

NO. 05-1678

IN THE SUPREME COURT OF OHIO

THIS IS A CAPITAL CASE

STATE OF OHIO,
Plaintiff-Appellee

-vs-

DELANO HALE,
Defendant-Appellant

MERIT BRIEF OF APPELLEE

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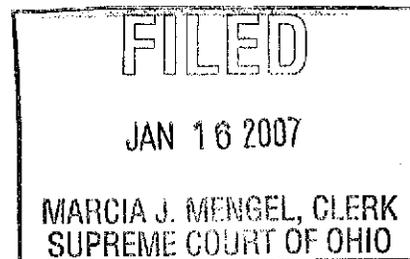


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STATEMENT OF THE CASE

On July 28, 2004 Appellant was indicted on a six-count indictment by the Cuyahoga County Grand Jury in Case No. 454857. Count One of the indictment included Aggravated Murder with prior calculation and design; w/ firearm specification, felony murder specification, notice of prior conviction & repeat violent offender specification. Count Two of the indictment included Aggravated Murder while committing an aggravated felony; w/ firearm specification, felony murder specification, notice of prior conviction & repeat violent offender specification. Count Three of the indictment included aggravated robbery ; w/ firearm specification, notice of prior conviction & repeat violent offender specification. Count Four of the indictment included Tampering w/Evidence w/ firearm specification. Count Five of the indictment was a charge of Escape. Count Six of the indictment included a charge of Having Weapon While Under Disability w/ firearm specification and repeat violent offender specification.

A jury trial commenced May 9, 2005 before Judge Richard Ambrose in the Cuyahoga County Court of Common Pleas as to Counts One thru Four. Appellant waived his right to a jury trial as to Counts Five and Six and those counts were bifurcated for later hearing by the Court. Prior to the start of trial, the State placed on the record the fact that a plea bargain to Aggravated Murder, carrying an agreed sentence of life incarceration with parole eligibility after the Appellant had served thirty-three full years of incarceration, was available if Delano Hale desired to avoid the trial and a potential death sentence. Appellant Delano Hale rejected the State's proposed plea bargain. On June 7, 2005, the jury returned its verdict finding Appellant guilty on all counts and specifications. The mitigation phase began June 13, 2005. On June 16, 2005 the jury returned the verdict "the aggravating circumstances which the defendant was found guilty of committing does outweigh the mitigating factors presenting in this case by proof

beyond a reasonable doubt. (T. 4179). We, therefore, unanimously find that the sentence of death should be imposed upon the defendant, Delano Hale.” (T.4180).

On Tuesday July 5, 2005, the State and Defense met in open court regarding the remaining counts against the defendant. At that hearing, Appellant pled guilty to count five, Escape. (T. 4194). Appellant also stipulated to his prior conviction, and as such the Court then found Appellant had a prior conviction which was a felony of the first or second degree, and that less than five years had elapsed from the Appellant’s release or from post release control in that case. (T. 4195). The Court further found that based on the record in this case presented at trial that the defendant was carrying a weapon while under a disability or while under indictment, or having been convicted of a felony previously, as stipulated to by defense counsel in court, and found the defendant guilty of Count Six of the indictment. (T. 4196).

On July 18, 2005 the court after weighing all of the factors presented at trial, the sentencing phase, through the sentencing memorandums prepared and submitted by counsel, arguments and statements by the victim’s family, imposed the sentence of death on Counts One and Two, with various prison terms on the remaining counts. (T. 4233).

Appellant filed this appeal bringing the matter before this court for review.

STATEMENT OF FACTS

In a poignant and prescient letter to his father from prison written prior to this offense, Appellant told his parents that he alone was responsible for the life decisions he had made which resulted in his criminal history to that point: “DP did what DP wanted to do” . . . “ I made my own choices . . .” See : State’s Exhibit 188.

On June 21st, 2004, shortly after his parole from a twelve year prison sentence for Aggravated Robbery and Aggravated Burglary, Appellant Delano Hale called Douglas Green to

Hale's hotel room at the Lake Erie Lodge located in Euclid, Ohio, where Hale then ambushed and executed Douglas Green by shooting him four times behind Green's right ear. Three of the four shots to Green's head were described by the Coroner as contact gunshot wounds. After wrapping Green's body in plastic bags, Appellant hid Douglas Green's body in a nearby storage room. Appellant spent the next forty-two hours extensively cleaning the scene of Green's murder with chemical cleaning solutions he purchased using Green's debit card, while denying access to his room by housekeeping staff of the hotel. Appellant then took all of the property of Green, moved out of the hotel, and spent Greens' funds for the next several days while living in Green's Ford Explorer SUV. At the time of his arrest on June 28th, 2004, Green's SUV contained all of Appellant Hale's personal effects. Appellant later admitted to police that he disposed of the murder weapon in the hotel garbage dumpster.

On June 23, 2004, the body of Douglas Green had been found at the Lake Erie Lodge room #231, with four gunshot wounds in a small, close grouping behind his right ear. Green's body had been wrapped in plastic garbage bags and hidden amongst furniture and renovation supplies located in room 231, which was being used as a storage room. Jude Nilsson, employee of the Lodge found the body of Douglas Green in room 231. (T. 2032). Daniel Sawyer, an off duty Euclid PD Officer, was the first to respond to the scene. As he was escorted to room 231 it was explained to him that the room was being used as a storage room at present and was not rented out. Sawyer declared it a crime scene and awaited the arrival of additional City of Euclid police officers. (T. 2196). Kurt Eyman arrived soon after and observed the room with a flashlight. (T. 2216). Looking into the room to the left a body wrapped in plastic and duct tape seen. A small portion of the victim's stomach was visible. (T. 2217). Officer Eymen then contacted detectives. (T. 2217). Euclid Police Detective Michael Grida and Detective Sergeant

Robert Pestak arrived and began to process the scene. (T. 2509). They observed an empty window opening for room 231 which led to an easily accessible platform over an interior courtyard for the hotel. When observing the platform, the detectives were able to see drag marks. It was determined the body was placed into the room through the window. (T. 2521).

The Cuyahoga County Coroner's office removed Mr. Green's body from the Lake Erie Lodge and an autopsy was performed June 24, 2004 by Dr. Andrea McCollum, M.D. (T. 2259). Dr. McCollum stated the cause of death was four gunshot wounds to the back of the head of Douglas Green. (T. 2320). Mr. Green's body had been wrapped in six plastic garbage bags and the bags were secured with black electrical tape. (T. 2260).

At about 1500 hours Thursday June 24, 2004 Douglas Green's wife and children were notified of his death. They reported that they had not seen him since Monday, June 21, 2004 at approximately 1330 hours. He was last seen driving his 1998 Ford Explorer, white in color with Ohio license plate CSY2449, the vehicle was then entered as stolen. (T. 2524-2525).

On Friday June 25, 2004 it was learned that Green's credit cards were being used. His visa card is through US Bank and they were immediately notified and sent all credit card activity since June 21, 2004. Mr. Green's bank statement shows that there were charges on June 22, 2004 at the Giant Eagle grocery store in Willoughby Hills, Ohio. (T. 2538). There were two purchases made at the Giant Eagle on June 22 and June 23. Giant Eagle Manager Carl Catucci met with police and produced a video tape of the party who used Green's credit card, as well as the records that showed he used the Giant Eagle Advantage Card (a discount/electronic coupon card issued by the store) in the names of Lashayla Hale and Patricia Hale along with Douglas Green's Visa debit card. (T. 2539-2540). Mr. Catucci was able to reconcile the transactions that were made with Mr. Green's credit card by the defendant. (T. 2542).

It was learned that Mr. Green's cell phone was missing. Detectives ran a check of Green's cell phone records and it was learned that there were three calls placed to Green's cell phone from Lake Erie Lodge and one call placed by Green's phone to the Lake Erie Lodge. (T. 2551). The calls out from the hotel were generated from Room 260. Room 260 was rented to Delano Hale. (T. 2552). The surname Hale being familiar from the use of the Giant Eagle Advantage Card, officers learned that Lashayla Hale is the sister of Delano Hale and Patricia Hale is the deceased mother of Delano Hale. (T. 2577). The defendant appeared in the video at Giant Eagle. (T. 2578). It was learned that Delano was working at "Power Direct" at East 24th and Superior Ave. (T. 2582).

On Saturday June 26th, 2004, Detectives Pestak and Medved received permission from the owner and entered room 260 of the Lake Erie Lodge. Nobody else had rented the room since Mr. Hale checked out, but the housekeeping staff had cleaned the room after Hale's departure. (T. 3191). Using a "Multistix 7" field test kit, detectives were able to locate several places throughout the room that showed a positive reaction for the presence of blood. The strips were tagged and marked as evidence. A warrant for the arrest of Delano Hale was issued.

Lt. Zevnik and Det. Pestak learned that Hale was employed in Cleveland, Ohio, and at 2:00 p.m. Monday, June 28, 2004 drove to the area of East 24th and Superior Ave. in Cleveland, Ohio, to look for Hale and/or Green's vehicle. Parked in a parking lot on the Northeast corner of Superior and East 24th was Green's white Ford Explorer. (T. 3116). As they pulled in they observed Defendant Delano Hale sitting behind the wheel of the vehicle. (T. 3121). They immediately called the Cleveland Police. Hale was taken into custody and the vehicle was towed and processed. (T. 3123). Hale was mirandized at the time of his arrest by Euclid Detective-

Sergeant Robert Pestak and again later the same day at the Euclid Police Department by Euclid Detective-Sergeant James Baird.

Hale was read his Miranda rights and signed a waiver of rights form. (T. 2348). Hale stated he wanted to explain what had happened. Hale made oral and written statements giving his account of the death of Douglas Green:

Appellant Delano Hale and Douglas Green met a couple of weeks prior when Mr. Green allegedly approached the defendant about auditioning for a possible record contract. Douglas Green told the defendant that he was a record producer according to the Appellant's statement. Appellant received Douglas Green's cell phone number before they parted ways.

On Monday June 21, 2004, Appellant called Douglas Green and they spoke about an audition and studio time. They agreed to meet at the Lake Erie Lodge where the appellant was staying. Appellant claimed they met in the Billiards Room, played pool and drank beer. [Police investigation contradicts the possibility of this happening as claimed by Defendant Hale - the Billiards room was closed at the time Hale claims he was in that location]. They got more beer and went to room 260 of the Lake Erie Lodge. The defendant reported that he sang two songs for Mr. Green and then had to go to the restroom. When Hale emerged from the restroom he reportedly found Mr. Green naked on the bed. Hale claims that victim Green made a homosexual overture: "Why don't you give me some of that dick? How big is it anyway". They had words and Hale alleges he grabbed the gun from the victim's bag and fired a shot into the Green's head, then fired again. Hale then admits to reloading the gun and fired again "once or twice". It should be noted that the four gunshots were at close range in a close grouping behind the right ear, which would tend to contradict this account. Hale then used Douglas Green's credit card to buy cleaning supplies to clean up the victim's blood. Hale took Green's SUV and

his credit cards and purchased cleaning supplies, went back to the Lake Erie Lodge, wrapped the body and dragged it to the storage room, packed his things and lived in Mr. Green's SUV until he was apprehended. (T. 2358-2363).

LAW AND ARGUMENT

PROPOSITION OF LAW NO. I: A DEFENDANT'S RIGHT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT ARE VIOLATED WHEN A TRIAL COURT PROHIBITS DEFENSE COUNSEL FROM REVIEWING WITNESS STATEMENTS PURSUANT TO OHIO CRIMINAL RULE 16(B)(1)(G). US. CONST. AMENDS. VI AND XIV.

In this proposition of law, Hale argues that his convictions must be vacated because "the trial court did not permit the defense to participate" in the in camera review of the witnesses statements from James Hull and Detective Baird to determine whether there were inconsistencies between their trial testimony and their statements. As Hale accurately points out in his brief, the trial court determined that there were no inconsistencies. (Tr. 328, 2001, 2044) However, Hale's appellate counsel is disingenuous by asserting in the brief that "the trial court did not permit the defense to participate in that review." Hale's brief at 8. Nowhere in the record is there any indication that the trial court excluded the defense team from reviewing the statements to determine if any inconsistencies existed. Herein, the trial defense team was in possession of the witness statements and was free to argue the existence of any inconsistencies. Hale's assertion that the trial court violated Crim.R. 16(B)(1)(g) by not permitting defense counsel to participate in the in camera review is unsupported by the record.

Moreover, any alleged error regarding the determination of inconsistencies between the statements of Hull and Baird does not require in reversal in this case. in *State v. Williams* (1983), 6 Ohio St.3d 281, paragraph six of the syllabus, this Court held that constitutional errors are harmless beyond a reasonable doubt "if the evidence, standing alone, constitutes

overwhelming proof of the defendant's guilt." The alleged inconsistencies presented by Hale for these two witnesses would not have made a difference in this trial given the substantial evidence of Hale's guilt.

Accordingly, because 1) defense counsel was not excluded from the in camera inspections and 2) the inconsistencies were not material, this Court should reject Hale's first proposition of law.

PROPOSITION OF LAW NO. II: HALE WAS SENTENCED TO MORE THAN MINIMUM, CONCURRENT SENTENCES BY THE TRIAL COURT, DESPITE THE FACT THAT THE STATE PROVES THE STATUTORY CRITERIA FOR INCREASING THE SENTENCE TO A JURY BEYOND A REASONABLE DOUBT, DEPRIVING HALE OF HIS AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

In this proposition of law, Hale argues that his non-capital sentences should be vacated and his sentence remanded for re-sentencing in light of this Court's decision in *State v Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856. Hale was sentenced prior to this Court's decision in *Foster* and the trial court imposed the maximum sentences on the non-capital offenses. This Court recently answered the question of what to do in this situation. In *State v. Elmore*, 111 Ohio St.3d 515, 857 N.E.2d 547, 2006 -Ohio- 6207, this Court held that the case should be remanded for resentencing on the non-capital offenses.

