

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

CASE NO. 2007-1741

Plaintiff-Appellee,

DEATH PENALTY APPEAL

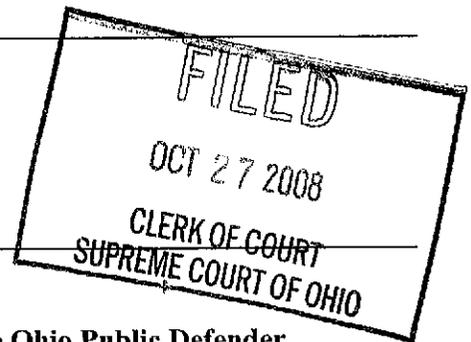
vs.

EDWARD LEE LANG,

Defendant-Appellant.

ON APPEAL FROM THE COURT OF COMMON PLEAS,
STARK COUNTY, OHIO
CASE NO. 2006-CR-1824(A)

MERIT BRIEF
THE STATE OF OHIO,
PLAINTIFF-APPELLEE



JOHN D. FERRERO, #0018590
PROSECUTING ATTORNEY,
STARK COUNTY, OHIO

By: RONALD MARK CALDWELL
Ohio Sup. Ct. Reg. No. 0030663
Assistant Prosecuting Attorney
Appellate Section

KATHLEEN O. TATARSKY
Ohio Sup. Ct. Reg. No. 0017115
Assistant Prosecuting Attorney
Appellate Section

Stark County Prosecutor's Office
110 Central Plaza, South
Suite 510
Canton, Ohio 44702
(330) 451-7897

FAX (330) 451-7120

Counsel for Plaintiff-Appellee

Office of the Ohio Public Defender

JOSEPH E. WILHELM
Ohio Sup. Ct. Reg. No. 0055407
Chief Counsel, Death Penalty Division
Counsel of Record

KELLY L. CULSHAW
Ohio Sup. Ct. Reg. No. 0066394
Supervisor, Death Penalty Division

BENJAMIN D. ZOBBER
Ohio Sup. Ct. Reg. No. 0079118
Assistant State Public Defender

Office of the Ohio Public Defender
8 East Long Street - 11th Floor
Columbus, Ohio 43215
(614) 466-5394

FAX: (614) 644-0708

Counsel for Defendant-Appellant

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE AND FACTS	2
ARGUMENT	

PROPOSITION OF LAW NO. 1

A DEFENDANT’S RIGHT TO DUE PROCESS IS VIOLATED WHEN A JUROR WHO IS RELATED ONE OF THE VICTIMS, AND HAS A PREJUDICE AND BIAS, IS SEATED ON THE JURY, U.S. CONSTITUTION AMENDS. VI, XIV; OHIO CONSTITUTION ARTICLE I §§ 5, 10. 12

PROPOSITION OF LAW NO. 2

EXPERT SCIENTIFIC TESTIMONY THAT IS NOT ESTABLISHED TO A REASONABLE DEGREE OF SCIENTIFIC CERTAINTY IS UNRELIABLE AND INADMISSIBLE. ADMISSION OF EVIDENCE THAT DOES NOT MEET THIS STANDARD VIOLATES A DEFENDANT’S RIGHTS TO EQUAL PROTECTION, DUE PROCESS, AND HIS RIGHTS TO CONFRONTATION AND TO PRESENT A DEFENSE. U.S. CONSTITUTION AMENDS. V, XIV; IT ALSO VIOLATES OHIO R. EVIDENCE 401-403. 18

PROPOSITION OF LAW NO. 3

A DEFENDANT’S RIGHT TO GRAND JURY INDICTMENT UNDER THE OHIO CONSTITUTION, AND HIS RIGHTS TO DUE PROCESS UNDER BOTH THE STATE AND FEDERAL CONSTITUTIONS ARE VIOLATED WHEN THE INDICTMENT FAILS TO ALLEGE A MENS REA ELEMENT FOR THE OFFENSE OF AGGRAVATED ROBBERY. U.S. CONSTITUTION AMENDS. V, XIV; OHIO CONSTITUTION ARTICLE I, §§ 10, 16. THIS ERROR ALSO DENIES THE DEFENDANT HIS RIGHTS AGAINST CRUEL AND UNUSUAL PUNISHMENT BECAUSE IT AFFECTS THE JURY’S VERDICT ON THE O.R.C. §2929.04(A)(7) SPECIFICATION. U.S. CONSTITUTION AMENDS. VIII, XIV; OHIO CONSTITUTION ARTICLE I, § 9. 23

PROPOSITION OF LAW NO. 4

WHEN A DEFENDANT IS CHARGED WITH AGGRAVATED FELONY MURDER AND THE O.R.C. § 2929.04(A)(7) SPECIFICATION AS EITHER THE PRINCIPAL OFFENDER OR AN AIDER AND ABETTER, THE JURY MUST BE GIVEN THE OPTION TO FIND THE DEFENDANT GUILTY

**UNDER EITHER THE PRINCIPAL OFFENDER ELEMENT OR THE
PRIOR CALCULATION AND DESIGN ELEMENT OF THAT
SPECIFICATION. U.S. CONSTITUTION AMENDS. VIII, XIV; OHIO
CONSTITUTION ARTICLE I, §§ 9, 16. 29**

PROPOSITION OF LAW NO. 5

**AN ACCUSED IS DEPRIVED OF SUBSTANTIVE AND PROCEDURAL
DUE PROCESS RIGHTS WHEN A CONVICTION RESULTS DESPITE
THE STATE’S FAILURE TO INTRODUCE SUFFICIENT EVIDENCE.
U.S. CONSTITUTION AMENDS. VI, XIV; OHIO CONSTITUTION
ARTICLE I, §§ 9, 16. 35**

PROPOSITION OF LAW NO. 6

**THE ACCUSED IS DENIED THE RIGHTS TO DUE PROCESS AND
EFFECTIVE ASSISTANCE OF COUNSEL WHEN A TRIAL COURT
REFUSES TO GRANT ACCESS TO GRAND JURY MATERIALS PRIOR
TO TRIAL. U.S. CONSTITUTION AMENDS. V, VI, V111, IX, XIV;
OHIO CONSTITUTION ARTICLE I, §§ 1, 2, 5, 9, 10, 16, 20. 43**

PROPOSITION OF LAW NO. 6

**THE ACCUSED IS DENIED THE RIGHTS TO DUE PROCESS AND
EFFECTIVE ASSISTANCE OF COUNSEL WHEN A TRIAL COURT
REFUSES TO GRANT ACCESS TO GRAND JURY MATERIALS PRIOR
TO TRIAL. U.S. CONSTITUTION AMENDS. V, VI, V111, IX, XIV;
OHIO CONSTITUTION ARTICLE I, §§ 1, 2, 5, 9, 10, 16, 20. 43**

PROPOSITION OF LAW NO. 7

**ADMISSION OF THE PRIOR CONSISTENT STATEMENT OF A
WITNESS VIOLATES OHIO R. EVIDENCE 801 AND DEPRIVES A
CRIMINAL DEFENDANT OF A FAIR TRIAL AND DUE PROCESS.
U.S. CONSTITUTION AMEND. XIV; OHIO CONSTITUTION
ARTICLE I, § 16. 45**

PROPOSITION OF LAW NO. 8

**ADMISSION OF IRRELEVANT AND PREJUDICIAL EVIDENCE
DURING A CAPITAL DEFENDANT’S TRIAL DEPRIVES HIM OF
A FAIR TRIAL AND DUE PROCESS. U.S. CONSTITUTION AMEND.
XIV; OHIO CONSTITUTION ARTICLE I, § 16. 51**

PROPOSITION OF LAW NO. 9

**A CAPITAL DEFENDANT IS DENIED HIS SUBSTANTIVE AND
PROCEDURAL DUE PROCESS RIGHTS TO A FAIR TRIAL AND**

RELIABLE SENTENCING AS GUARANTEED BY U.S. CONSTITUTION AMENDS. VIII AND XIV; OHIO CONSTITUTION ARTICLE I, §§ 9 AND 16 WHEN A PROSECUTOR COMMITS ACTS OF MISCONDUCT DURING THE TRIAL PHASE OF HIS CAPITAL TRIAL. 60

PROPOSITION OF LAW NO. 10

THE DEFENDANT’S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IS VIOLATED WHEN COUNSEL’S PERFORMANCE DURING THE CULPABILITY PHASE OF A CAPITAL TRIAL IS DEFICIENT TO THE DEFENDANT’S PREJUDICE. U.S. CONSTITUTION AMEND. VI AND XIV; OHIO CONSTITUTION ARTICLE I, § 10. 72

PROPOSITION OF LAW NO. 11

WHERE THE JURY RECOMMENDS THE DEATH SENTENCE FOR ONE COUNTY OF AGGRAVATED MURDER, BUT RECOMMENDS LIFE SENTENCE ON ANOTHER COUNT, AND THE AGGRAVATING CIRCUMSTANCES AND MITIGATING FACTORS ARE IDENTICAL, THE RESULTING DEATH SENTENCE IS ARBITRARY AND MUST BE VACATED. U.S. CONSTITUTION AMENDS. VIII, XIV. 79

PROPOSITION NO. 12

A CAPITAL DEFENDANT’S RIGHTS TO DUE PROCESS AND A FAIR TRIAL ARE DENIED WHEN A PROSECUTOR ENGAGES IN MISCONDUCT DURING THE PENALTY PHASE. U.S. CONST. AMENDS. VIII, XIV; OHIO CONST., ART. 1; §10. 60

PROPOSITION OF LAW NO. 13

THE DEFENDANT’S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IS VIOLATED WHEN COUNSEL’S PERFORMANCE, DURING THE PENALTY PHASE OF HIS CAPITAL TRIAL, IS DEFICIENT TO THE DEFENDANT’S PREJUDICE. U.S. CONSTITUTION AMEND. VI; OHIO CONSTITUTION, ARTICLE I, §10. 72

PROPOSITION OF LAW NO. 14

A CAPITAL DEFENDANT’S RIGHT TO DUE PROCESS AND AGAINST CRUEL AND UNUSUAL PUNISHMENT ARE VIOLATED BY INSTRUCTIONS THAT RENDER THE JURY’S SENTENCING PHASE VERDICT UNRELIABLE. U.S. CONSTITUTION AMENDS. VIII, XIV; OHIO CONSTITUTION ARTICLE I, §§ 9, 16. 83

PROPOSITION OF LAW NO. 15

A CAPITAL DEFENDANT’S RIGHTS AGAINST CRUEL AND UNUSUAL PUNISHMENT AND DUE PROCESS ARE VIOLATED BY ADMISSION

OF PREJUDICIAL AND IRRELEVANT EVIDENCE IN THE PENALTY PHASE OF THE TRIAL. U.S. CONSTITUTION AMENDS. VIII, XIV; OHIO CONSTITUTION ARTICLE I, §§ 9, 16. 87

PROPOSITION OF LAW NO. 16
A CAPITAL DEFENDANT’S DEATH SENTENCE IS INAPPROPRIATE WHEN THE EVIDENCE IN MITIGATION OUTWEIGHS THE AGGRAVATING CIRCUMSTANCES O.R.C. §§ 2929.03; 2929.04; U.S. CONSTITUTION AMENDS. VIII, XIV; OHIO CONSTITUTION ARTICLE I, §§ 9, 16. 92

