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Fact or Fiction: Mitigating the Death Penalty in Ohio

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NOTES

FACT OR FICTION: MITIGATING THE DEATH PENALTY IN OHIO*

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I. INTRODUCTION

The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and common place result of convictions¹

In *Lockett v. Ohio*,² the United States Supreme Court found that Ohio's capital statute violated the eighth and fourteenth amendments of the Constitution because the statute permitted consideration of only three mitigating factors.³ The purpose of mitigating factors is to reduce culpa-

* The author wishes to acknowledge the conscientious assistance of Elaine C. Hilliard, Esq., and Mary Ann Kuzila.

¹ Williams v. New York, 337 U.S. 241, 247 (1949).

² 438 U.S. 586 (1978). Chief Justice Burger, writing for the plurality, stated that "the sentencer [should] 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 his sentence less than death." *Id.* at 604 (emphasis in original) (footnote omitted).

³ OHIO REV. CODE ANN. § 2929.04(B) (Page 1975) (amended (1981)). The mitigating circumstances were:

(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

bility and ensure "that the punishment assigned for a criminal act may for ethical and humanitarian reasons, be tempered out of consideration of the individual offender and his crime."⁴ Lockett had asserted that it was unconstitutional for a state to limit a sentencer in its consideration of mitigating circumstances.⁵ The Supreme Court agreed, stating:

[A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.⁶

In response to *Lockett*, the Ohio legislature enacted a new capital statute, effective on October 19, 1981, to redress the constitutional infirmities detailed by the *Lockett* Court. The legislature increased the number of statutory mitigating factors from three to seven.⁷ The last mitigating fac-

duress, coercion, or strong provocation; and (3) The offense was chiefly the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

Id. § 2929.04(B)(1), (2), (3) (amended (1981)). Under the previous capital statute, even if one or more aggravating circumstances was proved beyond a reasonable doubt, the death penalty for aggravated murder was precluded if the trial court found that any of the three mitigating circumstances was established by a preponderance of the evidence. *Id.* § 2929.04(B). See Comment, *The Constitutionality of Ohio's Death Penalty*, 38 OHIO ST. L.J. 617 (1977) (hereinafter cited as *Death Penalty*); Comment, *Capital Punishment in Ohio: The Constitutionality of the Death Penalty Statute*, 3 U. DAYTON L. REV. 169 (1978); Comment, *Legislative Response to Furman v. Georgia—Ohio Restores the Death Penalty*, 8 AKRON L. REV. 149 (1974).

⁴ *State v. Woods*, 48 Ohio St. 2d 127, 137, 357 N.E.2d 1059, 1066 (1976).

⁵ 438 U.S. at 597.

⁶ *Id.* at 605.

⁷ Presently, the statute provides that the sentencing authority shall:

weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all the following factors:

- (1) Whether the victim of the offense induced or facilitated it;
- (2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;
- (3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;
- (4) The youth of the offender;
- (5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;
- (6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;
- (7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

tor allows the sentencing authority to consider any other relevant factor(s) when deciding whether the offender should be sentenced to death.⁸

Twelve men and one woman have been sentenced to death under the new capital statute.⁹ One additional jury recommendation of death has been overturned by a trial judge.¹⁰ Increasingly, the existence of mitigating factors may be the critical factor in determining whether the person convicted will live or die. However, the determination that mitigating factors are present will not preclude the death penalty. In Ohio, the court must be convinced that the aggravating circumstances¹¹ outweigh the mitigating factors by proof beyond a reasonable doubt.¹² If a three-judge panel acts as the sentencing authority, its finding must be unanimous.¹³

The trial courts must issue written opinions whenever the death penalty is imposed.¹⁴ This Note will analyze opinions handed down since the enactment of the capital statute to ascertain whether the various mitigating factors adequately meet the concerns of *Lockett*. Part II contains a brief overview of Ohio's capital plan. The scope and interpretation of the mitigating factors should dominate future appellate decisions; thus, in Part III, four mitigating factors will be examined. In Part IV the treatment of the mitigating factors in the weighing process will be explored.

OHIO REV. CODE ANN. § 2929.04(B) (Page 1982).

* *Id.* § 2929.04(B)(7).

* Sharon Young in *State v. Young*, No. B832363 (C.P. Hamilton County 1983); Ernest Martin in *State v. Martin*, No. CR180038 (C.P. Cuyahoga County 1983); David Steffen in *State v. Steffen*, No. B-824004 (C.P. Hamilton County 1983); David Mapes in *State v. Mapes*, No. CR-181703 (C.P. Cuyahoga County 1983); Jeffrey Thompson in *State v. Thompson*, No. 82L15216 (C.P. Licking County 1983); Frank Spisak in *State v. Spisak*, No. CR-176651 (C.P. Cuyahoga County 1983); John Byrd in *State v. Byrd*, No. B-831662 (C.P. Hamilton County 1983); Arthur Tyler in *State v. Tyler*, No. 181132B (C.P. Cuyahoga County 1983); Donald Maurer in *State v. Maurer*, No. 82-2545 (C.P. Stark County 1983); Bill Penix in *State v. Penix*, No. 82-CR-241 (C.P. Clark County 1983); John Glenn in *State v. Glenn*, No. 81 CR 933 (C.P. Portage County 1982); Billy Rogers in *State v. Rogers*, No. 81-6906 (C.P. Lucas County 1982); Leonard Jenkins in *State v. Jenkins*, No. CR 168784 (C.P. Cuyahoga County 1982). The jury recommended death in all cases.

¹⁰ *State v. Kiser*, No. 82-CR69 (C.P. Ross County 1983). The jury recommended death, but the judge, pursuant to § 2929.03(D)(3) of the Ohio Revised Code, did not find that the State of Ohio had proved beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors. *Id.* trial op. at 16. See *State v. Forney*, No. CR 82 4443 (C.P. Summit County 1982). A three-judge panel failed to find unanimously that the aggravating circumstances outweighed the mitigating factors. *Id.* trial op. at 2. Thus, the death penalty could not be imposed and the defendant was sentenced to life imprisonment with parole eligibility after serving 30 full years. *Journal Entry*, No. 10928 at 1, *State v. Forney*, No. CR 82 4443.

¹¹ For an excellent analysis of the aggravating circumstances in Ohio's capital plan, see Note, *Capital Punishment in Ohio: Aggravating Circumstances*, 31 CLEV. ST. L. REV. 495 (1982).

¹² OHIO REV. CODE ANN. § 2929.03(D)(3) (Page 1982).

¹³ *Id.*

¹⁴ *Id.* § 2929.03(F).

The examination of the mitigating factors in the capital statute is relevant to the determination of whether mitigating the death penalty in Ohio will be a fact or an elusive fiction.

II. THE OHIO CAPITAL PLAN

The Ohio capital plan is a bifurcated process,¹⁵ whereby the offender's guilt of the principal charge and any specification of an aggravating circumstance¹⁶ is determined at the trial stage. The offender may waive a trial by jury and elect to utilize a three-judge panel as trier of fact and sentencer.¹⁷ If the offender is found guilty of the principal charge, but found not guilty beyond a reasonable doubt of the specifications, the sentencer shall impose life imprisonment with parole eligibility after serving twenty years.¹⁸ If the offender is found guilty of the principal charge and one or more of the specifications, the process enters the sentencing stage. Initially, upon the request of the defendant, the court will order a pre-sentence investigation and mental examination.¹⁹ Reports of these studies will be among the evidence considered by the sentencer. Pursuant to the statute, the sentencer shall also consider: evidence adduced at trial relevant to the aggravating circumstances; evidence adduced at trial relevant to the mitigating circumstances; other evidence and testimony relevant to the nature of the aggravating circumstances; other evidence and testimony relevant to the statutory mitigating factors or any other factors in mitigation of the imposition of the death sentence; any statement of the defendant; and any statements of counsel for the defense and prosecution that are relevant to the penalty that should be imposed.²⁰

Furthermore, the defendant is to be given "great latitude" in the pres-

¹⁵ The Supreme Court, in *Gregg v. Georgia*, 428 U.S. 153 (1976), approved of a bifurcated sentencing process:

Much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question. This problem however is scarcely insurmountable. Those who have studied the question suggest that a bifurcated procedure—one in which the question of sentence is not considered until the determination of guilt has been made—is the best answer.

Id. at 190-91.

¹⁶ All of the specifications are tried and determined in the guilt phase except prior convictions. OHIO REV. CODE ANN. § 2929.04(A)(5) (Page 1982). The defendant may elect to have this specification determined in the sentencing phase. In either case, however, the determination of the existence of this specification is made by the trial judge or three-judge panel and not the jury. *Id.* § 2929.022(A).

¹⁷ *Id.*

¹⁸ *Id.* § 2929.03(C)(1). It is important to note the distinction between a 20-year sentence in this section and a 20-full-year sentence imposed under § 2929.03(D)(3)(a) (Page 1982). Under the latter sentence, the offender must serve the *full* 20 years before he is eligible for parole.

¹⁹ *Id.* § 2929.03(D)(1).

²⁰ *Id.*

entation of evidence of statutory mitigating factors and any other factors in mitigation of the imposition of the death sentence.²¹ The statute places on the defendant the burden of going forward with the evidence of any factors of mitigation,²² but it is silent as to which party bears the burden of proof regarding the mitigating factors. The prosecution must prove beyond a reasonable doubt that the aggravating circumstances are sufficient to outweigh the mitigating factors.²³

If the prosecution meets its burden, the trial jury "shall recommend to the court that the sentence of death be imposed on the offender."²⁴ If the prosecution fails to meet its burden, the trial jury shall recommend²⁵ either a life sentence without parole for twenty full years, or a life sentence without parole for thirty full years. The trial judge, after a jury recommendation of death, may impose the jury's recommended sentence if he is satisfied that the aggravating circumstances outweigh the mitigating factors by proof beyond a reasonable doubt.²⁶ A three-judge panel must unanimously find that the aggravating circumstances are sufficient to outweigh the mitigating factors.²⁷ The judge, however, must accept the jury's recommendation of a life sentence.²⁸

Notwithstanding the penalty imposed, the court or panel is required to state in a separate opinion the existence of any statutory or other mitigating factors, and the existence of aggravating circumstances, as well as reasons why the aggravating circumstances were sufficient or insufficient to outweigh the mitigating factors.²⁹ The opinion must be filed with the ap-

²¹ *Id.*

²² *Id.* This provision could be interpreted to mean that the prosecution shall have the final opportunity to speak in the sentencing process. Two Ohio trial courts have allowed the defense to make two closing arguments. See *State v. Byrd*, No. B-831662, trial op. at 4 (C.P. Hamilton County 1983); *State v. Steffen*, No. B-824004, trial op. at 5 (C.P. Hamilton County 1983). Section 2929.023 establishes the burden of proving beyond a reasonable doubt that the defendant was 18 years of age or older at the time of the commission of the offense. The burden of raising the matter of age and of going forward with the evidence is upon the defendant. *Id.*

²³ *Id.* § 2929.03(D)(1).