{¶ 139} In the present case, we hold that the trial court's factfinding in support of maximum and consecutive sentences violated *Foster*. We reject the state's argument that Elmore's challenge to the noncapital sentences is rendered moot by Elmore's death sentence. The trial court's reliance on unconstitutional sentencing statutes when imposing maximum and consecutive sentences on the noncapital offenses violated Elmore's constitutional rights and must be corrected.

{¶ 140} We find that proposition XVII has merit. Thus, we remand Elmore's case to the trial court for a new sentencing hearing on the noncapital offenses in accordance with *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

Elmore supra at ¶ 139, 140.

Accordingly, pursuant to *Elmore*, the State agrees with Hale that his case should be remanded for resentencing on the non-capital offenses.

PROPOSITION OF LAW NO. III: THE TRIAL COURT ERRED IN FAILING TO SUPPRESS HALE'S STATEMENTS IN VIOLATION OF HIS RIGHTS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AS WELL AS ARTICLE I, §§ 10 AND 16 OF THE OHIO CONSTITUTION.

In the third proposition of law, Hale argues that the trial court erred in failing to suppress Hale's written and oral statements. The State disagrees.

At the suppression hearing, Detective Pestak testified that at the time of Hale's arrest, around 2:30p.m. on June 28, Pestak orally informed Hale of his Miranda rights. (Tr. 275, 277) Hale was then transferred to the Euclid Police station arriving at 3:35 p.m. (Tr. 278) After receiving dinner, Hale was taken to Detective Baird in the detective bureau around 8:00 p.m. (Tr. 279.) Detective Baird obtained Pestak's person history and filled out Euclid Police's personal history form. Baird described the form as verifying the arrestee's personal history. (Tr. 287) After verifying Hale's personal history, Baird advised Hale of his Miranda rights. (Tr. 293) Thus, the advisement of rights was prior to any questions about the crime he was charged with. (Tr. 294) Hale was described as articulate, he held himself out college educated, and showed no indications of drug or alcohol use. (Tr. 289-290) Thereafter, prior to questioning Hale about the crime, Baird showed Hale the Miranda form and orally advised Hale of his Miranda rights. (Tr. 295) Hale indicated that he understood those rights. (Tr. 296) Hale further read the Miranda form and signed it. (Tr. 297) At this point, after Baird gave Hale his second set of Miranda warnings, Hale said, "he didn't kill anybody." (Tr. 301) During this time, Hale showed no signs of discomfort and did not ask for water, cigarettes, food, or to use the bathroom. (Tr. 300) Importantly, he never asked for counsel. (Tr. 300, 320.) It is illustrative of the Euclid Police

Department's handling of Hale that Detective Baird did not conduct a traditional Q & A style interrogation of Hale. Defendant's Exhibit A is Hale's self-composed four page written statement in his own handwriting of Hale's account of the death of Douglas Green.

It is well established, however, that a suspect who receives adequate *Miranda* warnings prior to a custodial interrogation need not be warned again before each subsequent interrogation. *Wyrick v. Fields* (1982), 459 U.S. 42, 48-49, 103 S.Ct. 394, 396-397, 74 L.Ed.2d 214, 219; *State v. Barnes* (1986), 25 Ohio St.3d 203, 208, 25 OBR 266, 270; see, also, *State v. Brewer* (1990), 48 Ohio St.3d 50, 58-59. Police are not required to readminister the *Miranda* warnings when a relatively short period of time has elapsed since the initial warnings. *State v. Mack*, 73 Ohio St.3d at 513-514, 653 N.E.2d at 338. Courts look to the totality of the circumstances when deciding whether initial warnings remain effective for subsequent interrogations. *State v. Roberts* (1987), 32 Ohio St.3d 225, 232, 513 N.E.2d 720, 725

In *Barnes, supra*, the defendant sought to suppress inculpatory statements made twenty-four hours after being advised of his *Miranda* rights. This Court concluded that “[a]lthough re-reading appellant's rights to him * * * would have been an extra precaution, it is not one mandated by the Ohio or United States Constitutions.” *Id.*, 25 Ohio St.3d at 208. In *Brewer, supra*, the suspect received *Miranda* warnings from one police department early in the evening and made inculpatory statements to officers of a different police department the following day without being readvised of his *Miranda* rights. This Court noted that while a “great deal of time” had elapsed since the original *Miranda* warnings, the subsequent interrogation was “part of a series of discussions” that appellant had with police, during which the appellant had indicated his awareness of his rights. *Id.*, 48 Ohio St.3d at 60, 549 N.E.2d at 501. Accordingly, based on the totality of the circumstances, no new warnings were required. *Id.*

This record more than supports the trial court's decision to deny Hale's motion to suppress. First, the initial Miranda warnings given at the time of arrest were still effective. This was an articulate well-educated defendant who was not under the influence of drugs or alcohol and had previous experience in the criminal justice system. There is no evidence whatsoever that Hale did not understand his Miranda rights at 8:00 p.m. that he was earlier informed of at 2:30 p.m. that same day. Indeed the time frame in the case at bar was shorter than the time frames at issue in *Barnes* and *Brewer*.

Second, Hale was properly informed of his Miranda rights a second time by Detective Baird and Hale signed the Miranda form prior to giving his statement. (Tr. 297) After being given his Miranda rights this second time, there is nothing in the record to indicate that Hale did not understand his Miranda rights at the time of his statement. Importantly, there was no indication of any physical stress placed on Hale or of any mental impairment. Indeed it is significant that given Hale's prior criminal experience, Hale was familiar with the criminal justice system.

Finally, it is not even clear what statements Hale is currently arguing should be suppressed. Hale mostly complains that, although Miranda was given at the time of the arrest, the second Miranda warnings, which were given prior to Hale's statement, were not given prior to the taking of Hale's personal information by Detective Baird. Nothing incriminating was elicited during the taking of Hale's personal history.

Thus the record is clear that the trial court did not err in denying Hale's motion to suppress and Hale's third proposition of law should be rejected.

PROPOSITION OF LAW NO. IV: THE ACCUSED HAS A RIGHT OF PRESENCE AT ALL CRITICAL STAGES OF THE TRIAL UNDER THE CONFRONTATION CLAUSE AND THE DUE PROCESS CLAUSE. THE RIGHT OF PRESENCE IS PERSONAL TO THE ACCUSED AND MAY ONLY BE WAIVED BY THE ACCUSED. U.S. CONST. AMENDS. VI, XIV.

In Hale's fourth proposition, he contends that his convictions should be vacated because he was not present at "Trial Proceedings." Hale's brief at 21. In support of his argument, Hale cites to numerous pretrial dates from the docket.

Hale's fourth proposition lacks merit. Regarding the pretrial conferences, the record fails to affirmatively establish that Hale was absent from the proceedings. More importantly, however, Hale cannot establish any prejudice even if he was not a part of these pretrials. As this Court stated,

[e]ven if a defendant should have been present at a stage of the trial, '[e]rrors of constitutional dimension are not ipso facto prejudicial.' Prejudicial error exists only where 'a fair and just hearing [is] thwarted by [defendant's] absence.' "

State v. White (1998), 82 Ohio St.3d 16, 26 (Internal citations omitted.) Indeed in a recent capital case, this court held that an assumption that a defendant was not present at a conference will not require reversal where the jury never received testimony or evidence, no critical stage of the trial was involved, and the defendant failed to establish the content of the discussions which may well have involved legal or scheduling issues within the professional competence of counsel. *State v. Brinkley*, 105 Ohio St.3d 231, 2005 -Ohio- 1507. The *Brinkley* Court stated as follows:

{¶ 122} Even if we were to assume that Brinkley was absent from the unrecorded in-chambers or bench conferences, counsel could have waived his presence. See *United States v. Gagnon*, 470 U.S. at 528, 105 S.Ct. 1482, 84 L.Ed.2d 486 (trial court "need not get an express 'on the record' waiver from the defendant for every trial conference which a defendant may have a right to attend"); *United States v. Gallego* (C.A.2, 1999), 191 F.3d 156, 171 (waiver can be implied by accused's failure to object to exclusion); *State v. Green*, 90 Ohio St.3d at 371, 738 N.E.2d 1208; *State v. Hill* (1995), 73 Ohio St.3d 433, 444, 653 N.E.2d 271.

{¶ 123} Moreover, at these conferences, the jury never received testimony or evidence, and no critical stage of the trial was involved. Cf. *State v. Taylor* (1997), 78 Ohio St.3d 15, 24, 676 N.E.2d 82. Nor has Brinkley established the content of the discussions. The conferences may well have involved legal or scheduling issues within the professional competence of counsel. Cf. *United States v. Brown* (C.A.6, 1978), 571 F.2d 980, 987 (accused must establish prejudice from absence at in-chambers conference); *State v. Green*, 90 Ohio St.3d at 371, 738 N.E.2d 1208; *State v. White* (1998), 82 Ohio St.3d 16, 26, 693 N.E.2d 772.

Moreover, regarding the two instances in the record cited by Hale, where the record does indicated defense counsel was aware of Hale's absence for non-critical discussions, this *Brinkley* Court specifically, held that the "trial court "need not get an express 'on the record' waiver from the defendant for every trial conference which a defendant may have a right to attend" *Brinkley* at {¶ 123} quoting *United States v. Gagnon*, 470 U.S. at 528, 105 S.Ct. 1482, 84 L.Ed.2d 486.

Accordingly this Court should reject Hale's fourth proposition of law.

PROPOSITION OF LAW NO. V: WHEN A TRIAL COURT *SUA SPONTE* DEATH QUALIFIES A CAPITAL JURY, BUT FAILS TO *SUA SPONTE* LIFE QUALIFY THAT SAME JURY, THE DEFENDANT IS DENIED HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL IN VIOLATION OF THE EQUAL PROTECTION CLAUSE AND THE PROSECUTION INURES A BENEFIT UNFAIRLY DENIED THE DEFENDANT IN VIOLATION OF THE DUE PROCESS CLAUSE. U.S. CONST. AMEND. XIV.

In his fifth assignment of error, Hale argues that the trial court committed reversible error by failing to *sua sponte* "life qualify" the jury. Hale argues that the trial court should have asked more questions regarding whether the jurors could consider the life sentences. By virtue of Hale's argument that the trial court should have "*sua sponte*" life qualified the jury, it is apparent that Hale concedes that trial counsel did not request such a "life qualification" of the jury. That is probably because the defense team itself asked each juror during individual voir dire to fully and fairly consider life sentence alternatives. In addition, the individual voir dire is replete with repeated and numerous examples of the prosecution "life qualifying" jurors.

This Court has rejected Hale's argument. In *State v. Skatzes*, 104 Ohio St.3d 195, 2004 - Ohio- 6391 this Court stated as follows:

There is no requirement for a trial court to "life qualify" prospective jurors absent a request by defense counsel. *State v. Stojetz* (1999), 84 Ohio St.3d 452, 705 N.E.2d 329, syllabus. Failure to do so does not constitute deficient performance.

Accordingly, because this Court has already rejected his very claim, this Court should reject Hale's fifth proposition of law.

PROPOSITION OF LAW NO. VI: OHIO'S DEATH PENALTY SCHEME RESULTS IN AN ARBITRARY APPLICATION OF PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT. FURTHERMORE, JURORS WHO CONSIDER NONSTATUTORY AGGRAVATING CIRCUMSTANCES AT THE PENALTY PHASE VIOLATE THE CAPITAL DEFENDANT'S RIGHTS TO DUE PROCESS AND A FAIR AND RELIABLE SENTENCING HEARING. U.S. CONST. AMENDS. VI, VIII, XIV; OHIO CONST. ART. 1, § 16.

The State submits that it is difficult to discern what appellate claim Hale is asserting in his sixth proposition of law. After broadly asserting that "Ohio's death penalty scheme does not work, Hale boldly asserts that jurors from his trial did not understand the concept of "statutory aggravating circumstances." Hale's brief at 35. The State disagrees with Hale's speculation about the jurors. The only evidence in the record to support this claim is two statements from the individual voir dire of jurors who were ultimately seated.

This proposition should be rejected. Nothing about these two individual voir dire statements cited by Hale indicates a lack of understanding by the jurors. Obviously, because these statements were made prior to trial, the jurors, at this point, had not been instructed on the law. Moreover, Hale has not cited to any instance from either the guilt phase or mitigation phase instruction where incorrect or misleading instructions were provided to the jury. Similarly, trial counsel never objected or argued at trial that the jurors did not understand the law or that the trial court mislead the jury in the instructions.

Accordingly, this Court should reject Hale's sixth proposition of law.

PROPOSITION OF LAW NO. VII: WHEN THE TRIAL COURT FAILS TO REMOVE TWO JURORS AND DENIES A CHALLENGE FOR CAUSE FOR A THIRD JUROR WHO ARE BIASED IN FAVOR OF THE DEATH PENALTY, THE CAPITAL DEFENDANT IS DEPRIVED OF HIS RIGHTS AS GUARANTEED BY U.S. CONST. AMENDS. V, VIII AND XIV; OHIO CONST. ART. I, §§ 9 AND 16.

For his seventh proposition of law, Hale claims that the trial court erred in seating jurors, Randy Tolen and Ramona Klein. Hale further argues that the trial court erred in denying a challenge for cause for potential juror Renade Freeman. Nothing from this proposition warrants a new trial or a reversal of the death penalty.

