NO. 2007-0755

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE CUYAHOGA COUNTY COURT OF COMMON PLEAS
NO. 475400

STATE OF OHIO,

Plaintiff-Appellee

-vs-

CHARLES MAXWELL,

Defendant-Appellant

MERIT BRIEF OF APPELLEE

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STATEMENT OF THE CASE

On January 4, 2006, the Cuyahoga County grand jury returned an eight-count indictment against Appellant Charles Maxwell (hereinafter "Defendant") for the aggravated murder of Nichole McCorkle which occurred on November 27, 2005.

Count one of the indictment was for Aggravated Murder, R.C. 2903.01(A)(1). Count two of the indictment was for Aggravated Murder, R.C. 2903.01(B). The first count charged Appellant with the Aggravated Murder of Ms. McCorkle by prior calculation and design, while the second count charged Appellant with the Aggravated Murder of Ms. McCorkle by purposely causing her death while committing, attempting to commit, or while fleeing immediately after committing, attempting to commit Kidnapping and/or Aggravated Burglary. Both counts one and two contained five specifications as follows: R.C. 2929.04(A)(5), course of conduct (f.k.a. mass murder); R.C. 2929.04(A)(7), felony murder; R.C. 2929.04(A)(8) retaliation for testimony; R.C. 2929.04(A)(3), murder to escape accounting for crime; and, R.C. 2941.145, three-year firearm.

Count three was for Kidnapping, R.C. 2905.01(A)(2) and/or (A)(3) with a three-year firearm specification.

Counts four and five were for the Aggravated Burglary of Ms. McCorkle's home under alternative the, R.C. 2911.11(A)(1) and R.C. 2911.11(A)(2), each with a three-year firearm specification.

Count six was for the Attempted Murder of Lauretta Kenney, Ms. McCorkle's sister, pursuant to R.C. 2923.02 and 2903.02(A) with a three-year firearm specification.

Count seven was for the Retaliation against Ms. McCorkle for testifying against Appellant at grand jury, pursuant to R.C. 2921.05(B) with a three-year firearm specification.

Count eight was for Having a Weapon While Under Disability, R.C. 2923.13(A) for having a firearm at the time of the Aggravated Murder, which was tried to the court.

Pursuant to Rule 29, the court acquitted Appellant of counts two through five. The jury found Appellant guilty of the following: Count one Aggravated Murder, with the retaliation for testimony, murder to escape accounting for crime, and, three-year firearm specifications; and Count seven Retaliation with the three-year firearm specification.

The jury found Appellant not guilty of the following: The course of conduct specification in count one; Count six Attempted Murder with the three-year firearm specification.

The court found Appellant guilty of the following: Count eight Having a Weapon While Under Disability.

For the mitigation phase, the retaliation for testimony and the murder to escape accounting for crime specifications merged. After the mitigation phase the jury found the aggravating circumstances outweighed the mitigating factors and returned a verdict of death. The court authored an opinion in which Appellant was sentenced to death for count one, for five years for counts seven and eight, concurrent but consecutive to the three-year firearm specification.

Now before this Honorable Court is defendant's timely direct appeal of right.

STATEMENT OF RELEVANT FACTS

State's case and witnesses

In the early morning hours of November 27, 2005, Appellant Charles Maxwell murdered Nichole McCorkle, the mother of his three-year-old daughter Cheyenne Maxwell, by firing two bullets into Ms. McCorkle's head in the foyer of her home at 1046 East 146th Street, Cleveland, Ohio, with Cheyenne Maxwell witnessing the killing standing a few feet away. Appellant's reason for killing Ms. McCorkle was to keep her from testifying against him for an incident, which occurred on October 6, 2005, in which Appellant pistol-whipped Ms. McCorkle in the head with a gun causing her to be hospitalized for three days with stitches to her head.

Previously, Appellant had seen on television how a man was sentenced to eight years of prison for committing a felonious assault. Appellant's plan was to utilize his friend John Gregg in a three-way phone conversation to have Ms. McCorkle recant and/or minimize the October 6th incident from a felonious assault to a domestic violence crime and to tell the grand jury that she pushed Appellant, Appellant pushed her, and the she then hit her head on a stove resulting in the injuries.

Ms. McCorkle did minimize the incident in written statements to police October 10th and October 25th. However, Appellant and Ms. McCorkle's relationship was physically, emotionally, and mentally abusive. The relationship included prior acts of domestic violence. Ms. McCorkle obtained a TPO against Appellant and eventually, Ms. McCorkle decided to testify before a grand jury against Appellant for the October 6th incident, albeit reluctantly. Appellant's plan to persuade Ms. McCorkle to minimize/recant her testimony failed when Ms. McCorkle did testify before the grand jury. Appellant retaliated against Ms. McCorkle for testifying and tried to escape an

accounting for the crime by murdering Ms. McCorkle. The State called nineteen witnesses in its case-in-chief.

The State's first witness was Michelle Kenney. Ms. Kenney was Ms. McCorkle's younger sister. (Tr. p. 782) Ms. McCorkle was the oldest sibling at age 37, Ms. McKenney was 36, Lauretta Kenney was 33, Raymond James, III was 33; and Heinz Kenney, Jr. was 27. (Tr. p. 782-3) Heinz Kenney. Sr. was the biological father of Ms. McCorkle, Ms. Michelle Kenney, Ms. Lauretta Kenney, and Heinz Kenney, Jr. (Tr. p. 784). Ms. McCorkle was previously married and divorced; her maiden name was Kenney. (Tr. p. 786) Ms. Michelle Kenney's mother was Lydia James, who was married to Raymond James II. (Tr. p. 784-5) Mr. James, II was the father figure in Michelle Kenney's life due to Mr. Kenney, Sr.'s chronic absence in his children's lives. (Tr. p. 785) Ms. Kenney was employed by the City of Cleveland in the Empowerment Zone Department in economic development. (Tr. p. 782) In July 2005, Mr. Kenney, Sr. reintroduced himself into his children's lives in Cleveland. (Tr. p. 785)

Ms. McCorkle had three children: Derrick was eighteen, Domonique was thirteen, and Cheyenne was five. (Tr. p. 786) Since 1999, Ms. McCorkle lived with Ms. Michelle Kenney on Ablewhite, lived across from Ms. Kenny on Ablewhite, lived also on Holiday Avenue off East 152nd, lived near East 118 and Parkgate; lived on Nottingham, and finally purchased her home a t 1046 East 146th in August 2005. (Tr. p. 787-8)

Appellant and Ms. McCorkle met and started dating in 1999-2000. (Tr. p. 789) During their relationship, they produced one child: Cheyenne Maxwell. (Tr. p. 790) During their relationship, Appellant lived off and on with Ms. McCorkle at each one of her residences. They would get into arguments, get mad at each other, Appellant would

leave, and then Appellant would come back later after they decided to make up. (Tr. p. 790)

Appellant did not live at 1046 East 146th Street with Ms. McCorkle, but Appellant did have a key for the side door, did keep clothes there, and stayed over when the terms were good. (Tr. p. 790) The house did have front and back doors, but Ms. McCorkle did not give Appellant keys for these doors. (Tr. p. 794) In July 2005, Ms. McCorkle's father Mr. Kenney, Sr. moved in with Ms. McCorkle at the Nottingham Road residence, after he was released from prison in Arizona. (Tr. p. 791) Ms. McCorkle offered to take care of him, as he was sick. Id. At the time, Appellant lived with Ms. McCorkle, Domonique, and Cheyenne on Nottingham. (Tr. p. 793) Derrick Kenney had moved to Georgia to stay with Ms. Michelle Kenney's first cousin Marguerite Antoine. Id.

Ms. McCorkle was a full-time nursing student at Huron Hospital in East Cleveland and worked a temporary position in a factory. (Tr. p. 795) Ms. Michelle Kenney would talk with Ms. McCorkle daily. (Tr. p. 796) Ms. McCorkle's daughter Cheyenne attended the same school as Ms. Michelle Kenney's daughter Brianna. (Tr. p. 797) Many times Appellant would drive Domonique over to Ms. Kenney's house. Id.

In early October 2005, Ms. Michelle Kenney lost contact with Ms. McCorkle. Id. Ms. Michelle Kenney recalled that on a Friday, Appellant dropped Domonique, which was unusual because Ms. McCorkle did not talk to her about pick-up arrangements. (Tr. p. 798-9) Ms. Michelle Kenney called Ms. McCorkle's cell phone, but was unable to reach Ms. McCorkle. (Tr. p. 799) Ms. Michelle Kenney asked Appellant about Ms. McCorkle and Appellant said that Ms. McCorkle was at work. (Tr. p. 800) On Saturday morning, Ms. McCorkle called Ms. Michelle Kenney from University Hospital. (Tr. p. 801) Ms. McCorkle was a patient at the hospital. (Tr. p. 802)

The next time Ms. Michelle Kenney saw Ms. McCorkle was at her other sister, Ms. Lauretta Kenney's house. (Tr. p. 803) Ms. Michelle Kenney saw Ms. McCorkle in taking a bath in the bathtub. (Tr. p. 807) There were two sets of stitches in her head and bruises on her body. Id. Because of the injuries, Ms. Michelle Kenney accompanied Ms. McCorkle before Judge Adrine of the Cleveland Municipal Court, where Ms. McCorkle sought and was granted a temporary protection order ("TPO") against Appellant. (Tr. p. 832-3) The TPO was obtained a week to a week and a half after the October 6, 2005 incident. (Tr. p. 833) During that time, Ms. McCorkle stayed with Ms. Lauretta Kenney, before returning to her home on East 146th. (Tr. p. 834)

Ms. Michelle Kenney maintained daily communication with Ms. McCorkle, who on October 15th told Ms. Michelle Kenney that she was afraid. Id. Ms. Michelle Kenney did not see Appellant again prior to Ms. McCorkle's murder. Id.

On November 27, 2005 in the early morning hours around 2:45 a.m., Ms. Lauretta Kenney called Ms. Michelle Kenney, Appellant was at Ms. McCorkle's home. (Tr. p. 835, 840) After that call Ms. Michelle Kenney called Detective Freeman, a Cleveland police detective assigned nearby, that she knew, and left him a voicemail asking him if he could go over to Ms. McCorkle's home, because Appellant was not supposed to be there due to the TPO (Tr. p. 835-6) Ms. Michelle Kenney next called Ms. Lauretta Kenney, asked her if she called 911, and then hung up and called 911 herself (Tr. p. 836). Ms. Michelle Kenney called 911 at 2:46 a.m. and 2:57 a.m. (Tr. p. 1560)

Ms. Michelle Kenney then drove over to Ms. McCorkle's home. (Tr. p. 841) While en route, Ms. Michelle Kenney's daughter Brianna called her on the cell phone and let her know that Domonique called Briana and told Briana that Ms. McCorkle was shot. (Tr. p. 841) Ms. Michelle Kenney saw her sister Ms. Lauretta Kenney running up

East 146th toward Saint Clair Avenue. (Tr. p. 842) Appellant was seen running away, and Ms. Michelle Kenney and Ms. Lauretta Kenney drove around to see if they could find what route he had traveled on foot. Id. Unsuccessful in locating Appellant, they then went to Ms. McCorkle's home and called 911 again. Id. Thirty-forty seconds later police arrive on scene. Id. Then an ambulance and more police arrived on scene. (Tr. p. 843) The police escorted Domonique and Cheyenne out and they went to stay with Ms. Michelle Kenney. (Tr. p. 844) The ambulance transported Ms. McCorkle to Huron Hospital. Id.

At the hospital, family members were contacted and Ms. McCorkle was pronounced dead at 6:21 a.m. on November 27, 2008. Id.

Ms. Michelle Kenney called Appellant's friend, John Gregg. (Tr. p. 845) Mr. Gregg was had worked with Appellant and had performed remodeling work with him on Ms. Michelle Kenney's kitchen and bathroom in 2004, which took a week (Tr. p. 846, 848, 853) Ms. Kenney called him to see if knew where Appellant was so that the police could get him or to see if Mr. Gregg could get Appellant to turn himself in. Id.

For the past six years, Appellant had worked construction, including fixing up bathrooms and kitchens with new walls, sinks, floors, and cabinets. (Tr. p. 847) Appellant made the financial decisions regarding how much to charge or what the family discount would be for the work. (Tr. p. 847)

The State's second witness was Cheyenne Maxwell. (Tr. p. 854) Cheyenne Maxwell was five years old and the daughter of Appellant and Ms. McCorkle. (Tr. p. 856) Cheyenne now lived with her Aunt Michelle Kenney. (Tr. p. 857) Cheyenne identified the following crime scene photographs taken after Ms. McCorkle was transported to the hospital, labeled State's Exhibit: #1 of her mommy's house; #2 of a

house and a car; #3 of mommy's house, again; #4 of mommy's front door; #5 of the foyer area; #6 of the living room; #7 of the couch and table in mommy's house; #11 mommy's bed in mommy's room; and #12 Domonique's bedroom (Tr. p. 857-9)

Cheyenne recalled being in the bed with her mother, when Appellant was in the bedroom with a gun. (Tr. p. 859) Appellant was talking with her mother. Id. Then, Appellant her mother and she went downstairs, first to the kitchen and then to the door. (Tr. p. 860). Cheyenne wanted to see what Appellant was fixing to do. Id. When her Aunt Lauretta Kenney arrived, Appellant and her mother were fighting. (Tr. p. 870) Cheyenne then saw Appellant shoot her mommy. (Tr. p. 860) The shooting occurred near the door in the foyer area. (Tr. p. 861) In State's Exhibit 5, Cheyenne indicated where Ms. McCorkle would have been lying in the photograph. (Tr. p. 861) Domonique was in bed at the time of the shooting. Id.

The State's third witness was Lauretta Kenney. (Tr. p. 873) Ms. Lauretta Kenney was the sister of Ms. McCorkle. (Tr. p. 874) Ms. Lauretta Kenney has known Appellant since 1999 when he began dating her sister. Id. In October 2005, Ms. Lauretta Kenney would talk to her sister four to five times a day. (Tr. p. 877) Then just like her sister Ms. Michelle Kenney, there came a time when Ms. Lauretta Kenney could not reach Ms. Nicole McCorkle. Id.

On October 7, 2005, Ms. Lauretta Kenney asked her father Mr. Kenney, Sr. to come over to her house to watch her kids. (Tr. p. 877-9) Ms. McCorkle had to work that night and had arranged to have Appellant watch Cheyenne, but Appellant had a problem watching Cheyenne, so Ms. McCorkle wanted Cheyenne to over to Ms. Lauretta Kenney's house that night, Thursday October 7, 2005. (Tr. p. 879) Ms. Lauretta Kenney went to a concert that night and did not see Cheyenne. The next day, Friday, October 8,

Ms. Lauretta Kenney called Ms. McCorkle three to four times to reach her about where Cheyenne was. (Tr. p. 880) Ms. Lauretta Kenney also called her sister Mss. Michelle Kenney, her mother Ms. Lydia James, her cousin Marguerite Antoine of Georgia, to see if anyone knew where Ms. McCorkle was. (Tr. p. 881)

It was not until Saturday morning that Ms. Lauretta Kenney found out from her Ms. Michelle Kenney that their sister Ms. McCorkle was in the hospital. (Tr. p. 883) At the hospital, Ms. Lauretta Kenney saw that her sister had stitches down the front and side of her head. (Tr. p. 884) The police then arrived at the hospital, went to Ms. McCorkle's room, and took a report. (Tr. p. 885) Ms. McCorkle was in the hospital from Thursday to Saturday and then stayed at Ms. Lauretta Kenney's house to the following Thursday. (Tr. p. 885-6) The reason Ms. McCorkle stayed at her sister's house during this period was that Ms. McCorkle was scared to go to her house on East 146th. (Tr. p. 886)

On November 27, 2005, Ms. McCorkle was out with Will Hutchinson. (Tr. p. 887) Ms. Lauretta Kenney has known Mr. Hutchinson since 1996 and introduced him to her sister after the October 7th incident with Appellant, a month before her sister's murder. (Tr. p. 887, 1067) Mr. Hutchinson called Ms. Lauretta Kenney at about 2:30 a.m. that morning. (Tr. p. 888) Because of that call, Ms. Lauretta Kenney called her sister Ms. McCorkle at approximately 2:35 a.m. or 2:40 a.m. Id. Appellant answered the phone, said hello and gave the phone to Ms. McCorkle (Tr. p. 889) Ms. Lauretta Kenney asked her why was Appellant there? (Tr. p. 889)

Ms. Lauretta Kenney told her sister that Appellant did not need to be there, he needed to leave, and he should not be there. Id. Ms. Lauretta Kenney then called her sister Ms. Michelle Kenney and told her that Appellant was at Ms. McCorkle's house and

that she didn't sound like herself, she didn't know what was going on, she sounded scared, upset. (Tr. p. 890) Ms. Lauretta Kenney then drove from her house in Cleveland Heights to Ms. McCorkle's house in nine minutes; the drive would usually take her 15-20 minutes. Id. Ms. Lauretta Kenney was rushing because she was scared that Appellant was there when he should not have been there. (Tr. p. 891)

Ms. Lauretta Kenny also called Ms. Antoine to talk to her on the way to Ms. McCorkle's house. (Tr. p. 1033) When Ms. Lauretta Kenny drove down Saint Clair Avenue from Cordway to East 146th and turned down East 146th. (Tr. p. 1032) While driving Ms. Lauretta Kenney was looking for Appellant's cars. (Tr. p. 1032-3) Appellant's cars included a burgundy Toyota and a pick up truck. (Tr. p. 1033) Ms. Lauretta Kenney did not see any of Appellant's cars on East 146th. Id. Appellant's car was not in the driveway at 1046 East 146th. Id. Ms. Lauretta Kenney pulled into the driveway and saw Ms. McCorkle's blue Ford car parked in the driveway. Id. Ms. Lauretta Kenney called Ms. Michelle Kenney to let her know that she did not see any of Appellant's cars there. (Tr. p. 1034) Ms. Lauretta Kenney then called Ms. McCorkle, who answered the phone, mumbled something, and then the phone hung up. Id. Ms. Lauretta Kenney then called Ms. Antoine to let her know that Ms. McCorkle answered the phone but was not letting her inside, and that Ms. Lauretta Kenney was going to try to get inside her sister's home by telling her sister that she was cold. Id.

Ms. Lauretta Kenney called Ms. McCorkle, who answered the phone, Ms. Lauretta Kenney asked to come inside because she was cold and her sister said okay. (Tr. p. 1035) Ms. Lauretta Kenney then called Ms. Antoine to update her on the situation. Id. While standing outside, Ms. Lauretta Kenney saw someone peeking out of the top of living room blinds, which would be too tall for her sister to peek out, since her

sister was 5'5"-5'6". Ms. Lauretta Kenney went to the front door, which Ms. McCorkle opened. (Tr. p. 1036)

Appellant was standing next to Ms. McCorkle (Tr. p. 1036) Appellant seemed agitated with Ms. Lauretta Kenney's presence at that time. (Tr. p. 1079) Ms. Lauretta Kenney told Appellant that he should not be there; he is not supposed to be there. (Tr. p. 1037) Appellant said that he and Ms. McCorkle were talking. Id. Appellant and Ms. Lauretta exchanged words. (Tr. p. 1038) Appellant called Ms. Lauretta Kenney a bitch, told her if anyone is leaving it's you, and then took a few steps back and started going into his front pants and made a motion as if was pulling something out of his pants. (Tr. p. 1038, 1081)

Ms. McCorkle yelled out, my God, Lauretta, he got a gun, run. Id. Appellant came outside and on the porch, Ms. Lauretta Kenney jumped off the porch and started running diagonally across the street and then Appellant shot the gun as she was running. (Tr. p. 1038, 1059) Ms. Lauretta Kenney heard Ms. McCorkle yell do not shoot her, do not shoot her. (Tr. p. 1039) Appellant shot the gun again. (Tr. p. 1038)

From across the street by the bushes, Ms. Lauretta Kenney ducked down and heard another gunshot. Id. Ms. Lauretta Kenney then looked up and saw Appellant kneel down by and over Ms. McCorkle. (Tr. p. 1039, 1086) Ms. Lauretta Kenney then dialed 911 at 2:52 a.m. (Tr. p. 1039, 1560) Appellant then picked up his hat, put it on his head and just galloped down the stairs, looked around to see if anybody was behind him or around, and then started jogging down East 146th toward St. Clair. (Tr. p. 1039, 1041-2) Appellant was not going fast traveling on the left side of East 146th. Ms. Lauretta Kenney ran up the right side of East 146th describing Appellant's clothing and direction to the 911 operator. (Tr. p. 1042) Appellant lost Ms. Lauretta Kenney when Appellant

got to the corner of East 146th and St. Clair. Id. Appellant turned left. Id. When Ms. Kenney reached the corner of East 146th and St. Clair, her sister Ms. Michelle Kenney drove up from the left. The Kenney sisters attempted to find Appellant but were unsuccessful. (Tr. p. 1043)

While on the phone, the 911 operator asked Ms. Lauretta Kenney is she had a niece Domonique. (Tr. p. 1048) Domonique had called 911 at 2:58 a.m. (Tr. p. 1560) When the Kenney sisters arrived at Ms. McCorkle's house, Domonique was standing at the doorway over Ms. McCorkle. (Tr. p. 1049) Domonique was standing with the phone in her hand, while her mother was lying on the floor with blood coming out. Id. Ms. McCorkle was lying in the foyer of her house with her feet by the door and the upper part of her torso and head in the living room, near the stairs. (Tr. p. 1085-6, 1300) Ms. Lauretta Kenney took the phone from Domonique, made her go outside, and talked to the 911 operator on the house phone. Id.