PROPOSITION OF LAW NO. 17
WHEN THE TRIAL JUDGE TRIVIALIZES AND MINIMIZES MITIGATING EVIDENCE, IT VIOLATES A CAPITAL DEFENDANT’S RIGHT TO A RELIABLE SENTENCE. O.R.C. §§ 2929.03; 2929.04; U.S. CONSTITUTION AMENDS. VIII, XIV; OHIO CONSTITUTION ARTICLE I, §§ 9, 16. 95

PROPOSITION OF LAW NO. 18
THE CUMULATIVE EFFECT OF TRIAL ERROR RENDERS A CAPITAL DEFENDANT’S TRIAL UNFAIR AND HIS SENTENCE ARBITRARY AND UNRELIABLE. U.S. CONSTITUTION AMENDS. VI, XIV; OHIO CONSTITUTION ARTICLE I, §§ 5, 16. 97

PROPOSITION OF LAW NO. 19
IMPOSITION OF COSTS ON AN INDIGENT DEFENDANT VIOLATES THE SPIRIT OF THE EIGHTH AMENDMENT. U.S. CONSTITUTION AMENDS. VIII AND XIV; OHIO CONSTITUTION ARTICLE I, §§ 10, 16. 99

PROPOSITION OF LAW NO. 20
THE ACCUSED’S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS VIOLATED WHEN THE STATE’S BURDEN OF PERSUASION IS LESS THAN PROOF BEYOND A REASONABLE DOUBT. 102

PROPOSITION OF LAW NO. 21
OHIO DEATH PENALTY LAW IS UNCONSTITUTIONAL. O.R.C §§ 2903.01, 2929.02, 2929.01, 2929.022, 2929.023, 2929.03, 2929.04 AND 2929.05 DO NOT MEET THE PRESCRIBED CONSTITUTIONAL REQUIREMENTS AND ARE UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED TO EDWARD LANG. U.S. CONSTITUTION AMENDS. V, VI, VIII AND XIV; OHIO CONSTITUTION ARTICLE I,

**§§ 2, 9, 10 AND 16. FURTHER, OHIO’S DEATH PENALTY STATUTE
VIOLATES THE UNITED STATES’ OBLIGATIONS UNDER
INTERNATIONAL LAW. 106**

CONCLUSION 113

PROOF OF SERVICE 114

APPENDIX 115

State v. Lang, Stark County Court of Common Pleas Case No. 2006-CR-1824(A),
Verdict Forms. 1-10

Ohio Revised Code 5120.133. 11

TABLE OF AUTHORITIES

Page

CASES

<i>Bell v. Cone</i> (2002), 535 U.S. 685.	73
<i>Benge v. Johnson</i> (S.D. Ohio, 2004), 312 F.Supp.2d 978.	111
<i>Berger v. United States</i> (1935), 295 U.S. 78.	60, 61
<i>Bies v. Bagley</i> (C.A. 6, 2008), 519 F.3d 324.	111, 112
<i>Booth v. Maryland</i> (1987), 482 U.S. 496.	88
<i>Buell v. Mitchell</i> (C.A. 6, 2001), 274 F.3d 337.	104, 111
<i>Burger v. Kemp</i> (1987), 483 U.S. 776.	78
<i>Coe v. Bell</i> (C.A. 6, 1998), 161 F.3d 320.	109
<i>Coleman v. Mitchell</i> (C.A. 6, 2001), 268 F.3d 417.	104
<i>Cooley v. Coyle</i> (C.A. 6, 2002), 289 F.3d 882.	109
<i>Crawford v. Washington</i> (2004), 541 U.S. 36.	45, 47, 48
<i>Dowling v. United States</i> (1990), 493 U.S. 342.	81
<i>Getsy v. Mitchell</i> (C.A. 6, 2007), 495 F.3d 295 (<i>en banc</i>).	81
<i>In re Winship</i> (1970), 397 U.S. 358.	103
<i>Jackson v. Virginia</i> (1979), 443 U.S. 307.	36
<i>Lawson v. Warden of Mansfield Correctional Institution</i> (S.D. Ohio, 2002), 197 F.Supp.2d 1072.	111
<i>Lowenfield v. Phelps</i> (1988), 484 U.S. 231.	109
<i>McCleskey v. Kemp</i> (1987), 481 U.S. 279.	80, 107, 110

<i>Mooney v. Holohan</i> (1935), 294 U.S. 103.	68
<i>Ohio v. Roberts</i> (1980), 448 U.S. 56.	47
<i>Payne v. Tennessee</i> (1991), 501 U.S. 808.	88-90
<i>Pulley v. Harris</i> (1984), 465 U.S. 37.	80, 110
<i>Remmer v. United States</i> (1954), 347 U.S. 227.	15-17
<i>Scott v. Anderson</i> (N.D. Ohio, 1998), 58 F.Supp.2d 767, <i>reversed in part</i> <i>on other grounds</i> (C.A. 6, 1998), 209 F.3d 854, <i>cert. denied</i> (2000), 531 U.S. 1021.	111
<i>Smith v. Phillips</i> (1982), 455 U.S. 209.	17
<i>South Carolina v. Gathers</i> (1989), 490 U.S. 805.	88
<i>Standefer v. United States</i> (1980), 447 U.S. 10.	81
<i>State v. Allen</i> , 73 Ohio St. 3d 626, 1995-Ohio-283, 653 N.E.2d 675.	21
<i>State v. Bedford</i> (1988), 39 Ohio St.3d 122, 529 N.E.2d 913.	108
<i>State v. Benner</i> (1988), 40 Ohio St.3d 301, 533 N.E.2d 701.	109
<i>State v. Bey</i> , 85 Ohio St.3d 487, 1999-Ohio-283, 709 N.E.2d 484.	107, 112
<i>State v. Biros</i> (1997), 78 Ohio St.3d 426, 678 N.E.2d 891, <i>cert. denied</i> (1997), 522 U.S. 1002.	101
<i>State v. Bradley</i> (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.	73
<i>State v. Buell</i> (1986), 22 Ohio St.3d 124, 489 N.E.2d 795.	108, 109
<i>State v. Byrd</i> (1987), 32 Ohio St.3d 79, 512 N.E.2d 611.	107
<i>State v. Carter</i> , 72 Ohio St.3d 545, 1995-Ohio-104, 651 N.E.2d 965.	107
<i>State v. Clevenger</i> , 114 Ohio St.3d 258, 2007-Ohio-4006, 871 N.E.2d 859.	100
<i>State v. Coleman</i> (1989), 45 Ohio St.3d 298, 544 N.E.2d 622.	107, 109

<i>State v. Coleman</i> (1999), 85 Ohio St.3d 129, 707 N.E.2d 476.	78
<i>State v. Coley</i> , 93 Ohio St. 3d 253, 2001-Ohio-1340, 754 N.E. 2d 1129.	43
<i>State v. Colon</i> , 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917.	23-28
<i>State v. Colon</i> , 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169.	24, 25
<i>State v. Combs</i> (1991), 62 Ohio St.3d 278, 581 N.E.2d 1071.	111
<i>State v. Cooney</i> (1989), 46 Ohio St.3d 20, 544 N.E.2d 895.	93, 104
<i>State v. Davis</i> , 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31.	78
<i>State v. DeHass</i> (1967), 20 Ohio St.2d 230, 39 O.O.2d 366, 227 N.E.2d 212.	37
<i>State v. DeMarco</i> (1987), 31 Ohio St.3d 191, 509 N.E.2d 1256.	97
<i>State v. DePew</i> (1988), 38 Ohio St.3d 275, 528 N.E.2d 542.	58
<i>State v. Dickerson</i> (1989), 45 Ohio St.3d 206, 543 N.E.2d 1250.	108
<i>State v. Drummond</i> , 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038.	37, 57, 112
<i>State v. Dunlap</i> , 73 Ohio St.3d 308, 1995-Ohio-243, 652 N.E.2d 988.	58, 109
<i>State v. D'Ambrosio</i> , 67 Ohio St.3d 185, 1993-Ohio-170, 616 N.E.2d 909.	21, 73
<i>State v. Esparza</i> (1988), 39 Ohio St.3d 8, 529 N.E.2d 192.	109
<i>State v. Evans</i> , (1992), 63 Ohio St.3d 231, 586 N.E.2d 1042.	63, 71
<i>State v. Fautenberry</i> , 72 Ohio St.3d 435, 1995-Ohio-209, 650 N.E.2d 878.	89
<i>State v. Fears</i> , 86 Ohio St.3d 329, 1999-Ohio-111, 715 N.E.2d 136, <i>cert. denied</i> (2000) 529 U.S. 1039.	63
<i>State v. Ferguson</i> , 108 Ohio St.3d 451, 2006-Ohio-1502, 844 N.E.2d 806.	108, 109
<i>State v. Fitzpatrick</i> , 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927.	109
<i>State v. Frazier</i> , 115 Ohio St.3d 139, 2007-Ohio-5048, 873 N.E.2d 1263, <i>cert. denied</i> (2008), ___ U.S. ___, 128 S.Ct. 2077, 170 L.Ed.2d 811.	104, 112

<i>State v. Gapen</i> , 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047.	81
<i>State v. Getsy</i> , 84 Ohio St.3d 180, 1998-Ohio-533, 702 N.E.2d 866.	84-86
<i>State v. Goff</i> , 82 Ohio St.3d 123, 1998-Ohio-369, 694 N.E.2d 916, <i>cert. denied</i> (1999), 527 U.S. 1039.	104
<i>State v. Gumm</i> , 73 Ohio St.3d 413, 1995-Ohio-24, 653 N.E.2d 253.	108
<i>State v. Hale</i> , 119 Ohio St. 3d 118, 2008-Ohio-3426, 892 N.E.2d 864.	63, 101
<i>State v. Hamblin</i> (1988), 37 Ohio St.3d 153, 524 N.E.2d 747.	78
<i>State v. Hancock</i> , 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032.	33, 104
<i>State v. Hand</i> , 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151.	57
<i>State v. Henderson</i> (1988), 39 Ohio St.3d 24, 528 N.E.2d 1237.	33, 109
<i>State v. Hessler</i> , 90 Ohio St.3d 108, 2000-Ohio-30, 734 N.E.2d 1237.	17
<i>State v. Hicks</i> (1989), 43 Ohio St.3d 72, 538 N.E.2d 1030, <i>cert. denied</i> (1990), 494 U.S. 1038	62
<i>State v. Hill</i> (1996), 75 Ohio St.3d 195, 661 N.E.2d 1068.	110
<i>State v. Iacona</i> (2001), 93 Ohio St.3d 83, 2001-Ohio-1292, 752 N.E.2d 951.	68
<i>State v. Jackson</i> , 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173.	58, 104
<i>State v. Jenkins</i> (1984), 15 Ohio St.3d 164, 473 N.E.2d 264.	107, 109, 111
<i>State v. Jenks</i> (1991), 61 Ohio St.3d 259, 574 N.E.2d 492.	36
<i>State v. Keenan</i> (1993), 66 Ohio St.3d, 402, 613 N.E.2d 209.	61, 70
<i>State v. Ketterer</i> , 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48.	112
<i>State v. Liberatore</i> (1982), 69 Ohio St.2d 583, 23 O.O.3d 489, 433 N.E.2d 561.	62
<i>State v. Logan</i> , Trumbull App. No. 2003-T-0016, 2003-Ohio-5425.	100
<i>State v. Long</i> (1978), 53 Ohio St. 2d 91, 7 O.O.3d 178, 372 N.E.2d 804.	20, 34, 62