²⁴ *Id.* § 2929.03(D)(2).

²⁵ *Id.* The language of the statute is that the jury shall "recommend" a life sentence. Actually, a jury recommendation of a life sentence is an imposition of a life sentence, since the trial judge may not overturn or alter the jury's recommendation of life. *Id.*

²⁶ *Id.* § 2929.03(D)(3). The Ohio plan seemingly does not unduly emphasize the jury's recommendation of death. Thus, the trial judge need offer no deference to its decision.

²⁷ *Id.* § 2929.03(D)(2).

²⁸ *Id.*

²⁹ *Id.* § 2929.03(F). This section is clear with respect to the opinion that must be written when the court or three-judge panel imposes death. The statute is unclear, however, as to whether an opinion must be written when the jury brings back a life sentence, or whether the opinion must be written when the court imposes a life sentence over a jury recommendation of death. The ambiguity centers on the phrase "imposes life imprisonment." Although, in effect, the jury "imposes" life imprisonment, the language of the statute is that of a recommendation only. Arguably, only the court may impose a sentence. Therefore it would

propriate clerks of the courts of appeals and the Ohio Supreme Court.³⁰

III. MITIGATING FACTORS

The first two statutory mitigating factors are identical to those found in the prior capital statute and will not be discussed herein.³¹ It is sufficient to note that under the prior law, no offender successfully established that the victim induced the offense³² or that the offense was committed while under coercion or duress.³³ The narrow scope of these two factors makes it unlikely that an offender will be any more successful under the new law.

The sixth mitigating factor is also narrow in scope and will not be discussed herein.³⁴ It focuses on the degree of the defendant's participation in the acts leading up to the offense as well as the participation in the offense itself. However, since the great majority of capital indictments will be brought against the principal offender, this factor, although new, may seldom be utilized. The third, fourth, fifth, and seventh factors will be discussed below. Special attention will be devoted to mitigating factor three—the existence of a mental disease or defect—for that factor has proved the one most often employed by capital defendants.

A. Mental Disease or Defect

The third mitigating factor for the sentencing authority to consider is

be realistic and beneficial to all concerned if trial judges wrote opinions in all three situations. See, e.g., *State v. Shields*, No. 173004-B (C.P. Cuyahoga County 1982) (defendant's life sentence was recommended by jury and imposed by judge). The opinion did not follow the statutory language, in that it did not state which mitigating factors existed, or why the aggravating circumstances were insufficient to outweigh the mitigating factors.

³⁰ OHIO REV. CODE ANN. § 2929.03(F) (Page 1982). For a broad overview of Ohio's capital plan, including the appellate review provisions, see Note, *Ohio Enacts a Death Penalty*, 7 U. DAYTON L. REV. 531 (1982).

³¹ For an excellent discussion of the ways in which Ohio courts interpreted the first two mitigating factors under the prior statute, see *Death Penalty*, *supra* note 3, at 636-44. As to the first mitigating factor, the author states that "it would be a rare case in which an individual would be proved guilty of aggravated murder, and of a specification, and still be able to prove by a preponderance of the evidence that the victim of the offense 'facilitated' it." *Id.* at 637. As to the second mitigating factor, the author concludes that "these factors authorize an extremely narrow inquiry into the characteristics of the criminal and his crime. As a result, few, if any, defendants will be able to rely on them to establish mitigation." *Id.* at 644.

³² *Id.* at 637.

³³ *Id.* at 644. See *State v. Weind*, 50 Ohio St. 2d 224, 364 N.E.2d 224 (1977); *State v. Woods*, 48 Ohio St. 2d 127, 357 N.E.2d 1059 (1976).

³⁴ The Supreme Court may have narrowed the scope of this factor even further. *Enmund v. Florida*, 458 U.S. —, 102 S. Ct. 3368 (1982). In *Enmund*, the Court reversed the death sentence of a non-triggerman found guilty of felony murder. *Id.* at —, 102 S. Ct. at 3379. This decision would not preclude Ohio from executing vicarious felony-murderers, but it might influence prosecutors in seeking capital indictments.

"[w]hether at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."³⁵ Prior to *Lockett*, this mitigating factor *precluded* the death penalty if "[t]he offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."³⁶

The terms have been changed, but the new factor still requires two distinct occurrences. First, the existence of a mental disease or defect³⁷ must be proved. Second, the causal connection between this disease or defect and the defendant's lack of substantial capacity either to appreciate³⁸ the criminality of his conduct, or to conform his conduct to the requirements of the law, must also be proved.

Ohio's insanity test is strikingly similar to mitigating factor three. The Ohio Supreme Court set forth the test for insanity in *State v. Staten*:³⁹

One accused of criminal conduct is not responsible for such conduct if, at the time of such conduct, as the result of mental disease or defect, he does not have the capacity either to know the wrongfulness of his conduct or to conform his conduct to the requirements of the law.⁴⁰

This similarity has created some problems. First, neither *Staten* nor sub-

³⁵ OHIO REV. CODE ANN. § 2929.04(B)(3) (Page 1982). The Model Penal Code formulation for insanity is virtually *identical* to mitigating factor three. MODEL PENAL CODE § 4.01(1) (Proposed Official Draft 1962).

³⁶ OHIO REV. CODE ANN. § 2929.04(B)(3) (Page 1975) (amended 1981).

³⁷ Psychoses are mental diseases, but it seems clear that other mental afflictions will also be classified as mental diseases. Mental deficiency is defined as:

a defective state of intelligence. It may be primary or secondary. Primary mental deficiency is hereditary. It is not based on any visible, organic or structural change in the brain. Secondary mental deficiency is associated with a brain defect, disease or birth injury. In law, mental deficiency is usually divided into three grades: idiocy, imbecility, and morosity. Idiocy is the most severe form; morosity, the mildest.

State v. Bayless, 48 Ohio St. 2d 73, 95, 357 N.E.2d 1035, 1050 (1976) (quoting SCHMIDT'S ATTORNEY'S DICTIONARY OF MEDICINE M-71 (vol. II, 1975)).

³⁸ One commentator has suggested that a substitution of "appreciate" for "know" indicates a "preference for the view that a sane offender must be emotionally as well as intellectually aware of the significance of his conduct." A. GOLDSTEIN, THE INSANITY DEFENSE, 87 (1967). However, the second prong of mitigating factor three is identical to the second prong of the insanity test. Thus, any benefit from a change from "know" to "appreciate" seems lost, since the prosecution must merely prove that the defendant was able to conform his conduct to the requirements of the law. Apparently, proving that fact is not difficult. See *infra* note 49.

³⁹ 18 Ohio St. 2d 13, 247 N.E.2d 293 (1969).

⁴⁰ *Id.* (Syllabus I). See *State v. Wilcox*, 70 Ohio St. 2d 182, 436 N.E.2d 523 (1982) (the court rejected the diminished capacity defense in Ohio).

sequent Ohio cases have defined the term "mental disease or defect."⁴¹ At one time mental disease was thought to be virtually synonymous with the psychoses.⁴² More recently, the term has been left virtually undefined, so that other forms of illness may be classified as "mental diseases" if a psychiatrist is willing so to state.⁴³ The term "mental disease" may be an

⁴¹ District of Columbia federal courts have interpreted "mental disease or defect" to include "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." *United States v. Browner*, 471 F.2d 969, 983 (D.C. Cir. 1972); *King v. United States*, 372 F.2d 383, 387-88 (D.C. Cir. 1967); *McDonald v. United States*, 312 F.2d 847, 851 (D.C. Cir. 1962).

⁴² A. GOLDSTEIN, *supra* note 38, at 84.

⁴³ *Id.* at 84-85. See *State v. Mapes*, No. CR-181703 (C.P. Cuyahoga County 1983). In *Mapes*, the defendant's argument that he possessed certain genes (D and E) which caused him to act the way he acted was dismissed by the trial judge as "unsupported by expert testimony or even by hearsay." *Id.* trial op. at 4-5; *State v. Spisak*, No. CR-176651 (C.P. Cuyahoga County 1983). In *Spisak*, the defense experts characterized the defendant as suffering from personality disorders classified as schizotypal and borderline personality. *Id.* trial op. at 8. A schizotypal person "includes one who has profound disturbances in his thought process, perception and behavior. *Id.* "The borderline personality has a psychotic element without the break with reality involved in psychosis; its characteristics are impulsiveness, unpredictability, self-damaging behavior, ranging from consistent bad judgment to self-mutilation, inability to relate properly, intense anger and lack of personal identity." *Id.* (quoting from Dr. McPhearson's testimony at 30). The court concluded that "[t]he defendant's personality disorders and their manifestations: his Nazism, his sexual problems, his isolation, etc., cannot be seen, either alone or together as in anyway lessening his degree of criminal responsibility." *Id.* *State v. Steffen*, No. B-824004 (C.P. Hamilton County 1983). The *Steffen* court stated: "[T]he impact of the defendant's earlier years caused him to . . . suffer from a mental disease or defect known as atypical dissociation disorder." *Id.* trial op. at 20. See *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 260 (3d ed. 1980) (describing the disorder). However, substantial expert testimony classified the defendant as suffering from a borderline personality disorder which was not due to any mental illness or disease. *Steffen*, trial op. at 18; *State v. Thompson*, No. 82 L 15216 (C.P. Licking County 1983). In *Thompson*, a defense expert classified the defendant as suffering from a "major personality malformation" which in his opinion was a defect within the meaning of OHIO REV. CODE ANN. § 2929.04(B)(3). *Id.* trial op. at 12.

