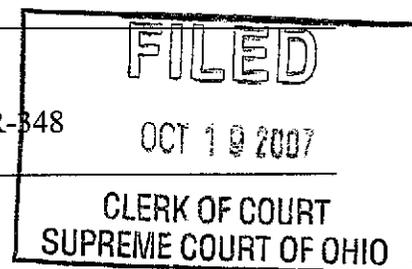


In the Supreme Court of Ohio

State of Ohio, :
Appellee, : Case No. 06-1126
-vs- :
Jason Dean, : **Death Penalty Case**
Appellant. :

On Appeal From The Court Of
Common Pleas Of Clark County, Case No. 05-CR-348

Reply Brief Of Appellant Jason Dean



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Preface

Appellant Jason Dean now replies to the arguments advanced in the State's brief. Dean has chosen not to reply to several claims to avoid mere reargument of his merit brief. Dean stands on his merit brief where no reply is made. No concessions for any claims should be implied from the absence of a reply by Dean.

Proposition of Law No. I

A defendant has a constitutional right to waive counsel and represent himself when the waiver is made knowingly, intelligently and voluntarily. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 10, 16.

The State's response regarding Jason Dean's request to represent himself is meritless. The State contends that Dean did not voluntarily assert this right. (State's brief at 32). However, Dean knowingly, intelligently and voluntarily waived his right to counsel and asserted his right to represent himself under Faretta v. California, 422 U.S. 806, 835 (1975).

Dean told the trial court that he wanted to represent himself at his capital trial. (Vol. 6, T.p. 1157; Vol. 7, T.p. 1337; Vol. 8, T.p. 1355). Dean stated that he did not have confidence in his defense attorneys. (Vol. 5, T.p. 753; Vol. 6, T.p. 1156). Defense counsel told the court they did not believe they could effectively represent Dean; based on the trial court's belief that counsel had behaved unethically in attempting to recuse the court. (See Vol. 5, T.p. 753). Defense counsel's comments to the court thus supported Dean's lack of confidence in them.

During a colloquy the trial court asked Dean if his decision to represent himself was voluntary. (Vol. 7, T.p. 1340). Dean told the trial court that this was a voluntary decision. Id. The trial court also asked Dean if any threats or promises had been made to him causing him to want to represent himself. (Vol. 7, T.p. 1340). Dean responded that there had not been any threats or promises made to him. Id. Dean then made the comment that his decision was made under duress. (Vol. 7, T.p. 1341).

The following day, Dean told the trial court that he still wanted to represent himself. (Vol. 8, T.p. 1355). Additionally, Dean retracted his comment about duress. (Vol. 8, T.p. 1355, 1363). Despite Dean's assertions, the trial court found that Dean's waiver of counsel was not voluntary due to the statement about duress. (Vol. 8, T.p. 1361). This decision by the trial court

was made despite Dean's retraction of the comment about duress — and his statement that his decision was voluntary — and Dean's assertion that no promises or threats prompted his decision. (Vol. 7, T.p. 1340; Vol. 8, T.p. 1355, 1363). There is nothing in the record demonstrating that any statements by Dean were coerced or induced.

To Dean's detriment, the trial court erred by not finding his waiver of counsel was voluntary. Dean's comment about duress, later retracted, does not affect the voluntariness of his waiver. Duress pertains to "a threat of harm made to compel a person to do something against his or her will or judgment." (Black's Law Dictionary 542 (8th ed. 2004)). This Court held in State v. Bedford, 39 Ohio St. 3d 122, 133, 529 N.E.2d 913, 924 (1988) that "duress generally indicates that some compulsion by threat exists."

Similarly, the Sixth Circuit held when giving up a constitutional right, the decision must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." Garner v. Mitchell, 2007 U.S. App. LEXIS 21705 *32-33, 2007 FED App. 0370P **10-11 (6th Cir. Sept. 11, 2007) (quoting Moran v. Burbine, 475 U.S. 412, 421 (1986) (other citations omitted)). The Sixth Circuit also quoted from Colorado v. Connelly, 479 U.S. 157, 167 (1986) for the holding by the Supreme Court "that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary.'" Garner, 2007 U.S. App. LEXIS at *35 n.5, 2007 FED App. 0370P at **11.

Duress was not present in this case regarding Dean's choice to waive his right to counsel and represent himself. Nothing in the record indicates there were any threats, coercion, or intimidation made against Dean that forced him to assert this right. To the contrary, testimony in the record establishes that, in response to questions from the trial judge, Dean stated that he made this decision voluntarily without any pressure from anyone. (Vol. 7, T.p. 1340). Dean was

unhappy with his counsel's representation; which could not have been a surprise to anyone, given the tension between the court and defense counsel. (See Proposition of Law III.)

But this did not render Dean's decision to waive counsel involuntary under constitutional standards. Compare Moran, 475 U.S. at 471; Connelly, 479 U.S. at 167. Dean's discomfort with his defense counsel, and not any threat, coercion, or promise resulted in his voluntary decision to waive counsel and represent himself. It is doubtful that any criminal defendant who is pleased with his defense counsel would seek to represent himself. Only a defendant who is feeling the internal "duress" of being dissatisfied with his counsel would assert the right to represent himself under Faretta. But a defendant's displeasure with his counsel alone has no bearing on whether the decision to waive counsel is voluntary under the Sixth Amendment. Under the trial court's view of duress, no assertion of this right would ever be voluntary — because every assertion of this right is prompted, in some measure, by the accused's internalized "duress" of being dissatisfied with his appointed counsel's performance.

The State's reliance on State v. Taylor, 98 Ohio St. 3d 27, 781 N.E.2d 72 (2002) is also misplaced as that case supports Dean's claim. In Taylor this Court held "[t]o establish an effective waiver of counsel, the trial court must determine whether the defendant fully understands and intelligently relinquishes his right to counsel." Id. at 35, 787 N.E.2d at 80. (citation omitted). The record in Dean's case demonstrates that his waiver of counsel and assertion of his right to self-representation met this test for an effective waiver. (Vol. 7, T.p.1338-40).

And it is irrelevant whether Dean's decision to represent himself would have been a good choice. Id. at 35, 781 N.E.2d at 81. This Court's decision in Taylor makes clear that the Constitution does not protect the accused from unwise choices that are made voluntarily. See id.

Accord State v. Berry, 80 Ohio St. 3d 371, 384-85, 686 N.E.2d 1097, 1107 (1997) (quoting Adams v. McCann, 317 U.S. 269, 280 (1942) (“Our law generally refuses to imprison a man in his privileges and call it the Constitution.”)) (internal quotation marks omitted).

By analogy, State v. Bays, 87 Ohio St. 3d 15, 716 N.E.2d 1126 (1999) illustrates the trial court’s error in precluding Dean’s assertion of his Sixth Amendment right under Faretta. In Bays the issue of the voluntariness of the defendant’s waiver of his Sixth Amendment jury trial right was raised. In a colloquy with the trial judge, Bays had stated that he sought to waive his right to a jury trial because “I don’t know which way to go really. With the jury, I don’t figure it was a fair pick.” Id. at 18, 716 N.E.2d at 1134. When asked by the trial judge whether he was making this decision voluntarily, Bays responded that he was. Id.

Despite stating that he was unsure and his decision was based on believing the jury to be unfair, this Court held that Bays voluntarily waived his right to a jury trial. Id. at 19, 716 N.E.2d at 1134. The internal duress that Bays felt over the putative fairness of the jury pool was irrelevant to this Court’s conclusion that his waiver had been asserted voluntarily. Bays chose to waive his jury trial right, his choice was neither coerced nor induced, and that was enough to make his waiver voluntary under the Sixth Amendment. See id.

Likewise, Dean’s expressed statement of “duress” (which he retracted) simply reflected his own doubts about defense counsels’ ability or willingness to represent him effectively. But here, as in Bays, no one tried to coerce or induce Dean to waive his Sixth Amendment right to counsel. A constitutional waiver is voluntary so long as it is not coerced or induced. This is true for the waiver of the Fifth Amendment right against self-incrimination, Connelly, 479 U.S. at 167, and it is true for the waiver of the Sixth Amendment right to jury trial. Bays, 87 Ohio St. 3d

at 19, 716 N.E.2d at 1134. It must also be true for the waiver of Dean's Sixth Amendment right to counsel. Accordingly, Dean's request to represent himself was voluntary.

Dean's oral motion to waive counsel and represent himself was knowing, intelligent, and contrary to the trial court's decision, voluntary. The trial court committed constitutional error when it denied Dean's request to represent himself. See Faretta, 422 U.S. at 832-34. Dean's convictions and sentence should be vacated and this case must be remanded for a new trial.

Proposition of Law No. II

A trial court errs in denying counsel's motion to withdraw when a ethical conflict exists in violation of the defendant's right to effective assistance of counsel. U.S. Const. amends. VI, VIII, XIV; Ohio Const. art. I, §§ 10, 16.

The State argues that the conflict of interest was "no more than a distraction by his counsel, where their attention was temporarily focused on their own dispute with the trial Court." (State's brief at 34.) Based on the record in this case, it would be naïve to think that defense counsel were able to focus their attention on Dean's representation, given the hostile environment in which this case took place. (See Proposition of Law III.) Dean's counsel asserted numerous times that they could not effectively represent Dean because they felt a chilling effect from the court's charge of unethical behavior. (Vol. 6, T.p.1162, 1165.)

Contrary to the State's position, this was also not a temporary situation that was "fully played out on the record" and defense counsel "got over it and moved on." (State's brief at 34-35.) The trial judge sentenced Dean to death on June 2, 2006. After Dean's trial had concluded, the trial judge issued his direct criminal contempt order fining defense counsel which shows that this issue was present throughout, and even after the conclusion of, the trial. (June 13, 2006, Entry, Appellant's Appendix to Merit Brief at A-54.) In this order the trial judge wrote that defense counsel had a dual motive for seeking the removal of the judge. The second part of this motive was the trial judge's assertion that defense counsel had "personal revulsion of the Court, dating back to when this Judge was an assistant prosecuting attorney." (Id. at A-59.)

The court of appeals reversed this contempt decision by the trial judge. (Id. at A-71.) State v. Dean, No. 2002CA61/2006CA63 (2nd Dist. Ct. App. March 9, 2007). The court of appeals determined that the trial court's "impartiality was impaired" and as support cited to the trial judge's response to the affidavit of disqualification filed by defense counsel where the judge

wrote that “it appears, in part, to be a personal attack on my integrity and competence as a Judge.” (Id. at A-80).

Three days after the court of appeals decision, the trial judge filed another entry citing trial counsel for indirect criminal contempt. (Id. at A-83). Obviously, the trial judge had not “moved on” as the State claims.

Defense counsel could not just “get over it” when the trial judge repeatedly informed them that he would deal with them and this contempt issue later: “[T]he Court will take that matter [concerns about defense counsel and the manner in which they’re operating in this courtroom] up at a later time; but I do assure the parties that that matter will be taken up at a later time. As the Court has indicated, those are very serious allegations; and they will be addressed by this Court, preferably at the conclusion of this case.” (Vol. 4, T.p. 746.) “And the only promise I made to you [defense counsel] was that it would be addressed at the conclusion of this case.” (Vol. 5, T.p. 756.) “As far as the conflict that arose between [the defense] attorneys and the Court, that’s something that the Court has, obviously, addressed with them; and the Court indicated that it would put that aside for now and that we would deal with that at a later time.” (Vol. 6, T.p. 1158.)

When discussing the various options available to the trial judge for dealing with this issue, the trial judge said one option would be to “stand up right now and tell your attorneys, ‘Nothing’s going to happen to you.’ And I’m not willing to do that.” (Vol. 7, T.p. 1328.) The trial judge further stated “I don’t know if something’s going to happen to them or not, but I’m not going to tell them — I’m not going to give them false assurances that nothing’s going to happen because I just don’t know.” Id.

Defense counsel made it clear that due to the trial judge stating he would deal with them and the ethical issue after the trial, a chilling effect on their representation of Dean was created. (Vol. 6, T.p. 1162.) Defense counsel also let the trial judge know that this issue not being addressed until the trial was completed meant they would be thinking about that situation and not Dean's case. (Vol. 6, T.p. 1165.) The trial judge's response was that he "didn't put [defense counsel] in that situation" and it was not the trial judge's "responsibility to hold your hand." Id.

Dean was the party who suffered from the trial court denying defense counsel's motion to withdraw. His representation was negatively affected by the overwhelming tension and conflict between counsel and the trial court. The trial court forced admitted ineffective counsel on Dean. This Court should reverse Dean's convictions and sentence and remand the case for a new trial.

Proposition of Law No. III

A capital defendant's conviction and death sentence are constitutionally infirm if the trial court is biased against the defendant during the trial proceedings. U.S. Const. amends. V, VI, VIII, XIV; Ohio Const. art. I, §§ 2, 5, 9, 16.

The State argues that any bias on the part of the trial court was against Dean's attorneys, not against Dean personally. That is likely true, but it misses the point. Bias against a party's attorneys is equally detrimental. This Court has acknowledged as much, characterizing judicial bias as "a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants *or his attorney*." See State ex rel. Pratt v. Weygandt, 164 Ohio St. 463, syl. para. 4, 132 N.E.2d 191 (1956) (emphasis added). Moreover, common sense tells us that if the trial judge holds feelings of ill will towards a party's counsel, and acts on those feelings or allows them to show before the jury, the party will bear the brunt of the harm just as if the bias were against him.

Furthermore, in the instant case, the trial judge did not merely harbor hostile feelings toward Dean's counsel. He had also prejudged the evidence against him. This is not a mere supposition. The trial judge said just this in his entry denying Dean's motion to recuse him. (Entry Denying Defendant's Motion to Disqualify, filed May 5, 2006.)

The State puts much weight on the fact that Dean stated on the record, "I don't feel in any way that you're biased against me, have a vendetta against me." (Vol. 8, T.p. 1356.) First, as discussed above, the fact that the trial court was not biased against Dean himself, is irrelevant. Second, this statement is taken out of context. The statement was made the day after Dean asked to represent himself. During that initial conversation, Dean stated that he would like the record to reflect that he was asking to represent himself "under duress due to you continually not

addressing that issue of Mr. Butz’s and Mr. Mayhall’s alleged unethical actions.”¹ (Vol. 7, T.p. 1341.) At that point, the trial court told Dean that his statement caused a problem “because I’m not going to accept a waiver of counsel if you’re telling me it’s under duress . . . [b]ecause you’re essentially saying that the Court’s forcing you to do this, and I’m not going to put myself in that position.” (Id.) When the court reconvened the following day to continue the discussion, the judge raised the issue of duress again—expressing concern about allowing Dean to waive his right to an attorney, stating “the way it appears, at least by your statement, is I’m indirectly forcing you to do that.” (Vol. 8, T.p. 1355.) Dean quickly tried to explain away what he had said. He was intent upon representing himself because of the tension between the court and his attorneys. Dean responded that it was not the case that he was acting under duress and that he said it was so that it would be in the record for his appeal. (Id. at 1355-56.) It was then that he said “I don’t feel in any way that you’re biased against me, prejudiced against me, have a vendetta against me.” (Id. at 1356.)

Dean expressed from the time he first raised the issue of representing himself that it was because he felt his attorneys could not be effective due to their relationship with the court. In fact, before he asked to represent himself, he asked the court to resolve the issue of the accusations that were hanging over their heads. He informed that court that he felt his attorneys were hindered “by the allegations you made that they made some unethical procedure, whatever it was that they did, something they done wrong.” (Vol. 7, T.p. 1323.) He said that he felt he could only get a fair trial if the issue was addressed. (Id.) It was only when the court said that it would not resolve the situation until the conclusion of the trial that Dean sought to represent

¹ The State used this exact quote in its brief in addressing Dean’s argument that he should have been allowed to represent himself. (See Proposition of Law No. I). The State used this quote to argue that the trial court was right to deny Dean’s request because it was not voluntary. The State is trying to have it both ways—using the same conversation to make two opposing points.

himself. (Id. at 1330.) It was clear that Dean felt the effects of the tensions between the court and his attorneys. That was why he wished to represent himself. That was the “duress” to which he referred. (See Proposition of Law No. I.) And the fact that the judge would not allow him to represent himself because he said it was under duress is the reason he made the statement that he did not feel the court was biased against him.

The State also argues that “nowhere in that extensive record does Dean or his counsel claim bias by the trial Court.” (State’s brief at 36.) The State may be correct that neither Dean nor his counsel ever used that word. But, it is clear from the record that Dean believed the court was biased against his attorneys. Again, that is why Dean asked the court to resolve the situation before proceeding further, why he sought to represent himself, why his trial attorneys filed an affidavit of disqualification, and why trial counsel sought to withdraw from representation.

The fact that Judge Rastatter refused to recuse himself is not indicative of a lack of bias. Judge Rastatter has a history of refusing to recuse himself from cases, even where that is clearly the appropriate action to be taken. For example, in one case he testified as a material witness for the prosecution at a suppression hearing, acknowledged holding ex parte conversations with the prosecutor about his testimony, and was a close personal friend of the prosecutor. In re Disqualification of Rastatter, 113 Ohio St. 3d 1218, 1219-20, 863 N.E.2d 623, 623-624 (2006). Even under those circumstances, he refused to step aside. Id. at 1219; 863 N.E.2d at 623. The defense filed an affidavit of disqualification with this Court, and it was granted. Id. at 1219-20; 863 N.E.2d at 623-24.

Ultimately, the State makes only two points in response to Dean’s claim of judicial bias. First, that Dean’s words contradict his claim. Second, that “the record regarding the [sic] Dean’s unsuccessful motion for mistrial over the Kaboos polygraph comment reveals the opposite of

judicial bias.” (State’s brief at 36.) Nowhere does Dean claim that the trial court’s handling of this matter was evidence of bias. The State goes on to say that the court heard argument and did research before ruling on the motion. The fact that the trial court handled this one motion without apparent bias hardly contradicts Dean’s argument. Moreover, this was a crucial motion requiring careful deliberation. The State’s key witness, whose credibility was to be severely brought into question by the defense, had just blurted out to the jury that she had passed three polygraph tests, thus giving them reason to believe her testimony. (See Proposition of Law No. IX.) Any trial court should consider such a matter carefully. The fact that the trial court took time to consider this motion, does not prove that it was not biased against Dean or his attorneys.

The trial court exhibited clear bias against Dean’s counsel, and thus against Dean. It inhibited counsel’s ability to effectively represent Dean. Dean was deprived of his right to a fair trial, effective representation, due process, and a reliable determination of his guilt and punishment in a capital case as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 2, 5, 9, and 16 of the Ohio Constitution. For these reasons, Dean’s convictions should be overturned.

Proposition of Law No. IV

It is error for a trial court to: 1) grant the State's motion for certification of a witness under Ohio R. Crim. P. 16(B)(1)(e) when sufficient evidence has not been presented warranting the certification; and 2) preside over the trial after hearing the certification hearing in violation of this Court's decision in State v. Gillard, 40 Ohio St. 3d 226, 533 N.E.2d 272 (1988). U.S. Const. amends. VI, VIII, XIV; Ohio Const. art. I, §§ 10, 16.

The trial court erred in granting the State's Certification that it not be required to divulge the address of Crystal Kaboos to Dean's counsel due to threats lodged at Kaboos. (4/24/06 Certification Hearing, T.p. 8-9.) The State concedes in its brief that the threats did not emanate from Dean. (State's brief at p. 37, 39-40.) These threats came from his co-defendant, Joshua Wade. (5/4/06, T.p. 21-22). If anyone's access to the State's principal witness was to be restricted, it should have been Wade and not Dean.

In State v. Gillard, 40 Ohio St. 3d 226, 229, 533 N.E.2d 272, 276 (1988) this Court held that information revealed at a certification hearing can be "more inflammatory and harder to disregard than the sort of information heard by the judge who issues an arrest warrant or presides over a motion hearing."

At the certification hearing the State put on the record that Kaboos had been threatened and "that people [were] going to get her." (4/26/06 Certification Hearing, T.p. 6-7). At this hearing the State told the trial court that the concern was about Dean and his co-defendant's family and friends gaining access to Kaboos. Id. at 7. By the State lumping Dean and Wade together with the threats to Kaboos, the trial court heard inflammatory information related to Dean — even though the threat came from Wade and not Dean. (5/4/06, T.p. 21-22.) This was the sort of information the Gillard court warned about. Gillard at 229, 533 N.E.2d at 276.

The right to confront one's accusers is a fundamental right under the Sixth and Fourteenth Amendments. Pointer v. Texas, 380 U.S. 400, 403 (1965). In Barajas v. Wise, 481

F.3d 734 (9th Cir. 2007), the Ninth Circuit Court of Appeals dealt with a factual scenario that was similar to Dean's. In Barajas, the state omitted revealing the name and address of a confidential informant in its pre-trial list of witnesses. Id. at 737. The state asserted that the confidential informant's identity would be disclosed to the defendant one week prior to the trial date and the informant would be available for the defense to interview. Id. As justification for not disclosing the informant's identity and address earlier, the state declared that disclosure would "subject [the informant] to risks and danger." Id. Upon learning the informant's name and interviewing her for thirty minutes, the defendant sought a listing of, among other things, the informant's current and past addresses. The state refused to disclose these addresses. Id. at 737-38. The trial court and subsequent state courts on appeal held that the state did not have to disclose information about the informant. Id. at 738.

In habeas the federal district court reversed the state court decision finding that the state was required to disclose the confidential informant's current and former addresses. Id. The district court held that a "witness' name and address open countless avenues of in-court examination and out-of-court investigation." Id. at 739 (citing Smith v. Illinois, 390 U.S. 129, 131 (1968)).

The Ninth Circuit affirmed the district court and held that an informant's identity should be disclosed when it is relevant and helpful to the defense and must be disclosed when the informant is a participant in the events that are part of the case. Id. at 739 (citing Roviaro v. United States, 353 U.S. 53, 60-61 (1957); United States v. Hernandez, 608 F.2d 741, 744-45 (9th Cir. 1979)).

Similarly, Kaboos testified that she was present for one of the crimes and had first-hand knowledge about the other crimes. (Vol. 11, T.p. 2103-05). She was a material witness. Having access to her address would have been helpful to the defense.

In the case at bar, the State should have been required to disclose Crystal Kaboos' address. According to the State, the threats Kaboos received were made by the co-defendant and not by Dean. (5/4/06, T.p. 22). The trial court erred in granting the certification. Moreover, the trial court erred in remaining on this case once it heard the claims from the State at the certification hearing. Dean's rights to due process and a fair trial were violated and his case should be reversed and remanded for a new trial.

Proposition of Law No. V

A trial court errs when a defendant is shackled without a hearing and in violation of his right to the presumption of innocence. U.S. Const. amends. VI, VIII, XIV; Ohio Const. art. I, §§ 10, 16.

Dean's presumption of innocence was compromised when he was shackled during his trial because the shackles were overly restrictive and visible to jurors.

In Holbrook v. Flynn, 475 U.S. 560 (1986) the Supreme Court decided a case involving the in-court restraint of the defendant. In Holbrook, the issue was the presence of uniformed state troopers seated in the courtroom for security purposes. Id. at 562. Flynn, the defendant, was convicted of robbery. On appeal he raised the issue that the presence of these four uniformed troopers in the courtroom caused the jurors to view Flynn in a negative light. Id.

The Supreme Court held that the presence of these uniformed troopers in the courtroom did not prejudice Flynn. Id. at 570. In so holding, the Supreme Court stated “[w]hile shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant’s trial need not be interpreted as a sign that he is particularly dangerous or culpable.” Id. at 569. The Supreme Court held that the officers could be there for any number of reasons and the jurors would not know whether their presence had anything to do with the defendant. Id.

The Supreme Court cited to its previous decision in Estelle v. Williams, 425 U.S. 501 (1976) as support. Holbrook, 475 U.S. at 568. In Estelle the defendant was forced to wear prison clothing before the jury. The court held that the prison attire was a “constant reminder of the accused’s condition implicit in such distinctive, identifiable attire may affect a juror’s judgment.” Estelle, 425 U.S. at 504-05. The same reasoning applies to a defendant who is visibly shackled before the jury, as Dean was. (Vol. 1, T.p. 3-4, 21.)

In Illinois v. Allen, 397 U.S. 337 (1970) the Supreme Court held that defendants at trial could be restrained; however, this was proper under different circumstances than in Dean's case. In Allen, the defendant was disruptive, contumacious, defiant and directed abusive language at the trial judge during the trial proceedings. Id. at 339-343. When Allen's trial began he insisted upon representing himself and the trial judge allowed this request. Id. at 339. At one point Allen became disobedient to the court, and after being warned that another outburst would result in Allen's removal from the courtroom, Allen continued his disobedience and was removed. Id. at 340. Later in the day, Allen appeared before the trial judge stating that he wished to be present for the trial. He was informed that if he conducted himself properly that he could remain in the courtroom. Id. When he was back in the courtroom, Allen did not conduct himself with decorum and was again removed from the courtroom. Id. at 341. Later, Allen assured the trial court another time that he would conduct himself properly in the courtroom and he was allowed to return and was present for the remainder of the trial. Id.

On appeal, Allen asserted the issue that he was unconstitutionally excluded from his trial. Id. at 341-342. Ultimately this case reached the Supreme Court. The court stated that when a defendant defies dignity, order and decorum in a courtroom, the defendant may be dealt with accordingly. Id. at 343-344. The court held that "there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly." Id.

The Supreme Court stated, however, that even when a defendant's unruly behavior necessitates physical restraints, that action still

arouses a feeling that no person should be tried while shackled and gagged except as a last resort. Not only is it possible that the sight of shackles and gags

might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.

Id. at 344.

In contrast to the defendant in Allen, Dean did not behave inappropriately in the courtroom whatsoever, yet he was shackled during the entirety of the trial. (Vol. 1, T.p. 22.) Dean was shackled based purely on his criminal record — without consideration that he was appropriate and respectful of the trial court during all of his courtroom appearances. (April 3, 2006 Entry.)

Dean was unconstitutionally shackled during his capital murder trial. The State claims that Dean's attempt to escape from the county jail required shackling him in the courtroom. (State's brief at 43). However, less prejudicial measures than shackles were not explored such as the presence of an additional deputy, or deputies, which would not have aroused suspicion by the jury. Holbrook, 475 U.S. at 569. Unlike in the jail where many inmates must be watched, the attention of the deputies in the courtroom would have been focused solely on Dean, which would have provided adequate security. The deputies would have been able to manage Dean given their training as well as his diminutive physical stature. (5/5/06, T.p. 17.)

At the very least the trial court should have taken measures to insure that the jurors did not see Dean wearing shackles. For example, Dean could have been shackled when transported into and out of the courtroom outside of the jury's presence.

Additionally, an evidentiary hearing was not conducted where testimony from witnesses as well as assurances from Dean himself that he would conduct himself properly would have been on the record before the trial court. Dean could have been informed that if he failed to

behave appropriately during the trial that he would then face the consequence of being shackled or removed if he became unruly. Allen, 397 U.S. at 341-42.

The trial court did not give Dean any chance to prove that his behavior in the courtroom would not warrant shackling or other such measures. Dean was not afforded an evidentiary hearing on this issue. Dean's right to a fair trial with the presumption of innocence was violated by his being shackled during his trial in view of the jurors. This Court should reverse Dean's conviction and sentence and remand the case for a new trial.

Proposition of Law No. VI

The accused's right to a fair trial is violated when the trial court denies reasonable requests by the accused for continuances in a capital case. U.S. Const. amends. V, VI, VIII, XIV; Ohio Const. art. I, §§ 9, 10, 16.

In this claim Dean alleges, inter alia, a violation of his right to a fair trial as the result of the trial court's refusal to grant a continuance to secure the culpability phase testimony of Dean's brother, Mark Dean. (Vol. 13, T.p. 2542-43.) Dean also asserts that the trial court erred to his prejudice when it refused to grant a continuance to secure the testimony of his mother in the penalty phase. (Vol. 14, T.p. 2733-35.) The State answers, in part, that "it might have been that Dean's brother and mother were seeking to manipulate the proceedings with their simultaneous unavailability" (State's brief at 45.)

The State's claim of manipulation by Dean's brother and mother regarding their unavailability as witnesses should not be well-taken. The State is incorrect to suggest that those potential witnesses acted in concert to manipulate or delay the proceedings because they were not simultaneously unavailable. A continuance was requested by Dean to secure his brother as witness in the culpability phase, not the mitigation phase. Conversely, Dean wished to call his mother only as a mitigation phase witness. Thus, the separate purposes and timing of those two potential witnesses belies the State's suggestion of "simultaneous unavailability." (See *id.*)

The State, moreover, merely insinuates that those two potential witnesses were absent due to some improper motive to delay or manipulate this case. There is no evidence or any finding made by the trial court to support the State's bare insinuation. Indeed, the trial court recognized that Dean's mother had health problems that caused her absence in the mitigation phase. (See Vol. 14, T.p. 2734.) And while Mark Dean's voluntary behavior caused his absence, the record does not support the State's claim of manipulation. In other words, there is

no evidence or finding by the trial court that Mark Dean got drunk in order to delay the trial. This Court has consistently rejected unsupported claims raised by capital defendants as speculative. See e.g. State v. Frazier, 115 Ohio St. 3d 139, ___, 873 N.E.2d 1263, ___, No. 2005-1316, 2007 Ohio 5048, *P108, 2007 Ohio LEXIS 2519, **32 (Oct. 10, 2007). (“Frazier’s claim that Kennedy might have additional contact with Tim, his wife, or Bill Gangway, is totally speculative.”); State v. Mundt, 115 Ohio St. 3d 22, 46, 873 N.E.2d 828, ___ (2007) (“Mundt’s contention that being depicted as a struggling special-education student would have humanized him is rank speculation.”). Likewise, the State’s unsupported claim of manipulation by these two potential witnesses should be rejected out-of-hand as mere speculation.

Dean suffered prejudice because the trial court would not accommodate brief delays to secure these two witnesses. Mark Dean bore a close resemblance to Jason Dean — which caused two of the State’s witnesses to confuse Jason with Mark. (See Vol. 6, T.p. 1223; Vol. 9, T.p. 1699, 1708.) Mark Dean’s testimony would have supported assertions of reasonable doubt based on a potential misidentification of Jason Dean. Of course, not all of the State’s witnesses confused Jason with Mark. But given the lack of credible eyewitness testimony to place Jason Dean at the scene of the Dibert Avenue crimes, see proposition of law XI, the jury could have had reasonable doubts of guilt based on the cumulative flaws in the State’s proof if it had considered the potential misidentification of Dean with his brother.

The prejudice to Dean in the mitigation phase was manifest. Dean lost the opportunity to present testimony from his own mother — the person who knew his history and background best — and the person for whom this death sentence would have a great emotional impact. See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Rev. ed. Feb. 2003), Guidelines 10.11(F)(1) and (4). Without the continuance, Dean was left

with only the testimony of a family friend, Sarah Bennett, in the mitigation phase to inform the jury of Dean's history and background. See O.R.C. § 2929.04(B). Only two other witnesses testified in the penalty phase. One witness, Ronald Vincent, was the clerk of the court. The other was Noel Kaech, a county public defender who represented Dean's codefendant, Josh Wade. Neither of those mitigation witnesses provided any information about Jason Dean's history and background. Bennett's testimony, moreover, comprises but four pages of transcript, including cross-examination. (Vol. 14, T.p. 2769-72.) Dean was thus prejudiced when the trial court refused a continuance to secure the mitigation phase testimony of his mother.