<i>State v. Lott</i> (1990), 51 Ohio St. 3d 160, 555 N. E. 2d 293, <i>cert denied</i> (1990), 498 U.S. 1017.	61
<i>State v. Loza</i> (1994), 71 Ohio St.3d 61, 641 N.E.2d 1082.	33
<i>State v. Martin</i> (1983), 20 Ohio App. 3d 172, 485 N.E.2d 717.	36
<i>State v. Martin</i> (1985), 19 Ohio St.3d 122, 483 N.E.2d 1157.	107
<i>State v. Maurer</i> (1984), 15 Ohio St.3d 239, 473 N.E.2d 768.	56-58, 104, 107
<i>State v. McKnight</i> , 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315.	108
<i>State v. McNeil</i> , 83 Ohio St.3d 438, 1998-Ohio-293, 700 N.E.2d 596.	108, 110
<i>State v. Mink</i> , 101 Ohio St.3d 350, 2004-Ohio-1580, 805 N.E.2d 1064.	107, 109, 110
<i>State v. Monroe</i> , 105 Ohio St.3d 384, 2005-Ohio-2282, 827 N.E.2d 285.	58
<i>State v. Nabozny</i> (1978), 54 Ohio St.2d 195, 8 O.O.3d 181, 375 N.E.2d 784, <i>vacated in part on other grounds</i> (1978), 439 U.S. 811.	104, 108
<i>State v. Newton</i> , 108 Ohio St.3d 13, 2006-Ohio-81, 840 N.E.2d 593.	110
<i>State v. Niels</i> , 93 Ohio St.3d 6, 2001-Ohio-1291, 752 N.E.2d 859.	107, 111
<i>State v. O'Neal</i> , 87 Ohio St.3d 402, 2000-Ohio-449, 721 N.E.2d 73.	109, 111
<i>State v. Payne</i> (Tenn.1990), 791 S.W.2d 10.	89
<i>State v. Phillips</i> (1982), 455 U.S. 209.	61
<i>State v. Phillips</i> , 74 Ohio St.3d 72, 1995-Ohio-171, 656 N.E.2d 643.	16, 112
<i>State v. Poindexter</i> (1988), 36 Ohio St.3d 1, 520 N.E.2d 568.	105, 106
<i>State v. Sage</i> (1987), 31 Ohio St.3d 173, 510 N.E.2d 343.	57, 67
<i>State v. Sanders</i> , 92 Ohio St.3d 245, 2001-Ohio-189, 750 N.E.2d 90.	16
<i>State v. Scott</i> , 101 Ohio St.3d 31, 2004-Ohio-10, 800 N.E.2d 1133.	94
<i>State v. Skatzes</i> , 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215.	57

<i>State v. Smith</i> (1984), 14 Ohio St.3d 13, 470 N.E.2d 883.	61
<i>State v. Smith</i> (1991), 61 Ohio St.3d 284, 574 N.E.2d 510.	111
<i>State v. Smith</i> , 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668.	58
<i>State v. Smith</i> , 89 Ohio St.3d 323, 2000-Ohio-166, 731 N.E.2d 645.	84
<i>State v. Sneed</i> (1992), 63 Ohio St.3d 3, 584 N.E.2d 1160.	81, 93, 111
<i>State v. Sowell</i> (1988), 39 Ohio St.3d 322, 530 N.E.2d 1294.	108
<i>State v. Stallings</i> , 89 Ohio St.3d 280, 2000-Ohio-164, 731 N.E.2d 159.	104
<i>State v. Steffen</i> (1987), 31 Ohio St.3d 111, 509 N.E.2d 383.	80, 111
<i>State v. Stumpf</i> (1987), 32 Ohio St.3d 95, 512 N.E.2d 598.	107
<i>State v. Thompkins</i> (1997), 78 Ohio St.3d 380, 678 N.E.2d 541.	36
<i>State v. Threatt</i> , 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164.	99, 100
<i>State v. Van Gundy</i> (1992), 64 Ohio St.3d 230, 1992-Ohio-108, 594 N.E.2d 604.	103, 104
<i>State v. Van Hook</i> (1988), 39 Ohio St.3d 256, 530 N.E.2d 883.	107, 108
<i>State v. Were</i> , 118 Ohio St. 3d 448, 2008-Ohio-2762, 890 N.E.2d 263.	36
<i>State v. Wharf</i> , 86 Ohio St.3d 375, 1999-Ohio-112, 715 N.E.2d 172.	26-28
<i>State v. White</i> , 103 Ohio St.3d 580, 2004-Ohio-5989, 796 N. E.2d 534.	99, 100
<i>State v. White</i> , 85 Ohio St.3d 433, 1999-Ohio-281, 709 N.E.2d 140.	90
<i>State v. Williams</i> (1986), 23 Ohio St.3d 16, 490 N.E.2d 906, <i>cert. denied</i> (1987), 480 U.S. 923.	71
<i>State v. Wogenstahl</i> , 75 Ohio St.3d 344, 1996-Ohio-219, 662 N.E.2d 311.	110
<i>State v. Yarbrough</i> , 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216.	37
<i>State v. Zuern</i> (1987), 32 Ohio St.3d 56, 512 N.E.2d 585.	107, 108

<i>Strickland v. Washington</i> (1984), 466 U.S. 668.	72
<i>Thomas v. Arn</i> (C.A. 6, 1983), 704 F.2d 865.	104
<i>Tuilaepa v. California</i> (1994), 512 U.S. 967.	108, 110
<i>United States v. Olano</i> (1993), 507 U.S. 725.	17
<i>Victor v. Nebraska</i> (1994), 511 U.S. 1.	103
<i>White v. Mitchell</i> (C.A. 6, 2005), 431 F.3d 517.	104
<i>Williams v. Taylor</i> (2000), 529 U.S. 362.	109

OTHER AUTHORITIES

Crim. R. 11(C)(3).	108
Crim. R. 52(B).	20, 25, 27, 34, 62
Crim. R. 6(E).	43
Evid. R. 403(A).	56
Evid. R. 403(B).	57
Evid. R. 404(B).	57
Evid. R. 801(C).	48
Evid. R. 801(D).	48
Evid. R. 801(D)(1)(b).	45, 47
Evid. R. 804(B).	66
Evid. R. 804(B)(3).	66
R. C. 2947.33.	99
R.C. 2901.05(D).	102

R.C. 2903.01(B).	2, 109
R.C. 2911.01(A)(1).	2, 26
R.C. 2911.02(A)(2).	25
R.C. 2929.021.	110
R.C. 2929.03(D)(1).	108
R.C. 2929.04(A)(5).	2, 79, 80
R.C. 2929.04(A)(7).	2, 23, 27, 29, 30, 79, 109
R.C. 2929.04(B).	81
R.C. 2929.04(B)(1).	82
R.C. 2929.05(A).	92, 110, 111
R.C. 2929.145.	2
R.C. 2953.02.	36
R.C. 5120.133.	99, 100, 101

STATEMENT OF CASE AND FACTS

In 2006, the Stark County Grand Jury returned an indictment charging Edward Lee Lang with two counts of aggravated murder, with attendant firearm and death penalty specifications,¹ and one count of aggravated robbery, with its attendant firearm specification.² Lang was charged alternatively as the principal offender and an accomplice. Lang pleaded not guilty to these charges and specifications, and proceeded to trial by jury in the Stark County Court of Common Pleas. The jury found Lang guilty as charged, and a separate and subsequent sentencing hearing was held. As part of its verdict, the jury found that Lang was the principal offender in these deaths, i.e, the actual killer. At the conclusion of this hearing, the jury recommended a life sentence of imprisonment with the possibility of parole for the one aggravated murder conviction (the Burditte killing), but a sentence of death for the other aggravated murder conviction (the Cheek killing). The trial court then independently reviewed the evidence of the aggravating circumstances and the mitigating factors, and weighed the two against each other, and found beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors. Accordingly, the court imposed a sentence of death upon Lang for executing Marnell Cheek. The court also imposed the mandatory three-year term of actual incarceration for the three firearm specifications, but merged them into one for purposes of sentencing, and imposed it consecutively with the death sentence. The court also sentenced Lang to a term of life imprisonment without eligibility for parole for the other aggravated murder conviction, and the

¹R.C. 2903.01(B) (aggravated murder based upon aggravated robbery), R.C. 2929.145 (firearm specifications), R.C. 2929.04(A)(5) (multiple murder specification), and R.C. 2929.04(A)(7) (felony-murder specification).

²R.C. 2911.01(A)(1) (aggravated robbery) and R.C. 2929.145 (firearm specification).

maximum ten-year prison term for the aggravated robbery conviction, imposing these also consecutively with each other and with Lang's death sentence. Lang thereafter filed the instant appeal to challenge the legality of his convictions and death sentence.

The convictions arose from Lang's execution-style killing of two people in furtherance of a plan to rob one of the victims, a known drug dealer. On October 22, 2006 around 9:30 p.m., Edward Lee Lang aka "Tech," defendant-appellant, shot and killed Jaron Burditte and Marnell Cheek, by firing a bullet into each of their heads at point blank range, in order to rob Burditte of money and drugs. As a result of these acts, Lang was convicted of two counts of aggravated murder with an aggravated robbery specification and a multiple killing specification. And for committing these crimes, Lang was sentenced to life imprisonment without parole for the killing of Burditte, and the penalty of death for the killing of Cheek.

Evidence at Trial – Guilt Phase

Sometime in 2006, Lang moved from Baltimore, Maryland to Canton, Ohio. While in Canton, he became friends with Antonio Walker. On October 22, 2006, Lang and Walker decided to "hit a lick," i.e., commit a robbery. The name of "Clyde" was mentioned by Lang as a possible victim because this Clyde sold drugs. Clyde was also known as C.J. or Jaron Burditte. Lang's plan was to call Burditte on the pretense of wanting to buy crack cocaine. Lang would then enter the back seat of Burditte's Dodge Durango SUV, threaten Burditte with his handgun, and Walker would take the money and drugs from Burditte.

Using his cell phone, Lang called Burditte and told him that he needed a "quarter soft," meaning a quarter ounce of crack cocaine. The agreed price was \$225, and an arrangement was

made to meet Burditte at 30th Street and Sahara Avenue in Canton. Taking Lang's black and gray .9 millimeter semi-automatic handgun with them, the pair headed to 30th Street and Sahara Avenue location to "hit the lick."³

Lang and Walker waited at this location until they saw Burditte drive by in his red Dodge Durango SUV and turn into the Sahara apartments. Upon seeing the van drive by, Lang cocked the handgun and loaded a round in the chamber. Lang then called Burditte on the cell phone to tell him that he had missed them and that Burditte should turn around and pull back in front of Lang and Walker. Burditte thus returned to where Lang and Walker were waiting.