As to alcohol and drugs, the Supreme Court of Ohio has stated that "the defense of insanity cannot be successfully established simply on the basis that the condition resulted from the use of intoxicants or drugs, where such use is not shown to be habitual or chronic." *State v. Toth*, 52 Ohio St. 2d 206, 210, 371 N.E.2d 831, 834 (1977). See *Commonwealth v. Sheehan*, 376 Mass. 765, 383 N.E.2d 1115 (1978) (drug addiction not considered a mental disease or defect which would support finding of lack of criminal responsibility). Alcoholism and depression have been recognized as "mental diseases or defects." *State v. Kiser*, No. 82-CR69, trial op. at 8-9 (C.P. Ross County 1983). Epilepsy is a neurological disease often associated with mental disease or defect. See *United States v. Browner*, 471 F.2d 969, 975 (D.C. Cir. 1972). Other mental conditions may also be termed "mental diseases or defects." For a discussion of the pre-menstrual syndrome and insanity, see Wallach & Rubin, *The Pre-Menstrual Syndrome and Criminal Responsibility*, 19 U.C.L.A. L. REV. 209 (1971); Hilliard, *Pre-Menstrual Syndrome: Relation to Insanity Defense in Ohio*, (Dec. 14, 1982) (unpublished manuscript on file in CLEV. ST. L. REV. office); see generally Annot., 42 A.L.R.3d 1414 (1972) (XXX Syndrome as affecting criminal responsibility). Sociopathy and narcotics addiction could be regarded as a mental disease. A. GOLDSTEIN, *supra* note 38, at

inadequate description of psychiatric realities,⁴⁴ but it has remained in use, perhaps because no better concept has been found to replace it.⁴⁵

Second, although mental defect has not been defined in Ohio, the term has been described as a "condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental illness."⁴⁶ This definition would encompass the large class of people suffering from mental retardation. It seems likely that this group, more often than any other, will seek mitigation due to the presence of a mental defect. Commentators and courts have been reluctant to classify a mental retardate as insane.⁴⁷ Such a person will probably not fare any better under mitigating factor three. Under Ohio's old "psychosis-mental deficiency" test, no mental retardate (or any other person) ever benefited from that provision.⁴⁸ Furthermore, under the new test, presumably all the prosecution must do to rebut evidence that the offender lacked substantial capacity is to proffer evidence that the defendant functioned rationally during the time period of the commission of the offense.⁴⁹ Unfor-

89; *contra* MODEL PENAL CODE § 4.01(2) (Proposed Official Draft 1962).

⁴⁴ "Mental disease" is a "concept that has no systematic role in psychiatric doctrine, and is not found in the official Diagnostic and Statistical Manual of Mental Disorders, 2nd ed. (1968) of the American Psychiatric Association." H. FINGARETTE & A. HASSE, *MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY*, 9 (1979). See MODEL PENAL CODE § 4.01, comment (Tent. Draft No. 4, 1955). "Nothing makes the inquiry into responsibility more unreal for the psychiatrist than limitation of the issue to some ultimate extreme of total incapacity, when clinical experience reveals only a graded scale with marks along the way." *Id.*

⁴⁵ A. GOLDSTEIN, *supra* note 38, at 87.

⁴⁶ *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954).

⁴⁷ See A. GOLDSTEIN, *supra* note 38, at 246 n.15. The author states that "existing tests of mental retardation are so culture-bound that there would be a real risk of classifying as insane persons who are merely uneducated. Moreover, mental hospitals are not ordinarily equipped to deal with the mentally retarded." *Id.* See generally *McDonald v. United States*, 312 F.2d 847 (D.C. Cir. 1962) (evidence of an I.Q. of 68 would not, standing alone, entitle submission of issue to jury); *Lewis v. State*, 380 So.2d 970 (Ala. Crim. App. 1979) (jury could have found defendant with an I.Q. of 45 sane); *State v. Hall*, 176 Neb. 295, 125 N.W.2d 918 (1964) (mentally defective offender with I.Q. of 64 presumed sane).

⁴⁸ See *State v. Weind*, 50 Ohio St. 2d 224, 364 N.E.2d 224 (1977) (the possibility of an acute, short-lived psychotic break is not enough to support the existence of this mitigating factor); *State v. Lockett*, 49 Ohio St. 2d 48, 358 N.E.2d 1062 (1976) (borderline mental retardate under the influence of methadone and subject to undue influence of others); *State v. Edwards*, 49 Ohio St. 2d 31, 358 N.E.2d 1051 (1976) (defendant was below average in intelligence, but educational deficiency does not equate with mental deficiency); *State v. Royster*, 48 Ohio St. 2d 381, 358 N.E.2d 616 (1976) (defendant had an I.Q. of 54; however, the testimony of the psychiatrist did not equate I.Q. with mental deficiency); *State v. Bell*, 48 Ohio St. 2d 270, 358 N.E.2d 556 (1976) (rejection of claim that minor defendant is per se mentally deficient); *State v. Black*, 48 Ohio St. 2d 262, 358 N.E.2d 551 (1976) (the incapacity must be the primary producing cause of the offense); *State v. Bayless*, 48 Ohio St. 2d 73, 357 N.E.2d 1035 (1976) (mental deficiency does not include the behavioral and emotional abnormalities claimed by defense).

⁴⁹ See *State v. Rogers*, No. 81-6906, trial op. at 18 (C.P. Lucas County 1982). In *Rogers*,

tunately, it seems likely that mental retardates will slip through the mitigation net even though there are good reasons why this group should receive some mitigating consideration.⁵⁰

Third, benefiting from this mitigating factor is made more difficult if the offender resorts to the insanity defense. This proposition holds true regardless of whether the individual is suffering from a mental disease or mental defect. Essentially, a jury or three-judge panel is asked to establish this mitigating factor at the sentencing stage after it has already rejected the defense of insanity at the trial stage. A problem for the defense is distinguishing the insanity defense from this mitigating factor. This is no small task, as the difference between Ohio's insanity test and mitigating factor three is minimal.⁵¹ Furthermore, this problem is exacerbated by the need to maintain the credibility of psychiatric experts during the sentencing phase.⁵² The same experts who testified that the defendant was insane will probably have to testify again during the sentencing phase. If the jury did not believe the experts' testimony that the defendant did not have the *capacity* to conform his conduct to the requirements of the law, it would be hard-pressed to find that he lacked *substantial capacity* to conform his conduct to the requirements of the law.

the evidence depicted a man "who at the time of the incidents in question was holding a job and worked regularly; who drew a paycheck, lived alone and cared for his own basic needs; who possessed a driver's license, a fishing license, purchased his own groceries and did his own laundry." *Id.* trial op. at 17-18.

⁵⁰ There are three ways in which a mental retardate's defective intelligence places him at a disadvantage in appreciating the significance of his acts:

- (1) [T]he retardate's impaired intelligence may manifest itself as an inability fully to understand legal rules, or the rationale underlying them . . . [(2)] [T]he retardate is more prone to commit a crime than a normal person because he misperceives surrounding circumstances and consequently tends to react immediately and violently to the urges of the moment. . . [(3)] [R]etardates' native suggestibility may lead them to participate in illegal activity out of a desire to please their cohorts, and so may reflect adversely on the existence of criminal intent.

Leibman & Shepard, *Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor*, 66 Geo. L.J. 757, 826-27 (1978).

⁵¹ Ohio Legislative Service Commission, Proposed Ohio Criminal Code 59 (1971) ("an analysis of the *Staten* rule reveals that, substantively, it is equivalent to the American Law Institute's insanity defense"); *Death Penalty*, *supra* note 3, at 647 n.157; Note, *The Proposed Affirmative Defenses Of Forced Perpetration, Entrapment, Intoxication and Sanity*, 33 OHIO ST. L.J. 397, 417 (1972) (the *Staten* test is very similar to the Model Penal Code's formulation). See also *State v. Wilcox*, 70 Ohio St. 2d 182, 436 N.E.2d 523 (1982) (insanity standard is "arguably less expansive" than Model Penal Code's standard); S. GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW*, 226-27 (1925) (no medical distinction between lack of substantial capacity and no capacity).

⁵² An ancillary problem is the possibility that the attorney will also lose his credibility in the sentencing phase after having lost the trial on the merits. See *Motion to Declare Ohio Revised Code Unconstitutional in Violation of the United States and Ohio Constitutions at 7-10*, *State v. Jenkins*, No. CR 168784 (C.P. Cuyahoga County 1982) (hereinafter cited as *Motion*); Brief for Appellant at 106-07, *State v. Jenkins*, No. CR 168784 (C.P. Cuyahoga County 1982) (hereinafter cited as *Appellant's Brief*).

An illustration of the inherent problems in pleading insanity and subsequently relying on mitigating factor three is presented in *State v. Rogers*.⁵³ In *Rogers*, the trial jury sentenced the defendant to death after finding that the aggravating circumstances outweighed the mitigating factors. In its treatment of mitigating factor three, the trial court stated:

In arriving at a conclusion as to mitigating factor three, this Court takes great solace and guidance from the decision of this jury when it determined the guilt of the defendant and elected to disregard, or find as totally insufficient, the evidence suggesting that the defendant was insane at the time of the commission of the offense. *While mitigating factor three as found in 2929.04(B) does not absolutely correspond to the test for insanity, it certainly comes so close as to allow this Court to take guidance from the jury's decision.*⁵⁴

Clearly, the court should have taken no "solace" or "guidance" from the fact that the jury found the defendant sane at the trial stage. The jury was *not asked* to determine whether the defendant lacked *substantial* capacity, a lesser standard than the standard for insanity. Just as a rejection of murder does not preclude a finding of manslaughter, the rejection of the insanity defense *bears no relation* to the defendant's lack of *substantial* capacity. During its discussion of this mitigating factor, the court stated that it disregarded the testimony of two defense experts, a psychologist and a psychiatrist,⁵⁵ and instead relied on the testimony of the state psychiatrist. His testimony pointed to the fact that the defendant had the "presence of mind" to use certain instruments and devices to make his attack more possible, which suggested that the defendant's conduct was "purposeful" and that he had the "knowledge" that his acts were wrong.⁵⁶ The court concluded that there was "no evidence" that the defendant, because of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law.⁵⁷ Thus, the court, in effect, applied the insanity test⁵⁸ at the mitigation hearing and concluded that the defendant was sane.

The trial judge in *State v. Kiser*,⁵⁹ on the other hand, found mitigating

⁵³ No. 81-6906 (C.P. Lucas County 1982).

⁵⁴ *Id.* trial op. at 19 (emphasis added).

⁵⁵ *Id.* at 20-21.

⁵⁶ *Id.* at 20.

⁵⁷ *Id.*

⁵⁸ The trial judge's discussion of "presence of mind," "knowledge," and "purposeful," suggests that the presence of these factors negated the existence of mitigating factor three. An Ohio court has stated that "[i]t is obvious that one may commit a purposeful act not knowing it to be wrong, or commit such a purposeful act, even though the actor knows the act to be wrong, but lacks the ability to refrain from doing it." *State v. Howze*, 66 Ohio App. 2d 41, 46, 420 N.E.2d 131, 135 (9th Dist. 1979) (Summit County).

⁵⁹ No. 82-CR69 (C.P. Ross County 1983).

factor three to exist despite the jury's rejection of the defendant's insanity defense. The jury had recommended the death penalty, but the judge found that the state had not met its burden of proving beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors. In its treatment of mitigating factor three, the court relied on a report submitted by the state's psychiatrist. Although the psychiatrist had testified at the trial stage that the defendant was sane, his report submitted at the sentencing phase stated that a combination of intoxication and depression left the defendant *significantly* impaired at the time of the commission of the offense.⁶⁰ The psychiatrist concluded that the defendant lacked, to a significant degree, the capacity to conform his conduct to the requirements of the law.⁶¹ It is unknown whether the jury: 1) did not believe the report; 2) determined that significant impairment was not a lack of substantial capacity; or 3) established the existence of mitigating factor three, but found that the aggravating circumstances present in the case outweighed mitigating factor three and other mitigating factors present. The trial judge, however, *did* rely on the report and found that at the time of committing the offense, the defendant suffered from "alcoholism and depression, a mental disease or defect, and as a result thereof he lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."⁶²

Thus in two cases involving insanity defenses under the new capital statute, the sentencing jury was unable or unwilling to distinguish the insanity test from statutory mitigating factor three.⁶³ In the one case where the judge did find mitigating factor three to exist, it was, ironically, the *state's* psychiatrist who established the fact that the defendant lacked substantial capacity at the time of the offense.