Cheyenne was standing over by the couch. (Tr. p. 1051) Then the police arrived. Id. The children were put in Ms. Michelle Kenney's car. (Tr. p. 1052) Ms. Lauretta Kenney identified State's Exhibits 1-9 describing Ms. McCorkle's house, foyer, living room, and driveway. The ambulance arrived and they put Ms. McCorkle on a stretcher and took her to Huron Hospital. (Tr. p. 1062)

The State's fourth witness was Cleveland police officer Reginald Smith. (Tr. p. 1106) In response to a call for a male disturbing at 1046 East 146th, P.O. Smith and P.O. Brown were the first police to arrive at the address. (Tr. p. 1119) The scene was chaotic and hysterical as people were screaming. (Tr. p. 1111) In the house, Ms. McCorkle had a pulse, but her body was shaking. (Tr. p. 1106) P.O. Smith called for EMS to step it up. (Tr. p. 1112) EMS arrived to take Ms. McCorkle to the ambulance with the help of police

officers Cox and Buford. (Tr. p. 1114) Additionally, Sergeant Patton, and Lieutenant Barrows, Officer Teel, Officer Riley, Detective Gajowski and Sowa are walking in the crime scene. (Tr. p. 1117) Crime scene tape was put in place. (Tr. p. 1114) Two shell casings were found, one by the door the other on the stairs inside the house. (Tr. p. 1136)

The State's fifth witness was Michael Kenny. (Tr. p. 1139) Mr. Kenny was an assistant Cuyahoga County prosecutor assigned to courtroom 3-D, where defendants who are arrested appear for a bond and can have a preliminary hearing, if requested. (Tr. p. 1140) Additionally, Mr. Kenny asks the court for temporary protection orders when necessary for victims of crime. Id. A temporary protection order is part of a criminal proceeding. (Tr. p. 1144, 1202)

On October 13, 2005, Ms. McCorkle appeared at court before Cleveland Municipal Court Judge Adrine and sought a TPO against Appellant in an ex parte hearing. (Tr. p. 1144) Judge Adrine granted the TPO to protect Ms. McCorkle and Cheyenne from Appellant.

The State's sixth witness was Brian Mooney. (Tr. p. 1157) Mr. Mooney was a city council member for Brook Park, and a regional director for the State Treasurer. (Tr. p. 1158) Previously, Mr. Mooney was an assistant Cuyahoga County prosecutor assigned to the grand jury unit. On October 20, 2005, Cleveland Police Department Detective Sardon submitted a felonious assault case to Mr. Mooney for review. (Tr. p. 1162) Mr. Mooney subpoenaed Det. Sardon to appear and testify. (Tr. p. 1164) Mr. Mooney reviewed the case and determined it was necessary to have the victim Nichole McCorkle testify as to what happened on October 6, 2005. Id. Mr. Mooney subpoenaed Ms. McCorkle on November 16, 2005 to testify on November 23, 2005. Id.

Ms. McCorkle appeared on November 23, 2005 and appeared frightened, shaking, and reluctant to testify. (Tr. p. 1166) A grand jury is part of a criminal proceeding. (Tr. p. 1170, 1202) On the same day, the grand jury true billed an indictment against Appellant for felonious assault, abduction, and domestic violence. (Tr. p. 1174) Mr. Mooney prepared the indictment for typing and requested an arrest warrant for Appellant. (Tr. p. 1177) Mr. Mooney also notified Ms. McCorkle that the indictment was true billed. (Tr. p. 1204-5)

The State's seventh witness was Gertie Moore. (Tr. p. 1210) Ms. Moore was a neighbor across the street from Ms. McCorkle at 1047 East 146th Street and lived there since 1968. (Tr. p. 1211) Ms. Moore saw Ms. McCorkle move in to the house in July 2005. (Tr. p. 1212) On November 27, 2005, Ms. Moore was lying in bed awake and heard three gunshots, two of them followed by a pause then a third. (Tr. p. 1214-5) Ms. Moore went to see what had occurred and saw Ms. Lauretta Kenney screaming and then the police and ambulance arrived. (Tr. p. 1230-3)

The State's eighth witness was Charles Teel. (Tr. p. 1237) P.O. Teel was a crime scene investigator for the Cleveland Police. Id. P.O. Teel placed crime scene markers that could be later be photographed by Det. Bell and collected swabs of suspected blood. (Tr. p. 1250) The recovered shell casings were a .25 caliber. (Tr. p. 1251)

The State's ninth witness was Lawrence Walker. (Tr. p. 1290) Mr. Walker was a Cleveland EMT paramedic. Id. On November 27, 2005, Mr. Walker and his partner Ms. Fuentes were called to 1046 East 146th. (Tr. p. 1293) Upon their arrival, two police officers were with Ms. McCorkle who was bleeding heavily of a gunshot wound to the head. (Tr. p. 1296) Ms. McCorkle was immediately taken to the hospital. (Tr. p. 1298)

The State's tenth witness was special agent Robert Riddlebarger of the FBI. (Tr. p. 1307). In November 2005, S.A. Riddlebarger was assigned to the Cuyahoga County Fugitive Gang Task Force to apprehend Appellant on an arrest warrant. (Tr. p. 1308) On December 16, 2005, S.A. Riddlebarger apprehended Appellant hiding in a crawl space at 9408 Jeffries Avenue in Cleveland. (Tr. p. 1311, 1314) As Appellant was being handcuffed, he was asked if he was armed. Appellant said, "I do not have a gun anymore." (Tr. p. 1318) Appellant further stated that he had "gotten rid of the gun he had." (Tr. p. 1320)

The State's eleventh witness was Alberto Sardon. (Tr. p. 1336) Alberto Sardon was a Cleveland Police Detective assigned to the Sixth District detective bureau. To investigate the October 6th, 2005 felonious assault of Ms. McCorkle by Appellant, (Tr. p. 1336, 1342) Det. Sardon photographed Ms. McCorkle on October 10, 2005 and took a written statement from her. (Tr. p. 1340, State's Ex. #67) Det. Sardon obtained a warrant for Appellant's arrest. (Tr. p. 1343) On October 26, 2005, Det. Sardon took a second written statement from Ms. McCorkle. (Tr. p. 1427, State's Ex. #68) The second statement was requested by Ms. McCorkle. (Tr. p. 1427)

The State's twelfth witness was Curtiss Jones. (Tr. p. 1360) Mr. Jones was supervisor of the trace evidence unit and DNA department of the Cuyahoga County Coroner's office. Id. Mr. Jones testified that gunshot primer residue was found on the right hand of Ms. McCorkle. Though DNA testing the blood found on Ms. McCorkle was her own. (Tr. p. 1379)

The State's thirteenth witness was Dr. Felo. (Tr. p. 1448) Dr. Joseph Felo was the chief deputy of the Cuyahoga County Coroner's Office. Id. Ms. McCorkle suffered two gunshot wounds to her head. One gunshot wound with the right eyebrow and the

second gunshot wound through the left ear an in the skull near the ear on the left. (Tr. p. 1460) Gunshot wound number one entered the scalp through the right eyebrow traveled front to back downward and from right to left. (Tr. p. 1465) The bullet went through the right eyeball and lodges in the sinuses on the right side of the nose. Id. The bullet did not enter the brain but did break the bones of the eye socket, causing bone matter to go into the brown. (Tr. p. 1466) Gunshot wound number one was not immediately fatal, but could be over time. (Tr. p. 1474)

Gunshot wound number two went through the scalp, the brain, the skull from the left side toward the right side from the front portion going backwards a little bit and upward. (Tr. p. 1471) The bullet lodged in the brain. (Tr. p. 1475) Stipple was present around gunshot wound number two indicating a muzzle to target distance of eighteen inches or less. (Tr. p. 1471) Gunshot wound number two was a fatal wound. (Tr. p. 1475, 1480)

Dr. Felo opined to a reasonable degree of medical certainty that the cause of death of Ms. McCorkle was gunshot wounds of the head. (Tr. p. 1478) The manner of death was homicide. Id.

The State's fourteenth witness was Willie Hutchinson. (Tr. p. 1498) Mr. Hutchinson was introduced to Ms. McCorkle by Ms. Lauretta Kenny in October 2005. (Tr. p. 1503) On November 26, 2005, he and Ms. McCorkle drove separately and met for a sociable drink at Junior's Bar on East 185th Street at approximately 11:00 p.m. (Tr. p. 1523, 1526) after the meeting, Mr. Hutchinson called Ms. McCorkle to make sure she made it home okay. (Tr. p. 1507) When Mr. Hutchinson dialed Ms. McCorkle's number, someone answered and then hung-up. (Tr. p. 1508) Mr. Hutchinson called Ms.

Lauretta Kenney and told her to check on her sister. Id. Mr. Hutchinson's phone number was 924-0026. (Tr. p. 1504)

The State's fifteenth witness was Marguerite Antoine. (Tr. p. 1537) Ms. Antoine was Ms. McCorkle's cousin. (Tr. p. 1539) Ms. Antoine would talk with Ms. McCorkle just about every day. Id. On November 27, 2005, between 2 and 3 a.m. Ms. Lauretta Kenney called her. (Tr. p. 1544)

The State's sixteenth witness was Domonique Cowan. (Tr. p. 1561) Domonique was the 13-year-old daughter of Ms. McCorkle (Tr. p. 1563) On October 7, 2005; Appellant dropped Domonique off at her Aunt Michelle Kenney's house. (Tr. p. 1566) When she saw her mother next, her mother had bandages on her head at Aunt Lauretta Kenney's house. (Tr. p. 1568) On November 27, 2005, Domonique was sleeping in bed and awoke to a shot, heard screaming, a second shot, more screaming, and then, a third shot. (Tr. p. 1578) The first two screams were Ms. McCorkle's voice. (Tr. p. 1578) Domonique went downstairs and saw her sister Cheyenne, who said, "My daddy shot my mommy." Id. Domonique saw her mother on the floor shaking. Id. Domonique called her Aunt Michelle Kenney and Domonique's cousin Brianna answered. (Tr. p. 1574) Domonique then called 911 at 2:58 a.m. (Tr. p. 1560) Blood was coming out of Ms. McCorkle's head and then Aunt Michelle Kenney arrived. (Tr. p. 1576)

The State's seventeenth witness was James Ealey. (Tr. p. 1601) Detective Ealey was employed by the Cleveland Police Department as a firearms examiner. (Tr. p. 1602) Det. Ealey testified that the two bullets recovered from Ms. McCorkle were put under the microscope and found to have been fired by the same gun. (Tr. p. 1610, 1630) The shell casings were Winchester .25 caliber. (Tr. p. 1612)

The State's eighteenth witness was John Gregg. (Tr. p. 1612) Mr. Gregg was Appellant's coworker and friend. (Tr. p. 1648) Mr. Gregg met Appellant in 1998 or 1999 through a newspaper ad placed by Appellant's brother Andy Maxwell in a classified ad for a repairperson. (Tr. p. 1648-9) Mr. Greg worked with Appellant from simple plumbing to room renovations and remodels. Each took turns bidding, getting materials, measuring and estimating profits. (Tr. p. 1650) After being co-workers, they began good friends, socializing and visiting with family. (Tr. p. 1651) Sometimes, Mr. Gregg and Appellant would have a three-way telephone call where one of them would call and have the phone muted so the other could listen in on the conversation. (Tr. p. 1651) Appellant would first call Mr. Gregg, then another person. (Tr. p. 1652) Mr. Gregg would press mute on his phone, and then be able to listen in on the conversation. Id.

Mr. Gregg also had Appellant use Mr. Gregg's mother's address for a car registration address so that Appellant could save on taxes and e-checks. (Tr. p. 1654) Mr. Gregg would call Appellant by Appellant's middle name Anthony or "Ant" for short. (Tr. p. 1656) Mr. Gregg described Appellant's relationship with Ms. McCorkle as love-hate. (Tr. p. 1659)

On October 6, 2005, Mr. Gregg talked with Appellant about a domestic violence situation. (Tr. p. 1662) Appellant said he hit Ms. McCorkle with a gun. (Tr. p. 1664) Mr. Gregg asked if Appellant pistol-whipped her and Appellant said yes. Id. Appellant said Ms. McCorkle had gotten stitches. (Tr. p. 1665) Appellant had seen on television how a man was sentenced to eight years of prison for committing a felonious assault. Id. Appellant needed to talk to Ms. McCorkle to try to make the incident like a domestic violence case instead of a felonious assault case. (Tr. p. 1666) Appellant and Mr. Gregg

were trying to get Ms. McCorkle to tell the grand jury that she pushed Appellant, Appellant pushed her, and the she then hit her head on a stove. (Tr. p. 1666)

Appellant told Mr. Gregg that Appellant was aware of the TPO against him and of an arrest warrant for him. (Tr. p. 1670)

At Appellant's behest, Mr. Gregg told Ms. McCorkle to tell the grand jury that she pushed Appellant, Appellant pushed her, and the she then hit her head on a stove. (Tr. p. 1672) This was done to minimize Ms. McCorkle's story by eliminating the gun. (Tr. p. 1672, 1740)

On the day before Thanksgiving, November 23, 2005 Mr. Gregg was driving to his mother's house. Id. Appellant had called Mr. Gregg and told him that he tried to reach Ms. McCorkle to find out how she testified at grand jury. (Tr. p. 1673) Appellant was unsuccessful in reaching her, so he felt she was blowing him off. (Tr. p. 1674) Appellant then made a call to Ms. McCorkle with Mr. Gregg listening in via three-way in the evening of November 23, 2005. Id. Appellant asked what had happened before the grand jury. (Tr. p. 1675) With a sincere demeanor, Ms. McCorkle said that she told the truth, she had to tell the truth. (Tr. p. 1675) Appellant was very upset at Ms. McCorkle's response. (Tr. p. 1676) Appellant stated the bitch (Ms. McCorkle) was going to make him kill her. Id. Appellant also asked Mr. Gregg. Where could Appellant get a gun? (Tr. p. 1677)

On November 27, 2005, Ms. Michelle Kenney called Mr. Gregg. (Tr. p. 1678) Mr. Gregg then called Appellant who admitted killing Ms. McCorkle by shooting her. (Tr. p. 1679) Appellant followed Ms. McCorkle from her home to a bar, where Appellant waited for hours in the parking lot. (Tr. p. 1680) Ms. McCorkle was talking to another man at the bar and later Ms. McCorkle and the man left separately in their own cars. Id.

Time passed and Appellant called Ms. McCorkle. (Tr. p. 1681) Appellant was not upset; he wanted to see Ms. McCorkle. Id. Appellant went in the house and the phone rang. Id. Appellant answered the call, it was man's voice asking for Ms. McCorkle, and Appellant hung up the phone. Id. The man called a second time and Appellant stated that the bitch was sucking his dick. (Tr. p. 1682)

Ms. Lauretta Kenney called and Appellant got into an argument with her on the phone. Id. Ms. Lauretta Kenney arrived at the house on the front porch, Appellant fired the gun, and Ms. Lauretta Kenney ran away. Id. Appellant then turned and shot Ms. McCorkle in the head. She fell and she was moving. Id. Appellant then shot her again in the head. Id. Appellant stated Cheyenne was present for the shooting. (Tr. p. 1683)

Mr. Gregg thought Appellant was at his cousin Anthony Brown's house. Id. Mr. Gregg then dialed 911 and told the operator that there was a murder and that Appellant was at Anthony Brown's house. (Tr. p. 1684) On November 30, 2005, Mr. Gregg met with Cleveland homicide detectives Sowa and Gajowksi who typed out his written statement but Mr. Gregg was too scared to sign it. (Tr. p. 1687-8) Mr. Gregg subsequently had a second typewritten statement prepared, which he later signed in November 2006. (Tr. p. 1691) Appellant and Mr. Gregg had conversation about Appellant fleeing to Canada and non-extradition countries, while Appellant was on the run. (Tr. p. 1692)

The State's nineteenth witness was Ignatius Sowa. (Tr. p. 1759) Ignatius Sowa was assigned to the Cleveland Police Department's Homicide Unit. (Tr. p. 1760) On November 27, 2005, Det. Sowa received a page at 4:37 a.m. regarding the murder of Ms. McCorkle. (Tr. p. 1764) Det. Sowa went to the crime scene with his partner, who was not retired, Det. Gajowski. Id. While on scene, Det. Sowa directed the examination and

collection of evidence. (Tr. p. 1767-70) Det. Sowa interviewed family members and friends, searched for the third shell casing, and canvassed the neighbors. (Tr. p. 1780-8) Det. Sowa learned the identity of Mr. Hutchinson in June 2006. (Tr. p. 1792) Mr. Hutchinson was arrested in November 2007 on a witness warrant and was found in possession of a .22 caliber derringer gun, which was too small to fire .25 caliber bullets. (Tr. p. 1794-6)

The distance between Ms. McCorkle's home on East 146th and Junior's Bar on East 185th was 3.8 miles and took 10 minutes by car. (Tr. p. 1798)

Defense mitigation witnesses

In the penalty phase, Appellant's first witness was William Steward. (Tr. p. 2072) Mr. Steward was Appellant's brother, the oldest of seven and knew Appellant all his life. (Tr. p. 2074) Mr. Steward testified that Appellant came from a good family, had a good heart, gave the shirt off his back to help people, was such a nice guy, and got himself in the wrong predicament by being too kind-hearted. (Tr. p. 2074-5) Ms. Seward would see Appellant two to three times a week and did a lot of horseback riding and camping with him. (Tr. p. 2075)

Mr. Seward acknowledged Appellant's prior history in and out of the court system, talked with Appellant about it, and Appellant was going to try to work it out and do better. (Tr. p. 2075,-78). Mr. Seward did not know the details or outcomes of Appellant's dealings with the court system. (Tr. p. 2078) Appellant was not a monster. *Id.* Appellant did have dealings with the wrong people in his life. (Tr. p. 2079)

Mr. Seward and Appellant were raised by their stepfather Thomas Brewer. *Id.* Mr. Brewer was a hard-working man who worked at Lincoln Electric and was an excellent provider for Appellant. (Tr. p. 2079-80). Appellant's stepfather read the Bible

and went to church. (Tr. p. 2080) Appellant's stepfather treated all his stepchildren as his own children. (Tr. p. 2081). Furthermore, there were no incidents of abuse by Appellant's stepfather or mother. (Tr. p. 2081-82) Mr. Seward apologized for what Ms. McCorkle's family was going through. (Tr. p. 2082) Appellant graduated from high school, had vocational training afterward, and had heavy equipment operating skills. (Tr. p. 2082-83) Appellant worked with Mr. Seward and helped him on some construction jobs in the past. (Tr. p. 2083)