Walker noticed that Burditte was not alone in his SUV. While Burditte was driving his vehicle, there was a woman in the front passenger seat. This woman was Marnell Cheek, a friend of Burditte. Upon seeing Cheek, Walker changed his mind and decided not to get into the back of the van as planned. According to Walker, "[I]t didn't feel right to me." Lang, however, proceeded with the plan and got into the back seat behind the driver. Shortly thereafter, Walker heard two gunshots from inside the SUV.⁴

After the shots, Lang jumped out of Burditte's SUV and he and Walker took off running. Taking separate routes, the two men ended up at the house of Lang's girlfriend. As the men entered Walker's residence, Lang went to the bathroom and started throwing up. Concerned about Lang, Walker went into the bathroom to check on him, asking him if he was all right.

³T.(IV) 882, Taped Statement of Lang, State's Exh.4.

⁴T.(IV) 885.

Lang replied, "Every time I do this, this same thing happens."⁵ Once he was alright, Lang next called his "home boy E" to see about getting the handgun melted down.⁶

Meanwhile, Burditte's red Durango traveled through several yards after the shooting until it ended up hitting a white Dodge Intrepid parked on Sahara Avenue. Donald McNatt saw lights and a loud noise, and went to check the disturbance. Once he got to the SUV, McNatt opened the door of the Durango and saw Burditte and Cheek slumped over inside. Both people appeared to McNatt to have been shot in the head. McNatt immediately called 911 upon seeing this carnage⁷

The police arrived in response to this 911 call and began its investigation into the execution-style shooting deaths of Cheek and Burditte. Because it was dark and raining very heavily that night, the police had the Durango removed by flatbed truck to the City's Service Center. The bodies of Cheek and Burditte were eventually removed and taken to the Stark County Coroner's Office where their autopsies were performed by the Stark County Coroner, Dr. P. S. S. Murthy, M.D. Dr. Murthy determined that the cause of death for both Cheek and Burditte was a single gunshot wound to each of their heads. The hollow point bullet, loaded by Lang into the chamber of the gun before entering the SUV, entered Burditte's head on the right side and exited through his mouth. This bullet lacerated Burditte's tongue and shattered his teeth, covering his jacket with blood and brain matter.⁸ Because of the presence of soot by the

⁵T.(IV) 887.

⁶Taped Statement of Lang, State's Exh. 4, at 13.

⁷T.(III) 829.

⁸T.(V) 1220.

entrance wound, gunshot residue inside the wound track, and the presence of skin splits, Dr. Murthy concluded that the gunshot wound to Burditte was caused by the barrel of the gun being held in contact or near contact to Burditte's head when it was fired.⁹

The autopsy of Cheek determined that Lang had also shot Cheek in the head area right behind the left ear. The bullet traveled through her brain and exited behind her right ear.¹⁰ Again, the stippling and soot observed by the wound indicated a gunshot at close range. The autopsy also revealed an injury to the backside of Cheek's left hand. This injury also had the presence of stippling, which indicated that the hand was in the presence of the barrel of the firearm when it was fired and was consistent with Cheek having raised her hand defensively to hopefully deflect any bullet fired her way.¹¹

In Burditte's Durango, the police found three cell phones and a shell casing in the back seat. They also found crack cocaine in a plastic baggie near Burditte. From one of the cell phones, the police were able to determine that calls had been received at 9:13 and 9:33 p.m. from a cell phone that was not registered to anyone but was a prepaid cell phone.¹² The police were eventually able to learn that the person who possessed this prepaid cell phone called a person named Teddy Seery those two times immediately after the shootings.

The police thus interviewed Seery and learned that Lang had visited him the day after the shootings. Lang told Seery that he had killed the two people that were found in the Durango on

⁹T.(V) 1226.

¹⁰T.(V) 1212.

¹¹T.(V) 1084, 1217.

¹²T.(IV) 986.

Sahara Avenue.¹³ Based on all the evidence obtained in the investigation, the police obtained an arrest warrant for the arrest of Lang. Two days after the killing of Burditte and Cheek, Lang was found driving a white car belonging to his girlfriend. Based upon the arrest warrant, Lang was arrested by members of the City's Gang Task Force Unit. On the floorboards under a towel, the Unit found a .9 millimeter caliber Model T-222 semiautomatic handgun and loose ammunition, i.e, seven bullets. No cartridge magazine, however, was found.¹⁴ The handgun was examined by Michael Short, a firearms expert with the Stark County Crime Laboratory, and found to be operable. Short also determined that the deformed hollow point bullet taken from the bodies was fired from the handgun found in Lang's car to the exclusion of all other firearms.¹⁵

The firearm was also swabbed for possible DNA evidence. Walker was excluded as a possible source of the DNA that was found on the gun. Lang, however, could not be excluded as a possible source.¹⁶

After his arrest, Lang was taken to the Canton Police booking station and read his *Miranda* rights. After waiving those rights, Lang gave a statement to Canton Detectives Mark Kandel and John Gabbard.¹⁷ Lang told the detectives that while he was an active participant in the robbery of Burditte, he denied shooting Burditte and Cheek and instead blamed their deaths on Walker. At most, according to Lang, he was guilty of conspiracy to murder: “[B]asically that

¹³T.(IV) 929.

¹⁴T.(IV) 960.

¹⁵T.(IV) 1067, 1072.

¹⁶T.(IV) 1129.

¹⁷State's Exh. 4.

he used my gun and then that I was in the car when that shit happenin'. And than as though, you know what I'm sayin', that's conspiracy to murder."¹⁸

After hearing this evidence and receiving instructions from the trial court, the jury found Lang guilty of all the offenses and specifications charged in the indictment. Since the jury found Lang guilty of the attendant death penalty specifications, the trial later proceeded to the mitigation or sentencing phase of this capital trial. Lang was thus given an opportunity to persuade the jury not to recommend a death sentence for the two execution-style killings of Burditte and Cheek.

The Evidence at the Mitigation Phase

The jury returned to the trial court on July 17, 2007 for the mitigation phase of Lang's capital trial. In this penalty phase, Lang presented his defense against a death sentence for either cold-blooded killing by introducing testimony from his sister and mother. Lang did not testify or make an unsworn statement to the jury.¹⁹

Lang's defense witnesses testified extensively regarding Lang's family and childhood. Lang was born on October 19, 1987, and was one of four children of Tracy Carter. Carter was age 19 when Lang was born, and he was the next to the youngest child. Before following his brother to Canton, Ohio in 2006, Lang lived in Baltimore, Maryland and fathered a child. Lang even dropped out of high school in the eleventh grade to take care of his daughter, and got a job

¹⁸State's Exh. 4, at 38.

¹⁹T.(Mitigation Phase), July 17, 2007.

working for the census department. According to Lang's mother, Lang had taken care of his daughter – "there was nothing that he wouldn't do for her and for the baby."²⁰

His father, Edward Lang, Sr., was abusive to both Lang's mother and Lang, and was an IV user of such drugs as heroin and cocaine. Lang's father was Carter's landlord and she slept with him in exchange for rent. After Lang was born, his father was around until he was jailed for setting Carter's apartment on fire and stabbing her. At another time, he was also jailed for child molestation.

When Lang was 10 years of age, his father took him for court-ordered visitation and didn't return him for two years. Lang thus had no contact with his mother during this two-year period. When his mother finally located him, Lang was living in Delaware, and was wearing the same clothing he had on when he was taken two years before. In addition, Carter noticed signs of abuse on her son – burns on his shoulder and back, a gash on his hand, and bruises on his body. Carter testified that Lang may have been sexually abused by his father during this time period.

Before Lang was taken by his father, he was a good student and had graduated from elementary school. Lang, however, was on medication for depression – depakote, lithium, respiradol. After he returned from his father's home, however, Lang had changed. At times, Lang was sad, and at other times he was angry. Lang, according to his mother, was also in a psychiatric facility over 28 times for his problems. "He stayed in the Bridges Program twice for 90 days. He stayed at Woodburn Respiratory Treatment Center for a year. And he stayed off and

²⁰T.(Mitigation Phase), July 17, 2007, at 70.

on at Walter P.–at Sheppard Pratt Center 28 times.”²¹ In the end, Lang’s mother asked the jury not to kill her child.

At the close of this testimony, the defense rested. The court noted:

[COURT]: I would indicate that just for the record, that as part of this trial preparation in this matter the Court had provided at the defense request various experts and other tools that were made available. The Court authorized the expenditure of funds for defense to explore the mitigation in this matter. And, counsel, that was followed through with all of that; is that correct.

[KOUKOUTAS]: Yes, Your Honor, it was.

T.(Mitigation Phase), July 17, 2007 at 85.

The trial court noted that James Krantz, one of the defense experts, was in the courtroom and that defense counsel had sought advice from him “time to time” throughout the mitigation phase of the trial. Dr. Jeffrey Smalldon, a psychologist, and a mitigation expert and private investigator were also appointed to assist the defense in Lang’s trial.²²

After hearing the evidence and receiving instructions from the trial court, the jury returned with a split verdict, recommending a life sentence without parole for the killing of Burditte, but a sentence of death for the cold-blooded execution of Cheek.

The Trial Court’s Ruling in the Sentencing Phase

Lang returned to the trial court for sentencing on July 25, 2007. The court imposed the life sentence recommended by the jury, and then proceeded to the death-sentence

²¹T.(Mitigation), July 17, 2007 at 67.

²²T.(Time Waiver Hearing), Jan. 17, 2007 at 7.

recommendation. After weighing the aggravating circumstances and the mitigating factors, including Lang's age of 18 and his background, the trial court accepted and affirmed the jury's recommendation for the killing of Cheek – a sentence of death.

Once the court's sentencing was completed, the court turned to the family members of the victims, allowing them to make any statement and to address the court. One of these family members was Burditte's sister, LaShonda Buritte. She specifically addressed Lang saying, "[Y]ou shot him in the back of the head like a coward. You didn't even given him a chance -- you didn't give him a chance to beg or fight for his life if that's what he chose to do." Lang responded to these emotional and painful words with a venomous reply: "That's what he did, bitch."²³

²³T.(Sentencing), July 25, 2007 at 27.

ARGUMENT

PROPOSITION OF LAW NO. 1

A DEFENDANT’S RIGHT TO DUE PROCESS IS VIOLATED WHEN A JUROR WHO IS RELATED ONE OF THE VICTIMS, AND HAS A PREJUDICE AND BIAS, IS SEATED ON THE JURY, U.S. CONSTITUTION AMENDS. VI, XIV; OHIO CONSTITUTION ARTICLE I §§ 5, 10.

Lang argues in his first proposition of law that his due process right to a fair trial by jury was violated when a juror who was distantly related to one of the victims was temporarily on the jury in this case. The juror did not disclose her relationship to Cheek, that her mother was married to Cheek’s brother, but this relationship was discovered shortly after the start of trial and brought immediately to the attention of the trial court. The trial court determined that the juror had not disclosed any information to the other jurors, and was promptly removed from the jury and replaced by an alternate juror. Lang, therefore, cannot show any prejudice from the actions of this juror since she had no impact on the remaining members, and his case was judged by a fair and impartial jury. For these reasons, the proposition of law should be rejected.

