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Comment

*659 OHIO'S DEATH PENALTY: HISTORY AND CURRENT DEVELOPMENTS

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I. INTRODUCTION

This comment will take a comprehensive look at the death penalty in Ohio. First, it will discuss the background and history of the death penalty in the state. Second, it will focus on the factors and influences which have shaped the current death penalty policy in Ohio, and the re-emergence of executions within the state over the last several years. Third, the comment will discuss several recent developments surrounding the death penalty in Ohio. This includes issues presented by the executions which resumed in 1999, a recent amendment to Ohio's death penalty statute to eliminate the electric chair as a choice for execution, and current legislative and judicial efforts to prohibit the execution of mentally retarded criminals in Ohio. Finally, the comment will analyze these current developments and proposals in light of current state and national attitudes and trends to predict the likely course Ohio's death penalty policy will take in the future.

This comment is both important and relevant because Ohio's death penalty statute has become a controversial topic since Ohio began executing death row inmates again in 1999. [FN1] In addition, several legislative proposals are currently under review in Ohio and major developments are also taking shape on the national front. [FN2] This comment will be informative to attorneys and other individuals interested in the current state of Ohio's death penalty policy, as well as the most prominent influences that will shape Ohio's death penalty policy in the future. Furthermore, a thorough review of current issues and attitudes surrounding the death penalty in Ohio serves as a microcosm of the development of death penalty issues on the national scene.

*660 II. BACKGROUND

A. Death Penalty in Ohio

The history of Ohio's death penalty dates back to Ohio's earliest days of statehood. [FN3] From the time Ohio was established as a state in 1803 until 1885, executions were carried out by public hanging in the county where the crime was committed. [FN4] In 1885, Ohio's state legislature enacted the first statewide statute regulating the administration of executions in the state. [FN5] Hanging remained the sole method of execution for Ohio prisoners sentenced to death, but the new statute centralized the operation of capital punishment in Ohio by requiring all executions to be carried out at the state penitentiary in Columbus, Ohio. [FN6] Between 1885 and 1897, a total of twenty-eight convicted murderers were executed by hanging at the state penitentiary in Columbus. [FN7]

*661 In 1897, a new era of capital punishment began in Ohio, as the electric chair was introduced and touted as

a more humane method of executing convicted criminals sentenced to death. [FN8] The concept for the electric chair came about several years earlier when Alfred Southwick, a dentist in Buffalo, New York, proposed the idea after watching a drunken man stagger into an electrical generator and die both quickly and apparently painlessly. [FN9] Subsequently, New York was the first state to adopt the electric chair, and the device was first used in 1890 in a prison in Auburn, New York to execute William Kemmler, a convicted murderer from Buffalo who had butchered his wife with an ax. [FN10] Eyewitness accounts state that the first jolt left Kemmler twitching and alive, and that he was not successfully put to death until a second sustained charge was applied to his body. [FN11] Nevertheless, the electric chair was perceived at the time as advancement in the area of humane executions, and its use expanded rapidly to a majority of states as a replacement for the traditional methods of death by hanging and firing squad. [FN12]

Between the adoption of the electric chair as Ohio's sole method of execution in 1897 and the final death by electrocution in 1963, a total of 312 men and women were put to death by the electric chair. [FN13] William Haas, a seventeen year-old man from Hamilton County, was the first person to be executed in Ohio's electric chair in 1897. [FN14] Charles Justice, a broom maker incarcerated at the penitentiary for robbery and burglary, was asked to assist with the assembly of Ohio's electric chair because he possessed some basic knowledge of electricity. [FN15] Ironically, Mr. Justice was later convicted of murder and put to death in the same electric chair he had helped create. [FN16] In fact, the chair was never replaced, and was still in use when Donald L. Reinbolt, a twenty-nine year old man from Franklin ***662** County, became the last death row prisoner to be executed in Ohio's electric chair in 1963. [FN17]

Ohio's death penalty statute remained largely unchanged until 1972, when the United States Supreme Court declared the current operation of death penalty statutes in several states unconstitutional in its landmark decision in *Furman v. Georgia*. [FN18] The Court in *Furman* reviewed the death penalty laws in Georgia [FN19] and Texas, [FN20] pursuant to which persons convicted of capital offenses could be sentenced to death at the discretion of the judge or jury. [FN21] In a per curium opinion, the Court held that "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." [FN22] Because the Court's opinion contains separate opinions from each of the nine Justices, the only clear holding that came from the case was that several members of the majority were concerned with the arbitrary and capricious manner in which the death penalty can be imposed under laws giving complete discretion in sentencing to the judge or jury. [FN23]

Although Ohio's death penalty statute was not directly struck down by *Furman*, the Ohio death penalty statute in effect at that time, like the Georgia and Texas statutes reviewed by the Court in *Furman*, also gave complete discretion to the judge or jury in deciding whether to impose the death penalty. [FN24] The only exception to this was that in the case of killing certain public officials, the death penalty appeared to be mandatory upon conviction. [FN25] Soon after *Furman*, the Ohio Supreme Court held Ohio's death penalty statute to be unconstitutional, at least with respect to its non-mandatory provisions, in the case *State v. Leigh*. [FN26] In *Leigh*, the jury returned a verdict without a recommendation of mercy for the defendant, John Leigh, who was convicted of killing four people during his robbery of ***663** a Hamilton County bank. [FN27] The Ohio Supreme Court, reviewing only the question of the degree of the penalty, was compelled to find the imposition of the death penalty unconstitutional in light of *Furman*, and therefore reduced John Leigh's sentence to life in prison. [FN28]

However, at the time the Court handed down its ruling in *Furman*, as well as at the time the Ohio Supreme Court decided *Leigh*, the Ohio legislature had already begun work on a new death penalty statute which was eventually adopted in December of 1972 and took effect on January 1, 1974. [FN29] In an attempt to cure the defect in the previous statute giving complete discretion to the judge and jury in deciding whether to impose the death penalty, the new statute laid out seven aggravating circumstances [FN30] ***664** and three mitigating factors. [FN31] Under this new death penalty statute, a defendant convicted of aggravated murder with at least one of the seven aggravating circumstances present would be sentenced to death, unless one or more of the three mitigating circumstances was proven by a preponderance of the evidence. [FN32]

In 1976, the United States Supreme Court further clarified its holding in *Furman* by laying out specific requirements for a constitutionally sound capital sentencing scheme in the case *Gregg v. Georgia*. [FN33] First, the Court made clear that the death penalty is not a per se violation of the Eighth and Fourteenth Amendments. [FN34] Next, the Court explained that the imposition of the death penalty is not in violation of the Eighth and Fourteenth Amendments as long as an appropriate capital sentencing scheme is put in place by states to ensure that the death penalty is not administered in an arbitrary and capricious manner. [FN35] Furthermore, the Court explained that in order for a capital sentencing scheme to be constitutional it must contain the following three elements: 1) the guilt and sentencing phases of the trial must be bifurcated; 2) the jury must be instructed on the factors of aggravation and mitigation to be considered in deciding whether to apply ***665** the death penalty; and 3) the state's highest court must review each sentence of death for proportionality. [FN36]

Ohio's 1974 death penalty statute came close to meeting the three criteria laid out by the Court in *Gregg*, but the statute nevertheless fell just short and was declared unconstitutional by the United States Supreme Court in the 1978 case *Lockett v. Ohio*. [FN37] The Court explained in its holding that sentencing authorities must have the discretion to consider every possible mitigating factor that might render the death penalty an inappropriate sentence for each convicted criminal, rather than being limited to a specific list of factors to consider. [FN38] Thus, the Court concluded that the Eighth and Fourteenth Amendments require that the sentencing authority not be precluded from considering as a mitigating factor any aspect of the 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. [FN39] As a result of the Court overturning Ohio's death penalty statute in *Lockett*, 106 men and four women on Ohio's death row had their sentences commuted to life in prison. [FN40]

Not to be discouraged, Ohio lawmakers went back to the drawing board, and, following the dictates of the Court in *Lockett*, enacted a new capital sentencing scheme on October 19, 1981, designed to address the concerns expressed by the Court. [FN41] The legislation included the strict criteria set forth in *Lockett*, requiring consideration of any and all mitigating factors that might preclude the sentencing authority from administering the death penalty. [FN42]