Appellant's second witness was Herbert Nelson. (Tr. p. 2084) Mr. Nelson was Appellant's first cousin and was in the tree cutting business his whole life (Tr. p. 2084-5) Mr. Nelson recalled in the summertime, when he was a little boy, he would go to visit Appellant who was born in Arkansas. (Tr. p. 2086) Appellant was real good guy and was never known to be in trouble. *Id.* Appellant moved to Cleveland at age eight or nine. (Tr. p. 2088) In Cleveland, Appellant was doing nothing but working, making ends meet. (Tr. p. 2087) Appellant worked with Mr. Nelson in the tree cutting business. (Tr. p. 2088.) Appellant understood directions, followed directions and was a really good worker. (Tr. p. 2088) Appellant watched and learned how to cut trees and had no problems comprehending instructions. (Tr. p. 2088-9) Mr. Nelson knew that Appellant once served time in prison. (Tr. p. 2089)

Appellant's third witness was Veronica Nelson. (Tr. p. 2090) Mrs. Nelson was the wife of Mr. Nelson. (Tr. p. 2091) Mrs. Nelson knew Appellant for the past five years referred to him as "Anthony" because there was another Charles in the family. (Tr. p. 2091-2) Appellant was also referred to as "Ant" by family and close friends. (Tr. p. 2094) Mrs. Nelson would see Appellant at regular family events, backyard parties, barbecues and at work because Mrs. Nelson's husband and Appellant's brother worked

cutting trees. (Tr. p. 2092) Mrs. Nelson described Appellant as well-dressed, well-behaved, not drunken, not cursing, well-mannered, and loving. (Tr. p. 2093,-95)

Appellant's fourth witness was Roscoe Horne. (Tr. p. 2096) Mr. Horne was the owner of Ronics Development Corporation, a custom builder construction company for commercial and residential buildings. (Tr. p. 2096-7) Mr. Horne was Appellant's neighbor for five years. Appellant was a subcontractor to Mr. Horne and worked by excavating, operating heavy equipment, operating dump trucks and all types of different vehicles. (Tr. p. 2098) Mr. Horne lent Appellant dump trucks and described Appellant as trustworthy. (Tr. p. 2098, 2100) Appellant tore out driveways, dug footers and foundations, did roof work. (Tr. p. 2099) Appellant was an excellent worker. (Tr. p. 2099) If there was a problem, Appellant was the first to try to fix it. *Id.* Appellant was usually very quiet, but was straight to the point and did not pull punches in talking with other workers. (Tr. p. 2100) If another worker was not pulling their weight, Appellant would ask that worker if that worker wanted to go home. *Id.* Appellant was compassionate. *Id.* If another worker was exhausted, Appellant would make an executive decision to have that worker take a break. *Id.*

Once, Appellant came to the rescue in assisting Mr. Horne finish a driveway job, when another worker lied to Mr. Horne about that worker's qualifications to operate a bobcat, a piece of heavy equipment. (Tr. p. 2102) Appellant operated the bobcat in difficult tricky conditions finishing an entire turnaround driveway for a Cleveland police officer. (Tr. p. 2101-2)

Appellant was also a skilled fisherman who would come home and cook the big fish that he caught and barbecue throughout the summer. (Tr. p. 2103) Appellant would take others fishing, teach them to fish, give them pointers. *Id.* Appellant was very quiet,

shy and had good manners. (Tr. p. 2104). Appellant was deliberate. (Tr. p. 2106) At work, Appellant would plan, leaving nothing to chance. *Id.* Appellant had good skills and was an excellent excavator. (Tr. p. 2107) If others were not living up to their commitment, Appellant would tell them I no uncertain terms. (Tr. p. 2107-8) Appellant was not the kind of person to blow up at others. (Tr. p. 2106)

Appellant's fifth witness was Raynard McNear. (Tr. p. 2108) Mr. McNear was married to Appellant's sister. (Tr. p. 2109) Mr. McNear knew Appellant for five to six years. Mr. McNear worked construction with Appellant. (Tr. p. 2110) Appellant would help and show Mr. McNear what to do. (Tr. p. 2111) Appellant also gave Mr. McNear employment advice.

Mr. McNear was a convicted felon in forgery in 1999, drug possession in 2000, and drug trafficking in 2003 and served approximately six years in prison in Ohio (Tr. p. 2112-3). Appellant gave Mr. McNear positive encouragement to stay out of prison and get on the right path. (Tr. p. 2114-5)

Appellant's sixth witness was Theresa McNear. (Tr. p. 2115) Mrs. McNear was the wife of Mr. McNear and Appellant's younger sister. (Tr. p. 2116-7) Mrs. McNear has known Appellant her entire life. (Tr. p. 2118) After Appellant got out of prison, he tried to teach her how to ride a horse and how to clean fish before cooking it; however Mrs. McNear was unsuccessful as a student. (Tr. p. 2119-20) Appellant also taught others how to ride a horse. (Tr. p. 2120) Appellant also tutored Mrs. McNear's daughter when she had difficulty with homework. (Tr. p. 2120)

Mrs. McNear had a conviction for drug trafficking in 2003. (Tr. p. 21301) Mrs. McNear knew Cheyenne Maxwell, Domonique [Cowan] and Nichole McCorkle. (Tr. p. 2123) Mrs. McNear claimed that she did now know that Ms. McCorkle was in the

hospital in October 2005. (Tr. p. 2124) Mrs. McNear knew Ms. McCorkle's house on 1046 East 146th Street had been there two to three times. (Tr. p. 2125)

Appellant's seventh witness was Sharon Graves (Tr. p. 2131). Ms Graves is Appellant's older sister. (Tr. p. 2133) Ms. Graves was aware that Appellant served time in prison. (Tr. p. 2134) Ms. Graves described Appellant as being always there for her and her children. (Tr. p. 2135)

Appellant's eighth witness was Andy Maxwell (Tr. p. 2136). Andy Maxwell was Appellant's brother. (Tr. p. 2137) Appellant was a very knowledgeable person. (Tr. p. 2143) On one occasion, Andy Maxwell and Appellant were at a barber shop and a saw a job opportunity sheet for convicted felons. *Id.* Appellant suggested that they make copies of the information to distribute it to others who needed it. *Id.*

Andy Maxwell knew that Appellant was incarcerated for dealing drugs. (Tr. p. 2144) Andy Maxwell testified that Appellant made his own choices. (Tr. p. 2145) Andy Maxwell did not follow Appellant's choice to traffic in drugs and go to prison. *Id.*

Appellant was the ninth witness. (Tr. p. 2145) Appellant gave an unsworn statement. *Id.* Appellant apologized to Nichole's family and his family for going through this. Appellant stated he had only one child and he did this [took his case to trial] to see her this one last time. (Tr. p. 2146)

Appellant's tenth witness was Ernestine Brewer. (Tr. p. 2147) Mrs. Brewer was Appellant's mother. *Id.* Mrs. Brewer testified that Appellant was the oldest of her children and was born in Arkansas. (Tr. p. 2150) Appellant was raised going to church, lived in church, was a Bible taught kid, and a good scholar. (Tr. p. 2151) In 1974, the family relocated to Ohio. (Tr. p. 2150) As Appellant grew up he ran afoul of the law. *Id.*

Mrs. Brewer had no control over Appellant, who ended up in prison. Id. Appellant fell by the wayside regarding his criminal life. (Tr. p. 2152)

Appellant's eleventh and final witness was Dr. Sandra McPherson. (Tr. p. 2154) Dr. McPherson had a Ph. D. in clinical psychology from Case Western Reserve University, a master's degree, and a bachelor's degree with honors from Kent State University in Psychology. (Tr. p. 2155) Dr. McPherson interned at the VA Hospital and at the Child Guidance Center in Cleveland, Ohio, was licensed in Ohio in 1972, and was board certified in clinical and forensic psychology. *Id.* Dr. McPherson was published in a number of journal articles, papers, book chapters and was on the faculty of Fielding Graduate University. (Tr. p. 2156) Dr. McPherson has testified as an expert witness several hundred times in state and federal court and was certified as a mitigation specialist. (Tr. p. 2157, 2181)

Dr. McPherson was asked to provide mitigation services and assessments for the development of information for mitigation for this case. (Tr. p. 2159) Dr. McPherson interviewed Appellant on May 4, May 23, June 22, and August 7, 2006, and on January 8, 2007. *Id.* Dr. McPherson reviewed Appellant's educational records from the Cleveland public school system, Appellant's prison records from Allen Correctional Institution, where Appellant served five years, and Appellant's competency records from October and November 2006. (Tr. p. 2160) Appellant received A's in shop math and in business math in 1983 and 1985. *Id.*

Appellant's criminal records reflected that Appellant had criminal charges and conviction from 1989 onward, which included drug trafficking and prior domestic violence with Ms. McCorkle. (Tr. p. 2161) Presentence investigation reports indicated that Appellant initially lied to the police claiming that the cocaine found on him was for

personal use, when in fact he later admitted it was for sale and he engage in dealing cocaine. (Tr. p. 2162)

Appellant's competency records indicated that Appellant was examined by Dr. Aronoff of the Court Psychiatric Clinic. (Tr. p. 2184) Dr. Aronoff opined that Appellant was perhaps malingering, that is deliberately producing symptoms to gain some particular end, and thus referred Appellant to Northcoast for an inpatient competency evaluation (Tr. p. 2184). At Northcoast, Dr. Cook examined Appellant and opined him to be competent. (Tr. p. 2163, -86)

Appellant was found to be competent, he understood the court system, he understood the charges against him, and he was able to proceed with trial. (Tr. p. 2164) Appellant was administered the Weschler Adult Intelligence Scale, the wide range achievement test, a thematic and perception test, the Minnesota Multiphasic Personality Inventory, second revision (MMPI), and the Bender-Gestalt. (Tr. p. 2164-5) Appellant's full scale IQ was 84; performance IQ was 95, a solidly average score; and verbal IQ of 77. His subscale scores included matrix reasoning of 14, which is a very high score above average.

Appellant's reading, spelling and arithmetic scores were quite respectable for adults who are no longer in school and would be consistent with average ability. (Tr. p. 2166) On the MMPI, his validity scales were within range, there were indicators that there was some desire by Appellant to look good over looking bad. Appellant's clinical scales were within normal limits, there were no signs of any psychosis or any condition that would have rendered him incapable of understanding what was going on. (Tr. p. 2171) Appellant tended more toward introversion and to think dark thoughts. (Tr. p.

2172) On memory testing, Appellant performed better on the difficult exercises, then on the basic exercises, which may have reflected Appellant's learning. (Tr. p. 2175)

Dr. McPherson diagnosed Appellant with adjustment disorder with due to his situation of being currently incarcerated, and alcohol abuse at one point in his life. (Tr. p. 2177) Appellant's alcohol diagnosis and any alleged head injuries were self-reported by Appellant. (Tr. p. 2188). Appellant's medical records from an alleged motorcycle accident in 1999 did not substantiate that Appellant suffered any traumatic head injury. (Tr. p. 2189) Huron hospital records confirmed that Appellant did not have any head injury from the alleged motorcycle accident in 1999. (Tr. p. 2190) Indeed, Appellant did not suffer from any mental disease. (Tr. p. 2191)

For mitigating factors, Dr. McPherson testified that Appellant was capable of conforming his conduct in prison. (Tr. p. 2178) Appellant's best predictor of future behavior is past behavior. *Id.* After being released from prison, Appellant was later incarcerated again and served additional time in prison. (Tr. p. 2188) Appellant maintained his innocence of the crime and continued to do so. (Tr. p. 2179) Appellant's history of violence included prior relationship violence with Ms. McCorkle. (Tr. p. 2180)

LAW AND ARGUMENT

Proposition of Law I: The failure of defense counsel to fully investigate and present all mitigation to the jury and object to improper evidence and argument during the penalty phase constitute ineffective assistance of counsel.

Proposition of Law XII: A trial court must grant defense experts to develop mitigation where counsel ahs established the need for such expert.

Due to their overlapping scope, and for the sake of brevity, the State responds jointly to defendant's first and twelfth propositions of law. Within his first proposition of law, defendant argues multiple points of ineffective assistance of counsel.

Specifically, defendant contends that his trial counsel was constitutionally ineffective in three key areas:

- Counsel allegedly failed to develop a mental retardation claim, or failed to present an already developed mental retardation claim in mitigation during the penalty phase;
- Counsel allegedly failed to fully prepare for penalty phase due to having sought a continuance on the day of the hearing;
- Counsel were ineffective for other alleged penalty phase errors, including arguing residual doubt, certifying a "mitigation expert," failing to object to alleged improper prosecutorial argument, and failing to preserve objections.

(Apt. Br. at 12-26). The State submits that, for the following reasons, defendant's first proposition of law lacks merit and should be overruled.

1. Legal standard for ineffective assistance of counsel.

To establish ineffective assistance, a criminal defendant "must show (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the proceeding's result would have been different." *State v. Hale* (Slip Opinion), 2008-Ohio-3426, at ¶ 204, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052 and *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus. Reviewing courts may not second-guess decisions of counsel which can be considered matters of trial strategy. *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128. Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel, even if, in

hindsight, it looks as if a better strategy had been available. *State v. Cook* (1992), 65 Ohio St.3d 516, 524, 605 N.E.2d 70.

In *State v. Sanders,* 94 Ohio St.3d 150, 2002-Ohio-350, this Honorable Court explained:

> *Strickland* charges us to "[apply] a heavy measure of deference to counsel's judgments," 466 U.S. at 691, 104 S.Ct. at 2066, 80 L.Ed.2d at 695, and to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *id.* at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694. Moreover, we must bear in mind that appellate counsel need not raise every possible issue in order to render constitutionally effective assistance. See *Jones v. Barnes* (1983), 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987.

Sanders, at 151.

2. Defendant did not receive ineffective assistance due to undeveloped or withheld evidence of mental retardation or cognitive deficit.

Defendant first argues that trial counsel should have called Cuyahoga County Court Clinic psychologist Dr. Michael H. Aronoff as a mitigation witness during the penalty phase to present evidence of defendant's allegedly low intelligence / "borderline intellectual functioning." (Apt. Br. at 13). However, the record does not show that trial counsel's decision against presenting this mitigation evidence was an unreasonable strategic choice.

Dr. Aronoff reported to the court that that he had identified a possibility that defendant was "malingering," and may have been "malingering or embellishing symptoms of mental illness and/or cognitive deficits." (Tr. p. 21). Dr. Aronoff's October 2, 2006 report was read into the record, and it explained that "[i]t is possible the defendant is malingering or embellishing the nature and severity [of] the symptoms of mental illness as it does not appear that he has had a prior psychiatric history." The report continued: "[i]t is also possible that Mr. Maxwell is malingering or minimally

embellishing the nature and severity of his cognitive deficits." (Tr. p. 41). "Given the severe sentence the defendant could receive if convicted of these charges, there is secondary gain to be had by malingering or embellishing symptoms of mental illness or cognitive defects." (Tr. p. 42).

In response to Dr. Aronoff's malingering concerns, defendant was evaluated for a period of 20 days, 24-hours per day, under the care of Dr. Alice Cook at Northcoast Behavioral Health Care Center in Cleveland, Ohio, because "[i]ts very difficult to malinger around the clock." (Tr. pp. 66-8). Following the evaluation, Dr. Cook concluded that "Mr. Maxwell understood the legal proceedings against him and is able to assist his attorney in his defense." (Tr. p. 70). In a one-on-one interview, defendant cooperated with Dr. Cook, allowing the doctor to conclude that defendant "did understand what he was being charged of." (Tr. p. 76). Further, defendant:

> [u]nderstood that he was facing a death penalty. He understood that all of his charges were felonies. He comprehended the reality of the situation in which he found himself. His vocabulary included terms that people familiar with the Courts would use, for instance volunteering the phrase death penalty and those expressions such as that.
>
> He understood the roles of the various courtroom personnel. He simply understood the various plea options available to him and how they might apply to his situation. He gave me information about the day of the alleged offense * * *. He communicated with me clearly. His thinking appeared fine. There appeared no obstacles in his communication."

(Tr. pp. 76-7).

In his testimony, Dr. Aronoff explained that his IQ testing placed defendant in the borderline range with an IQ score of 72, which reflected a performance IQ score of 83 and a verbal IQ score of 68. (Tr. p. 134). Dr. Aronoff explained that his malingering concerns came from his lower score on the CAST*MR test, which was designed to evaluate familiarity with the legal system and competency to stand trial. (Tr. p. 135-6).

Dr. Araonoff had anticipated a higher CAST*MR score based upon defendant's prior experience in the criminal justice system "and the fact that [defendant was on the borderline range not the mental[ly] retarded [range]." (Tr. p. 137).

This Honorable Court has previously recognized as a matter of strategic choice, defense counsel may reasonably refrain from "rais[ing] additional arguments in order to help focus attention on stronger arguments undiluted by weaker arguments." *State v. Tenace,* 109 Ohio St.3d 451, 2006-Ohio-2987, at ¶ 10. Defendant's mitigation strategy depended on calling his relatives and acquaintances to offer testimony as to defendant's general history of good character, as well as his history as a versatile and dependable worker, an upstanding neighbor, a positive role model, and a good family member. (Tr. pp. 2073-2217, *passim*).

Defendant's brother William Steward testified that defendant had graduated high school, and had skills operating heavy machinery. (Tr. pp. 2082-83). Defendant's neighbor Roscoe Horne testified that he had known defendant for over five years, and that defendant had worked with Mr. Horn. "[Defendant]'s done excavating, he's ran heavy equipment. He's an excellent operator of heavy equipment. He also drives dump trucks, all types of different vehicles or whatnot and he's just a very trustworthy person." (Tr. p. 2098). Mr. Horn described defendant as a versatile and excellent worker, and "if there was a problem, [defendant]'s the first to try to fix it." (Tr. p. 2099). Mr. Horn relied on defendant to take maintain and store his equipment, and relied on defendant's ability to successfully communicate and interact with other workers. (Tr. pp. 2100). Andy Maxwell testified that he viewed his brother as a teacher who always took the time to guid him through life. (Tr. pp. 2137-2141). Andy Maxwell also testified that that defendant had a special skill for training and breaking horses. (Tr. p. 2142). Andy

Maxwell also testified that defendant was a very knowledgeable person who had helped other felons obtain jobs by copying information posted at a barbershop. (Tr. p. 2143).

The State submits that it would be highly inconsistent with defendant's penalty phase strategy to argue mental retardation or "borderline intellectual functioning" as a mitigation of the aggravating factor in this case. Such an argument could have seriously undercut the witnesses that defendant called to testify about to his exemplary qualities as a dependable, kind-hearted attentive relative, neighbor, and worker. (See defendant's closing penalty phase argument at Tr. p. 2228). Further, there was a substantial risk that calling Dr. Aronoff as a witness would have led to an extended discussion of Dr. Aronoff's malingering concerns. An extended discussion of malingering with Dr. Aronoff would have unduly prejudiced the jury by creating a strong inference of insincerity or hypocrisy on the part of defendant (when contrasted against the testimony that had just been offered by his neighbors, acquaintances, and relatives).[1] Placed in its proper context, defendant cannot show that trial counsel's decision to refrain from offering Dr. Aronoff's testimony in mitigation was an unreasonable strategic choice or prejudiced defendant within the meaning of *Strickland, supra*. Defendant therefore cannot demonstrate that his trial counsel was ineffective for refraining from calling Dr. Aronoff as a penalty-phase witness.

3. Trial counsel not ineffective for failing to prevent Dr. McPherson from conducting a subsequent round of IQ testing.

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[1]The jury did hear a brief discussion of Dr. Aronoff's malingering concerns through the testimony of the mitigation specialist, Dr. Sandra McPherson, who had read Dr. Aronoff's report and relied on it when she conducted her own mitigation investigation. That testimony, however, never defined for the jury exactly what malingering was, how mental health professionals identify and counteract malingering, or what specific reasons Dr. Aronoff relied upon (from his evaluation of defendant) for having injected malingering concerns into his report. (See Tr. pp. 2181-2188).

Defendant next argues that his trial counsel was ineffective for having Dr. Sandra McPherson, the defense-retained mitigation expert, conduct a second round of IQ testing as part of her investigation. (Apt. Br. at 15, 18). Defendant cites to the so-called "Flynn" effect to argue that McPherson diluted his mental retardation claim by having his intelligence scores raised through subsequent IQ testing (and elevating him from borderline intelligence to average intelligence range). (Apt. Br. p. 15-18). Defendant cannot demonstrate ineffective assistance of counsel for two reasons.

