellant's] direct appeal within 120 days to allow [appellant] to raise his allocution argument." *Id.* at 473. Consequently, this court reopened

appellant's direct appeal to allow him to raise his allocution argument.

{¶ 6} On March 19, 2012, "we confirm[ed] our prior judgment affirming appellant's conviction," but reversed and vacated our prior judgment affirming his sentence, finding the trial court erred in failing to afford appellant his right of allocution. *State v. Goff*, 12th Dist. Clinton No. CA95-09-026, 2012-Ohio-1125, ¶ 20. We remanded the matter to the trial court "for the sole purpose of resentencing" and with instructions "to personally address appellant and afford him his right of allocution before imposing its sentence." *Id.*

{¶ 7} Subsequently, appellant filed a motion in the trial court to preclude imposition of the death penalty on remand, arguing that Ohio law required imposition of a life sentence with parole eligibility after 20 or 30 years. Appellant alternatively moved the trial court to empanel a new jury for his resentencing hearing, citing R.C. 2929.06(B) and *State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583. Following a hearing, the trial court denied the motion for a new jury, finding that *White* was inapplicable and therefore, R.C. 2929.06(B) did not require the empaneling of a new jury. The trial court held that the motion to preclude death penalty on remand was moot. Appellant appealed the trial court's decision but we dismissed the appeal for lack of a final appealable order.

{¶ 8} In 2013, appellant again filed a motion to preclude imposition of the death penalty on remand. In 2014, through new counsel, appellant filed a motion to preclude imposition of the death penalty on remand; or in the alternative, for the empanelment of a new jury; or at a minimum, for a hearing to proffer all new mitigation by testimony.

{¶ 9} On August 13, 2014, the trial court granted appellant's motion to proffer all new mitigating evidence but denied his motions to preclude imposition of the death penalty and to empanel a new jury. Subsequently, the trial court granted appellant's motion for funds to hire a consulting defense psychologist. Appellant hired Dr. Dennis Eshbaugh, a forensic psychologist who prepared a report.

{¶ 10} On June 30, 2015, the trial court conducted the resentencing hearing. Over the state's objection, the trial court allowed appellant to proffer Dr. Eshbaugh's report as representative of the psychologist's testimony had he been called to testify at the hearing. Defense counsel referenced appellant's difficult childhood and his youth and substance abuse at the time of the offenses. Defense counsel also briefly told the trial court that since being incarcerated, appellant has adjusted to prison life and has not shown any propensity towards violence. Defense counsel then asked that appellant be sentenced to prison for 52 years to life. The state asked that appellant be resentenced to death. The trial court then gave appellant the opportunity to make a statement. Appellant offered a brief statement in allocution.

{¶ 11} On July 1, 2015, the trial court resentenced appellant to death for the murder of Myrtle Rutledge. Appellant was resentenced to three consecutive prison terms on the other charges.

{¶ 12} Appellant now appeals, raising four assignments of error. For ease of discussion, the assignments of error will be addressed out of order.

{¶ 13} Assignment of Error No. 2:

{¶ 14} THE DECISION OF THE TRIAL COURT TO EXCLUDE TESTIMONY OF ADDITIONAL MITIGATING EVIDENCE IN THE TIME BETWEEN THE TWO SENTENCING HEARINGS, VIOLATED GOFF'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND OHIO CONST. ART. I, §§ 5, 9, AND 16.

{¶ 15} Assignment of Error No. 4:

{¶ 16} GOFF WAS DENIED DUE PROCESS, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT AND A FAIR AND RELIABLE SENTENCE WHEN HIS DEATH SENTENCE WAS IMPOSED, IN PART, ON THE BASIS OF INFORMATION THAT HE HAD NO OPPORTUNITY TO DENY OR EXPLAIN. U.S. CONST. AMENDS. VIII, XIV; OHIO

CONST. ART. I, §§ 9, 10 AND 16.

{¶ 17} In his second and fourth assignments of error, appellant argues the trial court erred in not allowing him to present additional mitigating evidence at the resentencing hearing. Appellant asserts he should have been permitted to present any and all relevant mitigating evidence, including a psychological update via Dr. Eshbaugh's testimony and evidence of his good behavior in prison. Appellant asserts that preventing him from presenting additional mitigating evidence, including evidence to rebut the state's argument that he was too dangerous for a sentence of life in prison, violated his constitutional rights. In support of his argument, appellant cites *Davis v. Coyle*, 475 F.3d 761 (6th Cir.2007).

{¶ 18} The issue of whether a capital defendant, whose death sentence has been vacated, is entitled to present additional mitigating evidence at resentencing on remand has been addressed several times by the Ohio Supreme Court and rejected each time.

{¶ 19} In *State v. Davis*, 63 Ohio St.3d 44 (1992), Davis was tried to a three-judge panel and sentenced to death. The Ohio Supreme Court affirmed his conviction but reversed his death sentence based upon errors which occurred after all available mitigating evidence had been heard in the penalty phase of his trial. The case was remanded to the original three-judge panel for a resentencing hearing. During the resentencing hearing, the panel did not allow Davis to introduce evidence regarding his adjustment to prison life or to present a psychological update via expert testimony covering the period since his conviction and original sentencing. Instead, the panel limited its consideration to the evidence presented in mitigation at Davis' 1984 trial and subsequently resentenced him to death.