A convicted murderer from Cuyahoga County named Leonard Jenkins was the first person to be sentenced under this new law. [FN43] However, Jenkins, as well as three other men and four women, later had their death ***666** sentences commuted to life by then Governor Richard Celeste, a staunch death-penalty opponent, during the last days of his tenure as Governor in January 1991. [FN44] The last minute commutations sparked a huge controversy over the clemency powers of Ohio's governor, and in the ensuing court case, the Franklin County Common Pleas Court found that seven of the eight clemencies were improperly granted. [FN45] The death penalties of those inmates were therefore reinstated on February 14, 1992, to include the death sentence handed down to Leonard Jenkins. [FN46] However, the Franklin County Common Pleas Court decision was overturned by an appeals court, and in 1993 those seven clemencies were reinstated. [FN47]

The Ohio Supreme Court upheld the appellate court's decision in *State ex rel. Maurer v. Sheward*, [FN48] in which it held that while the governor's pardon power is subject to legislative limitations, Ohio's Constitution does not allow the legislature to limit the governor's power to commute sentences. [FN49] Thus, the court concluded that Governor Celeste was acting within his power in commuting the sentences of the death row inmates to life in prison. [FN50]

The next major change to Ohio's death penalty law came about in 1993 when, in response to a growing trend around the states toward the use of lethal injection as a more humane alternative to the often-erratic electric chair, the Ohio legislature altered the death penalty statute to allow death row inmates to choose between electrocution and lethal injection. [FN51] This legislation, enacted through House Bill 11 in the 120th General Assembly, was signed by the governor and took effect on October 1, 1993. [FN52] In adjudicating a condemned criminal's right to choose between the two methods of execution, the Ohio Supreme Court held in *State v. Bey* [FN53] that although a judge may state in his order “death by electrocution,” the defendant sentenced to death still has a statutory right to exercise

the ***667** option of choosing death by lethal injection. [FN54]

In 1995, Ohio's death row was relocated to the Mansfield Correctional Institution in Mansfield, Ohio, where it remains today. [FN55] Women sentenced to death are held at the Ohio Reformatory in Marysville, Ohio; however, no women are currently on death row in Ohio. [FN56] The holding facility and execution chamber remain at the Southern Ohio Correctional Facility in Lucasville, Ohio. [FN57]

B. *The Death Penalty Process in Ohio*

1. *Guilt and Sentencing Phases*

To be eligible for the death penalty in Ohio, a defendant must first be convicted of aggravated murder under Ohio Revised Code Section 2903.01. [FN58] In addition, the indictment or count in the indictment charging ***668** aggravated murder must contain one or more specifications of aggravating circumstances as listed in Ohio Revised Code Section 2929.04. [FN59] The ***669** defendant ordinarily receives a trial by jury, but may choose to waive the jury trial and be tried by a three-judge panel instead. [FN60] If the jury or three-judge panel finds the defendant guilty beyond a reasonable doubt on both the principal charge of aggravated murder and one or more of the aggravating circumstances accompanying the indictment, the convicted defendant is eligible for the imposition of the death penalty and the trial moves into a new phase for purposes of sentencing the defendant. [FN61] ***670** However, it is important to note that a defendant under the age of eighteen at the time the offense was committed is *not* eligible for the death penalty in Ohio, regardless of whether the above two criteria are met. [FN62]

During the sentencing phase, the defendant is given the opportunity to present evidence establishing any of the mitigating factors listed in the statute, or to present evidence of any other factors in mitigation of the imposition of the sentence of death. [FN63] To aid in establishing mitigating ***671** factors, the defendant is entitled to both a pre-sentence investigation and a mental examination, the results of which are forwarded to the court for consideration in the sentencing determination. [FN64] The defendant has the burden of going forward with the evidence of any factors in mitigation of the imposition of the death sentence. [FN65] The prosecution is charged with the burden of proving beyond a reasonable doubt that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation presented by the defendant. [FN66]

After considering the evidence raised at trial, testimony, any statement made by the offender, arguments of counsel, and any reports submitted pursuant to pre-sentence investigations or examinations, and after weighing the nature and circumstances of the offense, the history, character, and background of the offender, and any evidence offered by the defendant in mitigation of the imposition of the death penalty, the jury or three-judge panel must determine whether the aggravating factors the defendant was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. [FN67] If the jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors, the jury must recommend to the court that the sentence of death be imposed on the offender. [FN68] If, however, the jury does not reach such a finding by unanimous decision, the jury is precluded from recommending the death penalty and instead must recommend one of the following three options for a life sentence: "[1] life imprisonment ***672** without parole; [2] life imprisonment with parole eligibility after serving twenty-five full years of imprisonment; or [3] life imprisonment with parole eligibility after serving thirty full years of imprisonment." [FN69]

2. *The Appeals Process*

After a defendant in Ohio is sentenced to death, the defendant is entitled to a direct appeal to review whether the trial record supports the imposition of the death penalty in the defendant's particular case. [FN70] In an effort to speed up the appellate review process in death penalty cases, several changes have been made to the appellate process in recent years. [FN71] In 1994, Ohio voters approved an amendment to Ohio's Constitution eliminating one

level of direct appeal for capital defendants by moving capital cases directly to the Ohio Supreme Court after sentencing. [FN72] Prior to the passage of the constitutional amendment, defendants sentenced to death were first required to appeal to a state court of appeals before appealing to the Ohio Supreme Court. [FN73] For capital murders committed on or after January 1, 1995, a person sentenced to death must appeal directly to the Ohio Supreme Court, bypassing the intermediate court of appeals. [FN74]

In reviewing a death penalty case on direct appeal, the Ohio Supreme Court, in addition to reviewing the merits of any normal appeals based on ***673** the trial record of the case, is required to "review and independently weigh all of the facts and other evidence disclosed in the record ... 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." [FN75] In addition, the court must conduct a proportionality review to determine whether the imposition of the death penalty in the particular case is excessive or disproportionate to the penalty imposed in similar cases. [FN76] After conducting this review, the Ohio Supreme Court may only affirm the sentence of death upon a determination that both the aggravating circumstances outweigh the mitigating factors present in the case, and that the sentence of death is appropriate in the particular case. [FN77] Upon a finding that the sentence of death was appropriate, the defendant in a capital case normally asks the United States Supreme Court to review the case. [FN78] Such requests, however, are rarely granted. [FN79]

At the same time the direct appeal to the Ohio Supreme Court is under review, capital defendants may also initiate a post-conviction action to review claims of errors outside the evidence contained in the trial record. [FN80] Again in an effort to address systemic delays in the appellate process for capital cases, several changes were made to Ohio's post-conviction laws following the 1994 amendment to Ohio's constitution eliminating one level of direct appeal in death penalty cases. [FN81] In 1995, the Ohio Legislature passed Senate Bill 4, which made the filing of post-conviction death penalty appeals proceed in a more orderly and timely fashion. [FN82] In addition, the post-conviction law was changed to require death row inmates to petition the trial court for post-conviction relief within 180 days of the time the record of the original trial is received by the Ohio Supreme Court in the direct appeal of the case. [FN83] Thus, in order to increase the ***674** speed at which capital cases move through the appellate process, defendants are required to petition the trial court for post-conviction relief based on errors outside the trial record at the same time the Ohio Supreme Court is reviewing the case on direct appeal to determine whether any on-the-record errors exist. [FN84]

When proceeding with post-conviction actions, defendants are required to file a petition with the court that imposed their sentence stating the grounds for relief being relied on, and asking the court to vacate or set aside the judgment or sentence of death. [FN85] In cases where the death penalty has been imposed, the defendant may petition the court to render void or voidable either the judgment with respect to the conviction of aggravated murder, or any specifications of aggravating circumstances of which the defendant was found guilty at trial. [FN86] Unlike the direct appeal, which is limited to a review of information contained in the trial record only, [FN87] the defendant in a post-conviction action may submit affidavits and other documentary evidence in support of each claim for relief that is not contained in the original trial record. [FN88] In addition, indigent defendants sentenced to death in Ohio are entitled to court-appointed counsel not only for the direct appeal of the case, but also to represent them in their claims for post-conviction relief. [FN89]