First, defendant cannot show that he would have qualified for the *Atkins / Lott* mental retardation standard, but for Dr. McPherson administering her subsequent IQ testing. An IQ test alone is not the *sine qua non* of a mental retardation finding. "IQ tests are one of the many factors that need to be considered, they alone are not sufficient to make a final determination on this issue." *State v. Lott,* 97 Ohio St.3d 303, 305, 2002-Ohio-6625, at ¶ 12, citing *Murphy v. State,* 54 P.3d at 568, 2002 OK CR 32, at ¶ 29. In *Lott,* this Honorable Court adopted the three part test discussed in *Atkins v. Virginia* (2002), 536 U.S 304, 122 S.Ct. 2242, 153 L.Ed.2d 335, for evaluating an individual's claim of mental retardation. "These definitions require (1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18. Most state statutes prohibiting the execution of the mentally retarded require evidence that the individual has an IQ of 70 or below." *Lott, supra,* at ¶ 12 (citations omitted).

The evidence of "significantly subaverage intellectual functioning" in this case, even viewed in a light most favorable to defendant, was not compelling. Dr. Aronoff's IQ test gave defendant a verbal IQ score of 68 (mild mental retardation range), a

performance IQ score of 83 (low average range), yielding a full IQ of 72[2] (borderline range). "This examiner can state within 95% confidence that the defendant's true full scale IQ score lies within the range of 68-77"[3] (October 2, 2006 Report of Dr. Aronoff, p. 6, quoted at Apt. Br. p. 14). Given that defendant's full scale IQ score was above 70, there was no presumption of mental retardation. See *Lott, supra,* at ¶ 12 ("[w]e hold that there is a rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70."). Dr. McPherson's subsequent IQ testing placed defendant in a higher category, "the low average range." Dr. McPherson found defendant to have a full scale IQ of 84, a performance IQ of 95, and a verbal IQ of 77. (Tr. p. 2165).

Dr. McPherson also studied defendant's public school records and discovered that in addition some poor grades in certain subjects, defendant had received A's in "shop math" in 1983, and "[i]n 1985 he obtained an A in business math and did somewhat better than he had prior." (Tr. p. 2160). The trial court also noted that defendant had filed a lucid, intelligent, and well thought-out *pro se* motion to disqualify his counsel on December 6, 2006. (Tr. p. 150). Likewise, the trial court "observed Mr. Maxwell actively reviewing exhibits as they were passed to his attorneys by the prosecution. He was reading those exhibits. He was nodding to Mr. Luskin in

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[2]This IQ number coincidentally matches that of Gregory Lott. *Lott, supra,* at ¶ 7. Following this Honorable Court's judgment in *Lott, supra,* Gregory Lott "filed a second successor post-conviction petition on July 17, 2002. Two experts, selected by Lott, testified during a hearing that Lott was not mentally retarded. Thereafter, the State moved for summary judgment, which Lott did not oppose. On October 14, 2003, the trial court granted the State's motion for summary judgment." *Lott v. Bagley* (N.D. Ohio, 2007), Case No. 1:04 cv 822, 2007 WL 2891272 (unreported), at *3.

[3]This statement is an apparent reference to the 5-point margin of error discussed in *State v. Lott, supra,* at ¶ 7 ("there is a five-point margin of error on any IQ test score.")

agreement. They were communicating before this Court at [the] trial table." (Tr. p. 150).

The other factors outlined in *Lott,* strongly indicate that defendant did not meet the standards for mental retardation. Evidence showed that defendant did not have *any* significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction. Defendant's brother William Steward testified that defendant had graduated high school, and had skills operating heavy machinery. (Tr. pp. 2082-83). Defendant's neighbor Roscoe Horne testified that he had known defendant for over five years, and that defendant had worked with Mr. Horn. "[Defendant]'s done excavating, he's ran heavy equipment. He's an excellent operator of heavy equipment. He also drives dump trucks, all types of different vehicles or whatnot and he's just a very trustworthy person." (Tr. p. 2098). Mr. Horn described defendant as a versatile and excellent worker, and "if there was a problem, [defendant]'s the first to try to fix it." (Tr. p. 2099). Mr. Horn relied on defendant to take maintain and store his equipment, and relied on defendant's ability to successfully communicate and interact with other workers. (Tr. pp. 2100). Andy Maxwell testified that he viewed his brother as a teacher who always took the time to guid him through life. (Tr. pp. 2137-2141). Andy Maxwell also testified that that defendant had a special skill for training and breaking horses. (Tr. p. 2142). Andy Maxwell also testified that defendant was a very knowledgeable person who had helped other felons obtain jobs by copying information posted at a barbershop. (Tr. p. 2143).

Finally, there was no indication that defendant had experienced the onset of mental-retardation symptoms before the age of 18. There were no indications in defendant's public school records of such a condition. (See Tr. p. 2160). Nor did

defendant offer any other evidence of onset of such symptoms prior to age 18.[4] (Tr., *passim*).

The second reason defendant cannot demonstrate ineffectiveness through trial counsel's failure to prevent Dr. McPherson from performing a subsequent battery of IQ testing is that there is no evidence of the so-called "Flynn Effect" in this record. (Apt. Br. at 15-19). It is improper to pass judgment on an ineffectiveness claim based on speculation where there is no evidence in the record to support a defendant's allegation. *State v. Woolard* (Feb. 11, 1994), Adams App. No. 93CA560, 1994 WL 64304, at *4, citing *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 228, 448 N.E.2d 452 (explaining that "it is impossible to determine whether the attorney was ineffective in his representation of appellant where the allegations of ineffectiveness are based on facts not appearing in the record"). Apart from speculation based on case law and treatises, defendant cites to no evidence *in this record* of what the "Flynn Effect" is, how it operates, whether qualified experts can agree on its operation and effect, or whether it actually affected defendant's IQ results in any meaningful way. As such, defendant does not demonstrate ineffective assistance of counsel.

4. Defendant does not demonstrate that trial counsel was unprepared for the penalty phase.

Defendant next argues that he received ineffective assistance of trial counsel because trial counsel was allegedly unprepared for the mitigation phase hearing. (Apt. Br. at 19). As evidence, defendant cites to a February 27, 2007 motion for continuance filed by trial counsel. The record, however, does not show that trial counsel offered any

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[4]If any such evidence had even existed, it presumably could have, at a minimum, been offered through family members who testified on Maxwell's behalf. (See Tr. pp. 2073-2181).

specific reasons for the continuance other than vague communication problems with defendant, a general cautionary wish to continue investigation before possible imposition of the death penalty, and concern that the mitigation expert review additional evidence that might be offered by the State in its penalty case in chief. (Tr. pp. 2033-35). The trial court inquired whether the State would admit any further evidence beyond exhibits already admitted at trial. (Tr. p. 2035). When it was satisfied that the State would not do so, the trial court denied the motion for continuance. *Id.*

"The grant or denial of a continuance is a matter which is entrusted to the broad, sound discretion of the trial judge." *State v. Unger* (1981), 67 Ohio St.2d 65, 67, 423 N.E.2d 1078. The *Unger* Court explained:

> In evaluating a motion for a continuance, a court should note, inter alia : the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case.

Id., at 67-8 (citations omitted). The record here does not demonstrate that the trial court abused its discretion in denying the continuance. The only specific reason defendant sought a continuance was to obtain any additional evidence (beyond guilt phase evidence) that the State might introduce in its penalty phase case-in-chief. Because the State indicated it had none, the trial court reasonably concluded that a continuance was not legitimate and therefore unnecessary.

Defendant certainly does not demonstrate any specific evidence in the record how unspecified communication problems or desire for more investigation hampered his ability to present mitigation evidence. Defendant contends that the mitigation

evidence of good-character, which opened the door to impeachment with defendant's prior convictions, demonstrates trial counsel's general lack of preparedness.[5] (Apt. Br. at 20). But as explained above, trial counsel's choice of calling these witnesses falls into the realm of reasonable and debatable trial strategy that does not satisfy the *Strickland* ineffectiveness standard.

5. No ineffectiveness through other alleged penalty phase errors.

Defendant next argues that trial counsel was ineffective for failing to object to several alleged penalty phase errors, including arguing residual doubt, certifying a "mitigation expert," failing to object to alleged improper prosecutorial argument, and failing to preserve objections.

a. Residual doubt argument has no factual basis.

Defendant contends that in summation, his trial counsel offered an improper "residual doubt" argument as the only mitigator, which he contends was ineffective.[6] Defendant cites to transcript pages 2226-7 as evidence that counsel only argued "residual doubt," to the exclusion of any other mitigating factors. A review of those transcript pages, however, discloses that counsel explicitly argued that testimony about to his exemplary qualities as a dependable, kind-hearted attentive relative, neighbor, and worker was mitigatory (Tr. p. 2227-8). Defense counsel also argued that defendant's expression of remorse and apology were mitigatory (Tr. p. 2228), and although not explicitly couched in mitigatory language, counsel argued that the

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[5]Defendant contends that all of the witnesses were family members. (Apt. Br. at 20). At least one witness was actually a neighbor and co-worker / employer. (Tr. pp. 2098-99).

[6]Elsewhere in his brief, defendant inconsistently argues that several mitigating factors were established in the record: (1) low intelligence, (2) ability to adapt in prison, (3) steady employment / work skills, (4) love and support of his family, (5) alcohol dependency, and (6) remorse. (Apt. Br. at 82).

continuing love that defendant's mother still expressed for her child warranted sparing defendant's life (which, in essence, was a plea for mercy as a mitigating factor). (Tr. p. 2230). As a factual matter, therefore, counsel did not argue residual doubt to the exclusion of other mitigating factors. Defendant's residual doubt argument lacks merit.

b. Mitigation expert certification argument has no factual basis.

Defendant next contends that trial counsel was ineffective for asking "Dr. McPherson if she had been certified as a mitigation specialist," which he contends was improper because "such a designation does not exist." (Apt. Br. at 22). Citing page 2157 of the transcript, defendant contends that the trial court "sustained the State's objection," which undermined the credibility of Dr. McPherson in the eyes of the jury. (Apt. Br. at 22). A review of that transcript citation, page 2157, shows (1) no objections by the State regarding Dr. McPherson appearing as a mitigation specialist, (2) no challenge to the status of a certified or expert mitigation specialist. The record simply reflects that defense counsel asked Dr. McPherson how many times she had testified as an expert witness in state and federal courts, and then asked—without objection—"if she had been certified as a mitigation specialist?" (Tr. p. 2157). In that context, defense counsel then moved that "Dr. McPherson be admitted as an expert witness in the area of mitigation," which the trial court sustained without objection. *Id.* So from a purely factual standpoint, defendant's ineffective assistance argument regarding the mitigation expert's nomenclature is unfounded.

c. No failure to object to prosecutor's questioning of mitigation expert.

Defendant next argues that defense counsel was ineffective for failing to object to the prosecutor's questioning of Dr. McPherson regarding the number of mitigating

factors she considered. (Apt. Br. at 23). Specifically, defendant argues that "[b]y first arguing that Dr. McPherson was a mitigation expert and then asking what factors she found, counsel limited the jury's consideration of the evidence it could treat as mitigation." (Apt. Br. at 23). Because the prosecutor's questioning was not error, defendant cannot demonstrate that trial counsel was ineffective.

Defendant offered Dr. McPherson's testimony to summarize mitigating factors. (Tr. pp. 2159). The State submits that it was reasonable, on cross-examination, to ask Dr. McPherson (who from her testimony demonstrated that she properly understood what constituted mitigating factors under Ohio law) what mitigation she found. (See Tr. p. 2182). Certainly the prosecutor has the ability to challenge and rebut mitigation evidence in a penalty phase hearing, and therefore should be free to question the witness about her findings. *State v. Depew* (1988), 38 Ohio St.3d 275, 286, 528 N.E.2d 542. Likewise, the jury was free to believe disbelieve all or any part of the witness's testimony. *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.

As was explained previously, the jury considered multiple points of mitigation in counsel's closing argument and throughout the penalty phase hearing. Because defendant does not demonstrate that the jury was confused about either the evidence or the law, he does not demonstrated that counsel was ineffective from failing to object to the prosecutors' questioning of the mitigation specialist.

d. No failure to object and preserve alleged error.

Defendant next argues that defense counsel failed to object to the prosecutor's argument that the ability to adapt to prison was not mitigation. (Apt. Br. at 24). The prosecutor's argument was not error. "Prosecutors can urge the merits of their cause and legitimately argue that defense mitigation is worthy of little or no weight." *State v.*

Smith (2000), 87 Ohio St.3d 424, 444, 721 N.E.2d 93, citing *State v. Wilson* (1996), 74 Ohio St.3d 381, 399, 659 N.E.2d 292, 309. Nor is defendant's citation to *Skipper v. North Carolina* (1986), 476 U.S. 1, applicable to these facts. *Skipper* involved the total exclusion of mitigatory evidence regarding a defendant's adjustment to incarceration, not the prosecutor's critical argument regarding the weight of such evidence.

Defendant next claims that his counsel ineffectively failed to obtain a neurologist or properly request a neurologist to assist in the development of mitigation evidence. (Apt. Br. at 24). This argument essentially restates the argument defendant made in his twelfth proposition of law. In *State v. Tibbets* (2001), 92 Ohio St.3d 146, 749 N.E.2d 226, this Honorable Court explained:

> R.C. 2929.024 requires the trial court to provide expert assistance when "reasonably necessary for the proper representation of a defendant charged with aggravated murder." We have accordingly held that the state must provide an indigent criminal defendant with funds to obtain expert assistance when the defendant has made a particularized showing that (1) there exists a reasonable probability that the requested expert would aid the defense and (2) denial of the requested expert assistance would result in an unfair trial. *Id.* at syllabus. The trial court uses its sound discretion in determining whether a defendant has made a particularized showing of the need for state-funded expert assistance. *Id.*

Here, defendant did not make a particularized showing for the need of a neurologist. Defendant's retained expert, Dr. Fabian, requested a neurological examination due to a self-reported head injury defendant had apparently suffered in a 1999 motorcycle accident. (Tr. pp. 44-48). Defendant told Dr. Alice Cook that he failed to seek any medical treatment from his motorcycle injury. (Tr. p. 85). However, Dr. Aronoff summarized medical records of the accident: "32 year old black male sitting on motorcycle which was struck from behind by a car at low speed. He was thrown off the bike on the right side. *No loss of consciousness.* Was wearing a helmet. Right shoulder,

right hip, right elbow, right ankle are painful. No headache or neck pain." (Tr. pp. 128-9, emphasis added). Dr. Aronoff added that defendant's own account of the injury described experiencing unconsciousness, but the actual Meridia-Huron Road Hospital Medical Records, which were dated March 29, 1999, indicated no loss of consciousness. (Tr. p. 129, 144). Dr. Aronoff esplained that doctors did not order any MRIs or CAT scans of defendant at the time of his motorcycle accident. (Tr. p. 144).

Defendant nevertheless accuses his counsel of failing to investigate all avenues of mitigation such as a neurological examination. Defendant likens his counsel's conduct to that in *Huffman v. Frazier,* "where defense counsel failed to investigate a brain defect that may have directly effected[sic] defendant's actions." (Apt. Br. at 25-6, citing *Frazier v. Huffman* (C.A. 6, 2003), 343 F.3d 780, 794-95). The "brain defect" that counsel in *Frazier* failed to present as mitigation evidence was the fact that Mr. Frazier, had fallen from a ladder earlier in life, which allegedly produced a brain injury that caused Frazier to "suffer[] from a functional brain impairment" which his postconviction experts opined affected Frazier's frontal lobe, which was "the site of impulse control, social judgment and reasoning." *Id.* Likewise, in *Frazier,* counsel had declined to present the "brain defect" mitigation in lieu of only presenting residual doubt as mitigation. *Id.*

In this case, by contrast, counsel presented much more mitigation than just residual doubt. Also, there was no independent record of an actual head injury in this case other than defendant's self-reporting. According to the defendant's own medical records, defendant was involved in a minor, slow speed accident in 1999 while wearing a helmet that did not cause any notable head or other injuries. Without any compelling evidence that defendant even suffered a head injury, the trial court acted with sound

discretion when it determined that defendant did not make a sufficient showing to warrant appointment of a neurologist.

In a similar case, the Eleventh District Court of Appeals held that where the "appellant failed to demonstrate the existence of an injury that would be discovered by a neurological examination, appellant failed to show his counsel was ineffective or that he was prejudiced." *State v. Davie* (1998), Trumbull App. No. No. 97-T-0175, 1998 WL 684157, at *6. In *Davie,* the court explained the lack of evidence of a head injury and the speculative need for a neurological examination.

> Moreover, a review of Dr. Kenny's testimony at the mitigation phase reveals that while he had no [CT] Scan or MRI performed on Petitioner, he further indicated that Petitioner's head injury was 'mild' and that he would only recommend such testing where there was a 'suggestion of a focal type of insult [to the brain]'. * * * He further explained that his diagnosis of post-concussion syndrome was based on his findings that Petitioner exhibited 'information process[ing] and emotional difficulties'. He testified that such findings commonly are the 'only sign' of post-concussion syndrome that will be found, 'unless they do microscopic studies after death and from another cause, and they will show microscopic lesions, but these do not necessarily show on CT scan or MRI.' * * * Thus, the testimony of Petitioner's own expert witness at the mitigation hearing appears to rebut, if not refute, Petitioner's current unsupported claim that a[CT] Scan or MRI would have shown an injury to Petitioner's brain. At a minimum, the Court finds Petitioner's claim in this regard pure speculation.

Id. (internal quotation marks omitted). Similarly, defense counsel in this case also were not ineffective for failing to obtain a neurological examination where there was no definitive proof of a past head injury and only a speculative request for a neurological examination. As such, defendant's twelfth proposition of law lacks merit and should be overruled.

Finally, defendant contends that counsel was ineffective for failing to object to the term "recommendation" by the trial court during voir-dire death qualification of the

jury. (Apt. Br. at 24). This was not error, nor can it serve as the basis for an ineffective assistance finding. "[U]se of the term "recommendation" does not diminish the jury's sense of responsibility, accurately reflects Ohio law, and does not constitute error." *State v. Jones* (2000), 90 Ohio St.3d 403, 418, 739 N.E.2d 300, citing *State v. Woodard* (1993), 68 Ohio St.3d 70, 77, 623 N.E.2d 75, 80-81.

<u>Proposition of Law II</u>: A trial court may not accept trial counsel's acquiescence to allow the prosecutor to materially amend the indictment as to an essential element of the without directly engaging in a colloquy with the defendant to ensure the was knowingly, intelligently, and voluntarily entered.

Defendant argues that the murder to escape a crime specification in counts 1 and 2 was improperly amended. Specifically, he argues 1) the trial court failed to obtain an oral or written waiver to his acquiescence to amending the indictment and 2) the amendment changed the name and identity of the crime charged. Defendant's argument fails for two reasons. First, the trial court was not required to obtain an oral or written waiver. Second, the amendment did not change the nature or identity of the crime charged and was proper under Crim.R. 7(D).

A. The trial court was not required to obtain a written waiver

"[N]o person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury." Section 10, Article I, Ohio Constitution. Crim.R. 7(A) provides:

> A felony that may be punished by death or life imprisonment shall be prosecuted by indictment. All other felonies shall be prosecuted by indictment, *except that after a defendant has been advised by the court of the nature of the charge against the defendant and of the defendant's right to indictment, the defendant may waive that right in writing and in open court.*

(emphasis added).

Defendant was charged with aggravated murder and a murder to escape accounting for a crime specification. The specification indicated that "[t]he Grand Jurors further find and specify that the offender committed the offense presented above for the purpose of escaping punishment for another offense committed by him, to wit: Rape." Indictment Counts 1 and 2. Approximately nine months before trial, the State orally moved to amend a typographical error in the escape specification. The reason Defendant killed McCorkle is because he was attempting to avoid responsibility for a felonious assault not rape. (Tr. 12). Defendant's counsel was aware of the typographical error:

> Your Honor, Mr. Awadallah raised this issue with me, I believe several pretrials ago. I had an opportunity to speak to Mr. Maxwell with regards to this. I explained to him certainly we have no objection to this, and he agrees with me in terms of that, and certainly the county prosecutor can, of course, take this back to the Grand Jury to correct the typographical error, if he wishes to do so.