The jury is asked to make a difficult, subtle determination that mitigating factor three exists after it has previously rejected the insanity defense. A better approach would allow the defendant to elect to have miti-

⁶⁰ *Id.* trial op. at 8.

⁶¹ *Id.*

⁶² *Id.* at 8-9.

⁶³ In an additional case a jury rejected the defendant's claim of insanity as well as statutory mitigating factor three. See *State v. Steffen*, No. B-824004 (C.P. Hamilton County 1983). In *Steffen*, the court stated that it was satisfied that the evidence reflected "conclusively that the defendant has never suffered from a mental disease or defect which would have prevented the defendant from distinguishing right from wrong or would have prevented him from conforming his conduct to the requirements of the law. . . . [i]n other words the defendant has never suffered from any psychosis." *Id.* trial op. at 16. In *State v. Spisak*, No. CR-176651 (C.P. Cuyahoga County 1983), a defense psychiatrist nullified the defense of insanity by testifying at the trial stage that the defendant was schizotypal, but that such disorder did not constitute a mental disease. The Plain Dealer, July 12, 1983, at 1-A, col. 1. Spisak's mental condition also did not meet the requirements of mitigating factor three. *Spisak*, trial op. at 8-9; see *supra* note 38.

gating factor three established at the trial stage. The defendant could then present all his evidence regarding insanity and mitigating factor three at the trial stage. The jury would have the opportunity first to accept or reject the insanity defense. Only after it had rejected the insanity defense would it be allowed to consider whether or not the defendant lacked substantial capacity to conform his conduct to the requirements of the law. In this way, the credibility of the defense witnesses would be maintained. The defense experts could still argue that the defendant was insane. Since the insanity defense encompasses mitigating factor three, the jury could find the defendant sane but still substantially impaired, without serious damage to the experts' credibility. Furthermore, the trial judge, pursuant to his duty to review a penalty of death, would still be able to find that mitigating factor three existed and consider it in the weighing process.

The best approach would *preclude* the death sentence altogether for an offender who has established mitigating factor three. The degree of mental capacity required to meet the stringent test of this mitigating factor is so near that of the insanity test that executing an offender who has established the existence of mitigating factor three may be a violation of the eighth and fourteenth amendments. The Supreme Court, in *Coker v. Georgia*,⁶⁴ overturned the death penalty as a punishment for the rape of an adult woman. The Court subsequently, in *Enmund v. Florida*,⁶⁵ overturned a penalty of death as a punishment for one who did not kill, attempt to kill, or intend to kill. The question in the latter case was not whether death was disproportionate as a penalty for murder, but rather whether death was disproportionate to the culpability of the offender.⁶⁶ It is important to note that mitigating factors are employed to reduce the culpability of the offender. Thus, death may not be imposed as a punishment for an offender who has sufficiently reduced his culpability to warrant a lesser punishment. In rejecting the penalty of death in *Coker*, the Supreme Court looked to the legislative judgments of other states as an indicator of society's evolving standards of punishment for various crimes.⁶⁷ In *Enmund*, the Court also looked to legislative judgments as an indicator of whether states were executing offenders who neither took life, attempted to take life, nor intended to take life.⁶⁸ A similar analysis will be undertaken here, to determine whether states are currently affording the mentally impaired a mitigating standard that will adequately ensure that their disability will be taken into account by the sentencing authority.

⁶⁴ 433 U.S. 584 (1977).

⁶⁵ 458 U.S. ____, 102 S. Ct. 3368 (1982).

⁶⁶ *Id.* at ____, 102 S. Ct. at 3377.

⁶⁷ 433 U.S. at 593-96.

⁶⁸ 458 U.S. at ____, 102 S. Ct. at 3372-74.

Under the prior statute, the legislature precluded the death sentence if a defendant could establish that the offense was a product of psychosis or mental deficiency.⁶⁹ These terms are virtually synonymous with mental disease or defect, as used in either the insanity test or mitigating factor three.⁷⁰

Thirty-six states currently authorize a death penalty. Of these, fifteen states⁷¹ have adopted the Model Penal Code's test for insanity. In these states, an offender with the identical mental condition as that required under Ohio's mitigating factor three is *not guilty* of the underlying crime,⁷² and needless to say, is not subject to possible execution. In the remaining states authorizing capital punishment, many expressly provide mitigating consideration to mentally impaired offenders. The standards that these states utilize to measure the impairment of the offender appear much less stringent than Ohio's mitigating factor three. Two states require a lesser standard of "significant impairment."⁷³ One state *precludes* the death penalty if "significant impairment" is established.⁷⁴ Two states require only "impairment" as a result of mental disease, defect, or intoxication.⁷⁵ Two states require only "impairment" of capacity.⁷⁶

Five states require that capacity be "substantially impaired."⁷⁷ However, the question is not phrased in the negative as is Ohio's standard, and there is no requirement that the capacity be substantially impaired due to mental disease or defect. In one of these five states, death is precluded if this factor is "sufficiently established."⁷⁸ Furthermore, in four of the five states the death penalty is discretionary; the jury need not rec-

⁶⁹ OHIO REV. CODE ANN. § 2929.04(B) (Page 1975) (amended 1981).

⁷⁰ *Death Penalty*, *supra* note 3, at 645-46; *see supra* note 51.

⁷¹ *People v. Drew*, 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 275 (1978); *Commonwealth v. Mchoul*, 352 Mass. 544, 226 N.E.2d 566 (1967); *Terry v. Commonwealth*, 371 S.W.2d 862 (Ky. 1963); ALA. CODE § 13A-3-1(a) (1982); ARK. STAT. ANN. § 41-601(1) (1977); CONN. GEN. STAT. § 53a-13 (Supp. 1982); ILL. ANN. STAT. ch. 38, § 6-2(a) (Smith-Hurd Supp. 1982); IND. CODE ANN. § 35-41-3-6(a) (Burns 1978); MD. HEALTH-GEN. CODE ANN. § 12-107(1)(2)(1982); MO. ANN. STAT. § 552.030(1) (Vernon Supp. 1983); *Graham v. State*, 547 S.W.2d 531 (Tenn. 1977); TEX. PENAL CODE ANN. § 8.01 (Vernon 1979); UTAH CODE ANN. § 76-2-305(1) (1978); VT. STAT. ANN. tit. 13, § 4801(1) (1974); WYO. STAT. § 7-11-304(a) (1977).

⁷² ILL. ANN. STAT. ch. 38, § 6-2(c) (Smith-Hurd Supp. 1983-84) (guilty but mentally ill).

⁷³ ARIZ. REV. STAT. ANN. § 13-703(G)(1) (Supp. 1981); VA. CODE § 19.2-264.4(B)(iv) (Supp. 1982).

⁷⁴ COLO. REV. STAT. § 16-11-103(5)(b) (1978).

⁷⁵ LA. CODE CRIM. PROC. ANN. art. 905.5(e) (Supp. 1983); NEB. REV. STAT. § 29-2523(2)(g)(1979).

⁷⁶ N.M. STAT. ANN. § 31-20A-6(C) (Supp. 1981); N.C. GEN. STAT. § 15A-2000(f)(6) (1978).

⁷⁷ FLA. STAT. ANN. § 921.141(6)(f) (West Supp. 1983); MISS. CODE ANN. § 99-19-101(6)(f) (Supp. 1982); MONT. CODE ANN. § 46-18-304(4) (1981); 42 PA. CONS. STAT. ANN. § 9711(e)(3) (Purdon 1982); S.C. CODE ANN. § 16-3-20(C)(b)(6) (Law. Co-op. Supp. 1982).

⁷⁸ MONT. CODE ANN. § 46-18-305 (1981).

commend death.⁷⁹

Among states not adopting the Model Penal Code's definition of insanity, the largest category is comprised of seven states; these jurisdictions do not list any statutory mitigating factors.⁸⁰ In these states it stands to reason that evidence may be proffered of mere impairment of capacity, alcohol impairment, or any other degree of impairment. In all of these states the death penalty is discretionary.⁸¹

There is only one state, Washington, with a provision identical to Ohio's mitigating factor three.⁸² However, Washington does not utilize a "weighing" method. A unanimous jury must give an affirmative answer to a question which focuses not on the aggravating circumstances, but on the lack of mitigating factors.⁸³

The examination of statutes in other states reveals a significantly greater protection of mentally-impaired offenders than Ohio's statute affords. While many states do not preclude death if mental incapacity is established, they at least provide a lesser standard that allows the sentencer to establish and consider the mental impairment of the offender.⁸⁴ In the group of states not utilizing the Model Penal Code's test for insanity, eleven of the thirteen states which list mitigating factors *also* include, as a mitigating factor, the existence of an "extreme emotional or mental disturbance."⁸⁵ In these states a significantly-impaired offender

⁷⁹ FLA. STAT. ANN. § 921.141(2)(c) (West Supp. 1983); MISS. CODE ANN. § 99-19-101(2)(c) (Supp. 1982); 42 PA. CONS. STAT. ANN. § 9711(f)(1), (2) (Purdon 1982); S.C. CODE ANN. § 16-3-20(C) (Law. Co-op. Supp. 1982).

⁸⁰ DEL. CODE ANN. tit. 11, § 4209(c)(4) (1979); GA. CODE ANN. § 17-10-31 (1982); IDAHO CODE § 19-2515(b) (1979); NEV. REV. STAT. § 175.552 (1979); N.H. REV. STAT. ANN. § 630.1 (1974) (the statute does not mention mitigating factors, but *Lockett* requires courts to consider them despite their absence); OKLA. STAT. ANN. tit. 21, § 701.10 (West 1983); S.D. CODIFIED LAWS ANN. § 23A-27A-1 (Supp. 1982).

⁸¹ DEL. CODE ANN. tit. 11, § 4209(d) (1979); GA. CODE ANN. § 17-10-31 (1982); NEV. REV. STAT. § 175.554(2)(c) (1979); N.H. REV. STAT. ANN. § 630.1 (1974); OKLA. STAT. ANN. tit. 21, § 701.11 (West 1983); S.D. CODIFIED LAWS ANN. § 23A-27A-4 (1979).

⁸² WASH. REV. CODE ANN. § 10.95.070(6) (Supp. 1982).