It is well settled, that the standard for determining whether a prospective juror may be excluded for cause due to his or her views on capital punishment is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. *Wainwright v. Witt* [1985], 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841; *State v. Rogers* (1985), 17 Ohio St.3d 174, 17 OBR 414, paragraph three of the syllabus, vacated and remanded on other grounds (1985), 474 U.S. 1002, 106 S.Ct. 518, 88 L.Ed.2d 452. See, also, *State v. Williams* (1997), 79 Ohio St.3d 1, 5. Additionally, "voir dire may constitute reversible error only upon a showing of abuse of discretion by the trial court." *Rogers*, 17 Ohio St.3d at 179, 17 OBR at 418, Moreover, a trial court has " 'great latitude in deciding what questions should be asked on voir dire.' " *State v. Wilson* (1996), 74 Ohio St.3d 381, 386, quoting *Mu'Min v. Virginia* (1991), 500 U.S. 415, 424, 111 S.Ct. 1899, 1904, 114 L.Ed.2d 493, 505 See, also, *State v. Beuke* (1988), 38 Ohio St.3d 29, 39, (issues raised in voir dire in criminal cases have long been held to be within the discretion of the trial judge).

Herein, the trial court did not abuse its discretion in seating jurors Randy Tolen and Ramona Klein. Regarding Randy Tolen, Hale now complains that, in response to question

about the death penalty, Tolen stated that he believed in the “sanctity of life.” This, Hale argues, is evidence that Tolen’s views about the death penalty views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. A review of the record, however, does not support Hale’s argument. During the individual voir dire, Tolen indicated that not all murders warrant the death penalty and that the death penalty should be reserved for “very few selected people” whose homicides that meet the requirements (Tr. 425-437). Thus the trial court did not abuse its discretion in seating this juror.

Regarding juror Ramona Klein, Hale argues that Klein’s statement that sex offenders and child molesters should receive the death penalty are evidence that Klein’s views about the death penalty views would prevent or substantially impair the performance of her duties. A review of the record, however, does not support Hale’s argument. During the individual voir dire, Klein indicated that it would not be easy to sign her name to a death verdict. (Tr. 448) Moreover, Klein explained that she would follow the law and that she understood a murder alone does not make it a death penalty case (Tr. 449, 460) Klein further explained that she would consider mitigation evidence and all lesser levels of penalty. (Tr.461) Regarding her statement that sex offenders and serial murders deserve the death penalty, she clarified that in specific cases she would consider something lesser if appropriate and that the imposition of the death penalty varies from case to case. (Tr. 464.) Thus the seating of Klein was not an abuse of discretion.

Hale further argues under this proposition that the trial court erred by denying a challenge for cause for potential juror Renade Freeman. Again the standard to be applied by the trial is “a prospective juror in a capital case may be excluded for cause if his views on capital punishment * * * would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” ’ ’ *State v. Coleman* (1989), 45 Ohio St.3d 298,

305, quoting *Wainwright v. Witt* (1985), 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841. Regarding challenges for cause, this Court has repeatedly stated that “even if a juror shows a *predisposition* in favor of imposing the death penalty, the trial court does not abuse its discretion in overruling a challenge for cause if the juror later states that she will follow the law and the court’s instructions.” *State v. Mack* (1995), 73 Ohio St.3d 502, 510, (emphasis added.) See also, *State v. Gross*, 97 Ohio St.3d 121, 2002 -Ohio- 5524. Again, a trial court’s denial of a challenge for cause in a capital case is reviewed under the abuse of discretion standard. *State v. Roberts*, 110 Ohio St.3d 71, 2006 -Ohio- 3665.

The trial court did not abuse its discretion in denying the challenge for cause regarding prospective juror Renade Freeman. In his brief, Hale cites the first portion of the individual voir dire of Renade Freeman from transcript pages 758 to 760. Hale however fails to provide a complete picture of this potential juror’s answers. From transcript pages 760 to 767, pursuant to questions posed by both the State and defense as well as the trial judge, Freeman explains that her feelings about the death penalty were her personal feelings and she repeatedly stated that she could set those feelings aside and follow the law. (Tr. 759, 761, 763, 764, 765, 766) Renade Freeman was also very clear in her answers that she would consider mitigation evidence. The trial court did not abuse its discretion in deciding not to remove prospective juror Freeman for cause.

Accordingly, this Court should reject Hale’s sixth proposition of law.

PROPOSITION OF LAW NO. VIII: A TRIAL COURT VIOLATES A CAPITAL DEFENDANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND DUE PROCESS WHEN IT ALLOWS THE STATE TO VIOLATE THE RULES OF DISCOVERY, ALLOWS MISLEADING, PREJUDICIAL EVIDENCE AND TESTIMONY TO BE INTRODUCED DURING THE TRIAL, ARBITRARILY LIMITS EVIDENCE IN THE DEFENSE'S CASE-IN-CHIEF, AND MAKES ARBITRARY EVIDENTIARY RULINGS. U.S. CONST. AMENDS. VI, XIV.

In his eighth proposition of law, Hale presents a hodgepodge of various alleged errors committed by the trial court. The State will respond to each argument as presented by Hale.

Hale first argues that trial court erred by allowing the admission of oral statements made by Hale to Detective Baird. Hale orally informed Detective Baird that Hale shot the victim with a two-shot Derringer pistol, which was material because it meant that Hale had to reload the gun to account for the four shots. (Tr. 1912) Hale also made oral statements regarding the disposal of the gun and trash bags. Hale did not argue that the State failed to provide these statements to the Hale defense team. Rather, Hale complained that these oral statements were not timely provided to the defense. The State argued that the information was provided to Hale's defense team at pretrials. (Tr. 1913) Defense counsel claimed to not have its notes from the pretrial in question. The trial court ruled that that the State's discovery was untimely and as a result the oral statements to Detective Baird would be excluded. (Tr. 1917)

In his brief, Hale recognized that the trial judge revisited this ruling and allowed cross-examination of Detective Pestak regarding Hale's oral statements. Specifically, the trial court allowed only a portion of Hale's oral statements to come in, that being the oral statements regarding the disposal of the gun, bloody clothes and towel in the hotel dumpster. (Tr. 3209) While Hale recognizes that the trial court modified its original ruling, Hale fails to explain the rationale behind the trial court's modification. Later in the trial, the State noticed that defense counsel was somehow able to recover its notes from the August 23, 2004 pretrial. The trial court

then made an *in camera* inspection of defense counsel's notes from the August 23, 2004 pretrial. (The State did not participate in the review of trial counsel's notes.) *After the in camera review, the trial court specifically found that the oral statements by Hale regarding the disposal of the clothing, gun, and towels in the dumpster were, in fact, provided to defense counsel at the pretrial.* (Tr. 3208) Thus, the trial court resolved the discovery dispute by allowing the State to reference the oral statements.

It is well settled that rulings on trial discovery disputes and rulings on the admission or exclusion of evidence are within the sound discretion of the trial court. *State v. Finnerty* (1989), 45 Ohio St.3d 104, 107. An abuse of discretion consists of more than an error of law or judgment. Rather, it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169 (citation omitted).

Herein, the trial court did not abuse its discretion in allowing the State to introduce evidence of Hale's oral statements regarding the disposal of the clothing, gun, and towels in the dumpster. The trial judge took care in exercising his discretion to not allow all aspects of the Hale's oral statements. The Court was, however, satisfied that Hale's oral statements regarding the disposal of the gun, clothes, and gun were communicated to defense counsel. Moreover, the Court was aware that defense counsel's cross-examination of the detectives which gave the impression of an incomplete investigation was prejudicial to the State. Thus, because the trial court determined that Hale's counsel was provided the information at the August 23, 2004 pretrial, a discovery sanction of excluding the statements regarding the disposal of the gun, clothes and towels was not warranted. (Tr. 3203-3208). Simply put, a trial court did not abuse its discretion because the defense team was aware of the oral statements prior to trial and to exclude the evidence would have left a false impression on the jury.

Hale next argues that he was denied a fair trial because the maintenance worker (Bob Stewart) who discovered the victim's body stated "[i]t shook him up pretty good." (Tr. 2095) The State submits that the trial court did not abuse its discretion in overruling the objection to this question and that this answer did not deny Hale a fair trial. Stewart testified for all of nine pages with no cross examination. He provided no information regarding Hale's involvement in this murder. Importantly, nothing about the answer, "[i]t shook him up pretty good" was unfairly prejudicial to Hale. The jury was aware that this was a murder case and thus there was a dead body. Moreover, it is not surprising for anyone to become emotionally upset upon discovering a dead human being. Thus, the trial court did not abuse its discretion.

In subsection C of this proposition, Hale argues that testimony about the victim denied him a fair trial. Specifically, Hale recognizes that, because Hale was claiming self-defense, the State was permitted to introduce character evidence regarding the victim. Hale contends that brief testimony regarding Green being in the singing industry and Green planning to sing happy birthday at a birthday party was impermissible victim impact evidence which denied him fair trial. Nothing about this evidence crossed the line into impermissible victim impact evidence which denied Hale a fair trial. As argued to the trial court, the questions were laying a foundation into the witnesses' opinion regarding Green's character for peacefulness (Tr. 3012) and information about the victim's business was germane to the case. (Tr. 3014) Additionally, there is no evidence that any of this brief testimony about the victim impermissibly prejudiced Hale and denied him a fair trial.

Hale next complains that the admission of a publicity photo of the victim denied Hale a fair trial. The State argued at trial that the photo showed Green wearing a style of clothing and jewelry as he did in real life, which made him an attractive target for a robbery. Hale's argument

is that there is no indication that this is how Green looked on the date he was murdered by Hale. Hale's argument misses the point. Regardless of when the photo was taken, Green by his everyday manner of dress as described by witnesses and corroborated by the photo, held himself out as being successful, making Green an attractive target for a robbery based on visual observation alone. Thus, the trial court did not abuse its discretion in allowing the photo into evidence. Lastly, Hale's brief does not explain how this photo of the murdered victim prejudiced him.

Hale also argues that the trial court erred in allowing Curtiss Jones of the Cuyahoga County Coroner's office to testify regarding blood splatter evidence. Hale raised this argument under the tenth proposition of law and the State will respond to it in the State's response to that proposition.

Under subsection F, Hale argues that the trial court erred by not permitting defense counsel to go into the specific details of the victim's prior sexual assault conviction. The trial court did not abuse its discretion on this ruling. First, the trial court did allow the jury to hear that the witness was a previous victim of a sexual assault from Green. The trial court merely limited the testimony to exclude specific details. This State submits the trial court did abuse its discretion as the ruling complied with this Court holding from *State v. Barnes, infra*, wherein this Court stated "a defendant asserting self-defense cannot introduce evidence of specific instances of a victim's conduct to prove that the victim was the initial aggressor". *State v Barnes*, 94 Ohio St.3d 21, 2002-Ohio-68. The trial court's ruling specifically followed *Barnes*. Moreover, because the jury heard about the fact of the assault, it cannot be said that Hale was prejudiced.

Lastly, in subsection G, Hale takes a shotgun approach by listing, in one page, unspecific rulings by the trial court without any explanation of why Hale believes these trial court rulings

were erroneous or how Hale was prejudiced by these alleged erroneous ruling. Because Hale has failed to carry his burden to establish error, nothing about subsection G of the Eighth proposition of law warrants the grant of a new trial.

Accordingly, this Court should reject Hale's eighth proposition of law.

PROPOSITION OF LAW NO. IX: THE ADMISSION OF SHOCKING AND GRAPHIC PHOTOGRAPHS INTO EVIDENCE AT THE BOTH PHASES VIOLATED HALE'S RIGHT TO DUE PROCESS WHEN THE PROBATIVE VALUE OF THE PHOTOGRAPHS WAS OUTWEIGHED BY THE DANGER OF PREJUDICE, AND THE PHOTOGRAPHS WERE CUMULATIVE.

In his ninth proposition of law, Hales argues that the admission of crime scene photos denied Hale a fair trial. Hale recognizes that he did not object to the admission of these photos. Hale's Brief at p. 62. See also Tr. 3263-3267.

It is well-settled that if a defendant failed to object to gruesome photographs at trial the defendant has waived all but plain error. *State v. McKnight*, 107 Ohio St.3d 101, 2005 -Ohio- 6046 ¶ 139; *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, ¶ 49. Plain error will not be found unless Hale establishes that the outcome of his trial clearly would have been otherwise except for the trial court's alleged improper action of allowing the photographs. *State v. Conway*, 108 Ohio St.3d 214, 2006 -Ohio- 791 {¶ 105}; *State v. Waddell* (1996), 75 Ohio St.3d 163, 166. Decisions on the admissibility of photographs are "left to the sound discretion of the trial court." *State v. Slagle* (1992), 65 Ohio St.3d 597, 601.

The trial court did not commit plain error in the admission of the photographs. At trial, the number and position of the bullet holes in the head were extremely relevant. Moreover, the wounds were relevant to determined the angle and distance from which the shots were fired. These photos illustrated the coroner's testimony on cause of death in comparison to Hale's account of the shooting, and were relevant and probative of issues at trial the trial and their

introduction outweighed any prejudicial impact. *State v. Goodwin* (1999), 84 Ohio St.3d 331, 342; *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, at ¶ 88; *State v. Campbell*, 69 Ohio St.3d at 50; *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, at ¶ 96-97. Thus, no plain error occurred from their admission. Moreover, no plain error existed in the reintroduction of these photos at the mitigation phase because, a trial court may properly allow repetition of much or all that occurred in the guilt phase, pursuant to R.C. 2929.03(D)(1). *State v. DePew*, 38 Ohio St.3d at 282-283/

PROPOSITION OF LAW NO. X: THE TRIAL COURT ERRED WHEN IT ALLOWED UNQUALIFIED EXPERT WITNESS TESTIMONY UNDER OHIO RULE OF EVIDENCE 702 AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AS WELL AS ARTICLE I, §§ 10 AND 16 OF THE OHIO CONSTITUTION.

For his tenth proposition of law, Hale argues that the trial court erred by allowing the testimony of Curtiss Jones as an expert on blood splatter evidence. The decision to allow expert testimony, is reviewed on an abuse of discretion standard. It is well-settled that a trial court possess broad discretion in determining the admissibility of evidence, including expert witness testimony. See, e.g. *State v. Thomas*, 97 Ohio St.3d 309, 2002-Ohio-1017, at ¶ 46; *State v. Hartman* (2001), 93 Ohio St.3d 274, 281. Thus, reversal should not occur unless the trial court “ ‘clearly abused its discretion.’ ” *State v. Slagle* (1992), 65 Ohio St.3d 597, 602, (quoting *State v. Hymore* (1967), 9 Ohio St.2d 122, 128,).