Certainly, Dean was not entitled to lengthy or indefinite delays to secure the testimonies of his mother and his brother. Nevertheless, given the interests at stake the trial court should have accommodated Dean with at least a brief delay to afford him with the opportunity to present those witnesses. See Powell v. Collins, 332 F.3d 376, 397 (6th Cir. 2003). Jason Dean is entitled to a new trial, or alternatively, a new mitigation phase under O.R.C. § 2929.06(B).

Proposition of Law No. VIII

The introduction of a defendant's letters and phone calls with no probative value but which are highly prejudicial violates a capital defendant's right to a fair trial, due process, a reliable determination of guilt, and a reliable sentencing determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and of Article I, §§ 9, 10, and 16 of the Ohio Constitution.

Any probative value of the phone calls and letters introduced at Dean's trial was outweighed by their prejudicial effect.

The State avers that Dean did not claim at trial that the jail calls and letters were inadmissible and that the claim is therefore waived. This is simply not true. Trial counsel objected on the record to specific letters and recordings, or in some instances, portions of them.² This issue is preserved.

However, should this court find that proper objections were not made at trial, Dean still prevails on a plain error standard. This Court has held that in capital cases, the 403(A) standard is more stringent. Evidence is not admissible in a capital case unless the probative value outweighs any potential danger of prejudice to the defendant. State v. Morales, 32 Ohio St. 3d 252, 257-58, 513 N.E.2d 267, 273 (1987). Dean's letters and phone calls from jail did little more than paint him as a despicable person. They were of very little probative value, and the prejudicial effect was high.

The State argues that "nowhere in any of Dean's statements does he claim a lack of involvement in the murder." (State's brief at 48.) That has nothing to do with their admissibility under Evidence Rule 403(A). What is important is that nowhere in any of his statements does he admit to his involvement in the murder. The letters and phone calls provided virtually no

² A detailed list of objections with transcript citations is found at Appellant's brief at 59.

evidence in support of the State's case. Dean does not admit to the crime. He makes only the most general statements about making mistakes, living life in the streets, and the like. But, the letters and recordings are rife with expletives, misogynistic statements, racist remarks, and examples of Dean's disregard for societal norms. Accordingly, they played inappropriately upon the jury's fears and emotions—something disallowed by Evidence Rule 403(A).

This evidence was an attempt by the State to paint Dean as a dangerous person of bad character. The jury could not have listened to Dean's words without having their emotions flared. The jury would have been left with feelings of disgust and fear for Dean, while not being provided with any additional facts from this evidence to support a conviction.

Furthermore, this evidence was not presented briefly. The presentation of this evidence takes up a total of fifty-four transcript pages (Vol. 12, T.p. 2364-73, 2405-50), and the jury had these materials before them during deliberations. This Court has considered the length of time for presenting this type of evidence as a factor in whether or not it was error to admit it. See State v. Wilson, 74 Ohio St. 3d 381, 391, 659 N.E.2d 292, 304 (1996).

Inexplicably, the State argues that Dean cannot prevail on this claim because he has not demonstrated that the evidence was not relevant. (State's brief at p. 49.) This is not the basis of Dean's claim. Dean's claim is that the evidence was inadmissible under Evidence Rule 403(A) because the probative value did not outweigh the prejudicial effect of the evidence.

Dean's letters and phone calls from jail were not probative of his guilty, and they were unfairly prejudicial rendering his trial fundamentally unfair. Dean was deprived of his rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 9, 10, and 16 of the Ohio Constitution. For these reasons, Dean's convictions should be overturned, or, at a minimum, his death sentence vacated.

Proposition of Law No. IX

A trial court errs when it 1) fails to grant a mistrial after prejudicial testimony about a polygraph examination is given and 2) gives an improper curative instruction in violation of the defendant's right to due process and a fair trial. U.S. Const. amends. VIII, XIV; Ohio Const. art. I, §§ 10, 16.

The trial court abused its discretion by failing to grant Dean a mistrial once State's witness Crystal Kaboos testified that she had taken and passed polygraph tests. Kaboos stated "I've taken three polygraph tests to prove that I was telling the truth." (Vol. 11, T.p. 2149.) The State claims that Dean failed to explain how the trial court mishandled the matter of Kaboos' improper testimony. (State's brief at 51.) However, the answer is obvious — the trial court erred by not granting Dean's motion for a mistrial.

The trial court gave the jury a curative instruction after Kaboos' prejudicial testimony. Contained in this instruction was the statement "although she said she took three polygraph exams to prove she was telling the truth, she never indicated one way or the other what the results were." (Vol. 11, T.p. 2179-2181.) This statement is rebutted by the trial judge's own words to the attorneys when he said "[the jurors] may tend to fall back on the information they received that she **passed** a polygraph exam." (Vol. 11, T.p. 2167, emphasis added.) This testimony from Kaboos, with its clear implication that she was truthful, improperly bolstered her testimony against Dean. The impact of the jurors believing Kaboos took and passed three polygraphs means that any inconsistencies between her testimony at trial and her prior statements would be resolved in her favor. In other words, whatever explanation Kaboos came up with for the inconsistencies would be believed by the jury — since the jury would believe that she was truthful according to a scientific machine, the polygraph.

According to the trial court, Kaboos was a material witness for the State. (Vol. 11, T.p. 2166.) Her testimony was the basis for Dean's conviction on many, if not all, of the charges against him. Dean was denied a fair trial by the jury being led to believe that she passed three polygraph exams; with the implication being that her credibility and truthfulness were not to be questioned.

Contrary to the State's assertion, Dean did not state that a rule must be enacted whereby whenever an important State's witness utters "14 words about the witness's own polygraph testing" a mistrial must be declared. (State's brief at 52.) Dean's position is that the issue must be looked at on a case-by-case basis.

The trial court deemed Kaboos "a significant witness who had information about all three incidents for which the defendant has been charged with crimes, the April 10 incident, the April 12, and the April 13." (Vol. 11, T.p. 2166.) As one example of Kaboos' significance, she was the only witness who put Dean at the scene of the Dibert Avenue shooting on April 12. (Vol. 11, T.p. 2164.) The other witnesses to the Dibert Avenue shooting, Shanta Chilton and Devon Williams, testified to only seeing one person in the driver's seat of the car who shot out of the passenger side window. (Vol. 9, T.p. 1803, 1816; Vol. 10, T.p. 2161.) Neither Chilton's nor Williams' credibility was in question. However, Kaboos' testimony about passing three polygraphs gave her the appearance of being more credible to the jury. The only answer in this case was for the trial court to grant a mistrial — because Kaboos' credibility was improperly bolstered — and Kaboos was a key witness.

This Court has set forth the requirements for the admissibility of the results of a polygraph examination in State v. Souel, 53 Ohio St. 2d 123, 372 N.E.2d 1318 (1978). In Souel, safeguards required for admitting a polygraph examination include, among other requirements,

that all parties sign a written stipulation regarding the defendant's submission to the test and the admission of the results. Id. at 132, 372 N.E.2d at 1323. Neither this safeguard, nor any of the others, were present in Dean's case.

A case decided prior to Souel on a related issue was State v. Smith, 113 Ohio App. 461, 178 N.E.2d 605 (6th Dist. Ct. App. 1960). In Smith, the issue was whether testimony presented on cross-examination that the accused had taken a polygraph examination, but did not know the results of the exam, was prejudicial. Id. at 465. The court of appeals ruled that it was error to admit this testimony because "the jury would gain the impression from this testimony that the accused had taken the test and failed to tell the truth." Id.

The same reasoning holds true in Dean's case. The polygraph examinations in Souel and Smith involved the accused but the same improper implication to the jury about the witness's credibility resulted. Kaboos' testimony on cross-examination that she took three polygraph tests gave the impression that she passed the tests, thus bolstering her credibility. The polygraph tests were inadmissible and her testimony created prejudice to Dean. Kaboos' testimony supplied details and accounts of these crimes that the State did not have without her and were contradicted by other witnesses. (Vol. 9, T.p. 1803, 1816; Vol. 10, T.p. 2061.) Her testimony about the polygraph tests, and the implication that she passed them, would have the effect of making her more believable in the face of contrary testimony.

When prejudicial evidence is admitted resulting in an unfair trial, the Due Process clause grants a remedy. Payne v. Tennessee, 501 U.S. 808, 825 (1991) (citing Darden v. Wainwright, 477 U.S. 168, 179-83 (1986)). In Dean's case the remedy was a mistrial and the trial court erred in denying that motion. This Court should reverse Dean's conviction and sentence and remand the case for a new trial.

Proposition of Law No. XI

When the State fails to introduce sufficient evidence of particular charges, a resulting conviction deprives a capital defendant of substantive and procedural due process. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 9, 16.

The evidence that Dean was present at the Dibert Avenue shootings is insufficient. Contrary to what the State has said, Devon Williams did not testify that he saw Dean driving the car from which the shots were fired. Williams testified that he saw one occupant in the vehicle. (Vol. 10, T.p. 2045.) He then said, “but when I seen him in here the first time I came, I knew it was him. It was—that was the guy that shot it. It wasn’t him. It was the other guy. It was the younger one. That’s—that’s who shot in my house, shot up my car.” (Id. at 2045-46.) He also testified that the shooter had sideburns. (Id.) It was Josh Wade whom Williams saw in the car, not Jason Dean. On cross-examination, Williams reiterated this point:

Q: And you saw one person in the car; right?

A: Yes, sir.

Q: He was the driver.

A: Yes.

Q: Shooting out the passenger side.

A: Yeah.

Q: Wasn’t this man?

A: Nope.

Q: Guy you saw had sideburns.

A: Yeah.

Q: And you saw him at an earlier time when you testified in the matter of State of Ohio versus Josh Wade; right?

A: Yeah.

(Id. at 2061).

Not a single eyewitness placed Dean at that scene. The only testimony that put him at the scene was that of Crystal Kaboos and Jason Mans, who was not even present at the crime scene. These two witnesses were severely lacking in credibility. Kaboos changed her story about this incident several times. (Vol. 11, T.p. 2104.) Moreover, her testimony simply did not make

sense when juxtaposed with the testimony of the eyewitnesses. Shanta Chilton and Devon Williams both testified that they saw only a driver, no one else in the car. (Vol. 10, T.p. 1803, 1816, 2045.) To believe Kaboos, you would have to believe that they both missed not one, but two, passengers, as well as a second gun firing.

When Jason Mans was asked if Dean said anything to him about a drive-by shooting, he replied, “yes” and stated that Dean told him he was paid to do it. (Vol. 12, T.p. 2324.) Mans completely lacked credibility. Mans testified on cross-examination that Dean told him he was paid between fifteen- and twenty-thousand dollars for the Dibert shootings and the murder of Titus Arnold. (Id. at 2329.) There is absolutely no evidence the Dean received any such amount of money from anyone. Moreover, Mans’s testimony was inconsistent with the facts of the case. He testified that Dean told him that while in the Nite Owl, he saw four black men leave and followed them out. (Id. at 2331.) This is inconsistent with the security video from the Nite Owl. (State’s Ex. 4-B.) And, Mans had access to Dean’s discovery packet. (Id. at 2332-33.) That discovery packet had in it an inner-office memorandum from the police department regarding a tip they received about Arnold’s murder being a contract killing. (Id.) Mans had all he needed to fabricate his testimony — testimony that is not supported by any other evidence in the record.

There is insufficient evidence to support a finding that Dean committed the shootings on Dibert Avenue. Dean’s convictions therefore violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Jackson v. Virginia, 443 U.S. 307, 316 (1979). His convictions and specifications on counts 5, 6, 7, 8, 9, 10 and 11 must be vacated, including the O.R.C. § 2929.04(A)(5) “course of conduct” capital specification.

Proposition of Law No. XIV

The right to the effective assistance of counsel is violated when counsel's deficient performance results in prejudice to the defendant. U.S. Const. amends. VI, XIV; Ohio Const. art. I, § 10.

In this claim Dean asserts, inter alia, that his counsel rendered ineffective performance to his prejudice in the mitigation phase under Strickland v. Washington, 466 U.S. 668 (1984). In response the State poses rhetorical questions as to why Dean chose not to request a presentence investigation report (PSI) or court-ordered mental exam. See O.R.C. § 2929.03(D)(1). And the State chides Dean for not calling a court-appointed psychologist, Dr. Jeffrey Smalldon, as a mitigation phase witness. (State's brief at 60-61.)

As a threshold matter, it would be a highly questionable tactic for defense counsel in a capital case ever to order a PSI or a court-ordered mental examination under O.R.C. § 2929.03(D)(1). Both clearly established federal law and the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases make clear that defense counsel have a duty to conduct a thorough and **independent** mitigation investigation. See Coleman v. Mitchell, 268 F.3d 417, 449-50 (6th Cir. 2001); ABA Guidelines 10.7, 10.11. An investigation by way of either a PSI or a mental exam under O.R.C. § 2929.03(D)(1) can hardly be deemed independent under case law and the ABA Guidelines. Defense counsel loses control of whether the reports generated from a PSI and court-ordered mental exam are submitted to the trier of fact and prosecutor. Id. (“Copies of any reports prepared under this division shall be furnished to the court, to the trial jury ... to the prosecutor, and to the offender or the offender's counsel”).

Competent defense counsel can readily obtain whatever mitigation evidence is available through other independent sources — and counsel may do so without losing tactical control over

the evidence developed. A competent defense attorney, moreover, would eschew a PSI and court-ordered mental exam in favor of independent expert services that are available to the defense under O.R.C. § 2929.024. See State v. Mason, 82 Ohio St. 3d 144, 694 N.E.2d 932, syl. (1998). Indeed, in Glenn v. Tate, 71 F.3d 1204, 1209-10 & n.5 (6th Cir. 1995), the Sixth Circuit found defense counsel ineffective in the mitigation phase because counsel relied on a court-ordered mental exam under O.R.C. § 2929.03(D)(1), rather than obtaining an independent defense expert under O.R.C. § 2929.024.

The answers to the State's rhetorical questions about counsel's performance are not contained in the record. Dean's appellate counsel cannot address matters outside the record with regard to what trial counsel did or did not do. See State v. Keith, 79 Ohio St. 3d 514, 536-37, 684 N.E.2d 47, 67 (1997). What is apparent from the record, however, is that Dean suffered from diabetes and his counsel recognized that his diabetes was a potential mitigating factor. (Vol. 5, T.p. 967; Vol. 8, T.p. 1544; Vol. 9, T.p. 1846.) Inexplicably, no evidence of Dean's diabetic condition was offered in mitigation.

Dean was prejudiced because his disease caused him to appear lethargic and detached at trial. (See Vol. 9, T.p. 1845.) A juror could easily misconstrue the effects of Dean's disease as coldness, callousness or indifference. And evidence of Dean's diabetes would not have contradicted any of the mitigation themes presented to the jury. Nor would evidence of Dean's disease "open the door" to rebuttal by the prosecutor. See ABA Guideline 10.11(G). Dean cannot be blamed because he acquired diabetes. Further, evidence of diabetes could have been used by defense counsel to argue that Dean may have a shortened life expectancy. See State v. Campbell, 95 Ohio St. 3d 48, 56, 765 N.E.2d 334, 343 (2002); State v. Bradley, 42 Ohio St. 3d 136, 149, 538 N.E.2d 373, 385 (1989).

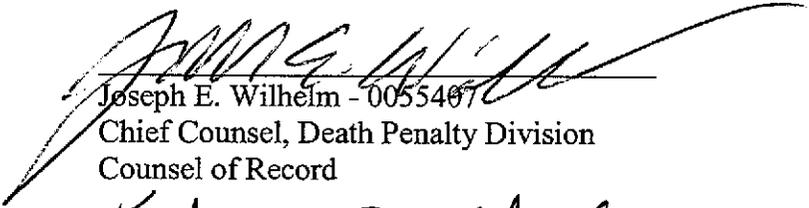
Although the State seeks to dissect matters outside the appellate record, it wholly ignores a valid claim on the record — counsel’s failure to argue Dean’s diabetes as a mitigating factor. See ABA Guidelines 10.11(F)(2). Counsel’s failure to present mitigating evidence of Dean’s diabetes lacks any tactical justification. And Dean was prejudiced by counsel’s mistake. Jason Dean is entitled to a new penalty phase.

Conclusion

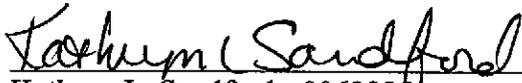
For each of the foregoing reasons, and based on the arguments presented in the merit brief, Appellant Jason Dean's convictions and death sentence must be reversed.

Respectfully submitted,

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Ohio Public Defender



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Chief Counsel, Death Penalty Division
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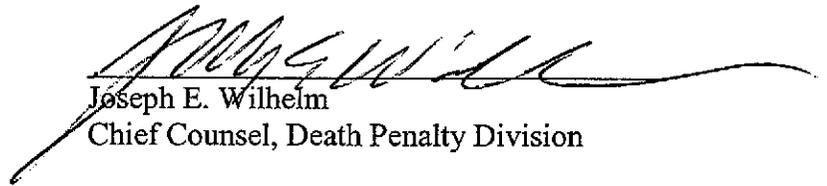
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Certificate Of Service

I hereby certify that a true copy of the foregoing REPLY BRIEF OF APPELLANT JASON DEAN was forwarded by regular U.S. Mail to Stephen Shumaker, Prosecuting Attorney, Darnell Carter, Assistant Prosecuting Attorney, and David Wilson, Assistant Prosecuting Attorney, Clark County, 50 E. Columbia Street, Springfield, Ohio 45502, on this 19th day of October, 2007.



Joseph E. Wilhelm
Chief Counsel, Death Penalty Division

Counsel For Jason Dean

265058

In the Supreme Court of Ohio

State of Ohio, :
Appellee, : Case No. 06-1126
-vs- :
Jason Dean, : **This is a death penalty case**
Appellant. :

On Appeal From The Court Of
Common Pleas Of Clark County, Case No. 05-CR-348

Appendix To Reply Brief Of Appellant Jason Dean

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LEXSEE 2007 U.S. APP. LEXIS 21705

WILLIAM GARNER, Petitioner-Appellant, v. BETTY MITCHELL, Warden, Respondent-Appellee.bern

No. 02-3552

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

07a0370p.06; 2007 U.S. App. LEXIS 21705; 2007 FED App. 0370P (6th Cir.)

March 7, 2007, Argued
September 11, 2007, Decided
September 11, 2007, Filed

PRIOR HISTORY: [*1]

Appeal from the United States District Court for the Southern District of Ohio at Columbus. No. 98-00870--James L. Graham, District Judge.
State v. Garner, 1994 Ohio App. LEXIS 3784 (Ohio Ct. App., Hamilton County, Aug. 31, 1994)

COUNSEL: ARGUED:

Kyle E. Timken, PUBLIC DEFENDER'S OFFICE, Columbus, Ohio, for Appellant.

Lisa Marie Stickan, OFFICE OF THE ATTORNEY GENERAL, Cleveland, Ohio, for Appellee.

ON BRIEF:

Kyle E. Timken, Kelly L. Culshaw, PUBLIC DEFENDER'S OFFICE, Columbus, Ohio, for Appellant.

Lisa Marie Stickan, OFFICE OF THE ATTORNEY GENERAL, Cleveland, Ohio, for Appellee.

JUDGES: Before: MARTIN, MOORE, and ROGERS, Circuit Judges. MOORE, J., delivered the opinion of the court, in which MARTIN, J., joined. ROGERS, J., delivered a separate dissenting opinion.

OPINION BY: KAREN NELSON MOORE**OPINION**
[**1]

KAREN NELSON MOORE, Circuit Judge. Petitioner-Appellant William Garner ("Garner") appeals from the district court's order denying his petition for a writ of habeas corpus. In 1992, Garner was convicted and sentenced to death in Ohio state court on five counts

of aggravated murder, one count of aggravated burglary, two counts of aggravated arson, one count of theft, and one count of receiving stolen property. His convictions and death sentence were affirmed on direct appeal and collateral review in state court. Garner [*2] then filed a petition for a writ of habeas corpus in the federal district court raising twenty-three grounds for relief. Garner raises four of those issues here on appeal, arguing that: (1) he did not knowingly and intelligently waive his *Miranda* rights before speaking with the police; (2) his state trial counsel were ineffective for failing to investigate and argue his *Miranda* claim; (3) the state trial court erred by not providing Garner with experts to [**2] assist with his *Miranda* claim; and (4) the process by which his petit jury venire was selected discriminated against African-Americans. Because we conclude that Garner did not knowingly and intelligently waive his *Miranda* rights, we **REVERSE** the judgment of the district court and **GRANT** Garner a conditional writ of habeas corpus.

I. BACKGROUND**A. Facts**

On the night of January 25, 1992, William Garner found a purse near a pay telephone in the emergency room area of a hospital in Cincinnati, Ohio. Inside, Garner found food stamps, keys, and the identification information of Addie F. Mack ("Mack"), a woman who was being treated at the hospital. Garner called a cab and directed the driver to take him to the address that he found inside the [*3] purse, an apartment at 1969 Knob Court in Cincinnati that was Mack's home, intending to steal whatever he found inside the apartment.

Garner went inside Mack's apartment while the cab driver, Thomas J. Tolliver ("Tolliver"), waited outside. Garner went through the rooms of the apartment, including two bedrooms in which he noticed four girls and two

boys sleeping. While Garner was inside, one of the girls woke up and asked Garner for a glass of water, which he gave her, and then the child watched television for a few minutes before going back to sleep. Garner removed a number of items from the apartment, including a television set, a VCR, a portable telephone, and a Sony "boom box." Garner put these items in the cab, telling the driver that he and his girlfriend had a fight and that he was moving out his belongings.

Garner went back inside the apartment and set three fires. Two of the fires, set in the mother's unoccupied bedroom and another unoccupied bedroom, smoldered but went out. The third fire was set on the living room couch. That fire quickly consumed the living room and filled the entire apartment with heavy smoke. Mack's oldest son, Rod, was awakened by the smoke and saw fire [*4] in the hallway outside his bedroom. Rod escaped out his bedroom window, but the other five children died inside.

Garner left in the cab and directed Tolliver to take him to a convenience store, where Tolliver waited while Garner purchased several items. Garner then had Tolliver take him home to 3250 Burnet Avenue. Tolliver helped Garner unload the cab and carry everything into Garner's home. Garner did not have enough cash to pay the cab fare, but Tolliver accepted a television set as payment.

Based on information provided by two police officers in the area, the police located Tolliver and interviewed him on the morning of January 26. Tolliver told the police that he had driven a man from the hospital emergency room to 1969 Knob Court, waited while the man went inside and returned with several items, driven the man to the convenience store, and driven him to 3250 Burnet Avenue. The police showed Tolliver still photographs from the convenience store's surveillance tape, and Tolliver identified his previous night's fare based on the man's clothing. The police also showed Tolliver three photo arrays, two of which contained photographs of Garner, and Tolliver identified Garner as his passenger [*5] from the night before.

Based on the information provided by Tolliver, police obtained a search warrant and searched the house at 3250 Burnet Avenue. Police recovered, among other things, a VCR, a Sony "boom box," a portable telephone, a pair of gloves, a set of keys later identified as Mack's, and copies of Mack's children's birth certificates. During the search, the police arrested Garner and advised him of his *Miranda* rights.

***3 Garner was taken to police headquarters, where he was interviewed and where he, after telling police that he would waive his *Miranda* rights, provided a taped statement describing the events of the previous night. When asked why he had set the couch on fire,

Garner told the police that he was attempting to cover fingerprints that he had left on the couch. Garner told the police that he believed the children would smell the smoke and get out of the apartment, especially because at least one child was awake and all of the children were old enough to escape.

B. Procedural History

On February 3, 1992, Garner was charged with five counts of aggravated murder, each with three death-penalty specifications, one count of aggravated burglary, two counts of aggravated arson, [*6] one count of theft, and one count of receiving stolen property. On September 25, 1992, Garner pleaded no contest to the charges of theft and receiving stolen property. The case proceeded to trial on the remaining charges, and on October 1, 1992, a jury convicted Garner on all counts and specifications. On October 16, after a mitigation hearing, the jury found that the aggravating factors outweighed the mitigating factors and recommended that Garner be sentenced to death. On November 5, 1992, the state trial court accepted the jury's recommendation and sentenced Garner to death on each of the five counts of aggravated murder. The trial court also sentenced Garner to ten to twenty-five years in prison for aggravated burglary and aggravated arson and two years in prison for theft and receiving stolen property, to be served consecutively.

On direct appeal, Garner raised twenty-three assignments of error. The Ohio Court of Appeals affirmed Garner's convictions and sentence, *State v. Garner, No. C-920864, 1994 Ohio App. LEXIS 3784, 1994 WL 466508 (Ohio Ct. App. Aug. 31, 1994)*, as did the Ohio Supreme Court, *State v. Garner, 74 Ohio St. 3d 49, 1995 Ohio 168, 656 N.E.2d 623 (Ohio 1995)*. The United States Supreme Court denied Garner's petition for a writ [*7] of certiorari. *Garner v. Ohio, 517 U.S. 1147, 116 S. Ct. 1444, 134 L. Ed. 2d 564 (1996)*.

On September 18, 1996, Garner filed a petition for post-conviction relief in the state trial court, raising eight claims. On October 18, 1996, the trial court denied the petition, and Garner appealed. The Ohio Court of Appeals affirmed, *State v. Garner, No. C-960995, 1997 Ohio App. LEXIS 5658, 1997 WL 778982 (Ohio Ct. App. Dec. 19, 1997)*, and the Ohio Supreme Court declined to exercise discretion to hear the case, *State v. Garner, 691 N.E.2d 1058 81 Ohio St. 3d 1497 (Ohio 1998)*. On August 6, 1999, Garner filed a second petition for post-conviction relief, which was also denied by the state trial court. The Ohio Court of Appeals once again affirmed, *State v. Garner, No. C-990659, 2000 Ohio App. LEXIS 1823, 2000 WL 492074 (Ohio Ct. App. Apr. 28, 2000)*, and the Ohio Supreme Court again declined to hear the case, *State v. Garner, 90 Ohio St. 3d 1404, 734 N.E.2d 835 (Ohio 2000)*.

On November 18, 1998, following the denial of his first petition for post-conviction relief in state court, Garner filed a petition for a writ of habeas corpus in the federal district court raising twenty-three grounds for relief. On July 29, 1999, the state filed a return of writ, and on February 28, 2001, Garner filed a traverse. On April 19, 2002, the [*8] district court denied all of Garner's claims and dismissed the petition. On July 19, 2002, the district court granted Garner a certificate of appealability on three claims: Claim 3, whether Garner knowingly and intelligently waived his *Miranda* rights and confessed to the crimes charged; Claim 7(E), whether Garner's trial counsel were constitutionally ineffective for failing to investigate and to argue that Garner did not knowingly and intelligently waive his *Miranda* rights and that Garner did not have the specific intent to kill the children; and Claim 11, whether Garner was afforded reasonable and necessary experts during the guilt and mitigation phases of his trial.

On May 17, 2002, Garner timely filed a notice of appeal. On July 26, 2002, we granted Garner's motion to hold the appeal in abeyance while he pursued a claim in state court that he is mentally retarded and therefore, pursuant to *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), cannot be lawfully executed. On June 27, 2005, Garner voluntarily dismissed his *Atkins* claim in state court. [**4] On September 8, 2006, we granted Garner a certificate of appealability on one additional claim: whether the process for selecting the petit jury [*9] venire in his trial was unconstitutional.

II. ANALYSIS

Garner argues that the district court erred in denying him habeas relief because: (1) he did not knowingly and intelligently waive his *Miranda* rights before speaking with the police; (2) his state trial counsel were ineffective for failing to investigate and to argue his *Miranda* claim; (3) the state trial court erred by not providing Garner with experts to assist with his *Miranda* claim; and (4) the process by which his petit jury venire was selected discriminated against African-Americans. We review de novo a district court's decision in a habeas proceeding. *Souter v. Jones*, 395 F.3d 577, 584 (6th Cir. 2005). We review a district court's factual findings for clear error. *Id.* The familiar standard for analyzing a petition for a writ of habeas corpus under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") is set forth in 28 U.S.C. § 2254(d):

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any

claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted [*10] in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The Supreme Court has further clarified the meaning of § 2254(d):

Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Terry Williams v. Taylor, 529 U.S. 362, 412-13, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). Importantly, the AEDPA standard of review applies only to habeas claims that were "adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d); [*11] *Maples v. Stegall*, 340 F.3d 433, 436 (6th Cir. 2003); see also *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). Where the AEDPA standard does not apply, we review de novo questions of law and mixed questions of law and fact. *Maples*, 340 F.3d at 436.

A. *Miranda*

Garner first argues that he did not knowingly and intelligently waive his *Miranda* rights and that the statement that he gave to the police was therefore inadmissi-

ble at trial. Before we turn to the merits of Garner's *Miranda* claim, we must decide a number of preliminary questions.

[**5] 1. Procedural Default

The state argues that Garner's claim that he did not knowingly and intelligently waive his *Miranda* rights is procedurally defaulted because it was never presented to the state courts for consideration. We have stated:

When a habeas petitioner fails to obtain consideration of a claim by a state court, either due to the petitioner's failure to raise that claim before the state courts while state-court remedies are still available or due to a state procedural rule that prevents the state courts from reaching the merits of the petitioner's claim, that claim is procedurally defaulted and may not be considered by the federal court on habeas [*12] review.

Seymour v. Walker, 224 F.3d 542, 549-50 (6th Cir. 2000), cert. denied, 532 U.S. 989, 121 S. Ct. 1643, 149 L. Ed. 2d 502 (2001). We will still review a defaulted claim if a petitioner "show[s] that there was cause for the default and prejudice resulting from the default, or that a miscarriage of justice will result from enforcing the procedural default," *id.* at 550, but Garner has not attempted to make either showing here.

Nonetheless, the state admits that it did not argue in the district court that Garner's *Miranda* claim was procedurally defaulted. The state also concedes that, as a result, we may deem this argument forfeited. ¹ See *Howard v. Bouchard*, 405 F.3d 459, 476 (6th Cir. 2005), cert. denied, 546 U.S. 1100, 126 S. Ct. 1032, 163 L. Ed. 2d 871 (2006); *Sowell v. Bradshaw*, 372 F.3d 821, 830 (6th Cir. 2004), cert. denied, 544 U.S. 925, 125 S. Ct. 1645, 161 L. Ed. 2d 485 (2005). The Supreme Court has instructed that "procedural default is normally a defense that the State is obligated to raise and preserv[e] if it is not to lose the right to assert the defense thereafter." *Trest v. Cain*, 522 U.S. 87, 89, 118 S. Ct. 478, 139 L. Ed. 2d 444 (1997) (emphasis added) (alteration in original) (internal quotation marks omitted). We may consider the issue of procedural default when raised for the first time [*13] on appeal, *White v. Mitchell*, 431 F.3d 517, 524 (6th Cir. 2005), cert. denied, 127 S. Ct. 578, 166 L. Ed. 2d 457, and 127 S. Ct. 581, 166 L. Ed. 2d 434 (2006), and may even raise the issue sua sponte, *Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000), but have determined that we should not do so "as a matter of course," *Howard*, 405 F.3d at 476. Thus, the question

before us is whether this case presents abnormal circumstances of the kind and degree that warrant our consideration of the issue of procedural default for the first time on appeal.