The problem with Lang’s argument is that he cannot show from the record in this case that the juror in any case contaminated the other members of the jury. After the testimony of the State’s first two witnesses, the connection of Juror No. 386 with Cheek was brought to the trial court’s attention. The juror had apparently lived in Florida and had moved to Canton about a year before with her grandparents. The trial court took the matter under advisement.

THE COURT: Okay. When we get our next break, we will make an inquiry of this particular juror alone.

I will ask that juror, also, if she made any – assuming that this is accurate, if she discussed this with any of the other jurors.

Then if counsel wants me to, if you want me to go further than that on either side and actually poll the balance of the jurors, to make sure she didn't say anything to anybody, I will be happy to do that.

I think we will play it by ear and see how it looks. But I will do that if you want me to, also. Then we will make a determination as to whether she stays or goes.

T.(IV) 865-866.

The trial court addressed defense counsel's concern about contaminating the other jurors, noting that the jurors were on a break and would not be discussing the case during the break or during the resumption of proceedings.²⁴

After the testimony of two more State's witnesses – Antonio Walker and Teddy Seery, Jr. – the trial court conducted its hearing on the juror issue. The juror admitted that she knew Marnell Cheek, and that she had not told the court about this knowledge. She also admitted that her mother is married to Cheek's brother. The juror reaffirmed that she lives with her grandparents, and talks with her mother in Florida periodically. She also knew that Cheek had been killed. She nonetheless maintained that her connection to Cheek would not cause her to be fair and impartial in this case.²⁵ The trial court then inquired about her conduct vis-a-vis the other jurors.

THE COURT: Before I ask [defense counsel] to ask you any questions.

Do you – have you told any of the other jurors about this at all?

²⁴T.(IV) 867.

²⁵T.(IV) 939-944.

JUROR NO. 386: No.

THE COURT: No? I mean, I know it is the juror seated beside you, 387, has been very friendly toward you and you have been friendly toward her.

Have you talked to her about this at all?

JUROR NO. 386: No.

THE COURT: Have you told any of the other jurors about the fact that you may have known Miss Cheek or anything else along those lines?

JUROR NO. 386: No.

THE COURT: So you followed what the Court told you. Thank you.

T.(IV) 944-945.

After defense counsel inquired about what the juror knew about Cheek's death, the juror was excused. The State of Ohio then moved to dismiss this juror for cause. Defense counsel concurred with the motion.²⁶ After a break, the court told this juror that she had been removed from the case. The court asked her once again about her contact with the other jurors, which she once again reaffirmed that he had not told the jurors about her connection.²⁷ Upon her dismissal, the remaining jurors were brought back into the courtroom, at which time the court addressed them about the juror's removal, as well as inquire about any contamination.

THE COURT: . . . Ladies and Gentlemen, I do want to bring you up to date on one matter before we move on to the next witness.

²⁶T.(IV) 948-949.

²⁷T.(IV) 950-951.

Juror No. 386 has been excused from this case. She will no longer be a juror in this particular case.

I will indicate to you simply the fact that we were provided some information this morning, which I kept Juror No. 386 here and she confirmed that information to me concerning the fact that as this case progressed it was determined that she may have had a relative relationship with either a witness or a party or somebody that was involved in the case.

She in fact confirmed that that was true, and at that point I then excused her from further service in this matter.

I just want to make certain, she indicated to us that she had not discussed this with anyone else.

Is there any member of the jury – I will take your silence if none did – but is there any member of the jury at all that she did discuss this with at all?

I take it by your silence that she did not. Thank you very much.

T.(IV) 952-953.

Lang did not object to the juror's removal or the procedure and manner in which the trial court attempted to ascertain what contamination may have occurred from the juror's involvement in this case as a juror. Lang nonetheless now argues on appeal that the trial court's handling of this juror problem denied him a fair trial. He speculates about the nefarious motivation of this juror, and asserts that the risk of contamination (as opposed to actual contamination) warranted a mistrial. In support of this argument, he relies upon the Supreme Court's *Remmer* decision.²⁸

In *Remmer*, the United States Supreme Court held that a trial court, upon learning of "private communication, contact, or tampering * * * with a juror during a trial about the matter pending before the jury," it must conduct a hearing to determine the impact of the misconduct

²⁸*Remmer v. United States* (1954), 347 U.S. 227.

upon the jury.²⁹ A *Remmer* hearing, therefore, must be conducted in order to allow the defense an opportunity to explore whether the misconduct occurred, and what impact, if any, the misconduct had on the jury.

In this case, the trial court took appropriate steps to address the misconduct. Upon learning that the juror may be related to one of the victims, even if distantly, the court took steps to ascertain whether the allegations were true. While the court may have conducted the hearing immediately instead of waiting for the next jury break (two State's witnesses later), the trial court related to counsel its intention of handling the issue then and neither party objected. As the court noted, the juror would not have any opportunity to contaminate the other jurors during the monitored break or during the resumption of trial. Upon reaching that break, the court then inquired of the juror outside the presence of the other jurors. The State moved to dismiss her for cause, which Lang went along with. The trial court then dismissed the juror, after again ascertaining that she had not related any information about the case to the other jurors. Once the juror was dismissed, the trial court then inquired of the remaining jurors, including the alternates, as to whether this dismissed juror had communicated any information to them. Thus, the record does not support any claim that this juror contaminated the remaining jurors with what she personally knew about the case. The trial court, in other words, conducted an adequate *Remmer* hearing,³⁰ and Lang cannot now show that he was prejudiced by the manner in which the court

²⁹*Remmer*, 347 U.S. at 229.

³⁰Compare *State v. Sanders*, 92 Ohio St.3d 245, 251-252, 2001-Ohio-189, 750 N.E.2d 90, 106; *State v. Phillips*, 74 Ohio St.3d 72, 88, 1995-Ohio-171, 656 N.E.2d 643, 661-662.

conducted the *Remmer* proceeding.³¹ And a defendant is required to show actual prejudice in a *Remmer* situation in order to make a valid claim.

Failing to show actual prejudice from the conduct of the dismissed juror on the remaining jurors, Lang cannot show that he was denied a fair trial. As a result, the proposition of law should be rejected.

³¹A defendant must show actual prejudice in a *Remmer* situation in order to make a valid claim. See *United States v. Olano* (1993), 507 U.S. 725, 738; *Smith v. Phillips* (1982), 455 U.S. 209, 215; *State v. Hessler*, 90 Ohio St.3d 108, 121, 2000-Ohio-30, 734 N.E.2d 1237, 1251.

PROPOSITION OF LAW NO. 2

EXPERT SCIENTIFIC TESTIMONY THAT IS NOT ESTABLISHED TO A REASONABLE DEGREE OF SCIENTIFIC CERTAINTY IS UNRELIABLE AND INADMISSIBLE. ADMISSION OF EVIDENCE THAT DOES NOT MEET THIS STANDARD VIOLATES A DEFENDANT'S RIGHTS TO EQUAL PROTECTION, DUE PROCESS, AND HIS RIGHTS TO CONFRONTATION AND TO PRESENT A DEFENSE. U.S. CONSTITUTION AMENDS. V, XIV; IT ALSO VIOLATES OHIO R. EVIDENCE 401-403.

I. Introduction.

In his second proposition of law, Lang argues that the testimony of Michelle Foster a criminalist with the Stark County Crime Laboratory should have been excluded. Lang claims that Foster's testimony on DNA should have been excluded because she did not testify to a reasonable degree of medical certainty that Lang's DNA was on the gun. All Foster could determine was that the DNA on the handgun that shot Burditte and Cheek could not have been from Walker but could be from Lang. In urging this court to accept this proposition, Lang has two hurdles to overcome. First, his trial counsel did not object to the evidence and even agreed that Foster was an expert in the field of DNA typing.³² Second, this Court has already decided that such evidence is admissible.³³ Therefore, Lang's proposition of law is without merit and should be rejected.

³²T.(IV) 1110.

³³See *State v. D'Ambrosio* (1993), 67 Ohio St. 3d 185, 616 N.E.2d 909.

II. DNA evidence of which Lang complains.

Foster tested various items of clothing collected from Walker and Lang. She found blood on a red shirt identified as belonging to Lang - it was Lang's own blood.³⁴

Foster also collected swabs from the .9 millimeter caliber pistol found in the car driven by Lang after the shooting, wrapped in a towel in the back seat. It was the handgun positively identified as the one used to shoot and kill both Burditte and Cheek to the exclusion of all others. Foster collected swabs from the trigger grips, the slide and magazine release and performed DNA typing. As a result of the testing, Foster found low levels of DNA. While not a lot, Foster was able to find DNA from at least two individuals and a major source of DNA at three different locations.³⁵ When asked about the identity of the sources, Foster testified:

[BARR] Do you have an opinion as to a reasonable degree of scientific certainty as to whose DNA appears on that handgun?

[FOSTER] In this particular case, we can say that Antonio Walker is not the major source of DNA that we detected from the swabbing of the pistol.

In this case we, based on our comparison, we can say that Edward Lang can not be excluded as a possible minor source to the DNA that we found on the weapon.

T.(IV) 1129.

Because of the low level of DNA, Foster, however, was not able to say to a reasonable degree of scientific certainty that Lange was the source of the DNA. And because of the small

³⁴T.(IV) 1124.

³⁵T.(IV) 1128.

amount and because it was not conclusive, it could not be entered into the Combined Index DNA System (CODIS).³⁶

III. Not plain error to allow evidence at trial

Lang waived the issue raised in this proposition of law because he failed to object at trial. Because there was no plain error in allowing the testimony that Lang could be the possible source of the DNA on the gun, this proposition has no merit. The plain error rule cannot be invoked unless, but for the error, the outcome of the trial would clearly have been otherwise.³⁷

Apart from the testimony of Foster, there was evidence that Lang handled the .9 millimeter gun used to shoot and kill Burditte and Cheek. The gun was found in his possession when he was arrested two days after the killings – in the car he was driving wrapped in a towel in the back seat. Still, Lang himself admitted that it was his gun and that he handled it the night of the killings explaining to Detectives Kandel and Gabbard, “The gun’s mine.”

In the end, it is the testimony of Foster that Walker’s DNA was not found on the gun that is most telling. Foster testified that to a reasonable degree of medical certainty Walker could be excluded as the major source of DNA found on the handgun. Lang does not challenge the testimony of Foster on this relevant point which significantly undermines his theory that Walker was the shooter.

³⁶T.(IV) 1135.

³⁷See *State v. Long* (1978), 53 Ohio St. 2d 91, 7 O.O.3d 178, 372 N.E.2d 804 (holding that “[N]otice of plain error under Crim. R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.”).

IV. Issue has been decided by prior case law.

As noted by Lang himself, this Court has already decided the issue of “possibility” testimony by an expert witness.