***675** A typical claim made by a capital defendant in a petition for post-conviction relief is that the lawyer who represented the defendant in the original trial was incompetent. [FN90] *Strickland v. Washington* [FN91] establishes the criteria for determining whether errors or omissions by defense counsel during trial constitute ineffective assistance of counsel, in violation of the defendant's right to counsel as guaranteed by the Sixth Amendment. [FN92] *Strickland* requires the defendant to show that the defense attorney's conduct at trial "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." [FN93] The defendant must first establish that the defense attorney's conduct at trial was deficient. [FN94] Second, the defendant must make a further showing that the deficient performance prejudiced the defense so severely that the defendant was deprived of a fair trial, and that therefore the outcome of the trial was unreliable. [FN95]

If a capital defendant's petition for post-conviction relief is denied by the trial court, the defendant may appeal the decision to the state court of appeals. [FN96] If the court of appeals also denies relief, the defendant may, as in the case of a direct appeal, appeal the post-conviction decision to the Ohio Supreme Court. [FN97] Ultimately, as in the line of direct appeals, the defendant may petition the United States Supreme Court for a review of any post-conviction claims rejected by the state courts. [FN98]

In addition to claiming ineffective assistance of counsel during the original trial, defendants in capital cases often times bring claims of ineffective assistance of counsel against the attorney or attorneys who handled their direct appeal in the case. [FN99] This proceeding is referred to as a "Murnahan" appeal after the 1992 Ohio Supreme Court case, *State v. Murnahan*. [FN100] In *Murnahan*, the court held that defendants are prohibited from bringing claims of ineffective assistance of appellate counsel in post-***676** conviction proceedings pursuant to Ohio Revised Code section 2953.21, [FN101] but that such claims may be raised in an application for reconsideration in the appellate court that considered the original appeal, or in a direct appeal to the Ohio Supreme Court. [FN102] Since, as previously discussed, defendants sentenced to death in Ohio are now required to file the direct appeal of their conviction and sentencing in the Ohio Supreme Court, claims for ineffective assistance of appellate counsel in capital cases must be brought through an application to reopen the appeal in the state supreme court. [FN103] The defendant must file the Murnahan appeal within ninety days of the final decision in the first appeal, unless good cause can be shown for filing at a later time. [FN104] If the Ohio Supreme Court denies the defendant's Murnahan appeal, the defendant may again request review of the decision by the United States Supreme Court. [FN105]

After capital defendants have exhausted all state court appeals, defendants may file for a writ of habeas corpus in federal district court. [FN106] ***677** In a habeas corpus action, the defendant is asking the court to review the case for a violation of a federal constitutional right. [FN107] The federal constitutional claim is brought against the state, with the warden of the prison where the appellant is incarcerated named as the defendant in the case, and the Ohio Attorney General serving as counsel in defending the case. [FN108] Defendants can appeal an unfavorable decision from the federal district court to the United States Court of Appeals for the Sixth Circuit. [FN109] An unfavorable decision from the Sixth Circuit can then be appealed to the United States Supreme Court through a petition for a writ of certiorari. [FN110] Capital defendants may be eligible to bring successive petitions for habeas corpus relief to the federal courts, but recent changes in the law made by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) [FN111] have made the process of obtaining habeas relief much more difficult for defendants. [FN112]

***678** III. RECENT DEVELOPMENTS IN OHIO'S DEATH PENALTY

A. *Wilford Berry — The "Volunteer"*

"On February 19, 1999, Wilford Berry, 38, was the first person executed in Ohio since March 1963." [FN113] Berry was convicted of aggravated murder, armed robbery, and aggravated burglary for the killing of Charles Mitroff, 53, on November 30, 1989." [FN114] Berry chose to waive his remaining appeals in the case and was executed by lethal injection, making him the first and only "volunteer" for execution in the history of Ohio's death penalty. [FN115]

The issue in Berry's case centered on whether he was competent to waive the appeals and face execution. [FN116] Berry's past was filled with signs of mental illness and psychological trauma, beginning with his father being committed to a state mental hospital for the criminally insane when Berry was a baby. [FN117] According to medical records, Berry's early childhood was marked by repeated sexual molestation and by beatings from his mother. [FN118] When Berry was fourteen, he was sent to an institution for children with severe emotional disturbances, and was diagnosed with severe schizoid personality disorder. [FN119] Later, Berry was convicted of car theft in Texas and spent six years in prison, where prison records indicate that Berry received psychiatric treatment after declaring that he was hearing voices, seeing things, and suffering from delusions. [FN120] After his release,

Berry eventually moved back to Cleveland where he was hired by Charles ***679** Mitroff to wash dishes in his bakery. [FN121] On his second night of work, Berry and a co-worker shot Mitroff to death with an AK-47 assault rifle and a twenty-two caliber sawed-off rifle. [FN122]

Ironically, in the case before the Ohio Supreme Court, the public defender's office found itself working against the wishes of Berry, while the Ohio Attorney General's office was in support. [FN123] The public defender argued that Berry was too mentally ill to fully comprehend the ramifications of his decision to waive his appeals. [FN124] In addition, the public defender attempted to argue that under the Ohio Constitution's "cruel and unusual" clause, collateral review of all capital cases is required, regardless of the defendant's wishes and whether or not the defendant is competent. [FN125] The state, however, contended that Berry was competent to waive his appeals based on mental examinations conducted by two psychiatrists. [FN126]

The Ohio Supreme Court ultimately issued its opinion in December 1997, concluding that Berry was competent to waive further appeals of his death sentence, and further finding that the Ohio Constitution does not compel the court to force post-conviction review upon a competent person, who, for his owns reasons, does not seek it. [FN127] The court reasoned that based on the psychiatric evidence, Berry had the "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation." [FN128] Subsequently, an additional last minute effort to secure a stay of execution for Berry pending a competency hearing was again denied by the Ohio Supreme Court on February 18, 1999, one day before Berry was ultimately put to death by lethal ***680** injection. [FN129]

B. *J.D. Scott - The Mental Illness Issue*

On June 14, 2001, after two previous last minute stays, J.D. Scott was the first non-volunteer to be executed in Ohio since 1963. [FN130] Scott was executed by lethal injection for the murder of Cleveland delicatessen owner Vinney Prince. [FN131] Scott was diagnosed in the early 1990's as suffering from chronic schizophrenia. [FN132] He exhibited "bizarre behavior in prison, banging his head on the wall, chanting, and running around his cell — actions he later explained as an effort to protect his family from evil." [FN133]

The attorneys representing Scott argued that he should not be executed because of his mental illness. [FN134] The Ohio Supreme Court rejected this argument, holding that neither the Ohio Constitution nor the United States Constitution bar the execution of a capital murder defendant with chronic, undifferentiated schizophrenia, as long as Scott understood the nature of the death sentence and why he was being executed. [FN135] In addition, the court held that requiring the defendant to bear the burden of proving unfitness for execution does not violate due process. [FN136] In reaching its conclusion, the Court explained that Scott's diagnosed mental illness could not act as a bar to his execution, because the trial court found he met the requirement of Ohio Revised Code section 2949.28, which provides that defendants are fit for execution as long as they have the mental capacity to comprehend the nature of the death sentence and the reasons they are to be executed. [FN137]

***681** C. *Legislation to Prohibit the Execution of the Mentally Retarded*

Following the execution of J.D. Scott, State Representative Ray Miller, a Democrat Ohio legislator, introduced House Bill 346 on August 28, 2001. [FN138] If it had passed, House Bill 346 would have prohibited the imposition of a death sentence upon an offender who is convicted of aggravated murder and one or more aggravating circumstances specifications, and is determined to be a mentally retarded person. [FN139] Instead of a death sentence, the defendant would be sentenced to one of the following: life imprisonment without parole; life imprisonment with parole eligibility after serving 25 years; life imprisonment with parole eligibility after serving 30 years; or, life imprisonment without parole, served pursuant to the sexually violent predator law, if the defendant is also convicted of a sexual motivation specification. [FN140]

The legislation required the defendant to give notice of the intention to raise mental retardation as a bar to execution at the beginning of the sentencing hearing, following conviction of a death penalty eligible offense. [FN141] The defendant would be required to give written notice to the court and to the prosecuting attorney, and file a motion with the trial judge asking the trial judge to determine whether the defendant is a mentally retarded person. [FN142] The trial judge would appoint two examiners to conduct mental retardation evaluations of the defendant, and stay further proceedings in the sentencing hearing until the conclusion of the evaluations. [FN143] The trial judge would then consider the findings of the examiners and issue a ruling on the mental capacity of the defendant. [FN144]