1 The dissent argues that, because there is a close relationship between procedural default and failure to exhaust, and because, under AEDPA, a state can waive the exhaustion requirement only via an express waiver, a state cannot forfeit a procedural-default defense based on failure to exhaust a remedy no longer available. Binding precedent requires otherwise. See *Howard v. Bouchard*, 405 F.3d 459, 476 (6th Cir. 2005), cert. denied, 546 U.S. 1100, 126 S. Ct. 1032, 163 L. Ed. 2d 871 (2006); *Sowell v. Bradshaw*, 372 F.3d 821, 830 (6th Cir. 2004), cert. denied, 544 U.S. 925, 125 S. Ct. 1645, 161 L. Ed. 2d 485 (2005). Moreover, we believe that that precedent is correct. There is a fundamental difference between AEDPA's explicit rule that [*14] a state can waive only via an express waiver the opportunity for its courts to hear a claim in the first instance, 28 U.S.C. § 2254(b)(3), and the dissent's suggested rule, nowhere set forth in AEDPA, that a state can waive or forfeit only via an express waiver the opportunity to argue that no court should ever consider the merits of a claim. Moreover, procedural default is normally an affirmative defense that must be raised and preserved by the state, see *Trest v. Cain*, 522 U.S. 87, 89, 118 S. Ct. 478, 139 L. Ed. 2d 444 (1997), and the Supreme Court has instructed us not to alter such rules when the statute itself does not address them, see *Jones v. Bock*, U.S. , 127 S. Ct. 910, 918-22, 166 L. Ed. 2d 798 (2007).

We have considered a number of factors relevant to our decision whether to consider the issue of procedural default for the first time on appeal. In *Sowell v. Bradshaw*, we concluded that we would not consider the issue when raised for the first time on appeal "[i]n light of the resources that have been expended by the district court and the serious consequences facing [the petitioner]." *Sowell*, 372 F.3d at 830. Just as the district court did in *Sowell*, the district court in this case expended considerable resources in deciding [*15] Garner's *Miranda* claim, and just like the petitioner in *Sowell*, Garner faces the death penalty. Thus, these factors weigh strongly against considering the issue of procedural default, just as strongly as they did in *Sowell*.

[**6] The state argues that we should consider the issue because "the default is apparent on the record and does not need factual development to confirm or refute it." Appellee's Br. at 33-34. We have previously recog-

nized that "[t]he main concern with raising procedural default sua sponte is that a petitioner not be disadvantaged without having had an opportunity to respond." *Howard*, 405 F.3d at 476. In *Howard*, the state had argued in the district court that the petitioner's claims were procedurally defaulted, giving the parties a full opportunity to make arguments and introduce evidence, but the district court never explicitly ruled on the procedural default issue and the state did not raise the argument on appeal. *Id.* at 476-77. In the case at hand, unlike in *Howard*, the state raised the issue of procedural default for the first time in its response brief on appeal, giving Garner, like the petitioner in *Sowell*, the opportunity to respond only in his reply brief and [*16] without any opportunity for factual development. See *Sowell*, 372 F.3d at 829. The state essentially argues that, because the default is allegedly apparent on the record, the lack of opportunity for factual development should be considered inconsequential. Even if we were to assume that this factor weighs more heavily towards considering the issue of procedural default than it did in *Sowell*, however, we do not see how, in light of the resources expended by the district court and the serious consequences facing Garner, this case presents abnormal circumstances of the kind and degree that warrant our consideration of the issue of procedural default for the first time on appeal. Accordingly, we exercise our discretion to reach the merits of Garner's *Miranda* claim.

2. Standard of Review

As noted above, and as both parties concede, Garner did not raise his *Miranda* claim in state court, and the state courts therefore never issued a decision on the merits of this claim. The AEDPA standard of review applies only to habeas claims that were "adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). Thus, the AEDPA standard of review does not apply, and "this court reviews questions [*17] of law and mixed questions of law and fact de novo." ² *Maples*, 340 F.3d at 436.

2 At oral argument on appeal, Garner's attorney agreed when questioned that the AEDPA standard of review applies to Garner's *Miranda* claim. "The parties, however, cannot determine this court's standard of review by agreement. Such a determination remains for this court to make for itself." *K & T Enters., Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 175 (6th Cir. 1996).

The state argues that a modified form of AEDPA review applies in this case. Under the modified AEDPA standard of review developed in this circuit, the federal courts conduct an "independent review" of the record and applicable law, but may grant habeas relief only if the

state court's decision was contrary to or an unreasonable application of clearly established federal law, in keeping with AEDPA standards. See *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000), cert. denied, 532 U.S. 947, 121 S. Ct. 1415, 149 L. Ed. 2d 356 (2001). We have applied the modified AEDPA standard of review in two sets of circumstances: when the state court decides the issue in question but does not articulate its reasoning, see *id.*, and when "the state court decision does not squarely address the federal [*18] constitutional issue in question, but its analysis bears 'some similarity' to the requisite constitutional analysis," *Filiaggi v. Bagley*, 445 F.3d 851, 854 (6th Cir. 2006); see also *Dyer v. Bowlen*, 465 F.3d 280, 284 (6th Cir. 2006); *Maldonado v. Wilson*, 416 F.3d 470, 475-76 (6th Cir. 2005), cert. denied, 546 U.S. 1101, 126 S. Ct. 1038, 163 L. Ed. 2d 874 (2006).

Without a state court decision on the claim at issue or analysis similar to the requisite constitutional analysis, however, de novo review is required. The reasons for this distinction are clear. When a state court directly decides the claim at issue but does not articulate its reasoning, the federal courts can assume that the state court undertook the proper analysis, and modified AEDPA standards giving deference to that decision are appropriate. When a state court does articulate its reasoning, the federal courts can see directly whether the state court's analysis is substantially similar to the requisite constitutional analysis of the claim at issue, and if it is, modified AEDPA [**7] standards giving deference to that analysis are appropriate. As we have explained, though, "[w]ithout such results or reasoning, any attempt to determine whether the [*19] state court decision 'was contrary to, or involved an unreasonable application of clearly established Federal law' would be futile." *McKenzie v. Smith*, 326 F.3d 721, 727 (6th Cir. 2003) (quoting 28 U.S.C. § 2254(d)(1)), cert. denied, 124 S. Ct. 1145, 157 L. Ed. 2d 105 (2004).

The record in this case is quite limited regarding this issue. On collateral review in the Ohio courts, Garner argued that his trial counsel was ineffective for failing "to inquire whether [Garner] knowingly, voluntarily, and intelligently waived his *Miranda* rights." 3 Joint Appendix ("J.A.") at 846 (Ohio Ct. App. Post-Conviction Br. at 22). The trial court made findings of fact and concluded that Garner's counsel's performance was not deficient, but did not decide whether counsel's performance prejudiced the defense. On appeal, the Ohio Court of Appeals recited the *Strickland* standard, stated that it had reviewed the record, and, without further reasoning, stated: "We conclude that appellant has failed to point to evidence either within or outside the record which demonstrates that the conduct of his counsel was either ineffective or prejudicial." *State v. Garner*, 1997 Ohio App. LEXIS 5658, 1997 WL 778982, at *3.

Although the prejudice inquiry under *Strickland* [*20] is related to the merits of Garner's *Miranda* claim, this does not fully satisfy either of the two sets of circumstances warranting modified AEDPA review under our precedents. Modified AEDPA review is called for when a state court decides an issue without articulating its reasoning, *Harris*, 212 F.3d at 943, but the Ohio courts did not decide the *Miranda* issue. The *Strickland* prejudice inquiry and the *Miranda* issue are not identical. This court has noted, for example, that bringing an ineffective-assistance-of-counsel claim in state court based on counsel's failure to raise an underlying claim does not preserve the underlying claim for habeas review because "the two claims are analytically distinct." *White*, 431 F.3d at 526; see also *Bailey v. Nagle*, 172 F.3d 1299, 1304 n.8 (11th Cir. 1999); *Levasseur v. Pepe*, 70 F.3d 187, 191-92 (1st Cir. 1995); *infra* at 13-14. Because the *Strickland* prejudice inquiry and the *Miranda* issue are not identical, modified AEDPA review is not warranted. Cf. *Cargle v. Mullin*, 317 F.3d 1196, 1202-05 (10th Cir. 2003) (concluding that the AEDPA standard of review did not apply because the state court applied a legal standard different than the standard required [*21] for analysis of the federal claim); *Daniels v. Lee*, 316 F.3d 477, 487 (4th Cir.) ("The State, however, has waived any exhaustion requirement on the [claim at issue]. And because that claim was never adjudicated in state court, it does not trigger the deference mandate of AEDPA."), *cert. denied*, 540 U.S. 851, 124 S. Ct. 137, 157 L. Ed. 2d 93 (2003); *Rollins v. Horn*, No. Civ. A.00-1288, 2005 U.S. Dist. LEXIS 15493, 2005 WL 1806504, at *6 (E.D. Pa. July 26, 2005) ("As the Pennsylvania Supreme Court's discussion of Petitioner's underlying claims . . . in the context of his assistance of counsel claim does not constitute an adjudication 'on the merits,' we must review these underlying claims de novo, rather than applying AEDPA's deferential standard of review.").

Modified AEDPA review is also warranted under our precedents when a state court decision on other grounds contains analysis bearing "some similarity" to the requisite constitutional analysis. *Filiaggi*, 445 F.3d at 854. However, even assuming, *arguendo*, that the *Strickland* prejudice inquiry satisfies the nebulous "some similarity" requirement, the Ohio Court of Appeals, the only state court to address the *Strickland* prejudice element, did not provide any reasoned analysis of that issue. The [*22] Ohio Court of Appeals decided an issue related to Garner's *Miranda* claim, but without analysis. Accordingly, modified AEDPA review is not dictated by our precedents.

Neither will we extend modified AEDPA review to the case at hand. Indeed, the record here convincingly illustrates why modified AEDPA review can apply only when a state court provides a decision on the merits of

the claim at issue or analysis very similar to the requisite constitutional analysis, and not when a state court provides a decision without analysis on a related issue. To decide Garner's *Miranda* claim, a state court would need to determine whether his waiver was knowing and intelligent, see *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986), and, if not, whether admission of his statement was harmless error, see *Arizona v. Fulminante*, 499 U.S. 279, 309-12, 111 S. Ct. 1246, 113 L. Ed. 2d 302 [**8] (1991). Notably, the analysis of the *Miranda* claim requires no evaluation whatsoever of what evidence might be revealed by further investigation. In contrast, to decide the prejudice element of Garner's ineffective-assistance-of-counsel claim, a state court would need to determine whether there is a "reasonable probability" that, but for his counsel's failure to inquire [*23] whether he knowingly and intelligently waived his *Miranda* rights, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The analysis of the *Strickland* prejudice element in this case requires an evaluation of what evidence likely would be revealed by an adequate investigation into Garner's ability to knowingly and intelligently waive his *Miranda* rights. Cf. *Coleman v. Mitchell*, 268 F.3d 417, 452 (6th Cir. 2001) (describing the materials that a reasonable investigation would have produced before evaluating whether counsel's failure to investigate constituted prejudice), *cert. denied*, 535 U.S. 1031, 122 S. Ct. 1639, 152 L. Ed. 2d 647 (2002). This might include what expert testimony could be secured and what that testimony would be, what relevant school or family history would have been uncovered, and any other evidence bearing on the totality-of-the-circumstances test applicable to a claim that a waiver of *Miranda* rights was invalid.

The analyses of the two issues is different, and the *Miranda* claim is not necessarily subsumed within the ineffective-assistance claim. The Ohio Court of Appeals certainly *might* have concluded that Garner did not suffer prejudice because his *Miranda* [*24] waiver was valid. The Ohio Court of Appeals also *might* have based its decision on a determination that Garner's waiver was invalid but that admission of his statement was harmless error. Or, the dispositive factor *might* have been the Ohio Court of Appeals' uncertainty regarding what an adequate investigation would have revealed. Cf. *Swatzell v. Lewis*, 79 Fed. Appx. 165, 167 (6th Cir. 2003) (unpublished opinion) (concluding that the petitioner had not shown prejudice because he had not shown "what a further investigation would have revealed"). Given the one-sentence, unreasoned disposition of Garner's ineffective-assistance-of-counsel claim, it is impossible for us to determine what the Ohio Court of Appeals decided regarding the merits of Garner's underlying *Miranda*

claim--or even if it made any decision at all--much less for us to give deference to that decision. ³ Cf. *Danner v. Motley*, 448 F.3d 372, 376 (6th Cir. 2006) (applying de novo review because "[t]here is no indication in the [state] trial court's comments that it examined [the claim at issue]"). Accordingly, we review Garner's *Miranda* claim de novo.

3 If we were even to attempt to apply modified AEDPA review, we would first [*25] need to analyze Garner's claims and speculate as to what the Ohio Court of Appeals most likely decided. We would then need to apply the modified AEDPA standards and analyze Garner's claims again, giving deference to what we had determined was the Ohio Court of Appeals' likely decision. Such a procedure borders on the ridiculous.

3. Expansion of the Record

Pursuant to *Habeas Rule 7*, the district court granted in part Garner's motion to expand the record, admitting portions of an affidavit and a report submitted by Dr. Caroline Everington, but excluding other portions. More specifically, Dr. Everington's affidavit and report contained a number of psychological test results and expert opinions, but the district court admitted only paragraphs 16-18 of Dr. Everington's affidavit and pages 9-10 of her report--those portions related to the "Instruments for Assessing Understanding & Appreciation of *Miranda* Rights" test (the "Grisso Test"). District Court Docket Entry 64 ("R.64") at 5 (Expansion Order). On appeal, the state argues that the district court erred by expanding the record. Garner urges us to consider additionally the portions of Dr. Everington's affidavit and report not admitted [*26] by the district court. "This court reviews a district court's decision to expand the record under *Rule 7* for an abuse of discretion." *Levine v. Torvik*, 986 F.2d 1506, 1517 (6th Cir.), cert. denied, 509 U.S. 907, 113 S. Ct. 3001, 125 L. Ed. 2d 694 (1993), abrogated on other grounds by *Thompson v. Keohane*, 516 U.S. 99, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995); see also *Schriro v. Landrigan*, U.S. , 127 S. Ct. 1933, 1939, 167 L. Ed. 2d 836 (2007). Notably, "it is an abuse of discretion to make errors of law or clear errors of factual determination." *United States v. Baker*, 458 F.3d 513, 517 (6th Cir. 2006) (quoting *United States v. McDaniel*, 398 F.3d 540, 544 (6th Cir. 2005)).

[**9] The Supreme Court has held that pursuant to AEDPA, a prisoner may introduce new evidence in support of an evidentiary hearing or relief without an evidentiary hearing "only if [the prisoner] was not at fault in failing to develop that evidence in state court, or (if he was at fault) if the conditions prescribed in § 2254(e)(2)

were met." ⁴ *Holland v. Jackson*, 542 U.S. 649, 652-53, 124 S. Ct. 2736, 159 L. Ed. 2d 683 (2004) (citing *Michael Wayne Williams v. Taylor*, 529 U.S. 420, 431-37, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000)). A prisoner is at fault in failing to develop the evidence if there is a "lack of diligence, or some greater fault, attributable to the prisoner [*27] or the prisoner's counsel." *Michael Wayne Williams*, 529 U.S. at 432. The required diligence is "a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." *Id.* at 435.

4 28 U.S.C. § 2254(e)(2) states:

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). Garner does not argue that he can meet these standards, but argues that he was not at fault in failing to develop the evidence in state court. Appellant's Reply Br. at 3-4.

The district court determined that Garner was [*28] not at fault in failing to develop the evidence in state court because "his requests for discovery, for expert funds, and for an evidentiary hearing were summarily denied by the state courts during his postconviction proceedings." R.64 at 4 (Expansion Order). The state has not contested this determination on appeal and has therefore forfeited any objections to it. See *Thaddeus-X v. Blatter*, 175 F.3d 378, 403 n.18 (6th Cir. 1999) (en banc).

Instead, the state argues that *Holland v. Jackson* barred the district court from expanding the record in this case, regardless of the determination that Garner was not at fault in failing to develop the evidence:

In reversing the grant of a writ, the Supreme Court unequivocally stated that in determining "unreasonable application," the state court's decision "must be assessed in light of the record the court had before it." [*Holland*, 542 U.S.] at 652. That is, a federal court cannot rely on facts not presented to the state court, as a basis for determining that the state court acted unreasonably. That is exactly what Garner asks this Court to do: find the state post-conviction court's denial of relief unreasonable based on evidence never submitted [*29] to that court.

Appellee's Br. at 36-37. The state's interpretation of *Holland* is wrong. The *Holland* Court did first state that "whether a state court's decision was unreasonable must be assessed in light of the record the court had before it," but in the very next sentence the Court noted that additional evidence may be introduced "if respondent was not at fault in failing to develop that evidence in state court, or (if he was at fault) if the conditions prescribed by § 2254(e)(2) were met." *Holland*, 542 U.S. at 652-53. The *Holland* Court concluded that a panel of our court had erred, not because it considered additional evidence at all but because it did so even though "[t]he District Court made no finding that respondent had been diligent in pursuing [the additional evidence] (and thus that § 2254(e)(2) was inapplicable) or that the limitations set forth in § 2254(e)(2) were met. Nor did the Sixth Circuit independently inquire into these matters . . ." *Id.* at 653. In the case at hand, the district court did make a determination that Garner had been diligent in pursuing his addi-

tional evidence, a [**10] determination which, as noted above, the state has not contested on appeal. Accordingly, [*30] we reject the state's argument that *Holland* barred the district court from expanding the record.

Garner argues that the district court abused its discretion by not admitting all of Dr. Everington's affidavit and report. Many parts of Dr. Everington's affidavit and report merely describe and interpret results from tests of Garner's general intellectual functioning, adaptive skills, and language abilities, tests which, as described more fully below, are similar or identical to tests the results of which were introduced into evidence in state court. Accordingly, we conclude that the district court did not err by considering only those portions of Dr. Everington's affidavit and report that were not cumulative—specifically, the results and analysis of the Grisso test. Cf. *McLaurin v. Fischer*, 768 F.2d 98, 104 (6th Cir. 1985) (noting that "[a] district court has considerable latitude in excluding repetitious or cumulative evidence" under the Federal Rules of Evidence (internal quotation marks omitted)).

We note, however, that the Grisso test results and Dr. Everington's interpretations are in many ways impossible to understand accurately without an awareness of the remainder of the report. [*31] For example, the report discussed Garner's Grisso test results relative to others in Garner's IQ range and the impact of his "cognitive and linguistic limitations" on Dr. Everington's interpretation of the test results. 1 J.A. at 379 (Everington Report at 10). To the extent that the district court expanded the record to include parts of Dr. Everington's affidavit and report without expanding the record to include other parts necessary to understand accurately the included parts, we conclude that the district court abused its discretion. Therefore, we will consider paragraphs 16-18 of Dr. Everington's affidavit and pages 9-10 of her report, plus those other parts necessary to understand accurately affidavit paragraphs 16-18 and report pages 9-10.

4. Knowing and Intelligent Waiver

With this background, we turn to the merits of Garner's *Miranda* claim. Garner argues that the totality of the circumstances show that he did not knowingly and intelligently waive his *Miranda* rights and that the statement that he gave to the police was therefore inadmissible at trial.

a. Legal Standards Governing the Validity of Waivers

The *Fifth Amendment* states that "[n]o person . . . shall be compelled in any [*32] criminal case to be a witness against himself." U.S. CONST. amend. V. In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694

(1966), the Supreme Court determined that the right against self-incrimination "is fully applicable during a period of custodial interrogation." *Id.* at 461. The *Miranda* Court further determined that "the right to have counsel present at the interrogation is indispensable to the protection of the *Fifth Amendment* privilege." *Id.* at 469. Moreover, the Court held that, prior to custodial interrogation, a suspect must be informed of these rights, now commonly known as the *Miranda* rights. *Id.* at 444 ("Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."). Of special import here, the *Miranda* Court noted that "[t]he defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently." *Id.* (emphasis added).

Subsequent decisions by the Supreme Court have further clarified that the validity of a waiver depends on it being made not only "voluntarily," [*33] but also "knowingly and intelligently." In *Moran v. Burbine*, for example, the Court stated:

The inquiry has two *distinct* dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned [**11] and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Burbine, 475 U.S. at 421 (emphasis added) (quoting *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979)) (citations omitted); see also *Colorado v. Spring*, 479 U.S. 564, 573-75, 107 S. Ct. 851, 93 L. Ed. 2d 954 (1987) (analyzing separately whether a suspect's waiver of his *Miranda* rights was voluntary and whether it was knowing and intelligent); *Edwards v. Arizona*, 451 U.S. 477, 482, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981) ("It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment [*34] or abandonment of a known right or privilege . . ."). Garner does not argue that he waived his *Miranda*

rights involuntarily, but he does argue that he waived his rights unknowingly and unintelligently.

Whether a suspect's waiver of *Miranda* rights is "a knowing and intelligent relinquishment or abandonment of a known right or privilege" is "a matter which depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" *Edwards*, 451 U.S. at 482 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)). A court must examine the "totality of the circumstances" to determine whether a suspect's waiver was knowing and intelligent, including inquiries into the suspect's "age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his *Fifth Amendment* rights, and the consequences of waiving those rights." ⁵ *Michael C.*, 442 U.S. at 725. "The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the *Fifth Amendment* privilege," but does require "that a suspect [*35] know[] that he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time." *Spring*, 479 U.S. at 574; see also *Burbine*, 475 U.S. at 421 ("[T]he waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."). The question before us is whether the totality of the circumstances showed that Garner knowingly and intelligently waived his *Miranda* rights before speaking to the police.

⁵ In *Colorado v. Connelly*, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986), the Supreme Court held "that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary,'" but did not suggest that coercive police activity is a necessary predicate to a conclusion that a waiver of *Miranda* rights was not knowing or intelligent. *Id.* at 167; see also *United States v. Turner*, 157 F.3d 552, 555 (8th Cir. 1998); *Miller v. Dugger*, 838 F.2d 1530, 1539 (11th Cir.) ("We do not read the *Connelly* decision as demonstrating an intent to eliminate this distinction between voluntariness and knowing waivers."), cert. denied, 486 U.S. 1061, 108 S. Ct. 2832, 100 L. Ed. 2d 933 (1988). Indeed, the *Connelly* Court [*36] noted that an expert witness "testified that Connelly's illness did not significantly impair his cognitive abilities. Thus, respondent understood the rights he had when [the police] advised him that he need not speak." *Connelly*, 479 U.S. at 161-62.

We recognize that the Supreme Court's requirement that a *Miranda* waiver be made knowingly and intelligently may, on occasion, put the police in the difficult position of having to assess a suspect's understanding and intellectual capacities at the time of interrogation. This difficulty is not wholly unique, however, as courts face similar difficulties, for example, when assessing a defendant's competency and understanding during a plea colloquy or when a defendant waives the right to counsel. Suspicions that a suspect's initial *Miranda* waiver was not made knowingly and intelligently also do not preclude the police from interrogating the suspect later under different circumstances--for example, following evaluation by a mental-health professional, following treatment, or in the presence of a lawyer, *see, e.g., In re B.M.B.*, 264 Kan. 417, 955 P.2d 1302, 1309-13 (Kan. 1998); *cf. infra* note 10--if the police desire greater assurances that the suspect's statement [*37] will be deemed admissible at trial.

To suggest as the dissent does, however, that the validity of a *Miranda* waiver depends only on the objective conduct of the police is to read the requirement that a valid waiver be "a knowing and intelligent relinquishment or abandonment of a known right or privilege," *Edwards*, 451 U.S. at 482, out of the Supreme Court's *Miranda* jurisprudence. Under the dissent's formulation, even a suspect who did not hear his *Miranda* rights being read somehow could give a knowing and intelligent waiver, so long as the police had no reason to believe that the suspect did not hear.

[**12] b. Relevant Facts

As explained by the Supreme Court, Garner's "age, experience, education, background, and intelligence" are relevant to our inquiry. *Michael C.*, 442 U.S. at 725. Garner was 19 years old at the time of the offense. He was "the product of a very abusive and disorganized family of origin." 2 J.A. at 513 (Schmidtgoessling Report at 3). Garner endured physical abuse at the hands of his mother and more than one of her boyfriends, suffered sexual abuse at the hands of an older brother, was left with his siblings to provide food and clothing for himself, and was repeatedly kicked [*38] out of his home. Garner's mother testified that Garner and his twin brother attended the first few years of school together in the same class, but that they were thereafter separated because Garner's brother had been doing Garner's work for him. Thereafter, Garner "didn't do very well" in school. 3 J.A. at 1028 (Mitigation Hr'g 10/13/92 at 52 (Patricia Garner Test.)). Garner told the police that he could read and had completed the twelfth grade, but his mother testified that the last grade that he completed was the sev-

enth grade, and both his mother and school records indicated that Garner's grades were always poor, that he was held back at least once, that he was frequently absent from school, and that he was placed in a variety of correctional or treatment-focused schools. According to his mother, Garner had at least one encounter with the juvenile court system. In 1992, the year of the offense, Garner had a full-scale Wechsler Adult Intelligence Scales-Revised IQ score of 76, placing him in the borderline range of intellectual functioning, as well as signs of a learning disability, attention deficit disorder, and organic brain impairment. ⁶

6 Dr. Everington's report, though not admitted [*39] by the district court for this purpose, confirmed that Garner had relatively consistent IQ scores between 76 and 81 as well as significant deficits in language abilities. 1 J.A. at 376-77 (Everington Report at 2-3).

The circumstances of Garner's interrogation are also relevant to our analysis. On January 26, 1992, police executed a search warrant at 3250 Burnet Avenue and arrested Garner. Officer Harry C. Frisby, Jr. ("Frisby"), of the Cincinnati Police Department advised Garner of his *Miranda* rights, and Garner said that he understood his rights. ⁷ Officer Frisby asked Garner about several items that Officer Frisby believed had been stolen, but Garner said that the items were his. Garner was then taken to the police station.

7 Officer Frisby testified as follows:

A: Before I said, Mr. Garner, let me advise you of your rights and I had a booklet that had his rights in it -- on the front of it. You have the right to remain silent, that anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions and have him with you during questioning. If you decide to answer questions now without a lawyer present, you still have [*40] the right to stop answering at any time. You also have the right to talk to a lawyer before any questioning if you wish. And I asked him if he understood those rights and he said yes.

Suppression Hr'g at 68 (Frisby Test.).

At the police station, Officer Frisby and Officer David Feldhaus ("Feldhaus") interrogated Garner. Officer Feldhaus advised Garner of his *Miranda* rights again, read a waiver-of-rights form to Garner, and Garner, Officer Frisby, and Officer Feldhaus signed the form. ⁸ The two officers [**13] proceeded to interrogate Garner. Officer Feldhaus testified that Garner appeared "perfectly normal" and "very coherent" and that Garner answered when questioned that he was not under the influence of drugs or alcohol. 3 J.A. at 944 (Suppression Hr'g at 204 (Feldhaus Test.)). Officer Frisby testified that Garner initially denied any involvement with the crimes and that he, Officer Frisby, repeatedly told Garner that he thought Garner was lying. After approximately forty minutes, the two officers began tape recording the interrogation, and Garner confessed to stealing items from 3250 Burnet Avenue and setting a fire.

8 Officer Feldhaus testified as follows:

Q: Carry us through and see, you [*41] know, exactly what was said as best you can remember.

A: Each line?

Q: Yeah.

A: You have a right to remain silent. He said he understood that. Anything you say can be used against you in court.

Q: Did he reply to that?

A: Yes. Do you understand that? Yes. You have the right to talk to a lawyer for advice before we ask you any questions and have him with you during questioning. You understand that? Yes. If you cannot afford a lawyer one will be appointed for you before any questioning if you wish. Understand that? Yes. If you decide to answer questions now without a lawyer present you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer. You understand that? The reply was yes.

I then said below that we have a waiver of rights. And I told him, I'll read this for you.

Q: Pardon me. Did you read the whole paragraph?

A: I said, I have read this statement on rights. I understand what my rights are. I am going to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind have [*42] been used again [sic] me. I asked him if he understood that. He said he did. I said, you have any questions about your rights? He replied, no. I said, well, if there's no questions and you understand it, I need you to sign your name and the time it is. At that time he signed his name. He said, what time is it? I held my wrist watch out and he looked at it, signed the time.

3 J.A. at 955-57 (Suppression Hr'g at 215-17 (Feldhaus Test.)).

Finally, we must consider "whether [Garner] ha[d] the capacity to understand the warnings given him, the nature of his *Fifth Amendment* rights, and the consequences of waiving those rights." *Michael C.*, 442 U.S. at 725. On collateral review in state court, Dr. Jeffrey Smalldon ("Smalldon"), a mental-health expert appointed by the state trial court to assist with the defense, submitted an affidavit regarding a number of issues. Dr. Smalldon stated that he had personally interviewed, tested, and assessed Garner in addition to reviewing reports from Dr. Nancy Schmidtgoessling ("Schmidtgoessling"), who was appointed by the state trial court to assess Garner's competency to stand trial, and Dr. Joseph D. Schroeder ("Schroeder"), a clinical neuropsychologist [*43] who further assessed Garner because of concerns raised by Dr. Schmidtgoessling. Regarding the issue at hand, Dr. Smalldon concluded that "Mr. Garner's borderline intelligence, functional (i.e., organic) brain impairment, abusive and socially deprived background, and long history of impulsivity raise serious questions as to whether he could or did understand the consequences of signing the 'Waiver of Rights.'" 3 J.A. at 921 (Smalldon Aff. at P10). Dr. Smalldon further concluded that "[t]he same assessment findings alluded to above, as well as my own clinical impressions, also raise serious questions about whether he had the ability to understand and appreciate the implications of the language used in the 'Waiver of Rights' form that he signed." 3 J.A. at 921 (Smalldon Aff. at P11). Dr. Smalldon opined that "[m]ore focused assessment would provide better, and perhaps even con-

clusive, information on this issue." 3 J.A. at 922 (Small-don Aff. at P13).

Dr. Everington provided this more focused assessment regarding Garner's understanding of his waiver of *Miranda* rights. Dr. Everington administered the Grisso test, specifically designed to "assess[] a defendant's comprehension of the *Miranda* [*44] warnings themselves" and "provid[e] a comparison of the defendant's performance to that of other defendants of various ages and levels of intelligence." THOMAS GRISSO, INSTRUMENTS FOR ASSESSING UNDERSTANDING & APPRECIATION OF MIRANDA RIGHTS 4 (1998). The Grisso test includes four separate testing instruments. The first instrument, Comprehension of *Miranda* Rights ("CMR"),

assesses the examinee's understanding of the *Miranda* warnings as measured by the examinee's paraphrased description of the warnings. The procedure involves presentation of each of the four *Miranda* warnings, one by one, to the examinee. [**14] After each warning is presented, the examinee is invited to tell the examiner "what that means in your own words."

Id. at 5. Answers are scored two points for "adequate" responses, one point for "questionable" responses, and zero points for "inadequate" responses, producing a total CMR score between zero and eight. *Id.*

The second instrument, Comprehension of *Miranda* Rights-Recognition ("CMR-R"),

assesses the examinee's understanding of the *Miranda* warnings as measured by the examinee's ability to identify whether various interpretations provided by the examiner are the same as or different [*45] from the warning that was presented.

...

As with the CMR, the CMR-R requires that each warning be presented to the examinee. After each warning statement, the examiner asks the examinee to listen to three other statements, some of which are the same as the warning and some of which are not the same. The examinee simply says "same" or "different" after each alternative statement.

Id. Answers are scored one point for each correct response, producing a total CMR-R score between zero and twelve. *Id.*

The third instrument, Comprehension of *Miranda* Vocabulary (CMV), "assesses the examinee's ability to define six words that appear in the version of the *Miranda* warnings on which the *Miranda* instruments are based. The examiner reads each word, uses it in a sentence, and then asks the examinee to define the word." *Id.* Answers are scored two points for "adequate" responses, one point for "questionable" responses, and zero points for "inadequate" responses, producing a total CMV score between zero and twelve. *Id.* at 5-6.