In *State v. D'Ambrosio*, 67 Ohio St.3d 185, 1993-Ohio-170, 616 N.E.2d 909, a capital case, defendant was tried and convicted of aggravated murder for the stabbing of the victim who died as the result of three knife wounds to the throat area. At trial, the knife used to kill the victim was introduced into evidence. The coroner was asked whether one of the stab wounds could have been made by the knife introduced into evidence. The coroner testified that it was physically possible that all the wounds could have been made by the knife introduced into evidence.

On appeal, the defendant argued that the trial court should have excluded the opinion of the coroner because it was stated in terms of possibility, not in terms of a reasonable degree of medical certainty. Like the case here, defendant did not object at trial and a plain error analysis applied. Finding that the defendant waived the issue and applying an outcome-determinative analysis, this Court found that defendant would not have prevailed even if the coroner had not testified about the possibility that the knife in evidence caused all of the stab wounds. What is more, this Court held that it is the “better practice” especially in criminal cases to let experts testify in terms of possibility.³⁸

Indeed, this Court reached a similar conclusion in *State v. Allen*, 73 Ohio St. 3d 626, 1995-Ohio-283, 653 N.E.2d 675, a capital case. This Court rejected the defendant’s claims that

³⁸*D'Ambrosio*, 67 Ohio St. 3d at 191, 616 N.E.2d 909.

the trace-evidence examiner's answers should have been stricken because they were not based on a reasonable degree of medical certainty.

V. The trial court's jury instruction

Finally, the jury was instructed as to the treatment of the testimony of the expert witnesses.³⁹ The trial court reminded the jury that, like other witnesses, the decision on what weight should be given to the testimony of the experts was within its sole province saying “[I]n determining its weight, you may take into consideration their skill, experience, knowledge, veracity, familiarity with the facts of this case, and the usual rules for testing credibility and determining the weight to be given to testimony.

As a result, the jury understood that an expert witness' testimony was subject to its scrutiny. A jury is presumed to follow the instructions given to it by the trial court.

The second proposition of law should be overruled..

³⁹T.(V) 1310.

PROPOSITION OF LAW NO. 3

A DEFENDANT’S RIGHT TO GRAND JURY INDICTMENT UNDER THE OHIO CONSTITUTION, AND HIS RIGHTS TO DUE PROCESS UNDER BOTH THE STATE AND FEDERAL CONSTITUTIONS ARE VIOLATED WHEN THE INDICTMENT FAILS TO ALLEGE A MENS REA ELEMENT FOR THE OFFENSE OF AGGRAVATED ROBBERY. U.S. CONSTITUTION AMENDS. V, XIV; OHIO CONSTITUTION ARTICLE I, §§ 10, 16. THIS ERROR ALSO DENIES THE DEFENDANT HIS RIGHTS AGAINST CRUEL AND UNUSUAL PUNISHMENT BECAUSE IT AFFECTS THE JURY’S VERDICT ON THE O.R.C. §2929.04(A)(7) SPECIFICATION. U.S. CONSTITUTION AMENDS. VIII, XIV; OHIO CONSTITUTION ARTICLE I, § 9.

Lang’s third proposition of law raises a *Colon* issue relative to the aggravated robbery charge contained in his indictment. Lang argues that the indictment in this case was defective and constituted structural error as the aggravated robbery charge in the indictment omitted the mens rea element. Lang further argues that this defect taints both aggravated murder charges, as well as the attendant felony-murder specifications under R.C. 2929.04(A)(7), since the aggravated robbery charge constituted a predicate for both those offenses and attendant specifications. The indictment in this case, however, did not constitute structural error under *Colon*. The omitted mens rea element for the aggravated robbery offense charged in this case was a strict liability part of that offense. In addition, the trial court instructed the jury about a mens rea element of “knowingly.” Therefore, the error that was so problematic in *Colon*, i.e., a defect in the indictment that permeated the entire trial, was not present in this case. Accordingly, the proposition of law should be rejected.

Lang relies upon this Court's first *Colon* decision⁴⁰ in support of his proposition of law. In *Colon I*, this Court held that a defendant has not waived the defect that an indictment has failed to charge a mens rea element of a crime when he fails to raise that defect in the trial court.⁴¹ Such an indictment is defective and constituted structural error under the facts and circumstances of that case. This Court later clarified its *Colon I* ruling in *Colon II*,⁴² a decision that Lang did not have the benefit of at the time he filed his merit brief. One aspect of this clarification is the Court's holding that *Colon I* is prospective only and "applies only to those cases pending on the date *Colon I* was announced."⁴³ The other, more pertinent, aspect of this clarification, however, was the narrowing of the scope of *Colon I*.

This Court noted that *Colon I* was premised on the assumption that the facts that led to the decision in *Colon I* were unique. The unique aspect to these facts were how pervasive the error created by the defect in the indictment was throughout the defendant's trial. The defective-indictment error permeated throughout the trial, affecting the evidence admitted at trial, the State's theory of the case, the court's jury instruction, and the State's closing argument.⁴⁴ The Court noted that this kind of pervasive error from the defective indictment would be rare, and that such error in these rare cases would be structural error. As the Court noted in *Colon II*:

⁴⁰*State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 ("*Colon I*").

⁴¹*Colon I*, supra, at syllabus ("When an indictment fails to charge a mens rea element of a crime and the defendant fails to raise that defect in the trial court, the defendant has not waived the defect in the indictment.").

⁴²*State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169 ("*Colon II*").

⁴³*Colon II*, supra, at ¶ 5. *Colon I* was decided on April 9, 2008.

⁴⁴*Colon II*, supra, at ¶ 6.

Applying structural-error analysis to a defective indictment is appropriate only in rare cases, such as *Colon I*, in which multiple errors at the trial follow the defective indictment. . . . Seldom will a defective indictment have this effect, and therefore, in most defective indictment cases, the court may analyze the error pursuant to Crim. R. 52(B) plain-error analysis. Consistent with our discussion herein, we emphasize that the syllabus in *Colon I* is confined to the facts in that case.

Colon II, supra, at ¶ 17.

Thus, the plain-error analysis under Crim. R. 52(B) will be applicable to all but the rare cases involving a defective indictment. Thus, a case in which the defective indictment does not result in multiple errors that are inextricably linked to this flawed indictment, the appropriate standard of review is plain error and not structural error. Accordingly, “[i]n most defective-indictment cases in which the indictment fails to include an essential element of the charge, we expect that plain-error analysis, pursuant to Crim. R. 52(B), will be the proper analysis to apply.”⁴⁵

The particular criminal charge at issue in *Colon* was robbery under R.C. 2911.02(A)(2), which charged the prong of the robbery charge that involved an offender inflicting, attempting to inflict, or threatening to inflict physical harm on another in attempting or committing a theft offense.⁴⁶ This prong of the statutory definition for robbery did not include a specified mens rea element, and thus the applicable mental element for this particular offense is recklessness.⁴⁷

⁴⁵*Colon II*, supra, at ¶ 7.

⁴⁶*Colon I*, supra, at ¶ 6.

⁴⁷*Colon I*, supra, at ¶ 14.

The relevant charge in the instant case is the aggravated robbery offense under R.C. 2911.01(A)(1): “No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following: Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it.” Lang acknowledges the difference between the offense at issue in *Colon* and the offense at issue in this claim, but argues that the difference is unimportant for purposes of *Colon* review. This argument is without merit and ignores this Court’s *Wharf* decision.

In *Wharf*,⁴⁸ this Court reviewed whether the weapons prong of the robbery statute – R.C. 2911.01(A)(1) requires the mens rea element of recklessness since the statute does not facially provide for mental element. This Court, after reviewing the statute’s language, concluded that the General Assembly intended that strict liability be the mental element for this prong of the robbery statute. Thus, “[t]he deadly weapon element of R.C. 2911.02(A)(1), to wit, ‘[h]ave a deadly weapon on or about the offender's person or under the offender's control[,]’ does not require the mens rea of recklessness.”⁴⁹ In other words, “[t]o establish a violation of R.C. 2911.02(A)(1), it is not necessary to prove a specific mental state regarding the deadly weapon element of the offense of robbery.”⁵⁰ As this Court explained in *Wharf*:

⁴⁸*State v. Wharf*, 86 Ohio St.3d 375, 1999-Ohio-112, 715 N.E.2d 172.

⁴⁹*Wharf*, 86 Ohio St.3d 375, 1999-Ohio-112, 715 N.E.2d 172, at paragraph one of the syllabus.

⁵⁰*Wharf*, 86 Ohio St.3d 375, 1999-Ohio-112, 715 N.E.2d 172, at paragraph two of the syllabus.

Our reading of the statute leads us to conclude that the General Assembly intended that a theft offense, committed while an offender was in possession or control of a deadly weapon, is robbery and no intent beyond that required for the theft offense must be proven. According to the statutory language, possession of a deadly weapon is all that is required to elevate a theft offense to robbery. * * * Thus, by employing language making mere possession or control of a deadly weapon, as opposed to actual use or intent to use, a violation, it is clear to us that the General Assembly intended that R.C. 2911.02(A)(1) be a strict liability offense.

Wharf, 86 Ohio St.3d at 377-378, 715 N.E.2d 172, 174-175.

Lang was charged under the deadly weapons prong of the aggravated robbery statute.

Thus, using the same analysis of the similar statutory language for the robbery statute, the mens rea element for this prong of aggravated robbery is strict liability. As a result, Lang cannot show a *Colon* error in this case for the lack of a mens rea element for the charged offense of aggravated robbery in the indictment.⁵¹

Since Lang's other arguments in this proposition of law, challenging the sufficiency of the indictment in charging the felony-murder prong of the aggravated murder statute, as well as the felony-murder death penalty specification under R.C. 2929.04(A)(7), require a defective aggravated robbery charge in the indictment, these collateral arguments fail as well.

In conclusion, the instant case is not one of those rare cases akin to *Colon* that results in structural error because of a defective indictment that does not include the mens rea element of the charged offense of aggravated robbery under the deadly weapons prong of the offense.

⁵¹And as Lang admits, the trial court instructed the jury on the offense of aggravated robbery as requiring a "knowingly" mental element. Not only does this instruction differentiate the instant case from *Colon*, but it also imposed a higher mental element for the offense than is required by law, thereby benefitting Lang. An erroneous jury instruction that benefits a criminal defendant does not constitute plain error under Crim. R. 52(B).

Unlike the physical harm prong under review in *Colon*, which requires a mental element of recklessness, the deadly weapons prong of aggravated robbery, per *Wharf*, is a strict liability offense. In other words, there is no mental element to allege or prove under such circumstances. As a result, the proposition of law is without merit and should be rejected.

PROPOSITION OF LAW NO. 4

WHEN A DEFENDANT IS CHARGED WITH AGGRAVATED FELONY MURDER AND THE O.R.C. § 2929.04(A)(7) SPECIFICATION AS EITHER THE PRINCIPAL OFFENDER OR AN AIDER AND ABETTER, THE JURY MUST BE GIVEN THE OPTION TO FIND THE DEFENDANT GUILTY UNDER EITHER THE PRINCIPAL OFFENDER ELEMENT OR THE PRIOR CALCULATION AND DESIGN ELEMENT OF THAT SPECIFICATION. U.S. CONSTITUTION AMENDS. VIII, XIV; OHIO CONSTITUTION ARTICLE I, §§ 9, 16.