Representative Miller, in presenting sponsor testimony before the House Criminal Justice Committee on October 9, 2001, noted that sixteen states had already passed legislation banning the execution of the mentally retarded, and he questioned whether inflicting such a punishment on mentally retarded individuals constitutes cruel and unusual punishment. [FN145] ***682** However, despite Representative Miller's efforts to call attention to this issue, House Bill 346 only received one hearing in the House Criminal Justice Committee and was never given serious consideration by the Ohio General Assembly. [FN146]

D. *John Byrd — Elimination of the Electric Chair*

On February 19, 2001, John Byrd, 37, became the second non-volunteer to be executed in Ohio since 1963, and he almost became the first prisoner to die in the electric chair since that same year. [FN147] Byrd, sentenced to death for the 1983 slaying of Cincinnati-area convenience store clerk Monte Tewksbury, originally chose to be put to death in Ohio's antiquated electric chair for his execution set for September 12, 2001, but was then granted a last-minute stay of execution for review of actual innocence claim in his case. [FN148] From the time of his conviction and sentence to death in the original trial court proceedings, Byrd maintained his innocence and repeatedly stated a desire to die in the electric chair to protest what he considered to be the barbaric nature of the death penalty. [FN149] During the time Byrd's claim was under review by the Sixth Circuit Court of Appeals, the Ohio legislature literally pulled the plug on the electric chair on November 21, 2001, with the passage of House Bill 362, eliminating the electric chair as an option for the execution of prisoners sentenced to death, and leaving death by lethal injection as the sole method of execution in Ohio. [FN150]

***683** This action to eliminate the electric chair in Ohio comes in the wake of a steady movement in the states toward the elimination of death by electrocution. [FN151] While it was once used in twenty-five states and the District of Columbia to carry out more than 4,200 executions, by 2001 the electric chair was the sole means of execution in only two states, Alabama and Nebraska. [FN152] Then, on April 25, 2002, the Governor of Alabama signed legislation which eliminated the electric chair and established lethal injection as Alabama's method of execution. [FN153] Although Alabama did carry out one execution by electrocution prior to the new law taking effect, [FN154] Nebraska did not carry out any executions during 2001 or 2002, nor were any prisoners executed by electrocution in any of the states allowing condemned prisoners to choose between electrocution or lethal injection. [FN155] As a further example of the strong momentum in the states toward the elimination of the electric chair, on October 5, 2001, the Georgia Supreme Court ruled that the use of the electric chair in executions violated Georgia's constitutional protection against cruel and unusual punishment. [FN156] As a result of this ruling, all future executions in Georgia ***684** must be by lethal injection, which the Georgia Supreme Court found to be a constitutionally acceptable form of capital punishment for prisoners sentenced to death in that state. [FN157]

IV. FUTURE IMPLICATIONS FOR THE DEATH PENALTY IN OHIO

Despite the numerous challenges and reform measures being advanced in an effort to eliminate or curtail current death penalty statutes in Ohio and across the nation, [FN158] the imposition of the death penalty still continues to garner strong support among the populace of the United States, with roughly two-thirds of Americans declaring themselves in favor of the death penalty in recent polls. [FN159] Ohioans in particular are even more strongly in favor of the death penalty, with nearly seventy-two percent declaring themselves in favor of the death penalty in a December 2000 poll conducted for the Ohio Public Defender's office. [FN160] Moreover, ***685** conservative Repub-

licans, traditionally viewed as strong death penalty supporters, [FN161] continue to hold a commanding majority in both the Ohio House of Representatives and the Ohio Senate, and this situation is not likely to decrease at any time in the near future. [FN162] This combination of factors would tend to suggest that Ohio will not be on the cutting edge of any death penalty reform movements across the nation, but rather will be pulled along somewhat grudgingly. [FN163] This conclusion is borne out by the factors surrounding the current developments in Ohio with respect to the electric chair and the execution of the mentally retarded.

A. *Eliminating the chair or eliminating the fear*?

Ohio's decision to eliminate the electric chair can hardly be considered a progressive measure towards death penalty reform on the part of the state. Currently, only one state maintains the electric chair as the only option for the execution of prisoners sentenced to death, and over the past two years there has been only one execution by electrocution in the United States. [FN164] In addition, the timing of the speedy adoption of House Bill 362 in the General Assembly indicates that Ohio's conservative legislature did not suddenly develop bleeding heart concerns over the physiological effects the electric chair may have on prisoners sentenced to death. Rather, ***686** the timing of the measure's adoption indicates that political leaders were motivated by fear that Ohio would suffer a major public relations embarrassment had John Byrd been allowed to fulfill his desire to be executed in Ohio's antiquated electric chair. [FN165] This view is supported by remarks made on several occasions by Reginald Wilkins, director of Ohio's Department of Rehabilitation and Correction, in urging passage of House Bill 362. [FN166]

B. *Legislation Regarding the Execution of Mentally Retarded Defendants*

Based on the same factors developed in the foregoing analysis, it is safe to conclude that in the current conservative climate of the Republican-dominated Ohio Legislature, a measure carving out an exemption from the death penalty for mentally retarded defendants would not receive any serious consideration were it not for recent court rulings which may prompt legislative focus on this issue in the near future. House Bill 346, which would have prohibited the execution of the mentally retarded, [FN167] was introduced by a Democrat lawmaker and received only one hearing in seventeen months following its introduction in the Ohio House of Representatives. [FN168] Although the subject matter of House Bill 346 was arguably more crucial than that of House Bill 362 since it dealt with the ***687** possibility of sparing the lives of certain defendants of low-level intelligence currently eligible for the death penalty, as opposed to merely determining which method of execution a defendant in Ohio may choose for carrying out a death sentence, the political climate in Ohio is not conducive to voluntary consideration of measures further curtailing the death penalty in the state. [FN169] Nevertheless, a recent decision by the United States Supreme Court has forced the Ohio Supreme Court to issue a ruling banning the execution of mentally retarded defendants, and may also force the Ohio General Assembly to deal squarely with the issue in its upcoming session. [FN170]

Therefore, currently the only limitations on the execution of mentally retarded individuals in Ohio have come as a result of a growing national trend in other states, leading to a recent reversal of opinion by the United States Supreme Court. In the 1989 case *Penry v. Lynaugh*, [FN171] the United States Supreme Court initially held that executing persons with mental retardation was *not* a violation of the Eighth Amendment, but that instead the intelligence level of the defendant should merely be considered as a mitigating factor in deciding whether to sentence the defendant to death. [FN172] Writing for the majority, Justice Sandra Day O'Connor said that a “national consensus” had not developed against executing those with mental retardation. [FN173] At the time, only two states, Maryland and Georgia, had prohibitions against such executions. [FN174] However, by June 2002, sixteen additional states prohibited the execution of the mentally retarded, and the federal death penalty also contained a provision forbidding such executions. [FN175]

***688** In light of the building consensus among the states against the imposition of the death penalty on mentally retarded defendants, the Supreme Court in March 2001 once again accepted the issue on review in the case *McCarver v. North Carolina*. [FN176] However, North Carolina subsequently amended its laws to preclude the imposition of the death penalty on mentally retarded defendants, rendering McCarver's case moot. [FN177] Neverthe-

less, on the same day the Supreme Court dismissed the granting of certiorari in *McCarver*, it granted review of the case *Atkins v. Virginia* on the same question of whether the execution of mentally retarded individuals convicted of capital crimes violates the Eighth Amendment. [FN178]

Sure enough, on June 20, 2002 the Court issued its ruling in *Atkins v. Virginia*, [FN179] holding that the execution of mentally retarded persons *does* violate the Eighth Amendment protection against cruel and unusual punishment. [FN180] In this case, Daryl Atkins was convicted of abduction, armed robbery and murder, and was sentenced to death. [FN181] Although attorneys for Atkins argued during the sentencing phase that Atkins was mentally retarded and therefore should not be sentenced to death, the Virginia Supreme Court upheld the jury's death penalty sentence for Atkins, relying on the United State Supreme Court's ruling in *Penry*, providing that the Eighth Amendment does not preclude the execution of mentally retarded criminals. [FN182]