The fourth instrument, Function of Rights in Interrogation ("FRI"),

assesses the examinee's grasp of the significance of the *Miranda* rights in the context of interrogation. For example, [*46] some defendants may understand the warning that they have the "right to an attorney," yet they may fail to appreciate its significance because they do not understand what an attorney does. The FRI, therefore, goes beyond understanding of the *Miranda* warning themselves to explore examinees' grasp of the significance of the warnings in three areas:

. **Nature of Interrogation:** jeopardy associated with interrogation

. **Right to Counsel:** the function of legal counsel

. **Right to Silence:** protections related to the right to silence, and the role of confessions

The FRI uses four picture stimuli, which are accompanied by brief vignettes (e.g., a story about a suspect who has been arrested, accompanied by a picture of a young man sitting at a table with two police officers). Each picture and vignette are followed by a set of standardized questions (15 in all) that assess the examinee's grasp of the significance of the three matters noted previously.

Id. at 6. Answers are scored two points for "adequate" responses, one point for "questionable" responses, and zero points for "inadequate" responses, producing a total FRI score between zero and thirty as well as subscale scores between zero and ten regarding [*47] recognition of the nature of interrogation, the significance of the right to counsel, and the significance of the right to silence. *Id.*

[**15] Dr. Everington administered the Grisso test in 1998 when Garner was 26 years old, approximately six years after Garner's interrogation. Garner received a CMR score of six, which "was below that of mentally typical adult subjects as well as below persons in his IQ range." 1 J.A. at 378 (Everington Report at 9). Garner's score was slightly below the mean score of thirteen-year-old juvenile delinquents of average intelligence but slightly above the mean score of twelve-year-old juvenile delinquents of average intelligence. ⁹ See GRISSE, *supra*, at 87 tbl.5. On the CMR-R, Garner received a perfect score of twelve, "indicating that he did not have difficulty in recognizing the meaning of the warning when presented in a true-false format." 1 J.A. at 378 (Everington Report at 9). On the CMV, Garner had difficulty defining five of the six vocabulary words: consult, attorney, appoint, entitled, and right. Garner received a score of seven, which was "below mentally typical peers and persons in his IQ range," *id.*, and below the mean score of twelve-year-old juvenile [*48] delinquents of average intelligence, *see* GRISSE, *supra*, at 88 tbl.6. Finally, Garner received a FRI score of twenty-four, "below that of adult offenders and non offenders." 1 J.A. at 378 (Everington Report at 9). Dr. Everington further noted that "all the items that [Garner] missed [on the FRI] were in one are[a]--the function of the right to silence--indicating that he still does [not] have a full understanding of this right, even after six years." *Id.* Garner's right-to-silence FRI subscale score of four was below the mean scores of adult offenders (7.48), adult nonoffenders (6.84), and juvenile delinquents (5.52). *See* GRISSE, *supra*, at 93 tbl.11. Dr. Everington concluded that the test results "indicate[d] that [Garner] does not have full comprehension of *Miranda* warnings or his right to remain silent." 1 J.A. at 373 (Everington Aff. at P17).

9 Grisso notes that CMR, CMR-R, and CMV scores "may be compared to norms for delinquent youths and adult offenders of various ages and levels of intelligence," as provided in a series of tables reporting results from earlier studies. GRISSE, *supra*, at 5-6; *see also id.* at 68. FRI and FRI subscale results from earlier studies are not delineated [*49] by age and IQ score, but still provide "norms for delinquent youths and adult offenders of various ages." *Id.* at 6.

c. Analysis

Garner's low IQ scores and other mental disabilities indicate that we must carefully consider whether Garner knowingly and intelligently waived his *Miranda* rights. Along with other courts, we have rejected calls to establish a categorical rule that a low IQ or other significant limitations in intellectual functioning are dispositive and make a suspect with such characteristics categorically unable to give a valid waiver of *Miranda* rights. *See, e.g., Clark v. Mitchell*, 425 F.3d 270, 283-84 (6th Cir. 2005) (concluding that borderline intellectual functioning was "not dispositive" and that the state court's determination that a suspect with an IQ of 75 knowingly and intelligently waived his *Miranda* rights was not unreasonable); *Finley v. Rogers*, 116 F. App'x 630, 636-38 (6th Cir. 2004) (unpublished opinion) (concluding that the state court's determination that a suspect with an IQ of 73 knowingly and intelligently waived her *Miranda* rights was not unreasonable because her below average intelligence "does not establish that she is *per se* unable to understand her [*50] *Miranda* rights"); *United States v. Rojas-Tapia*, 446 F.3d 1, 8-9 (1st Cir. 2006) (concluding that a suspect with an IQ of 71 did not show that he was incapable of knowingly waiving his rights, and collecting similar cases); *Young v. Walls*, 311 F.3d 846, 849 (7th Cir. 2002) ("Never has the Supreme Court of the United States held that retarded suspects are unable to waive their right to counsel or incapable of giving voluntary confessions . . ."). However, we also have not established a categorical rule that an express waiver from a person with a low IQ or other significant limitations similar to Garner's is always knowing and intelligent. Moreover, other courts have concluded that suspects with similar limitations in intellectual functioning did not knowingly and intelligently waive their *Miranda* rights in particular circumstances. *See, e.g., United States v. Garibay*, 143 F.3d 534, 538-39 (9th Cir. 1998) (concluding that a suspect with an IQ score that placed him in the borderline range of intellectual functioning did not knowingly and intelligently waive his *Miranda* rights); *Cooper v. Griffin*, 455 F.2d 1142, 1144-46 (5th Cir. 1972) (concluding that two teenage suspects with IQs between [*51] 61 and 67 did not knowingly and intelligently waive their *Miranda* rights); *United States v. Aikens*, 13 F. Supp. 2d 28, 34 (D.D.C. 1998) (concluding that a suspect with [***16] an IQ of 71 did not knowingly and intelligently waive his *Miranda* rights); *State v. Caldwell*, 611 So. 2d 1149, 1152 (Ala. Crim. App. 1992) (affirming the trial court's ruling that a suspect with an IQ of 71 did not knowingly and intelligently waive her *Miranda* rights), *cert. denied*, 510 U.S. 904, 114 S. Ct. 284, 126 L. Ed. 2d 234 (1993); *People v. Bernasco*, 138 Ill. 2d 349, 562 N.E.2d 958, 963-66, 150 Ill. Dec. 155 (Ill. 1990) (affirming the trial court's ruling that a 17-year-old suspect with an IQ of 80 did not knowingly and

intelligently waive his *Miranda* rights), *cert. denied*, 500 U.S. 932, 111 S. Ct. 2052, 114 L. Ed. 2d 458 (1991), *abrogated on other grounds by People v. G.O. (In re G.O.)*, 191 Ill. 2d 37, 727 N.E.2d 1003, 1010, 245 Ill. Dec. 269 (Ill. 2000).

Precedent also provides more specific guidance for our inquiry in this case. Those cases in which a court decided that a suspect with mental disabilities knowingly and intelligently waived his or her *Miranda* rights generally exhibit one or both of two important characteristics not found in this case. In a number of cases, the suspect produced expert evidence of mental disabilities, but did not produce [*52] any expert evidence that those disabilities made him or her incapable of knowingly and intelligently waiving *Miranda* rights or that he or she did not give a valid waiver in that particular instance. *See, e.g., Finley*, 116 F. App'x at 636-38; *United States v. Male Juvenile*, 121 F.3d 34, 40 (2d Cir. 1997); *Correll v. Thompson*, 63 F.3d 1279, 1288 (4th Cir. 1995), *cert. denied*, 516 U.S. 1035, 116 S. Ct. 688, 133 L. Ed. 2d 593 (1996); *Dunkins v. Thigpen*, 854 F.2d 394, 398-400 (11th Cir. 1988), *cert. denied*, 489 U.S. 1059, 109 S. Ct. 1329, 103 L. Ed. 2d 597 (1989). In those cases in which the suspect did produce specific expert evidence, at least one expert, usually the state's but sometimes even the suspect's, countered the assertion that the suspect did not knowingly and intelligently waive his or her *Miranda* rights.¹⁰ *See, e.g., Clark*, 425 F.3d at 275; *Taylor v. Rogers*, No. 95-3904, 1996 U.S. App. LEXIS 25350, 1996 WL 515349, at *3 (6th Cir. Sept. 10, 1996) (unpublished opinion); *Young*, 311 F.3d at 849; *People v. Jenkins*, 122 Cal. App. 4th 1160, 19 Cal.Rptr. 3d 386, 395 (Cal. Ct. App. 2004).

10 Because the state always has the opportunity to rebut a suspect's expert evidence that he or she did not knowingly and intelligently waive his or her *Miranda* rights, if competent evidence shows that to be true, we [*53] do not share the dissent's apparent fear that our decision today will require suppression of a large number of statements taken by police.

In the case at hand, in contrast, Dr. Everington offered her un rebutted expert opinion that Garner "does not have full comprehension of *Miranda* warnings or his right to remain silent." 1 J.A. at 373 (Everington Aff. at P17). The state has not countered that evidence with expert evidence to the contrary, but instead argues, as does the dissent, that the district court correctly determined that the limitations of the Grisso test made Dr. Everington's affidavit and report of limited probative value. First, the district court noted that the Grisso test measured Garner's understanding of the *Miranda* warnings at the time of the test, in 1998, and not at the time of his inter-

rogation, in 1992. However, the Grisso test manual does not indicate that it is reasonable to assume that Garner understood the *Miranda* warnings *better* at the time of his interrogation than he did at the time of the test. The manual lists a number of factors that Dr. Everington was to take into account in making a retrospective determination, *see* GRISSO, *supra*, at 71-72, and Dr. Everington [*54] concluded that "[i]n [her] professional opinion, it is reasonable to assume that he would not have comprehended the warnings any better under the highly stressful conditions present during the interrogation prior to trial." 1 J.A. at 373 (Everington Aff. at P17). Moreover, study results indicate that scores on the Grisso test are positively correlated with age--that is, one would generally expect Garner's Grisso test scores to be *higher* in 1998 than in 1992. *See* GRISSO, *supra*, at 83 tbl. 1, 87 tbl. 5, 88 tbl. 6. Accordingly, to the extent that the district court made a preliminary factual determination that Dr. Everington's affidavit and report should be given less weight because of this perceived limitation, we conclude that the district court committed clear error.

Second, the district court noted that the Grisso test as administered contained different language than the *Miranda* warnings given to Garner. This preliminary factual determination was correct: in addition to a number of slight differences in language, the Grisso test warnings used, for example, the word "attorney" instead of "lawyer" and "interrogation" instead of "questioning." [*17] GRISSO, *supra*, at 20; *cf. supra* notes 6 [*55] & 7. However, many of Dr. Everington's conclusions are unaffected by these differences. First, despite differences in language, "[n]evertheless, the comparison of the examinee's performance to the norms offered in the manual will provide an indication of the examinee's capacities for understanding relative to other examinees in the research study for which the instruments were developed. Thus comparative interpretations regarding the examinee's performance relative to people of various ages and levels of intelligence can still be made." GRISSO, *supra*, at 7. Garner consistently scored below persons in his age and IQ ranges, indicating that his competence for waiving his *Miranda* rights as suggested by his general cognitive abilities did not accurately reflect whether he actually knowingly and intelligently did so. Second, although three of the words that Garner could not define as part of the CMV--consult, attorney, and entitled--were not used in the warnings actually given him, Garner could not give a satisfactory definition of two key words common to both the test and the warnings: appoint and right. Third, the Grisso test warnings regarding the right to remain silent were identical [*56] in all relevant respects to those given by Officers Frisby and Feldhaus, and Garner's Grisso test results indicated that Garner had significant difficulties understanding the right to remain silent. "

11 The district court also noted two other limitations of the Grisso test, although these limitations need not concern us long. First, an individual may feign misunderstanding or otherwise attempt to give inaccurate responses. However, the Grisso test includes internal mechanisms by which to determine whether a subject is feigning misunderstanding, *see* GRISSO, *supra*, at 70-71, and, as the district court determined, there is no indication that Garner's Grisso test results are in any way inauthentic. Second, the Grisso test does not measure the ultimate validity of a *Miranda* waiver. That, of course, is a question for the court.

Additionally, the district court gave great weight to evidence tending to show that Garner did knowingly and intelligently waive his *Miranda* rights. However, this evidence is subject to significant limitations not recognized by the district court. First, the district court credited statements from Dr. Schmidtgoessling that Garner was of "near average intelligence" [*57] and "able to understand all questions and material presented to him." 2 J.A. at 410 (Dist. Ct. Op. & Order at 25) (quoting Schmidtgoessling Report at 2). However, these statements were taken out of context. Dr. Schmidtgoessling's report actually stated: "[Garner] *appeared* to be of near average intelligence *by observation*. His memory *appeared* to be intact. He *appeared* to be able to understand all questions and material presented to him suggesting that his receptive language is intact." Schmidtgoessling Report at 2 (emphasis added). In this portion of her report, Dr. Schmidtgoessling was describing only her observations, observations later determined to be inaccurate by results from her own tests as well as by tests administered by Dr. Smalldon, Dr. Schroeder, and Dr. Everington, and the district court therefore committed clear error by relying on Dr. Schmidtgoessling's observations as substantive conclusions. The expert evidence that Garner's appearance did not accurately reflect his level of intelligence and understanding also undermines any substantial reliance on the police officers' testimony that Garner appeared to understand the warnings. *Cf.* Morgan Cloud et al., *Words Without* [*58] *Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 *U. CHI. L. REV.* 495, 511-14 (2002) (discussing the difficulty in estimating the level of understanding of those with mental disabilities).

Similarly, the district court gave great weight to the fact that Garner told the police officers that he understood each *Miranda* warning as it was read to him. However, the district court did not mention, much less analyze, Garner's rebuttal evidence. Dr. Everington concluded in her report that Garner's "cognitive and linguis-

tic limitations make the likelihood of misunderstanding and suggestibility to input from others greater than with mentally typical individuals." 1 J.A. at 379 (Everington Report at 10); *see also* Cloud et al., 69 *U. CHI. L. REV.* at 511-12 & n.76 (describing how people with mental disabilities are "unusually susceptible to the perceived wishes of authority figures"). Thus, although Garner's statements of understanding are evidence that he knowingly and intelligently waived his *Miranda* rights, *see, e.g., United States v. Turner*, 157 *F.3d* 552, 555 (8th Cir. 1998), the probative value of this evidence is limited by Dr. Everington's expert evidence. [**18] Furthermore, [*59] although Garner was advised of his *Miranda* rights twice, repetition of the warnings was unlikely to be of any value if he did not understand them the first time, and warnings given after a suspect has already spoken once with police are often ineffective regardless of the suspect's cognitive abilities. *See Missouri v. Seibert*, 542 *U.S.* 600, 611-14, 124 *S. Ct.* 2601, 159 *L. Ed. 2d* 643 (2004) (plurality opinion).

In sum, the evidence shows that Garner was nineteen years old at the time of his interrogation and had a very poor education, an IQ of 76, and other significant limitations in intellectual functioning, including limitations directly related to understanding and comprehension of his *Miranda* rights. Specifically, Dr. Everington's un rebutted expert evidence indicated that Garner could not satisfactorily define the word "right" and did not understand the right to remain silent. Similar evidence has led other courts to conclude that suspects did not knowingly and intelligently waive their *Miranda* rights. *See Aikens*, 13 *F. Supp. 2d* at 32, 34 (suppressing a statement from a suspect with an IQ of 71 because he did not understand the right to remain silent or that he was entitled to have a lawyer present during questioning, [*60] despite the fact that police officers went over each warning with him one by one); *Bernasco*, 562 *N.E.2d* at 963-64 (affirming a trial court's ruling suppressing a statement from a suspect with an IQ of 80 because he did not understand the word "right" and other words contained in the *Miranda* warnings, although he did understand the right to remain silent). *But see Smith v. Mullin*, 379 *F.3d* 919, 932-34 (10th Cir. 2004) (concluding on habeas review under AEDPA that a suspect with "mild to borderline mental retardation" gave a knowing and intelligent waiver despite contrary results from a Grisso test administered years after the interrogation). We agree with the analysis of those courts: Garner's young age, indeterminate prior experience with the legal system, poor education, significant limitations in intellectual functioning, and the un rebutted expert evidence all tend to show that Garner's *Miranda* waiver was not made knowingly and intelligently. *Cf. Michael C.*, 442 *U.S.* at 725 (listing factors to be considered). The only significant evidence to the contrary is the fact that Garner told police at the

time of his interrogation that he understood his rights and the waiver, but he has introduced [*61] un rebutted expert evidence indicating that this evidence should not be given great weight. Accordingly, applying de novo habeas review, *see supra* Section II.A.2, we conclude that the preponderance of the evidence shows that Garner did not knowingly and intelligently waive his *Miranda* rights.¹² Thus, admission of his statement at trial was unconstitutional.

12 To be clear, we do not conclude that a person with Garner's mental disabilities is categorically *unable* to knowingly and intelligently waive his *Miranda* rights, only that the preponderance of the evidence shows that Garner did not do so in this case. *Cf. United States v. Macklin*, 900 F.2d 948, 952 (6th Cir.) (describing the potential disempowering effect of ruling that people with mental disabilities do not have the capacity to waive legal rights), *cert. denied*, 498 U.S. 840, 111 S. Ct. 116, 112 L. Ed. 2d 86 (1990). Garner may very well have been able to do so under different circumstances--for example, if his rights had been explained to him in very simple terms, *see Young*, 311 F.3d at 849, or if he had the assistance of a lawyer, social worker, or family member, *cf. G.O.*, 727 N.E.2d at 1021-22 & n.11 (McMorrow, J., dissenting) (stating that no confession given [*62] by a suspect under the age of 15 should be admitted into evidence unless the suspect is permitted to consult with a lawyer, family member, or other adult personally interested in the child's well-being and listing states that have adopted such a rule); *B.M.B.*, 955 P.2d at 1309-13 (adopting a similar rule and discussing decisions from other states that have also done so).

5. Harmless Error

The unconstitutional admission of a confession at trial is normally subject to harmless-error analysis. *See Fulminante*, 499 U.S. at 309-12. In this case, though, the state has waived any argument that admission of Garner's statement was harmless error. The state's brief on appeal includes a fact sheet with a box checked indicating that the state was not arguing that any potential constitutional violations were harmless, *see Appellee's Br.* at 1-2, and the state did not argue elsewhere in its brief that admission of Garner's statement was harmless. Accordingly, we conclude that admission of Garner's statement was not harmless error.

B. Other Claims

[**19] Because we grant Garner habeas relief on his *Miranda* claim, we decline to address his alternative claims for relief from his conviction.

III. CONCLUSION

Because [*63] Garner did not knowingly and intelligently waive his *Miranda* rights before his interrogation, we **REVERSE** the judgment of the district court and **REMAND** the case with instructions that the district court order Garner released from state custody unless the State of Ohio commences a new trial within 180 days of the final federal-court judgment in this case.

DISSENT BY: ROGERS

DISSENT

[**20]

ROGERS, Circuit Judge, dissenting. Law professors write whole books on what the meaning of a "right" is, yet that does not mean that such words cannot be used for ordinary purposes by people of average, or indeed below-average, intellect. To invalidate a waiver of *Miranda* rights because a person of limited IQ cannot give satisfactory definitions of words like "right" is to make it practically impossible for police to rely on objectively reasonable agreements on the part of such persons to talk with police. Nothing in the policies underlying *Miranda* mandates such an unreasonable obstacle to desirable police procedures.

I am therefore compelled to disagree with the conclusion of the majority opinion in this case that the defendant did not knowingly and intelligently waive his *Miranda* rights. The district court determined that the [*64] waiver was knowing and intelligent, based on the court's careful analysis of the record and of the evidence of the expert who administered an evaluative test on the defendant. The district court's factual conclusion in this regard is compelled by the district court's thoughtful analysis, *see Dist. Ct. Op.* at 12-26, and is obviously not erroneous, much less clearly erroneous.

To overturn such a factual determination on the basis of our independent appellate review is to create a wholly unwarranted rule of law. To rely essentially on the low score of defendant on a test, applied six years after the relevant waiver--when the test is scored low because the testee does a poor job of explaining the meaning of words such as "rights," "attorney," and "interrogation"--is to create a powerful litigation tool. That tool can easily become an engine that will effectively preclude the interrogation by police of criminal suspects in custody who are not articulate enough to convey effectively what they may basically understand. Because it is unrealistic to expect most criminal suspects to be able to

explain abstract concepts in an articulate fashion, the rule created will bring into question the bulk [*65] of statements by persons in custody, no matter how reasonable and careful the police have been in giving *Miranda* warnings.

There is no argument that the police in this case were not reasonable or careful in giving the warnings. After virtually each element of the *Miranda* warning the police asked and obtained assurance that the suspect understood the meaning. Words with a potential for misunderstanding--such as "attorney"--were, indeed, simplified (e.g., to "lawyer"). Importantly, there is nothing in the record to indicate that the police were made aware that there was a lack of understanding. It is not apparent what more the police could do, short of administering the Grisso test themselves.

Miranda cannot logically be extended to protect the hidden misunderstandings of suspects, where the police have been objectively reasonable in obtaining a waiver. The underlying interest protected is the right of suspects not to talk when they don't want to, or when they would prefer to have a lawyer. *Miranda* is a protective rule. That is, *Miranda* protects the underlying right, in part, by requiring the police to obtain an effective waiver, without which the information cannot be used. But if evidence [*66] is excluded notwithstanding proper police conduct, the deterrent aspect of *Miranda* is simply not applicable. It is the logical equivalent of saying that police violate the knock-and-announce rule for warrant-authorized home entries when the police *do* knock and announce but the inhabitant, unknown to the police, is deaf.

To succeed with his *Miranda* claim, Garner needed to prove that, under the totality of the circumstances, he did not knowingly and intelligently waive his rights. *Clark v. Mitchell*, 425 F.3d 270, 283 (6th Cir. 2005). The objective evidence in this case, however, demonstrated that Garner did waive his rights knowingly and intelligently. The undisputed evidence shows that Garner appeared "perfectly normal" and "very coherent" when officers read him his *Miranda* rights and [**21] when he confessed to his crimes. JA 944. The evidence also shows that Garner stated that he understood the term "waiver" and that he responded to each *Miranda* warning by indicating that he understood the warnings. JA 955. The Ohio Supreme Court, moreover, found that Garner signed a waiver of rights form and acknowledged verbally that he had previously executed a waiver. *State v. Garner*, 74 Ohio St. 3d 49, 1995 Ohio 168, 656 N.E.2d 623, 635 (Ohio 1995). [*67] Finally, at the time of Garner's interrogation, there were no obvious signs that Garner was mentally disabled, unable to understand the instructions, or under the influence of drugs or alcohol.

That is, all objective evidence pointed to Garner's knowing and intelligent waiver. ¹

1 The district court also noted that after Garner confessed, he entered a guilty plea before a state trial judge to theft and receiving stolen property. The district court found that the judge's colloquy with Garner presented additional evidence that Garner had the ability to answer questions coherently, and the district court found the colloquy to be additional evidence that Garner could have knowingly and intelligently waived his *Miranda* rights before he confessed.

It is a mistake to rely entirely on Garner's subjective understanding of the *Miranda* warnings instead of relying on objective signs that Garner's waiver was knowing and intelligent. A purely subjective approach deviates from the original purpose of the *Miranda* warnings, namely, "to protect the suspect's privilege against compulsory self-incrimination." *Young v. Walls*, 311 F.3d 846, 850 (7th Cir. 2002). As the Supreme Court explained in *New York v. Quarles*, "[t]he *Miranda* decision was based in large part on this Court's view that the warnings which it required police to give to suspects in custody would reduce the likelihood that the suspects would fall victim to constitutionally impermissible practices of police interrogation." 467 U.S. 649, 656, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984). Here, there is no evidence that authorities compelled Garner to testify against himself, and the police officers' objective understanding (of the suspect's subjective understanding) should be the ultimately determinative factor in the majority's analysis. As the Seventh Circuit has reasoned, the "relevant constitutional principles are aimed not at protecting people from themselves but at curbing abusive practices by public officers." *Rice v. Cooper*, 148 F.3d 747, 750 (7th Cir. 1998). Judge Posner's analysis in *Rice* is thoughtful and instructive: Of course if the subject is a small child, or obviously can't speak English, or is apparently so mentally ill or retarded as not to be able to make a rational choice, that objectively observable lack of subjective understanding invalidates a *Miranda* waiver. *See id.* On the other hand,

[o]n this analysis, the knowledge of the police is vital. [*69] If they have no reason . . . to think that the suspect doesn't understand them, there is nothing that smacks of abusive behavior. It would seem to follow that the question is not whether if [the subject] were more intelligent, informed, balanced, and so forth he would not have waived his *Miranda* rights, but whether the police believed he understood their explanation of those

rights; more precisely, whether a reasonable state court judge could have found that the police believed this.

Id. at 750-51; see also *Taylor v. Rogers*, No. 95-3904, 1996 U.S. App. LEXIS 25350, 1996 WL 515349, at *3 (6th Cir. Sept. 10, 1996) (considering objective factors in determining whether consent was knowing and intelligent); *United States v. Turner*, 157 F.3d 552, 555 (8th Cir. 1998) (finding, based only on objective signs, that consent was knowing and intelligent); *Starr v. Lockhart*, 23 F.3d 1280, 1294 (8th Cir. 1994) (same); *Derrick v. Peterson*, 924 F.2d 813, 824 (9th Cir. 1990) (relying, in part, on objective signs to find waiver); *United States v. Rojas-Tapia*, 446 F.3d 1, 7-8 (1st Cir. 2006).

Moreover, as even the majority opinion recognizes, a purely subjective approach will "put the police in the difficult position of having to [*70] assess a suspect's understanding and intellectual capacities at the time of interrogation." Maj. Op. at 11 n.5. That is, police departments will never know whether a suspect who confessed will claim years later that, contrary to objective signs at the time, he subjectively failed to consent; and these departments will need to hire mental-health [**22] professionals to divine the subjective intent of all defendants. These costs create no discernible benefits.

The district court's analysis, in short, properly considered evidence that Garner knowingly and intelligently waived his *Miranda* rights, and it would be wrong to assign no value to this objective evidence.

Even if it were proper to disregard contemporaneous objective evidence that Garner knowingly and intelligently waived his *Miranda* rights, the evidence of Garner's subjective abilities in this case does not require reversal. The majority opinion places great reliance on the expert opinion of Caroline Everington, Ph.D., an educational and forensic psychologist, who stated that Garner lacked the "full comprehension of *Miranda* warnings [and] his right to remain silent." Maj. Op. at 15. ² As the district court noted, there are serious concerns [*71] with the accuracy of Everington's assessment.

2 The majority opinion discusses at some length the affidavit of Dr. Jeffrey Smalldon. See Maj. Op. at 13. Dr. Smalldon, however, did not conclude that Garner did not knowingly and intelligently waive his *Miranda* rights. Rather, Dr. Smalldon merely called for a more "focused assessment." JA 922.

First, as the district court observed, Everington, who administered the so-called Grisso test, did not claim to be licensed as a clinical psychologist or licensed for psychi-

atric practice. This is important because the Grisso test requires "mental health professionals who are licensed for clinical psychological or psychiatric practice in their state, and who are qualified by training and experience to perform evaluations for use by courts and attorneys . . . in criminal cases" to administer the test. See THOMAS GRISSO, INSTRUMENTS FOR ASSESSING UNDERSTANDING & APPRECIATION OF MIRANDA RIGHTS 2 (1998). Presumably, the Grisso test requires that a professional administer the questions to avoid errors, errors that might have occurred in this case, which result from having a non-professional administer the test.³

3 Garner argues that Everington is a nationally [*72] known expert with extensive background in testing mental retardation and is a certified forensic examiner by the American Board of Forensic Examiners. However, Garner did not establish Everington's credentials before the district court and did not ask for an evidentiary hearing to allow Everington to testify.

Second, the district court expressed concerns over the accuracy of the Grisso test because Everington administered the test almost seven years after the police interrogation and after the imposition of Garner's death sentence. These are serious concerns because the Grisso test only provides an "index of the person's capacities for understanding the *Miranda* warnings at the time of the evaluation[.]" not at the time of the police interrogation, GRISSO, *supra*, at 7, and a defendant who is capable (whether through the insinuation of counsel or through other means) to understand the meaning and importance of the Grisso test might feign misunderstanding to avoid a death sentence. This court has no way of knowing whether the test accurately reflected Garner's abilities at the time that he waived his *Miranda* rights or whether Garner feigned misunderstanding. One cannot brush aside these [*73] serious concerns and accuse the district court of committing plain error by simply noting that, in general, Grisso test results are generally positively correlated with age.

Third, the district court noted that Everington asked Garner whether he understood a *Miranda* warning with complex terms (*i.e.*, "consult," "attorney," "interrogation") when the actual interrogation at issue in this case involved less complicated terms (*i.e.*, "talk," "lawyer," "questioning"). The district court was correct to find that the manner in which Everington questioned Garner could have skewed the results. See generally Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. [**23] REV. 495, 581 (2002) (chart showing that 49% of disabled participants in a survey understood the sim-

plified term "lawyer" while only 40% understood the *Miranda* term "attorney").⁴

4 The majority opinion appears to suggest that mere inability to explain the two terms that appeared in both Everington's test and the actual warning at issue in this case ("appoint" and "right") is sufficient to invalidate a waiver of *Miranda* rights even if the suspect has no difficulty in recognizing [*74] the meaning of the *Miranda* warning when presented in a true-false format, as is the case here. Such a sweeping holding threatens to preclude police from taking a vast number of otherwise proper statements.

The majority opinion minimizes or disregards other evidence that Garner was capable of subjectively waiving his *Miranda* rights. For example, the district court observed that Garner admitted that he started the fire to create a smokescreen. The confession suggests that, at the time, Garner understood the consequences of committing theft and therefore had the capacity to understand the consequences of waiving his rights. See *United States v. Macklin*, 900 F.2d 948, 952 (6th Cir. 1990). In addition, as the district court noted, the competency report stated that Garner was "near average intelligence" and "able to understand all questions and materials presented to him."⁵

5 The district court did not take these statements out of context, but quoted a passage from the competency report in full. The court quoted on page 13 of its opinion that:

[Garner] appeared to be of near average intelligence by observation. His memory appeared to be intact. He appeared to be able to understand all questions [*75] and material presented to him suggesting that his receptive language is intact. Likewise, his expressive language abilities were intact.

He was familiar with the specifics of the allegations against him. Mr. Garner was able to give a coherent, realistic account of his behavior relevant to the allegations although his account differed in a couple of major respects is [sic] from the statement he made to police.

Dist. Ct. Op. at 13.

The Ohio courts in this case essentially determined that Garner knowingly and intelligently waived his *Miranda* rights, although their conclusion appears in a slightly different context and without the benefit of Everington's observations. In rejecting Garner's claim that his counsel was ineffective in failing to raise this issue, the state trial court, for example, considered all the evidence that was available at that time and concluded that Garner's counsel had no essential duty to claim that Garner could not understand the *Miranda* warnings. JA 188. Because the bulk of the trial court's analysis deals with the issue of whether Garner could have knowingly and intelligently waived his *Miranda* rights, the trial court's conclusion that Garner did not suffer ineffective [*76] assistance of counsel appears to be the result of the trial court's conclusion that there was no merit to Garner's *Miranda* claim because the evidence established that Garner knowingly and intelligently waived his rights. The Ohio Court of Appeals also rejected Garner's ineffective assistance of counsel argument, after reviewing the record, *State v. Garner*, No. C-960995, 1997 Ohio App. LEXIS 5658, 1997 WL 778982, at *3 (Ohio App. Dec. 19, 1997), suggesting that it too did not believe that Garner lacked the ability to waive his *Miranda* rights.