Lang's fourth proposition of law takes issue with the trial court's jury instruction relative to the death penalty specification under R.C. 2929.04(A)(7), the felony-murder specification.⁵² He argues that he was prejudiced and denied a fair trial by the trial court's omission of the "prior calculation and design" prong of the specification, which would have permitted the jury to find he was not the principal offender. By omitting this prong, Lang argues, the trial court improperly prevented the jury from finding that he was an accomplice as opposed to the principal offender, and thus undermined the heart of his defense at trial. The argument, however, is without merit. The issue of whether Lang was the principal offender, i.e., the actual killer, or was simply an

⁵²This response assumes that Lang is solely challenging the R.C. 2929.04(A)(7) specification to the aggravated murder charge relating to Marnell Cheek, since the jury did not recommend a death sentence for the aggravated murder of Jaron Burditte.

The specification under R.C. 2929.04(A)(7) provides:

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

accomplice to capital murder was put squarely before the jury via the jury instructions and via the verdict form. The jury rejected Lang's defense and found that he was the actual killer in the deaths of Burditte and Cheek. Lang was thus not deprived of his right to present a defense, or denied a fair trial by the omission of this prong of the R.C. 2929.04(A)(7) specification.

Lang was charged with two counts of aggravated murder under the felony-murder prong of the aggravated murder statute. He was charged as the principal offender and alternatively as an accomplice. In addition, the attendant felony-murder death penalty specification charged Lang as the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design. As noted by Lang, however, the trial court omitted the "prior calculation and design" alternative for the specification.⁵³ Lang did not object to this omission. He argues, however, that his defense that he was only an accomplice at best was undermined by this omission. The argument is without merit.

The State's case throughout the trial was that Lang, and Lang alone, shot and killed both Burditte and Cheek. The evidence that Lang was only an accomplice was through his self-serving statement to police, which the State introduced. Lang attempts to make much out of the fact that the State argued in closing that he could be found guilty of the aggravated murders as an accomplice, but ignores the totality of the State's argument as well as the thrust of that argument. The State resolutely argued that Lang was the actual killer in this case, i.e., the principal offender. The trial court in fact labeled its jury instruction for the R.C. 2929.04(A)(7) specification as the

⁵³T.(V) 1328-1330, 1345-1346.

“principal offender” or “actual killer” specification.⁵⁴ The State, furthermore, argued that Lang was the principal offender, the actual killer of Burditte and Cheek. It argued in closing, however, that even if the jury only credited Lang’s self-serving statement to the police, he is nonetheless guilty of the charged aggravated murder offenses as an accomplice to these crimes.

The only issue is who pulled the trigger, who is the principal offender, who is the actual killer.

You are going to hear the Court’s instructions, and the Court will tell you that you can find Edward Lang guilty according to the law in the State of Ohio of aggravated murder, even if you don’t believe he is the principal offender in this case.

Because you are allowed to have your own theory of the case. The State has a theory of the case. The defense has got a theory of the case.

But the law tells you[,] you can believe or disbelieve all or any part of the evidence. So you can have your own theory.

There is a part of the instructions in here that you are going to hear that says aiding and abetting. An aider and abetter is somebody who helps, assist[s], strengthens another in committing an offense.

You have the right to believe what you want or to come up with your own theory based upon the evidence.

If you choose to believe Eddie Lang’s version, you can still convict him of aggravated murder and aggravated robbery.

T.(V) 1263-1264.

The State then went on to challenge the credibility of Lang’s story to police, and argued that even if one were to believe this version of events, Lang was still nonetheless guilty of the charged offenses as an accomplice. But, the State argued, there is more evidence in this case

⁵⁴T.(V) 1328, 1345. As part of its instruction for this specification, the court defined the term “principal offender” for the jury. T.(V) 1328-1329, 1346.

than this self-serving recitation to police, and this additional evidence points to Lang, and only Lang, as the actual killer in this case.

But I submit to you that there is more. I submit to you that he can not be believed and that the evidence proves beyond a reasonable doubt that he is the principal offender, that he is the actual killer, that the actual killer sits here in this room.

T.(V) 1266.

Lang argues that the evidence presented at trial that he was only an accomplice, via his statement to the police, permitted the instructions on accomplice liability, which were given relative to the charged offenses. He argues though that it was not provided for the felony-murder specification, despite the statutory language for such, and that this either deprived the jury of the option of finding Lang was an accomplice for purposes of this specification, or that its absence somehow pushed the jury towards a factual finding that he was the principal offender. The argument is flawed for a number of reasons.

First, the specification required that the jury find Lang was the principal offender in order to find him guilty of the felony-murder specification. The jury therefore had an option, one that actually benefitted Lang -- if the jury had concluded that he was an accomplice only and not the actual killer, it would have found Lang not guilty of this specification. Lang's argument presumes that the jury, given a choice between finding Lang was the principal offender and hence guilty of the specification or that he was not the principal offender and thus not guilty of the specification, would disregard the trial court's instruction regarding this choice and find him guilty even though it might find he was an accomplice only. Juries, however, are presumed to

follow the court's instructions.⁵⁵ Thus, the presumption is that the jury in this case found Lang guilty of the specification because it found he was the actual killer.

Second, the inclusion of this "prior calculation and design" language if the offender is not the principal offender would have in fact created confusion where there is none. In other words, if the jury instruction (and verdict form) had parroted the statutory language of the specification *in toto*, Lang would then argue that the jury's guilty finding for the specification is flawed since one would not know whether the jury found him as the actual killer. This confusion could be cured with a separate jury finding on the issue of principal offender, but this was effectively done with the jury instructions and verdict forms the trial court did adopt, i.e., they required that the jury find Lang as the principal offender in order to find him guilty of this felony-murder specification. This characterization was emphasized by the trial court in its jury instructions by referring to the specification as the "principal offender" or "actual killer" specification. Lang was not only not prejudiced by the court's instructions, but actually benefitted from it.

Third, the factual crux of this case was whether Lang was the killer or just an accomplice. Lang mischaracterizes the State's theory of the case, as reflected in its closing argument, by painting this theory as one that pursued alternative theories equally. It did not. The State's theory was that Lang and Lang alone was the killer in this case, and thus guilty of all the charged offenses and specifications. It simply pointed out that Lang's own self-serving statement to police, *if believed*, was nonetheless sufficient to find him guilty of the charged offenses as an accomplice. But the thrust of the State's case was to discredit the self-serving aspects of this

⁵⁵See, e.g., *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶¶ 86-87; *State v. Loza* (1994), 71 Ohio St.3d 61, 79, 641 N.E.2d 1082, 1102-1103; *State v. Henderson* (1988), 39 Ohio St.3d 24, 33, 528 N.E.2d 1237, 1246.

statement, and to highlight its self-serving aspects to point to the ultimate conclusion that Lang was the killer. The court's instruction did not improperly channel the jury towards a guilty finding on this factual issue.

In conclusion, Lang must show that the challenged jury instruction, which he did not object to, was plain error. In other words, but for the erroneous jury instruction, "the outcome of the trial clearly would have been otherwise."⁵⁶ Since the instruction not only did not prejudice Lang but benefitted him, he cannot show that the outcome of the trial was changed by this instruction. Under these facts and circumstances, therefore, Lang's challenge is without merit and the proposition of law should be rejected.

⁵⁶*State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, paragraph two of the syllabus. In addition, this Court further held in *Long* that "[n]otice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice."

PROPOSITION OF LAW NO. 5

AN ACCUSED IS DEPRIVED OF SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS WHEN A CONVICTION RESULTS DESPITE THE STATE'S FAILURE TO INTRODUCE SUFFICIENT EVIDENCE. U.S. CONSTITUTION AMENDS. VI, XIV; OHIO CONSTITUTION ARTICLE I, §§ 9, 16.

I. Introduction

In this proposition of law, Lang claims that the State failed to present sufficient evidence of his guilt. While not part of his proposition of law, Lang also argues that Lang's conviction was against the manifest weight of the evidence. Specifically, Lang claims that the evidence was insufficient to demonstrate that he was the principal offender in the killings of Burditte and Check. In making his argument, he faults the scientific evidence; claims that two witnesses, Walker and Seery, were not credible, and claims the State practiced "selective investigation." All of these arguments fail.

II. Applicable Law

A. Sufficiency of evidence claims

To succeed on a sufficiency of evidence claim, Lang must demonstrate that the evidence, when viewed in a light more favorable to the prosecution, fails to demonstrate each and every element of the offenses charged. Evidence is sufficient if any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. In reviewing claims that insufficient evidence of a defendant's guilt was presented at trial, a reviewing court must determine "whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The 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.⁵⁷

B. Manifest weight of evidence claims

Lang also argues in the same proposition of law that the jury verdict of guilty of the charge of committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery as the principal offender was against the manifest weight of the evidence. Pursuant to R.C. 2953.02, this Court may review Lang's manifest weight claim since the crimes committed by Lang – the killings of Burditte and Cheek – were committed after January 1, 1995.⁵⁸ A manifest weight of the evidence claim involves a quantitatively and qualitatively different analysis than a sufficiency of the evidence claim.⁵⁹ With respect to a manifest weight of the evidence claim, the court should review the entire record, sit as a thirteenth juror, and decide whether the jury lost its way and its verdict thus resulted in a manifest miscarriage of justice.⁶⁰ Recognizing the deference our system of justice gives to juries to determine questions of fact, the supreme court cautioned that courts reviewing manifest weight

⁵⁷*State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus (citing *Jackson v. Virginia* (1979), 443 U.S. 307); *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (“...in reviewing a sufficiency claim, a reviewing court should determine whether, as a matter of law, the evidence produced at trial is adequate to support the conviction”).

⁵⁸*State v. Were*, 118 Ohio St. 3d 448, 2008-Ohio-2762, 890 N.E.2d 263.

⁵⁹*State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, at paragraph two of the syllabus.

⁶⁰*State v. Thompkins*, supra, quoting *State v. Martin* (1983), 20 Ohio App. 3d 172, 175, 485 N.E.2d 717.

of the evidence claims should exercise their discretionary power to grant a new trial “only in the exceptional case in which the evidence weighs heavily against the conviction.”

C. Weight and credibility of witness testimony is resolved by trier of fact.

Lang argues that the evidence against him was insufficient because Walker was not a credible witness. In exchange for his testimony that Lang was indeed the actual killer and the principal offender, Walker was permitted to plead guilty to conspiracy to commit murder, and received a sentence of 18 years to life, hardly a free ride.

To explain Seery’s testimony that Lang admitted killing two people on Sahara, Lang argues that Seery escaped criminal liability as a suspect, while not explaining what evidence pointed to Seery as a suspect.

Yet, the evaluation of witness credibility is not properly on review of evidentiary sufficiency. *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038; *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216 ¶135. It is only capable of review under manifest weight analysis. And the law is clear - questions as to credibility are resolved by the trier of fact – in this case the jury. The jury is capable of weighing credibility and resolving inconsistencies. The trier of fact is in a better position to observe the witnesses’ demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of facts. *State v. DeHass* (1967), 20 Ohio St.2d 230, 39 O.O.2d 366, 227 N.E.2d 212, paragraph one of the syllabus.