⁸³ WASH. REV. CODE ANN. § 10.95.060(4) (Supp. 1982). "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" *Id.*

⁸⁴ Massachusetts was one of the last states to adopt a capital punishment statute. In comparison to Ohio's mitigating factor three, Massachusetts' corresponding mitigating factor is an excellent example of a standard which allows the sentencer to consider the mental impairment of the offender. The statute lists as a mitigating factor:

[T]he offense was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of a mental disease or defect, organic brain damage, emotional illness brought on by stress or prescribed medication, intoxication, or legal or illegal drug use by the defendant which was insufficient to establish a defense to the murder but which substantially affected his judgment. . . .

MASS. ANN. LAWS ch. 279, § 69(b)(4) (Michie/Law. Co-op Supp. 1983).

⁸⁵ FLA. STAT. ANN. § 921.141(6)(b) (West Supp. 1983); LA. CODE CRIM. PROC. ANN.

could receive mitigating consideration from both factors, while in Ohio the same offender could not benefit at all. It is true that in Ohio mitigating factor seven allows consideration of any other relevant factor proffered by the defendant. But the question of whether a jury can be expected to consider the mental impairment of the offender as relevant under mitigating factor seven after rejecting it under mitigating factor three is a problematic one.

Many other states provide further protection to mentally impaired offenders by allowing the jury to recommend a life sentence despite the numerical count of aggravating and mitigating factors.⁸⁶ Whether or not such complete jury discretion is beneficial in all cases, it is at least clear that this type of provision reduces the chances that a seriously-impaired individual will be executed.

Ohio's only statutory safeguard for the mentally impaired is mitigating factor three. The similarities between this factor and the insanity test make it likely that an offender will first plead the latter before attempting to benefit from the former. The same similarities also make it unlikely that the sentencer will find the mitigating factor to exist after the insanity defense is rejected. But in those cases where mitigating factor three is found to exist, death should be precluded in all cases. The lack of any other safeguards in the statute, combined with the stringent standard of mitigating factor three, indicates that Ohio will execute offenders who would be considered legally insane in fifteen states⁸⁷ and subject to far greater protection in all others. Such a punishment, under the rationale of *Enmund v. Florida*,⁸⁸ is unconstitutional.

B. The Youth of the Offender

The fourth mitigating factor provides that the "youth of the offender"⁸⁹ be considered by the sentencing authority. However, "youth" is

art. 905.5(b) (Supp. 1983); MISS. CODE ANN. § 99-19-101(6)(b) (Supp. 1982); MONT. CODE ANN. § 46-18-304(2) (1981); N.M. STAT. ANN. § 31-20A-6(D) (1981) (merely under the "influence of mental or emotional disturbance"); NEB. REV. STAT. § 29-2523(2)(c) (1979); N.C. GEN. STAT. § 15A-2000(f)(2) (Supp. 1981) (merely under the "influence of mental or emotional disturbance"); 42 PA. CONS. STAT. ANN. § 9711(E)(2) (Purdon 1982); S.C. CODE ANN. § 16-3-20(C)(b)(2) (Law. Co-op. Supp. 1982) (merely under the "influence of mental or emotional disturbance"); VA. CODE § 19.2-264(4)(B)(ii) (Supp. 1982); WASH. REV. CODE ANN. § 10.95.070.(2) (Supp. 1982) (under the "influence of extreme mental disturbance").

⁸⁶ See *supra* notes 79, 81.

⁸⁷ See *supra* note 71.

⁸⁸ 458 U.S. —, 102 S. Ct. 3368 (1982).

⁸⁹ OHIO REV. CODE ANN. § 2929.04(B)(4) (Page 1982). Some states have made "age" of the offender a mitigating factor. See FLA. STAT. ANN. § 921.141(6)(g) (West Supp. 1982); MISS. CODE ANN. § 99-19-101(6)(g) (Supp. 1982); 42 PA. CONS. STAT. ANN. § 9711(e)(4) (Purdon 1982). Thus, an elderly offender may receive mitigation under this factor. In Ohio the offender's advanced age could still be considered as a mitigating factor as part of the history, character, and background of the offender, as well as relevant to statutory factor seven.

left undefined in the Ohio Revised Code.⁹⁰ Ohio has included in its capital statute a provision precluding the sentencer from imposing the death sentence on a person under the age of eighteen at the time of the commission of the offense.⁹¹ Thus, youth as a mitigating factor can apply only to offenders eighteen or older and naturally should weigh most heavily in favor of those offenders closest to age eighteen.

Unfortunately, the indication is that "youth of the offender" does not carry a great deal of mitigating weight. In *State v. Penix*,⁹² the offender was eighteen years of age at the time of the commission of the offense. Despite his youth, the court stated that "it should be viewed in the light of the Defendant's previous years of criminal activity . . . which indicate an emerging habitual criminal, immune to rehabilitation."⁹³ However, nowhere does the statute state that a court may view a mitigating factor established by the defendant in light of his prior record. A similar analysis regarding "youth" was carried out in *State v. Glenn*.⁹⁴ The offender was nineteen, but the court failed to establish youth as a mitigating factor because the "evidence was that the defendant planned and put into execution a scheme to free his brother from jail and to kill, if necessary, an officer."⁹⁵ In *State v. Byrd*,⁹⁶ the court, examining mitigating factor four, found that the defendant was nineteen years old at the time of the trial. After noting that the defendant was the oldest nineteen-year-old that the judge had ever seen, the court concluded that there was "no evidence to suggest that his age was a factor that should be taken into account in mitigation of the sentence of death."⁹⁷

One court has adopted a different interpretation of mitigating factor four. In *State v. Kiser*,⁹⁸ a twenty-three-year-old offender received consideration of mitigation under this factor. The court viewed the age of the offender as *independent* of the issue of guilt. The conclusion was that "youth can be defined only in terms of perspective."⁹⁹ The offender was

⁹⁰ See generally OHIO REV. CODE ANN. § 3109.01 (Page 1982) (persons of the age of eighteen are of full age for "all purposes").

⁹¹ *Id.* § 2929.03(D)(1).

⁹² No. 82-CR-241 (C.P. Clark County 1983).

⁹³ *Id.* trial op. at 4.

⁹⁴ No. 81 CR 933 (C.P. Portage County 1982).

⁹⁵ *Id.* trial op. at 4.

⁹⁶ No. B-831662 (C.P. Hamilton County 1983).

⁹⁷ *Id.* trial op. at 10. See *State v. Steffen*, No. B-824004 (C.P. Hamilton County 1983). In *Steffen*, the defendant was 23 years old at the time of trial. The court concluded that there was "absolutely no evidence to suggest that [the defendant] was a youthful offender or that his age was a factor that should be taken into account in mitigation of the sentence of death. This factor was not present." *Id.* trial op. at 11. In *State v. Thompson*, No. 82 L 15216 (C.P. Licking County 1983), the court found that the defendant's age of 23 was *both* an aggravating and a mitigating factor. *Id.* trial op. at 14, 15.

⁹⁸ No. 82-CR69 (C.P. Ross County 1983).

⁹⁹ *Id.* trial op. at 9.

less mature than a middle-aged man and therefore youthful.¹⁰⁰

The legislature's inclusion of "youth" as a mitigating factor must mean more than the guilt or prior record of the offender. None of the mitigating factors will excuse the guilt of the offender; they may only reduce the punishment for the criminal act. If "youth" does not apply to eighteen- and nineteen-year-olds, this factor will be quite useless.

C. Lack of Significant History

The fifth mitigating factor authorizes the sentencer to consider the offender's "lack of a significant history of prior criminal convictions and delinquency adjudications."¹⁰¹ The interpretation of "significant history" by the courts will be the major issue to be resolved before the efficacy of this factor is determined. Significant history could be interpreted several ways: 1) the relative significance of the prior conviction; 2) the numerical count of prior convictions; 3) the numerical count of prior convictions of the same type or nature that led to the charge in the pending case;¹⁰² or 4) the time span over which the criminal convictions extended.¹⁰³

These categories, of course, are not mutually exclusive. They do, however, represent four potentially distinct situations in which the sentencer's determination of mitigation will revolve around the interpretation of "significant history." If the courts construe the particular focus of this factor as precluding consideration of mitigation where an offender has prior significant convictions, then to some extent mitigation should accrue to an offender with a long but relatively insignificant record. A less stringent standard would result from a judicial focus on the number of prior convictions.

The interpretation apparently favored by the American Law Institute

¹⁰⁰ *Id.*

¹⁰¹ OHIO REV. CODE ANN. § 2929.04(B)(5) (Page 1982). *C.f.* FLA. STAT. ANN. § 921.141(6)(a) (West Supp. 1983) (lack of a significant history of criminal activity is to be considered as a mitigating factor). This type of wording negates the establishment of this factor when the defendant is confronted with uncorroborated confessions to various crimes, see *Smith v. State*, 407 So. 2d 892 (Fla. 1982), or evidence of criminal activity for which no convictions resulted. See *Washington v. State*, 362 So. 2d 658 (Fla. 1978). *But see State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977) (significant history means meaningful history, not inconsequential history of criminal activity).

¹⁰² *State v. Rogers*, No. 81-6906, trial op. at 12 (C.P. Lucas County 1982).

¹⁰³ Florida courts apparently interpret "significant history" to mean the numerical count of the convictions, the time span over which the criminal convictions extended, or the significance of the conviction. See *Simmons v. State*, 419 So. 2d 316 (Fla. 1982) (defendant's robbery convictions and numerous misdemeanor convictions, several arrests, and two charges of parole violation constituted significant history); *Washington v. State*, 362 So. 2d 658 (Fla. 1978) (defendant had carried on a course of burglaries, and had possessed stolen properties for a significant period of time); *Douglas v. State*, 328 So. 2d 18 (Fla.), *cert. denied*, 429 U.S. 871 (1976) (felony convictions).

is a combination of the first and fourth interpretations above.¹⁰⁴ The Model Penal Code states that "the word 'significant' was inserted into the tentative draft formulation lest a trivial and remote conviction be construed to bar consideration of an otherwise law-abiding life as a mitigating factor."¹⁰⁵ However, what types of convictions will be regarded as trivial or as significant is unknown. Some states have denied consideration of mitigation when the earlier conviction was for a crime of violence.¹⁰⁶ This approach admits this factor for misdemeanor convictions, but it lacks the flexibility to allow the sentencer to overlook a remote conviction of, for example, attempted robbery.