{¶ 20} On appeal, Davis argued his sentence should be vacated as he was not allowed to present additional post-trial mitigating evidence at the resentencing hearing. In support of his argument, Davis cited several United States Supreme Court opinions. *See Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954 (1978); *Eddings v. Oklahoma*, 455 U.S. 104,

102 S.Ct. 869 (1982); *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669 (1986); and *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821 (1987). The Ohio Supreme Court affirmed, rejecting Davis' argument that the Supreme Court opinions entitled him to post-trial mitigating evidence on remand:

> [N]o relevant mitigating evidence was excluded from consideration by the panel during the mitigation phase of appellant's 1984 trial. All mitigating evidence which was available at that time was duly received and considered by the panel including appellant's ability to adjust to prison life. That same relevant evidence was again received and considered by the panel in 1989 for purposes of resentencing appellant. The evidence excluded from consideration * * * at appellant's resentencing hearing concerned certain *post-trial* matters.

(Emphasis sic.) *Davis*, 63 Ohio St.3d at 46.

{¶ 21} The supreme court next considered this issue in *State v. Chinn*, 85 Ohio St.3d 548 (1999). Chinn was sentenced to death following a jury trial. The appellate court affirmed the conviction but vacated the death penalty based upon errors committed by the trial judge in his independent evaluation of the sentence and in writing the sentencing opinion. On remand, the trial court denied Chinn's motion to present additional mitigating evidence and resentenced him to death. On appeal, the supreme court again rejected the argument that a capital defendant is entitled to present new mitigating evidence on remand:

> [*Lockett*, *Skipper*, and *Hitchcock*] each involved a situation where the capital sentencer was prohibited, in some form or another, from considering relevant mitigating evidence at trial. In the case at bar, no relevant mitigating evidence was ever excluded from consideration during the penalty phase of appellant's 1989 trial. Therefore, the case at bar is clearly distinguishable from * * * *Lockett, Skipper,* and *Hitchcock*. Accordingly, as was the case in * * * *Davis*, we find *Lockett, Skipper,* and *Hitchcock* to be inapplicable here. It is of no consequence that the additional mitigating evidence in *Davis* involved *post-trial* accomplishments, whereas appellant's additional mitigation evidence involves matters appellant claims he could have presented but did not present during the mitigation phase of his 1989 trial. In this case, as in *Davis,* the errors requiring resentencing occurred after the close of the mitigation phase of the trial. Under these

> circumstances, the trial court is to proceed on remand from the point at which the error occurred.

(Citation deleted and emphasis sic.) *Chinn* at 565. The supreme court further stated, "[the defendant] was not entitled to an opportunity to improve or expand his evidence in mitigation simply because [the court of appeals] required the trial court to reweigh the aggravating circumstance and mitigating factors." *Id.*

{¶ 22} In 2007, the United States Court of Appeals for the Sixth Circuit addressed this issue in habeas corpus proceedings involving the *Davis* case. *See Coyle*, 475 F.3d 761. The Sixth Circuit held that the three-judge panel's decision to exclude post-trial mitigation evidence from Davis' resentencing hearing violated his Eighth Amendment rights. *Id.* at 773. The Sixth Circuit stated that the Ohio Supreme Court's affirmance of that ruling in *Davis*, "based on the court's belief that the facts of Davis's case could be distinguished from *Skipper's* solely on the basis of timing, was both an unreasonable application of the decision in *Skipper* and contrary to the holding in that opinion and its antecedent cases." *Id.* The Sixth Circuit concluded that "the holding in *Skipper* * * * requires that, at resentencing, a trial court must consider any new evidence that the defendant has developed since the initial sentencing hearing." *Id.* at 774.

{¶ 23} In 2013, the Ohio Supreme Court once again considered this issue, this time in light of *Coyle*. *See State v. Roberts*, 137 Ohio St.3d 230, 2013-Ohio-4580. Roberts was sentenced to death following a jury trial. The supreme court affirmed her conviction but vacated her death sentence and remanded the case for resentencing because the trial judge had engaged in ex parte communications with the prosecutor in drafting the sentencing opinion. On remand, Roberts moved to introduce new mitigating evidence at the resentencing hearing. The trial court denied the motion and Roberts proffered her evidence into the record. The trial court then resentenced her to death.

{¶ 24} On appeal, the supreme court rejected Roberts' claim that the Eighth Amendment entitled her to introduce new mitigating evidence on remand, *Coyle* notwithstanding. The supreme court first emphasized that *Coyle* was not binding precedent because the court was "not bound by rulings on federal statutory or constitutional law made by a federal court other than the United States Supreme Court." *Roberts* at ¶ 33. The supreme court then declined to follow *Coyle*, noting that *Lockett*, *Eddings*, *Skipper*, and *Hitchcock* each "involved the trial court's exclusion of, or refusal to consider, evidence in the original sentencing proceeding. None of these cases involved a proceeding on remand." *Id.* at ¶ 34. By contrast, *Roberts*, like *Davis* and *Chinn*, involved "a proceeding on remand for the limited purpose of correcting an error that occurred *after* the defendant had had a full, unlimited opportunity to present mitigating evidence to the sentencer." (Emphasis sic.) *Id.*

{¶ 25} The supreme court then concluded:

> In a case in which the defendant was not deprived of any constitutional right - including her Eighth Amendment right to present mitigation - at the time of her mitigation hearing, there seems to be no basis for requiring the trial court to reopen or supplement that evidence in a later proceeding. To hold, as *Coyle* does, that a new mitigation hearing must be held, even though no constitutional error infected the original one, would transform the right to present relevant mitigation into a right to *update* one's mitigation. Such a right has no clear basis in *Lockett* or its progeny.

(Emphasis sic.) *Roberts*, 2013-Ohio-4580 at ¶ 36.

{¶ 26} The supreme court most recently addressed this issue in *State v. Jackson*, Slip Opinion No. 2016-Ohio-5488, a companion case to *Roberts*. As in *Roberts*, the supreme court affirmed Jackson's conviction but vacated his death sentence because the trial judge had engaged in ex parte communications with the prosecutor in drafting the sentencing opinion. On remand, Jackson moved to introduce new mitigating evidence at the resentencing hearing. The trial court denied the motion and resentenced him to death.