If there were any remaining doubt that Garner knowingly and intelligently waived his rights, the fact that the Ohio courts considered and implicitly rejected Garner's *Miranda* claim bolsters the conclusion that Garner did not suffer a constitutional violation. Although the issue before this court and the issue before the Ohio courts are not identical, in that this court must decide whether there was merit to Garner's *Miranda* claim and the Ohio courts determined whether counsel was ineffective in not raising Garner's *Miranda* claim, the Ohio courts clearly considered Garner's argument that the evidence demonstrated that he lacked the capacity to consent. After considering that [*77] evidence, the Ohio courts found that counsel was not ineffective, and the courts' evaluation of that evidence should help guide our analysis of the *Miranda* claim, see *Filiaggi v. Bagley*, 445 F.3d 851, 854 (6th Cir. 2006), especially considering that the Ohio courts reached the correct result.

[**24] In addition, I question the decision to review an issue that Garner procedurally defaulted but as to which the state failed to argue procedural default in the district court. First, it is not clear whether, under AEDPA, a state can forfeit a procedural default defense based on failure to exhaust a remedy no longer available, absent an express waiver. In cases to which AEDPA applies, such as this one, "[a] State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." 28 U.S.C. § 2254(b)(3). In *Banks v. Dretke*, 540 U.S. 668,

705, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004), the Supreme Court noted that "under pre-AEDPA law, exhaustion and procedural default defenses could be waived based on the State's litigation conduct," but that "AEDPA forbids a finding that exhaustion has been waived unless the State expressly [*78] waives the requirement." The close conceptual relationship between the distinct doctrines of procedural default and exhaustion suggests that express waiver should be required for both. The Eleventh Circuit has explicitly held that, although § 2254(b)(3) by its language applies only to exhaustion, the section "applies with full force in cases . . . where the procedural bar arises only as a direct result of the petitioner's failure to exhaust his state law remedies." *McNair v. Campbell*, 416 F.3d 1291, 1305 (11th Cir. 2005); see also *Gonzales v. McKune*, 279 F.3d 922, 924 (10th Cir. 2002) (en banc). But see *Franklin v. Johnson*, 290 F.3d 1223, 1231 (9th Cir. 2002) ("[Section] 2254(b)(3)'s reference to exhaustion has no bearing on procedural default defenses."). The Eleventh Circuit reasoned that "[b]ecause § 2254(b)(3) provides that the State can waive [petitioner's] failure to properly exhaust his claim only by expressly doing so, it logically follows that the resulting procedural bar, which arises from and is dependent upon the failure to properly exhaust, can only be waived expressly." *McNair*, 416 F.3d at 1305.

The majority in this case relies upon our decisions in *Sowell v. Bradshaw*, 372 F.3d 821 (6th Cir. 2004), [*79] and *Howard v. Bouchard*, 405 F.3d 459 (6th Cir. 2005), as permitting discretionary disregard of a procedural default argument not raised in the district court. These cases simply do not address the question of whether, under AEDPA, a state may implicitly waive a procedural default based on failure to exhaust a presently unavailable state remedy. *Sowell* was a pre-AEDPA case to which § 2254(b)(3) did not apply. It is true that this court in a post-AEDPA case relied on *Sowell* for the proposition that we are "permitted to consider the procedural default issue even when raised for the first time on appeal if we so choose," thereby suggesting by negative inference that refusal to consider procedural default is also within our discretion when raised for the first time on appeal. *White v. Mitchell*, 431 F.3d 517, 524 (6th Cir. 2005). But the *White* opinion did not address the possible applicability of § 2254(b)(3) and did not exercise any discretion that might have been implied to refuse to consider procedural default. Indeed, the *White* court denied relief on the issue in question on the basis of procedural default. 431 F.3d at 525.

Howard is also very different. In *Howard*, the state raised the [*80] procedural default argument in district court but failed to reassert the argument on appeal. 405 F.3d at 476. First, *Howard* involved waiver in the court of appeals rather than in the district court, and the discre-

tion involved in *Howard* was whether to affirm a judgment on grounds presented below but not argued on appeal—a traditionally broad appellate court discretion. Second, and more fundamentally, *Howard* held that it was within the appellate court's discretion to invoke procedural default that had arguably been waived. *Id.* The conclusion was proper regardless of whether any waiver had to be express. This is simply not a holding that it is within the court's discretion not to invoke procedural default where procedural default had arguably been waived. The express waiver requirement of AEDPA, which had no effect on the resolution of the former question, is dispositive of the latter question, under the Eleventh Circuit's analysis. Thus, the question of our discretion to refuse to consider a procedural default claim not raised below, where the procedural default consists of a failure to exhaust a remedy no longer available, remains open in this circuit. In my view, the reasoning of [*81] the Eleventh Circuit in *McNair* is persuasive, and procedural default accordingly precludes our reaching the *Miranda* waiver issue in this case.

[**25] Second, even if we have the discretion to disregard the procedural default because of the state's failure to argue procedural default in the district court, it is inconsistent with the guiding principles of AEDPA to exercise that discretion in the context of this case. In *Sowell*, we exercised the discretion "[i]n light of the resources that have been expended by the district court and the serious consequences facing Sowell." 372 F.3d at 830. However, in *White*, a post-AEDPA case, we held—without giving particular reasons for not exercising *Sowell* discretion—that procedural default should bar a death-row defendant's claim even though the State did not raise procedural default in the federal district court. 431 F.3d at 524-25. Thus *Sowell* cannot be read to require the dispensation of the procedural default requirement simply because the stakes are high. And the post-AEDPA *White* case can be read as at least implicitly taking into account state-comity considerations of the type that drove the enactment of AEDPA.

Such considerations counsel against [*82] disregarding procedural default in this case, notwithstanding the state's failure to raise the procedural default of the *Miranda* waiver competence issue in the district court. The Seventh Circuit in similar circumstances assumed arguendo that it had the discretion post-AEDPA to reach a procedurally defaulted claim because the state failed to raise procedural default in the district court, but that court found it appropriate to reach the state's procedural default defense for several reasons. *Perruquet v. Briley*, 390 F.3d 505, 516-19 (7th Cir. 2004). First, the procedural default was clear, *id.* at 518, as it is in this case. Second, "because no [state] court was ever given the opportunity to pass on the merits of [petitioner's] consti-

tutional claim, comity and federalism principles weigh strongly against permitting [petitioner] to assert the claim in federal court." *Id.* This is true in the present case. Indeed, this consideration weighs particularly strongly where—as here—the state court's lack of opportunity to pass on the merits was not the result of, for instance, a state court's erroneous application of some procedural hurdle or the ineffective assistance of counsel appointed [*83] by the state courts. Third, in Judge Rovner's words,

if we were to reach the merits of [petitioner's] constitutional claim, we necessarily would have to do so *de novo*, as there is no state-court decision we can look to for an evaluation of this claim. This would be inconsistent with the high level of deference to state-court decisions that Congress mandated when it passed the Antiterrorism and Effective Death Penalty Act of 1996. It would also amount to a windfall for [petitioner], who would win plenary review of a claim that he never presented to the [state] courts, whereas habeas petitioners who properly present their claims to state courts first are entitled only to the extremely narrow review mandated by section 2254(d).

Id. (citations omitted). This consideration directly applies in this case where the majority has rejected modified AEDPA review in favor of *de novo* review on the theory that the precise issue of voluntary and intelligent waiver was not necessarily determined by the state courts. (Were modified AEDPA review to apply, this factor would weigh less in favor of considering procedural default.)⁶

All of these considerations strongly counsel in favor of considering the [*84] state's procedural default contention raised for the first time on appeal. Since no real argument is put forward that the *Miranda* waiver competence issue was not procedurally defaulted, I would affirm in the alternative on that basis alone.

6 The Seventh Circuit also relied on its observation that the federal issue in that case required substantial familiarity with elements of state criminal law. *Perruquet*, 390 F.3d at 518. While that particular consideration does not apply in this case, the issue here, on the other hand, is one of great impact on the conduct of state law enforcement systems.

Finally, none of Garner's other claims requires habeas relief. First, because Garner's *Miranda* claim lacks merit, his counsel was not ineffective for failing to investigate the claim or to raise it before the state courts. Second, Garner claims that the state trial court's denial of expert [**26] assistance unfairly kept him from developing evidence that he could not have knowingly and intelligently waived his *Miranda* rights. This claim lacks merit because the assistance that the experts would have given would not have been sufficient to show that his waiver was intelligent. *See* Dist. Ct. Op. at 62. Finally, [*85] Garner claims that the process for selecting the petit jury venire violated his constitutional rights. Garner admits that he did not present this claim to the state courts. *See* Appellant's Supp. Reply Br. at 2. For the reasons given by the district court, this claim was procedurally defaulted and in any event is without merit. *See* Dist. Ct. Op. at 27-34. For the thoughtful and extensive reasons provided by the district court on these issues, I would affirm.

[Cite as *State v. Dean*, 2007-Ohio-1031.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO :
Plaintiff-Appellee : C.A. CASE NOS.
 : 2006CA61/2006CA63
v. : T.C. NO. 05CR348
JASON DEAN : (Criminal Appeal from
JOHN BUTZ AND RICHARD MAYHALL : Common Pleas Court)
Defendants-Appellants :
 :

.....
OPINION

Rendered on the 9th day of March, 2007.

.....
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1608, Springfield, Ohio 45501
Attorney for Plaintiff-Appellee

RICHARD A. CLINE, Atty. Reg. No. 0001854, 580 South High St., Suite 200,
Columbus, Ohio 43215
Attorney for Defendants-Appellants John Butz and Richard Mayhall

.....
WOLFF, P.J.

{¶ 1} Richard Mayhall and John Butz, trial counsel for Jason Dean in his
capital murder case, appeal from a judgment of the Clark County Court of Common
Pleas, which found them to be in direct criminal contempt and imposed a fine of

\$2,000 each. Mayhall and Butz appeal from the contempt citations. As discussed infra, we agree with Mayhall and Butz that the trial court erred in holding them in contempt without notice and the opportunity to be heard and without the benefit of a neutral and detached judicial officer.

{¶ 2} The following facts are relevant to this appeal.

{¶ 3} Mayhall and Butz represented Dean in his capital murder case, which involved six counts of attempted murder, two counts of aggravated murder, four counts of having weapons while under disability, two counts of aggravated robbery, and two counts of improperly discharging a firearm into a habitation. Prior to trial, Dean's counsel filed numerous motions, including a motion for disclosure of exculpatory evidence and a demand for discovery. On April 20, 2006, the state filed a certification that disclosure of the address of a witness, Crystal Kaboos, might subject her to physical harm or coercion (Doc. #126). Dean requested a hearing on the state's certification.

{¶ 4} On April 24, 2006, the court held a hearing on the state's certification as well as other issues. No witnesses testified. The trial court "accepted the State's certification that the disclosure of witness Kaboos' address may subject her to physical harm or coercion," and it held that the state need not disclose Kaboos' address to the defense. In the interest of justice and fairness, the court further required the state to make Kaboos available at the Clark County Common Pleas Courthouse the week of May 8, 2006 for defense counsel and their investigator to interview her; however, the court did not order Kaboos to speak with the defense. (Doc. #128).

{¶ 5} On May 3, 2006, Dean filed a motion for the court to disqualify itself.

(Doc. #138). Citing *State v. Gillard* (1988), 40 Ohio St.3d 266, 533 N.E.2d 272, Dean asserted that, because the trial court heard the evidence regarding the Crim.R. 16(B)(1)(e) certification, the court may not preside over his trial. The *Gillard* court held that “when the state seeks to obtain relief from discovery or to perpetuate testimony under Crim.R. 16(B)(1)(e), the judge who disposes of such motion may not be the same judge who will conduct the trial.” *Gillard*, 40 Ohio St.3d 226 at paragraph one of the syllabus. Dean noted that, at the April 24, 2006 hearing, the prosecutor had represented to the court that Kaboos had been threatened with death, including a specific threat to shoot her in the face.

{¶ 6} On May 5, 2006, the court held another hearing to address several pending motions, including the motion to disqualify. The court determined that it would take the matter under advisement. (Doc. #142). Later that day, the court filed an entry overruling the motion to disqualify. The court cited two reasons: (1) that the court anticipated “overwhelming evidence of the defendant’s guilt at trial which would render a *Gillard* violation harmless,” and (2) that the court did not hear any evidence about Dean and whether he had made threats. The court noted that the April 24th hearing was not an evidentiary hearing and consisted of only statements by counsel. (Doc. #143).

{¶ 7} Jury selection began on May 8, 2006. On May 11, 2006, Mayhall and Butz filed an application for the disqualification of the trial judge with the Supreme Court of Ohio . (Doc. #149). They cited the judge’s entry denying the motion to disqualify, among other things, as evidence of the court’s bias and prejudice. Chief Justice Moyer denied the application for disqualification on May 11, 2006.

{¶ 8} On May 12, 2006, the trial court informed counsel that it had “very serious concerns about defense counsel and the manner in which they’re operating in this courtroom.” However, the court further stated that it would “take that matter up at a later time ***, preferably at the conclusion of this case.”

{¶ 9} On May 15, 2006, Mayhall and Butz filed a motion to withdraw as counsel for Dean, stating that the court’s “great concern” about defense counsel’s conduct and the implication that they had done something unethical and/or contemptuous would impair their ability to effectively represent their client. The court denied the motion. The court also repeatedly denied defense counsel’s subsequent requests to address their conduct and not to wait until the end of trial.

{¶ 10} On June 13, 2006 – after trial had concluded and Dean had been sentenced – the trial court filed an entry addressing the alleged misconduct by Mayhall and Butz. The trial court found that “defense counsel, in a calculated scheme to remove [the judge] from the Dean case, manipulated the Court into presiding over a Criminal Rule 16(B)(1)(e) hearing so that the Court would be disqualified from presiding over the Dean trial pursuant to *Gillard*.” The court determined that the conduct warranted a direct criminal contempt finding, and it fined both counsel \$2,000. The court collected the fines by discounting \$2,000 from the compensation of each attorney for representing Dean.

{¶ 11} Mayhall and Butz raise two assignments of error on appeal. We address the assignments in reverse order.

{¶ 12} II. “THE COURT BELOW ERRED IN SUMMARILY FINDING DEFENSE COUNSEL IN DIRECT CRIMINAL CONTEMPT OF COURT FOR CONDUCT THAT

DID NOT OCCUR IN THE PRESENCE OF THE COURT. FURTHERMORE, THE TRIAL COURT WAS SO EMBROILED IN THE CONTROVERSY THAT IT SHOULD HAVE REFERRED THE FACT FINDING TO ANOTHER JUDGE. THESE ERRORS VIOLATED DEFENSE COUNSEL'S RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 10 AND 16 OF THE OHIO CONSTITUTION."

{¶ 13} In their second assignment of error, Mayhall and Butz argue that, to the extent their conduct was contemptuous, it constituted indirect contempt and, therefore, they should have been afforded due process protections. Alternatively, Mayhall and Butz contend that, even if the conduct constituted direct contempt, there was no imminent threat to the administration of justice and, consequently, a summary proceeding was inappropriate.

{¶ 14} "Contempt of court consists of an act or omission substantially disrupting the judicial process in a particular case." *In re Davis* (1991), 77 Ohio App.3d 257, 262, 602 N.E.2d 270. Courts have inherent authority to punish contemptuous conduct. *Id.* at 262-63. "The propriety of imposing punishment for contempt often turns on whether the contempt is direct or indirect, and on whether it is civil or criminal in nature." *State v. Kitchen* (1998), 128 Ohio App.3d 335, 341, 714 N.E.2d 976.

{¶ 15} Contempt falls within two general categories – civil and criminal – based on the character and purpose of the sanction. *Id.* "Sanctions for criminal contempt are punitive in nature and unconditional." *State v. Montgomery*, Montgomery App. No. 20036, 2004-Ohio-1699, at ¶18. They are intended to punish the offender for past

disobedience of a court order or other contemptuous conduct and to vindicate the authority of the court. *Id.* “Civil contempt sanctions, on the other hand, are remedial and are intended to coerce the contemnor into complying with the court’s order.” *Id.* The punishment for civil contempt is conditional, and the contemnor has an opportunity to purge himself of the contempt and avoid the punishment by complying with the court’s order. *Id.*

{¶ 16} Mayhall and Butz assert – and we agree – that this case involves criminal, as opposed to civil, contempt. The trial court’s contempt order operated as punishment for the defense counsel’s alleged manipulation of the court and “to vindicate the authority of the law and the court.” *Brown v. Executive 200, Inc.* (1980), 64 Ohio St.2d 250, 254, 416 N.E.2d 610; *State v. Palmer*, Montgomery App. No. 19921, 2004-Ohio-779, at ¶6. The contempt finding had no remedial or coercive purpose, nor was it for the benefit of a complainant. *Brown*, 64 Ohio St.2d at 253.

{¶ 17} Contempt may also be either direct or indirect, and the distinction lies in where the conduct occurs. With direct contempt, the conduct occurs in the presence of the court; indirect contempt occurs outside the court’s presence but obstructs the orderly administration of justice. *State v. Perkins*, 154 Ohio App.3d 631, 2003-Ohio-5092, 798 N.E.2d 646, ¶36. “Direct contempt usually involves some misbehavior which takes place in the actual courtroom.” *In re Purolo* (1991), 73 Ohio App.3d 306, 310, 596 N.E.2d 1140.

{¶ 18} “Whether and how a court may punish contempt depends in large part on whether the contempt is classified as ‘direct’ or as ‘indirect.’” *Davis*, 77 Ohio App.3d at 263. With indirect contempt, the contemnor must be afforded certain procedural

safeguards, including a written charge, entry on the court's journal, an adversary hearing, and an opportunity for legal representation. *City of Xenia v. Billingham* (Oct. 9, 1998), Greene App. No. 97-CA-124; R.C. 2705.03.

{¶ 19} In contrast, R.C. 2705.01, which governs direct contempt, "permits a court to punish a direct contempt summarily, and due process does not require that the contemnor be granted a hearing." *Kitchen*, 128 Ohio App.3d at 341. However, as we stated in *Davis*, the power to punish summarily is limited in two ways:

{¶ 20} "First, the locus of the contumacious act or acts must be such that the determinative issues of the offense are known to the court personally. Under those circumstances, because the 'external facts' of the contempt are known, no fact-finding determination is required and a summary proceeding is appropriate.

{¶ 21} "Second, the nature or quality of the contumacious act must be such that the orderly and effective conduct of the court's business requires its immediate suppression and punishment. *In re Oliver* (1948), 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682. The particular conduct must create 'an open threat to the orderly procedure of the court' such that if 'not instantly suppressed and punished, demoralization of the court's authority will follow.' *Cooke v. United States* (1925), 267 U.S. 517, at 536, 45 S.Ct. 390, at 395, 69 L.Ed. 767, at 773. In authorizing exercise of the summary power to punish, the *Oliver* court 'gave no encouragement to its expansion beyond the suppression and punishment of the court disrupting misconduct which alone justified its exercise.' *Id.*, 333 U.S. at 274, 68 S.Ct. at 508, 92 L.Ed. at 695. Further, the limits of the contempt authority are, in general, 'the least possible power adequate to the end proposed.' *Id.*, quoting *Ex Parte Terry* (1888), 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 405,

citing *Anderson v. Dunn* (1821), 19 U.S. (6 Wheat.) 204, 5 L.Ed. 242.

{¶ 22} “It seems clear that under the rules of *Cooke* and *Oliver* a summary proceeding is not authorized simply because the conduct constitutes direct contempt. Even if the external facts are clear because they took place in the presence of the judge, the effect of the contumacious conduct must create a ‘need for speed’ to immediately suppress the court-disrupting misbehavior and restore order to the proceedings. *Dobbs*, *supra*, 56 Cornell L.Rev. at 229. Absent that need, an evidentiary hearing is required even though the contempt is ‘direct.’” *Davis*, 77 Ohio App.3d at 263-64.

{¶ 23} Upon review of the record, we doubt that the trial court properly deemed Mayhall’s and Butz’s action to be direct contempt. Although certain actions occurred in the presence of the court, the trial court’s ruling also cited to motions filed by defense counsel and to an audio recording of a conversation between Dean and his brother while Dean was incarcerated at the Clark County Jail. We have held that the libeling of the trial court in motions and memoranda does not constitute direct contempt. See *State v. Daly*, Clark App. No. 06-CA-20, 2006-Ohio-6818. Moreover, it is apparent from the record that the court developed its concerns after reviewing the state’s response to the application to the Supreme Court of Ohio for the disqualification of the trial judge. In other words, the trial court became concerned that defense counsel had attempted to manipulate the court *after* the critical events had occurred, not contemporaneously with defense counsel’s conduct.

{¶ 24} Regardless of whether the contempt was direct or indirect, we find that Mayhall and Butz should have been afforded an evidentiary hearing because there

was no “need for speed” to address the allegedly contemptuous conduct. This lack of urgency is amply illustrated in the record.

{¶ 25} When the trial court initially informed counsel on May 12, 2006, that it had “very serious concerns about defense counsel and the manner in which they’re operating in this courtroom,” the court indicated that it would address its concerns at the conclusion of the trial. On May 15, 2006, defense counsel indicated that they were greatly concerned that they would be charged with contempt at the conclusion of trial, that they were intimidated, and that they believed their ability to represent Dean effectively would be affected by “this hanging over [their] head[s].” The court responded that it “simply told [them] on Friday that it would handle the matter at the conclusion of these proceedings” and it reiterated that “[w]e’re not getting into this now because I told you we’d address that at the conclusion of the case.”

{¶ 26} On May 16, 2006, Dean expressed to the court his concerns that Mayhall and Butz could not effectively represent him. Defense counsel reiterated their feeling that the situation was having a “chilling effect on [their] ability to represent [their] client.” The court responded that they would be held accountable if they engaged in unethical conduct. The court further stated: “I’ve told you three times that I’m not going to prejudge that. There’s been accusations made that if I believe that they’re founded, that it does mean that you engaged in unethical activity. It appears on the face of the allegations that there’s facts that would corroborate the allegations so I have serious concerns about it. I’m not going to make a determination at this time because we’re in the middle of a capital trial.” The court reassured counsel, however, that they had “free reign and wide latitude to defend [their] client in an ethical manner.”

{¶ 27} On May 17, 2006, Dean again expressed concerns to the court about Mayhall's and Butz's continued representation. Dean "implored" the court to address the issue of his counsel's alleged unethical conduct "because I feel as though that is the only way that I will receive justice in this courtroom." The court explained possible options for addressing the misconduct issue – stay the trial until the issue is resolved, turn the issue over to another judge, or inform defense counsel that they would receive no punishment. The court rejected each of these possibilities and decided to proceed with the trial. The court ultimately addressed the issue on June 13, 2006.

{¶ 28} In light of the trial court's repeated determinations that it need not give immediate attention to evaluating defense counsel's conduct, we find no basis for the court to resolve the matter in a summary fashion. Because there was no "need for speed," Mayhall and Butz were entitled to an evidentiary hearing on the contempt allegations.

{¶ 29} Mayhall and Butz further assert that the trial court should have referred the fact-finding to another judge, because the court was "too embroiled in the controversy to act as a neutral and detached fact finder." The record supports defense counsel's assertion.

{¶ 30} In his affidavit in support of his motion to withdraw as counsel, Mayhall stated that on May 12, 2006, he, Butz, and the prosecutors met with the court in chambers, during which the court informed defense counsel that the supreme court had dismissed the affidavit of prejudice. Mayhall indicated that the judge appeared to be "angry: his face was flushed and he was glaring at defense counsel." During the trial, the court repeatedly stated that it had "serious concerns" with defense counsel's

behavior and told defense counsel that “you guys got yourself into this situation.”

{¶ 31} When Dean also expressed concern about whether Mayhall and Butz could adequately represent him, he indicated that the court appeared to “have taken this personally; and [that Mayhall and Butz] have offended you in some way, shape, or form. Whatever it is, I don’t know. I’m not a lawyer myself. But I’m fairly telling you as an individual, I feel you’re taking this personally; and it’s impeding their ability to defend me properly. ***”

{¶ 32} Most significantly, statements from the trial court indicated that the court’s impartiality was impaired. In responding to defense counsel’s affidavit of disqualification, the trial court indicated that it felt compelled to respond to the affidavit “since it appears, in part, to be a personal attack on my integrity and competence as a Judge.” Later, in its ruling on the contempt, the trial court found that “defense counsel had a dual motive for having this Court removed from the case. *** Their second motive stems from a longstanding personal revulsion of the Court, dating back to when this Judge was an assistant prosecuting attorney. Accordingly, the Court vehemently disagrees with Mr. Butz’s statement that ‘This is not a personal attack on the Court.’”

{¶ 33} Although the trial court repeatedly stated that it would not prejudge the issue, the record supports defense counsel’s assertion that the court was “too embroiled in the controversy to act as a neutral and detached fact finder” and that a different judge should have conducted an evidentiary hearing.

{¶ 34} The second assignment of error is sustained.

{¶ 35} I. “THE COURT BELOW ERRED WHEN IT FOUND DEFENSE COUNSEL IN CRIMINAL CONTEMPT OF COURT WHEN THE EVIDENCE WAS

INSUFFICIENT, AS A MATTER OF LAW, TO PROVE CONTEMPT BEYOND A REASONABLE DOUBT. IN THE ALTERNATIVE, THE FINDING OF CONTEMPT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶ 36} In their first assignment of error, Mayhall and Butz claim that there was insufficient evidence to support the contempt finding or, alternatively, the contempt was against the manifest weight of the evidence.

{¶ 37} Given our disposition of the second assignment of error, we find it unnecessary to address the merits of this assignment, which we overrule as moot.

{¶ 38} The judgment of the trial court will be reversed and the case will be remanded for the sole purpose of the trial court’s ordering that Richard Mayhall and John Butz each be paid \$2,000, these sums representing money that the trial court ordered deducted as fines from the compensation due each for representing Jason Dean. The trial court shall order these payments within seven days of the file stamp date appearing on the final entry filed in this case.

.....

GRADY, J. and DONOVAN, J., concur.

Copies mailed to:
William H. Lamb
Richard A. Cline
Hon. Douglas M. Rastatter

2007 Ohio 5048, *; 873 N.E.2d 1263;
2007 Ohio LEXIS 2519, **

LEXSEE 2007 OHIO 5048

THE STATE OF OHIO, APPELLEE, v. FRAZIER, APPELLANT.

No. 2005-1316

SUPREME COURT OF OHIO

2007 Ohio 5048; 873 N.E.2d 1263; 2007 Ohio LEXIS 2519

April 4, 2007, Submitted
October 10, 2007, Decided

PRIOR HISTORY: [**1]

APPEAL from the Court of Common Pleas of Lucas County, No. CR04-1509.

State v. Frazier, 106 Ohio St. 3d 1584, 2005 Ohio 5814, 836 N.E.2d 606, 2005 Ohio LEXIS 2513 (2005)

DISPOSITION: Judgement affirmed.

HEADNOTES

Criminal law -- Aggravated murder -- Death penalty upheld.

COUNSEL: Julia R. Bates, Lucas County Prosecuting Attorney, and David F. Cooper and Eric A. Baum, Assistant Prosecuting Attorneys, for appellee.

Spiros P. Cocoves and Ann M. Baronas, for appellant.

JUDGES: LUNDBERG STRATTON, J. MOYER, C.J., PFEIFER, O'CONNOR, O'DONNELL, LANZINGER and CUPP, JJ., concur.

OPINION BY: LUNDBERG STRATTON

OPINION

LUNDBERG STRATTON, J.

[*P1] In this appeal, defendant-appellant, James Frazier, raises 24 propositions of law. We find that none of his propositions of law have merit and affirm Frazier's convictions. We have also independently weighed the aggravating circumstances against the mitigating factors and have compared Frazier's sentence of death to those imposed in similar cases, as *R.C. 2929.05(A)* requires. As a result, we affirm Frazier's sentence of death.

[*P2] The evidence at trial established that, on the morning of March 2, 2004, James Frazier entered 49-year-old Mary Stevenson's apartment and murdered her by strangling her and slitting her throat. Frazier stole two

of her purses and fled the scene. Subsequently, Frazier was convicted of the aggravated murder of Stevenson and was sentenced to death.

State's Case

[*P3] [**2] The evidence at trial established the following facts. Frazier and Stevenson were both residents of the Northgate Apartments in Toledo. Northgate is a federally subsidized apartment complex, and the residents are low income and either elderly or disabled. Frazier was supported by Social Security disability income, and Stevenson suffered from cerebral palsy.

[*P4] During the late summer or early fall of 2003, Frazier baked a cake for Stevenson. Later, Stevenson took the cake pan to Cindy Myers, a social worker at Northgate Apartments, and asked Myers to return the pan to Frazier. Stevenson asked Myers to "tell him thanks for baking the cake but she could do that herself, and * * * she also had a boyfriend." Myers returned the cake pan to Frazier and told him, "Mary said thank you for baking the cake but she can bake herself * * * and not to do it anymore." Frazier responded, "[O]kay."

[*P5] On the evening of March 1 and in the early morning of March 2, 2004, Frazier and a group of individuals smoked crack cocaine and drank alcohol inside Frazier's third-floor apartment.

[*P6] During the drug party, Frazier provided Chastity McMillen with \$ 200 to \$ 300 worth of crack cocaine without charge. At some point, [**3] Frazier's guests ran out of crack. Frazier called someone to deliver more crack, and he also called someone for money to buy it. More crack was brought to Frazier's apartment later that night.

[*P7] Frazier was wearing jeans and a white T-shirt during the party. At some point during the evening, Frazier left the party. When he returned, Frazier was not wearing a shirt.

[*P8] At 7:17 a.m. on March 2, Frazier made a 911 call to report a woman at the complex lying on the laundry-room floor, having seizures. Paramedics met Frazier at the apartment, but no one needing medical attention was found in the laundry room.

[*P9] Stevenson lived alone in a first-floor apartment at Northgate. She supported herself on Social Security benefits. Because of her condition, Stevenson had limited mobility and difficulty speaking. Her apartment was located about 20 to 30 feet from the laundry room and 15 feet from the elevators close to one of the stairways.

[*P10] On March 1, Bill Gangway, Stevenson's boyfriend, and Stevenson talked on the telephone, and they agreed to meet at her apartment the next day. Around 9:00 a.m. on March 2, Gangway knocked on Stevenson's apartment door, but she did not answer. Gangway remained at Northgate [**4] for the rest of the day and unsuccessfully tried to contact Stevenson three or four times. At 4:15 p.m., Susan Adams, Northgate's assistant manager, checked on Stevenson. After receiving no answer to her knocking, Adams entered Stevenson's apartment and found her lying on the bedroom floor, dead. Adams then called 911.

[*P11] Around 5:00 p.m. on March 2, police arrived at Stevenson's apartment. Stevenson's body was near the foot of her bed. Stevenson's throat had been slashed, and blood had pooled underneath her head and shoulders. She was wearing a nightgown that was tucked into the front of her underpants.