The Ohio trial courts appear split on the interpretation and scope of a lack of significant history of prior criminal convictions. Two Ohio trial courts have apparently adopted the significance of the prior conviction as the particular focus of "lack of a significant history." In *State v. Forney*,¹⁰⁷ a three-judge panel determined that the defendant lacked a significant history of criminal convictions despite a prior conviction for aggravated robbery.¹⁰⁸ In *State v. Kiser*,¹⁰⁹ the court found that the defendant had been adjudged a delinquent child by virtue of his apprehension for breaking and entering at age fourteen. Furthermore, the defendant had twice been convicted of driving under the influence of alcohol, and once been convicted of having an intoxicating beverage on or about his person while in control of a motor vehicle.¹¹⁰ The court, citing the *Forney* decision, found that the defendant lacked a significant history of prior criminal convictions or delinquency adjudications.¹¹¹

In *State v. Glenn*,¹¹² the court phrased the question as whether the defendant lacked a *sufficient* history of prior criminal convictions. The court noted that the defendant's record included delinquency convictions as a juvenile and misdemeanor convictions as an adult, but found that these did not constitute a "substantial history of prior criminal activity."¹¹³

¹⁰⁴ The Model Penal Code's formulation is apparently a combination of the time span and the significance of the prior convictions. MODEL PENAL CODE § 210.6(4)(a) (1980).

¹⁰⁵ *Id.*

¹⁰⁶ *E.g.*, MD. CRIM. LAW. CODE ANN. § 413(G)(1) (1982). Crime of violence means "abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery or sexual offense in the first or second degree, or attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence." *Id.*

¹⁰⁷ No. 824443 (C.P. Summit County 1982).

¹⁰⁸ *Id.* trial op. at 2.

¹⁰⁹ No. 82-CR69 (C.P. Ross County 1983).

¹¹⁰ *Id.* trial op. at 10.

¹¹¹ *Id.*

¹¹² No. 81 CR 933 (C.P. Portage County 1982).

¹¹³ *Id.* trial op. at 4. The court's statement regarding the relative mitigating weight of this factor illustrates the difficulty of establishing such weight after it has been determined that

The trial courts that have rejected mitigating consideration for prior criminal convictions and delinquent adjudications have done so by focusing on the acts and the time span over which these acts extended. For example, the court in *State v. Rogers*¹¹⁴ stated that the defendant had a significant history of convictions "for acts of the same or similar nature" and that these convictions extended over a significant period of time.¹¹⁵ Likewise, in *State v. Byrd*¹¹⁶ and *State v. Steffen*,¹¹⁷ the courts applied this standard in rejecting consideration of mitigating factor number five. The court in *Byrd* found that the offender "had a significant history of convictions and adjudications of delinquency for a variety of acts and that these convictions and adjudications of delinquency extend over a significant period of time."¹¹⁸ The opinion was silent as to the nature of the criminal convictions and delinquency adjudications. The court in *Steffen* recited precisely the same language in rejecting consideration of mitigating factor number five.¹¹⁹ The *Rogers*, *Byrd* and *Steffen* decisions regarding this factor will allow the appellate courts to determine the permissible scope for interpreting lack of significant history of prior convictions. The appellate courts should interpret this factor to allow consideration of mitigation to all persons except those with prior convictions of significant crimes extending over a substantial period of time. This approach would not preclude the sentencer from giving little mitigating weight to an offender with a long record of insignificant convictions. It would, however, force the sentencer to establish the existence of this factor at the outset.

D. Any Other Factors

The final mitigating factor authorizes the sentencer to consider "any other factors that are relevant to the issue of whether the offender should be sentenced to death."¹²⁰ This factor may constitute the most important one for the defendant in attempting to mitigate the death penalty. It purports to allow the defendant to proffer a wide range of evidence on the reasons why he should not suffer the death penalty. In fact, the following provision of the statute states that "[t]he defendant shall be given great latitude in the presentation of evidence of [the seven statutory factors] and of any other factors in mitigation of the imposition of the sentence of

this factor exists. "The court is of the opinion that it is not a substantial history of prior criminal activity but certainly is sufficient to show the vicious tendency of the defendant, John Glenn." *Id.*

¹¹⁴ No. 81-6906 (C.P. Lucas County 1982).

¹¹⁵ *Id.* trial op. at 11-12.

¹¹⁶ No. B-831662 (C.P. Hamilton County 1983).

¹¹⁷ No. B-824004 (C.P. Hamilton County 1983).

¹¹⁸ No. B-831662, trial op. at 10.

¹¹⁹ The *Steffen* court concluded that the "prior history of criminal activity would be more aggravating than mitigating." No. B-824004, trial op. at 11.

¹²⁰ OHIO REV. CODE ANN. § 2929.04(B)(7) (Page 1982).

death."¹²¹ Thus, the only limiting qualification written into this factor, and which must be assumed to be implicit in the above formulation, is that evidence be *relevant* to the issue of whether the offender should be sentenced to death.

Relevant evidence was discussed in *Lockett v. Ohio*¹²² when Chief Justice Burger stated that "the sentencer . . . [should] 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."¹²³ In a footnote following that passage, the Chief Justice stated that "[n]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense."¹²⁴

Other types of evidence are relevant to the sentencer's decision. However, in cases where the defendant has proffered evidence of the non-deterrent effect of capital punishment, the courts have generally excluded that evidence on the basis of *Lockett's* exclusive treatment of mitigating factors pertaining to the character, record and circumstances of the offense.¹²⁵ The lone Ohio trial court where evidence of non-deterrence was proffered followed this interpretation. In *State v. Jenkins*,¹²⁶ the trial judge ruled that a witness could testify only from his own personal knowledge "with respect to the history, character and background of the offender."¹²⁷ However, the court in *State v. Mapes*¹²⁸ rejected the arguments of counsel that capital punishment was not a deterrent to further commission of crimes by stating that "no expert testimony was offered to support this bare allegation."¹²⁹

The statutory provision can be interpreted differently. The preface to the subsection detailing the mitigating factors states that the sentencer should consider "the nature and circumstances of the offense . . . and all of the following [statutory] factors."¹³⁰ If the statute is given literal effect, mitigating factor seven must allow the admission of relevant evi-

¹²¹ *Id.* § 2929.04(C).

¹²² 438 U.S. 586 (1978).

¹²³ *Id.* at 604 (emphasis in original).

¹²⁴ *Id.* at 604 n.12.

¹²⁵ *Franklin v. State*, 245 Ga. 141, 263 S.E.2d 666, *cert. denied*, 447 U.S. 930 (1980); *Houston v. State*, 593 S.W.2d 267 (Tenn. 1980); *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 55, *cert. denied*, 446 U.S. 941 (1979). *But see* *Davis v. State*, 241 Ga. 376, 247 S.E.2d 45 (1978) (prosecution failed to object to testimony of witnesses).

¹²⁶ No. CR168784 (C.P. Cuyahoga County 1982).

¹²⁷ Appellant's Brief, *supra* note 52, at 63.

¹²⁸ No. CR-181703 (C.P. Cuyahoga County 1983).

¹²⁹ *Id.* trial op. at 5. The defendant in *State v. Tyler*, No. 181132B (C.P. Cuyahoga County 1983), argued in his testimony and statement to the jury that the death sentence was not a deterrent to crime. *Id.* trial op. at 3.

¹³⁰ OHIO REV. CODE ANN. § 2929.04(B) (Page 1982) (emphasis added).

dence *different* from character, record, or offense evidence. The best reading of the statute would allow evidence of character, record, and circumstances of the offense as well as evidence of the non-deterrent effect of capital punishment and of the rehabilitative prospects of the offender.

Notwithstanding a statutory construction allowing admission of non-deterrent evidence, support can be found in Supreme Court opinions for such admission. The Supreme Court has recognized that deterrence and retribution are the principal social purposes of the death penalty.¹³¹ In *Enmunds v. Florida*,¹³² Justice White stated that "[u]nless the death penalty when applied to those in *Enmunds*' position measurably contributes to one or both of these goals, 'it is nothing more than the purposeless and needless imposition of pain and suffering and hence an unconstitutional punishment.'"¹³³ Implicit in this formulation is the relationship between retribution and deterrence on the one hand, and the death penalty on the other. If this relationship is negated, the death penalty must not be imposed. A legislative decree that execution promotes deterrence is not enough.¹³⁴ The judiciary in this age of individualized sentencing must be

¹³¹ *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). See *State v. Meyer*, 163 Ohio St. 279, 126 N.E.2d 585 (1955) ("the object of a criminal penalty is to punish the accused, deter others from crime, and to protect the public"). But see *In re Lamb*, 34 Ohio App. 2d 85, 296 N.E.2d 280, (8th Dist. 1973) (Cuyahoga County). In *Lamb* the court of appeals stated "it is now clear that '[r]etribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.'" *Id.* at 88, 296 N.E.2d at 284 (quoting *Williams v. New York*, 337 U.S. 241 (1949)).

¹³² 458 U.S. —, 102 S. Ct. 3368 (1982).

¹³³ *Id.* at 3377 (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

¹³⁴ The Supreme Court in *Gregg v. Georgia*, 428 U.S. 153 (1976), stated that "[t]he value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts." *Id.* at 186. However, the Ohio legislature has never made a determination that the death penalty indeed deters crime or is a useful tool to express the state's sense of moral outrage at the crime of murder. See THE OHIO DEATH PENALTY TASK FORCE, OHIO DEATH PENALTY MANUAL II-46 (1981). Moreover, one study concluded that "the present analysis of Ohio's experience with capital punishment provides no justification for reinstating the death penalty as an effective means for dealing with the state's murder problem." Bailey, *The Deterrent Effect of the Death Penalty for Murder in Ohio: A Time Series Analysis*, 28 CLEV. ST. L. REV. 51, 70 (1979). Even if the legislature had made such a determination, it still must defer to the commands of the eighth amendment. See *Enmund v. Florida*, 458 U.S. —, 102 S. Ct. 3368, 3376 (1982). See, e.g., Hertz & Weisberg, *In Mitigation of the Penalty of Death*, *Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CALIF. L. REV. 317, 368-69 (1981). If the penological justification can be questioned in *Enmunds*, why can it not be questioned also in other types of cases? Specifically, in *Jenkins*, the defendant sought to proffer evidence of the reduced life expectancy of a paraplegic. See Appellant's Brief, *supra* note 52, at 64. The defendant also argued that "[t]he jury should have been permitted to consider there was nothing to be gained by executing a paralyzed man, especially when he suffered paralysis as the result of his own criminal actions." *Id.* Notwithstanding its relevance to *Jenkins*' character, history, and circumstances of the offense, this evidence is directly relevant to whether

sure that in relation to *every* defendant a death penalty promotes the twin social goals of deterrence and retribution.¹³⁵

At a minimum, it would seem appropriate for all offenders to proffer evidence that executing them would not further the twin goals of deterrence and retribution.¹³⁶ Moreover, such an interpretation would not require a change in the statutory language. The provision is broad enough to encompass that meaning in its present form.