{¶ 27} On appeal, the supreme court once again rejected the claim that a capital defendant is entitled to improve or expand his mitigating evidence on remand simply because the trial court was required to resentence him and prepare a new sentencing opinion. *Jackson* at ¶ 70. Specifically, the court held that

> No binding authority holds that the Eighth Amendment requires a resentencing judge to accept and consider new mitigation evidence at a limited resentencing when the defendant had the unrestricted opportunity to present mitigating evidence during his original mitigation hearing. Accordingly, we adhere to our precedent in *Roberts*[.]

Id. at ¶ 73.

{¶ 28} In so holding, the supreme court cited a recent decision from the South Dakota Supreme Court, *State v. Berget*, 2014 S.D. 61, 853 N.W.2d 45. The *Berget* court, upon comparing the reasoning underlying *Coyle* and *Roberts* and determining that *Roberts* is the more persuasive authority, held that a capital defendant does not have an Eighth Amendment right to present updated mitigation evidence on resentencing. *Berget* at ¶ 38, 45-46.

{¶ 29} Quoting *Berget* with approval, the Ohio Supreme Court noted that

> recognizing a capital defendant's right to present updated mitigation on remand "would establish the incentive to turn a limited resentencing into a full-fledged, second sentencing hearing by seeking out all newly discoverable mitigation evidence conceivable, again no longer making the original sentencing proceeding the 'main event' but consigning it to a mere 'tryout on the road.' It is also more than conceivable that [the defendant] may claim new, positive relationships with family members, fellow prisoners, or strangers for the remainder of his life if this Court permits each assertion of a relationship to be grounds for a new sentencing hearing or grounds for ignoring our limited remand instructions."

(Citations deleted.) *Jackson*, 2016-Ohio-5488 at ¶ 72, quoting *Berget* at ¶ 45.

{¶ 30} In the case at bar, the error requiring the vacation of appellant's death penalty and his resentencing occurred when the trial court failed to provide appellant with an

opportunity to exercise his right of allocution in violation of Crim.R. 32(A)(1), prior to the imposition of sentence. Thus, as was the case in *Davis*, *Chinn*, *Roberts*, and *Jackson*, the error requiring resentencing occurred after the close of the mitigation phase of the trial, where appellant had a full, unlimited opportunity to present mitigating evidence. In other words, appellant's death sentence was vacated for a sentencing error unrelated and subsequent to the presentation of evidence during the mitigation phase of his 1995 trial.

{¶ 31} Accordingly, appellant was not entitled to improve or update his mitigating evidence or to present new mitigating evidence at his resentencing hearing. *Roberts*, 2013-Ohio-4580 at ¶ 36-39; *Jackson*, 2016-Ohio-5488 at ¶ 73. The trial court, therefore, did not err in not allowing appellant to present additional mitigating evidence, including rebuttal evidence, at the resentencing hearing.

{¶ 32} Appellant's second and fourth assignments of error are overruled.

{¶ 33} Assignment of Error No. 1:

{¶ 34} A CAPITAL DEFENDANT IS DENIED HIS SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS TO A FAIR TRIAL WHEN THE COURT REFUSES TO EMPANEL A NEW JURY FOR THE SENTENCING PROCEEDING. U.S. CONST. AMENDS. VI, VIII, XIV; OHIO CONST. ART. I, §§9, 16, 20.

{¶ 35} Appellant argues the trial court erred in denying his motion to empanel a new jury for the resentencing hearing. Appellant asserts the trial court was required under R.C. 2929.06(B) and the Ohio Supreme Court's decision in *White* to empanel a new jury on remand before it could resentence him to death. *See White*, 2012-Ohio-2583.

{¶ 36} In 1987, the Ohio Supreme Court held that when a death sentence imposed after a jury trial is vacated, empanelment of a new jury on remand was not permissible and therefore, the defendant could not be resentenced to death. *State v. Penix*, 32 Ohio St.3d 369, 372-373 (1987). In 1996, the General Assembly amended R.C. 2929.06 to permit

empanelment of a new jury and abrogate the *Penix* rule.

{¶ 37} R.C. 2929.06(B), in its current form, provides that whenever a death sentence is set aside, nullified, or vacated "because of error that occurred in the sentencing phase of the trial, * * * the trial court that sentenced the offender shall conduct a new hearing to resentence the offender. If the offender was tried by a jury, the trial court shall impanel a new jury for the hearing." Thus, the effect of the 1996 amendment to R.C. 2929.06(B) permits any capital offender convicted by a jury and whose original death sentence was vacated to be resentenced to death on remand. *White*, 2012-Ohio-2583 at ¶ 6, 21; *State ex rel. Steffen v. Myers*, 143 Ohio St.3d 430, 2015-Ohio-2005 (R.C. 2929.06[B] permits the reimposition of the death sentence).

{¶ 38} *White* involved a capital defendant who had been convicted of aggravated murder with death specifications and sentenced to death after a jury trial. After the enactment of R.C. 2929.06(B), he obtained habeas corpus relief from his death sentence, obliging the trial court to resentence him. At his resentencing, and again on appeal, White argued that R.C. 2929.06(B) could not constitutionally be applied to a case involving a crime committed before its enactment. Thus, the issue before the supreme court was "whether the trial court should apply R.C. 2929.06(B) on resentencing, thereby allowing the death penalty to once again be available on remand." *White* at ¶ 3. The supreme court then addressed whether R.C. 2929.06(B) violated the Retroactivity and Ex Post Facto Clauses.

{¶ 39} The supreme court first held that R.C. 2929.06(B) applies to resentencings where the error invalidating the death sentence does not affect the guilt-phase verdict: "R.C. 2929.06(B) applies where an aggravated-murder conviction with a death specification has been affirmed, but the death sentence has been set aside for legal error, when the error infects and thus invalidates the sentencing phase of the trial." *White*, 2012-Ohio-2583 at ¶ 23-25.