Herein the trial court did not abuse its discretion in allowing the blood splatter testimony from Curtiss Jones. When Jones began his testimony regarding blood splatter evidence, defense counsel asked for the State to lay a foundation. The State then elicited detailed testimony explaining Jones’ blood splatter training. Specifically, Jones stated 1) he completed a 40-hour class by a forensic scientist and blood splatter expert from the Miami Dade crime lab, 2) he

completed a separate 8-hour training class on blood splatter evidence at the Henry Lee Institute of Forensic Science at the University of New Haven, 3) he completed two blood splatter proficiency tests, 4) he deals with blood evidence every day in his position with the coroner's office, and 5) three or four times he has testified regarding blood splatter evidence. (Tr. 2445-2447) Subsequent to this foundation being laid, the trial court allowed Jones to testify on blood splatter evidence and defense counsel did not object.

Hale cannot establish plain error in the trial court's discretionary decision to allow Jones's testimony on blood splatter evidence. Jones had testified as an expert on this topic previous to this trial. Importantly, Jones received specific blood splatter training from different respected sources. Moreover, he successfully completed proficiency tests and had everyday experience on the subject. Thus the trial court did not commit plain error in exercising its discretion to allow this testimony and, thus, Hale's tenth proposition of law should be rejected.

PROPOSITION OF LAW NO. XI: WHEN THE TRIAL COURT PRECLUDES A CAPITAL DEFENDANT FROM PRESENTING RELEVANT MITIGATION EVIDENCE, A CAPITAL DEFENDANT'S RIGHTS TO A FAIR SENTENCING PROCEEDING AND INDIVIDUALIZED SENTENCING. U.S. CONST. AMENDS. VIII, XIV; OHIO CONST. ART. I, §§ 9, 16.

For his eleventh proposition, Hale posits that he is entitled to a new mitigation hearing because the trial court did not allow testimony regarding the effect of a death sentence on Hale's family. Hale's argument under this proposition is misleading. The trial court allowed extensive testimony from Hale's family members and from Hale's expert at the mitigation hearing. The only limitation on this testimony was where the trial court did not allow Hale to testify as to their feelings specific personal feelings on the death penalty or the effect of the death penalty on Hale's family. (Tr. 3828, 3832.)

The trial court's evidentiary ruling does not warrant a new mitigation hearing. While Hale was entitled to present mitigation evidence which was relevant to his history, character, and background under R.C. 2929.04(B), any opinion regarding the impact of a death sentence on Hale's family had no bearing on appellant's history, character, or background. Moreover any sentencing recommendations from Hale's family members did not constitute relevant mitigation under R.C. 2929.04(B)(7), which encompasses "[a]ny other factors that are *relevant* to the issue of whether the offender should be sentenced to death." (Emphasis added.) See, *State v. McKnight*, 107 Ohio St.3d 101, 837 N.E.2d 315, 2005 -Ohio- 6046.

Aside from the correctness of the trial court's ruling, Hale cannot establish prejudice from this ruling. The jury heard testimony from Hale family at the mitigation hearing and was surely aware that the family did not want to have the death penalty imposed on Hale. Specific testimony about the effect of the death penalty on the family would have been cumulative.

Finally, any error in the exclusion of this testimony from mitigation can be cured by this Court in its independent sentence review.

{¶ 91} Moreover, we can eliminate the effect of the trial court's decision as a result of our independent review. When independently reviewing a sentence of death pursuant to R.C. 2929.05(A), we may consider proffered evidence that the jury was prevented from considering. *State v. Sanders* (2001), 92 Ohio St.3d 245, 267, 750 N.E.2d 90; *State v. Williams* (1996), 74 Ohio St.3d 569, 578, 660 N.E.2d 724. Accordingly, we reject Conway's third proposition.

State v. Conway, 109 Ohio St.3d 412, 848 N.E.2d 810, 2006 -Ohio- 2815.

Thus this Court should reject Hale's eleventh proposition of law.

PROPOSITION OF LAW NO. XII: THE ADMISSION OF PREJUDICIAL AND IRRELEVANT EVIDENCE DURING THE SENTENCING PHASE OF HALE'S CAPITAL TRIAL DENIED HALE HIS RIGHTS TO DUE PROCESS AND A RELIABLE DETERMINATION OF HIS SENTENCE AS GUARANTEED BY U.S. CONST. AMENDS. V, VI, VIII AND XIV; OHIO CONST. ART. I, §§ 10 AND 16.

In his twelfth proposition of law, Hale argues that he is entitled to a new sentencing hearing because 1) the trial court allowed the State to cross-examine Hale's sister about an incident where Hale threatened to kill his father, and 2) the trial court allowed the State to elicit from Hale's expert, the fact that Hale had been paroled. Neither of these items warrant a new mitigation hearing. Herein the trial court did not abuse its discretion in allowed these cross-examination questions of Hale's mitigation witnesses. Indeed, a capital defendant's presentment of witnesses to establish mitigation can open the door to allow the introduction of information via cross examination that otherwise may not come into evidence. *State v. McKnight*, 107 Ohio St.3d 101, 837 N.E.2d 315, 2005 -Ohio- 6046

Regarding Laquita Hale-Fleming's testimony cited in Hale's brief where she was asked about Hale threatening to kill his father, defense counsel opened the door to this testimony by having Hale-Fleming testify at mitigation about Hale's character. Regarding Dr. Fabian's testimony, Dr. Fabian discussed Hale's prison record. As such, and given the fact that some of the life sentencing option included the possibility of parole, the State's cross-examination was appropriate. Moreover, Hale cannot establish prejudice from either of these questions.

Accordingly, the trial court did not abuse in allowing the State to cross-examine these mitigation witness on their testimony.

PROPOSITION OF LAW NO. XIII: THE CAPITAL DEFENDANT'S RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT AND HIS RIGHT TO DUE PROCESS ARE VIOLATED WHEN THE LEGAL ISSUE OF RELEVANCE IS LEFT TO THE JURY REGARDING SENTENCING CONSIDERATIONS AND, THE SENTENCING PROCEEDING CREATES AN UNACCEPTABLE RISK OF ARBITRARY, NONSTATUTORY AGGRAVATORS IN THE WEIGHING PROCESS. U.S. CONST. AMENDS. VIII AND XIV. THOSE SAME RIGHTS ARE VIOLATED WHEN THE TRIAL COURT INSTRUCTS THE JURY NOT TO CONSIDER RELEVANT MITIGATING EVIDENCE.

In his thirteenth proposition of law, Hale challenges the following instruction provided to the jury at the mitigation phase of the trial.

Some of the evidence and testimony that you considered in the trial phase of this case may not be considered in the sentencing phase. For purposes of this proceeding, only that evidence admitted in the trial phase that is relevant to the aggravating circumstances and to any of the mitigating factors is to be considered by you. You will also consider all of the evidence admitted during the sentencing phase together with the defendant's own statement.

Tr. 4114. Hale argues that this instruction impermissibly left the issue of relevancy up to the jury. In evaluating this claim, it is important to note that (1) Hale's attorneys did not object to admission of the guilt phase evidence and the instruction and (2) this Court has held that, much of the guilt-phase testimony [is] relevant in the penalty phase because it relates to the nature and circumstances of the offenses. See *State v. Cunningham*, 105 Ohio St.3d 197, 2004 -Ohio- 7007 at ¶ 71.

Herein, Hale cannot establish plain error by the trial court in giving this instruction. In *Cunningham*, this Court found no plain error when the trial court admitted all the guilt phase evidence and gave the same instruction. This Court stated as follows:

{¶ 67} Cunningham claims in proposition VII that the trial court erred when it failed to instruct the jury about which evidence from the guilt phase was relevant and could be considered during the penalty phase. Cunningham argues that the trial court erred by instructing the jury: {¶ 68}“For purposes of this proceeding, only that evidence admitted in the trial phase that is relevant to the aggravating circumstance and to any mitigating factors is to be considered by you.”

{¶ 69} Cunningham failed to object to the above instruction. He also failed to object when the trial court granted the state's request to admit all testimony from the guilt phase in the penalty phase. Thus, Cunningham has waived all but plain error. Crim.R. 52(B). We conclude that plain error did not occur.

{¶ 70} In *State v. Coley* (2001), 93 Ohio St.3d 253, 269-270, 754 N.E.2d 1129, we rejected the same argument that Cunningham now makes. In this case, as in *Coley*, the trial court determined which guilt-phase exhibits were relevant to the penalty phase and instructed the jury that "only that testimony and evidence which was presented in this [first] phase that is relevant to the two aggravating circumstances * * * and to any of the mitigation factors * * * are to be considered by you." Id. at 269, 754 N.E.2d 1129. Here, the trial court identified a single aggravating circumstance for the jury's consideration and instructed the jury that only this aggravating circumstance may be considered and the "aggravated murder itself is not an aggravated [sic] circumstance."

Cunningham at ¶ 67-70. Accordingly, because this Court has already found no error in this instruction, Hale's thirteenth proposition should be rejected.

PROPOSITION OF LAW NO. XIV: SENTENCING BEFORE A COURT BIASED IN FAVOR OF THE DEATH PENALTY DEPRIVED HALE OF HIS DUE PROCESS RIGHTS. U.S. CONST. AMEND. XIV; OHIO CONST. ART. I, § 16.

Hale's fourteenth proposition argues that his death sentence should be vacated and a new mitigation hearing is warranted because the "the trial court was biased in favor of the death penalty." In support of this argument, Hale cites to one brief passage when, after receiving the jury's mitigation phase verdict, the trial judge stated as follows:

The Court having polled the jury does find that this is the verdict of the jury in this case, and the sentence of death shall be imposed upon the Defendant.

A sentencing hearing will be set in the case at 3 p.m. on Monday to place that verdict into effect. The Court will enter that verdict at that time.

Tr. 4182. Nothing about this single statement supports Hale's argument that the trial judge was biased in favor of the death penalty. Judge Ambrose fairly presided over this lengthy trial and nowhere exhibited any bias against Hale or in favor of the death penalty. Indeed, this statement was made after the conclusion of both phases of the trial there was no more evidence to be received.

Importantly, after this statement was made by the trial judge, Hale filed an affidavit of disqualification with this Court seeking to have Judge Ambrose removed from the case. See, Application to Disqualify Richard Ambrose, Case No. 05-AP69, filed on July 8, 2005. On July 11, 2005, this Court denied Hale's request and Judge Ambrose was allowed to remain on the case. Thus, because this Court has previously determined that Judge Ambrose was fit to remain on this case, it cannot be said that the same record supports Hale appellate claim that Judge Ambrose was biased. Moreover, Judge Ambrose's lack of bias was demonstrated by his opinion explaining why the aggravating circumstance outweighed the mitigating factors. This opinion was a thoughtful, thorough explanation of his decision. Nothing about the opinion evidences any bias on the part of Judge Ambrose.

Accordingly, this Court should reject Hale's fourteenth proposition of law.

PROPOSITION OF LAW NO. XV: IT IS CONSTITUTIONAL ERROR FOR THE TRIAL COURT TO CONSIDER VICTIM IMPACT EVIDENCE IN CAPITAL SENTENCING IN THE FORM OF OPINIONS BY THE VICTIM'S FAMILY MEMBERS ABOUT THE DEFENDANT'S CHARACTER AND THE OFFENSE. U.S. CONST. AMENDS. VIII AND XIV.

In Hale's fifteenth proposition of law he argues that the trial court allowed impermissible victim impact evidence. This alleged impermissible victim impact evidence consisted 1) a member of the victim's family called Hale a "heartless, ruthless person," (tr. 4227) and two members of the victim's family briefly criticized the Hale's defense. (Tr. 4228, 4230-4231) Trial counsel did not object to this testimony. In reviewing this claim, it is important to note that this brief victim testimony was not presented to the jury. Rather, this testimony was presented after the trial court went on the record at sentencing to explain why it believed the aggravating circumstance outweighed the mitigating factors.

This unobjected-to victim impact evidence does not amount to plain error. In a similar situation, this Court found no impermissible victim-impact evidence when the victim's family called the actions of a capital defendant, "despicable violent crime that was an ultimate act of a bully." *State v. Thomas*, 97 Ohio St.3d 309, 2002 -Ohio- 6624 at ¶ 111.

More importantly, Hale cannot meet his burden to establish prejudice. *State v. Fautenberry* (1995), 72 Ohio St.3d 435 at 439. Herein, to obtain a vacation of his death sentence, Hale must point to some indication that the trier of fact was "influenced by or considered" the victim-impact evidence. *Id.* To show prejudice, there must be some reasonable probability that the outcome would have been different. *State v. Reynolds* (1998), 80 Ohio St.3d 670, 679, 687 N.E.2d 1358. See, also, *State v. Soke* (1995), 105 Ohio App.3d 226, 253, 663 N.E.2d 986 (no prejudice from single, brief reference); *State v. Chinn*, 85 Ohio St.3d 548, 709 N.E.2d 1166, 1999 -Ohio- 288. Surely, the jury and the judge were not surprised to hear that the victim's family felt that Hale was a "heartless, ruthless person." Herein, the jury did not hear this brief victim testimony and the trial court had already explained its opinion prior to this testimony. Thus, Hale cannot establish prejudice and his fifteenth proposition should be denied.

PROPOSITION OF LAW NO. XVI: WHEN A TRIAL COURT WEIGHS MITIGATION EVIDENCE SEPARATELY, RELIES ON AN IMPROPER EXPERT OPINION, DIMINISHES RELEVANT MITIGATION, AND FAILS TO SPECIFY WHY THE AGGRAVATING FACTORS OUTWEIGH THE MITIGATING CIRCUMSTANCES, THE CAPITAL DEFENDANT IS DEPRIVED OF THE RIGHT TO INDIVIDUALIZED SENTENCING AND OF HIS LIBERTY INTEREST IN THE STATUTORY SENTENCING SCHEME IN VIOLATION OF RIGHTS AS GUARANTEED BY U.S. CONST. AMENDS. V, VIII AND XIV; OHIO CONST. ART. I, §§ 9 AND 16.