[*P12] Police examining Stevenson's apartment found no signs of a struggle, forcible entry, or indication that her apartment had been ransacked. Stevenson's purse and identification cards were missing, and police found no cash in her apartment. Stevenson's apartment key was discovered on her wheelchair in the living room. No knife or other possible murder weapon was found in Stevenson's apartment. However, a knife was missing from the knife holder on the kitchen counter.

[*P13] Police used an alternate light source to look for semen or other bodily fluids in Stevenson's bedroom, but police found no [**5] evidence of semen on Stevenson's bed, bed sheets, robe, or anything else in the bedroom. Police also searched the area around the apartment building and the Dumpster that was used by first-floor residents, but no evidence was found.

[*P14] On March 3, 2004, police investigators examined the sealed trash compactor-Dumpster that was used by Northgate residents living on the second through the tenth floors. During the search, investigators found Stevenson's clutch purse, which contained her birth certificate, bank card, and library card. Two bills addressed

to Frazier were located near the clutch purse. Investigators also found Stevenson's Social Security and Medicaid cards, her large black purse, and a Fruit of the Loom T-shirt, size double X, 50 to 52, that had been turned inside out. Frazier is six feet one inch tall and weighs 250 pounds. A knife that matched the set of knives in Stevenson's kitchen was also found and appeared to have blood on it. No money was found in Stevenson's two purses.

[*P15] Investigators returned to the police station with the evidence collected from the trash. Bloodstains were detected on the front of the white T-shirt and tested positive for the presence of human blood. [**6] The T-shirt and the knife were sent to the lab for DNA testing.

[*P16] On March 4, 2004, investigators executed a search warrant of Frazier's apartment. There, police seized two T-shirts that were the same size and had the same manufacturing tags as the T-shirt found in the trash compactor.

[*P17] At approximately 2:30 p.m. on March 4, Toledo detectives William Seymour and Denise Knight conducted a videotaped interview of Frazier. After being advised of his *Miranda* rights and waiving them, Frazier stated that sometime after 6:00 a.m. on March 2, he went to the laundry room with a basket of bedding and found a woman lying on the laundry-room floor. According to Frazier, he knocked on Stevenson's door and said he needed to call 911. Stevenson let Frazier into her apartment. Frazier then called 911 and told the operator that there was a lady lying on the laundry-room floor at Northgate Apartments. Frazier left Stevenson's apartment and waited for the paramedics.

[*P18] Frazier said Stevenson was fine when he left her apartment. Stevenson locked the door when he left. Frazier said he did not return to Stevenson's apartment after making the 911 call.

[*P19] Frazier said the lady was gone when he returned to the laundry [**7] room. He told the arriving paramedics that he did not know what happened to the lady. Frazier says he asked Francis Clinton, a fifth-floor resident who was in the laundry-room area, about the lady, and she said, "I didn't see nobody."

[*P20] At approximately 9:45 p.m. on March 4, 2004, Detectives Seymour and Knight conducted a second videotaped interview of Frazier. According to Frazier, he watched TV at a friend's apartment until midnight or 1:00 a.m. on March 2. Frazier then returned to his apartment. Sometime after 6:00 a.m., he took a light load of bedding to the laundry room. He repeated that he found an unidentified lady lying on the laundry-room floor, went to Stevenson's apartment, and called 911.

[*P21] Frazier said, "Nothing happened out of the ordinary" when he was in Stevenson's apartment. Frazier

said that Stevenson had a beautiful personality but claimed, "I never looked at her in a sexual way." He claimed that he was impotent, so he had no interest in sex. Frazier denied throwing away anything that belonged to the victim. However, he admitted, "I threw that T-shirt away." Frazier said, "I did not do this."

[*P22] Surveillance cameras at Northgate Apartments provided coverage of the elevators, [**8] the main entrances, and the parking lots. However, there were no cameras in the main stairwell next to the laundry room. Police reviewed the surveillance tapes and tracked the movements of Frazier and other residents on the evening of March 1 and the morning of March 2.

[*P23] Cameras show Francis Clinton entering the laundry room with a load of clothes at 6:30 a.m. on March 2 and then departing. At 7:16 a.m., Frazier entered the laundry room with a small bundle of clothes under his arm and then left and walked towards Stevenson's apartment.

[*P24] At 7:19 a.m., Clinton returned to the laundry room. At 7:24:11 a.m., Frazier came back to the laundry room with the bundle of clothes under his arms, took a quick look inside, and walked away. At 7:25:02 a.m., Frazier took the elevator to the third floor with the bundle still under his arms. At 7:25:25 a.m., Frazier got out on the third floor. He returned to the elevator at 7:25:50 a.m. without the bundle.

[*P25] At 7:25:58, Clinton left the laundry room and returned to the fifth floor. At 7:26:12 a.m., Frazier returned to the laundry room, took another quick peek inside, and left. At 7:26:44 a.m., Frazier and the paramedics entered the laundry room. At 7:27:14 [**9] a.m., they departed. Frazier wore a white T-shirt during this entire sequence of events.

[*P26] At trial, Detective Seymour testified that the third-floor garbage chute is close to the elevator. He said it takes approximately 20 seconds to walk at a normal pace to the garbage chute and return to the elevator. Frazier's third-floor apartment is further down the hall. Seymour said that walking at a regular pace to Frazier's apartment and returning to the elevator takes 40 to 45 seconds.

[*P27] Dr. Cynthia Beisser, the deputy coroner for Lucas County, conducted the autopsy on Stevenson. The victim suffered a "large sharp-force injury across the neck" that cut "both the carotid arteries and the jugular veins and went through the trachea * * * down to the spine." Stevenson's thyroid cartilage was fractured, and "there was bruising on the undersurface of the chin and on the upper portion of the chest, and * * * blood in the tongue," which showed that she had also been strangled. Dr. Beisser also found vaginal abrasions and lacerations

consistent with vaginal intercourse that had occurred while the victim was alive. Dr. Beisser concluded that Stevenson "died of a combination of * * * strangulation and [**10] the sharp-force injury to the neck."

[*P28] Detective Terry Cousino collected physical evidence during the autopsy, including a hair found on Stevenson's right tricep. The hair was sent to the lab for further testing.

[*P29] Staci Violi, a serology expert at the Ohio Bureau of Criminal Identification and Investigation ("BCI"), conducted tests and verified the presence of human blood on the knife blade and on some areas of the T-shirt that had been found in the trash compactor. Test results were also positive for the presence of amylase, a component of saliva, on the neck area of the T-shirt. However, vaginal and rectal swabs obtained during the autopsy tested negative for the presence of semen.

[*P30] Brian Bowen, a DNA analyst at BCI, conducted DNA tests on bloodstains found on the knife blade. These tests revealed a partial DNA profile consistent with Stevenson's DNA. Bowen testified that the expected frequency of occurrence of the partial DNA profile found on the knife blade is one in 58,070,000 individuals. DNA testing of the knife handle revealed a "mixture," with the "major DNA type * * * consistent with Mary Stevenson." Bowen also conducted DNA testing of a bloodstain from the T-shirt. These tests [**11] provided a full DNA profile consistent with Stevenson's DNA. The expected frequency of occurrence from the DNA on this bloodstain is one in 285,500,000,000,000 individuals.

[*P31] Bowen also conducted DNA testing on the amylase stain on the T-shirt. DNA testing resulted in a "partial profile [that] was a mixture, and the major DNA type is consistent with James Frazier." The frequency of occurrence of the DNA from this stain is one in 493 individuals. DNA testing of the neck band of the T-shirt resulted in a mixture, and Frazier's DNA is consistent with the DNA of a contributor to the mixture. Bowen testified that the frequency of occurrence of the DNA from the neck band of the T-shirt is one in 15,500 individuals. However, Bowen's written report states that the expected frequency of occurrence is one in 115,500 individuals. Finally, DNA testing of swabs from the armpit of the T-shirt resulted in a "mixture," and Frazier's DNA is consistent with the DNA of a contributor to that mixture.

[*P32] Ted Manasian, an expert in trace evidence at BCI, examined the hair found on Stevenson's right tricep. Manasian testified, "It was found also to be similar * * * to gross physical characteristics to the pubic [**12] hairs of James Frazier." Subsequently, the hair was sent to the ReliaGene Corporation for further testing.

[*P33] Amrita Lal-Paterson, formerly a senior DNA analyst at ReliaGene Technologies, conducted mitochondrial DNA testing of the hair from Stevenson's arm. Lal-Paterson found that the hair sample is "consistent with the * * * mitochondrial genetic profile of Mr. Frazier, and * * * therefore Mr. Frazier or a maternal relative of his could not be excluded from that particular sample." According to Lal-Paterson, the percentage of people that could be excluded as a potential donor is 99.6 percent of the African-American population, 99.8 percent of the Caucasian population, and 99.6 percent of the Hispanic population.

[*P34] Lal-Paterson also conducted Y-chromosome testing of swabs from the T-shirt's armpit. The result of this testing was a "mixture," and the "major contributor was consistent with Mr. Frazier or a paternal relative of his." Lal-Paterson testified that the percentage of the population that could be excluded as a potential donor is 99.8 percent of the African-American population, 99.7 percent of the Caucasian population, and 99.3 percent of the Hispanic population.

[*P35] The defense presented [**13] no evidence during the trial phase.

Case History

[*P36] The grand jury indicted Frazier on one count of aggravated murder. Count 1 charged him with the aggravated murder of Stevenson while committing kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape. Count 1 included death-penalty specifications for murder while committing, attempting to commit, or fleeing after committing aggravated robbery, *R.C. 2929.04(A)(7)*, and murder while committing, attempting to commit, or fleeing after committing aggravated burglary, *R.C. 2929.04(A)(7)*. Count 2 charged Frazier with aggravated robbery, and Count 3 charged him with aggravated burglary.

[*P37] Frazier pleaded not guilty to all charges. However, the jury found Frazier guilty of all charges and specifications, and he was sentenced to death.

[*P38] Frazier now appeals to this court as a matter of right.

Pretrial and Guilt-Phase Issues

[*P39] *Phrasing of voir dire questions.* In proposition of law III, Frazier argues that the trial court erred in advising prospective jurors during voir dire that if the law requires a death sentence, jurors must vote to impose death as a sentence, but if the law requires a life [**14] sentence, they must "consider" voting for a life sentence. We find no merit to this argument.

[*P40] First, Frazier never objected at trial to the phrasing of these voir dire questions, and he thereby waived the issue absent plain error. *State v. Brinkley*, 105 Ohio St.3d 231, 2005 Ohio 1507, 824 N.E.2d 959, P64; *State v. Williams* (1977), 51 Ohio St.2d 112, 5 O.O.3d 98, 364 N.E.2d 1364, paragraph one of the syllabus.

[*P41] Second, no plain error occurred. During voir dire, each of the sitting jurors was questioned about his or her views of the death penalty. The voir dire of juror Benne typifies the court's line of questioning:

[*P42] "THE COURT: Are you religiously, philosophically, morally or otherwise opposed to the death penalty?"

[*P43] "MS. BENNE: No.

[*P44] "THE COURT: Okay. I take it then that you are saying that if, according to my instructions, you would find it appropriate to vote to impose the death penalty in a case, that you would do so?"

[*P45] "MS. BENNE: Yes.

[*P46] "THE COURT: On the other hand, I take it that if, according to my instructions, you find the imposition of the death penalty inappropriate, *you would consider* the three other sentencing options of life imprisonment with parole eligibility after serving a [**15] full 25 or 30 years or life imprisonment without parole?"

[*P47] "MS. BENNE: Yes.

[*P48] "THE COURT: If you were a juror in the sentencing phase of the trial, would you automatically impose -- vote to impose the sentence of death regardless of the facts of the case, or *would you consider all of the sentencing options?*"

[*P49] "MS. BENNE: I would consider all of the options." (Emphasis added.)

[*P50] Other sitting jurors were questioned in a similar fashion.

[*P51] The trial court's use of the term "consider" referred to all of the sentencing options. The trial court frequently used the term "consider" in referring to the choice of life-sentence options. But the trial court never suggested that the jurors may be required to vote for a death sentence, yet only "consider" voting for one of the life sentences. Moreover, we rejected a similar complaint in *Brinkley*, 105 Ohio St.3d 231, 2005 Ohio 1507, 824 N.E.2d 959, P 85: "the use of the term 'consider' in voir dire was not misleading or improper." Thus, we overrule proposition III.

[*P52] *Batson challenges.* In proposition of law II, Frazier asserts that the prosecutor peremptorily challenged two African-American prospective jurors because

of their race, in violation of their equal [**16] protection rights under *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69.

[*P53] During jury selection, the prosecutor peremptorily challenged two African-American prospective jurors, Franklin and Robinson. Frazier's counsel objected to the state's use of its peremptory challenges as a violation of *Batson*.

[*P54] With regard to prospective juror Franklin, the state explained, "[W]e excused her because she said on record during our one-on-one conference that she was morally opposed to the death penalty * * *. She did not rise to the level of cause but she was one of the people that was close to being cause, and we ask that she be excused." The trial court stated, "Well, that is on the record. * * * And she is excused."

[*P55] As to prospective juror Robinson, the state provided two reasons for its peremptory challenge:

[*P56] "[Prosecutor] MR. BRAUN: Yes. Well, Your Honor, a couple things. * * * One is a factual issue. We'll have testimony from a number of witnesses that the defendant was smoking crack cocaine on the night before the murder occurred. And this defendant [sic; venire member] is a recovering drug addict.

[*P57] "Our main concern, however, in moving for a challenge on him on a peremptory [**17] basis was based on his answers during the *Witherspoon* portion of the questioning where he was unable to articulate whether or not he could actually impose capital punishment. He simply could not answer that question. He had to think about it, and he was the only potential juror who could not tell us one way or the other whether or not he could do it.

[*P58] " * * *

[*P59] "THE COURT: All right. * * * The *Batson* challenge is on the record. And we'll call the next juror. Thank you."

[*P60] Following jury selection, the trial court provided the following additional matters about the *Batson* challenges:

[*P61] "THE COURT: * * * [T]here were two *Batson* challenges yesterday. * * * One of the things I wanted to put on the record was that I did a review of the questionnaires that the entire venire answered, the 86 people that we actually talked to. And out of the 86, six people were African American.

[*P62] "Now, some of those people * * * were released after our individual voir dire because of challenges or other complications. And I think that the final

pool, we only had three in the final 44 that were African American."

[*P63] The trial court stated that the prospective jurors were randomly selected from the voter registration list, [**18] and the small number of African-Americans in this jury pool is "just one of those things that happened."

[*P64] " 'A court adjudicates a *Batson* claim in three steps.' " *State v. Bryan*, 101 Ohio St.3d 272, 2004 Ohio 971, 804 N.E.2d 433, P 106, quoting *State v. Murphy* (2001), 91 Ohio St.3d 516, 528, 2001 Ohio 112, 747 N.E.2d 765. "First, the opponent of the peremptory challenge must make a prima facie case of racial discrimination. Second, if the trial court finds this requirement fulfilled, the proponent of the challenge must provide a racially neutral explanation for the challenge. *Batson*, 476 U.S. at 96-98, 106 S.Ct. 1712, 90 L.Ed.2d 69." Id. Third, the trial court must decide, based on all the circumstances, whether the opponent has proved purposeful racial discrimination. *Batson* at 98, 106 S.Ct. 1712, 90 L.Ed.2d 69. See, also, *Purkett v. Elem* (1995), 514 U.S. 765, 767, 115 S.Ct. 1769, 131 L.Ed.2d 834. A trial court's finding of no discriminatory intent will not be reversed on appeal unless clearly erroneous. *State v. Hernandez* (1992), 63 Ohio St.3d 577, 583, 589 N.E.2d 1310, following *Hernandez v. New York* (1991), 500 U.S. 352, 368, 111 S.Ct. 1859, 114 L.Ed.2d 395.

[*P65] In step three, the trial court may [**19] not simply accept a proffered race-neutral reason at face value, but must examine the prosecutor's challenges in context to ensure that the reason is not merely pretextual. "[T]he rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it." *Miller-El v. Dretke* (2005), 545 U.S. 231, 251-252, 125 S.Ct. 2317, 162 L.Ed.2d 196. If the trial court determines that the proffered reason is merely pretextual and that a racial motive is in fact behind the challenge, the juror may not be excluded. *Id.* at 252, 125 S.Ct. 2317, 162 L.Ed.2d 196.

[*P66] In his first argument, Frazier invokes *Miller-El v. Dretke* in arguing that the prosecutor's reasons for peremptorily challenging Franklin and Robinson were simply a pretext for discrimination. In *Miller-El*, the Supreme Court outlined the type of evidence to be considered and the analysis to be used to assess a *Batson* claim. During jury selection in *Miller-El*, prosecutors used peremptory challenges to exclude ten African-American prospective jurors, and the trial court overruled defense claims that the challenges [**20] were racially motivated. *Id.* at 236, 125 S.Ct. 2317, 162 L.Ed.2d 196. The Supreme Court reversed and held that the totality of the evidence showed that the prosecutor's

race-neutral reasons for the peremptory challenges of two potential jurors were so at odds with the evidence that pretext is the fair conclusion. *Id.* at 265-266, 125 S.Ct. 2317, 162 L.Ed.2d 196.

[*P67] In *Miller-El*, the court found several disturbing factors that together showed that the prosecutor's reasons for challenging African-American jurors were pretextual: (1) the "bare statistics," which showed that of the 20 African-Americans on the 108-person venire, only one served, and ten African-Americans were peremptorily struck by the prosecution, *Miller-El*, 545 U.S. at 240-241, 125 S.Ct. 2317, 162 L.Ed.2d 196; (2) the similarity of answers to voir dire questions by African-American jurors who were peremptorily challenged and answers by non-African-American prospective jurors who were allowed to serve, *id.* at 241-252; (3) the broader patterns of practice, which included jury shuffling, ¹ *id.* at 253; (4) disparate questioning of African-American and non-African-American jurors, *id.* at 255-260; and (5) evidence that the district ² attorney's office had historically discriminated against African-Americans in jury selection, *id.* at 263-264.

1 Under Texas practice, during voir dire in a criminal case, either side may literally reshuffle the cards bearing panel members' names, thus rearranging the order in which members of a venire panel are seated for questioning. *Miller-El v. Dretke*, 545 U.S. at 253, 125 S.Ct. 2317, 162 L.Ed.2d 196.

[*P68] Two *Miller-El* factors are not present in Frazier's case. The state did not engage in jury shuffling, and there is no evidence that the Lucas County prosecutor's office has historically discriminated against African-Americans in the jury-selection process.

[*P69] Frazier's claims are also not supported by the "bare statistics." The absence of African-Americans on Frazier's jury resulted from the few African-Americans randomly selected for the original jury pool. There were six African-Americans out of 86 prospective jurors in the original jury pool for Frazier's trial. There were only three African-Americans out of a final jury pool of 44 prospective jurors. The prosecution exercised five of its six peremptory challenges, and two of these were against African-Americans. The record is unclear ³ as to what happened to the third African-American juror. Thus, the statistics do not establish that the state had a discriminatory intent in peremptorily challenging Franklin and Robinson.

[*P70] There is also no evidence of disparate questioning of African-American and non-African-American jurors. In *Miller-El*, the prosecutor made prefatory statements cast in general terms to non-African-American

prospective jurors, but he used a more graphic script describing in detail the method of execution to African-American prospective jurors. *Miller-El*, 545 U.S. at 258, 125 S.Ct. 2317, 162 L.Ed.2d 196. The Supreme Court held that the use of the graphic script to a higher proportion of blacks than whites provided further evidence that the prosecution wanted blacks off the jury. *Id.* at 260. Here, there is no evidence that the prosecutor posed a different type of question to Franklin and Robinson than to the other jurors. Rather, the prosecutor asked questions based upon a juror's previous answers, such as Franklin's statement that she was morally opposed to the death penalty.

[*P71] Frazier argues that the state's reasons for excluding Franklin and Robinson (e.g., their uneasiness about the death penalty) ⁴ were improper because other jurors also expressed uneasiness about the death penalty, but were not peremptorily challenged. In *Miller-El*, the Supreme Court held: "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." *Miller-El*, 545 U.S. at 241, 125 S.Ct. 2317, 162 L.Ed.2d 196. Thus, a comparison of the voir dire answers of Franklin and Robinson with the individuals who served on Frazier's jury is required.

[*P72] *Prospective juror Franklin*. During voir dire, Franklin said that she was opposed to the death penalty on moral grounds. However, Franklin stated that she could set aside her moral views, follow the trial court's instructions, and vote to impose the death penalty if appropriate. During the prosecutor's questioning, Franklin stated that she opposed the death penalty because evidence might later show that the accused was innocent. During voir dire, the following exchange occurred between the prosecutor and Franklin:

[*P73] "[Prosecutor] MR. BRAUN: Okay. And Miss Franklin * * * if we get to this stage ⁵ you're going to have four sentencing options, life with 25 full years in prison without the chance of parole, * * * life with 30 years, * * * life without parole, or the death penalty. *The way you feel about capital punishment, you're really going to consider all the life verdicts first?*

[*P74] "MS. FRANKLIN: *Yes, I will.*

[*P75] "MR. BRAUN: Okay. And those are the verdicts you're much more comfortable with than the death penalty; isn't that right?

[*P76] "MS. FRANKLIN: *Yes, I am.*

[*P77] "MR. BRAUN: And this is just based on your personal beliefs here that the death penalty is something you would just not consider unless -- if you had

one of the life verdicts available to you. Would that be fair, ma'am?

[*P78] "MS. FRANKLIN: Yes." (Emphasis added.)

[*P79] Afterwards, the prosecutor challenged Franklin for cause because her moral opposition to the death penalty "substantially impairs her ability to fairly consider the death penalty as an option." The trial court overruled this challenge.

[*P80] During voir dire, ten of the sitting jurors told the court that they were not religiously, philosophically, or morally opposed to the death penalty. Juror Wagner stated that he felt "[n]either way" about the death penalty, but would vote for [*25] the death penalty, if appropriate.

[*P81] Juror Schoch was the only sitting juror who stated that she did not believe in the death penalty. But Schoch's responses differed markedly from Franklin's. Schoch's opinion was based on her view that life without parole was sometimes a worse sentence than death. Schoch also expressed no preference for a life sentence over a death sentence.

[*P82] We find that the comparison of Franklin's responses with the sitting jurors' responses does not support Frazier's pretext claim.

[*P83] *Prospective juror Robinson.* As discussed, Robinson was peremptorily challenged because of his inability to articulate his views about the death penalty and his history of crack cocaine use. Robinson told the trial court that he was "not sure" about his views of the death penalty. When asked whether he could follow the trial court's instructions about the death penalty, Robinson stated, "If you gave me instructions * * * it would probably depend on the evidence I got before that."

[*P84] The prosecutor also asked Robinson whether he could follow the court's instructions on the death penalty:

[*P85] "[Prosecutor] MR. BRAUN: * * * And what I'm going to ask you, sir, is could you sign your name in ink on [*26] a verdict form saying somebody should be executed for a crime they committed? Could you take that kind of responsibility?

[*P86] "MR. ROBINSON: I'd have to go back, I'd have to fully hear out all the facts presented to me.

[*P87] " * * *

[*P88] "MR. BRAUN: *Okay. Do you think you could make that decision if you thought it was warranted by the law and the facts?*

[*P89] "MR. ROBINSON: *If the facts fairly came, I wouldn't know.* I really haven't got that far. I have to go through it to be convinced before I can even say anything that might * * *, I guess, affect me from knowing -- I don't want to make that type of decision.

[*P90] "MR. BRAUN: Is this the kind of decision you don't want any part of, Mr. Robinson?

[*P91] "MR. ROBINSON: I would say yes to that." (Emphasis added.)

[*P92] As to drugs, the prosecutor asked Robinson and several other jurors whether friends or family members had "been affected by drugs." Robinson said, "I was an alcoholic and a drug addict." He added, "In 1979 I retired from Chrysler and I went to Flower Hospital and I've been in sobriety ever since going through their step program." Robinson said he has been sober "[g]oing on 26 years" but still attends rehabilitation meetings.

[*P93] Several of the sitting jurors indicated [*27] that friends or family members used drugs. However, none of these jurors indicated that they had used drugs.

[*P94] Unlike sitting jurors, Robinson never clearly articulated whether he could follow the trial court's instructions and vote for the death penalty. Moreover, Robinson had been a drug addict, unlike the sitting jurors. Thus, Robinson's voir dire answers were different from the answers provided by sitting jurors.

[*P95] Viewed as *Miller-El* directs, the record does not support Frazier's claim that the prosecution's race-neutral reasons for striking Franklin and Robinson were pretextual.

[*P96] In his second argument, Frazier claims that the prosecutor failed to question Franklin and Robinson about the underlying basis for peremptorily challenging them, which shows that the state's reasons for the peremptory challenges were a pretext. This claim has no merit. The record shows that the prosecutor questioned Franklin and Robinson on their views about the death penalty. The prosecutor also questioned Robinson about his history of addiction and alcohol abuse before peremptorily challenging him.

[*P97] In his third argument, Frazier asserts that the prosecutor's failure to challenge Robinson for cause because [*28] he was a recovering drug addict shows that the state's use of his drug addiction as a reason for its peremptory challenge was pretextual. However, this argument has no merit because the "prosecutor's explanation [for a peremptory challenge] need not rise to the level justifying exercise of a challenge for cause." *Batson*, 476 U.S. at 97, 106 S.Ct. 1712, 90 L.Ed.2d 69.

[*P98] Finally, Frazier contends that the trial court's failure to make findings in connection with its ruling requires reversal. Certainly, more thorough findings by the trial court in denying the defense *Batson* objections would have been helpful. However, the trial court is not compelled to make detailed factual findings to comply with *Batson*. See *Miller-El v. Cockrell* (2003), 537 U.S. 322, 347, 123 S.Ct. 1029, 154 L.Ed.2d 931 ("a state court need not make detailed findings addressing all the evidence before it" to render a proper *Batson* ruling). "As long as a trial judge affords the parties a reasonable opportunity to make their respective records, he may express his *Batson* ruling on the credibility of a proffered race-neutral explanation in the form of a clear rejection or acceptance of a *Batson* challenge." *Messiah v. Duncan* (C.A.2, 2006), 435 F.3d 186, 198. [**29] Thus, no error was committed in ruling on Frazier's two *Batson* challenges, because the trial court clearly rejected them.

[*P99] Based on the foregoing, we overrule proposition II.

[*P100] *Outside contact with juror.* In proposition of law VI, Frazier argues that the trial court erred by failing to dismiss juror Kennedy because she had been approached by a relative of one of the state's witnesses. In the alternative, Frazier argues that his counsel were ineffective by failing to request that juror Kennedy be dismissed from the jury.

[*P101] Before guilt-phase opening statements, juror Kennedy notified the bailiff that someone had approached her at a softball game and asked whether she was on jury duty. The trial court then conducted an in-chambers hearing to determine whether improper contact had occurred.

[*P102] Juror Kennedy informed the court that on the previous evening, she was playing in a softball game for her employer's team. One of the players, whose name she did not know, approached her and asked, "Are you on jury duty?" Kennedy replied, "Yes, but I'm not allowed to discuss it." He said, "Oh, okay," and "put his hands like he understood and * * * backed away." He said nothing more to Kennedy for the rest [**30] of the game. Kennedy later learned that Tim Gangway was the person who approached her and that Gangway's wife and Kennedy worked for the same employer. Tim is the brother of Bill Gangway, the victim's boyfriend.

[*P103] Kennedy said that she is not close to Tim or his wife. Kennedy stated that she did not feel intimidated, threatened, or uncomfortable because of this conversation. She added that this experience did not compromise her ability to be a fair and impartial juror.

[*P104] Tim's version of the events echoed Kennedy's. Tim told the court that he had approached Ken-

nedy after his wife told him that one of her co-workers might be on Frazier's jury. Tim talked to Kennedy because he was concerned that she might see the name "Gangway" on the back of his jersey and make some connection with his brother, who was scheduled to testify in the case. Tim said he approached Kennedy, explaining, "I didn't want it to cause any problems in the future." After finishing his explanation, the trial court admonished Tim not to have any kind of contact with the jurors, and he was excused.

[*P105] The trial court stated that Tim "was trying to do the right thing." The state and trial counsel agreed, both noting, "We're [**31] good." The trial court declared the matter resolved, and the trial continued.

[*P106] In cases involving outside influences on jurors, trial courts are granted "broad discretion" in dealing with the contact and determining whether to declare a mistrial or to replace the affected juror. *State v. Phillips* (1995), 74 Ohio St.3d 72, 89, 1995 Ohio 171, 656 N.E.2d 643. A trial court is permitted to rely on a juror's testimony in determining that juror's impartiality. *State v. Herring* (2002), 94 Ohio St.3d 246, 259, 2002 Ohio 796, 762 N.E.2d 940. Moreover, issues concerning the weight given to the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 39 O.O.2d 366, 227 N.E.2d 212, paragraph one of the syllabus.

[*P107] Frazier argues that the trial court should have dismissed juror Kennedy and replaced her with an alternate because she might have had other conversations with Bill Gangway, Tim Gangway, or Tim's wife during the trial. Frazier also claims that no one knows the true impact of Tim's conversation on juror Kennedy. However, trial counsel expressed satisfaction with juror Kennedy's answers and did not challenge her. Thus, in the absence of plain error, this [**32] claim is waived. See *State v. Childs* (1968), 14 Ohio St.2d 56, 43 O.O.2d 119, 236 N.E.2d 545, paragraph three of the syllabus.

[*P108] We find no plain error. Frazier's claim that Kennedy might have had additional contact with Tim, his wife, or Bill Gangway is totally speculative. Nothing in the record supports this claim. Moreover, juror Kennedy said that she was not affected by Tim's contact, and the trial court could rely on her assurances.

[*P109] Frazier's alternative argument claiming that his counsel were ineffective by failing to challenge Kennedy also has no merit. Reversal of a conviction for ineffective assistance of counsel requires that the defendant show, first, that counsel's performance was deficient and, second, 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, 538 N.E.2d 373, [**33] paragraph two of the syllabus. Here, trial counsel were not deficient because nothing was said during Tim's brief conversation with Kennedy that would support a defense challenge. Based on the foregoing, proposition VI is rejected.

[*P110] *Failure to file motions to suppress.* In proposition of law V, Frazier argues that his counsel were ineffective by failing to file a motion to suppress his pretrial statements and a motion to suppress evidence seized from his apartment.

[*P111] *I. Frazier's pretrial statement.* Detective William Seymour testified that Frazier was advised of his *Miranda* rights prior to making a statement. Frazier waived his *Miranda* rights orally and in writing and agreed to provide a statement. The advisement and waiver of Frazier's *Miranda* rights were also videotaped. According to Detective Seymour, Frazier appeared to be clearheaded and did not appear to be under the influence of alcohol or drugs.

[*P112] A court, in determining whether a pretrial statement is involuntary, " 'should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation [**34] or mistreatment; and the existence of threat or inducement.' " *State v. Mason (1998)*, 82 Ohio St.3d 144, 154, 1998 Ohio 370, 694 N.E.2d 932, quoting *State v. Edwards (1976)* 49 Ohio St.2d 31, 3 O.O.3d 18, 358 N.E.2d 1051, paragraph two of the syllabus.

[*P113] Frazier claims that his statements were involuntary because of his low intelligence. However, mental deficiency is but one factor in the totality of circumstances to be considered in determining the voluntariness of a confession. A defendant's mental condition may be a "significant factor in the 'voluntariness' calculus. * * * But this fact does not justify a conclusion that a defendant's mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional 'voluntariness.' " *Colorado v. Connelly (1986)*, 479 U.S. 157, 164, 107 S.Ct. 515, 93 L.Ed.2d 473. See *State v. Lynch*, 98 Ohio St.3d 514, 2003 Ohio 2284, 787 N.E.2d 1185, P55-57.