***689** When the United States Supreme Court was first faced with the issue of executing mentally retarded criminals in *Penry*, Justice O'Connor reasoned that because only a couple of states had prohibited such executions, executing the mentally retarded did not constitute a cruel and unusual punishment in violation of the Eighth Amendment. [FN183] However, in *Atkins*, Justice Stevens, writing for the majority, acknowledged that since the Court's decision in *Penry*, a significant number of states had enacted statutes prohibiting the execution of mentally retarded criminals. [FN184] The Court, after examining the Eighth Amendment within the "evolving standards of decency," concluded that the execution of mentally retarded persons is an excessive punishment and is now a violation of the "cruel and unusual punishment" clause of the Eighth Amendment of the United States Constitution. [FN185]

As a result of the United States Supreme Court's decision in *Atkins*, the Ohio Supreme Court stayed the execution of Gregory Lott, who was convicted of aggravated murder for setting a Cleveland man on fire in 1986, and ordered a hearing to determine if Lott was mentally retarded. [FN186] Because the United States Supreme Court in *Atkins* did not define "mentally retarded" or establish the criteria for determining if a person is mentally retarded, the Ohio Supreme Court established a three-prong definition of "mentally retarded" in its order for a new hearing on Lott's sentencing. [FN187] The court defined mental retardation for purposes of the ruling in *Atkins* as a finding that the defendant has 1) significantly subaverage intellectual functioning; 2) significant limitations in two or more adaptive skills; and 3) an onset of these disabilities before the age of ***690** 18. [FN188] Additionally, the court clarified that judges, not juries, will determine if a person is mentally retarded, and that attorneys for the defendant must prove by a preponderance of the evidence that the defendant is mentally retarded. [FN189]

V. CONCLUSION

Despite recent movements to curtail the death penalty both in Ohio and on the national scene, Ohio remains a staunchly pro-death penalty state and further measures curtailing the death penalty will not come about in the near future unless forced down on Ohio by the United States Supreme Court. Although Ohio recently adopted a measure eliminating the electric chair as a method of execution in the state, this measure comes at the tail end of a national trend toward eliminating the electric chair in favor of lethal injection. In addition, it is evident that the conservative legislature in Ohio speedily adopted this measure not so much out of humane concerns over the potential physiological effects death by electrocution may have on the person executed, but more so in an effort to prevent the potential embarrassment and public relations nightmare that may have resulted had John Byrd been allowed to fulfill his expressed desire to be put to death in Ohio's antiquated electric chair.

Furthermore, while the United States Supreme Court's recent holding in *Atkins* may lead to the enactment of legislation in Ohio establishing a method for screening-out mentally retarded defendants from being sentenced to death, this issue would have continued to receive little or no attention form Ohio's legislature if it had not been pushed into the spotlight by the Supreme Court. Similarly, any future developments necessitating the curtailment of the death penalty in Ohio will likely not be motivated by legislative initiatives or judicial holdings originating within Ohio itself. Rather, changes to the death penalty will be forced down on Ohio through mandates from the United

States Supreme Court as it analyzes emerging national trends and reaches new decisions driven by evolving attitudes and opinions in more progressive death penalty states.

[FN1]. On February 19, 1999, Wilford Berry, 38, was the first person executed in Ohio since 1963. Alan Johnson, *344th execution since 1885 picks up where Ohio left off*, COLUMBUS DISPATCH, Feb. 20, 1999, at A4.

[FN2]. *See* DEATH PENALTY INFO. CTR, *The Death Penalty in 2002: Year End Rep., at* http://www.deathpenaltyinfo.org.html (Dec. 2002).

[FN3]. OHIO DEPT. REHAB. AND CORR., *Capital Punishment in Ohio, at* http://www.drc.state.oh.us/public/capital.htm (last visited Dec. 23, 2002) [hereinafter *Capital Punishment*].

[FN4]. *Id.*

[FN5]. *Id.*; The 1885 statute provided the following:

> 1. The mode of inflicting the punishment of death shall be by hanging by the neck until the person is dead; and the warden of the Ohio penitentiary, or in case of his death, inability or absence, a deputy warden, shall be the executioner; and when any person shall be sentenced, by any court of the state having competent jurisdiction, to be hanged by the neck until dead, such punishment shall only be inflicted within the walls of the Ohio penitentiary, at Columbus, Ohio, within an enclosure to be prepared for that purpose under the direction of the warden of the penitentiary and the board of managers thereof, which enclosure shall be higher than the gallows, and so constructed as to exclude public view. 2. All executions of the death penalty by hanging shall take place according to the provisions of this act, and on the day designated by the judge passing sentence, but before the hour of sunrise of the designated day, and the warden or a deputy warden executing the sentence shall receive for his services fifty dollars, to be paid out of any fund on hand appropriated for the maintenance and support of the Ohio penitentiary.

OHIO GEN. CODE § 7338 (1885).
[FN6]. *Capital Punishment, supra* note 3.

[FN7]. *Capital Punishment, supra* note 3.

[FN8]. *Capital Punishment, supra* note 3.

[FN9]. Richard Willing, *Critics Condemn Electric Chair*, USA TODAY, Sept. 7, 2001, at A3. It is curious to speculate as to what motive prompted Dr. Southwick to observe the man as he wandered to his death, rather than seeing fit to rescue him from his shocking death.

[FN10]. *Id.*

[FN11]. *Id.*

[FN12]. *Id.*

[FN13]. *Capital Punishment, supra* note 3.

[FN14]. *Id.*; Johnson, *supra* note 1, at A4.

[FN15]. *Capital Punishment, supra* note 3.

[FN16]. *Capital Punishment, supra* note 3.

[FN17]. *Capital Punishment, supra* note 3.

[FN18]. Furman v. Georgia, 408 U.S. 238 (1972).

[FN19]. 1968 GA. LAWS § 26-1302.

[FN20]. TEX. PENAL CODE ANN. § 1189 (Vernon 1961).

[FN21]. *Furman*, 408 U.S. at 239-40.

[FN22]. *Id.*

[FN23]. *Id.* at 240.

[FN24]. *See* State v. Leigh, 285 N.E.2d 333 (Ohio 1972).

[FN25]. *Id.*

[FN26]. *Id.* at 334. The ruling in this case was handed down July 19, 1972, just 20 days after the U.S. Supreme Court's holding in *Furman*.

[FN27]. *Id.*

[FN28]. *Id.*

[FN29]. 1971-1972 Ohio Laws, Part II, 1886.

[FN30]. The seven aggravating circumstances were that:

> (1) The offense was the assassination of the President of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the President-elect or Vice President-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.
>
> (2) The offense was committed for hire.
>
> (3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.
>
> (4) The offense was committed while the offender was a prisoner in a detention facility ....
>
> (5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to offense at bar, or the offense at bar was part of a course of

conduct involving the purposeful killing or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

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

OHIO REV. CODE ANN. § 2929.04(A) (West 1974) (the current version at OHIO REV. CODE ANN. § 2929.04(A)(1-9) (West Supp. 2002)).
[FN31]. The three mitigating factors created in the new statute were as follows:

(1) The victim of the offense induced or facilitated it.

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

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

OHIO REV. CODE ANN. § 2929.04(B) (West 1974) (the current version at OHIO REV. CODE ANN. § 2929.04(B) (West Supp. 2002)).
[FN32]. OHIO REV. CODE ANN. § 2929.03 (West 1974) (current version at OHIO REV. CODE ANN. § 2929.03 (West 2002)).

[FN33]. Gregg v. Georgia, 428 U.S. 153 (1976).

[FN34]. *Id.* at 154.

[FN35]. *Id.* at 155.

[FN36]. *Id.*

[FN37]. Lockett v. Ohio, 438 U.S. 586 (1978).

[FN38]. *Id.* at 604; *See also* Bell v. Ohio, 438 U.S. 637 (1978). At that time, Ohio only allowed the sentencing authority to consider three mitigating factors. OHIO REV. CODE ANN. § 2929.04(B)(West 1974)(current version at OHIO REV. CODE ANN. § 2929.04(B)(West Supp. 2002)).

[FN39]. *Lockett*, 438 U.S. at 604.

[FN40]. *Capital Punishment*, *supra* note 3.