In arguing that retributive and deterrent goals are not furthered by executing the individual offender, there is much additional evidence that is relevant to the sentencer's decision. The following evidentiary concepts, relevant to retribution, could be proffered: 1) eyewitness accounts of an execution;¹³⁷ 2) the concept that where there is life, there is hope;¹³⁸ 3) the religious interpretation of the phrase "an eye for an eye;"¹³⁹ 4) reasons why the sentencer should be merciful;¹⁴⁰ and 5) reasons why incarceration for life would adequately fulfill society's retributive objective.¹⁴¹ The Ohio capital plan does not allow the sentencing authority to act mercifully, i.e., to grant life where there are no mitigating factors, or where the aggravating circumstances outweigh the mitigating factors.¹⁴² Thus, in *State v. Jenkins*,¹⁴³ the judge stated that

[c]ontrary to popular belief and contrary to the intimations contained in the statement of the defendant and the arguments of counsel, neither the trial jury nor I, the Judge, could consider sentiments such as sympathy, mercy or compassion in determining the primary issue of whether the aggravating circumstances out-

society's sense of outrage has been adequately redressed.

¹³⁵ See generally Liebman & Shepard, *supra* note 50, at 785.

¹³⁶ See *id.*

¹³⁷ *Shriner v. State*, 386 So. 2d 525 (Fla. 1980); *Franklin v. State*, 245 Ga. 141, 263 S.E.2d 666, *cert. denied*, 447 U.S. 930 (1980).

¹³⁸ See Appellant's Brief, *supra* note 52, at 65.

¹³⁹ H. BEDAU, *THE DEATH PENALTY IN AMERICA* 372 (3d ed. 1982) ("a closer study of these earliest chapters of the Bible indicates the death penalty is not so much a requirement as a limitation").

¹⁴⁰ See *Houston v. State*, 593 S.W.2d 267 (Tenn. 1980) (testimony on effect of execution on parents and on society was excluded); Appellant's Brief, *supra* note 52, at 8. *But see*, *State v. Rogers*, No. 81-6906 (C.P. Lucas County 1982). "For the court to allow its personal [merciful] sentiment to intervene and play a role in its judgment would in effect, be tantamount to disregarding the law as written in order to avoid an unpleasant decision." *Id.* trial op. at 9. In *State v. Byrd*, No. B-831662 (C.P. Hamilton County 1983), the court noted that the defendant had aided a young child who had fallen into a frozen creek. The court stated that "[t]his being the only socially redeeming act of the defendant's life offered or otherwise shown by the evidence it does not rise to the level of a mitigating factor." *Id.* trial op. at 13.

¹⁴¹ See Appellant's Brief, *supra* note 52, at 64-65; Hertz & Weisberg, *supra* note 134, at 369-71.

¹⁴² OHIO REV. CODE ANN. § 2929.03(D)(2) (Page 1982).

¹⁴³ No. CR168784 (C.P. Cuyahoga County 1982).

weigh the mitigating factors.¹⁴⁴

One might consider whether mercy is a built-in component of Ohio's capital statute. What prevents a jury from reaching a verdict of life in prison, in spite of factors apparently calling for the death penalty? In *State v. Shields*,¹⁴⁵ no evidence of statutory mitigating factors was presented, yet the jury, apparently moved by pleas of compassion and mercy, returned a verdict of life imprisonment.¹⁴⁶ Even the judge's weighing of the aggravating and mitigating factors may merely be an exercise in merciful, subjective decision-making.

The defendant should additionally be allowed to proffer evidence focusing on other concepts, such as that: 1) murderers have a comparatively low recidivism rate;¹⁴⁷ 2) the sentence of death would be disproportionate to sentences rendered in similar cases;¹⁴⁸ and 3) it is more costly to execute an offender than it is to imprison him for the rest of his life.¹⁴⁹

The critics of this type of wide-open sentencing consideration argue that the approach invites a return to the pre-*Furman v. Georgia*¹⁵⁰ days, when the sentencer exercised so much discretion that the penalty was imposed "wantonly and freakishly and so infrequently" that any death sentence constituted cruel and unusual punishment.¹⁵¹ However, more guidance would seem preferable to less guidance. The *Furman* opinions regarded unguided and unrestrained sentencing discretion as a violation of the eighth amendment.¹⁵² But a statute which would allow *consideration*¹⁵³ of all types of evidence, including evidence of retribution and de-

¹⁴⁴ *Id.* trial op. at 8.

¹⁴⁵ No. 173004-B (C.P. Cuyahoga County 1982).

¹⁴⁶ Telephone interview with T. Keane, attorney for defendant (Jan. 25, 1983).

¹⁴⁷ See Appellant's Brief, *supra* note 52, at 64 n.19; H. BEDAU, *supra* note 139, at 175-80. A related aspect is the offender's rehabilitative prospects. The Supreme Court has stated "the sentencing judge is obligated to make his decision on the basis, among others, of predictions regarding the convicted defendant's potential, or lack of potential, for rehabilitation." *United States v. Grayson*, 438 U.S. 41, 47-48 (1978).

¹⁴⁸ See *State v. Kiser*, No. 82-CR69, trial op. at 12-15 (C.P. Ross County 1983) (the defendant successfully argued proportionality at the trial stage); see also *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) (approving of appellate procedures which review proportionality of sentence).

¹⁴⁹ H. BEDAU, *supra* note 139, 241-46.

¹⁵⁰ 408 U.S. 238 (1972).

¹⁵¹ *Lockett v. Ohio*, 438 U.S. 586, 622 (1978) (White J., concurring). "By encouraging defendants in capital cases, and presumably sentencing judges and juries, to take into consideration anything under the sun as a 'mitigating circumstance' it will not guide sentencing discretion but will totally unleash it." *Id.* at 631. (Rehnquist, J., dissenting).

¹⁵² 408 U.S. 238, 256 (1972) (Douglas, J., concurring); see *id.* at 314 (White, J., concurring). "I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Id.* at 309-10 (Stewart, J., concurring).

¹⁵³ No intimation is made concerning the degree of *weight* that specific evidence proffered on behalf of the defendant that executions do not deter murder or types of murder should

terrence, would still be channeled and directed toward the goal of eliminating "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."¹⁶⁴ A less severe penalty would be called for if the death penalty were found not to deter.

The Supreme Court has stated that the death penalty should be imposed in such a manner that would afford a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."¹⁶⁵ The admission of all types¹⁶⁶ of mitigating evidence would not destroy that meaningful basis for distinguishing life from death cases. In some instances the sentencing authority would disregard this evidence, or afford it little weight in view of the aggravating circumstances present in the case. When, however, there is an equilibrium in the weighing process, such that a decision to execute a defendant would in fact be discretionary, arbitrary, or capricious,¹⁶⁷ the proffered evidence on the non-deterrent effect of execution may tip the scales in favor of life over death.

IV. WEIGHING

Once the mitigation phase has concluded, the crucial weighing process begins. The sentencing authority must determine by proof beyond a reasonable doubt whether the applicable aggravating circumstances are sufficient to outweigh the mitigating factors present in the case.¹⁶⁸ The sentencer has already found the defendant guilty of the aggravating specifications or circumstances at the trial stage. The major problem for the defendant is establishing the *presence* of the mitigating factor so that it may be weighed properly against the aggravating circumstances.

have in the crucial calculus, the weighing of the aggravating and mitigating factors.

¹⁶⁴ *Lockett*, 438 U.S. at 605; *Gregg*, 428 U.S. at 188.

¹⁶⁵ *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring).

¹⁶⁶ What other states have considered relevant enough to the issue of death to be stated expressly as a mitigating factor should be relevant enough for purposes of mitigating factor seven. See ARIZ. REV. STAT. ANN. § 13-703(G)(4) (Supp. 1981) (the offender could not reasonably have foreseen that his conduct would cause or create death to another person); NEB. REV. STAT. § 29-2523(2)(b) (1979) (the offender acted under unusual influences or pressures); MASS. ANN. LAWS ch. 279, § 69(b)(6) (Michie/Law Co-op Supp. 1983) (defendant was battered or otherwise sexually or mentally abused by the victim in connection with or immediately prior to the murder); N.M. STAT. ANN. § 31-20A-6(H) (Supp. 1981) (the offender cooperated with authorities); WASH. REV. CODE ANN. § 10.95.070(8) (Supp. 1982) (whether the offender will pose a danger to others in the future). See *State v. Forney*, No. CR 82 4443 (C.P. Summit County 1983). In *Forney*, the three-judge panel found as mitigating factors the fact that the defendant had "no prior calculation and design to kill the victim" and the fact that the defendant "acted upon instantaneous deliberation motivated by fear." *Id.* trial op. at 2.

¹⁶⁷ See Appellant's Brief, *supra* note 52, at 103; see also Comment, *Capital Punishment and the Burden of Proof: The Sentencing Decision*, 17 CAL. W.L. REV. 316, 349 (1981).

¹⁶⁸ OHIO REV. CODE ANN. § 2929.03(D)(2) (Page 1982).

This problem is caused by the lack of a standard for burden of proof.¹⁵⁹ The statute does not state that the prosecution must prove the absence of any mitigating factors,¹⁶⁰ but only that the "defendant shall have the burden of going forward with the evidence."¹⁶¹ The statute's silence in this regard may be more damaging to the defendant than if he had to prove, by a preponderance of the evidence, the existence of any mitigating factors. The lack of a standard for burden of proof means that a mitigating factor is never really established as required. Consequently, some mitigating factors may never rise to a level competent to outweigh the aggravating circumstances present in the case. The Supreme Court has stated that:

A statute that prevents the sentencer in all capital cases from giving *independent mitigating weight* to all aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.¹⁶²

The Ohio statute fails to provide independent mitigating weight to proffered evidence, i.e., independent from the issue of guilt determined at the trial stage. This fundamental failure is evident in many cases where the court imposed death on the offender.

For example, in *State v. Glenn*,¹⁶³ the defendant was found guilty of aggravated murder with the specification of killing a peace officer. The court's opinion listed the specific mitigating factors presented by the defendant, indicating which were present. The first three factors were dismissed for lack of evidence, as were the sixth and seventh factors.¹⁶⁴ Since the defendant was only nineteen, the mitigating factor of "youth" should have been established. The court noted the defendant's age and that he had "some lack of mental capacity, but the evidence was that the defendant planned and put into execution a scheme to free his brother from jail and to kill, if necessary an officer."¹⁶⁵

The lack of independent consideration is equally evident in the court's treatment of the fifth factor. The court noted that the defendant's criminal background did not constitute "a substantial history of prior criminal

¹⁵⁹ See Appellant's Brief, *supra* note 52, at 101-03.

¹⁶⁰ *Id.*

¹⁶¹ OHIO REV. CODE ANN. § 2929.03(D)(1) (Page 1982).

¹⁶² *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original).

¹⁶³ No. 81 CR 933 (C.P. Portage County 1982).

¹⁶⁴ *Id.* trial op. at 3-4.