[*P114] Frazier has failed to demonstrate that his counsel were ineffective by failing to file a motion to suppress his pretrial statement because of his mental deficiencies. First, there is no evidence of police coercion or overreaching rendering Frazier's statement involuntary. [**35] Absent such evidence, counsel had no basis to request suppression of Frazier's statements.

[*P115] Second, there is no evidence that Frazier was incapable of making a voluntary statement. Frazier

was found competent to stand trial. In his evaluation, Dr. Gregory Forgac, a clinical psychologist, reported, "Frazier did surprisingly well in responding to my questions. He was able to converse with me appropriately and he appeared capable of understanding the nature and objectives of the proceedings which have been brought against him." In a subsequent evaluation, Dr. Forgac determined that Frazier was not mentally retarded and that his intellectual functioning was within the upper range of borderline intellectual functioning.

[*P116] Frazier's behavior during the police interview also belies his claim that his pretrial statements were involuntary because of his low intelligence. His videotaped statements show that Frazier comprehended the investigators' questions, and he was able to express his thoughts and recall his actions in a rational manner.

[*P117] Moreover, trial counsel appear to have made a tactical decision not to challenge Frazier's statement because the introduction of Frazier's statement allowed [**36] the jury to hear Frazier's proclamations of innocence. In his statements, Frazier persistently denied any sexual contact with the victim, denied taking any of her property, and denied any responsibility for her death. The introduction of Frazier's statements meant that counsel had the benefit of having Frazier's exculpatory explanation of events in evidence, without the risk of having Frazier take the stand in his own defense and subject himself to cross-examination. See *State v. Adams*, 103 Ohio St.3d 508, 2004 Ohio 5845, 817 N.E.2d 29, P 32-34 (not contesting a voluntary and exculpatory pretrial statement is a matter of trial strategy and is not ineffective assistance).

[*P118] Frazier argues that the prosecutor's concern about Frazier's low intelligence should have alerted trial counsel to file a motion to suppress. This argument also has no merit. During a pretrial hearing, Frazier's trial counsel, Mark Berling, mentioned that Frazier's "limited abilities in abstract thinking" hindered defense efforts to reach a plea agreement with the state. In response, the prosecutor stated, "[B]ased upon what Mark's saying, I have an ongoing concern that his client may not be able to knowingly, intelligently [**37] and voluntarily enter into a plea." The prosecutor's concerns were based on trial counsel's description of Frazier's mental problems. The prosecutor's comments did not alert the defense to any new information about Frazier's mental deficiencies that should have led them to file a motion to suppress.

[*P119] *2. Search of Frazier's apartment.* On March 4, 2004, investigators executed a search warrant for Frazier's apartment. The police seized two white T-shirts that were the same size and brand as the bloody T-shirt found in the trash.

[*P120] Frazier argues that his counsel were ineffective by failing to file a motion to suppress the search warrant because of his mental deficiencies. Nothing in the record suggests that the search warrant was defective, and Frazier presents no evidence that his mental deficiencies had any bearing on the issuance of the search warrant. Based on the foregoing, we overrule proposition V.

[*P121] *Sealing the prosecutor's file.* In proposition of law XI, Frazier argues that the trial court erred by refusing the defense request to have the prosecutor's file sealed for appellate review.

[*P122] The defense filed a pretrial motion requesting that a complete copy of the prosecutor's file be made, [**38] turned over to the trial court to review, and sealed for appellate review. The defense argued this was necessary to ensure the complete disclosure of exculpatory and impeachment evidence, as required by *Brady v. Maryland (1963)*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215. The trial court denied this motion.

[*P123] The trial court was not required to examine or seal the prosecutor's file based on speculation that the prosecutor *might* have withheld exculpatory evidence. *State v. Hancock*, 108 Ohio St.3d 57, 2006 Ohio 160, 840 N.E.2d 1032, P 64; *State v. Hanna*, 95 Ohio St.3d 285, 2002 Ohio 2221, 767 N.E.2d 678, P 60. The prosecutor provided the defense with open-file discovery and was fully aware of his continuing obligation to divulge exculpatory evidence. Thus, we reject proposition XI.

[*P124] *Expert qualifications.* In proposition of law XVI, Frazier claims that the trial court erred by allowing Brian Bowen to testify about DNA test results without determining that he was qualified to testify as an expert.

[*P125] At trial, Bowen testified that DNA testing identified Stevenson's DNA on the knife blade and the bloody T-shirt recovered from the trash. Bowen also identified Frazier's DNA on the T-shirt. While [**39] the state never formally tendered Bowen as an expert, trial counsel never objected to his testimony or challenged his qualifications. Thus, Frazier waived all but plain error. *State v. Brinkley*, 105 Ohio St.3d 231, 2005 Ohio 1507, 824 N.E.2d 959, P 112.

[*P126] No plain error occurred. Bowen, a forensic scientist, testified that he had worked at the DNA serology unit at BCI for approximately five years. Bowen holds a bachelor's degree in biology from Wittenberg University and a master's degree in immunology from Ohio State University. He is also a member of the American Academy of Forensic Sciences and the Midwestern Association of Forensic Scientists. Bowen main-

tains his qualifications by taking biannual proficiency tests in DNA. He testified that he has analyzed thousands of DNA samples during his career.

[*P127] Under *Evid.R. 702(B)*, Bowen "qualified as an expert by specialized knowledge, skill, experience, training, or education" to testify as a forensic scientist about DNA test procedures and DNA test results. Based on his qualifications, the state's failure to tender him as an expert was of no legal consequence. See *State v. Hartman (2001)*, 93 Ohio St.3d 274, 285-286, 2001 Ohio 1580, 754 N.E.2d 1150. Thus, [**40] we overrule proposition XVI.

[*P128] In proposition of law XVII, Frazier argues that his counsel were ineffective by failing to object to Bowen's DNA testimony because he was not qualified as an expert witness. However, his counsel were not deficient by failing to object, because Bowen was qualified to testify as an expert in DNA analysis. Moreover, by not challenging Bowen's qualifications, trial counsel avoided inviting the prosecutor to ask questions that might bolster Bowen's qualifications in the eyes of the jury. See *State v. Thomas*, 97 Ohio St.3d 309, 2002 Ohio 6624, 779 N.E.2d 1017, P 51. Given the strong presumption that counsel's performance constituted reasonable assistance, we conclude that trial counsel's actions may have been tactical decisions, and we reject this claim of ineffectiveness. See *State v. Bradley*, 42 Ohio St.3d at 144, 538 N.E.2d 373. Proposition XVII is overruled.

[*P129] *Rape evidence.* In proposition of law VII, Frazier argues that the trial court erred by permitting evidence that the victim suffered vaginal injuries and a bruised cervix because he was not charged with rape or any other sexual offenses. He also contends that the prosecutor committed misconduct during [**41] his closing argument by arguing that the victim was raped.

[*P130] Count one in the indictment alleged that Frazier "did purposely cause the death of another while committing or attempting to commit * * * kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape." (Emphasis added.) In a motion in limine, the defense sought to prohibit the introduction at trial of "any evidence of alleged sexual activity and/or conduct of defendant." During a pretrial hearing on this motion, the prosecutor informed the court that "rape is one of the theories underlying the aggravated murder." (Emphasis added.)

[*P131] During the state's case-in-chief, Detective Schriefer testified that at the crime scene, the victim's nightgown was tucked into her underpants. Dr. Beisser testified that during the victim's autopsy, abrasions and lacerations were found on the vagina, and bruising was found on the cervix. Dr. Beisser stated that the vaginal

trauma was consistent with vaginal intercourse, but she could not determine whether the victim had been raped. DNA test results were also introduced identifying Frazier as the source of a pubic hair found on the victim's [**42] arm.

[*P132] During the state's guilt-phase closing argument, the prosecutor argued that vaginal injuries, trauma to the cervix, and the presence of Frazier's pubic hair on the victim's arm showed that Frazier had raped Stevenson. The prosecutor also argued that sex was one of Frazier's motives for breaking into Stevenson's apartment and attacking her.

[*P133] After its motion in limine, the defense did not renew its objections at trial to the introduction of evidence of rape or the prosecutor's closing argument about rape and thus waived all but plain error. See *Gable v. Gates Mills*, 103 Ohio St.3d 449, 2004 Ohio 5719, 816 N.E.2d 1049, P 34 ("a ruling on a motion in limine may not be appealed and * * * objections * * * must be made during the trial to preserve evidentiary rulings for appellate review").

[*P134] Frazier claims that evidence of rape was evidence of another crime that was not admissible under *Evid.R. 404(B)*. Under *Evid.R. 404(B)*, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove" a defendant's character as to criminal propensity. (Emphasis added.) Frazier's argument can be rejected because evidence of rape is not evidence of another crime, but proof of one of the underlying [**43] felonies for the felony-murder charge. Thus, the state was entitled to present police and expert testimony showing that Stevenson was raped at the time of her murder. Moreover, even if rape had not been charged as one of the underlying felonies, rape evidence would be admissible under *Evid.R. 404(B)* to prove Frazier's possible motive for committing the murder. See *State v. Brinkley*, 105 Ohio St.3d 231, 2005 Ohio 1507, 824 N.E.2d 959, P 34.

[*P135] Frazier's claim that the prosecutor committed misconduct during his closing argument by arguing that Frazier raped Stevenson is also rejected. A prosecutor is "entitled to latitude as to what the evidence has shown and what inferences can reasonably be drawn from the evidence." *State v. Smith* (1997), 80 Ohio St.3d 89, 111, 1997 Ohio 355, 684 N.E.2d 668. Thus, the prosecutor committed no plain error in arguing that the evidence showed that Frazier had murdered Stevenson while committing or attempting to commit rape.

[*P136] Finally, we reject the defense argument that rape evidence improperly prejudiced Frazier during the penalty phase. First, the trial court excluded photographs of vaginal trauma before the start of the penalty phase. Second, the prosecutor made no reference [**44] to rape evidence during his penalty-phase closing argu-

ment. Finally, the trial court's instructions on the aggravating circumstances correctly identified aggravated murder committed during an aggravated robbery and aggravated murder committed during an aggravated burglary as the only two aggravating circumstances for the jury to consider during its penalty-phase deliberations.

[*P137] Based on the foregoing, we reject proposition VII.

[*P138] *Defendant's absence.* In proposition of law XVIII, Frazier argues that the trial court's failure to secure his presence or obtain a waiver of his presence at various in-chambers discussions and legal conferences violated his constitutional rights to confrontation and due process.

[*P139] An accused has a fundamental right to be present at all critical stages of his criminal trial. *Section 10, Article I, Ohio Constitution*; *Crim.R. 43(A)*. An accused's absence, however, does not necessarily result in prejudicial or constitutional error. "[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." (Emphasis added.) *Snyder v. Massachusetts* (1934), 291 U.S. 97, 107-108, 54 S.Ct. 330, 78 L.Ed. 674.

[*P140] [**45] In *United States v. Gagnon* (1985), 470 U.S. 522, 527, 105 S.Ct. 1482, 84 L.Ed.2d 486, the Supreme Court held that under certain circumstances, a defendant's absence from a hearing at which his counsel are present does not offend due process. In *Kentucky v. Stincer* (1987), 482 U.S. 730, 746, 107 S.Ct. 2658, 96 L.Ed.2d 631, the court found no *due process* or *Confrontation Clause* violation when an accused was excluded from a hearing on the competency of two child witnesses. See, e.g., *State v. Williams* (1983), 6 Ohio St.3d 281, 285-286, 6 OBR 345, 452 N.E.2d 1323 (absence at hearings can be harmless error).

[*P141] First, Frazier complains about his absence during in-chambers discussions among the court, defense counsel, and the state on March 16, 2004, and January 26, 2005. However, the record does not affirmatively establish Frazier's absence. *State v. Clark* (1988), 38 Ohio St.3d 252, 258, 527 N.E.2d 844 ("the record must affirmatively indicate the absence of a defendant or his counsel during a particular stage of the trial"). Thus, this complaint lacks merit.

[*P142] Second, Frazier complains about his absence during an in-chambers discussion on March 17, 2005. During this session, counsel discussed [**46] motions that needed to be argued and decided that day. During a subsequent pretrial hearing, the defense counsel waived Frazier's presence on March 17. Even though the waiver was after the fact, counsel could have waived

Frazier's presence during these in-chambers discussions. See, e.g., *State v. Brinkley*, 105 Ohio St.3d 231, 2005 Ohio 1507, 824 N.E.2d 959, P 122. Moreover, Frazier suffered no prejudice, because his absence occurred during a discussion involving legal or scheduling issues within the professional competence of counsel. See *State v. McKnight*, 107 Ohio St.3d 101, 2005 Ohio 6046, 837 N.E.2d 315, P 215; see, also, *United States v. Brown* (C.A.6, 1978), 571 F.2d 980, 987 (accused must establish prejudice from absence at in-chambers conference).

[*P143] Third, Frazier argues that his absence during an in-chambers discussion on April 27, 2005, violated his right to be present. However, the record shows that Frazier was present at these proceedings.

[*P144] Fourth, Frazier complains about his absence during an in-chambers conference on May 3, 2005. During this conference, the parties discussed the status of pretrial negotiations and scheduling issues. Frazier was in open court and did not object [**47] when the defense counsel waived Frazier's presence at the in-chambers conference. Thus, Frazier's presence was properly waived. 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).

[*P145] Fifth, Frazier objects to his absence during an in-chambers conference on May 11, 2005. During this conference, counsel for both sides talked with the judge about jury selection and excuses and the defendant's clothing at trial. The record does not show that Frazier's presence at the in-chambers conference was waived. Nevertheless, Frazier's absence was not prejudicial because the jury received neither testimony nor evidence, and no critical stage of the trial was involved.

[*P146] Sixth, Frazier argues that his absence during two off-the-record bench conferences violated his right to be present. However, no prejudice occurred because of the absence of evidence about the discussions during those bench conferences. [**48] See *State v. Tyler* (1990), 50 Ohio St.3d 24, 38, 553 N.E.2d 576.

[*P147] Seventh, Frazier objects to his absence during a conference on jury instructions. Trial counsel waived Frazier's presence at this conference. Moreover, Frazier's absence during the hearing on proposed jury instructions did not deprive him of a fair trial. *State v. Conway*, 108 Ohio St.3d 214, 2006 Ohio 791, 842 N.E.2d 996, P 52.

[*P148] Finally, Frazier claims that his absence when a jury question was asked during deliberations

constituted prejudicial error. During jury deliberations, the jury returned to the courtroom and asked whether a written copy of the coroner's report was submitted into evidence. Trial counsel waived Frazier's presence because "[h]e was brought over and there was some difficulty in getting him in the mood to get dressed for Court * * *." Because counsel waived the defendant's presence, Frazier's claim lacks merit. Moreover, Frazier invited the error that he now complains about because his own behavior caused his absence from court. See *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.* (1986), 28 Ohio St.3d 20, 28 OBR 83, 502 N.E.2d 590, paragraph one of the syllabus (a "party will not be permitted to take [**49] advantage of an error which he himself invited or induced").

[*P149] Based on the foregoing, we overrule proposition XVIII.

Penalty-Phase Issues

[*P150] *Mental retardation.* In proposition of law IV, Frazier asserts that he cannot be executed because he was mentally retarded. In the alternative, Frazier argues that his counsel were ineffective by failing to present and preserve evidence of his mental retardation.

[*P151] In a pretrial motion, trial counsel requested that Frazier be examined to determine whether he is mentally retarded. On April 22, 2005, Frazier was evaluated by Dr. Gregory Forgac at the Court Diagnostic and Treatment Center in Toledo. Dr. Forgac administered the Wechsler Adult Intelligence Scale-Third Edition ("WAIS-III") test, which showed that Frazier had a verbal IQ of 81, a performance IQ of 73, and a full-scale IQ of 75. Dr. Forgac determined that Frazier is not mentally retarded.

[*P152] In a pretrial hearing on May 3, 2005, trial counsel withdrew the claim that Frazier is mentally retarded. The defense withdrawal was based on Dr. Forgac's report and trial counsel's "lengthy discussions with him and * * * Dr. Smalldon, who had initially seen Mr. Frazier."

[*P153] During mitigation, Dr. Jeffrey Smalldon, [**50] a clinical psychologist, testified that Frazier "was not mentally retarded." Dr. Smalldon also administered the WAIS-III test, which showed that Frazier has a "verbal IQ estimate of 77, a performance or non-verbal IQ estimate of 72, and a full scale IQ estimate of 72."

[*P154] In *Atkins v. Virginia* (2002), 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335, the United States Supreme Court held that executing a mentally retarded person violates the *Eighth Amendment's* proscription against cruel and unusual punishment. In advancing an *Atkins* claim, the defendant bears the burden of proving by a

preponderance of the evidence that he or she (1) suffers from "significantly subaverage intellectual functioning," (2) experienced "significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction," and (3) manifested "onset before the age of 18." *State v. Lott*, 97 Ohio St.3d 303, 2002 Ohio 6625, 779 N.E.2d 1011, P 12. *Lott* also held that "there is a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70." *Id.*

[*P155] The state argues that Frazier waived this claim because the defense withdrew its *Atkins* motion at trial. We have not [**51] previously decided whether a capital defendant can waive an *Atkins* claim. However, a constitutional right can be waived in criminal cases by the failure to make timely assertion of it. *Peretz v. United States* (1991), 501 U.S. 923, 936-937, 111 S.Ct. 2661, 115 L.Ed.2d 808. Moreover, other jurisdictions have held that the failure to raise an *Atkins* claim results in waiver. *Bowling v. Commonwealth* (Ky.2005), 163 S.W.3d 361, 371; *Winston v. Commonwealth* (2004), 268 Va. 564, 617, 604 S.E.2d 21; *Head v. Hill* (2003), 277 Ga. 255, 259, 587 S.E.2d 613. Absent plain error, Frazier has waived his *Atkins* claim.

[*P156] Here, there is no error, plain or otherwise. After conducting comprehensive evaluations and administering a full battery of tests, Dr. Forgac and Dr. Smalldon determined that Frazier was not mentally retarded. Moreover, the results of two IQ tests showed that Frazier's IQ was above 70. Thus, Frazier has failed to meet his burden of proof to show that he is mentally retarded, as *Atkins* requires.

[*P157] Frazier argues that his IQ score of 72 has a margin of error of plus or minus five points, and so the score places him within the borderline mentally retarded range. Dr. Smalldon acknowledged that [**52] IQ tests have "some wiggle room that goes about five points either way." However, Dr. Smalldon stated, "[B]ased on everything that I've learned about Mr. Frazier, I believe that those numbers [the IQ test results] are pretty good numbers, that those are pretty accurate numbers." Moreover, Dr. Forgac reported a "95% confidence level" that Frazier's IQ test results were accurate within a range of a 71 IQ and 80 IQ. See *In re Bowling* (C.A.6, 2005), 422 F.3d 434, 437; *United States v. Roane* (C.A.4, 2004), 378 F.3d 382, 409, quoting *United States v. Tipton* (May), 378 F.3d 382 (the psychologist's care in calculating an IQ score "belies the suggestion that [the psychologist's] analysis did not account for possible variations in his testing instrument' "). Thus, we reject Frazier's claim for a downward adjustment of his IQ score to within the borderline mentally retarded range.

[*P158] Second, Frazier claims that he is mentally retarded because he was awarded Social Security bene-

fits in 1994 based on a diagnosis that he is mentally retarded. However, Frazier has presented neither the IQ test score nor the criteria that the Social Security officials used in making this diagnosis. [**53] See *State v. Waddy*, Franklin App. No. 05AP-866, 2006 Ohio 2828, P 41 (distinguishing diagnosis of mental retardation made for purposes of receiving Social Security benefits from an *Atkins* claim).

[*P159] Finally, Frazier argues that he lived in subsidized housing for the elderly and disabled at the time of the murder, a circumstance revealing significant limitations in his adaptive skills. Frazier also contends that his poor grades in school, erratic employment history, failed marriage, and other poor relationships provide evidence of his limitations in adaptive skills. However, Frazier provides no support for these claims. Moreover, neither Dr. Forgac nor Dr. Smalldon found that Frazier has "significant limitations in adaptive functioning in at least two * * * skill areas," as *Atkins* requires. *Atkins*, 536 U.S. at 309, 122 S.Ct. 2242, 153 L.Ed.2d 335, fn. 3, quoting American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th Ed.2000) 41.

[*P160] Based on the foregoing, we overrule Frazier's mental-retardation claim.

[*P161] We also reject Frazier's argument that his counsel provided ineffective assistance by failing to present evidence that he is mentally retarded. See [**54] *Strickland v. Washington*, 466 U.S. at 687, 104 S.Ct. 2052, 80 L.Ed.2d 674.

[*P162] First, Frazier's argument that his counsel were ineffective in withdrawing his mental-retardation claim because his IQ score of 72 had a margin of error of five points lacks merit. As previously discussed, Dr. Smalldon testified that Frazier's IQ score of 72 was a "pretty accurate" score.

[*P163] Second, Frazier's contention that his counsel failed to properly present evidence that he received Social Security benefits based on a diagnosis of mental retardation is also meritless. Frazier presented no evidence linking the criteria used for the Social Security diagnosis and his *Atkins* claim. Moreover, trial counsel's decision not to present the Social Security diagnosis represented a tactical decision because Dr. Smalldon and Dr. Forgac had found that Frazier was not mentally retarded.

[*P164] Third, we conclude that Frazier's counsel were not ineffective by failing to request a penalty-phase instruction about what the defense terms Frazier's "status as a mentally retarded individual." His counsel were not deficient, because no evidence was presented during mitigation that Frazier was mentally retarded.

[*P165] Fourth, we reject Frazier's [**55] assertion that his counsel were ineffective by failing to consult with him before withdrawing the mental-retardation claim. During a hearing on May 9, 2005, Frazier told the trial court that he understood his counsel's reasons for withdrawing his motion for a court's determination of mental retardation. Frazier stated, "I know what we're talking about and everything, I understand what he's saying, IQ and so forth and so on, yes." Frazier also said, "I don't have a problem with" the withdrawal of the motion.

[*P166] Finally, Frazier contends that his counsel were ineffective by failing to obtain the opinion from a mental-retardation expert, other than Dr. Smalldon and Dr. Forgac, before withdrawing the mental-retardation claim. Dr. Smalldon and Dr. Forgac are clinical psychologists who examined Frazier and determined that he is not mentally retarded. Frazier asserts that Dr. Smalldon and Dr. Forgac were not qualified to render an adequate opinion about mental retardation because they are not mental-retardation experts.

[*P167] Dr. Smalldon and Dr. Forgac were both fully qualified to render an opinion that Frazier is not mentally retarded. We note that Dr. Smalldon, the defense's own expert, has presented [**56] testimony about mental retardation in numerous capital cases. See *State v. Elmore*, 111 Ohio St.3d 515, 2006 Ohio 6207, 857 N.E.2d 547, P 157-158; *State v. Ketterer*, 111 Ohio St.3d 70, 2006 Ohio 5283, 855 N.E.2d 48, P 224; *State v. Thomas*, 97 Ohio St.3d 309, 2002 Ohio 6624, 779 N.E.2d 1017, P 118. Thus, we find that counsel were not ineffective by failing to request the opinion of a third expert before withdrawing the mental-retardation claim.

[*P168] Based on the foregoing, we overrule proposition IV.

[*P169] *Prosecutorial misconduct.* In proposition of law X, Frazier argues that the prosecutor committed misconduct by arguing that Frazier should receive the death penalty even though the prosecutor had expressed concern about Frazier's mental capacity to enter a plea. However, trial counsel failed to object to the comments he now complains of and waived all but plain error. *State v. Slagle* (1992), 65 Ohio St.3d 597, 604, 605 N.E.2d 916.

[*P170] The test for prosecutorial misconduct during closing argument is whether the remarks were improper and, if so, whether they prejudicially affected the accused's substantial rights. *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 14 OBR 317, 470 N.E.2d 883. To determine [**57] prejudice, the record must be reviewed in its entirety. *State v. Lott* (1990), 51 Ohio St.3d 160, 166, 555 N.E.2d 293.

[*P171] During a pretrial hearing on May 3, 2005, trial counsel stated that the defense was trying to negotiate a plea bargain. Counsel continued, "Mr. Frazier * * * has very limited abilities in abstract thinking, * * * and if we are going to reach a successful plea agreement, * * * I'm going to need to be able to offer him something concrete other than the death penalty." Counsel added, "I can't * * * [present him] with a range of options because he doesn't get the range of options. He will never understand that." Trial counsel conceded that Frazier had never expressed an interest in entering a guilty plea.

[*P172] In response, the prosecutor stated, "But if we have somebody who can't plead or won't plead, there aren't very many options left to me." The prosecutor also said, "Well, *based upon what [defense counsel] Mark's saying*, I have an ongoing concern that his client may not be able to knowingly, intelligently and voluntarily enter in to a plea." (Emphasis added.) Ultimately, pretrial negotiations were not successful.

[*P173] During the penalty-phase rebuttal argument, the prosecutor [**58] argued:

[*P174] "What else do we have? He's one short step above mental retardation. He is. Probably the most critical question I asked Dr. Smalldon this morning was, What's the relationship between his IQ and committing [a] death penalty murder offense? And Dr. Smalldon answered honestly, there is no correlation. Some cold-blooded killers have IQs of 120, some have IQs of 72 or 74.

[*P175] "What's the point I'm making here? He still had the ability to make other choices throughout his long life, and he chose not to make them."

[*P176] Frazier contends that the prosecutor's remarks about Frazier's ability to make choices constituted misconduct because the prosecutor knew that Frazier was unable to make a complex decision. However, the prosecutor's argument was not error, plain or otherwise.

[*P177] The prosecutor's rebuttal comments responded to earlier defense arguments suggesting that Frazier's behavior was not a matter of choice. During final argument, defense counsel emphasized that Frazier is "a short step above mental retardation," a crack cocaine addict, and an abuse victim. Trial counsel argued that Frazier "didn't have the tools to begin with * * * [and] it's extremely difficult, especially when you have [**59] these limited tools, * * * to break this cycle. And once that monster has its hands on you, you're going to be a monster and something like this is going to happen."

[*P178] The prosecutor's rebuttal simply pointed out the lack of correlation between Frazier's low IQ and the victim's murder. Thus, the prosecutor's rebuttal argument represented fair comment.

[*P179] Moreover, the prosecutor's pretrial concern about Frazier's ability to enter a plea did not bar the prosecutor from making this rebuttal argument. The prosecutor's pretrial comments were made in the context of *defense assertions* that Frazier was having problems understanding his plea options. However, Frazier was found competent to stand trial, and he is not mentally retarded. Thus, the prosecutor's earlier concerns about Frazier's abilities did not prevent the prosecutor from making this rebuttal argument. We reject proposition X.

[*P180] In proposition of law XIII, Frazier argues that the prosecutor committed misconduct during his penalty-phase closing rebuttal argument. However, the defense failed to object to the prosecutor's remarks and waived all but plain error. *State v. Slagle*, 65 Ohio St.3d at 604, 605 N.E.2d 916.

[*P181] First, Frazier argues [**60] that the prosecutor's rebuttal argument improperly treated the nature and circumstances of the offense as an aggravating factor. Frazier complains about the following comments:

[*P182] "Let's look at the other nature and circumstances of this offense. Let's talk about the victim for a second. He chose somebody who was more helpless than him. Sure he didn't bring the knife with him, but he brought his hands and he used those hands on her neck until she was this close to being dead and then he cut her throat. This is predatory behavior. That fits in with the lack of remorse, the failure to take responsibility for what he did, the efforts to throw off the police and all the lies he's told about this case. There's very little weight, due to the nature and circumstances of this offense, that go on the mitigation side of the scale."

[*P183] Although "prosecutors cannot argue that the nature and circumstances of an offense are aggravating circumstances, the facts and circumstances of the offense must be examined to determine whether they are mitigating. R.C. 2929.04(B). Thus, a prosecutor may legitimately refer to the nature and circumstances of the offense, both to refute any suggestion that they are mitigating [**61] and to explain why the specified aggravating circumstance[s] outweigh mitigating factors." *State v. Sheppard* (1998), 84 Ohio St.3d 230, 238, 1998 Ohio 323, 703 N.E.2d 286.

[*P184] The prosecutor did not characterize any of the facts of the offense as aggravating circumstances. Rather, the prosecutor refuted trial counsel's argument suggesting that the nature and circumstances of the offense had mitigating aspects. Trial counsel had argued that Frazier "didn't go down there [i.e., to the victim's room] with his own knife. He didn't go down there attempting to inflict any harm at all." In response, the prosecutor pointed out that Frazier did not bring a knife

to the victim's apartment because he strangled her. Thus, the prosecutor properly argued that the nature and circumstances of the offense were not mitigating. See *State v. Bryan*, 101 Ohio St.3d 272, 2004 Ohio 971, 804 N.E.2d 433, P 178-179. Second, Frazier contends that the prosecutor committed misconduct by urging the jurors to reach a unanimous verdict. During his closing rebuttal argument, the prosecutor stated:

[*P185] "If you all go back there and just vote individual opinions, we haven't accomplished anything through the course of this trial. You need to [**62] go back there and talk about the weight of things and agree among the 12 of you what they weigh, and when you do that, ultimately we've reached the right verdict here."

[*P186] Frazier argues that the prosecutor's argument undermined the trial court's instructions that a solitary juror may prevent a death-penalty recommendation. While the prosecutor's comments were not precise, isolated comments by a prosecutor are not to be taken out of context and given their most damaging meaning. *Donnelly v. DeChristoforo* (1974), 416 U.S. 637, 647, 94 S.Ct. 1868, 40 L.Ed.2d 431. This argument was not improper because the prosecutor was simply urging the jurors to deliberate before voting.

[*P187] Moreover, the trial court accurately instructed the jurors on the weighing process. The court also instructed the jurors that "[o]ne juror may prevent a death penalty determination by finding that the aggravating circumstances do not outweigh the mitigating factors." Cf. *State v. Brooks* (1996), 75 Ohio St.3d 148, 160-162, 1996 Ohio 134, 661 N.E.2d 1030. Thus, we find no plain error.

[*P188] For the foregoing reasons, we overrule proposition XIII.

[*P189] *Instructions*. In proposition of law I, Frazier argues that errors in the penalty-phase jury instructions [**63] violated his rights and require a new penalty hearing. However, except where noted, the defense failed to object and waived all but plain error. *State v. Underwood* (1983), 3 Ohio St.3d 12, 3 OBR 360, 444 N.E.2d 1332, syllabus.

[*P190] First, Frazier argues that the trial court erred by refusing the defense request to instruct the jury to consider mercy in its deliberations. However, Frazier was not entitled to an instruction on mercy. *State v. Garner* (1995), 74 Ohio St.3d 49, 57, 1995 Ohio 168, 656 N.E.2d 623; *State v. Lorraine* (1993), 66 Ohio St.3d 414, 417, 613 N.E.2d 212.

[*P191] Second, Frazier asserts that the trial court erred by failing to instruct the jury to consider each aggravating circumstance separately. Frazier was convicted on one murder count and two attached aggravating cir-

cumstances. During penalty-phase instructions, the trial court instructed the jury to weigh the two aggravating circumstances (murder during an aggravated robbery and murder during an aggravated burglary) against the mitigating factors. Contrary to Frazier's assertion, "[a]ggravating circumstances in a single count are considered collectively in assessing the penalty for that count, and a defendant is sentenced only on individual [**64] criminal counts, not on specifications of aggravating circumstances." *State v. Hessler (2000)*, 90 Ohio St.3d 108, 126, 2000 Ohio 30, 734 N.E.2d 1237. Thus, no plain error was committed in giving these instructions.