[FN41]. H.B. 1, 114th Gen. Assemb., Reg. Sess. (Oh. 1981); *See* OHIO REV. CODE ANN. §§ 2929.02-.06 (West 1982).

[FN42]. §§ 2929.02-.06.

[FN43]. *Capital Punishment*, *supra* note 3.

[FN44]. *Id.*; Johnson, *supra* note 1, at A4.

[FN45]. *Capital Punishment*, *supra* note 3.

[FN46]. *Capital Punishment*, *supra* note 3.

[FN47]. *Capital Punishment*, *supra* note 3.

[FN48]. Maurer v. Sheward, 644 N.E.2d 369 (Ohio 1994).

[FN49]. *Id.* at 378.

[FN50]. *Id.*

[FN51]. OHIO REV. CODE ANN. § 2949.22(B)(1) (West 1994).

[FN52]. *Id.*

[FN53]. State v. Bey, 709 N.E.2d 484 (Ohio 1999).

[FN54]. *Id.* at 500.

[FN55]. *Capital Punishment*, *supra* note 3.

[FN56]. *Capital Punishment*, *supra* note 3.

[FN57]. *Capital Punishment*, *supra* note 3.

[FN58]. Section 2903.01 lays out six offenses constituting aggravated murder as follows:

> (A) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.
>
> (B) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.
>
> (C) No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense.
>
> (D) No 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.
>
> (E) No person shall purposely cause the death of a law enforcement officer whom the offender knows or has reasonable cause to know is a law enforcement officer when either of the following applies:

(1) The victim, at the time of the commission of the offense, is engaged in the victim's duties.

(2) It is the offender's specific purpose to kill a law enforcement officer.

OHIO REV. CODE ANN. § 2903.01 (West Supp. 2002).
[FN59]. OHIO REV. CODE ANN. § 2929.04 (West 1997). The current version of Ohio Revised Code Section 2929.04 contains a total of nine aggravating circumstances as follows:

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

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

(2) The offense was committed for hire.

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

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

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

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

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

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

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the ag-

gravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

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

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

OHIO REV. CODE ANN. § 2929.04(A) (West Supp. 2002).
[FN60]. OHIO REV. CODE ANN. §§ 2945.05 -.06 (West 1997).

[FN61]. OHIO REV. CODE ANN. § 2929.03(B) (West 1997). This section provides that the jury shall be instructed that a specification must be proven beyond a reasonable doubt in order to support a guilty verdict on the specification, and further states that the instruction "shall not mention the penalty that may be the consequence of a guilty or not guilty verdict on any charge or specification." *Id.* This ensures that the guilt and sentencing phases are bifurcated in accordance with the requirements set forth for death penalty cases in the United States Supreme Court's holding in *Gregg*. Gregg v. Georgia, 428 U.S. 153 (1976).

[FN62]. *See* OHIO REV. CODE ANN. § 2929.02(A) (West Supp. 2002); OHIO REV. CODE ANN. § 2929.023 (West 1997). This age limitation for the imposition of the death penalty was added to the Ohio Revised Code in 1981 as part of Senate Bill 1, most likely as a result of the circumstances present in the case *Bell v. Ohio*, 438 U.S. 637 (1978), in which a person was sentenced to death for a crime committed when he was sixteen years of age. *See Bell*, 438 U.S. at 639. *Bell* was a companion case to *Lockett* (discussed *supra* at text accompanying notes 37-40), and the death sentence of Bell was overturned on the basis of the holding in *Lockett*, without the Supreme Court addressing the issue of the offender's youth. *See Bell*, 438 U.S. at 642.

[FN63]. OHIO REV. CODE ANN. § 2929.03(D)(1) (West 1997). The current version of Ohio Revised Code Section 2929.04(B) lists seven mitigating factors which may be considered in deciding whether to impose the death penalty:

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

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

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

(4) The youth of the offender;

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

(6) If the offender was a participant in the offense but not the principal offender, the degree of the of-

fender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

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

OHIO REV. CODE ANN. § 2929.04(B) (West Supp. 2002).
[FN64]. OHIO REV. CODE ANN. § 2929.03(D)(1) (West 1997). In addition, indigent defendants in capital cases are entitled to any investigation services, experts, or other services at the court's expense, if the court determines that such services are reasonably necessary. OHIO REV. CODE ANN. § 2929.024 (West 1997).

[FN65]. OHIO REV. CODE ANN. § 2929.03(D)(1) (West 1997).

[FN66]. *Id.*

[FN67]. *Id.*; § 2929.03(D)(2); OHIO REV. CODE ANN. § 2929.04(B) (West Supp. 2002).

[FN68]. OHIO REV. CODE ANN. § 2929.03(D)(2) (West 1997). The court must, however, overrule the jury's recommendation if it fails to find that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors. *Id.*; § 2929.03(D)(2). In such a case, the court is required to override the jury's recommendation and impose a lesser life sentence in lieu of the death penalty. *Id.*

[FN69]. *Id.*; § 2929.03(D)(2)(a).

[FN70]. *See id.*; § 2929.06. This provision allowing for the automatic review of the death sentence comports with the guidelines set forth in the Supreme Court's holding in *Gregg*. *See* Gregg v. Georgia, 428 U.S. 153 (1976).

[FN71]. *See* 2001 OHIO ATT'Y GEN. CAPITAL CRIMES REP. 1. This report was produced voluntarily by the Ohio Attorney General until 1998 when House Bill 18 was passed, requiring the attorney general to prepare an annual report on individuals sentenced to death in Ohio, and file a copy of the report with the Governor, the Chief Justice of the supreme court, the President of the Senate and the Speaker of the House of Representatives, no later than the first day of April annually. *See* OHIO REV. CODE ANN. § 109.97 (West Supp. 2002).

[FN72]. *See* OHIO CONST. art. IV, § 2 (amended effective November 8, 1994 to provide the Ohio Supreme Court with appellate jurisdiction in "direct appeals from the courts of common pleas or other courts of record inferior to the court of appeals as a matter of right in cases in which the death penalty has been imposed").

[FN73]. *See* OHIO REV. CODE ANN. § 2929.05(A) (West Supp. 2002) (providing a direct appeal to the court of appeals in cases where the sentence of death was imposed for an offense committed before January 1, 1995).

[FN74]. *Id.*

[FN75]. *Id.*

[FN76]. *Id.*

[FN77]. *Id.*

[FN78]. 2001 OHIO ATT'Y GEN. CAPITAL CRIMES REP. 5.

[FN79]. *Id.*

[FN80]. OHIO REV. CODE ANN. § 2953.21 (West Supp. 2002).

[FN81]. *See* 2001 OHIO ATT'Y GEN. CAPITAL CRIMES REP. 1-6.

[FN82]. *Id.* at 1.

[FN83]. OHIO REV. CODE ANN. § 2953.21(A)(2) (West Supp. 2002). (In like fashion, the Ohio Supreme Court instituted Superintendence Rule 39 in 1997 to alleviate delays in the post-conviction process by setting a 180-day time period for disposition of the action and establishing reporting requirements for trial courts.) *See* 2001 OHIO ATT'Y GEN. CAPITAL CRIMES REP., at 3.

[FN84]. 2001 OHIO ATT'Y GEN. CAPITAL CRIMES REP. at 6.

[FN85]. OHIO REV. CODE ANN. § 2953.21(A). Section 2953.21(A)(1) provides as follows:

> Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

Id.
[FN86]. OHIO REV. CODE ANN. § 2953.21(A)(2).

[FN87]. 2001 OHIO ATT'Y GEN. CAPITAL CRIMES REP. 6.

[FN88]. § 2953.21(A)(1).

[FN89]. § 2953.21(I)(1).

[FN90]. 2001 OHIO ATT'Y GEN. CAPITAL CRIMES REP. 6.

[FN91]. Strickland v. Washington, 466 U.S. 668 (1984).

[FN92]. *Id.* at 671.

[FN93]. *Id.* at 686.

[FN94]. *Id.* at 687.

[FN95]. *Id.*

[FN96]. 2001 OHIO ATT'Y GEN. CAPITAL CRIMES REP. 6.

[FN97]. *Id.*

[FN98]. *Id.*

[FN99]. *Id.* at 6-7.

[FN100]. State v. Murnahan, 584 N.E.2d 1204 (Ohio 1992).

[FN101]. *Id.* at 1208.