{¶ 40} Addressing the defendant's retroactivity argument, the supreme court held, "The General Assembly has clearly expressed its intent that R.C. 2929.06(B) apply retroactively." *Id.* at paragraph two of the syllabus. The court further held, "R.C. 2929.06(B) is remedial, not substantive. Hence, the Retroactivity Clause of the Ohio Constitution does not bar its retroactive application in cases where the aggravated murder was committed before its enactment, but the death sentence was set aside after its enactment." *Id.* at ¶ 48. The court also held that the application of R.C. 2929.06(B) to the case did not violate the Ex Post Facto Clause. *Id.* at ¶ 64.

{¶ 41} The trial court denied appellant's motion on the ground that *White* was inapplicable and therefore, R.C. 2929.06(B) did not require the empaneling of a new jury. Specifically, the trial court found that because the error – failing to provide appellant with the right of allocution – "occurred after the jury had returned its verdict in the penalty phase and because this verdict was untainted by error," the court was "not required to empanel a new jury, but to proceed with resentencing after first providing the Defendant with the right of allocution." In support of its ruling, the trial court cited, inter alia, *Chinn*, 85 Ohio St.3d 548, and *Roberts*, 2013-Ohio-4580.

{¶ 42} As stated earlier, *Chinn* and *Roberts* both involved capital defendants who were tried to a jury and whose death sentences were vacated following errors committed by the trial court in drafting the sentencing opinion. Roberts was also sentenced to death without being afforded the right of allocution. Consequently, the Ohio Supreme Court vacated her death sentence, found the issue regarding allocution to be moot, and remanded the case to the trial court with instructions to provide Roberts with her right of allocution, determine anew the appropriateness of the death penalty, and to personally write the sentencing opinion. In both cases, the defendants were resentenced to death on remand; both appealed to the supreme court.

{¶ 43} In *Chinn*, the supreme court rejected the claim that the vacation of Chinn's death sentence also vacated the jury's sentencing recommendation: "The appellate court specifically determined, and we agree, that the recommendation of the jury was untainted by error." *Chinn*, 85 Ohio St.3d at 564. The supreme court then rejected the claim that *Penix* prohibited reimposition of the death penalty on remand:

> *Penix* does not preclude the trial court from imposing the death sentence on remand. The reason, of course, is that the errors identified and relied upon by the court of appeals in vacating appellant's original death sentence in 1991 related to the trial judge's independent evaluation of sentence. These errors were committed *after* the jury had returned its verdict in the penalty phase. Under these circumstances, * * * *Penix* does not prohibit the trial judge, on remand, from accepting the jury's 1989 sentencing recommendation. Rather, * * * the trial court was required to proceed on remand from the point at which the errors had occurred, *i.e.*, after the jury had returned its recommendation of death.

(Emphasis sic.) *Id.* at 564. The supreme court's holding in *Chinn* is clear: when, as in this case, "the errors requiring resentencing occurred after the close of the mitigation phase of the trial[,] the trial court is to proceed on remand from the point at which the error occurred," that is, after the jury had returned its recommendation of death. *Id.* at 654-565.

{¶ 44} Appellant argues *Chinn* is not applicable here because it was decided prior to *White*. However, *White* was concerned with the retroactive application of R.C. 2929.06(B), as amended in 1996, and whether a capital defendant remained eligible for the death penalty on remand, and not the circumstances under which the statute requires empanelment of a new jury. In addition, the death sentence in *White* was vacated based upon the trial court's failure to grant a challenge regarding a juror who was biased in favor of a death sentence. Thus, unlike in *Chinn*, the jury's recommendation was tainted in *White*. We find that *White* did not in any respect modify *Chinn*.

{¶ 45} In *Roberts*, decided after *White*, the supreme court, while addressing whether

Roberts was entitled to present new mitigating evidence on remand for resentencing, reiterated that

> when "errors requiring resentencing occurred after the close of the mitigation phase," the correct procedure was for the trial court "to proceed on remand from the point at which the error occurred." Indeed, we stated that "the trial court was *required* to proceed on remand from the point at which the errors had occurred, i.e., after the jury had returned its recommendation of death."

(Emphasis sic.) *Roberts*, 2013-Ohio-4580 at ¶ 45, quoting *Chinn*, 85 Ohio St.3d at 565. Continuing, the supreme court stated that on remand for resentencing, the trial court was bound by *Chinn* and the supreme court's remand order that the trial court afford Roberts her right of allocution, personally review and evaluate the evidence, weigh the aggravating circumstances against any relevant mitigating evidence, and determine anew the appropriateness of the death penalty. *Roberts* at ¶ 46.

{¶ 46} In the case at bar, the jury recommended a death sentence on August 11, 1995, after hearing extensive mitigating evidence. The error requiring vacation of the death sentence occurred a week later when at the sentencing hearing, where with no jury present, the trial court failed to provide appellant with his right of allocution before sentencing him. As in *Chinn* and *Roberts* and unlike in *White*, the jury's recommendation here was untainted by error. We vacated the death sentence and remanded the matter "for the sole purpose of resentencing" and with instructions to the trial court to "personally address appellant and afford him his right to allocution before imposing its sentence." *Goff*, 2012-Ohio-1125 at ¶ 20.

{¶ 47} Under these circumstances, the correct procedure for the trial court was to proceed from the point at which the error occurred, that is, after the mitigating evidence had been presented and after the jury had returned its recommendation of death. We find that the supreme court's clear holdings in *Chinn*, *Roberts*, and *Jackson* support our decision.

Because new, updated, and additional mitigating evidence cannot be presented on remand for resentencing and the jury's sentencing recommendation remains proper for consideration by the trial court, a new jury serves no purpose.