[*P192] Third, without citation to authority, Frazier claims that the trial court should have instructed that the state has to prove that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt. This argument has no merit because the trial court's instruction on the burden of proof followed the language in *R.C. 2929.03(D)(1)* and *(D)(2)*. See *State v. Jackson, 107 Ohio St.3d 53, 2005 Ohio 5981, 836 N.E.2d 1173, P 100*.

[*P193] Fourth, Frazier asserts that the trial court erred in instructing the jury that "[m]itigating factors are factors that lessen the moral culpability of the defendant * * *." Mitigation is not about blame or culpability, but rather about punishment. See *State v. Holloway (1988)*, 38 Ohio St.3d 239, 527 N.E.2d 831, paragraph one of the syllabus. Nevertheless, the overall penalty-phase instructions informed the jury that the issue was punishment, not culpability. See *State v. Bey (1999)*, 85 Ohio St.3d 487, 498, 1999 Ohio 283, 709 N.E.2d 484.

[*P194] Finally, Frazier claims that the [**65] trial court erred by failing to instruct the jury that Frazier must prove the mitigating factors by a preponderance of the evidence. See *State v. Jenkins (1984)*, 15 Ohio St.3d 164, 171-172, 15 OBR 311, 473 N.E.2d 264.

[*P195] In a pretrial motion, the defense requested (1) an order relieving it of the burden of proving the mitigating factors and (2) an instruction that the state bears the burden of proving the absence on any mitigating factors offered by the defense. This motion was denied. However, trial counsel did not preserve this motion by raising it during trial.

[*P196] Frazier argues that the trial court's failure to instruct on the burden of proof for mitigating factors may have caused the jury to believe that the mitigating factors must be proven beyond a reasonable doubt. However, the trial court instructed the jury that the "defendant does not have the burden of proof," an instruction more favorable to Frazier than the absent instruction. See *State v. Hicks (1989)*, 43 Ohio St.3d 72, 78, 538 N.E.2d 1030. We find no plain error. Based on the foregoing, we reject proposition I.

[*P197] *Noncapital sentencing*. In proposition of law VIII, Frazier argues that he is entitled to a new penalty-phase hearing [**66] because the trial court imposed consecutive sentences in violation of *State v. Foster, 109 Ohio St.3d 1, 2006 Ohio 856, 845 N.E.2d 470*.

[*P198] On May 9, 2005, the trial court sentenced Frazier to eight years for aggravated robbery in Count 2, and eight years for aggravated burglary in Count 3. The trial court ordered that the sentences for aggravated robbery and aggravated burglary be served concurrently with each other and consecutively to the aggravated murder count.

[*P199] In imposing consecutive sentences, the trial court stated:

[*P200] "[T]he Court find[s] that consecutive sentences [are] necessary to fulfill the purpose of 2929.11 of the Ohio Revised Code, and specifically in making that finding, the Court finds that it is necessary to protect the public from future crime and it is not disproportionate to the seriousness of the defendant's conduct and not disproportionate to the danger the offender poses to the public.

[*P201] "Specifically, the Court finds that in the commission of these offenses the defendant caused the death of another, Miss Mary Stevenson, a very vulnerable woman and handicapped woman * * *, and that it was a very senseless act. And the Court also finds that the harm was so great and [**67] unusual that no single prison term can adequately reflect the seriousness of the offender's conduct, and the Court again specifically refers to the findings relative to the specifications and the aggravating factors in those specifications, that being that the commission of these offenses resulted in the brutal murder of * * * Mary Stevenson."

[*P202] On June 24, 2004, more than ten months before Frazier's sentencing, the Supreme Court had decided *Blakely v. Washington (2004)*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403. *Blakely* held that the *Sixth Amendment* prohibits a judge from imposing a sentence greater than that allowed by a jury verdict or by the defendant's admissions at a plea hearing. *Id.* at 305-306. However, trial counsel did not object that Frazier's noncapital sentences were imposed in violation of *Blakely*.

[*P203] On February 27, 2006, in *Foster, 109 Ohio St.3d 1, 2006 Ohio 856, 845 N.E.2d 470*, we applied *Apprendi v. New Jersey (2000)*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, and *Blakely* to Ohio's noncapital sentencing statutes. *Foster* at paragraphs one and three of the syllabus. *Foster* held that portions of *R.C. 2929.14(C)*, which requires judicial fact-finding for maximum prison [**68] terms, and *R.C. 2929.14(E)(4)*, which requires judicial findings for consecutive terms,

are unconstitutional under *Blakely*. *Foster*, paragraph three of the syllabus. *Foster* also held that these unconstitutional statutory provisions are severable and that judicial fact-finding is no longer required before the imposition of maximum sentences or consecutive prison terms. *Id.*, paragraphs two and four of the syllabus.

[*P204] In the present case, the trial court's fact-finding in support of consecutive sentences violated *Foster* because a jury did not make findings on the seriousness of the offense justifying consecutive sentences.

[*P205] Nevertheless, there is a question as to whether Frazier's failure to object to his noncapital sentences constitutes waiver. Frazier was sentenced after *Blakely* but before this court's decision in *Foster*. In *Foster*, we rejected waiver on the ground that *Blakely* had not been decided at the time of *Foster*'s sentencing: "*Foster* could not have relinquished his sentencing objections as a known right when no one could have predicted that *Blakely* would extend the *Apprendi* doctrine to redefine 'statutory maximum.'" *Foster*, 109 Ohio St.3d 1, 2006 Ohio 856, 845 N.E.2d 470, P 31. [**69] We recently resolved this issue in *State v. Payne*, 114 Ohio St.3d 502, 2007 Ohio 4642, 873 N.E.2d 306, and we therefore conclude that defense counsel's failure to challenge Frazier's noncapital sentencing waived his present claim.

[*P206] A waived claim will still be considered when there is plain error. However, the test for plain error is stringent. A party claiming plain error must show that (1) an error occurred, (2) the error was obvious, and (3) the error affected the outcome of the trial. See *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 2002 Ohio 68, 759 N.E.2d 1240; *United States v. Olano* (1993), 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508; *Crim.R. 52(B)*; see, also, *Washington v. Recuenco* (2006), 548 U.S. , 126 S.Ct. 2546, 2553, 165 L.Ed.2d 466 (*Blakely* error is not a "structural error" and is subject to harmless-error analysis).

[*P207] The burden of demonstrating plain error is on the party asserting it. See, e.g., *State v. Jester* (1987), 32 Ohio St.3d 147, 150, 512 N.E.2d 962 ("appellant cannot claim that the trial court's instruction was plain error, inasmuch as he cannot demonstrate that but for the error, the outcome of the trial would have been different"). Additionally, "[n]otice of plain [**70] error * * * is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, paragraph three of the syllabus.

[*P208] We hold that the consecutive sentences imposed on Frazier did not result in plain error. After *Foster*, "trial courts * * * are no longer required to make findings or give their reasons for imposing maximum,

consecutive, or more than the minimum sentences." *Foster*, 109 Ohio St.3d 1, 2006 Ohio 856, 845 N.E.2d 470, P 100. Nothing in the record suggests that the noncapital sentencing would have been different if Frazier had been sentenced in accordance with *Blakely* and *Foster*. Indeed, there is no way to know whether the trial court would have imposed consecutive sentences had he sentenced Frazier consistently with *Blakely* and *Foster*.

[*P209] Based on the foregoing, we reject proposition VIII.

[*P210] *Postverdict discussions with jury.* In proposition of law XIV, Frazier contends that the trial judge erred in conducting an off-the-record ex parte discussion with the jurors after the jury had returned its penalty-phase verdict but before the trial court had imposed [**71] sentence.

[*P211] After the jury's penalty-phase verdict was announced, the trial court acknowledged the jury's hard work on the case. The trial judge announced, "[W]e'll be in recess now," and added, "I'll come back and talk with you for a couple of minutes."

[*P212] Frazier's claim lacks merit. First, trial counsel was present, but did not object, when the trial judge mentioned that she would speak to the jurors. By making no complaint, the defense waived any objection. See *State v. Brinkley*, 105 Ohio St.3d 231, 2005 Ohio 1507, 824 N.E.2d 959, P 153.

[*P213] Second, Frazier has failed to establish prejudice from any conversations that the trial court may have had with the jury. Moreover, Frazier has not attempted to reconstruct what the trial court discussed with the jury in an effort to show prejudice. See *App.R. 9(B)* and *(E)*; *State v. Williams*, 99 Ohio St.3d 439, 2003 Ohio 4164, 793 N.E.2d 446, P 98.

[*P214] Finally, as in *Williams*, "when the judge and jury met, the jurors had satisfied their official task and were free to discuss the case." *Id.* at P 99. Also, the trial court can be presumed to consider " 'only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively [**72] appears to the contrary.'" *State v. Post* (1987), 32 Ohio St.3d 380, 384, 513 N.E.2d 754, quoting *State v. White* (1968), 15 Ohio St.2d 146, 151, 44 O.O.2d 132, 239 N.E.2d 65. Thus, we reject proposition XIV.

Ineffective Assistance of Counsel

[*P215] In proposition of law, XII, Frazier raises various claims that his trial counsel provided ineffective assistance and that a new trial is warranted. See *Strickland v. Washington*, 466 U.S. at 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus.

[*P216] **1. Lack of pretrial preparation.** Frazier argues that his counsel provided ineffective assistance by failing to review and object to surveillance footage. The state provided the defense with CD-ROMs (compact discs, read-only memory) showing 350 hours of footage from 16 surveillance cameras at Northgate Apartments. The defense also received a compilation CD-ROM showing relevant footage of Frazier's and other individuals' movements around the time of the murder.

[*P217] During an out-of-court hearing on May 12, 2005, trial counsel expressed concern about the fairness of the compilation CD-ROM. The trial court ruled that the compilation CD would be admitted. [**73] Trial counsel also mentioned that the defense lacked the proper equipment to open the CD-ROMs. Later that day, the state loaned the defense a laptop computer to review the CD-ROMs.

[*P218] On May 16, 2005, the compilation CD-ROM was shown, without objection, to the jury. Toledo policeman Randal Navarro and Detective William Seymour provided the foundation for introducing the compilation CD-ROM into evidence. Detective Seymour also provided narrative testimony explaining events shown on the CD-ROM.

[*P219] First, Frazier argues that his counsel failed to review the surveillance footage from the CD-ROMs. However, Frazier presents no evidence showing that his counsel did not review the surveillance footage. It cannot be assumed that counsel did not review the footage just because four days elapsed between the date that the defense received equipment to open the CD-ROMs and the date when the surveillance footage was shown in court.

[*P220] Second, Frazier argues that his counsel provided ineffective assistance by not cross-examining Navarro and by conducting only a brief cross-examination of Seymour. Frazier fails to state the questions that his counsel should have asked these witnesses. Moreover, whether further [**74] questioning would have unearthed any useful information is speculative. We find that counsel's decision to forgo cross-examination constituted a legitimate tactical decision. See *State v. Foust*, 105 Ohio St.3d 137, 2004 Ohio 7006, 823 N.E.2d 836, P 125.

[*P221] **2. Inadequate voir dire.** Frazier argues that his counsel provided ineffective assistance by failing to ask any follow-up questions of six prospective jurors who stated that they could not impose the death penalty. However, "[t]he conduct of voir dire by defense counsel does not have to take a particular form, nor do specific questions have to be asked." *State v. Evans* (1992), 63 Ohio St.3d 231, 247, 586 N.E.2d 1042. Moreover, "counsel is in the best position to determine whether any potential juror should be questioned and to what extent."

State v. Murphy (2001), 91 Ohio St.3d 516, 539, 2001 Ohio 112, 747 N.E.2d 765.

[*P222] The six prospective jurors expressed strong views opposing the death penalty. Contrary to Frazier's claims, trial counsel did ask venireman Piel whether she "could or could not sign a death verdict," and she replied, "Could not." The remaining five jurors indicated to the court that "under no circumstances" would they be willing or able [**75] to follow the instructions and consider the death penalty. Trial counsel were not deficient by failing to ask follow-up questions of these jurors after they had expressed intractable views opposing the death penalty. See *State v. Phillips* (1995), 74 Ohio St.3d 72, 85, 1995 Ohio 171, 656 N.E.2d 643.

[*P223] **3. Trial counsel's comments.** Frazier argues that trial counsel made various comments during both phases of the trial that resulted in ineffective assistance.

[*P224] Before trial, counsel responded, "You mean besides enter a plea? Which is what I would prefer," to the trial court's question about any further pretrial issues in the case. Frazier claims that this response showed that his counsel were not putting forth a full effort in his defense. Frazier's complaint takes these comments out of context. The defense had tried to negotiate a pretrial agreement before the trial began. If counsel's negotiations had been successful, Frazier would not have received the death penalty. Counsel's remarks reflected no unwillingness to continue actively defending Frazier after these negotiations failed. Counsel's isolated remarks do not show deficient performance and were not prejudicial. See *State v. Drummond*, 111 Ohio St.3d 14, 2006 Ohio 5084, 854 N.E.2d 1038, P 214.

[*P225] [**76] Second, Frazier complains that his counsel provided ineffective assistance during the guilt-phase closing argument by conceding that the crime was "horrible" and that the victim "was a wonderful person. And she had no reason to die, and she was murdered in a fashion most foul." Trial counsel's statements do not reflect deficient performance. Counsel's candid acknowledgement that a horrible murder was committed on a defenseless victim helped to build rapport with the jury. Indeed, it is difficult to discuss this crime without using such words. See *State v. Campbell* (2000), 90 Ohio St.3d 320, 337, 2000 Ohio 183, 738 N.E.2d 1178.

[*P226] Third, Frazier argues that his counsel provided ineffective assistance during the penalty-phase opening statement by commenting on the horrible nature of the crime committed on an innocent and defenseless victim. He also claims that his counsel was ineffective by stating:

[*P227] "I'd like to harken back to the statements I made at the conclusion of the first phase and that is, we worked real hard to get a jury in this case, one whose verdict we could trust, and that's what we got. That's exactly what we got. And I heard the evidence too. I mean, I worked on the case for 14 months. [**77] And we got a sound verdict."

[*P228] Counsel's acceptance of the jury's guilt-phase verdict helped trial counsel maintain rapport with the jury as the defense moved into the penalty phase. See *State v. Johnson*, 112 Ohio St.3d 210, 2006 Ohio 6404, 858 N.E.2d 1144, P 151-152. There was nothing counsel could do to change the jury's finding of guilt. Counsel merely noted that the jury had already convicted his client and that counsel was then moving beyond that fact to focus the jury's attention on mitigating factors. Such argument represented a legitimate tactical decision. See *State v. Hartman* (2001), 93 Ohio St.3d 274, 296, 2001 Ohio 1580, 754 N.E.2d 1150 (counsel not ineffective for conceding blame during the penalty-phase closing argument).

[*P229] Finally, Frazier argues that his counsel provided ineffective assistance during the penalty-phase closing argument by stating:

[*P230] "But relative to the nature and circumstances of the offense, * * * this was a gruesome crime. They don't get much more gruesome than that. When you physically lay your [h]ands on another human being in the act of strangulation, take their life, that puts you right up to the top, a consideration for imposition of the death penalty."

[*P231] Frazier's [**78] claim that trial counsel's argument improperly conveyed to the jury that the gruesome nature of the crime could be considered an aggravating circumstance misconstrues the purpose of this argument. Trial counsel acknowledged that the crime was gruesome; however, he then emphasized that Frazier never intended to kill Stevenson when he went to her apartment. Thus, trial counsel's remarks focused on highlighting the mitigating features (e.g., no intent to kill) of Frazier's actions. We find that this argument was a tactical decision and did not constitute ineffective assistance. *State v. Bradley*, 42 Ohio St.3d at 144, 538 N.E.2d 373.

[*P232] **4. Failure to ensure a complete record.** Frazier claims that his counsel provided ineffective assistance by failing to object to unrecorded bench conferences and an unrecorded jury-instruction conference. However, Frazier cannot show prejudice because there is no evidence about what happened during these conferences. *State v. Drummond*, 111 Ohio St.3d 14, 2006 Ohio 5084, 854 N.E.2d 1038, P 220. "Acts or omissions by trial counsel which cannot be shown to have been prejudicial may not be characterized as ineffective assistance."

State v. Davie (1997), 80 Ohio St.3d 311, 332, 1997 Ohio 341, 686 N.E.2d 245.

[*P233] [**79] **5. Alcohol- and drug-abuse expert.** Frazier argues that his counsel provided ineffective assistance by failing to retain a substance-abuse expert to present testimony about his history of alcohol and drugs, particularly crack cocaine. This claim has no merit. Dr. Jeffrey Smalldon testified as a mitigation witness, and his written evaluation was also introduced into evidence. Dr. Smalldon diagnosed Frazier with a "history of alcohol abuse and a history of polysubstance abuse." Dr. Smalldon testified that Frazier was drinking 15 to 20 beers a day in his mid-thirties. In the mid-1990s, Frazier went through a detoxification program to treat his cocaine abuse. Thus, Dr. Smalldon found that "there's a pretty solid foundation for inferring a history of both significant alcohol abuse and significant substance abuse." Accordingly, the defense presented " 'alternative devices that * * * fulfill the same functions as the expert assistance sought.' " *State v. Foust*, 105 Ohio St.3d 137, 2004 Ohio 7006, 823 N.E.2d 836, P 103, quoting *State v. Jenkins* (1984), 15 Ohio St.3d 164, 15 OBR 311, 473 N.E.2d 264, paragraph four of the syllabus.

[*P234] **6. Failure to request change of venue.** Frazier argues that his [**80] counsel provided ineffective assistance by failing to move for a change of venue. The record does show the pervasive publicity about which Frazier complains. Counsel could also reasonably decide as a matter of trial strategy to conduct the trial in Toledo instead of requesting a change of venue. See *State v. Bryan*, 101 Ohio St.3d 272, 2004 Ohio 971, 804 N.E.2d 433, P 156 (reviewing court "will not second-guess trial strategy decisions").

[*P235] Moreover, a change of venue is not automatically granted when there is extensive pretrial publicity. Any decision to change venue rests largely within the discretion of the trial court. *State v. Maurer* (1984), 15 Ohio St.3d 239, 250, 15 OBR 379, 473 N.E.2d 768. "[A] careful and searching voir dire provides the best test of whether prejudicial pretrial publicity has prevented obtaining a fair and impartial jury from the locality." *State v. Bayless* (1976), 48 Ohio St.2d 73, 98, 2 O.O.3d 249, 357 N.E.2d 1035. Also, a "defendant claiming that pretrial publicity has denied him a fair trial must show that one or more jurors were actually biased." *State v. Gross*, 97 Ohio St.3d 121, 2002 Ohio 5524, 776 N.E.2d 1061, P 29.

[*P236] Here, the trial court questioned the [**81] jurors about pretrial publicity. Nine of the seated jurors had not been exposed to any media coverage about the case. One juror had heard Frazier's name in the news, and another juror had seen TV news reports about the case. Both jurors indicated that pretrial publicity would

not have any effect on their ability to be fair and impartial. The remaining juror saw a headline about the case in the paper; however, she was not asked whether it would influence her. Nevertheless, this juror said, "I would have to know the circumstances of the case, which I don't know anything" before reaching a verdict. We find that this claim also lacks merit.

[*P237] **7. Other allegations of ineffective assistance of counsel.** Frazier raises other instances of alleged ineffective assistance of counsel, but none of these prejudiced him. *Strickland v. Washington*, 466 U.S. at 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. As previously discussed in other propositions, Frazier's counsel were not ineffective by failing to object because Bowen was not qualified as an expert witness (XVII), and his counsel were not ineffective by failing to file motions to suppress (V). Frazier was also not prejudiced by trial counsel's failure to [**82] secure Frazier's waiver of his presence at in-chambers discussions and legal conferences (XVIII) or by his counsel's failure to obtain an expert in mental retardation and more fully develop Frazier's mental status (IV). Finally he was not prejudiced by his counsel's failure to object to the state's penalty-phase argument (XIII) or by his counsel's failure to object to penalty-phase instructions

[*P238] For the foregoing reasons, we reject proposition XII.

[*P239] In proposition of law XXI, Frazier claims that his counsel failed to preserve meritorious issues, but Frazier never cites any record reference or any specific meritorious issues that counsel failed to preserve. Thus, Frazier fails to establish deficient performance or prejudice. Moreover, we find nothing in the record showing any meritorious issues that were not preserved. Proposition XXI is overruled.

[*P240] In proposition of law XXII, Frazier asserts that his counsel were ineffective by failing to adequately preserve the record for appellate review. As discussed in proposition XII, Frazier cannot show prejudice because he fails to establish what transpired during unrecorded in-chambers discussions and legal conferences. Thus, we deny proposition [**83] XXII.

Cumulative Errors

[*P241] In proposition of law XX, Frazier argues that cumulative errors deprived him of a fair trial and require a reversal of his convictions and death sentence. However, Frazier received a fair trial. Moreover, "errors cannot become prejudicial by sheer weight of numbers." *State v. Hill* (1996), 75 Ohio St.3d 195, 212, 1996 Ohio 222, 661 N.E.2d 1068. Thus, we reject proposition XX.

Settled Issues

[*P242] **Reasonable doubt.** In proposition of law IX, Frazier challenges the constitutionality of the instructions on reasonable doubt. However, we have repeatedly affirmed the constitutionality of R.C. 2901.05(D). See *State v. Van Gundy* (1992), 64 Ohio St.3d 230, 232, 1992 Ohio 108, 594 N.E.2d 604. Thus, proposition IX is denied.

[*P243] **Constitutionality.** In proposition of law XV, Frazier attacks the constitutionality of Ohio's death-penalty statutes. We summarily reject these claims. See *State v. Carter* (2000), 89 Ohio St.3d 593, 607, 2000 Ohio 172, 734 N.E.2d 345; *State v. Jenkins*, 15 Ohio St.3d 164, 15 OBR 311, 473 N.E.2d 264, paragraph one of the syllabus.

[*P244] Frazier also contends that Ohio's death-penalty statutes violate international law and treaties to which the United States is a party. These arguments also lack merit. See *State v. Bey*, 85 Ohio St.3d at 502, 709 N.E.2d 484.

[*P245] [**84] In proposition of law XVII, Frazier challenges the constitutionality of lethal injection. We have previously rejected similar claims. See *State v. Adams*, 103 Ohio St.3d 508, 2004 Ohio 5845, 817 N.E.2d 29, P 131; *State v. Carter*, 89 Ohio St.3d at 608, 734 N.E.2d 345.

Sufficiency and Weight of the Aggravating Circumstances

[*P246] In proposition of law XXIII, Frazier argues that his death penalty must be vacated because the aggravating circumstances do not outweigh the mitigating factors. We shall address this argument during our independent sentence evaluation.

Proportionality

[*P247] In proposition of law XXIV, Frazier claims that his death sentence is disproportionate to death sentences imposed in similar cases. This argument will also be addressed during our independent sentence evaluation.

INDEPENDENT SENTENCE EVALUATION

[*P248] Having considered Frazier's propositions of law, we are required by R.C. 2929.05(A) to independently review Frazier's death sentence for appropriateness and proportionality. The evidence at trial established beyond a reasonable doubt that Frazier murdered Mary Stevenson while committing or attempting to commit aggravated robbery, R.C. 2929.04(A)(7), and while committing or attempting [**85] to commit aggravated burglary, R.C. 2929.04(A)(7).

[*P249] Against these aggravating circumstances, we are called upon to weigh the mitigating factors contained in *R.C. 2929.04(B)*. Frazier called one mitigating witness, Dr. Smalldon, and introduced his written report, the coroner's verdict, and Dr. Forgac's written report, and he submitted other documentary evidence for the jury's consideration. Frazier presented neither a sworn nor unsworn statement.

[*P250] Dr. Smalldon evaluated and conducted psychological testing of Frazier. Dr. Smalldon also reviewed Frazier's records, interviewed Frazier's brother, reviewed statements from other family members, and talked to Gary Ericson, the defense's mitigation specialist, about Frazier's background.

[*P251] As discussed in proposition IV, Frazier's IQ tests show that he has a verbal IQ of 77, a performance IQ of 72, and a full scale IQ of 72. Dr. Smalldon testified that Frazier's IQ scores place him "toward the lower end of the borderline range of intelligence." Dr. Smalldon also stated that Frazier's IQ scores are consistent with his failure in first grade, his designation as a slow learner in school, and Frazier's attendance in special classes before he dropped [*86] out of school after the tenth grade.

[*P252] Dr. Smalldon diagnosed Frazier with "a depressive disorder not otherwise specified." According to Dr. Smalldon, Frazier's records show that he has had "episodic fluctuating symptoms of depression over a period of many years." Frazier was also diagnosed with a history of alcohol and polysubstance abuse, including marijuana and cocaine. Finally, Dr. Smalldon diagnosed Frazier with "a personality disorder not otherwise specified" and "borderline intellectual functioning."

[*P253] According to Dr. Smalldon, Frazier was the "product of a very unstable family." He was one of six children. Social service workers reported that Frazier and his siblings "were just kind of running around unsupervised, not responsive to parental direction." Frazier's family was also very poor. Records showed that the family was living on a weekly wage of \$ 64.

[*P254] Frazier's father was absent and uninvolved with his children. He was also a gambler and a drinker. Frazier described his father as the "main disciplinarian" and said, "When you got a whooping, you got a whooping." Frazier remembered that on one occasion, "his father crash[ed] through the bathroom door * * * to administer one [*87] of those."

[*P255] Frazier described himself as feeling ashamed as an elementary school student and said that other students would tease him and call him stupid. Frazier was not active in school activities because he lacked money for "clothes and stuff like that." Frazier was an

overall D student, and he dropped out of high school when he was 19 years old.

[*P256] Frazier told Dr. Smalldon that when he was 13 or 14 years old, a man abducted him while he was getting off a bus and sodomized him. Frazier stated, "I've never forgotten it. Fifty years later, those images are with me today." Dr. Smalldon testified that Frazier's trust in other people "evaporated after that experience."

[*P257] When Frazier was 25 years old, he married Tommie Louise Washington, but they divorced several years later. Frazier dated several other women after his divorce and fathered three illegitimate children. According to Dr. Smalldon, "none of these relationships had a great deal of staying power, and even when he was involved in them, * * * [there was] quite a bit of turmoil."

[*P258] Frazier's employment history has been erratic, and he seldom remained employed for very long. Moreover, most of his employment involved "unskilled or very [*88] marginally-skilled jobs." Frazier described himself as an unreliable employee. He said, "I'd get fired because I drink." In 1994, Frazier was granted Social Security disability based on an administrative finding that he was mentally retarded.

[*P259] Frazier has a history of significant alcohol and substance abuse. Frazier's medical records in the mid-1990s show that he was drinking "20 bottles of beer a day, along with using drugs." His medical records also show that he was hospitalized in the mid-1990s for suicidal and homicidal ideation. Frazier was depressed because he had broken up with his girlfriend, and he was thinking of hurting himself and killing her.

[*P260] Dr. Smalldon testified that Frazier never expressed remorse about Stevenson's murder because he said "he didn't do it." Dr. Smalldon also reported Frazier to be "a very compliant, easy-to-handle inmate" during the 15 months that he was in the county jail. Dr. Smalldon stated that if he were treating Frazier, "the very first thing that [he] would look to is structure, [a] highly-controlled environment like a prison." Beyond that, Dr. Smalldon stated that he would not "expect to make any major progress in terms of changing [Frazier's] [*89] personality structure." Rather, he would look at "behavioral kinds of interventions."

[*P261] As discussed in proposition IV, Dr. Forgac found that Frazier is not mentally retarded. Dr. Forgac diagnosed Frazier with "borderline intellectual functioning." When Dr. Forgac asked Frazier whether he hears voices, he replied, "All the time, even when I'm sitting here sometimes. Men's voices, not clear, like interference, but mostly when I get ready to go to sleep." Frazier also indicated that he was "[w]atched all the time" where he lives. However, Dr. Forgac concluded, "There was

nothing in this man's clinical presentation, including his thought content or stream of thought, which would indicate he was acutely psychotic on the day of this evaluation."

[*P262] We find nothing in the nature and circumstances of the offense to be mitigating. Frazier entered Stevenson's apartment and murdered her by strangling her and slitting her throat. Afterwards, Frazier stole two of her purses and fled the scene. These facts establish a horrific crime without any mitigating features.

[*P263] Although Frazier's character offers nothing in mitigation, we give some weight to his history and background. Frazier was raised in an unstable [**90] family environment with little parental direction and control. Frazier did poorly in school and dropped out of high school. Frazier claims that when he was a teenager, he was sexually abused by a man. If that is true, Frazier was undoubtedly traumatized by this experience.

[*P264] Frazier also had a long history of drug and alcohol abuse. Testimony at trial showed that Frazier was drinking and using crack cocaine on the night before he murdered Stevenson.

[*P265] The statutory mitigating features are generally inapplicable here, including *R.C. 2929.04(B)(1)* (victim inducement), *(B)(2)* (duress, coercion, or strong provocation), *(B)(4)* (youth of the offender), *(B)(5)* (lack of a significant criminal record), and *(B)(6)* (accomplice only).

[*P266] Frazier's mental deficiencies do not qualify as an *R.C. 2929.04(B)(3)* factor because there was no testimony that Frazier, by reason of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

[*P267] Nevertheless, Frazier's limited intellectual abilities are entitled to significant weight in mitigation under the catchall provision of *R.C. 2929.04(B)(7)*. Dr.

Smalldon testified [**91] that Frazier has an IQ of 72, which places him in the borderline range of intelligence. However, the evidence at trial did not establish that he is mentally retarded. Thus, his execution is not barred by *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335.

[*P268] In proposition of law XXIII, Frazier argues that he should not receive the death penalty because he is elderly (he was 63 at the time of the offenses) and not a "fit candidate" for the death penalty. Frazier argues that any life sentence will keep him in prison for the rest of his life. However, Frazier's age had no effect on his ability to brutally murder Stevenson. Thus, we give little weight to his age as a mitigating factor. The evidence does not reveal any other mitigating factors under *R.C. 2929.04(B)(7)*.

[*P269] We find that the aggravating circumstances outweigh the mitigating factors, beyond a reasonable doubt. Frazier murdered Stevenson during the course of an aggravated robbery and an aggravated burglary. Compared with these serious aggravating circumstances, Frazier's mitigating evidence has little significance.

[*P270] Finally, the death penalty imposed for the aggravated murder of Stevenson is proportionate to death sentences [**92] approved for other robbery-murder and burglary-murder cases. See *State v. Elmore*, 111 Ohio St.3d 515, 2006 Ohio 6207, 857 N.E.2d 547, P 168; *State v. Thomas*, 97 Ohio St.3d 309, 2002 Ohio 6624, 779 N.E.2d 1017, P 124; *State v. Jones (2000)*, 90 Ohio St.3d 403, 423, 2000 Ohio 187, 739 N.E.2d 300; and *State v. Stallings (2000)*, 89 Ohio St.3d 280, 301, 2000 Ohio 164, 731 N.E.2d 159.

Judgment affirmed.

MOYER, C.J., PFEIFER, O'CONNOR, O'DONNELL, LANZINGER and CUPP, M., concur.

OHIO REVISED CODE

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR MURDER

ORC Ann. 2929.04 (2007)

§ 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 [2929.02.3] 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.