In this proposition of law, Hale raises various arguments that the trial court's opinion sentencing Hale to death was deficient. Herein, the trial court authored a thorough opinion explaining its verdict and any alleged error by the trial court is cured by this Court's independent

sentence review. Nothing in Hale's argument establishes any prejudice. Moreover, in *State v. Skatzes*, 104 Ohio St.3d 195, 2004 -Ohio- 6391 this Court stated as follows:

A trial court is not required to accept or assign weight to mitigating evidence. See *State v. Steffen* (1987), 31 Ohio St.3d 111, 31 OBR 273, 509 N.E.2d 383, paragraph two of the syllabus. Even if the trial court failed to explain its weighing process, inadequate explanations do not create reversible error. *State v. Fox* (1994), 69 Ohio St.3d 183, 190, 631 N.E.2d 124. Moreover, any error in the trial court's sentencing opinion can be cured by our independent review. See, e.g., *State v. Raglin* (1998), 83 Ohio St.3d 253, 257, 699 N.E.2d 482.

Skatzes at ¶ 176}. Thus, Hale's sixteenth proposition of law should be rejected.

PROPOSITION OF LAW NO. XVII: IMPOSITION OF COSTS ON AN INDIGENT DEFENDANT VIOLATES THE SPIRIT OF THE EIGHTH AMENDMENT. U.S. CONST. AMENDS. VIII AND XIV; OHIO CONST. ART. I, §§ 10 AND 16.

Under this proposition, Hale argues that the trial court erred in imposing costs on Hale. Notwithstanding the fact that nothing about this argument has any bearing on Hale's conviction or death sentence, Hale's argument lacks merit. In *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, this Court held that a trial court may assess court costs against an indigent defendant convicted of a felony as part of the sentence. Because there is no need for this Court to reconsider the holding in *White*, Hale's seventeenth proposition of law should be rejected.

PROPOSITION OF LAW NO. XVIII: DELANO HALE'S SENTENCE OF DEATH IS INAPPROPRIATE. HIS CHILDHOOD, THE CIRCUMSTANCES OF THE OFFENSE, WHICH INCLUDES INDUCEMENT, PROVOCATION, AND DURESS, REMORSE, THE LOVE AND SUPPORT OF HIS FAMILY, AND THE ABILITY TO SUCCESSFULLY ADJUST TO A PRISON SENTENCE, ALL FAVOR A LIFE SENTENCE. MOREOVER, DELANO'S DEATH SENTENCE IS NOT PROPORTIONATE WHEN COMPARED TO OTHER SIMILAR OFFENSES.

In this proposition, Hale presents no claim of error, rather he merely disagrees with the exercise of judgment of the trial court in finding the aggravating circumstance outweighed Hale's mitigation.

To begin, there was strong evidence of the aggravating circumstance. Aggravated robbery, or felony murder, serves as the statutory aggravating circumstance in this case. R.C. 2929.04(A)(7). The jury unanimously convicted defendant of the felony murder aggravating circumstance beyond a reasonable doubt. The State submitted compelling evidence of the aggravating circumstance, summarized during the State's argument in response to defendant's Crim. R. 29(A) motion:

[Y]ou need to look in total at the State's evidence, and here the trace evidence plays a strong role.

The blood on the headboard as testified to by Curtiss Jones, that the right area of the headboard, there was a spot or spots that he indicated only traveled a short distance. And when you couple that with the gunshot residue on the right hand of the victim, and when you couple that with the financial need of the defendant, we submit that there is a fact pattern that's possible based upon these points of evidence that this was an ambush, that the defendant was behind the area of the bed opened up, it would have been possible for the defendant to push the victim face down on the bed, in the area of the right – area of the headboard, draw his weapon, put it to the right of his head where we know the injuries to be, and make his demand for the wallet and property.

And as the victim began to resist, raising his hand to the area of where the gun was placed at his head, that's when Mr. Hale fired his first shot. And that explains the gunshot residue on the right hand of the victim.

We submit that that is more likely the scenario than the account given and claimed by the defendant in his own statement that as the two were facing each other with the victim grabbing both the wrists of the defendant, that the defendant, that the defendant freed his right wrist, reached into the bag of Mr. Green somewhere adjacent to the bed where he described Mr. Green having come to the foot of the bed, reaches into the bag, retrieves the gun and puts it somehow to the right of the head of Mr. Green.

And that he then has to make a claim of I'm not kidding, this gun is loaded. How in that instance does he know that the gun is loaded? He claims he checked it prior. He claims Green disagrees with him. Where is the logic in Mr. Green not realizing his own gun is loaded if it's as Mr. Hale claims.

Everything points to an ambush and the number of shots points to an execution. Simply because the property isn't capable of being demonstrated as being taken or used before the homicide was committed does not negate the possibility of the clear intent to cause death immediately and accomplish the robbery without resistance. That is not an impossibility under the law.

The law allows for ambush killing and taking of property as an aggravated robbery. And the defense hasn't cited any case law contra to that position. Everything that we've shown by circumstance, the phone contact, could lead one

to the inference that the defendant lured Mr. Green to his hotel room for the purpose of killing him.

And again, we return * * * to the choice of the cite[sic] of the murder. Obviously for Mr. Hale's statement, the two of them were at the Underground Railroad, so he claims. They could have had a singing audition there. There were any number of possible locations to hold a singing audition other than the hotel room. We submit that it's clear from the evidence that the defendant chose Room 260 as the place to have the, quote, unquote, singing audition.

In his sentencing memorandum, Hale minimized the State's evidence of the aggravating circumstance by arguing that "[t]he State had no eyewitnesses to contradict Mr. Hale's statement about the shooting." (Hale's sentencing memorandum at 4). While technically accurate, this statement omits the fact that defendant executed the only eyewitness to the robbery. Hale went on to argue:

Instead, the State relied upon three main pieces of evidence to establish that Mr. Hale committed the crimes alleged: (1) the location of the four shots in close proximity to one another in the head, (2) evidence of the falsity of Mr. Hale's statement about where he first met with the alleged victim in the hotel (a downstairs bar that was closed that evening) and (3) evidence that Mr. Hale was in need of money.

(Hale sentencing memorandum at 4). Within the same statement, defendant claimed "what kind of record producer has no money?," demonstrating a state of mind that he was focused on the victim's finances. The State also submitted forensic evidence that showed that defendant's account of the murder did not happen. Gun shot residue on the victim's right hand showed that the victim tried to resist, raising his hand to the area where defendant shot him. Blood recovered on the headboard showed that the victim's blood had only traveled a short distance from where the victim had been shot. All of this evidence contradicted defendant's statement that he killed the victim only after the defendant made an unwanted sexual advance at the area of the foot of the bed. Instead, the State's evidence proved beyond a reasonable doubt that Hale committed a cold and calculated execution / aggravated robbery.

Hale also made the implausible argument that “[t]his Court should not find itself convinced beyond a reasonable doubt that the aggravated robbery even exists.” (Hale’s sentencing memorandum at 7). Defendant cited to no authority—and the State knows of none—where a court could find some new, or auxiliary “reasonable doubt” that applies only to sentencing but not to conviction. The same evidence overcame Hale’s Crim. R. 29 motions and formed the basis of the jury’s verdict that the State proved the felony murder specification beyond reasonable doubt.

The State submits that this aggravating circumstance outweighs the mitigating factors offered by Hale. Again, the State proved that defendant killed the victim in an ambush-execution in order to rob the victim without any resistance. The evidence also proved that defendant spent approximately forty-two (42) hours concealing Mr. Green’s body and destroying the evidence of his crime. Hale cited to R.C. 2929.04(B)(1), offering as mitigation his own statement that he killed the victim because the victim “made an unwanted sexual advance towards Mr. Hale and refused to leave the hotel room.” (Hale’s sentencing memorandum at 7). Hale contended that at the time that he made his statement, he could not have known that the victim “had previously committed a sexually motivated assault at the time that Mr. Hale spoke with the police.” (Hale’s Memorandum at 7). Before he gave his statement, however, Hale learned from Euclid Police Detective James Baird during interrogation that the victim may have been bisexual. Hale possessed more than enough information to concoct his false self-defense statement about sexual contact with the victim.

Hale offered as his second theory of mitigation the fact that the victim’s unwanted sexual advances and refusal to leave his hotel room caused defendant such duress, coercion, or strong provocation that he murdered the victim, citing R.C. 2929.04(B)(2). (Hale’s sentencing

memorandum at 7). Hale also claimed past instances of childhood sexual abuse predisposed him to “overreact” to the victim’s sexual advances and murder the victim. (Hale’s memorandum at 8). However, during the sentencing hearing, Hale did not adduce any evidence that Hale possessed any diagnosable mental illness (ST. 276). Nor did Hale produce any evidence that “unwanted sexual advances” had caused him to act violently while under duress, coercion, or strong provocation at any other time in his life, including while incarcerated. Notably, Hale’s record of offenses while incarcerated belied his statement to police that he had fought off sexual attacks while imprisoned.

Trial evidence also flatly contradicted these theories of mitigation. In addition to substantial circumstantial evidence, discussed above, forensic evidence—including the gun shot residue on the victim’s hand and the blood on the headboard—demonstrated that the Hale coldly ambushed and executed the victim. The coroner’s pathologist, Dr. Andrea McCollom, testified that three of the four gunshot wounds to the head were contact gunshot wounds. She further defined contact gunshot wounds as being either muzzle to skin or within one inch of the site of injury. Hale also reloaded his weapon after the first two gun shot wounds to the head, and proceeded to inflict two more gun shot wounds to the head. This evidence proved execution, and flatly contradicted Hale’s account that he shot the victim at any distance. Even worse, Hale’s strong motive—his desperate financial situation—also demonstrated that he executed the victim to rob him, not because the victim made an “unwanted sexual advance.” The aggravating circumstance outweighs Hale’s first and second theories of mitigation.

Hale next argued that his expression of remorse and his family support serve as mitigating factors, citing to R.C. 2929.04(B)(7). (Hale’s sentencing memorandum at 8, 9). Again, the facts and circumstances of the crime cut strongly against any expression of remorse or

family support enjoyed by the Hale. Hale executed the victim with four shots to the head, any three of which would have immediately incapacitated the victim, and most likely killed the victim instantly. One of the shots did not penetrate the skull to directly injure the brain of Douglas Green, but its impact would have had a range of effects upon Green. Dr. McCollom could not opine on which order the shots were inflicted in, but was certain that even allowing for the non-penetrating “skip” shot as the first shot in order of delivery, any of the next three shots were immediately incapacitating because they penetrated the skull and traversed the base of the brain near the brain stem. Conversely, if the “skip” shot was not the first shot of the four, Dr. McCollom testified that there was absolutely no medical possibility of any voluntary movement by Douglas Green if the first shot inflicted was one of the three that penetrated his brain as described above. Therefore, under either scenario, there was no medical possibility that Green acted in the fashion described by Hale after the first two shots in whatever sequence.

Hale however claimed that after the first two shots, Hale had to reload the firearm to shoot the victim in the head two more times because Green was still coming after Hale.

Nor did Hale express any remorse at the time of his arrest. Hale’s actions show that he took money, he took credit cards, he took the SUV and he fled. He made a choice to use those credit cards to buy beer, cigarettes, and cleaning supplies to conceal the evidence of Green’s murder in room 260 of the Lake Erie Lodge. And he made a choice to live in Douglas Green’s car until he was apprehended. Hale’s friend Hull testified that the day he helped Hale move out of the hotel, they later went swimming at a city pool with Hull’s young nieces and nephews. Hull described Delano Hales’ behavior that day as completely normal. Hale also argued that his unsworn “statement demonstrated that remorse and sympathy to the victim’s family.” (Hale’s sentencing memorandum at 10). Hale’s actions, by contrast, in executing the victim, and the

lengths he went to conceal his crime and evade responsibility, showed no remorse whatsoever. The aggravating circumstances outweighs any mitigating factors that can be found in defendant's expression of remorse and family support.

Hale next argues that his "ability to function while incarcerated" served as a mitigating factor. (Hale's memorandum at 10). Hale cited to the testimony of Dr. Fabian, in which the witness opined that defendant was "unlikely to commit violent infractions if incarcerated for these offenses." (Hale sentencing memorandum at 10). Hale also touts as mitigation the "various drug treatment programs he had completed while in prison and even going on to counsel other inmates who were drug dependent." (Hale's sentencing memorandum at 10). Defendant's incarceration record mitigates nothing. Hale's prison accomplishments occurred prior to this crime. The execution of the victim overshadows any positive accomplishment that Hale might have had while previously incarcerated. If anything, this crime demonstrates Hale's own profound failure to rehabilitate himself, as well as his failure to learn anything from his previous prison experiences. Nothing positive was achieved from Hale's incarceration because his only notable accomplishment outside the prison walls was this horrible crime. Hale also produced no evidence whatsoever of taking any overt step towards his claimed post-incarceration goal of opening a youth or community counseling center. The aggravating circumstance far outweighs any mitigating factors that can be found in Hale's prison record.