(Tr. 12). The trial court then granted the motion to amend the indictment.

Defendant argues that under Crim.R. 7(A) the trial court was required to obtain a written wavier to the amendment. Defendant's argument is premised on an incorrect reading of the rule.

Crim.R. 7(A)'s first paragraph is composed of two sentences. The first sentence applies to this case. The second sentence—the one Defendant uses as support—does not apply to a capital case. The first sentence requires the State to prosecute a capital case by indictment only. The second sentence deals with all other felonies that are prosecuted by information. The second sentence provides:

> All other felonies shall be prosecuted by indictment, except that after a defendant has been advised by the court of the nature of the charge against the defendant and of the defendant's right to indictment, the defendant may waive that right in writing and in open court.

Crim.R. 7(A). The first clause of this sentence requires the State to prosecute all felonies, other than a capital case, by indictment. The next clause then creates an exception to this requirement for any felony that is not a capital case. This clause then requires that a trial court explain to the defendant his *right* to grand jury indictment. The next clause provides that the *right* to grand jury presement can be waived in writing and in open court.

This is a capital case. Defendant did not waive his right to grand jury presement and agree to a prosecution by information. Defendant agreed that the indictment could be amended to correct the typographical error. The second sentence in Crim.R. 7(A) does not apply to Defendant and his fails.

B. Amendment of the typographical error did not change the name or identity of the specification.

Defendant's further argues that by fixing the typographical error the name and identity of the crime is changed. Thus, the specification could not be amended without represement to the grand jury. Defendant's argument is flawed. The amendment did not alter the name or identity of the crime charged. And this Court indicated that an amendment in a similar specification would be appropriate.

Defendant's specification concerned a prior criminal act in which he brutally beat McKorkle. The specification was based on Defendant killing McKorkle so that he would not be held accountable for his criminal conduct. The actual crime, such as rape, kidnapping, or theft is irrelevant to the name or identity of the specification. The specification, regardless of the felony committed, makes Defendant death eligible. Thus, the name or identity of the crime was not changed.

This Court addressed a similar claim in *State v. Joseph* (1995), 73 Ohio St.3d 450, 1995-Ohio-288. In *Joseph*, the defendant was indicted for aggravated murder with a felony murder specification. The defendant's specification provided that ""The Grand Jurors further find and specify that the offense was committed while the offenders were committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, and the offenders were principal offenders in the commission of the *kidnapping* in violation of the Ohio Revised Code, Section 2903.01(B) * * *."" *Id.* at 455. The indictment should have provided that the defendant was "the principal offender in the commission of the *aggravated murder*."

This error was not realized until the appeal was filed. On appeal, *Joseph* argued the indictment was defective. This Court disagreed and held:

> Furthermore, appellant has not shown that he was prejudiced in the defense of his case from this substitutional error or that he would have proceeded differently had this error been corrected. *Indeed, had the error been discovered, it was properly subject to amendment. Crim.R. 7(D).*

Id. at 456. (emphasis added).

The error in Defendant's indictment is similar to the error in *Joseph*. The crime alleged in Defendant's specification was not correct. Like the specification in *Joseph*, the specification is properly subject to amendment because it does not change the nature or identity of the crime. Defendant was given notice of the charges against him and was provided nine months to prepare his defense. The amendment was proper and did not prejudice Defendant's trial.

<u>Proposition of Law III</u>: A child witness under the age of ten years must be found incompetent to testify unless the record affirmatively establishes that the witness is able to distinguish right from wrong and the truth from a lie.

Defendant argues that allowing his daughter, C.M., to testify was unreasonable, arbitrary, and unconscionable. Specifically, he argues that his daughter was unable to understand the ramifications of telling a lie. The trial court was in the best position to determine whether Defendant's daughter was able to truthfully relate just impressions of facts and transactions. The State met its burden establishing the witness's competence. This proposition should be overruled.

A. Standard of review

A party may not challenge the admission of evidence unless "a timely objection or motion to strike appears of record stating the specific ground of objection." Evid.R. 103(A)(1). Unless the error is plain, *failure to make a specific objection at trial waives review of the alleged error. State v. Hartman*, 93 Ohio St.3d. 274, 281, 2001-Ohio-1580. (emphasis added).

"[T]he admission of evidence lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that has created material prejudice." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, at ¶ 62. This Court's "inquiry is confined to determining whether the trial court acted unreasonably, arbitrarily, or unconscionably in deciding" C.M. was competent to testify. *Id.*

Crim.R. 601(A) indicates that a child under the age of ten is incompetent unless the child is able to "receive[] just impressions of fact and transactions respecting which they are examined, or of relating them truthfully." "In determining whether a child under ten is competent to testify, the trial court must take into consideration (1) the child's ability to receive accurate impressions of fact or to observe acts about which he or she will testify, (2) the child's ability to recollect those impressions or observations, (3)

the child's ability to communicate what was observed, (4) the child's understanding of truth and falsity and (5) the child's appreciation of his or her responsibility to be truthful." *State v. Frazier* 1991, 61 Ohio St.3d 247, 251.

B. Analysis

The trial court held a competency hearing. C.M. was asked various questions. She indicated that she understood that it was good to tell the truth and you can get in trouble if you lie. (Tr. 812). She was also asked questions relating to the events she witnessed. C.M. was able to relay the events she witnessed, what her house looks like, and who was at the house when Defendant murdered Nicole McCorkle.

The defense's only objection to C.M. testifying was that she was not able to recall just impressions. Trial counsel failed to make an objection that C.M. was unable to be truthful. (Tr. 825-826). The only issued raised in this proposition is that the State failed to establish C.M. understood her obligation to testify truthfully. Because the truthfulness of C.M.'s testimony was not the specific objection raised, it is improper to argue this point for the first time on appeal. This assignment should be overruled.

C. Assuming this issue is not forfeited, the trial court properly determined that C.M. was competent to testify.

After examination, the trial court opined that C.M. was able to receive just impressions and understood the importance of telling the truth. (Tr. 824). This decision is based on answers C.M. provided the State, defense counsel, and the trial court during the hearing. C.M. indicated that she knew she would get in trouble if she told a lie. She understood the difference between the concepts of lies and truth. The court's decision is based on the record. The court's decision is not unreasonable,

arbitrary, or unconscionable. The trial court correctly found that C.M. was competent to testify. This proposition should be overruled.

D. Assuming the trial court erred in allowing C.M. to testify, the evidence did not prejudice Defendant's case.

"'Trial error' is 'error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.'" *State v. Fisher*, 99 Ohio St.3d 127, 130, 2003-Ohio-2761 (quoting *Arizona v. Fulminante* (1991), 499 U.S. 279, 307-308).

There was additional evidence that tied Defendant to McCorkle's murder. Loretta Kenny, the victim's sister, received a call from McCorkle that Defendant was in her house. Kenny went to the house. She saw Defendant and Defendant fired a gun at her. This places Defendant at the crime scene with a gun. There was overwhelming evidence that Defendant committed this crime. C.M.'s testimony did not change the outcome of the trial. The admission of this testimony was harmless beyond a reasonable doubt. Defendant's third proposition should be overruled.

<u>Proposition of Law IV</u>: The failure to raise and preserve meritorious issues during a capital trial results in the denial of a defendant's right to effective assistance of counsel.

Within this assignment, Defendant argues he received ineffective assistance of counsel. Specifically, he argues that trial counsel improperly struck female jurors without a gender-neutral reason, counsel failed to life qualify a single juror, and counsel failed to object to victim impact evidence admitted during the guilt phase.

A. Improper strike of female jurors

The State's response to this claim, within this proposition, is two fold. First, the State will show that defense counsel was not ineffective and pursued a legitimate trial tactic in striking certain jurors. Second, assuming counsel violated any juror's equal protection rights, the State will show that this is invited error and cannot from the basis for reversible error.

i. **Standard of Review**

"To establish ineffective assistance, [Defendant] must show (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the proceeding's result would have been different." *State v. Hale*, ____ Ohio St.3d ____, 2008-Ohio-3426, at ¶ 204 (citing *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 694). "[D]ebatable trial tactics do not establish ineffective assistance of counsel." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, at ¶ 101. "Decisions on the exercise of peremptory challenges are a part of trial strategy." *State v. Goodwin*, 84 Ohio St.3d 331, 341, 1999-Ohio-356.

ii. **Analysis**

Defendant challenges trial counsel's dismissal of five jurors.

Juror 18

Defendant concedes that this juror's recent relationship with the Cuyahoga County Prosecutor's Office provides a debatable strategic decision for dismissal. Additionally, trial counsel asked that this juror be removed for cause and Defendant's Sixth Proposition argues that this juror should have been removed for cause. It is not proper to argue that this juror was removed because of her gender.

Trial counsel based the decision to strike this juror because she was sexually assaulted, as well as the fact that she had prior contact with the prosecutor's office regarding another case. This was a strategic decision supported by a gender-neutral reason. Counsel was not ineffective in striking this juror.

Juror 23

Defendant concedes that trial counsel strategically decided to strike this juror because she suffered from depression and was in and out of hospitals for a mental disease. Additionally, counsel requested that this juror be removed for cause because she remembered the facts of the case that were reported on the news. (Tr. 678-684, 717-718). Counsel felt that this juror could not be impartial given her history and knowledge of the case. Based on her response to questions, it was a strategic decision to remove this juror. Counsel was not ineffective for striking this juror.

Juror 25

Defendant concedes that this juror is a domestic violence victim. (Tr. 447-457) A man with whom she had a child assaulted her. This juror's experience is similar to the theory proved by the State. It was a legitimate strategic decision to remove this juror. She may have sympathized with the victim. It was too risky to allow this juror to sit on the panel. Counsel struck this juror for a legitimate reason and was not ineffective.

Juror 26

On the juror questionnaire, this juror wrote that she *firmly* believed in capital punishment. She further indicated that she has a concern with recidivism. (Tr. 462). When asked whether she could consider another sentence she indicated that she could consider life without parole. (Tr. 460). Trial counsel was in the beast position to judge this juror's demeanor and credibility. Trial counsel, in the exercise of discretion,

believed this juror could only impose death or life without parole. There was a strategic decision, based on gender-neutral reasons, to strike this juror.

Juror 15

On the juror questionnaire this juror wrote "don't do the crime if you can't do the time." (Tr. 371). Trial counsel was in the best position to judge this juror's demeanor and credibility when she indicated she could consider other options. Trial counsel pursued a legitimate trial strategy in striking this juror.

There is an apparent gender-neutral reason for the strike of these five jurors. Trial counsel was experienced and based the decision to strike these jurors on legitimate concerns that appear on the face of the record. The decision to strike these jurors should not be second-guessed because these were strategic decisions. This proposition lacks merit and should be overruled.

iii. Assuming counsel struck even one women for a improper reason, Appellant invited this error and cannot use this claim as a basis for reversal.

Standard of review for invited error

"The doctrine of invited error holds that a litigant may not 'take advantage of an error which he himself invited or induced.'" *State v. Campbell*, 90 Ohio St.3d 320, 324, 2000-Ohio-183 (quoting *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.* (1986), 28 Ohio St.3d 20). "This court [finds] invited error when a party has asked the court to take some action later claimed to be erroneous, or affirmatively consented to a procedure the trial judge proposed." *Id.* Because a *Batson/McCollum* violation requires reversal, the Oklahoma Court of Criminal Appeals succinctly stated why a criminal defendant should never be permitted to raise this issue on appeal:

> This traditional remedy of reversal has two unpalatable consequences when applied to *McCollum* violations: 1) it discourages prosecutors from raising meritorious claims of error in order to ensure they are not preserved for appellate review; and 2) it allows a defendant to benefit on appeal from error he committed at trial. We find it difficult to believe that the *McCollum* Court intended these results. *Criminal jurisprudence simply cannot allow a defendant to benefit from error he creates.* In an era where jury selection and the entire structure of criminal trials is being questioned on grounds of fairness and effectiveness, this result will undermine respect for the criminal justice system as surely as the practice of discriminating against jurors on the basis of race.

Ezell v. State (1995), 909 P.2d 68, 72-73. (emphasis added).

iv. Analysis of invited error

Without conceding, the State starts from the presumption that trial counsel used preemptory challenges based on gender. It would be error for a trial court to allow a defendant to strike jurors based on gender. Assuming Defendant was permitted to strike these jurors based on gender, he got exactly what he wanted—fewer women on the jury. Defendant should not be allowed to claim reversible error for a panel that he was actively responsible in creating.

A criminal defendant should not be permitted to inject error and then argue that his active participation in creating the error should result in a reversal. Defendant received his desired jury that he was actively responsible in creating. Invited error prohibits examination of Defendant's fourth proposition.

B. Failure to life qualify

Within this subproposition, Defendant argues that defense counsel failed to life qualify a single juror. Defendant does not cite to any juror's voir dire to support this claim and Defendant does not argue that a "death prone" jury was selected. Additionally, the trial judge asked each juror whether they could consider imposing a

penalty less than death. Trial counsel asked this question of many of the jurors as well. This argument lacks merit and should be overruled.

i. Standard of Review

The question presented for review in this subproposition is whether Defendant was tried before a death prone jury. Counsel's performance is reviewed under the ineffective rubric discussed above. Because the trial court life qualified each juror that decided this case, trial counsel was not required to life qualify any juror. Counsel performance was reasonable and did not prejudice Defendant.

ii. Analysis

The only jurors that are important in this analysis are the jurors that actually decided the case. The trial court examined each juror to determine whether the juror could impose a lesser sentence than death.

The trial court asked juror Healy if he could impose a lesser sentence than death if the aggravating circumstances did not outweigh mitigating factors beyond a reasonable doubt. The juror answered in the affirmative. (Tr. 230-231). Trial counsel asked this juror whether he could keep an open mind and consider the life options. The juror answered affirmatively. (Tr. 233). This juror was life qualified.

The trial court asked juror Zellner if she could impose a lesser sentence than death if the aggravating circumstances did not outweigh mitigating factors beyond a reasonable doubt. The juror answered in the affirmative. (Tr. 238-239). This juror also indicated "that it's more of a punishment to be alive and be in jail the rest of your life, you know." (Tr. 248). This juror was life qualified.

The trial court asked juror Storch if he could impose a lesser sentence than death if the aggravating circumstances did not outweigh mitigating factors beyond a

reasonable doubt. The juror answered in the affirmative. (Tr. 258-259). This juror was life qualified.

The trial court asked juror Hudak if he could impose a lesser sentence than death if the aggravating circumstances did not outweigh mitigating factors beyond a reasonable doubt. The juror answered in the affirmative. (Tr. 320). This juror was life qualified.

The trial court asked juror Lehmann if she could impose a lesser sentence than death if the aggravating circumstances did not outweigh mitigating factors beyond a reasonable doubt. The juror answered in the affirmative. (Tr. 325). Trial counsel asked this juror if she could consider all the sentencing options besides death. She responded affirmatively. (Tr. 329-330). This juror was life qualified.

The trial court asked juror Adams if she could impose a lesser sentence than death if the aggravating circumstances did not outweigh mitigating factors beyond a reasonable doubt. The juror answered in the affirmative. (Tr. 385-386). Trial counsel asked this juror if she could consider all the sentencing options besides death. She responded affirmatively. (Tr. 389). This juror was life qualified.

The trial court asked juror Szabo if she could impose a lesser sentence than death if the aggravating circumstances did not outweigh mitigating factors beyond a reasonable doubt. The juror answered in the affirmative. (Tr. 401-402). This juror was life qualified.

The trial court asked juror Doris if she could impose a lesser sentence than death if the aggravating circumstances did not outweigh mitigating factors beyond a reasonable doubt. The juror answered in the affirmative. (Tr. 410). Trial counsel asked

this juror whether she would consider alternatives to a death penalty. She responded affirmatively. (Tr. 415-416). This juror was life qualified.

The trial court asked juror Bonamer if he could impose a lesser sentence than death if the aggravating circumstances did not outweigh mitigating factors beyond a reasonable doubt. The juror answered in the affirmative. (Tr. 435-436). This juror was life qualified.

The trial court asked juror Novy if he could impose a lesser sentence than death if the aggravating circumstances did not outweigh mitigating factors beyond a reasonable doubt. The juror answered in the affirmative. (Tr. 440). This juror was life qualified.

The trial court asked juror Harper if he could impose a lesser sentence than death if the aggravating circumstances did not outweigh mitigating factors beyond a reasonable doubt. The juror answered in the affirmative. (Tr. 468-469). This juror was life qualified.

The trial court asked juror Qua if she could impose a lesser sentence than death if the aggravating circumstances did not outweigh mitigating factors beyond a reasonable doubt. The juror answered in the affirmative. (Tr. 475-476). Trial counsel asked this juror whether she could consider a lesser option than death. She answered affirmatively. (Tr. 479). This juror was life qualified.

The trial court asked juror Stewart if she could impose a lesser sentence than death if the aggravating circumstances did not outweigh mitigating factors beyond a reasonable doubt. The juror answered in the affirmative. (Tr. 483). This juror was life qualified.

All of the jurors that sat on Defendant's panel indicated that they would consider other sentencing options. No juror was death prone. The jury that tried Defendant was fair, impartial, and life qualified. Trial counsel reasonably conducted voir dire. Assuming trial counsel failed to conduct a proper voir dire, Defendant was not prejudiced because the jury was life qualified. This subproposition lacks merit and should be overruled.

C. Failure to object to victim impact evidence

Counsel has raised this issue in the tenth proposition of law and the issue will be discussed there.

This entire proposition lacks merit and should be overruled.

Proposition of Law V: Where a party to a lawsuit displays a prima facie pattern of bias in its exercise of peremptory challenges against women, it is incumbent upon the trial judge to determine whether gender neutral reasons for the challenge exists.

Within this assignment of error, Defendant argues that the trial court failed to stop trial counsel from striking female jurors. This argument lacks merit for two reasons. First, defense counsel properly struck the female jurors. Second, assuming defense counsel is actively responsible for improperly striking jurors, Defendant cannot take advantage of an error, which he himself invited or induced. Defendant cites no cases that support the proposition that a trial court is required to intervene, without an objection, to ensure counsel has gender-neutral reasons for striking jurors. This proposition should be overruled.

As discussed above, the record provides gender-neutral reasons for the strike of the five female jurors. The trial court is not required to inject himself in the preemptory process to ensue counsel is not pursuing an illegal trial tactic.

Additionally, as discussed above, if counsel improperly struck the jurors, Defendant is actively responsible for any error that he created and he cannot attempt to shift blame to the trial court for his actions. Like Proposition of Law IV, this claim fails.

Proposition of Law VI: The trial court's refusal to dismiss biased jurors from the panel deprives the defendant of his protections under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Within this proposition, Defendant argues, based solely on a Federal Constitutional violation, that the trial court erroneously denied his challenge for cause in relation to juror 18.[7] Specifically, he argues that because juror 18 was a crime victim she was likely to find the State's case more credible. Thus, he was prejudiced when he was required to use a preemptory challenge to remove this juror. Defendant's argument lacks merit for two reasons. First, the United States Supreme Court holds that this type of claim is not cognizable under the United States Constitution. Second, the trial court properly determined that juror 18 could be fair and impartial. This proposition should be overruled.

1. Federal Claim

Defendant's legal claim is based on deprivation of *federal constitutional rights.* There is no corresponding State claim. Thus, an examination of United States Supreme Court precedent is necessary and binding on this analysis.

a) Sixth Amendment violation

The Sixth Amendment to the United States Constitution provides that a criminal defendant enjoys the right to "an impartial jury of the State and district wherein the crime shall have been committed." The United States Supreme Court examined this

[7] During individual sequestered voir dire this juror is given the numerical designation 18. During general voir dire she is juror 13.

exact issue in *Ross v. Oklahoma* (1988), 487 U.S. 81. This Court adopted *Ross* and addressed a similar claim in *State v. Hale*, ____ Ohio St.3d ____, 2008-Ohio-3426, at ¶ 86. In *Hale*, the defendant challenged a juror for cause. The defendant then struck the juror during preemptory challenges. This Court held "'[s]o long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated.'" *Id.* (quoting *Ross v. Oklahoma* (1988), 487 U.S. 81, 88).