{¶ 48} The trial court, therefore, did not err in denying appellant's motion to empanel a new jury on remand on the grounds that *White* is not applicable here, and therefore, R.C. 2929.06(B) does not require the empanelment of a new jury.

{¶ 49} Appellant's first assignment of error is overruled.

{¶ 50} Assignment of Error No. 3:

{¶ 51} TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN VIOLATION OF GOFF'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND OHIO CONSTITUTION ARTICLE. I, §§ 1, 2, 5, 9, 10, AND 16.

{¶ 52} Appellant argues he received ineffective assistance of counsel at his resentencing hearing because defense counsel failed to adequately prepare appellant for allocution and failed to proffer available, mitigating evidence from appellant's institutional file.

{¶ 53} To establish a claim of ineffective assistance of counsel, appellant must show that his trial attorney's performance was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). Appellant must show that his counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688. Appellant must further show that he was prejudiced by this deficient performance. *Id.* at 687. Appellant demonstrates prejudice when, but for counsel's errors, a reasonable probability exists that the result of the trial would have been different. *State v. Bradley*, 42 Ohio St.3d 136, 143 (1989). A strong presumption exists that the licensed attorney is competent and that the challenged action falls within the wide range of professional assistance. *Id.* at 142; *Strickland* at 689.

{¶ 54} Appellant first argues defense counsel was ineffective because he failed to properly prepare appellant and explain to him the importance of his statement to the court. During his brief statement in allocution, appellant stated he did not have a history of violence before or after his incarceration, he was offered a plea deal in 1995 but was not told what it involved, and he had a hard childhood. Appellant also asked for leniency.

{¶ 55} Appellant provided no substantiation for his claim of ineffective assistance of counsel other than his own self-serving statement. Appellant's broad and conclusory assertion is therefore insufficient to establish ineffective assistance of counsel. *See State v. Lattire*, 12th Dist. Butler No. CA2004-01-005, 2004-Ohio-5648; *State v. Witherspoon*, 12th Dist. Butler No. CA2010-01-025, 2010-Ohio-4569; *State v. Green*, 90 Ohio St.3d 352 (2000).

{¶ 56} Appellant also argues defense counsel was ineffective because he failed to proffer or present available, mitigating evidence from appellant's institutional file which would have shown appellant's adjustment to prison life as well as his "positive achievements, such as having a job inside the prison." In support of his argument, appellant cites *Coyle*, 475 F.3d 761.

{¶ 57} Upon review of the record, we find that defense counsel's representation was not deficient. While defense counsel did not speak at great length during the resentencing hearing, he did indicate to the trial court that appellant had adjusted to prison life, "ha[d] not had any major write-ups or disciplinary actions taken against him, and there [were] certainly none relating to violence," and "ha[d] not demonstrated a propensity towards violence" since his conviction and original sentencing. Defense counsel also successfully moved to proffer Dr. Eshbaugh's report. The report, which the trial court reviewed before resentencing appellant, discusses appellant's adjustment to prison life in some detail. Furthermore, given the Ohio Supreme Court's holdings in *Roberts* and *Jackson*, which rejected the right to present updated mitigation evidence at resentencing upon remand, defense counsel was not

ineffective for failing to present or proffer evidence from appellant's institutional file regarding his adjustment to prison life or good behavior in prison, in addition to that previously detailed.

{¶ 58} In light of the foregoing, we find that appellant has failed to establish ineffective assistance of counsel during the resentencing hearing. Appellant's third assignment of error is overruled.

{¶ 59} Judgment affirmed.

S. POWELL and PIPER, JJ., concur.

The Supreme Court of Ohio

State of Ohio

v.

James R. Goff

Case No. 2017-0021

RECONSIDERATION ENTRY

Clinton County

It is ordered by the court that the motion for reconsideration in this case is denied.

(Clinton County Court of Appeals; No. CA2015-08-017)

Maureen O'Connor
Chief Justice

The Official Case Announcement can be found at http://www.supremecourt.ohio.gov/ROD/docs/

Appendix C

IN THE COURT OF COMMON PLEAS
CLINTON COUNTY, OHIO

State of Ohio	)	
PLAINTIFF	)	CASE NO. CRI 95-5-008 (CAPITAL CASE)
-vs-	)	
James R. Goff	)	SENTENCING ENTRY
DEFENDANT	)	

This cause came before the Court for hearing this 30th day of June, 2015. Richard W. Moyer, Prosecuting Attorney and Andrew T. McCoy, Assistant Prosecuting Attorney, appeared on behalf of the State of Ohio. Defendant, James R. Goff appeared in Court in custody of the Sheriff and with his counsel, William J. Mooney, Assistant Ohio Public Defender and Kirk A. McVay, Assistant Ohio Public Defender of the State Public Defender's Office, for the purposes of re-sentencing pursuant to Order of the 12th District Court of Appeals dated March 19, 2012.

The Court has considered all of the evidence, testimony, all of the evidence raised in mitigation and arguments that counsel have made during each phase of this proceeding including this proceeding, all of which the Court has considered significant prior to pronouncing its sentence. The Court has found additional mitigating evidence as of the date of this hearing which it has considered, including the statement of Defendant made in allocution. The Court has written its decision which more fully details the weighing process which the Court has performed. A copy of the Court's DECISION shall be filed immediately following the hearing.

It is the ORDER of this Court that the offense of Aggravated Murder as found in the first and second counts of the indictment, be merged into the first count of the indictment; that the offenses of Aggravated Burglary as contained in the fourth and fifth counts of the indictment be

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merged into the third count of the indictment and the offense of Aggravated Robbery as contained in the seventh count of the indictment be merged into the sixth count contained in the indictment and that the Defendant be sentenced accordingly.