Hale next asked the Court to consider residual doubt as a mitigating factor. (Hale's sentencing' memorandum at 11). Ohio law, however, precludes consideration of residual doubt as a mitigating factor. "Residual doubt is not an acceptable mitigating factor under R.C. 2929.04(B), since it is irrelevant to the issue of whether the defendant should be sentenced to death." *State v. McGuire* (1997), 80 Ohio St.3d 390, syllabus. "[R]esidual doubt is mentioned

nowhere in the statutory scheme, and further, cannot be considered under the catchall factor of R.C. 2929.04(B)(7).” *Id.*, at 403. The *McGuire* court explained that “* * * R.C. 2929.04(B)(7) * * * allows consideration only of those other factors relevant to the issue of whether the offender should be sentenced to death, that is, only those factors relating to the nature and circumstances of the offense, and the history, character, and background of the offender. *Id.*, citing *State v. Watson* (1991), 61 Ohio St.3d 1, 19, 572 N.E.2d 97; see also *State v. Cunningham*, 105 Ohio St.3d 197, 2004-Ohio-7007, at ¶ 112 (reaffirming the *McGuire* holding). Because Ohio Law flatly excludes any consideration of residual doubt as a mitigating factor, Hale’s argument lacks merit.

A sentence of death in this case would be proportionate to other cases. See *State v. Martin* (1985), 19 Ohio St.3d 122, 483 N.E.2d 1157 (robbery-murder); *State v. Williams* (1986), 23 Ohio St.3d 16, 490 N.E.2d 906 (robbery-murder); *State v. Scott* (1986), 26 Ohio St.3d 92, 497 N.E.2d 55 and *State v. Scott*, 92 Ohio St.3d 1, 2001-Ohio-148 (attempted robbery-murder); *State v. Tyler* (1990), 50 Ohio St.3d 24, 28, 553 N.E.2d 576 (robbery-murder); *State v. Jackson* (1991), 57 Ohio St.3d 29, 565 N.E.2d 549 (robbery-murder); *State v. Waddy* (1992), 63 Ohio St.3d 424, 588 N.E.2d 819 (kidnapping, aggravated burglary); *State v. Cook* (1992), 65 Ohio St.3d 516, 605 N.E.2d 70 (kidnapping, aggravated robbery); *State v. Allen* (1995), 73 Ohio St.3d 626, 653 N.E.2d 675 (robbery-murder); *State v. Otte* (1996), 74 Ohio St.3d 555, 660 N.E.2d 711 (felony-murder, multiple-murder); *State v. Spivey* (1998), 81 Ohio St.3d 405, 692 N.E.2d 151 (felony-murder); *State v. Cowans* (1999), 87 Ohio St.3d 68, 717 N.E.2d 298 (kidnapping, aggravated burglary, robbery-murder).

Hale argues that a death sentence in this case would not be proportionate, citing to numerous cases in which a sentence of death was not imposed. However, under Ohio law,

proportionality review only encompasses cases in which a sentence of death was actually imposed. In *State v. Steffen* (1987), 31 Ohio St.3d 11, 509 N.E.2d 383, the Ohio Supreme Court explained:

Appellant's nineteenth and twentieth propositions of law contend that the death penalty in this case is disproportionately severe compared to penalties imposed in similar cases in the same county and that proportionality review must encompass not only cases where the death penalty was sought, but cases where it could have been, but was not. We reject both arguments.

Id., at 122. Nor is proportionality review constitutionally required. *Id.* “No reviewing court need consider any case where the death penalty was sought but not obtained or where the death sentence could have been sought but was not.” *Id.*, at 123. Because Ohio law does not require any review of cases in which the death penalty could have been obtained, but was not, Hale’s citation of non-death penalty cases is inapposite. Hale’s argument that a sentence of death is disproportionate has no merit.

Consideration of mercy is unlawful when sentencing a capital defendant. Permitting a jury to consider mercy, which is not a mitigating factor and thus irrelevant to sentencing, would violate the well-established principle that the death penalty must not be administered in an arbitrary, capricious or unpredictable manner. *California v. Brown* (1987), 479 U.S. 538, 541, 107 S.Ct. 837, 839, 93 L.Ed.2d 934, 939; *Gregg v. Georgia* (1976), 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859; *Furman v. Georgia* (1972), 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346. “and mercy are not relevant sentencing criteria.” *State v. Jones*, 91 Ohio St.3d 335, 351, 744 N.E.2d 1163, 2001-Ohio-57, citing *State v. Taylor*, 78 Ohio St.3d at 30; *State v. Allen* (1995), 73 Ohio St.3d 626, 638, 653 N.E.2d 675, 687.

Thus, the record supports the trial court’s judgment imposing the death penalty on Hale. The trial judge as well as a jury of Hale’s peers found that the aggravating circumstance

outweighed the mitigating factors by proof beyond a reasonable doubt. Hale has not put forward any compelling reason why his death sentence should be vacated. Because the aggravating circumstance outweighs the mitigating factors by proof beyond a reasonable doubt, Ohio law, the facts of this case, and fundamental justice require a sentence of death.

Accordingly, this Court should reject Hale's eighteenth proposition of law.

PROPOSITION OF LAW NO. XIX: A CAPITAL DEFENDANT IS DENIED SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS TO A FAIR TRIAL AND A RELIABLE SENTENCE WHEN THE PROSECUTOR COMMITS ACTS OF MISCONDUCT DURING THE CAPITAL TRIAL. U.S. CONST. AMENDS. VI, VIII, XIV; OHIO CONST. ART. I, §§ 9, 16.

In his nineteenth proposition of law, Hale argues that he was denied a fair trial because of prosecutorial misconduct.

In order to succeed on a claim of prosecutorial misconduct, by virtue of remarks made by a prosecutor at trial, Brown must establish that (1) the remarks were improper and (2), that the remarks prejudicially affected the Brown's substantial rights. *State v. Smith* (1984), 14 Ohio St.3d 13, 14. Moreover, it is well-established that in prosecutorial misconduct analysis, the touchstone "is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78. In this regard, a trial will not be deemed unfair if, in the context of the entire trial, it appears clear beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments. *State v. Treesh* (2001), 90 Ohio St.3d 460, 464.

Hale has presented his arguments under various headings within this proposition. The State's arguments will correspond to Hale's headings.

A.1 Discovery

Hale first argues that the prosecutor committed misconduct by 1) not providing discovery in a timely manner and not providing written summaries of Hale's oral statements to law enforcement. This argument fails. As explained above, all of this information was provided to defense counsel. Thus, Hale cannot establish that the timing of the discovery or having discovery in written as opposed to oral form denied Hale a fair trial.

A.2 Voir Dire

Hale argues the prosecutor's questions during voir dire, the trial prosecutor planted prejudicial information in the jurors minds. Both sides were appropriately afforded wide latitude in voir dire and Hale cannot establish that anything said by the prosecutor amounted to misconduct or denied Hale a fair trial.

B.1 Laundry list

In Section B.1 Hale lists various evidence admitted at trial or questions asked by the prosecutor and claims they are examples of prosecutorial misconduct. For the vast majority of these example, trial counsel did not object.

B.2 Victim Impact

Hale next argues that the prosecutor committed misconduct by referencing "victim impact" evidence during opening and closing arguments. Counsel for both parties are afforded wide latitude during arguments. *State v. Brown* (1988), 38 Ohio St.3d 305, 317. Moreover, the references to the victim did not amount to misconduct. As this court noted regarding similar evidence in *State v. Lorraine* (1993), 66 Ohio St.3d 414, 420, 613 N.E.2d 212, "this evidence illustrated the nature and circumstances of the crimes. * * * *The victims cannot be separated from the crime.*" (Emphasis added.) See, also, *State v. Fautenberry* (1995), 72 Ohio St.3d 435,

440, 650 N.E.2d 878; *State v. Combs* (1991), 62 Ohio St.3d 278, 283, 581 N.E.2d 1071. Thus, this misconduct claim fails.

B.3 Inflammatory evidence

Hale argues the prosecutor committed misconduct by 1) asking Hale's sister on direct examination whether Hale said he possessed a gun prior to Green's murder, 2) asking Detective Baird about Hale's disposal of Green's shoulder bag, 3) asking Detective Grida about the "murder scene clean up kit", and 4) referring to Hale's confession as a "mea culpa confession of guilt." Nothing about these questions posed by the prosecutor amount to prosecutorial misconduct. Each of the cited questions referred to issues that were at issue at trial: whether Hale possessed his own gun in contradiction of Hale's claim that the murder weapon belonged to Green, the absence of Green's well known shoulder bag, Hale's clean-up of the crime scene to destroy forensic evidence, and Hale's confession. Merely litigating issues raised in a trial does not amount reversible misconduct by the State.

B.4 Unreliable Testimony

Hale further claims that the prosecutor's question to Detective Grida regarding how blood may have been transferred to the wall of Room 231 was asking for the witness to speculate and that this amounted to prosecutorial misconduct. Hale cannot establish prejudice from this question. Any testimony provided by Detective Grida regarding the blood on the wall was cumulative to the testimony of the State's blood splatter expert. Thus, Hale cannot establish that, but for this testimony the result of his trial would have been different.

B.5 Improper Rebuttal

During discovery, the State disclosed to the defense team the existence of a prior prosecution of Douglas Green for a claim of homosexual oral rape made by an adult

complainant, Johnny Smith, during a suit fitting. The State's prosecution of Green, although indicted as felony rape, was resolved as a misdemeanor offense. At trial, Hale called Johnny Smith to testify that Smith had been sexually assaulted by Douglas Green, the victim in this case. It was made an issue by the defense and during direct and cross-examination of Smith, the issue of the plea agreement entered into between Green and the State arose, putting Johnny Smith's credibility in issue. In response, the State called former assistant prosecutor Michael Nolan to testify regarding the circumstances of the plea bargain and the involvement of Johnny Smith in the formulation of the plea bargain, which Smith had denied. Thus, by responding to specific issues that arose on direct examination the State properly called former Assistant Prosecutor Michael Nolan as a rebuttal witness and did not commit prosecutorial misconduct.

B.6 Talking to the Victim's family

In section B.6 Hale argues the prosecutor committed misconduct by talking to the victim's family. The State is at a loss to see how talking to the victim's family amounts to misconduct. The jury surely was aware who the victim's family were. Hale cannot carry his burden to establish that contact between the prosecution and the victim's family denied Hale a fair trial.

B. 7 Closing Arguments

Hale next complains that the prosecutor committed misconduct, briefly citing to various moments at closing argument, some objected to and some not. Hale cannot carry his burden to establish error, plain or otherwise from these comments. "Prosecutors can urge the merits of their cause and legitimately argue that defense mitigation evidence is worthy of little or no weight." *State v. Wilson* (1996), 74 Ohio St.3d 381, 399. Moreover, "counsel for both parties are afforded wide latitude during closing argument." *State v. Brown* (1988), 38 Ohio St.3d 305, 317. The

prosecutor did not commit plain error, or any error, in making these arguments. Additionally, other than speculating, Hale cannot prove that any of these arguments actually prejudiced him.

B.8 Chilling Defense Counsel

In Section B.8 of his misconduct claim, Hale argues that the prosecutor committed misconduct by arguing that the defense team was trying to inject error into the trial and raising the issue of ineffective assistance of counsel. Nothing cited by Hale in this sections amounts to prosecutorial misconduct. Frankly, giving the fact that the State will be defending ineffective assistance claims for years to come, it is wise for the prosecutor to try to head off any error by trial counsel at the trial level.

C.1 Cross examination at Mitigation Phase

Hale argues that the prosecutor committed misconduct in his cross-examination of Hale's sister, Latisha Hale at the mitigation phase. As argued above, under the twelfth proposition of law, Hale opened the door to this testimony by putting this witness on the stand. Thus, because the cross-examination was proper, no misconduct occurred.

C.2 Closing arguments at Mitigation

Hale also contends that the trial prosecutor committed misconduct. "Prosecutors can urge the merits of their cause and legitimately argue that defense mitigation evidence is worthy of little or no weight." *State v. Wilson* (1996), 74 Ohio St.3d 381, 399. Moreover, the instances cited where the prosecutor argues against Hale's mitigation were permissible fair comment. *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, ¶ 183.

PROPOSITION OF LAW NO. XX: HALE'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN COUNSEL'S PERFORMANCE WAS DEFICIENT AND WAS THEREBY PREJUDICED. U.S. CONST. AMENDS. VI, XIV; OHIO CONST. ART. I, § 10.

Hale's twentieth proposition is a compilation of his ineffective assistance of counsel claims. Hale has chosen to not present any of these arguments as a stand-alone proposition of law. Rather, Hale's strategy is to throw all the ineffective claims to the wall to see if any stick. The State submits that none of these arguments, alone or together, satisfy the *Strickland* standard. In reviewing this proposition, it is important for this Court to be mindful, that Hale enjoyed the representation of an experience defense team. Hale was represented by Assistant Cuyahoga County Public Defender Kenneth Mullin, Assistant Cuyahoga County Public Defender David Magee, Attorney Jillian Davis, and, at times, Assistant Cuyahoga County Public Defender John Martin, the head of that office's appellate division. These were experienced attorneys who zealously represented Hale.

The standard to be applied to these claims is well-known. In order to succeed on an ineffective assistance of counsel claim, Hale must establish that counsel's performance was deficient and that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Accord, *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus.

As Hale has chosen to brief argue separate instances of alleged ineffectiveness, the State will respond to each argument under the headings presented by Hale in his brief.

B.1 Allowing Randy Tolen and Ramona Klein to sit on this jury.

The defense team was not ineffective for allowing Tolen and Klein to sit on this jury. As pointed out above, both of these jurors satisfied the *Wainwright v. Witt* [1985], 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 standard. During the individual voir dire, Tolen indicated that not

all murders warrant the death penalty and that the death penalty should be reserved for “very few selected people” whose homicides that meet the requirements (Tr. 425-437) Regarding juror Ramona Klein, Klein explained that she would follow the law and that she understood a murder alone does not make it a death penalty case (Tr. 449, 460) Klein further explained that she would consider mitigation evidence and all lesser levels of penalty. (Tr.461) Regarding the statement that sex offenders and serial murders deserve the death penalty, she clarified that in specific cases she would consider something lesser if appropriate and that the imposition of the death penalty varies from case to case. (Tr. 464.) Thus, counsel’s performance was not deficient for allowing these two jurors to sit. Moreover, Hale has not established prejudice by because these two jurors sat on this case.