¹⁶⁵ *Id.* at 4. See *State v. Byrd*, No. B-831662 (C.P. Hamilton County 1983). In *Byrd*, the offender's age of 19 should have established the presence of mitigating factor four. The court, however, stated that there was "no evidence to suggest that his age was a factor that should be taken into account in mitigation of the sentence of death." *Id.* trial op. at 10. See *supra* text accompanying notes 89-100.

activity but [was] certainly sufficient to show the vicious tendency of the defendant."¹⁶⁶ Thus, the court failed to establish this mitigating factor as well. The actual weighing process was a foregone conclusion. The court concluded that the aggravating circumstance outweighed any mitigating circumstances beyond a reasonable doubt and sentenced the defendant to death.¹⁶⁷

The purpose of a mitigation hearing is explained in *State v. Woods*:¹⁶⁸

*The question at [the mitigation] stage is not guilt, for guilt has already been determined. Nor is it primarily whether the standards of conduct imposed by the criminal law have been upheld in order to express society's disapproval of the criminal act and to deter others, for those goals too are largely accomplished by the verdict. Rather the purpose of mitigation is to recognize that the punishment assigned for a criminal act may for ethical and humanitarian reasons, be tempered out of consideration of the individual offender and his crime.*¹⁶⁹

The legislature's inclusion of mitigating factors in the capital statute is an expression of specific humanitarian and ethical concerns by which courts should be bound.

The flaw in the *Glenn* court's reasoning is shared by *State v. Rogers*.¹⁷⁰ The defendant in *Rogers* was found guilty of a heinous crime, the rape and aggravated murder of a young girl. The defendant was also found guilty of two specifications.¹⁷¹ In its opinion, affirming the jury's recommendation of death for the defendant, the court discussed the applicability of each mitigating factor. The court concluded that mitigating factors one through six¹⁷² were inapplicable and would not be the subjects of any consideration.¹⁷³ Mitigating factor seven was analyzed in view of the defendant's history, character, and background. The court acknowledged the clear evidence that defendant was a mentally-retarded person who functioned at a fourth-grade level.¹⁷⁴ Furthermore, the defendant was a wanderer with minimal skills for self-support.¹⁷⁵ However, the court stated that it failed to "see any direct or positive correlation between the

¹⁶⁶ *Byrd*, No. B-831662, trial op. at 10.

¹⁶⁷ *Id.* at 5.

¹⁶⁸ 48 Ohio St. 2d 127, 357 N.E.2d 1059 (1976).

¹⁶⁹ *Id.* at 137, 357 N.E.2d at 1066 (emphasis added).

¹⁷⁰ No. 81-6906 (C.P. Lucas County 1982).

¹⁷¹ OHIO REV. CODE ANN. § 2929.04(A)(7) (Page 1982) (offense committed while offender committed kidnapping and rape).

¹⁷² See *supra* text accompanying notes 53-58 for the court's discussion of mitigating factor three.

¹⁷³ *Rogers*, No. 81-6906, trial op. at 10-20 (C.P. Lucas County 1982).

¹⁷⁴ *Id.* at 16.

¹⁷⁵ *Id.*

defendant's I.Q. . . . and his ability to kidnap, rape and murder."¹⁷⁶

The defendant's I.Q. was tested in the 68-72 range.¹⁷⁷ Despite such mental retardation, the court stated that:

To apply a psychological-academic intelligence quotient standard in determining possible punishments for a crime would result in the imposition of an infinite multitude of disparate sentences for the commission of the same offense by different citizens under the same body of laws. Thus, we would have the unequal application of the law¹⁷⁸

Apparently, the *Rogers* court did not heed the command in *Lockett* that an "individualized decision is essential in capital cases."¹⁷⁹ The precise purpose of mitigation hearings is to differentiate among individuals for purposes of punishment. There are sentencing guidelines in Ohio for non-capital cases as well.¹⁸⁰ The *Rogers* court could have established the existence of mitigating factor seven, based upon the defendant's lack of intelligence, and still have found that the aggravating circumstances outweighed the mitigating factors. However, the court concluded that it could find "no ability to give the defendant any consideration under mitigating factor number seven."¹⁸¹

The Supreme Court, in *Eddings v. Oklahoma*,¹⁸² reversed a sixteen-year-old offender's death sentence because the sentencer refused to consider, as a matter of law, relevant mitigating evidence proffered by the defendant.¹⁸³ The *Rogers* court's statement that an "unequal application of the law" would result if the intelligence of the defendant were considered in mitigation closely approaches the concept found offensive by the *Eddings* court. The law in Ohio *does* countenance disparity of treatment between offenders. In capital cases this treatment should be more, not less pronounced.

In *State v. Jenkins*,¹⁸⁴ the defendant was found guilty of the aggravated murder of a police officer and all five specifications.¹⁸⁵ At the sen-

¹⁷⁶ *Id.* at 24.

¹⁷⁷ *Id.* at 22.

¹⁷⁸ *Id.* at 24-25.

¹⁷⁹ *Lockett*, 438 U.S. at 605.

¹⁸⁰ See OHIO REV. CODE ANN. § 2929.12(C) (Page 1982) (listing factors to be considered in favor of imposing a shorter term of imprisonment for a felony).

¹⁸¹ *Rogers*, No. 81-6906, trial op. at 25 (C.P. Lucas County 1982).

¹⁸² 455 U.S. 104 (1982).

¹⁸³ *Id.* at 114. The defendant sought to proffer evidence of his emotional disturbance and unhappy upbringing. *Id.* at 115.

¹⁸⁴ No. CR 168784 (C.P. Cuyahoga County 1982).

¹⁸⁵ OHIO REV. CODE ANN. § 2929.04(A)(3) (offense committed while escaping apprehension for another offense); (5) (killed or attempted to kill two or more persons); (6) (victim was a police officer); (7) (fleeing after committing aggravated robbery and kidnapping) (Page 1982).

tencing phase, the defendant presented evidence as to the existence of the third and seventh mitigating factors. As in *Rogers*, the debate centered on the defendant's lack of intelligence.¹⁸⁶ The defendant had an I.Q. of 63, with a psychological age of 9.3 years.¹⁸⁷ He presented evidence that mental retardation affected his judgment in becoming involved in the criminal activity, and also influenced his judgment inside and outside the bank on the day of the offense.¹⁸⁸ The court pointed to testimony of the defense psychologist, who admitted on cross-examination that despite his mental retardation, the defendant could have formed intent, refrained from shooting the police officer, and could have laid down his gun and surrendered to the police.¹⁸⁹

The court also pointed to the testimony portraying the defendant not as a "follower" but as a "proficient, modern-day criminal."¹⁹⁰ The court then concluded "that the impact of Jenkins' I.Q. as a mitigating factor is quite minimal when weighed against the aggravating circumstances which the defendant was found guilty of committing."¹⁹¹ The court also stated that a person "should never be held accountable for a crime in a greater or lesser degree dependent upon the gradations of his color, difference in sex, or *intellectual ability*."¹⁹² Thus, the court committed the same error as did the *Rogers* court. No mitigating consideration would be given to a mentally-retarded offender.

In its conclusion, the *Jenkins* court stated what it apparently would have considered as appropriate mitigating factors:

If one scrutinizes the so-called mitigating factors, one immediately notices that all of these have the following basic characterization: there is absolutely nothing positive, redeeming, complimentary, honorable, pleasant, patriotic, religious, respectful, or respect compelling about the defendant. To the contrary, the so-called mitigating factors basically call for emotional considerations of sympathy and mercy.¹⁹³

Thus, the five aggravating circumstances outweighed the absent mitigating factors and the court affirmed the jury's recommendation of the death sentence.

In *Glenn*, *Rogers*, and *Jenkins*, the courts have seemingly inappropriately weighed various mitigating factors. Some of these factors, youth and lack of criminal history in *Glenn* for example, were never established. An-

¹⁸⁶ *State v. Jenkins*, No. CR 168784, trial op. at 9-19 (C.P. Cuyahoga County 1982).

¹⁸⁷ *Id.* at 11.

¹⁸⁸ *Id.* at 9.

¹⁸⁹ *Id.* at 13.

¹⁹⁰ *Id.* at 18.

¹⁹¹ *Id.*

¹⁹² *Id.* (emphasis added).

¹⁹³ *Id.* at 33.

other mitigating factor, mental retardation, was dismissed by both the *Rogers* and *Jenkins* courts as undeserving of *any* consideration. Mental retardation does not fit the specific language of mitigating factor three, and therefore will be considered, if at all, under mitigating factor seven.¹⁹⁴ But the courts seem unreceptive to this evidence because retardation does not provide a legal excuse for the crime. However, the courts fail to grasp a vital distinction: mitigating factors reduce culpability, rather than excuse crime.

The statute states that the aggravating circumstances must "outweigh" the mitigating factors.¹⁹⁵ The balance hinges on the preponderance-of-the-evidence test. If the aggravating circumstances even marginally outweigh the mitigating factors, death would seem to be mandated by the statute.¹⁹⁶ For that reason it is imperative that the trial courts be more discerning when dealing with the existence of mitigating factors. Despite the justifiable outrage and revulsion which surround an aggravated murder trial, the courts must ungrudgingly accept what the Ohio General Assembly has legislated—that the existence of mitigating factors calls for a reduced sentence. This is especially true when an offender may be found guilty of numerous specifications stemming from a single incident.¹⁹⁷ The existence of a set number of specifications should not be tantamount to an automatic death penalty.¹⁹⁸ The trial courts have an affirmative duty to review jury recommendations of death. The courts need not give any special deference to a decision by the jury in this regard. Therefore the courts must display a *greater* observance of the rights of the offender in a capital case. The right of the offender to have his unique characteristics fairly considered and evaluated by the sentencing judge and jury is chief among these rights.

V. CONCLUSION

The constitutionality of Ohio's capital statute will surely be tested in the years ahead. Simply by increasing the number of mitigating factors that the sentencer may consider, the legislature has not cured the statute of serious defects. While the statute does contain important safeguards absent from the prior law, troublesome questions remain as to whether this statute can be applied with fundamental fairness. If the trial courts'

¹⁹⁴ See *supra* text accompanying notes 47-50.

¹⁹⁵ OHIO REV. CODE ANN. § 2929.03(D)(2) (Page 1982).

¹⁹⁶ Appellant's Brief, *supra* note 52, at 103.

¹⁹⁷ See *id.* at 92-93.

¹⁹⁸ In some situations the sheer number of specifications would seem to preclude a finding that the mitigating factors outweigh the aggravating circumstances. For example, the defendant in *State v. Spisak*, No. CR-176651 (C.P. Cuyahoga County 1983), was found guilty of four separate counts of aggravated murder involving 19 specifications. *Id.* trial op. at 8. The court concluded that "[w]hen compared to the aggravating circumstances present in the several counts, the factors in mitigation seem insignificant indeed." *Id.* at 9.

opinions are any indication of the way the appellate courts will interpret and weigh the various mitigating factors, this statute may not have the life span of its predecessor.

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