[FN102]. *Id.* at 1209.

[FN103]. 2001 OHIO ATT'Y GEN. CAPITAL CRIMES REP. 7.

[FN104]. OHIO. R. APP. P. 26(B)(1). Ohio Appellate Rule 26(B) was added in 1993 after the decision in *Murnahan* and provides, in pertinent part:

> (1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

Id.

[FN105]. 2001 OHIO ATT'Y GEN. CAPITAL CRIMES REP. 7.

[FN106]. *Id.* at 7. Black's Law Dictionary provides the following explanation for "habeas corpus":

> Lat. (You have the body). The name given to a variety of writs (of which these were anciently the emphatic words), having for their object to bring a party before a court or judge. In common usage, and whenever these words are used alone, they are usually understood to mean the *habeas corpus ad subjiciendum* [produce the body]. The primary function of the writ is to release from unlawful imprisonment. The office of the writ is not to determine prisoner's guilt or innocence, and the only issue which it presents is whether prisoner is restrained of his liberty by due process ... Initially, the writ only permitted a prisoner to challenge a state conviction on constitutional grounds that related to the jurisdiction of the state court. But the scope of the inquiry was gradually expanded, and the writ now extends to all constitutional challenges.

BLACK'S LAW DICTIONARY 709 (6th ed. 1991).

[FN107]. 2001 OHIO ATT'Y GEN. CAPITAL CRIMES REP. 8.

[FN108]. *Id.*

[FN109]. *Id.* at 9.

[FN110]. *See id.*

[FN111]. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 § 1214 (the AEDPA became effective on Apr. 24, 1996).

[FN112]. *Id.* Two provisions added by the AEDPA in particular render the bringing of habeus corpus petitions more difficult for defendants appealing a state court conviction. *Id.* First, the AEDPA requires that the writ of habeas corpus may only be granted when the adjudication of the claim in state court: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law ... or (2) resulted in a decision

that 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 (2002). Second, in the case of successive petitions, the AEDPA requires that successive petitions be approved by a three-judge panel of the federal court of appeals, rather than the federal district court, and that the petition must be based on newly discovered evidence or new constitutional rights established by the Supreme Court and retroactively applied. *See id.* § 2244(b). Furthermore, for a successive petition to succeed under the AEDPA, the defendant must show that the facts, when viewed in light of the evidence as a whole, establish by clear and convincing evidence that no reasonable fact finder would have found the person guilty. *Id.*

[FN113]. *Capital Punishment*, *supra* note 3.

[FN114]. *Id.*

[FN115]. *See id.* Although this was a case of first impression for Ohio, surprisingly many death row inmates in the United States have waived their appeals and have asked to be executed. *See* Craig Pittman, *Death Row Volunteers Don't Always Get Wish*, ST. PETERSBURGH TIMES, Jan. 4, 1998, at 1B. (Officials estimate that approximately ten percent of all death row inmates executed in the past twenty years have requested to die.).

[FN116]. State v. Berry, 686 N.E.2d 1097 (Ohio 1997).

[FN117]. Mary Beth Lane, *Campaigning For Execution — Death Row Inmate Wants to Die*, PLAIN DEALER (Clev.), Jan. 29, 1996, at 1A. (Berry's father claimed to have killed his family, and was diagnosed with schizophrenia.).

[FN118]. *Id.*

[FN119]. *Id.*

[FN120]. *Id.*

[FN121]. *Id.*

[FN122]. Lane, *supra* note 117, at 1A.

[FN123]. *See* Lane, s*upra* note 117, at 1A. In the words of Attorney General Betty Montgomery: "We have taken the position that if a volunteer wishes to have the death penalty, we will concur in that." Lane, *supra* note 117, at 1A.

[FN124]. State v. Berry, 686 N.E.2d 1097, 1103 (Ohio 1997).

[FN125]. *Id.* at 1107; OHIO CONST. art. I, § 9.

[FN126]. *Berry*, 686 N.E.2d at 1099.

[FN127]. *Id.*

[FN128]. *Id.* at 1108. In addition, the opinion handed down by the Ohio Supreme Court levied harsh criticism against the public defender's argument in the case, asserting that the public defender's reading of the Ohio Constitution "reflects a radical paternalism outside the mainstream of American law and inconsistent with the human dignity of a competent adult." *Id.* at 1107.

[FN129]. State v. Berry, 706 N.E.2d 1273 (Ohio 1999).

[FN130]. OHIO DEPT. REHAB. AND CORR., *Ohio Executions*, *available at* http://www.drc.state.oh.us/web/executed/executed25.htm (last visited Dec. 23, 2002) [hereinafter *Ohio Executions*].

[FN131]. *Id.*

[FN132]. Alan Johnson, *Violence, Mental Ills Marked Cleveland Murderer's 48 Years*, COLUMBUS DISPATCH, June 15, 2001, at A5:

[FN133]. *Id.*

[FN134]. Alan Johnson, *Scott Case Reflects National Questions*, THE COLUMBUS DISPATCH, Apr. 19, 2001, at A1.

[FN135]. State v. Scott, 748 N.E.2d 11, 14 (Ohio 2001).

[FN136]. *Id.*

[FN137]. *Id.; see also* OHIO REV. CODE ANN. § 2949.28(A) (Anderson 2002).

[FN138]. H.B. 346, 124th Gen. Assemb., Reg. Sess. (Ohio 2001), *available at* http://www.legislature.state.oh.us/BillText124/124_HB_346_I_Y.html.

[FN139]. *Id.*

[FN140]. *Id.*

[FN141]. *Id.*

[FN142]. *Id.*

[FN143]. *Id.*

[FN144]. *Id.*

[FN145]. *Hearing on H.B. 346 before the House Crim. Just. Comm*. 1999 leg., 124th Gen. Assemb. (Ohio 2001) (sponsor testimony of Rep. Ray Miller).

[FN146]. With the conclusion of Ohio's 124th General Assembly on December 31, 2002, House Bill 346 will no longer be under consideration by the legislature. However, in light of the Ohio Supreme Court's recent decision in *State v. Lott* (*see infra* text accompanying notes 184-87), similar legislation may very well be introduced and considered in 2003.

[FN147]. Alan Johnson, *Execution Set for Feb. 19*, COLUMBUS DISPATCH, Jan. 12, 2002, at B1.

[FN148]. Kate Macek, *Electric Chair Banned in Ohio*, CINCINNATI ENQUIRER, Nov. 22, 2001.

[FN149]. Johnson, *supra* note 147, at B1. (Byrd made the following statement: "What they was [sic] doing was to try to make capital punishment seem as if it has some kind of humanity to it .... If you want a humane way, go back to beheading. Once the head is cut off, there's no feeling.").

[FN150]. Kate Macek, *Electric Chair Banned in Ohio*, CINCINNATI ENQUIRER, Nov. 22, 2001. House Bill 362 amended Ohio Revised Code Section 2949.22 to remove references to death by electrocution as the primary option for execution in Ohio, leaving lethal injection as the sole remaining method available to condemned prisoners. *See* OHIO REV. CODE ANN. § 2949.22 (Anderson 2002). The legislation was passed as an emergency measure and took effect immediately on November 21, 2001. *Id.* Following John Byrd's execution in the wake of the elimination of the electric chair in Ohio, two other condemned prisoners were put to death by lethal injection in 2002. *See Ohio Executions*, *supra* note 130. Alton Coleman, the only person in the United States to be on death row in three different states, was executed on April 26, 2002 for the 1984 murder of Marlene Walters of Hamilton County. Then, on September 25, 2002, Robert Buell was executed for the 1982 kidnapping, rape and murder of eleven-year-old Krista Lea Harrison of Wayne County. *See also* Tom Breckenridge, *State Prepares, inmate appeals as execution nears*, THE PLAIN DEALER (Clev.), Sept. 22, 2002, at B1.

[FN151]. Willing, *supra* note 9, at A3.

[FN152]. *Id.; see* DEATH PENALTY INFO. CTR., *Methods of Execution, at* http://www.deathpenaltyinfo.org/methods.html (last visited Jan. 13, 2003).

[FN153]. *See Alabama Law Adopts Injection for Executions*, THE MIAMI HERALD, Apr. 26, 2002, at 28.