B.2 Allowing service of a juror who knew the victim.

The defense team was not ineffective for juror Longstreet to sit on the jury. Nothing about the fact that the victim sang at this juror’s wedding resulted in that juror being biased. Indeed, on review, this Court must presume the tactical decisions of counsel are competent in light of the fact that trial counsel was able to personally address this african-american juror during voir dire. It is entirely possible that the defense team desired Longstreet as a juror for reasons of race, which in their analysis trumped any personal knowledge of Douglas Green. Thus, counsel’s performance was not deficient for allowing this juror to sit. Moreover, Hale has not established prejudice because of juror Longstreet.

B.3 Allowing juror Skrypek to sit on the jury

The defense team was not ineffective for allowing juror Skrypek to sit on this jury. Her answers at the individual voir dire demonstrated her open-mindedness regarding the death penalty, and a reluctance to easily agree that she could even perform the function of a capital

juror. Most telling was the fact that the State challenged her for cause based on the answers she gave in the individual voir dire. More importantly, Hale cannot establish prejudice based on his argument that Skrypek would not consider the lesser life options. Given the fact that this jury recommended the death penalty, juror Skrypek's views on various life sentence options cannot support an ineffective assistance claim.

B.4 Failure to further voir dire Jurors Johnson and Overton

Hale argues that trial counsel was ineffective for failing to ask more questions of these two jurors during the individual voir dire. This argument fails. Both jurors answered questions indicating that they would consider both the death penalty and the life options. (Tr. 1495, 1394) Thus their answer gave no indication of bias and counsel was not ineffective for failing to inquire further.

B.5 Failure to Rehab potential jurors

This Court has specifically held that counsel's failure to rehabilitate jurors does not render trial counsel ineffective, as counsel is in a better position to determine whether the jurors merited in-depth examination. *State v. Phillips* (1995), 74 Ohio St.3d 72, 85. Because voir dire is largely a matter of strategy and tactics, "[t]he reason for excusing these prospective jurors may have been readily apparent to those viewing the jurors as they answered the question." *State v. Keith* (1997), 79 Ohio St.3d 514, 521.

B.6 Misstatement of law

In subsection B.6, Hale argues that trial counsel was ineffective for incorrectly "correcting" Judge Ambrose. Hale's appellant's brief cites to one sentence where lead defense counsel stated that the jury is to consider the life options after rejected death. (Tr. 650) Hale fails to put this comment in context. It occurred during a break in the individual voir dire when

no potential juror was present. More importantly, the statement was never made to a juror and the court gave correct instructions to the jury. Thus, Hale cannot establish any prejudice.

B.7 Failure to object to misstatements during individual voir dire.

Hale argues that trial counsel was ineffective for failing to object to the trial court's misstatements during the individual voir dire. Any error by the court did not prejudice Hale and counsel was not ineffective for failing to object. The purpose of the individual voir dire was to probe the potential jurors views on the death penalty. No such error occurred during the jury instructions at either stage of the trial. Thus, Hale cannot establish prejudice from his failure to object.

B.8 Failure to question the jury about race.

The defense team was not ineffective for failing to inquire about race. Hale recognizes that the prosecutor asked questions about race. Hale cites to no statements by any potential jurors that would necessitate further inquiry on the issue and Hale presents no complaint regarding the racial composition of the jury. Importantly, Hale cites no authority requiring questioning on the issue of race and offers no prejudice for failing to inquire on this issue. Thus, counsel was not ineffective.

B.9 Failure to correct potential jurors regarding aggravating circumstances

Hale next argues trial counsel was ineffective for not "correcting" two jurors' statements regarding aggravating circumstances. Hale cites to two brief comments by the two jurors. Herein, counsel was not ineffective. As stated above, the purpose of the individual voir dire was to probe the individual jurors opinion about the death penalty. The individual voir dire is not a time to instruct the potential jurors on the law. That occurs during the jury instructions. Given the

correct instructions given to the jurors, Hale cannot establish any prejudice. Thus, trial counsel was not ineffective for failing to lecture the potential jurors on the state of the law.

C.1 Failure to seek funds for a crime scene expert

Trial counsel was not ineffective for failing to seek funds for a crime-scene expert. Hale's current counsel merely speculates that such an expert would have come to a different conclusion. Hale presents no information that a different crime scene expert would have provided to the jury. Moreover, it is well-settled that declining to call an expert and opting instead to rely on cross-examination does not amount to ineffective assistance of counsel. *State v. Nicholas* (1993), 66 Ohio St.3d 431, 436.

C.2 Insufficient investigation

Hale next argues that trial counsel was ineffective for failing to investigate the case further. This argument fails. Hale's appellate counsel fails to explain how Hale's trial counsel were deficient in their investigation or any prejudice from their investigation. Specifically, Hale does not offer any information, relevant to the defense, that would have been unearthed with more investigation by the trial team.

C.3 Failure to call Hale to testify

Hale cannot establish ineffectiveness of trial counsel based on the decision not to call Hale to testify. "Generally, counsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court." *State v. Hughbanks*, 99 Ohio St.3d 365, 2003-Ohio-4121, at ¶ 82 Failure to call a witness is not ineffective assistance of counsel if calling that witness opens the door to unfavorable testimony that would likely outweigh the value of any favorable testimony the witness might offer. *State v. Reynolds*, 148 Ohio App.3d 578, 2002-Ohio-3811, 774 N.E.2d 347, at ¶ 74. Here, Hale's experienced trial

counsel may have concluded that the better trial strategy was to attempt to discredit the State's evidence rather than for Hale to testify as to his version of the events. Thus, Hale cannot establish ineffective assistance of counsel.

C.4 Arguments unsupported by evidence

Hale next claims that trial counsel was ineffective for arguing that no robbery took place. This argument fails. The fact that trial counsel attacked all aspects of the State's case is not evidence of deficient performance. Moreover, Hale has not established any prejudice from this counsel's zealous performance.

C.5 Introduction of Hale's prior incarceration

In this claim, Hale argues that trial counsel was ineffective for introducing evidence of Hale's prior incarceration. This argument fails. It was defense counsel's strategy to claim that, because Hale had previously been incarcerated, he reacted violently to a sexual advance. Their theory of defense was to establish the subjective state of mind of Hale while reacting to what he claimed was an unwanted sexual advance. Once they saw that the State was not going to give them the easy use of the written confession of Hale (in large measure because the written statement referred to Hale's prior history of criminality, i.e. "after serving twelve long years in prison...") their next best option was to accept the fact that in order to preserve Hale's fifth amendment rights, they needed the jury to have the written confession of Hale, Defendant's Exhibit "A", in order to support their argument of subjective state of mind. While the State disagrees with this theory, it does recognize that the introduction of Hale's confession supports this theory. Thus, counsel's decision was strategic and will not form the basis of an ineffective claim.

C.6 Emphasizing Detective Baird's statement to Hale

Hale further second-guesses trial counsel for cross-examining Detective Baird on Baird's claim that he told Hale that Green might be bi-sexual. Hale's brief at 159. This subclaim lacks merit as trial counsel's decision to cross-examine Baird was a strategic choice of trial counsel. Even if the wisdom of this approach is debatable, "debatable trial tactics" do not constitute ineffective assistance of counsel. *State v. Phillips*, 74 Ohio St.3d 72, 85, 1995-Ohio-171.

C.7 Agreeing to review witness statements

In subclaim C.7 Hale claims that trial counsel was ineffective because they reviewed witness statements during trial as opposed to prior to trial. Hale's argument ignores the discovery that was provided and reviewed prior to trial. Moreover, defendant has not even attempted to allege any prejudice arising from *when* trial counsel reviewed statements.

C.8 Opening the door to excluded information

Hale next complains that trial counsel was ineffective for opening the door to excluded testimony, including the oral statements from Hale. This is a classic case of second-guessing that Strickland does not permit. The record is replete with instances where defense counsel explained their strategy to have the full oral statement provided to the jury. See Tr. 2625, 2643, 2835. Indeed, trial counsel specifically explained their strategy, "It was the point of his cross-examination was [sic] to put the complete statement in." (Tr. 2644) Thus, because this decision falls under trial strategy, trial counsel was not constitutionally ineffective.

D.1 Failure to voir dire prior to mitigation

Hale counsel was not ineffective for failing to request a voir dire of the jury prior to mitigation. This Court has held that a trial court need not voir dire the jury prior to the

mitigation phase. *State v. Sneed* (1992), 63 Ohio St.3d 3. Moreover, Hale fails to explain how this voir dire would have changed the outcome of his mitigation phase.

D.2 Failure to adequately prepare for mitigation

Hale argues that counsel was ineffective for not preparing for at mitigation. Hale speculates that there were other family members who could testify at mitigation and that Dr. Fabian's testimony was a "disaster." Hale's brief at 164-165. Hale cannot succeed on this claim because he does provide any specific information that could have and was not provided to the jury. Indeed, Hale does not explain how such testimony would have not been cumulative to the mitigation presented and how information would have changed the outcome. Dr. Fabian's answers were an effort to admit the undeniable negatives in Hale's background and personality in order to maintain Dr. Fabian's credibility with the jury. See: "*Death Penalty Mitigation and the Role of the Forensic Psychologist*", John M. Fabian, *Law and Psychology Review*, Spring 2003.

E.1 Failure to ask for a life-qualifying voir dire

Counsel was not ineffective for failing to life-qualify the jury during voir dire. This Court has held that there is no requirement for such a voir dire and that trial counsel is not ineffective for failing to ask for such a voir dire. *State v. Skatzes, supra*. Thus, counsel is not ineffective for failing to ask for something that is not required.

E. 2 Failure to object to Hale's absence

Counsel was not ineffective for failing to object to counsel presence at pretrials. The record fails to affirmatively establish that Hale was absent from the proceedings. More importantly, however, Hale cannot establish any prejudice from his not being a part of these pretrials. As this Court stated,

even if a defendant should have been present at a stage of the trial, '[e]rrors of constitutional dimension are not ipso facto prejudicial.' Prejudicial error exists only where 'a fair and just hearing [is] thwarted by [defendant's] absence.' "

State v. White (1998), 82 Ohio St.3d 16, 26 (Internal citations omitted.)

E.3 Failure to object to the Crim.R. 16 in camera review

Counsel was not ineffective for failing to object to the in camera review of witness statements. Nowhere in the record is there any indication that the trial court excluded the defense team from reviewing the statements to determine if any inconsistencies existed. Herein, the trial defense team was in possession of the witness statements and was free to argue the existence of any inconsistencies. Hale also cannot establish any prejudice under this claim.

E.4 Failure to object to the photographs.

Counsel was not ineffective for failing to object to the photographs. At trial the number and position of the bullet holes in the head were relevant. Indeed the wounds were relevant to determine the angle and distance in which the shots were fired. Thus, because these photos illustrated the coroner's testimony on cause of death and were relevant and probative of issues at trial the trial and their introduction outweighed any prejudicial impact. *State v. Goodwin* (1999), 84 Ohio St.3d 331, 342, 703 N.E.2d 1251; *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, at ¶ 88; *State v. Campbell*, 69 Ohio St.3d at 50, 630 N.E.2d 339; *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637, at ¶ 96-97. Thus, counsel was not ineffective for failing to object.

E.5 Failure to object to Curtiss Jones' testimony

Trial counsel was not ineffective for failing to object to the blood splatter testimony from Curtiss Jones. When Jones began his testimony regarding blood splatter evidence, defense counsel asked for the State to lay a foundation. The State then elicited detailed testimony

explaining Jones' blood splatter training. Specifically, Jones stated he 1) completed a 40-hour class by a forensic scientist and blood splatter expert from the Miami Dade crime lab, 2) completed a separate 8-hour training class on blood splatter evidence at the Henry Lee Institute of Forensic Science at the University of New Haven, 3) completed two blood splatter proficiency tests, 4) deals with blood evidence every day in his position with the coroner's office, and 5) three or four times he has testified regarding blood splatter evidence. (Tr. 2445-2447) Subsequent to this foundation being laid, the trial court allowed Jones to testify on blood splatter evidence and defense counsel did not object.

Jones had testified as an expert on this topic previous to this trial. Importantly, Jones received specific blood splatter training from different respected sources. Moreover, he successfully completed proficiency tests and had everyday experience on the subject. Thus, he was well qualified and Hale cannot establish ineffectiveness in the failure to object to Jones' testimony on blood splatter evidence

E.6 Failure to object to victim-impact evidence

Trial counsel was not ineffective for failing to object to the alleged victim-impact evidence. This testimony was not presented to the jury. Rather, the family members spoke after the jury made its decision and after the trial judge explained his decision. The final sentence was rendered before the presentation of victim impact witnesses. Thus, trial counsel cannot establish deficient performance or prejudice.

E. 7 Failure to object to prosecutorial misconduct

As argued under the nineteenth proposition of law, none of the complained of examples of alleged prosecutorial misconduct are meritorious. Thus, defense counsel was not ineffective for failing to object.

E. 8 Failure to object to instructional errors

The lone instruction that Hale complains counsel did not object to has been found to be a correct instruction by this Court. *State v. Cunningham*, 105 Ohio St.3d 197, 2004 -Ohio- 7007 at ¶ 71. Thus, trial counsel was not ineffective.

E.9 Failure to object to the non-capital sentences

The State has conceded that Hale needs to be resentenced on the non capital offenses.

E.10 Failure to object to the imposition of costs

Trial counsel was not ineffective in this regard. In *State v. White*, 103 Ohio St.3d 580, 817 N.E.2d 393, 2004-Ohio-5989, this Court held that a trial court may assess court costs against an indigent defendant convicted of a felony as part of the sentence. Because the costs were permissible, trial counsel was not ineffective for failing to object. Nor can Hale establish that the trial court would not have imposed costs if trial counsel would have objected.