Defendant asked to strike Juror 13, for cause, during individual sequestered voir dire. That request was denied. Prior to general voir dire, the trial court informed counsel that if you do not challenge the first 22 for cause, at the end of your voir dire you will have waived that ability to challenge them for cause." (Tr. 615).

After general voir dire, counsel did not renew its challenge for cause to juror 13. (Tr. 717-718). For his second preemptory, Defendant struck "Juror No. 13. Ms. Juanita Gibson because of the tragedies that have occurred in her family." (Tr. 720). Defendant then used his remaining preemptory challenges.

Here, Defendant makes a blanket statement, without citation to the record, that because he choose to use his preemptory on Juror 13 he was forced to take another objectionable juror. Defendant does not indicate which of the jurors was objectionable. And the record does not support this claim. Counsel did not object that the jury was composed of jurors that could not be impartial. Defendant is unable to show that the jury was not impartial. This Court rejects the Defendant's Sixth Amendment claim. The facts of this case do not support any claim that the jury was not fair and impartial. Thus, Defendant's Sixth Amendment claim must be overruled.

b) Fifth and Fourteenth Amendment claims

Defendant also challenges his decision to strike juror 13, as a federal due process violation. But as a federal due process claim, this Court must reject this argument.

For 123 years, Ohio has adhered to the standard that where a challenge for cause is improperly denied and a defendant exhausts his preemptory challenges the result is automatic reversal. *Hartnett v. State* (1885), 42 Ohio St. 568 at paragraph four of the syllabus. But this standard is not based on federal constitutional principles nor is it the standard adopted by the United States Supreme Court. Thus, as a claim of a federal violation, this proposition must be overruled.

In *U.S. v. Martinez-Salazar* (2000), 548 U.S. 304, the United States Supreme Court was confronted with the claim that because the trial court erroneously denied a challenge for cause the defendant was required to waste a preemptory challenge. The Ninth Circuit Court of Appeals held that this error was a Fifth Amendment violation. *Id.* at 309-310. The Supreme Court reversed and held:

> The Court of Appeals erred in concluding that the District Court's for-cause mistake compelled Martinez-Salazar to challenge Gilbert peremptorily, thereby reducing his allotment of peremptory challenges by one. *A hard choice is not the same as no choice.* Martinez-Salazar, together with his codefendant, received and exercised 11 peremptory challenges (10 for the petit jury, 1 in selecting an alternate juror). That is all he is entitled to under the Rule.
>
> After objecting to the District Court's denial of his for-cause challenge, Martinez-Salazar had the option of letting Gilbert sit on the petit jury and, upon conviction, pursuing a Sixth Amendment challenge on appeal. Instead, Martinez-Salazar elected to use a challenge to remove Gilbert because he did not want Gilbert to sit on his jury. This was Martinez-Salazar's choice. The District Court did not demand-and Rule 24(b) did not require-that Martinez-Salazar use a peremptory challenge curatively.
>
> In choosing to remove Gilbert rather than taking his chances on appeal, Martinez-Salazar did not lose a peremptory challenge. Rather, he used the challenge in line with a principal reason for peremptories: to help secure the constitutional guarantee of trial by an impartial jury. *Moreover, the immediate choice Martinez-Salazar confronted-to stand on his objection*

> *to the erroneous denial of the challenge for cause or to use a peremptory challenge to effect an instantaneous cure of the error-comports with the reality of the jury selection process.*

Id. at 315-316. (footnote and citations omitted) (emphasis added).

In this case, Defendant received all process due—6 preemptory strikes. The United States Supreme Court holds that this means Defendant received all the process due to him and there is no constitutional violation. As a federal due process claim, this Court is bound by *Martinez-Salazar* and this proposition must be overruled.

2. State Law Claim

Adoption of *Martinez-Salazar*

Within this proposition, Defendant does not make a state law claim. Assuming this proposition is reviewed as a state law claim, this Court should follow the lead of the United States Supreme Court and adopt the holding of *Martinez-Salazar*. Defendant was allowed six preemptory challenges. He used six preemptory challenges. No rights were violated. As a claimed violation of a right to "an impartial jury of the county in which the offense is alleged" under Ohio Constitution Article I Section 10 this Court has already adopted the Supreme Court's decision in *Ross v. Oklahoma* and rejected this claim if the complained of juror is subsequently struck. Thus, in this context, Ohio law provides no greater protection than the Sixth Amendment right to an impartial jury.

In relation to a claimed state due process right this Court has held:

> We look to federal case law to delineate the right of relators under both the state and federal provisions. The Ohio Constitution's guarantees in these matters are substantially equivalent to the United States Constitution's guarantees. The phrase in Section 2 of Article I that " * * * (g)overnment is instituted for their (the people's) equal protection and benefit" is essentially identical to the Fourteenth Amendment's equal protection clause. *Kinney v. Kaiser Aluminum & Chemical Corp.* (1975), 41 Ohio St.2d 120, 123, 322 N.E.2d 880. Section 16 of Article I guarantees that " * * * every person, for an injury done him in his land, goods, person, or

> reputation, shall have remedy by due course of law * * *." When read in conjunction with Sections 1, 2 and 19, Section 16 is the equivalent to the Fourteenth Amendment's due process clause. *Direct Plumbing Supply Co. v. Dayton* (1941), 138 Ohio St. 540, 38 N.E.2d 70; *Akron v. Chapman* (1953), 160 Ohio St. 382, 116 N.E.2d 697. As a consequence, decisions of the United States Supreme Court can be utilized to give meaning to the guarantees of Article I of the Ohio Constitution.

State ex rel. Heller v. Miller (1980), 61 Ohio St.2d 6, 8.

There is no federal constitutional right to a preemptory challenge. Thus, there is no violation of federal due process when a litigant uses a preemptory strike to dismiss a juror that should have been dismissed for cause. Because Ohio Constitution's provides criminal defendant's no more due process than its federal counterpart this Court should adopt *Martinez-Salazar* as the law of Ohio.

In reaching the current state of the law on this issue, this Court held:

> The reason for this rule is that an error by the trial judge in overruling a challenge for cause *forces* the defendant to use a peremptory on a prospective juror who should have been excused for cause, giving the defendant fewer peremptories than the law provides.

State v. Williams, 79 Ohio St.3d 1, 8, 1997-Ohio-407 (emphasis added).

The Ohio Constitution, the revised code, or the Rules of Criminal Procedure do not support this standard. The United States Supreme Court rejected this exact argument and held that "*a hard choice is different than no choice.*" *Martinez-Salazar* (2000), 548 U.S. at 315. Defendant was entitled to and used six challenges. Defendant could have allowed the complained of juror to sit on the panel and pursued a Sixth Amendment and Article I Section 10 violation on appeal. There has been no due process violation in this case. A justice on the Florida Supreme Court has noted that a

significant number of jurisdictions[8] have adopted the *Martinez-Salazar* standard and this Court should continue this trend and adopt this standard.

This proposition should be overruled.

Standard of review under current state law

Assuming this Court declines to adopt *Martinez-Salazar*, Defendant's argument still fails. The trial court made the correct decision in refusing to strike juror 13 for cause.

Standard of review

"Generally, the denial of a challenge for cause does not violate a defendant's constitutional rights." *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, at ¶ 182. If a defendant "exhaust[s] his peremptory challenges, we consider the merits of his

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[8] *Kopsho v. State* (2007), 959 So. 2d 168 fn 3 "Examples of cases from other states which require a showing of prejudice include: *Dailey v. State*, 828 So.2d 340, 343-44 (Ala.2001); *Minch v. State*, 934 P.2d 764, 769-70 (Alaska Ct.App.1997); *State v. Hickman*, 205 Ariz. 192, 68 P.3d 418, 427 (2003); *Bangs v. State*, 338 Ark. 515, 998 S.W.2d 738, 744-45 (1999); *People v. Yeoman*, 31 Cal.4th 93, 2 Cal.Rptr.3d 186, 72 P.3d 1166, 1188 (2003); *State v. Pelletier*, 209 Conn. 564, 552 A.2d 805, 810 (1989); *Manley v. State*, 709 A.2d 643, 655-56 n. 15 (Del.1998); *State v. Ramos*, 119 Idaho 568, 808 P.2d 1313, 1314-15 (1991); *Dye v. State*, 717 N.E.2d 5, 18 n. 13 (Ind.1999); *State v. Neuendorf*, 509 N.W.2d 743, 746-47 (Iowa 1993); *State v. Manning*, 270 Kan. 674, 19 P.3d 84, 96-98 (2001); *People v. Bell*, 473 Mich. 275, 702 N.W.2d 128, 138-39 (2005); *State v. Anderson*, 603 N.W.2d 354, 355-56 (Minn.Ct.App.1999) (citing *State v. Stufflebean*, 329 N.W.2d 314, 317 (Minn.1983)); *Johnson v. State*, 754 So.2d 576, 577-78 (Miss.Ct.App.2000); *State v. Storey*, 40 S.W.3d 898, 904-05 (Mo.2001); *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121, 133-34 (2001); *Blake v. State*, 121 Nev. 779, 121 P.3d 567, 577-78 (2005); *State v. DiFrisco*, 137 N.J. 434, 645 A.2d 734, 751-54 (1994); *State v. Entzi*, 615 N.W.2d 145, 148-50 (N.D.2000); *Myers v. State*, 17 P.3d 1021, 1026-28 (Okla.Crim.App.2000), overruled on other grounds by *James v. State*, 152 P.3d 255 (Okla.Crim.App.2007); *State v. Barone*, 328 Or. 68, 969 P.2d 1013, 1018-19 (1998); *Green v. Maynard*, 349 S.C. 535, 564 S.E.2d 83, 84-87 (2002); *State v. Verhoef*, 627 N.W.2d 437, 440-42 (S.D.2001); *State v. Middlebrooks*, 840 S.W.2d 317, 329 (Tenn.1992), superseded on other grounds by Tenn.Code Ann. § 39-13-204(i)(h), (1995); *State v. Menzies*, 889 P.2d 393, 397-400 (Utah 1994); *State v. Fire*, 145 Wash.2d 152, 34 P.3d 1218, 1221-25 (2001); *State v. Lindell*, 245 Wis.2d 689, 629 N.W.2d 223, 243-46 (2001); *Klahn v. State*, 96 P.3d 472, 480-84 (Wyo.2004)."

claim." *Id.* "A trial court's resolution of a challenge for cause will be upheld on appeal unless the trial court abused its discretion." *Id.* at 183.

Analysis

Defendant argues that juror 13 was closely aligned with the prosecutor's office. This juror was previously victimized. The defendant was apprehend and was still serving a term of incarceration at the time of trial. Juror 13 indicated that she did not have much contact with the Cuyahoga County Prosecutor's office because she agreed to allow the defendant to plead to a lesser charge. During voir dire, the following colloquy was had between defense counsel and juror 13:

> Counsel: Do you think that the fact that you were -- you were with prosecutors in terms of that case, with the county prosecutor's office, and these gentlemen are with the county prosecutor's.
>
> Do you think that's going to somehow possibly taint the way you view this case against my client?
>
> Juror 13: Why would it? No, I don't. One has nothing to do with the other.

The trial court's decision to overrule the challenge was based on the response provided by the juror. The trial court is in the best position to decide the juror's credibility in regards to impartiality. The record supports the trial court's decision to overrule the challenge. This proposition should be overruled.

<u>Proposition of Law VII</u>: Evidence of a near instantaneous decision to purposely kill another is insufficient to sustain a conviction of prior calculation and design.

Defendant argues that his decision to kill Nicole McCorkle was instantaneous eruption of events and there was no prior calculation and design. The facts establish that Defendant told John Gregg that he was going to kill McCorkle, he found a gun,

followed McCorkle to a bar with the gun, waited for McCorkle to leave the bar, followed her home, called and asked to come in, walked in the house with a gun, was there long enough to receive several phone calls, attempted to shot McCorkle's sister who had come to assist, and then shot McCorkle two times. This is prior calculation and design. This proposition should be denied.

Standard of review

The State was required to prove that Defendant purposely and with prior calculation and design caused the death of Nicole McCorkle. R.C. 2903.01.

"In reviewing a record for sufficiency, '[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.'" *State v. Conway*, 108 Ohio St.3d 214, 2006 -Ohio- 791, at ¶ 36 (quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus). Prior calculation and design is defined by this Court as "require[ing] a scheme designed to implement the calculated decision to kill." *Id.* at ¶ 38. This Court has "held that a defendant's threat to obtain a weapon and kill his victim and his later actions carrying out the threat are enough to prove prior calculation and design." *Id.* at 45 (citing *State v. Sowell* (1988), 39 Ohio St.3d 322, 333; *State v. Toth* (1977), 52 Ohio St.2d 206, 213; *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, at ¶ 80-84).

John Gregg testified that in October 2005, Defendant told Gregg that he pistol-whipped McCorkle. (Tr. 1664). Later Defendant called Gregg and asked him to talk with McCorkle because the Defendant learned that an individual received an eight-year prison sentence for felonious assault. (Tr. 1665-1666).

Gregg talked with McCorkle because Defendant knew that she was going to testify at the Grand Jury. (Tr. 1667). Defendant also told Gregg that he was aware of a temporary protection order. (Tr. 1670).

Gregg indicated that he was driving to his mother's house when he received a telephone call from Defendant. Defendant told Gregg that he was unable to locate McCorkle and he needed to speak with her about her grand jury testimony that day. (Tr. 1672-1673).

Defendant then called McCorkle on a three-way conversation and Gregg heard McCorkle tell Defendant that she told the truth to the grand jury. (Tr. 1675). Defendant told Gregg that "the bitch is going to make me kill her." (Tr. 1676). Defendant then asked Gregg if he knew where he could get a gun. (Tr. 1677).

Four days later, Gregg learned that McCorkle was killed. (Tr. 1679). Defendant admitted he killed McCorkle. Defendant told Gregg how he carried out his plan. Defendant, armed with a gun, followed McCorkle to a bar. After seeing McCorkle in the bar with another man, Defendant waited in his car outside the bar. When McCorkle left the bar, Defendant followed her to her house. He waited for the other man to leave and called and asked to come over. McCorkle agreed and Defendant entered the house with a gun. After some time, McCorkle's sister arrived and Defendant shot at her. Then he turned and shot McCorkle. McCorkle fell and was moving on the ground so he fired another shot at point blank range into McCorkle's head. (Tr. 1679-1683).

The circumstances of defendant's behavior on the night he shot the victim also indicated that the murder was not done in a jealous rage, but rather was the product of careful and deliberate planning. According to Gregg's testimony, defendant had followed the victim to the bar in his car. (Tr. p. 1680). Later that night, when Lauretta

Kenney ran after defendant after seeing him shoot her sister, defendant had apparently parked his car some distance away from the crime scene because he jogged away from the crime scene on foot after shooting the victim. (See Tr. pp. 1041-1043, 1047-1049). If defendant had been acting under the influence of a jealous rage, he would have simply driven his car to the victim's residence, shot her, and fled in his vehicle.

Gregg's account was also consistent with the testimony of an independent witness. There was no evidence that Gregg had ever spoken to Willie Hutchinson, who testified that he was the one who had gone out with the victim for a drink on the night she was killed. (Tr. pp. 1500-1509, 1941).

Evidence showed that defendant made a threat to obtain a gun, a threat to kill McCorkle, a decision to follow McCorkle with a recently obtained gun, a decision to enter McCorkle's home with a gun after a witness left, shot McCorkle, then shot McCorkle again because she moving on the floor. Defendant designed a plan to kill McCorkle over a four-day period. Defendant could have abandoned this plan during this four-day period. He did not. He then began carrying out this plan. There were many opportunities to abandon the decision to kill McCorkle during the events immediately before her death. The evidence that defendant planned and carried out the execution of a person who was a witness against him was much more compelling than defendant suddenly killing the victim in a fit of jealous rage.

<u>Proposition of Law VIII</u>: When circumstantial evidence that retaliation was the motive for a homicide is superceded by a greater, more contemporary motive, the evidence is insufficient to support an R.C. 2929.04(A)(8) finding by the jury.

Within this proposition, Defendant argues that his purpose in killing McCorkle was rage and jealously—not to prevent her from testifying in a criminal proceeding.

Defendant's theory is just that—theory. When the facts are viewed in a light most favorable to the State a reasonable juror could find that Defendant killed McCorkle to prevent her testimony.

Standard of Review

"In reviewing a record for sufficiency, '[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.'" *Conway*, 2006-Ohio-791, at ¶ 36 (citations omitted). "R.C. 2929.04(A)(8) allows the death penalty if '[t]he 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.'" *Id.* at ¶ 54.

As discussed above, Defendant decided to obtain a gun after he learned that McCorkle told the truth to the grand jury. After obtaining a gun, he found McCorkle and followed her. He then went to her house and killed her. When viewed in a light most favorable to the prosecution, a reasonable juror could have found that Defendant killed McCorkle to prevent her testimony. It should also be noted that the State took exceptional measures to secure the presence and testimony of Willie Huthinson, the subject of the defendant's argument that this was a jealousy and rage murder. By doing so, the jury was presented with the evidence that suggested a jealousy murder and expressly rejected it by finding that the defendant was guilty of prior calculation and design murder and for the purpose of retaliation and escaping accountability for criminal activity.

Based on the foregoing, defendant's eighth proposition of law should therefore be overruled.

<u>Proposition of Law IX</u>: Testimony before a grand jury is not testimony in a "criminal proceeding" as defined in R.C. 2929.04(A)(8) until the indictment is returned and filed in the Clerk's office under Crim.R. 55 and Crim.R. 6 or a no bill is returned and filed.

Within this proposition, Defendant argues that no evidence was presented that a criminal proceeding was instituted. Specifically, he argues that because a true bill indictment was not filed before McCorkle was killed there was no criminal proceeding as contemplated by the R.C. 2929.04(A)(8) specification. This Court has already rejected this claim. This proposition should be overruled.

This exact argument was advanced and rejected in *State v. Conway*:

> Conway also maintains that the state failed to present sufficient evidence to prove the third capital specification, that he killed Dotson to prevent his "testimony in any criminal proceeding." R.C. 2929.04(A)(8). Conway contends that the (A)(8) specification is inapplicable because there was no evidence that Conway was a suspect in the shooting of Jesse James, and no criminal proceeding regarding the James shooting was underway.
>
> R.C. 2929.04(A)(8) allows the death penalty if "[t]he 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."
>
> Under the R.C. 2929.04(A)(8) specification, the state was not required to show that Conway was a suspect or that he had committed any underlying offense in order to prove the witness-murder specification. In addition, R.C. 2929.04(A)(8) does not require that a criminal action be pending when the defendant kills the victim-witness. Indeed, we have previously upheld application of the witness-murder specification in situations where no criminal proceeding had been initiated at the time the victim was murdered. See, e.g., *State v. Keene* (1998), 81 Ohio St.3d 646, 655, 693 N.E.2d 246; *422 *State v. Brooks* (1996), 75 Ohio St.3d 148, 159, 661 N.E.2d 1030; *State v. Hooks* (1988), 39 Ohio St.3d 67, 69, 529 N.E.2d 429. The plain language of the statute requires only (1) that the victim was

> a witness to an offense and (2) that the purpose of killing the victim was to prevent the victim from testifying in a criminal proceeding. See *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, at ¶ 126.

2006-Ohio-791, at ¶s 53-55.

The evidence showed that Defendant pistol whipped McCorkle. He was concerned that she told the grand jury what he did and that she would testify against him at trial. Like the defendant in *Conway*, Defendant killed McCorkle to prevent her from testifying in a criminal proceeding. This proposition fails.

Proposition of Law X: Victim impact evidence is irrelevant to the determination of guilt or non-guilt.