[FN154]. *Id.; see also Woman in Alabama Goes to Electric Chair*, HOUSTON CHRON., May 11, 2002, at 15. Lynda Lyon Block, the first woman to be executed in Alabama since 1957, chose to waive her appeals and was executed in Alabama's electric chair on May 10, 2001, prior to the legislation eliminating the electric chair taking effect. *Id.*

[FN155]. *See* DEATH PENALTY INFO. CTR., *Executions in the U.S. 2001*, and *Executions in the U.S. 2002, at* http://www.deathpenaltyinfo.org (last visited Jan 13, 2003).

[FN156]. Dawson v. State, 554 S.E.2d 137 (Ga. 2001). In reaching its decision to declare the electric chair an unconstitutional form of capital punishment, the court pointed to the grisly effects of the execution on the bodies of executed prisoners:

> The evidence adduced in the record ... reveals uncontrovertedly that the bodies of condemned prisoners in Georgia are mutilated during the electrocution process .... [A]utopsy reports show that the bodies are burned and blistered with frequent skin slippage from the process, and ... that the brains of the condemned prisoners are destroyed in a process that cooks them ....

Id. at 143.

[FN157]. *Id.*

[FN158]. *See* DEATH PENALTY INFO. CTR., *The Death Penalty in 2002: Year End Report*, Dec. 2002, *at* http://www.deathpenaltyinfo.org (last visited Jan. 13, 2003) [hereinafter *Year End Report*].

[FN159]. *See* Jeffrey M. Jones, *Two-Thirds of Americans Support the Death Penalty*, GALLUP NEWS SERVICE, Mar. 2, 2001 (poll showing sixty-seven percent of the public favors the death penalty for murder, while twenty-five percent are against it); WASHINGTON POST-ABC POLL, *The Death Penalty*, May 3, 2001, *available at* http://www.washingtonpost.com/wp-srv/nation/sidebars/polls/050301deathpoll.htm (showing sixty-three percent of

the public in favor of the death penalty for persons convicted of murder and twenty-eight percent against it). The Death Penalty Institute reports that in October 2002, seventy-two percent of Americans favored the death penalty, while twenty-five percent opposed it. *See Year End Report*, *supra* note 158.

[FN160]. *See* Kimberly Downing, *Project Report For: Office of the Ohio Public Defender*, THE OHIO POLL, (Dec. 2002) (poll showing seventy-two percent of Ohioans in favor of the death penalty for persons convicted of premeditated murder, with twenty-two percent against it).

[FN161]. The results of the March 2001 Gallup Poll showed that seventy-nine percent of Republicans favor the death penalty compared to fifty-two percent of Democrats. *See* Jones, *supra* note 159.

[FN162]. In the November 5, 2002 election, Republicans increased their majority to 22-11 in the Ohio Senate, and 62-37 in the Ohio House of Representatives. Lee Leonard, *GOP manages to increase House, Senate majorities*, THE COLUMBUS DISPATCH, Nov. 6, 2002, at C4. This represents the most dominant Republican majority in the Ohio Legislature in over thirty years. Thomas Suddes, *High GOP tide strands Democrats*, PLAIN DEALER (Clev.), Nov. 13, 2002, at B11. As an additional example of current GOP dominance in Ohio, Republicans were elected to all four statewide elected offices in Ohio for the third straight time in November 2002. Catherine Candisky, *Montgomery top vote-getter in GOP sweep*, COLUMBUS DISPATCH, Nov. 6, 2002, at C4.

[FN163]. The Ohio Supreme Court also retained a 5-2 Republican majority in the November 2002 election, indicating that Ohio's highest court will most likely continue taking a conservative approach to death penalty issues as well. Thomas Suddes, *High GOP tide strands Democrats*, PLAIN DEALER (Clev.), Nov. 13, 2002, at B11.

[FN164]. *See supra* text accompanying notes 150-53.

[FN165]. In an ironic example of the strongly conservative nature of Ohio's current legislature, on the same day the Ohio House passed the measure eliminating the electric chair, the House also managed to muster the conservative support to push through the following bills: a measure declaring a strong public policy against same-sex marriages in Ohio; a bill requiring public schools to set aside time for a moment of silence for prayer, reflection, or meditation, and for recitation of the Pledge of Allegiance to the Flag; and a bill making it more difficult for localities to ban smoking in public. *See* Catherine Candinsky, *3 House bills reflect conservatives' power*, COLUMBUS DISPATCH, Nov. 1, 2001, at C1.

[FN166]. Macek, *supra* note 148. (remarks by Wilkins indicating that he was “worried about possible trauma to his staff, their inexperience with electrocution and the age of Ohio's electric chair”).

[FN167]. *See supra* text accompanying notes 135-45.

[FN168]. *See supra* note 138. In stark contrast, House Bill 362, the above-discussed measure eliminating the electric chair, was introduced on Sept. 13, 2001, more than two weeks after H.B. 346, and on greased skids was quickly reported through committees, passed by both houses and signed into law on Nov. 21, 2001. *See* OHIO LEG. SERV. COMM., *Status Report of Legislation*, H.B. 362, 124th Ohio Gen. Assembly, *available at* http://www.lsc.state.oh.us.

[FN169]. *See supra* notes 159-61.

[FN170]. *See* State v. Lott, 97 Ohio St.3d 303 (Ohio 2002); Alan Johnson, *Retardation appeals allowed*, COLUMBUS DISPATCH, Dec. 12, 2002, at C1. (The Ohio Public Defender estimates that there may be as many as 50 mentally retarded convicts on death row who can use this decision as a basis for appealing their death sentence, but the Ohio Department of Rehabilitation and Corrections claims that none of the 207 inmates currently on Ohio's death

row are mentally retarded.).

[FN171]. Penry v. Lynaugh, 492 U.S. 302 (1989).

[FN172]. *Id.* at 340.

[FN173]. *Id.* at 334.

[FN174]. *Id.*

[FN175]. Prior to the United States Supreme Court's decision in *Atkins v. Virginia* handed down on June 20, 2002 (*see infra* text accompanying note 177), the eighteen states with statutes prohibiting the imposition of the death penalty on a defendant found to be mentally retarded were Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Maryland, Missouri, Nebraska, New Mexico, New York (except for murder by a prisoner), North Carolina, South Dakota, Tennessee, and Washington. *See* Atkins v. Virginia, 536 U.S. 304, 306 (2002).; *see also* DEATH PENALTY INFO. CTR., *Mental Retardation and the Death Penalty*, Death Penalty Information Center 2001, http://www.deathpenaltyinfo.org (last visited Jan. 13, 2003).

[FN176]. McCarver v. North Carolina, 532 U.S. 941 (2001), *cert dismissed*, 533 U.S. 975 (2001).

[FN177]. McCarver v. North Carolina, 533 U.S. 975 (Sept. 25, 2001) (*cert. dismissed*); *See* DEATH PENALTY INFO. CENTER, *Changes in the Death Penalty Around the U.S. 2000-2001, at* http://www.death penaltyinfo.org (last visited Jan 13, 2003).

[FN178]. *See* Atkins v. Virginia, 524 S.E.2d 312 (Va. 2000), *cert. granted*, 2001 WL 121852, No. 00-8452 (Sept. 25, 2001).

[FN179]. Atkins v. Virginia, 536 U.S. 304 (2002).

[FN180]. *Id.*

[FN181]. *Id.*

[FN182]. *Id.*

[FN183]. *See* Penry v. Lynaugh, 492 U.S. 302, 340 (1989). At the time the ruling in *Penry* was handed down, only two states, Georgia and Maryland, had enacted statutes prohibiting the execution of the mentally retarded. *Id.* at 334. Justice O'Connor did, however, leave the issue open for future re-visitation by the Court, as is evident by the following statement in the conclusion of her opinion: “While a national consensus against execution of the mentally retarded may someday emerge reflecting the ‘evolving standards of decency that mark the progress of a maturing society,’ there is insufficient evidence of such a consensus today.” *Id.* at 340.

[FN184]. *Atkins*, 536 U.S. at 304. The eighteen states prohibiting the execution of mentally retarded criminals are listed *supra* at note 173.

[FN185]. *Id.*

[FN186]. *See* State v. Lott, 779 N.E.2d 1011 (Ohio 2002).

[FN187]. *Id.*

[FN188]. *Id.*

[FN189]. *Id.*

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