To conclude, none of Hale arguments, taken individually or in sum, amount to a meritorious ineffective assistance of counsel claim. Simply put, Hale cannot carry his burden to establish that any of this complained-of actions of trial counsel reached the level of deficient performance that actually prejudiced Hale. Accordingly, this Court should reject Hale's twentieth proposition of law.

PROPOSITION OF LAW NO. XXI: THE CUMULATIVE EFFECT OF TRIAL ERROR RENDERS A CAPITAL DEFENDANT'S TRIAL UNFAIR AND HIS SENTENCE ARBITRARY AND UNRELIABLE. U.S. CONST. AMENDS. VI, XIV; OHIO CONST. ART. I, §§ 5, 16.

For his twenty-first proposition, he argues that, the cumulative effect of his claimed errors entitled him to a new trial. The State, after responding to each of Hale's claimed errors, asserts that none of these errors, individually or cumulatively warrant a new trial. *State v. Jackson*, 107 Ohio St.3d 300, 2006 -Ohio- 1.

PROPOSITION OF LAW NO. XXII: OHIO'S DEATH PENALTY LAW IS UNCONSTITUTIONAL. OHIO REV. CODE ANN. §§ 2903.01, 2929.02, 2929.022, 2929.023, 2929.03, 2929.04, AND 2929.05 DO NOT MEET THE PRESCRIBED CONSTITUTIONAL REQUIREMENTS AND ARE UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED TO DELANO HALE. U.S. CONST. AMENDS. V, VI, VIII, AND XIV; OHIO CONST. ART. I, §§ 2, 9, 10, AND 16. FURTHER, OHIO'S DEATH PENALTY STATUTE VIOLATES THE UNITED STATES' OBLIGATIONS UNDER INTERNATIONAL LAW.

Finally, in his twenty-second proposition of law, Hale argues that Ohio's death penalty is unconstitutional. This court has repeatedly rejected any arguments that Ohio's death penalty scheme is unconstitutional. See, e.g., *State v. McNeill*, 83 Ohio St.3d 438, 453, 1998-Ohio-293; *State v. Gumm*, 73 Ohio St.3d 413, 417, 1995-Ohio-24; *State v. Evans* (1992), 63 Ohio St.3d 231, 253; *State v. Mills* (1992), 62 Ohio St.3d 357; *State v. Coleman* (1989), 45 Ohio St.3d 298, 308; *State v. Poindexter* (1988), 36 Ohio St.3d 1; *State v. Zuern* (1987), 32 Ohio St.3d 56; *State v. Buell* (1986), 22 Ohio St.3d 124, 138; *State v. Jenkins* (1984), 15 Ohio St.3d 164. Accordingly, this Court should reject Hale's twenty-second proposition of law.

CONCLUSION

Accordingly, for the foregoing reasons, the State of Ohio respectfully asks this Court to affirm the judgment of the court below.

Respectfully submitted

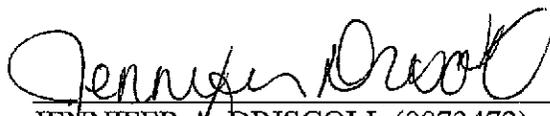
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SERVICE

A copy of the foregoing Merit Brief of Appellee has been mailed this 12th day of January 2007, to Kelly L. Culsahw, Ruth L. Tkacz and Kimberly S. Rigby, Office of the Ohio Public Defender, 8 East Long Street, 116th Floor, Columbus, Ohio 43215.



Assistant Prosecuting Attorney

Crim. R. Rule 16

Baldwin's Ohio Revised Code Annotated Currentness
Rules of Criminal Procedure (Refs & Annos)
➔ **Crim R 16 Discovery and inspection**

(A) Demand for discovery

Upon written request each party shall forthwith provide the discovery herein allowed. Motions for discovery shall certify that demand for discovery has been made and the discovery has not been provided.

(B) Disclosure of evidence by the prosecuting attorney*(1) Information subject to disclosure.*

(a) Statement of defendant or co-defendant. Upon motion of the defendant, the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any of the following which are available to, or within the possession, custody, or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney:

- (i) Relevant written or recorded statements made by the defendant or co-defendant, or copies thereof;
- (ii) Written summaries of any oral statement, or copies thereof, made by the defendant or co-defendant to a prosecuting attorney or any law enforcement officer;
- (iii) Recorded testimony of the defendant or co-defendant before a grand jury.

(b) Defendant's prior record. Upon motion of the defendant the court shall order the prosecuting attorney to furnish defendant a copy of defendant's prior criminal record, which is available to or within the possession, custody or control of the state.

(c) Documents and tangible objects. Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, available to or within the possession, custody or control of the state, and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant.

(d) Reports of examination and tests. Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, or copies thereof, available to or within the possession, custody or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney.

(e) Witness names and addresses; record. Upon motion of the defendant, the court shall order the prosecuting attorney to furnish to the defendant a written list of the names and addresses of all witnesses whom the prosecuting attorney intends to call at trial, together with any record of prior

felony convictions of any such witness, which record is within the knowledge of the prosecuting attorney. Names and addresses of witnesses shall not be subject to disclosure if the prosecuting attorney certifies to the court that to do so may subject the witness or others to physical or substantial economic harm or coercion. Where a motion for discovery of the names and addresses of witnesses has been made by a defendant, the prosecuting attorney may move the court to perpetuate the testimony of such witnesses. In a hearing before the court, in which hearing the defendant shall have the right of cross-examination. A record of the witness' testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state.

(f) Disclosure of evidence favorable to defendant. Upon motion of the defendant before trial the court shall order the prosecuting attorney to disclose to counsel for the defendant all evidence, known or which may become known to the prosecuting attorney, favorable to the defendant and material either to guilt or punishment. The certification and the perpetuation provisions of subsection (B)(1)(e) apply to this subsection.

(g) In camera inspection of witness' statement. Upon completion of a witness' direct examination at trial, the court on motion of the defendant shall conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

If the court determines that inconsistencies exist, the statement shall be given to the defense attorney for use in cross-examination of the witness as to the inconsistencies.

If the court determines that inconsistencies do not exist the statement shall not be given to the defense attorney and he shall not be permitted to cross-examine or comment thereon.

Whenever the defense attorney is not given the entire statement, it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) *Information not subject to disclosure.* Except as provided in subsections (B)(1)(a), (b), (d), (f), and (g), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the prosecuting attorney or his agents in connection with the investigation or prosecution of the case, or of statements made by witnesses or prospective witnesses to state agents.

(3) *Grand jury transcripts.* The discovery or inspection of recorded proceedings of a grand jury shall be governed by Rule 6(E) and subsection (B)(1)(a) of this rule.

(4) *Witness list; no comment.* The fact that a witness' name is on a list furnished under subsections (B)(1)(b) and (f), and that such witness is not called shall not be commented upon at the trial.

(C) Disclosure of evidence by the defendant

(1) *Information subject to disclosure.*

(a) Documents and tangible objects. If on request or motion the defendant obtains discovery under subsection (B)(1)(c), the court shall, upon motion of the prosecuting attorney order the defendant to permit the prosecuting attorney to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, available to or within the possession, custody or control of the defendant and which the defendant intends to introduce in evidence at the trial.

(b) Reports of examinations and tests. If on request or motion the defendant obtains discovery under subsection (B)(1)(d), the court shall, upon motion of the prosecuting attorney, order the defendant to permit the prosecuting attorney to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, available to or within the possession or control of the defendant, and which the defendant intends to introduce in evidence at the trial, or which were prepared by a witness whom the defendant intends to call at the trial, when such results or reports relate to his testimony.

(c) Witness names and addresses. If on request or motion the defendant obtains discovery under subsection (B)(1)(e), the court shall, upon motion of the prosecuting attorney, order the defendant to furnish the prosecuting attorney a list of the names and addresses of the witnesses he intends to call at the trial. Where a motion for discovery of the names and addresses of witnesses has been made by the prosecuting attorney, the defendant may move the court to perpetuate the testimony of such witnesses in a hearing before the court in which hearing the prosecuting attorney shall have the right of cross-examination. A record of the witness' testimony shall be made and shall be admissible at trial as part of the defendant's case in chief in the event the witness has become unavailable through no fault of the defendant.

(d) In camera inspection of witness' statement. Upon completion of the direct examination, at trial, of a witness other than the defendant, the court on motion of the prosecuting attorney shall conduct an in camera inspection of the witness' written or recorded statement obtained by the defense attorney or his agents with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

If the court determines that inconsistencies exist the statement shall be given to the prosecuting attorney for use in cross-examination of the witness as to the inconsistencies.

If the court determines that inconsistencies do not exist the statement shall not be given to the prosecuting attorney, and he shall not be permitted to cross-examine or comment thereon.

Whenever the prosecuting attorney is not given the entire statement it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) *Information not subject to disclosure.* Except as provided in subsections (C)(1)(b) and (d), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the defense attorney or his agents in connection with the investigation or defense of the case, or of statements made by witnesses or prospective witnesses to the defense attorney or his agents.

(3) *Witness list; no comment.* The fact that a witness' name is on a list furnished under subsection (C)(1)(c), and that the witness is not called shall not be commented upon at the trial.

(D) Continuing duty to disclose

If, subsequent to compliance with a request or order pursuant to this rule, and prior to or during trial, a party discovers additional matter which would have been subject to discovery or inspection under the original request or order, he shall promptly make such matter available for discovery or inspection, or notify the other party or his attorney or the court of the existence of the additional matter, in order to allow the court to modify its previous order, or to allow the other party to make an appropriate request for additional discovery or inspection.

(E) Regulation of discovery

(1) *Protective orders.* Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by a party the court may permit a party to make such showing, or part of such showing, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such a showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) *Time, place and manner of discovery and inspection.* An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection permitted, and may prescribe such terms and conditions as are just.

(3) *Failure to comply.* If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

(F) Time of motions

A defendant shall make his motion for discovery within twenty-one days after arraignment or seven days before the date of trial, whichever is earlier, or at such reasonable time later as the court may permit. The prosecuting attorney shall make his motion for discovery within seven days after defendant obtains discovery or three days before trial, whichever is earlier. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon showing of cause why such motion would be in the interest of justice

Crim. R. Rule 29

Baldwin's Ohio Revised Code Annotated Currentness
Rules of Criminal Procedure

→Crim R 29 Motion for acquittal**(A) Motion for judgment of acquittal**

The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

(B) Reservation of decision on motion

If a motion for a judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict, or after it returns a verdict of guilty, or after it is discharged without having returned a verdict.

(C) Motion after verdict or discharge of jury

If a jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within fourteen days after the jury is discharged or within such further time as the court may fix during the fourteen day period. If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal. It shall not be a prerequisite to the making of such motion that a similar motion has been made prior to the submission of the case to the jury.

R.C. § 2929.03

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure

* Chapter 2929. Penalties and Sentencing (Refs & Annos)

* Penalties for Murder

→2929.03 Imposing sentence for a capital offense; procedures; proof of relevant factors; alternative sentences

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose sentence on the offender as follows:

(1) Except as provided in division (A)(2) of this section, the trial court shall impose one of the following sentences on the offender:

(a) Life imprisonment without parole;

(b) Life imprisonment with parole eligibility after serving twenty years of imprisonment;

(c) Life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(d) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard. The instruction to the jury shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but the instruction shall not mention the penalty that may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 of the Revised Code, the trial court shall impose sentence on the offender as follows:

(a) Except as provided in division (C)(1)(b) of this section, the trial court shall impose one of the following sentences on the offender:

(i) Life imprisonment without parole;

(ii) Life imprisonment with parole eligibility after serving twenty years of imprisonment;

(iii) Life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(iv) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(2)(a) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be one of the following:

(i) Except as provided in division (C)(2)(a)(ii) of this section, the penalty to be imposed on the offender shall be death, life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(ii) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the penalty to be imposed on the offender shall be death or life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(b) A penalty imposed pursuant to division (C)(2)(a)(i) or (ii) of this section shall be determined pursuant to divisions (D) and (E) of this section and shall be determined by one of the following:

(i) By the panel of three judges that tried the offender upon the offender's waiver of the right to trial by jury;

(ii) By the trial jury and the trial judge, if the offender was tried by jury.

(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require

a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or the offender's counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, the offender is subject to cross-examination only if the offender consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to one of the following:

(a) Except as provided in division (D)(2)(b) of this section, to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, to life imprisonment without parole.

If the trial jury recommends that the offender be sentenced to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the sentence is a sentence of life imprisonment without parole imposed under division (D)(2)(b) of this section, the sentence shall be

served pursuant to section 2971.03 of the Revised Code. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Except as provided in division (D)(3)(b) of this section, one of the following:

(i) Life Imprisonment without parole;

(ii) Life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(iii) Life imprisonment with parole eligibility after serving thirty full years of Imprisonment.

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Except as provided in division (E)(2) of this section, one of the following:

(a) Life imprisonment without parole;

(b) Life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(c) Life Imprisonment with parole eligibility after serving thirty full years of imprisonment.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. For cases in which a sentence of death is imposed for an offense committed before January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. For cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G)(1) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed before January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

(2) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed on or after January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the supreme court.

(2004 H 184, eff. 3-23-05; 1996 H 180, eff. 1-1-97; 1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1-96; 1995 S 4, eff. 9-21-95; 1981 S 1, eff. 10-19-81; 1972 H 511)

R.C. § 2929.04

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure

Chapter 2929. Penalties and Sentencing (Refs & Annos)

Penalties for Murder

→2929.04 Criteria for imposing death or imprisonment for a capital offense

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

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

(2) The offense was committed for hire.

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

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

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

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

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

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

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

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

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

(10) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit terrorism.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

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

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

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

(4) The youth of the offender;

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

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

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender but shall be weighed pursuant to divisions (D) (2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

(2002 S 184, eff. 5-15-02; 1998 S 193, eff. 12-29-98; 1997 H 151, eff. 9-16-97; 1997 S 32, eff. 8-6-97; 1981 S 1, eff. 10-19-81; 1972 H 511)