In his tenth proposition of law, defendant contends that testimony from the victim's family should have been precluded during his trial because, he argues, it amounted to irrelevant victim-impact evidence. (Apt. Br. at 58). Specifically, defendant complains about testimony from Michelle Kenney where she offered evidence about her sister Nichole, including seeing her in the emergency room, struggling with whether to withdraw life support, and the moment her sister died. (Apt. Br. at 58). Defendant complains another sister, Lauretta Kenney, offered irrelevant testimony about how often she spoke with her sister and close they were growing up. (Apt. Br. at 58). Defendant next argues that it was improper for his daughter, Cheyenne Maxwell, to testify about seeing her mother shot, and identify a picture of her mother. (Apt. Br at 58-9). Finally, defendant complains about Deputy Coroner Joseph Felo's testimony about how much pain the victim must have suffered after being shot. (Apt. Br. at 59).

In *State v. White* (2000), 85 Ohio St.3d 433, 709 N.E.2d 140, this Honorable Court explained:

> [T]his court has held that capital sentencing juries are permitted to review victim-impact evidence if the evidence is relevant to the circumstances of

> the murder, the existence of the statutory aggravating circumstances that permit the death penalty, and the nature and circumstances of the statutory aggravating circumstances, if the evidence is introduced to attempt to refute or rebut the mitigating evidence offered, or if the defendant requests a presentence investigation report.

Id. "This court permitted a jury to review victim-impact evidence in *State v. Fautenberry* (1995), 72 Ohio St.3d 435, 440, 650 N.E.2d 878, 883, where the court found that 'evidence which depicts *both* the circumstances surrounding the commission of the murder and also the impact of the murder on the victim's family may be admissible during *both* the guilt and sentencing phases.'" *White, supra,* at 446, citing *Fautenberry, supra,* at 440.

Michelle Kenney's testimony was relevant to the nature circumstances of the murder, the existence of the statutory aggravating circumstances that permit the death penalty, and the nature and circumstances of the statutory aggravating circumstances. Although defendant highlights only portions of her testimony, a thorough review shows that the testimony was relevant and proper. Michelle Kenney's testimony about who lived at her house was relevant to show who had access to the dwelling. (Tr. pp. 793-5). Michelle Kenney's habit of making regular telephone to her sister prior to October 7, 2005 (and the fact that she was suddenly unable to reach her sister because she had to go to the hospital) was relevant to prove the existence of the aggravating circumstance, i.e., the fact that the victim was a witness in a domestic violence incident. (Tr. p. 796-801). Likewise, the regularity of her communication with the victim showed her personal knowledge of the existence of the aggravating circumstance.

Michelle Kenney's testimony about going to the hospital, seeing her sister's injuries, and her ultimate death, was relevant to prove the causation element of aggravated murder. Together with the testimony of Lauretta Kenney, who witnessed

defendant shoot their sister, Michelle Kenney's testimony established that defendant's conduct caused the victim's injuries and death.

Likewise, Lauretta Kenney's testimony about the regularity of her telephone calls with her sister, the victim, and the sudden break of communication around October 8, 2008 was relevant to prove the existence of the aggravating circumstance, i.e., the fact that the victim was a witness in a domestic violence incident. (Tr. p. 796-801). Again, the regularity of her communication with the victim (followed by the sudden break in communication at the time defendant assaulted the victim) showed Lauretta Kenney's personal knowledge of the existence of the aggravating circumstance. Defendant cites to page 877 of the transcript for the assertion that Lauretta testified about "how close she was with her sister as they grew up together," but a review of the transcript citation discloses no such testimony. (Apt. Br. at 58).

Further, Lauretta Kenney also provided testimony establishing the causation element of aggravated murder. Lauretta called the victim in the early morning hours of November 27, 2005 after Ms. Kenney received a telephone call from Willie Hutchinson who had met the victim at a bar earlier that evening. (Tr. 888). Ms. Kenney learned that defendant was at the victim home in violation of the Temporary Protection Order. The victim was scared and upset. (Tr. 890) Ms. Kenney drove to her sister's house and defendant's car was not there. (Tr. 1034) Ms. Kenney went up on the front porch and defendant and Ms. McCorkle were inside at the front door. (Tr. 1038) An argument ensued between Ms. Kenney and defendant, with defendant pulling a gun from his waist and firing shots while Ms. Kenney ran to safety. Ms. Kenney saw defendant kneeling near the victim, then get up look around, and run down the street toward St. Clair

Avnue. (Tr. 1039). Ms. Kenney called 911 to report the shooting and described Appellant's flight from the scene. (Tr. 1041).

Defendant next complains about the testimony of his daughter, Cheyenne Maxwell, whom defendant contends was improperly allowed to identify a picture of her mother before the jury due to its emotional impact. (Apt. Br. at 59, citing Tr. p. 862). A review of the transcript citation at page 862 discloses that the prosecutor did not actually show Cheyenne a picture of her mother. Instead, the prosecutor showed Cheyenne State's Exhibit 5, which is actually a photograph of the area of the house where the incident occurred—not a photograph of her mother. (See Tr. p. 862, 1832, State's Exhibit 5, contained in the record).

Defendant next complains about Dr. Joseph Felo's testimony "about the debilitating pain the decedent must have suffered from one of the gunshot wounds." (Apt. Br. at 59). The transcript reflects that Dr. Felo was asked about the effect of gunshot wound number one (which had entered above the victim's right eye and penetrated her sinus cavity). (Tr. p. 1473). In response to the question, Dr. Felo offered an unsolicited opinion about the high level of excruciating pain that a bullet perforation of an eye would have caused. The trial court sustained the defendant's objection and instructed the jury to disregard the answer. The prosecutor followed up the question by asking whether the wound would have been immediately fatal. (Tr. p. 1474). While this evidence does have bearing on the personal suffering of the victim, it is also relevant to the "facts and circumstances surrounding the offense," because it described one of the victim's injuries to have been painful but non-fatal. See *Fautenberry, supra,* at 440.

To the extent that introduction of Dr. Felo's pain statement might have caused error, the trial court gave a curative instruction for the jury to disregard the answer. (Tr.

p. 1474). Reversible error does not occur where a trial court sustains an objection to victim impact statements and gives the jury a curative instruction. *State v. Noser* (2001), Lucas App. No. L-00-1154, 2001 WL 1556491, at *13. Moreover, defendant does not demonstrate that the outcome would have been different, had Dr. Felo not made the statement about the victim's pain. It is appropriate to find error harmless where there is "either overwhelming evidence of guilt or some other indicia that the error did not contribute to the conviction." *State v. Ferguson* (1983), 5 Ohio St.3d 160, 166, 450 N.E.2d 265166, fn. 5. The State submits that Dr. Felo's isolated comment was not so prejudicial as to outweigh the overwhelming evidence of defendant's guilt, and therefore is harmless error.

Proposition of Law XI: The prosecutor may not argue victim-impact considerations or that the lack of mitigating factors under R.C. 2929.04(B) as a basis for the jury to consider death as the appropriate sentence.

In his eleventh proposition of law, defendant argues that he did not receive a fair trial due to alleged prosecutorial misconduct during the penalty phase. Specifically, defendant alleges that prosecutor improperly questioned Dr. McPherson about mitigating factors, restating arguments made in Proposition of Law I, the prosecutor improperly made a victim impact statement, improperly argued that ability to adapt to prison was not a mitigating factor, and argued mitigating factors that the defendant did not raise such as a bad or abusive childhood. For the reasons outlined in Appellee's response to proposition of law I, the prosecutor's questioning of Dr. McPherson was not error.

Similarly, the prosecutor did not argue that defendant's mitigation, such as ability to adapt to prison, "was not a mitigating factor," but instead questioned how much weight the jury should give such argument, stating that the jury should "assign the

weight that you think each of these deserve." (Tr. p. 2214). This argument was proper because it simply attempted to rebut a point of mitigation placed into issue by the defendant. See *State v. McGuire* (1997), 80 Ohio St.3d 390, 395, 686 N.E.2d 1112, 1117, ("McGuire specifically asserted his potential for rehabilitation as a mitigating factor, and the state was entitled to rebut that factor by arguing that McGuire's denial of guilt was inconsistent with a potential for rehabilitation.")

Defendant also contends that the prosecutor improperly argued the non-existence of mitigating factors that the defendant had not placed in issue, including a bad or abusive childhood. (Tr. p. 2216). Although a prosecutor may not turn the nonexistence of a mitigating factor into an aggravating circumstance,[9] the prosecutor was properly commenting on what weight the jury should give the mitigation that defendant had offered, which is permissible under *McGuire, supra*. The context of the prosecutor's comment showed that he was simply explaining that the mitigation offered by defendant was not sufficient to overcome the aggravating circumstances because it simply highlighted defendant's positive upbringing while failing to acknowledge any real remorse (which defendant did attempt to express, albeit halfheartedly, in his unsworn statement). (Compare Tr. pp. 2216, 2146). Nor did defendant offer any objection to the prosecutor's comment, which waives all but plain error. As the Court noted in *State v. Tyler* (1990), 50 Ohio St.3d 24, 41, 553 N.E.2d 576, "[i]t is far from clear that the jury would have found this factor equal in weight to the aggravating circumstance but for the prosecutor's remark." The State submits that defendant has not demonstrated that the mitigating factors would outweigh the aggravating circumstance beyond a reasonable

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[9]See. *State v. Stumpf* (1987), 32 Ohio St.3d 95, 106, 512 N.E.2d 598, 609-610, and. *State v. DePew* (1988), 38 Ohio St.3d 275, 289, 528 N.E.2d 542, 557-558.

doubt, but for the prosecutor's statement. Therefore, defendant cannot demonstrate plain error.

Finally, defendant contends that the prosecutor improperly made a victim impact statement in closing argument by pointing out that while the crime was devastating to the victim's family, the murder of a witness as retaliation for testifying was a serious offense against the criminal justice system itself. (Tr. p. 2213). While the prosecutor's argument did have some victim-impact relevance, it also emphasized the nature of the aggravating circumstance for the jury, which is a permissible argument. Because the prosecutor's comment was relevant to the aggravating circumstance, the State submits that it was proper under *Fautenberry, supra.* Again, "This court permitted a jury to review victim-impact evidence in *State v. Fautenberry* (1995), 72 Ohio St.3d 435, 440, 650 N.E.2d 878, 883, where the court found that 'evidence which depicts *both* the circumstances surrounding the commission of the murder and also the impact of the murder on the victim's family may be admissible during *both* the guilt and sentencing phases.'" *White, supra,* at 446, citing *Fautenberry, supra,* at 440.

As such, defendant's eleventh proposition of law lacks merit and should be overruled.

<u>Proposition of Law XIII:</u> The public safety exception to the requirements of Miranda does not apply when one is arrested in a private home with no other occupants and the home has been secured.

Within this proposition, Defendant argues that his motion to suppress his statements to arresting officers should have been granted. Specifically, he argues that the trial court erred in applying the public safety exception to the police question and his response. Defendant's argument lacks merit for at least three reasons. First, *Miranda* does not apply because Defendant was not being interrogated. Second, assuming the

trial court applied the wrong standard, the trial court made the correct decision. Third, assuming this evidence should have been suppressed, it was not prejudicial to Defendant's trial.

A. Standard of review

> "Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19, [20], 1 OBR 57, 437 N.E.2d 583. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, at ¶ 8.

State v. Reynolds, 110 Ohio ST.3d 71, 2006-Ohio-3665, at ¶ 100.

B. Defendant was not interrogated

The Defendant was in custody. The next issue concerns whether the Defendant was interrogated. "Interrogation involves express questioning or words or actions reasonably likely to elicit an incriminating response." *State v. Franklin*, 97 Ohio St.3d 1, 2002 -Ohio- 5304, at ¶ 40 (citing *Rhode Island v. Innis* (1980), 446 U.S. 291, 301-302).

Members of the fugitive apprehension task force went to the Defendant's home to execute an arrest warrant. The agent testified that as a matter of policy he asks arrestees whether they are armed. (Tr. 198). This question is asked for the agent's safety. (Tr. 198).

The agent testified that the defendant was found in a bedroom crawl space. The defendant was removed from the crawl space and as he was being handcuffed he was

asked whether he was armed. (Tr. 204). The defendant responded that he did not have a gun anymore. (Tr. 204).

This was a direct question that was meant to elicit a direct response i.e. "yes" or "no." This question is not reasonably likely to elicit the response "I don't have a gun anymore." The defendant did not answer the posed question and provided an unforeseeable response. Police routinely ask this question and there is either no response or a direct response. It was not reasonable or foreseeable that a defendant would add the word "anymore" to the response "I do not have a gun." As this statement was not foreseeable, there was no integration.

Without integration, *Miranda* is not implicated. Defendant's statements were not protected by *Miranda* and were properly admitted.

C. Public Safety Exception

In *New York v. Quarles* (1984), 467 U.S. 649, "the [United States Supreme C]ourt adopted a public-safety exception to the Miranda rule: police may justifiably fail to inform a suspect of his Miranda rights in order to ask *questions necessary to secure their own safety* or the safety of the public. The questions asked under the public-safety exception must be readily distinguishable from questions designed to elicit testimonial evidence from the suspect. The availability of the public-safety exception does not depend upon the motivation of the individual officers involved. So application of the exception does not depend 'on post hoc findings at a suppression hearing concerning the subjective motivation of the arresting officer.'" *State v. Sneed*, 166 Ohio App.3d 492, 2006-Ohio-1749, at ¶s 18-19 (footnotes omitted).

The agent testified that his job is to apprehend violent fugitives for Cleveland homicide located within Cuyahoga County. (Tr. 196). These agents have probable cause to believe that a person that has committed a homicide is armed and dangerous.

With this background, the agent asked the defendant if he was armed. This was necessary to secure his own safety in apprehending the suspect, patting down the suspect, and to protect the safety of the additional arresting officers. Defendant argues that the public safety exception does not apply because the officers were in his home and there was no threat to the public. This argument only relies on the second have of the public safety exception. The first half of the test allows officers to ask questions to protect their *own* safety. The agent's safety is always at risk, especially when an arrest takes place in the Defendant's home.

The trial court correctly held that the public safety exception applied to the agent's questions and the defendant's responses. This proposition should be overruled.

D. Assuming the statement should have been suppressed, defendant's statement was not prejudicial to his case.

Assuming that Defendant's statements should have been suppressed, the Court's inquiry does not end there. Defendant must show that admission of his statements prejudiced the trial. There was overwhelming evidence of guilt. Several eyewitnesses place Defendant at the murder scene and the Defendant explained to Gregg how he stalked and murdered McCorkle. Defendant would have been convicted even if these statements were suppressed.

"The final inquiry is whether the [Fifth] Amendment error was 'harmless beyond a reasonable doubt.' This inquiry is not simply a sufficiency of the remaining evidence inquiry; rather, the question is whether there is a reasonable possibility that the

evidence complained of might have contributed to the conviction." *State v. Madrigal*, 87 Ohio St.3d 378, 388, 2000-Ohio-448 (quoting *Chapman v. California* (1967), 386 U.S. 18, 23).

The strength of the State's case consisted of two main areas. Eyewitness testimony that places the Defendant at the murder scene with a gun and physical evidence of several gunshots.

The fact that the Defendant told his arresting officers that he got rid of a gun does not raise a reasonable probability that the evidence might have contributed to the conviction. There is not a reasonable probability that the statement contributed to the Defendant's conviction. This proposition lacks merit and should be overruled.

Proposition of Law XIV: The out of court statement of the decedent via a three way telephone call is inadmissible hearsay and the appellant's right to confrontation under the Sixth and Fourteenth Amendments of the federal Constitution was violated.

Within this proposition, Defendant argues that an out of court statement of the victim made to the Defendant was improperly admitted. Specifically, he claims that Gregg's testimony that McCorkle told the defendant that she told the grand jury the truth is hearsay and violates the confrontation clause. Defendant is wrong on both points. First, McCorkle's statement is not testimonial. Second, the statement is not hearsay because it was not admitted for the truth of the matter asserted.

A. Standard of review

1. Was the statement testimonial?

A defendant has a right to confront witnesses against him. For the Sixth Amendment right to confrontation to apply the out of court statements must be testimonial and hearsay. *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, at ¶ 59.

There are "three examples of 'formulations' for 'testimonial statements': all ex parte in-court testimony or its functional equivalent; extrajudicial statements contained in formalized testimonial materials; and a class of statements that are made "'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Id.* at ¶ 60 (citations omitted).

The statement was not made in the context of in-court testimony or its equivalent. The statement was not an extrajudicial statement contained in formalized testimonial materials. The statement would not lead an objective witness reasonably to believe that the statement would be available for trial. McCorkle made this statement to Defendant. Defendant was going to be the defendant. An objective witness would know that Defendant would not be forced to testify. An objective witness would presume that this statement would *not* be available for trial. The statement is not testimonial. The Defendant's Sixth Amendment rights have not been implicated. The analysis now turns to a determination whether the statement is hearsay.

2. Was the statement hearsay?

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C).

Gregg's testimony that McCorkle's stated "I told the truth" meets the first half of the hearsay definition. It is a statement made by someone else while testifying at a trial. *But the statement was not offered to prove the truth of the matter asserted.* Whether McCorkle told the grand jury the truth was not before the jury nor was the State attempting to prove that McCorkle told the grand jury the truth. The statement was offered as evidence that the Defendant believed McCorkle told the truth and he needed

to kill her so she would not testify. This statement is excluded from hearsay's definition and was properly admitted. This proposition should be overruled.

Proposition of Law XV: The admission of the autopsy report and testimony from a doctor who did not perform the autopsy violates the Sixth and Fourteenth Amendments of the federal Constitution.

Within this proposition, the Defendant argues that his confrontation rights were violated. Specifically, he argues that the State was prohibited from using an expert to testify to the results of another expert's autopsy. This argument fails. This Court has rejected this claim. And the case pending before the United States Supreme Court This proposition fails.

A. This Court's controlling decision

In *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, this Court was confronted with an identical issue. The defendant argued that because the person that preformed the autopsy did not testify his confrontation rights were violated. This Court rejected that argument and held 1) "The presentation of expert testimony [] has no unavailability requirement" and "[a]n expert witness can testify even if a more qualified expert might be available;" and 2) "[w]e agree with the majority view under *Crawford* and conclude that autopsy records are admissible as nontestimonial business records." *Id.* at ¶s 78 & 88. This issue has been decided and the Defendant provides no reason why the decision was incorrect. This proposition should be overruled.

B. Pending issue before the United States Supreme Court

In *Melendez-Diaz v. Massachusetts*, Supreme Court of the United States Docket Number Docket for 07-591, the following issue, advanced by the defendant/petitioner, is currently before the United States Supreme Court:

> Whether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is "testimonial" evidence subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004).

In that case, the defendant was apprehended with suspected narcotics. The suspected narcotics were tested and found to be cocaine. The trial court allowed the State to admit the laboratory report through an unqualified police officer.

This case is distinguishable from the present case. A qualified expert testified concerning 1) the procedures used during the autopsy 2) the results obtained and 3) the conclusion of the medical examiner that preformed the autopsy. According to the Brief of Law Professors as Amici Curiae in Support of Petitioner Melendez-Diaz, this would be an acceptable framework to resolve the issue:

> When the scientist who conducted the original test is unavailable, having another expert retest the materials certainly represents the optimal means for protecting a defendant's Confrontation rights. In many instances, though, as with a years-old autopsy, retesting will be impracticable or literally impossible, and the necessity issue resurfaces. In narrowly circumscribed circumstances - (1) conducting another test is infeasible; (2) the original test was conducted in accordance with regularized procedures and documented in sufficient detail for another expert to understand, interpret, and evaluate the results, and (3) the original expert is now unavailable - a plausible argument exists that surrogate testimony by another qualified expert ought to be constitutionally permissible.
>
> This framework gives necessity and unavailability a larger role in confrontation analysis than Crawford expressly contemplates, but we submit that this proposal accords with Crawford's spirit.

The framework suggested by the brief in support of petitioner is exactly what happened in this case. The expert's testimony and admission of the autopsy was proper under this Court's precedent and a framework submitted before the United States Supreme Court. This proposition lacks merit.

C. Assuming the testimony and autopsy were improper, the Defendant was not prejudiced by admission of the evidence.

Causation, while an essential element, was not at issue. "The final inquiry is whether the Sixth Amendment error was 'harmless beyond a reasonable doubt.' This inquiry is not simply a sufficiency of the remaining evidence inquiry; rather, the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Madrigal*, 2000-Ohio-448 (quoting *Chapman v. California* (1967), 386 U.S. 18, 23).