WHEREUPON, the Court inquired of the Defendant as to whether he had anything to say as to why sentence ought not be imposed on him. The Defendant did address the Court.

It is therefore ORDERED, ADJUDGED and DECREED as follows:

1. That the Defendant, James R. Goff, under Count One of the Indictment, be sentenced to death on July 6, 2016. The death sentence, shall be executed by causing the application to the person upon whom the sentence was imposed, of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death. The application of the drug or combination of drugs shall be continued until the person is dead. The Warden of the correctional institution in which the sentence is to be executed or another person selected by the Director of Rehabilitation and Corrections shall ensure that the death sentence is executed. The Sheriff is hereby ordered, within thirty days and in a private manner, to transport the prisoner, James R. Goff, to the facility designated by the Director of Rehabilitation and Corrections for the reception of the prisoner for assignment to an appropriate penal institution for Aggravated Murder in violation of Section 2903.01 (B) of the Ohio Revised Code, a felony and a capital offense, with **SPECIFICATION No. 1:** that the offense of Aggravated Murder was committed while the said James R. Goff was committing or attempting to commit Aggravated Burglary, and the offender was the principal offender in the commission of the Aggravated Murder.

2. That the Defendant, James R. Goff, under Count Three of the indictment, be sentenced for not less than ten (10) years nor more than twenty-five (25) years for Aggravated Burglary in violation of Section 2911.11 (A)(1) of the Ohio Revised Code, an aggravated felony of the first degree as contained in the third count of the indictment.
3. That the Defendant, James R. Goff, under Count Six of the indictment be sentenced for not less than ten (10) years nor more than twenty-five (25) years for Aggravated Robbery in violation of Section 2911.01 (A)(1) of the Ohio Revised Code, an aggravated felony of the first degree as contained in the sixth count of the indictment. Said sentence shall run consecutively with the sentence imposed under the third count herein.
4. That the Defendant, James R. Goff, under Count Eight of the indictment, be sentenced for a definite term of two (2) years for Grand Theft, in violation of Section 2913.02 (A)(1) of the Ohio Revised Code, a felony of the third degree, as contained in the eighth count of the indictment. Said sentence shall run consecutively to the sentences imposed under the third and sixth counts contained herein.
5. That the Defendant be given credit for 19 years, 11 months and 22 days spent confined prior to and including the day of imposition of re-sentence, plus all days accrued up to the date of Defendant's conveyance to the state correctional institution.
6. That the Defendant shall pay the costs of prosecution for which execution is awarded including costs of transportation.
7. That the Defendant shall be remanded to the custody of the Sheriff for transportation to such institution designated by the Director of Rehabilitation and Corrections.
8. Further, the Court advised the Defendant of his right to appeal, that if he is unable to pay the cost of an appeal, he has the right to appeal without payment; that if he is unable to

obtain counsel for an appeal, counsel will be appointed without cost; that if he is unable to pay the cost of documents necessary to an appeal, such documents will be provided without costs; and that he has a right to have notice of an appeal timely filed on his behalf, pursuant to Rule 32(A) of the Ohio Rules of Criminal Procedure.

9. The Court hereby appoints Marshall G. Lachman, Attorney at Law, who is certified to represent capital case defendants on appeal, as Appellate Counsel to represent the defendant, James R. Goff.

This is a final appealable order.

ENTER this 4 day of ~~July~~ August, 2015.

William B. McCracken, JUDGE

IN THE COURT OF COMMON PLEAS
CLINTON COUNTY, OHIO

State of Ohio,

Plaintiff,

-vs-

James R. Goff,

Defendant.

CASE NO. CRI 95 5008

DECISION

Jr 20 Pg 856-864

This matter is before the Court on remand from the Twelfth District Court of Appeals for resentencing. Present in Court were the Defendant with his attorneys, Kirk A. McVay and William J. Mooney of the State Public Defender's Office. The State was represented by Richard W. Moyer, Prosecuting Attorney and Andrew McCoy, Assistant Prosecuting Attorney.

The Defendant was found guilty of the Aggravated Murder of Myrtle Rutledge as well as Aggravated Burglary, Aggravated Robbery, and Grand Theft. On August 11, 1995, after hearing extensive mitigating evidence during the penalty phase hearing, the jury unanimously found that the aggravating factors outweighed the mitigating circumstances and returned a recommendation of death. On August 18, 1995 after weighing the mitigating and aggravating factors, the Court accepted the recommendation of the jury and sentenced the Defendant to death. However, the Court erred by failing to advise the Defendant of his right to allocution before imposing sentence and the case was remanded for resentencing. As part of this hearing the Court has permitted the Defendant to proffer additional testimony with regard to mitigation.

The Court has reviewed and considered all of the trial transcripts of this matter, as well as all of the mitigating factors presented at the original trial, in addition to those that were presented or re-presented with regard to the resentencing hearing. The Court has further searched the entire record for any further evidence as to mitigation. Although parts of this opinion are similar to the Court's original opinion herein, it has considered anew, the evidence, testimony, arguments of counsel as well as the Defendant's allocution.

Appendix E

For purposes of this Decision, and the Entry the offenses contained in Count I and II of the indictment will be merged and the Court will sentence the Defendant on Count I only (Aggravated Murder – specification of Aggravated Burglary).

On September 15, 1994 the Defendant, James Goff, and another individual were requested to deliver some furniture to the residence of Myrtle Rutledge who resided at 3314 St. Rt. 3-22E, just outside of Wilmington. Mrs. Rutledge, an 88 year old woman, was in the process of moving from her old farmhouse into a new "double-wide home" that had been built behind the farmhouse. The Defendant delivered the furniture to the new home and also helped her move a bed frame from the old house to the new house. Testimony indicated that after delivering the furniture, the Defendant and the other individual purchased "crack cocaine" which they immediately consumed. The Defendant went back to Mrs. Rutledge's residence that evening, sometime after 10:00 p.m. with the intent to burglarize the house in order to get money to purchase more crack cocaine. A storm window was removed from the house and a door lock was broken off in gaining entrance to the Rutledge house. The phone wires were also found to be cut.