Several witness testified that McCorkle had two gunshot wounds to her head. This was obviously the cause of death. The admission of the autopsy and testimony does not raise a reasonable possibility that the evidence contributed to the conviction. The jury would have convicted the Defendant had the testimony and autopsy been excluded. This proposition should be overruled.

Proposition of Law XVI: In a capital trial, the only evidence that a penalty phase jury may consider from the culpability phase of trial is that which is relevant to a proven aggravating circumstance or mitigation for the defendant.

In his sixteenth proposition of law, defendant argues that the trial court improperly allowed an autopsy photograph, as well as photographs of the victim taken during the investigation of the felonious assault incident to be admitted during the penalty phase, which defendant argues was irrelevant to the aggravating circumstance. (Apt. Br. at 76-77).

As an initial matter, defendant states that State's Exhibits 72, 73, 75 and 76 "were of the injuries the victim sustained from the felonious assault charge over a decade earlier." (Apt. Br. at 77). In fact, the photographs of victim's injuries document why she became a witness against defendant, which was directly relevant to the aggravating

circumstance of killing a witness. On pages 1338-40, Detective Sardon testified that he took the photographs of the victim's injuries when he took her statement on October 10, 2005.

Secondly, defendant does not demonstrate that the trial erred by admitting State's Exhibits 71, 72, 73, 75, and 75, and 100. "It is the trial court's responsibility to determine the admissibility of evidence." *State v. Getsy* (1995), 84 Ohio St.3d 180, 181, 702 N.E.2d 866, citing Evid.R. 104(A) and *State v. Heinish* (1990), 50 Ohio St.3d 231, 553 N.E.2d 1026."[P]ractically all the guilt-phase evidence was relevant to the aggravating circumstance, the nature and circumstances of the offense." *State v. Hale,* 2008 -Ohio- 3426, at ¶ 140 (slip opinion), citing State v. Jones (2001), 91 Ohio St.3d 335, 350, 744 N.E.2d 1163. The trial court explained on pages 2201 through 2204, the trial court explained that these exhibits, including one autopsy photograph documenting the victim's murder, were relevant to prove that victim was purposely killed in retaliation for her testimony in a criminal proceeding.

As such, defendant's sixteenth proposition of law lacks merit and should be overruled.

Proposition of Law XVII: The death penalty may not be sustained where the cumulative errors occurring in the trial deprived the defendant of a fair consideration of the appropriateness of the death penalty.

For his seventeenth proposition, defendant argues that the cumulative effect of his claimed errors entitled him to a new trial. The State, after responding to each of Maxwell's claimed errors, asserts that none of these errors, either individually or cumulatively, warrant a new trial. *State v. Jackson,* 107 Ohio St.3d 300, 2006-Ohio-1. As such, the State submits that defendant's seventeenth proposition lacks merit and should be overruled.

<u>Proposition of Law XVIII:</u> A sentence of death is in appropriate where the aggravating factors proven at trial do not outweigh the mitigation beyond a reasonable doubt.

In his eighteenth proposition of law, defendant argues that the aggravating factor proven at trial do not outweigh the mitigating factors beyond a reasonable doubt. (Apt. Br. at 80). Defendant's eighteenth proposition of law invokes this Court's role set forth in R.C. 2929.05 to independently review whether a sentence of death is appropriate. Defendant maintains that the aggravating circumstance, i.e. purposely killing Nichole McCorkel in retaliation for her testimony in a criminal proceeding, is entitled to less weight due to evidence that defendant killed her in a jealous rage. Then, defendant contends that mitigation evidence of his low intelligence, ability to adapt to prison, steady employment / work skills, love and support of his family, alcohol dependency, and remorse, outweigh the aggravating factor by proof beyond a reasonable doubt. (Apt. Br. at 79).

No compelling evidence that the aggravating circumstance is worth less weight because defendant allegedly had jealousy motive.

Defendant first argues that the aggravating circumstance is entitled to less weight due to evidence that he murdered the victim out of a jealous rage, rather than anger or retaliation over her grand jury testimony. Evidence does not support the argument that jealousy, rather than retaliation, was defendant's primary motive for killing the victim.

John Gregg testified that in October 2005, Defendant told Gregg that he pistol-whipped McCorkle. (Tr. 1664). Later Defendant called Gregg and asked him to talk with McCorkle because the Defendant learned that an individual received an eight-year prison sentence for felonious assault. (Tr. 1665-1666).

Gregg talked with McCorkle because Defendant knew that she was going to testify at the Grand Jury. (Tr. 1667). Defendant also told Gregg that he was aware of a temporary protection order. (Tr. 1670).

Gregg indicated that he was driving to his mother's house when he received a telephone call from Defendant. Defendant told Gregg that he was unable to locate McCorkle and he needed to speak with her about her grand jury testimony that day. (Tr. 1672-1673).

Defendant then called McCorkle on a three-way conversation and Gregg heard McCorkle tell Defendant that she told the truth to the grand jury. (Tr. 1675). Defendant told Gregg that "the bitch is going to make me kill her." (Tr. 1676). Defendant then asked Gregg if he knew where he could get a gun. (Tr. 1677).

Four days later, Gregg learned that McCorkle was killed. (Tr. 1679). Defendant admitted he killed McCorkle. Defendant told Gregg how he carried out his plan. Defendant, armed with a gun, followed McCorkle to a bar. After seeing McCorkle in the bar with another man, Defendant waited in his car outside the bar. When McCorkle left the bar, Defendant followed her to her house. He waited for her date to leave and called and asked to come over. McCorkle agreed and Defendant entered the house with a gun. After some time, McCorkle's sister arrived and Defendant shot at her. Then he turned and shot McCorkle. McCorkle fell and was moving on the ground so he fired another shot at point blank range into McCorkle's head. (Tr. 1679-1683).

The circumstances of defendant's behavior on the night he shot the victim also indicated that the murder was not done in a jealous rage, but rather was the product of careful and deliberate planning. According to Gregg's testimony, defendant had followed the victim to the in his car. (Tr. p. 1680). Later that night, when Lauretta

Kenney ran after defendant after seeing him shoot her sister, defendant had apparently parked his car some distance away from the crime scene because he jogged away from the crime scene on foot after shooting the victim. (See Tr. pp. 1041-1043, 1047-1049). If defendant had been acting under the influence of a jealous rage, he would have simply driven his car to the victim's residence, shot her, and fled in his vehicle.

Gregg's account was also consistent with the testimony of an independent witness. There was no evidence that Gregg had ever spoken to Willie Hutchinson, who testified that he was the one who had gone out with the victim for a drink on the night she was killed. (Tr. pp. 1500-1509, 1941).

Evidence showed that defendant made a threat to obtain a gun, a threat to kill McCorkle, a decision to follow McCorkle with a recently obtained gun, a decision to enter McCorkle's home with a gun after a witness left, shot McCorkle, then shot McCorkle again because she moving on the floor. Defendant designed a plan to kill McCorkle over a four-day period. Defendant could have abandoned this plan during this four-day period. He did not. He then began carrying out this plan. There were many opportunities to abandon the decision to kill McCorkle during the events immediately before her death.

The evidence that defendant planned and carried out the execution of a person who was a witness against him was much more compelling than the notion that the defendant suddenly chose to murder the victim in a fit of jealous rage. Both the jury and the trial court agreed. In particular, the trial court specifically held:

> In my independent weighing process, I do not agree with the defense's contention that Nichole McCorkle's behavior on the night of the murder had anything to do with Mr. Maxwell's actions. I specifically find that she did not induce the offense. Further I find that the Aggravated Murder committed by Mr. Maxwell was not done while the defendant was

> acting under duress, coercion or strong provocation. Therefore, I find that the mitigatory factors listed in R.C. 2929.04(B)(1) and (2) do not apply.

(March 23, 2007 Opinion of the Court Findings of Fact and Conclusions of Law Regarding Imposition of Death Penalty at p. 10). As such, defendant has not demonstrated that any victim provocation or jealousy mitigated the aggravating factor, which was extremely serious. The trial court held:

> The retaliation for testimony aggravating circumstance is a weight one. In considering how much pressure this specification puts on the scales of justice one has to consider the potential chilling effect retaliation has on the criminal justice system. Our system of justice is dependent upon victims and witnesses confronting the accused in open court. Retaliatory acts chill the willingness of victims to participate in our system of justice.
>
> The civilized society which we enjoy in the United States and the State of Ohio is Dependent upon our Justice System. Our criminal Justice System would not exist if witnesses did not come forward to seek justice and confront the indicted.
>
> Without a strong justice system, the rule of law would not exist. Civilized democracies are dependant upon the rule of law. Without the rule of law, society would be unrecognizable from the one we live in today and have enjoyed for over 230 years.
>
> Mr. Maxwell's aggravated murder of Nicole McCorkle was a crime against her but also an attack on the rule of law.

Id, at pp. 5-6.

If anything, the trial court's assessment of the weight of the witness retaliation aggravating circumstance was restrained. Witness intimidation has become an increasingly malignant cancer in the criminal justice system. "Police and prosecutors have been contending with reluctant witnesses for decades. But according to law enforcement experts, the problem is getting dramatically worse, and is reflected in falling arrest and conviction rates for violent crimes." Jeremy Kahn, *The Story of a Snitch,* The Atlantic Monthly (April, 2007), available for download at

http://www.theatlantic.com/doc/print/200704/stop-snitching (last viewed August 17, 2008). Kahn's article offered a bleak but compelling assessment:

> The growing culture of silence helps to legitimize witness intimidation. At the same time, criminals have become more adept at enforcing the code, using increasingly sophisticated methods to bribe, intimidate, and harm witnesses. Defendants and their surrogates have obtained witnesses' supposedly confidential grand-jury testimony and tacked it to their doors, along with threatening notes. They have adopted new technology like cell-phone cameras and text messaging to spread the word about who is snitching; threats have even been text-messaged to the phones of sequestered witnesses. ***And every incident in which a witness is assaulted or murdered heightens the climate of fear and mistrust—the sense that the law either can't or won't protect ordinary people.***

Id. (emphasis added).

As the foregoing makes clear, the aggravating circumstance in this case had great weight and importance, and defendant has not offered compelling reasons why it was not worthy of the weight the trial court and jury assigned to it.

Defendant's mitigation evidence does not outweigh the aggravating circumstance by proof beyond a reasonable doubt.

In finding that the mitigating factors did not outweigh the aggravating circumstance beyond a reasonable doubt, the trial court offered a well-reasoned and thorough analysis of the mitigating factors offered by defendant. The trial court indicated that it considered whether the victim induced the offense under R.C. 2929.04(B)(1), whether it was unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion or strong provocation, remorse, love and support of family, the defendant's work ethic, the defendant's lack of significant criminal history, the defendant's conformance while incarcerated, residual doubt,[10] and

[10]Ohio law, however, precludes consideration of residual doubt as a mitigating factor. "Residual doubt is not an acceptable mitigating factor under R.C. 2929.04(B), since it is

defendant's lower academic ability. (March 23, 2007 Opinion of the Court Findings of Fact and Conclusions of Law Regarding Imposition of Death Penalty, at p. 8).

The trial court properly appropriately rejected as mitigation the love and support of defendants family / defendant's positive background as mitigation. This Honorable Court has recently noted that a defendant's history, character, and background has been rarely given decisive weight as a mitigating factor. *Hale, supra,* 2008-Ohio-3426 (slip opinion), at ¶ 204. The trial court explained: "I find that Mr. Maxwell's life, while laudable in some areas, including him being a high school graduate, hard worker, and loved by his family, was lacking in depth." *Id.,* at p. 11. "Mr. Maxwell never held a job of any regular structure or duration. When asked by friends and family for assistance, he was there; however, the evidence did not demonstrate that he was a regular provider for his family, including his daughter Cheyenne and the victim, Nichole McCorkle." *Id.* "The Court concludes that the mitigatory factors of Mr. Maxwell's educational attainment and work ethic are without significant weight to tilt the scales against the weight of the aggravating circumstance." *Id.*

Defendant next cites "low intelligence" as a mitigating factor. (Apt. Br. at 82). As explained above, evidence of allegedly low intelligence is not persuasive enough to be

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irrelevant to the issue of whether the defendant should be sentenced to death." *State v. McGuire* (1997), 80 Ohio St.3d 390, syllabus. "[R]esidual doubt is mentioned nowhere in the statutory scheme, and further, cannot be considered under the catchall factor of R.C. 2929.04(B)(7)." *Id.,* at 403. The *McGuire* court explained that "* * * R.C. 2929.04(B)(7) * * * allows consideration only of those other factors relevant to the issue of whether the offender should be sentenced to death, that is, only those factors relating to the nature and circumstances of the offense, and the history, character, and background of the offender. *Id.,* citing *State v. Watson* (1991), 61 Ohio St.3d 1, 19, 572 N.E.2d 97; see also *State v. Cunningham,* 105 Ohio St.3d 197, 2004-Ohio-7007, at ¶ 112 (reaffirming the *McGuire* holding). As such, the trial court's discussion of residual doubt is not relevant to this Honorable Court's independent weighing of whether the death penalty is appropriate in this case.

considered a decisive mitigating factor. In two IQ tests administered by experts, defendant scored on a range from borderline to average functioning, but consistently above the mental retardation level. Defendant likewise presented his positive work and employment history through the testimony of his own relatives, neighbors and former employers, all of whom contradicted claims of defendant suffering from a low enough intelligence that warranted serious condition as mitigation. Defendant's brother William Steward testified that defendant had graduated high school, and had skills operating heavy machinery. (Tr. pp. 2082-83). Defendant's neighbor Roscoe Horne testified that he had known defendant for over five years, and that defendant had worked with Mr. Horn. "[Defendant]'s done excavating, he's ran heavy equipment. He's an excellent operator of heavy equipment. He also drives dump trucks, all types of different vehicles or whatnot and he's just a very trustworthy person." (Tr. p. 2098). Mr. Horn described defendant as a versatile and excellent worker, and "if there was a problem, [defendant]'s the first to try to fix it." (Tr. p. 2099). Mr. Horn relied on defendant to take maintain and store his equipment, and relied on defendant's ability to successfully communicate and interact with other workers. (Tr. pp. 2100). Andy Maxwell testified that he viewed his brother as a teacher who always took the time to guid him through life. (Tr. pp. 2137-2141). Andy Maxwell also testified that that defendant had a special skill for training and breaking horses. (Tr. p. 2142). Andy Maxwell also testified that defendant was a very knowledgeable person who had helped other felons obtain jobs by copying information posted at a barbershop. (Tr. p. 2143). Placed in context, defendant's allegedly positive work and employment history does not mitigate the aggravating circumstance. His ability to find employment evidently did not trickle down to supporting his child, and any positive contribution to society through his

work record was completely undone when he set out to execute the victim for having testified before the grand jury.

Defendant likewise argues that his "ability to function while incarcerated" is a mitigating factor that outweighs the aggravating circumstance. (Apt. Br. at 82). The trial court afforded this factor significant weight, but found that it still did not overcome the aggravating circumstance. Defendant's incarceration record mitigates nothing. Defendant's prison accomplishments occurred prior to this crime. The execution of the victim overshadows any positive accomplishment that defendant might have had while previously incarcerated. If anything, this crime demonstrates defendant's own profound failure to rehabilitate himself, as well as his failure to learn anything from his previous prison experiences. If anything positive had come from his prison record, he would not have committed this crime. The aggravating circumstance far outweighs any mitigating factors that can be found in defendant's prison record.

Defendant next contends that alcohol dependency is a mitigating factor sufficient enough to have overcome the aggravating circumstance. Defendant did not produce any records other than his own self-reporting to demonstrate that he had suffered from alcoholism. (Tr. p. 2188-9). Even if defendant had produced any evidence that an alcohol addiction affected his life in such a profound way that it could be considered a significant mitigating factor, "[i]t is well settled that alcoholism and other addictions are given little weight in the sentencing phase." *State v. Otte,* Cuyahoga App. No. 84455, 2005-Ohio-100, at ¶ 35, citing *State v. Slagle* (1992), 65 Ohio St.3d 597, 614, 605 N.E.2d 916, citing *State v. Morales,* 32 Ohio St.3d at 261, 513 N.E.2d 267; *State v. Hicks* (1989), 43 Ohio St.3d 72, 80, 538 N.E.2d 1030; *State v. Lawson* (1992), 64 Ohio St.3d 336, 352, 595 N.E.2d 902.

Finally, defendant contends that his own expressions of remorse were a significant enough mitigating factor to outweigh the aggravating circumstance. (Apt. Br. at 82). It should be noted that in his own unsworn statement, defendant did not truly express remorse for having caused the victim's death, but instead was "sorry to the victim's family and my family for going through this. I wouldn't want nobody's family to go through this," and that "he was sorry they had to go through this." (Tr. pp. 2146-7). Defendant then added that he "did this" (i.e., go to trial), just so he could see his daughter "this one last time." (Tr. p. 2146). Instead of being sincerely remorseful for his conduct, defendant continued to evade real responsibility, and therefore real remorse. And defendant then stated that he had forced his daughter to undergo the traumatic experience of testifying about seeing him shoot her mother just so he could selfishly see her "this one last time." Any mitigatory weight that could be attached to defendant's performance is negligible at best.

In summary, defendant has failed to demonstrate that any of the mitigating factors raised in this case outweighed the aggravating circumstance by proof beyond a reasonable doubt. The State therefore submits that defendant's eighteenth proposition of law lacks merit and should be overruled.

Proposition of Law XIX: The death penalty is unconstitutional as presently administered in Ohio.

In his last proposition of law, defendant argues that Ohio's death penalty is unconstitutional. This Honorable Court has repeatedly rejected any arguments that Ohio's death penalty scheme is unconstitutional. See, e.g., *State v. McNeill,* 83 Ohio St.3d 438, 453, 1998-Ohio-293; *State v. Gumm,* 73 Ohio St.3d 413, 417, 1995-Ohio-24; *State v. Evans* (1992), 63 Ohio St.3d 231, 253; *State v. Mills* (1992), 62 Ohio St.3d 357;

State v. Coleman (1989), 45 Ohio St.3d 298, 308; *State v. Poindexter* (1988), 36 Ohio St.3d 1; *State v. Zuern* (1987), 32 Ohio St.3d 56; *State v. Buell* (1986), 22 Ohio St.3d 124, 138; *State v. Jenkins* (1984), 15 Ohio St.3d 164. Accordingly, this Court should reject defendant's nineteenth proposition of law.

CONCLUSION

For the foregoing reasons, the State of Ohio respectfully requests that this Honorable Court affirm defendant's convictions and death sentence.

Respectfully submitted,

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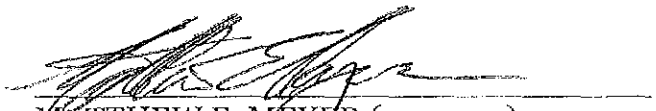

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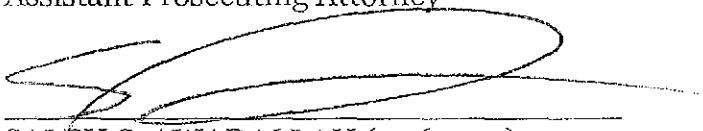

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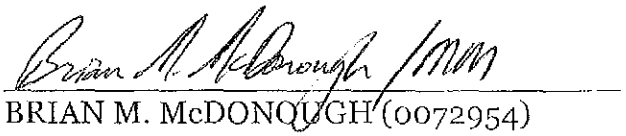

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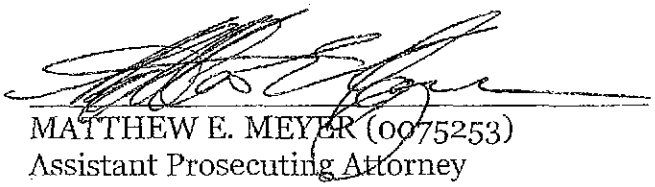
CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Appellee has been mailed this 18th day of August, 2008 to David L. Doughten, Esq., and John P. Parker, Esq., 4403 St. Clair Ave., Cleveland, Ohio 44103-1125.



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