The Defendant found Mrs. Rutledge in her upstairs bedroom where he attempted to strangle her, crushing her larynx. He then slashed and/or stabbed her 22 times. There were slash and stab wounds to the head, face, and neck with one stab wound severing the carotid artery, and another puncturing the right eye and going into the brain. There were defensive slash marks and bruises to the right hand and forearm. There was a contusion to the left side of the head which caused a hemorrhage to the brain. On the left flank was an abrasion that appeared to be a shoe print. There were other contusions and abrasions to the head, face, neck, thighs, back, and ankles. There were also contusions, identified by the Doctor, to the anus and vaginal areas caused by a hard, blunt object. Dr. Lehman testified that Mrs. Rutledge would have died within three minutes of the carotid artery being severed. Many of the abrasions and contusions and some of the knife wounds were indicated by the Doctor to have been inflicted after the carotid artery was cut when the blood pressure was low. A pubic hair was found at the crime scene and Denise Rankin a criminologist with the Miami Valley Crime Lab, indicated that the microscopic characteristics of the pubic hair were consistent with samples taken from the Defendant.

The Defendant took a small amount of money and also stole the 1980 Toyota owned by Mrs. Rutledge, which he later abandoned on N. High Street in Wilmington.

The last person to talk to Mrs. Rutledge was her sister-in-law on Thursday, September 15, 1994 at approximately 10:00 p.m. The 1980 Toyota was later observed parked on Columbus Street on Friday, September 16, 1994 at 1:30 a.m. by Mrs. Barkey in front of whose house the car was parked. Mrs. Rutledge's body was discovered by her daughter Saturday, September 17, 1994 shortly before noon, after she had failed to show up at a family reunion.

On Thursday, July 27, 1995 the jury returned a verdict of guilty on the two counts of aggravated murder with specification; the three counts of aggravated burglary; two counts of aggravated robbery, and two counts of grand theft.

The sentencing of the Defendant on the aggravated burglary, aggravated robbery, and grand theft charges will take place in open court and will not be discussed in this Decision. This Decision will only address the subject of the sentence for the aggravated murder charges as set forth in Section 2929.03 of the Revised Code.

Section 2929.03 of the Ohio Revised Code requires the court to:

> "...state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division B of Section 2929.04 of the Revised Code; the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing..."

and determine whether the aggravating circumstances outweigh the mitigating factors. In rendering this decision the Court has taken into consideration all of the relevant evidence raised at trial, the testimony and other evidence offered at the mitigation hearing (Defendant's Exhibits A,B,C, and D) and the arguments of counsel.

1. Aggravating Circumstances:

The Court finds that the State has proved beyond a reasonable doubt the following aggravating circumstances:

A. Count One: That on or about the period of September 15, 1994, through September 17, 1994, the Defendant, James R. Goff, committed the offense of aggravated Murder of Myrtle Rutledge while the said Defendant, James R. Goff, was committing or attempting to commit or fleeing immediately after committing or attempting to commit Aggravated Burglary, and that the Defendant, James R. Goff, was the principal offender in the commission of the Aggravated Murder of Myrtle Rutledge.

The Court feels compelled by Section 2929.03 of the Ohio Revised Code to consider all the mitigating factors listed in Section 2929.04 (B) even though the Jury did not consider each of those factors. They are as follows:

I. History, Character and Background of the Defendant.

In the mitigation hearing four witnesses testified on behalf of the Defendant. They were his sister, Melissa; Sharon Cole, a former teacher; Charlotte Fisher, a former landlord; and Dr. Jeffrey L. Smalldon, a psychologist.

From the testimony of the witnesses and the social history provided by Dr. Smalldon from discussions with the Defendant, his mother, his sister, a teacher, and review of the records the following picture of the Defendant emerges.

The Defendant, James E. Goff was born on January 26, 1975 in Somerset, Kentucky to Bobby and Dottie Goff. He was the youngest of three children. His father, to whom both James and his sister Melissa were very attached, died when James was four years old. After this the family seemed to quickly deteriorate. Within a short period of time Kentucky Social Services became involved with the Goff family. This was the first of what was to become an almost 14-year relationship and involvement with either Kentucky Social Services or the Clinton County Children Services.

Dr. Smalldon testified that Mrs. Goff deteriorated both emotionally and physically after the death of her husband. He described her parenting skills as being profoundly neglectful; she provided little guidance or supervision and was unable to provide the basic needs for her children – shelter, food, clothing, and supervision. The children were left to fend for themselves and James was smoking, drinking alcohol, and stealing things by the time he was ten. The living conditions were described as "squalor" and several homes were without heat, water, or sanitary facilities. James learned to play sick so he would not have to go to school and quickly fell behind. At age 13 James and his sister Melissa were removed from the home and James spent the next five years at Mid-West Children's Home and a succession of foster homes.

Dr. Smalldon, a licensed psychologist, indicated that he had four personal interviews with the Defendant, totaling approximately 15 hours. He also conducted several interviews with family members of the Defendant and other witnesses. Dr. Smalldon performed both a neuropsychological exam and a clinical exam on James. The purpose of the neuropsychological examination was to determine whether James suffered

from any substantial brain impairment or brain damage. Dr. Smalldon, from this examination, concluded that James had no substantial brain impairment or brain damage. From other tests he concluded that James was of average intelligence and that he most likely was placed in "L.D." classes because he had missed so much school, not because he had a learning disability.

The clinical evaluation showed the Defendant to be suffering from a personality disorder with antisocial and narcissistic features. He also has a history of poly-substance abuse with a crack-cocaine dependency during several months of 1994. By antisocial, Dr. Smalldon indicated that it means a pattern of behavior that violates the standards of society and a difficulty with empathizing with other people and seeing their perspectives. "Narcissistic" indicates that an individual may display an outward appearance of being self-assured but when confronted, provoked, or challenged often responds in a way that is out of proportion to any realistic feature of the provocation.

In addition to indicating that the Defendant did not suffer from any significant brain impairment, Dr. Smalldon also testified that the Defendant, James Goff, had no difficulty in determining right from wrong or what is criminal conduct or what is not criminal conduct. Dr. Smalldon testified that there is no direct connection between the Defendant's personality disorder and the commission of this offense.

Based upon the evidence and testimony the Court assesses some weight to the Defendant's history, character, and background as a mitigating factor.

The remaining factors found in Section 2929.04 (B) are:

1. Whether the victim of the offense induced or facilitated the offense:

There is no evidence that the victim induced or otherwise facilitated this offense. The victim was an 88-year-old woman who lived alone when the Defendant entered her home to commit a theft offense therein.

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

There is no evidence of any motive of the Defendant, other than a desire on his part to burglarize the house to obtain money to purchase drugs. The evidence is overwhelming that he acted alone.

This is not a mitigating factor.

3. Whether, at the time of committing the offense, the offender, because of a mental disease or defect lacked substantial capacity to appreciate the criminality of his conduct or to confirm his conduct to the requirements of the law:

Dr. Smalldon performed a neuropsychological examination and a clinical evaluation of the Defendant. The results showed that he had no significant brain impairment. The clinical exam and Dr. Smalldon's testimony further showed that although he had a personality disorder, he knew right from wrong and there was no direct connection between the personality disorder and the commission of this offense. The Defendant was of average intelligence.

This is not a significant mitigating factor; however, the Court will assign some weight to it.

4. The youth of the offender:

The Defendant was age 19 at the time of this offense. The Court will consider this a mitigating factor and assign significant weight to it.

5. The offender's lack of a significant history of prior criminal convictions and a delinquency adjudication:

The Defendant had a juvenile history of minor theft offenses. As an adult the Defendant had two felony convictions, one for grand theft, the second for Aggravated Trafficking.

He had no offenses of violence.

The Court will assign no weight to this as a mitigating factor.

6. The degree of the Defendant's participation in the offenses:

The evidence indicates that the Defendant was the principal and only offender involved in this offense.

This is not a mitigating factor.

7. Any other factors that are relevant to the issue of whether the offender should be sentenced to Death:

a) The Defendant has argued that the Court should consider his positive adjustment to incarceration and evidence of his good behavior in jail.

Dr. Smalldon testified that the Defendant is someone who would adjust well to a secure, structured, predictable environment such as a correctional environment. Testimony at this hearing indicates that Defendant has generally been of good behavior while in prison; however, the Court assigns no weight to this factor.

b) The Defendant has argued that he suffered from alcohol and/or drug impairment at the time of the offense.

There was significant evidence that the defendant had a serious addiction to crack cocaine and had used crack earlier in the day. There is also evidence that his use of crack was a motivating factor in his desire or need to obtain money to purchase more crack cocaine. However, there was no evidence that at the time of the offense that Defendant had recently used crack or was under the influence of alcohol or crack cocaine. The Court is cognizant of the significance of such a serious addiction and will assign some weight to it as a mitigating factor.

c) Finally, the Defendant has argued "mercy" and "residual doubt" as factors to be considered in mitigation.

With regard to mercy the Court has taken this factor into consideration as it has considered each of the previous six mitigating factors and assigns no further weight to it.

With regard to "residual doubt" the Court finds that the jury has already determined the Defendant's guilt beyond a reasonable doubt. The Court has considered all the evidence and testimony presented and also feels there is no "residual doubt".

The Court will assign no weight to this factor.

d) Remorse – the Defendant did not express remorse.

Sentence:

The Defendant has been found guilty of Aggravated Murder with a specification that while he was committing, attempting to commit or fleeing immediately after committing or attempting to commit Aggravated Burglary (Aggravated Robbery) he was the principal offender in the murder of Myrtle Rutledge.

The Court has considered all of the relevant evidence, the testimony, the evidence raised on mitigation, and the arguments of counsel. At the sentencing, counsel for the Defendant were given an opportunity to address the Court on behalf of the Defendant. The Court also addressed the Defendant and asked him if he wished to make a statement on his own behalf or present any other information in mitigation of sentence. The Court has considered the statements of counsel for the Defendant, as well as the allocution of Defendant. The Court has also reviewed the proffered evidence (report of Dr. Eshbaugh, Ph.D.) by the Defendant. As a result the Court has found that certain mitigating factors exist, as outlined above, and has weighed them against the aggravating circumstances.

The jury found in Count I that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. The Court has conducted the same process and having weighed the aggravating circumstances and the mitigating factors finds that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. The Court has not considered the aggravating factors of Count II with regard to Count I.

After searching and reviewing the record, the Court finds beyond a reasonable doubt the following aggravating circumstances:

Defendant committed the aggravated murder of Myrtle Rutledge while committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated burglary and Defendant was the principal offender in the aggravated murder of Myrtle Rutledge.

The Defendant James Goff having been convicted of the Aggravated Murder of Myrtle Rutledge, and the jury having determined the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt as to Count I of the indictment; and the Court having independently reviewed and weighed the evidence on the record, finds as to Count I that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt, and the sentence of death shall be imposed upon the Defendant.

Enter this 30 day of June 2015.

Judge William B. McCracken

A copy of this decision was sent to the attorneys for the Defendant, Kirk A. McVay and William J. Mooney at the Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.