III. The guilty verdict will not be set aside where credible evidence demonstrates that Lang was the principal offender.

A. Verdict Forms - Lang is the actual killer.

In separate verdict forms, Lang was found guilty of committing the offense of aggravated murder and that he was the principal offender. As to Burditte, the jury found:

We, the jury in this case being duly impaneled and sworn, having found the Defendant, Edward Lee Lang, guilty beyond a reasonable doubt of aggravated murder as set forth in Count 1 of the indictment do further find the Defendant, Edward Lee Lang, guilty beyond a reasonable doubt of committing said offense while he was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery and he was the principal offender (Actual Killer) in the aggravated murder.

T.(VI) 1430, Specification 3 to Count 1, Verdict Form 4

A similar verdict was reached for the aggravated murder of Cheek:

We, the jury in this case being duly impaneled and sworn, having found the Defendant, Edward Lee Lang, guilty beyond a reasonable doubt of aggravated murder as set forth in Count 2 of the indictment do further find the Defendant, Edward Lee Lang, guilty beyond a reasonable doubt of committing said offense while he was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery and he was the principal offender (actual killer) in the aggravated murder.

T.(VI) 1447, Specification to Count 2, Verdict Form 8

B. Testimony of Walker established that Lang was the principal offender.

Antonio Walker testified that he met Lang through Tamia Horton and knew him as “Tech” from Baltimore. Walker saw Lang on a regular basis . On October 22, 2006 around 9:20 p.m. Walker was at the home of Horton with Lang who had his gun out. Lang and Walker decided to “hit a lick,” that is, commit a robbery. The two planned a robbery and Lang

mentioned the name Clyde, Jaron Burditte. Lang called him and set up a meeting on the guise of buying some cocaine. The two left and saw Burditte turn into Sahara apartments. Lang called Burditte on his cell phone and told him that he missed us. Lang was holding the .9 millimeter gun, cocking it, trying to chamber a round. The round didn't chamber right and fell out of the gun. Walker picked it up and Lang put it back in the clip and chambered it again with success. Meanwhile, Burditte pulled out of Sahara and stopped. The plan was for Walker and Lang to get in the car. Lang was "supposed to put the gun to him and tell him to give us everything, and I was supposed to take it from him." ⁶¹ Lang got into Burditte's Durango; Walker did not. Standing on the street, Walker heard two gunshots and saw Lang jump out of the car. Returning to Walker's home, Lang threw up, explaining that every time he does this, this same thing happens.

For his role in the killings, Walker was charged with two counts of complicity to commit aggravated murder. He pleaded guilty to complicity to commit aggravated murder and received a sentence of 18 years to life.

B. Lang's statement confirms details of Walker's testimony.

After his arrest, Lang was interviewed by Canton City Detectives. Lang confirmed many of the crucial details given to detectives by Walker. Lang admitted that he used his cell phone to lure Burditte to the killing scene by asking him for a quarter ounce of crack cocaine. Lang told the detective that it was his gun that killed Burditte and Cheek. Lang described the direction of Burditte's Durango in detail – the car made a left into Sahara Street and then a left onto Rem Circle. While denying that he was the shooter, Lang admitted to getting in the car,

⁶¹T.(IV) 884.

using his coat to open the door handle, and jumping out after the two fatal shots were fired.

Lang confirmed Walker's story that the two went to Walker's home where Lang threw up. Lang then called his "home boy E" to get his gun melted down. Lang confirmed that his "home boy E" is Teddy Seery by his telephone number, 455-7629.

C. Lang admitted to his home boy "E" that he was the killer

Canton City detectives traced the number of Teddy Seery, Jr., from Lang's cell phone. Seery knew Lang as "Tech" and hung out with him about every day. Lang called Seery the night of the shooting. Seery testified that the day after the shootings, he learned that "someone got murdered on Sahara."⁶² Later that day, Lang knocked on his back door and the two went into the kitchen. Seery asked Lang what happened at Sahara. The two talked about the killings and Lang told Seery that "he [Lang] killed two people up there."⁶³ Lang gave details:

[SEERY]He told me he had called the guy up and the guy came and he saw there was a girl in the car. The guy passed him up. He called him back. The guy came back around, and he got in the car.

[BARR] Did he tell you what happened when he got in the car?

[SEERY] He said he shot them.

....

Twice

T.(IV) 929.

D. Circumstantial and forensic evidence put the handgun in Lang's hands

After a warrant was issued for Lang's arrest, police began an active search for him.

⁶²T.(IV) 925.

⁶³T.(IV) 928.

On October 24, 2006, he was spotted driving his girlfriend's white Pontiac automobile. Officer Dittmore pulled up to the white Pontiac and spoke with the driver, later identified as Lang. But Lang gave them a false name.⁶⁴ When the officers made a positive identification, Lang was arrested. On the back seat passenger area was a towel. When Dittmore picked it up, a dark colored semiautomatic pistol and ammunition fell out.

The pistol was examined by Michael Short, a firearms expert with the Stark County Crime Laboratory and identified as a Talon Industries .9 millimeter caliber Model T-200 semiautomatic pistol.⁶⁵ A deformed hollow point bullet taken from the body of Cheek was also tested by Short.⁶⁶ Short was able to identify the bullet as having been fired from the pistol found in the car Lang was driving, to the exclusion of all other guns.⁶⁷

Lang's pistol was also swabbed for DNA. Michelle Foster, of the Stark County Crime Laboratory excluded Walker as the major source of DNA on the pistol. Lang was not excluded as a possible minor source of the DNA found on the pistol.⁶⁸

D. Red Herring – failure to investigate Walker

Lang argues that the State failed to investigate Walker and ended its inquiry prematurely – continuing its theme that Walker was the actual killer. Ironically, Lang argues that the State promptly ended its investigation when it “amassed enough evidence” against Lang, admitting that

⁶⁴T.(IV) 959.

⁶⁵State's Exh. 1.

⁶⁶State's Exh. 4-B.

⁶⁷T.(IV) 1072.

⁶⁸T.(IV) 1129.

all the evidence pointed to Lang as the actual killer.⁶⁹

After the shootings and killings, Walker came to the police station in response to a card left at his residence by Detective Kandel. Walker gave a statement to the detectives and implicated himself in the robbery. Walker's clothes were taken from him and tested by Foster for trace evidence. He was not a major source of DNA evidence on the handgun. In fact, the only implication that he was the shooter was the self-serving statement of Lang.

In conclusion, the evidence presented at trial was sufficient to prove that Lang was the cold-blooded killer who chambered hollow-point bullets in his .9 millimeter handgun and put the gun to the heads of Burditte and Cheek, killing them. The jury did not lose its way in weighing the credibility of the witnesses, especially Walker and Seery. The proposition of law is therefore without merit.

⁶⁹“They promptly ended their investigation once they amassed enough evidence.” Appellant’s Merit Brief at 49.

PROPOSITION OF LAW NO. 6

**THE ACCUSED IS DENIED THE RIGHTS TO DUE
PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL
WHEN A TRIAL COURT REFUSES TO GRANT ACCESS
TO GRAND JURY MATERIALS PRIOR TO TRIAL. U.S.
CONSTITUTION AMENDS. V, VI, VIII, IX, XIV; OHIO
CONSTITUTION ARTICLE I, §§ 1, 2, 5, 9, 10, 16, 20.**

Lang claims in this sixth proposition of law that he was entitled to access to the grand jury testimony of Antonio Walker. This claim is without merit because Lang did not demonstrate a particularized need and that the trial court abused its discretion. More important, there is no evidence in the record that Walker testified before the grand jury.

The law in the area of access to grand jury materials is well settled. Grand jury proceedings are secret and an accused is not entitled to inspect grand jury materials either before or during trial unless the ends of justice require it. In other words, the defendant must show a particularized need and disclosure that outweighs the need for secrecy. Crim. R. 6(E). The decision whether to release grand jury testimony is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Coley*, 93 Ohio St.3d 253, 261, 2001-Ohio-1340, 754 N.E.2d 1129.

Lang cannot demonstrate a particularized need and cannot demonstrate that the trial court abused its discretion particularly where Walker did not testify before the grand jury. . The court's docket discloses the names of the witnesses who appeared before the grand jury – Detectives Mark Kandel and Gabbard, Teddy Seery, Jr., Amber Walls, Tamia Horton and Eirene

Gonzalez.⁷⁰ The name of Lang's co-defendant, Antonio Maurice Walker, does not appear and the record does not demonstrate that he testified at the grand jury. Indeed, Lang and Walker were indicted at the same time demonstrating that it is unlikely Walker testified. While Walker was indicted on two counts of complicity to commit aggravated murder, he entered into a negotiated plea for complicity to commit murder.

During pretrial discovery, the State disclosed all of the prior statements of Walker. The name of Walker was given to Lang as a potential witness and the statement he gave to detectives was provided. The statement Walker gave to police shortly after the murders of Cheek and Burditte is essentially the same story he gave before he reached his agreement with the State.

Lang, therefore, cannot demonstrate that he was prejudiced by failing to access Walker's grand jury testimony because he did not testify. Lang does not argue that he demonstrated a particularized need to access any of the testimony of the other witnesses.

This proposition of law must, therefore, be overruled.

⁷⁰State v. Lang, Stark Common Pleas Court, Case No. 2006 CR1824A, Nov. 15, 2006, Nov. 20, 2006.

PROPOSITION OF LAW NO. 7

**ADMISSION OF THE PRIOR CONSISTENT STATEMENT
OF A WITNESS VIOLATES OHIO R. EVIDENCE 801 AND
DEPRIVES A CRIMINAL DEFENDANT OF A FAIR TRIAL
AND DUE PROCESS. U.S. CONSTITUTION AMEND. XIV;
OHIO CONSTITUTION ARTICLE I, § 16.**

Lang argues next that the admission of a prior consistent statement of a witness under Evid. R. 801 deprived him of a fair trial. During the direct examination of Antonio Walker during which he described his and Lang's participation in the crimes of this case, the prosecutor asked him whether his testimony of these events was consistent with what he had told Canton Detective Mark Kandel when he was interviewed by police. Walker, without objection, testified that it was. Lang now argues that this testimony constituted plain error under Evid. R. 801(D)(1)(b) and violated his confrontation rights under *Crawford*.⁷¹ Because the statement was properly admitted and neither violated *Crawford* nor the evidentiary rule, the proposition of law is without merit and should be rejected.

The challenged testimony in this case is the direct examination of Antonio Walker. After testifying about his and Lang's roles in the homicides of Burditte and Cheek, Walker testified about his agreement with the State of Ohio.⁷² In exchange for his cooperation and truthful testimony, Walker pleaded guilty to two counts of complicity to murder with attendant firearm specifications, as well as to one count of complicity to aggravated robbery with a firearm specification, and was sentenced to an aggregate indeterminate prison term of 18 years to life.

⁷¹*Crawford v. Washington* (2004), 541 U.S. 36.

⁷²T.(IV) 891-892.

Walker then testified, without objection, that his trial testimony was the same story that he had provided the police detective who interviewed him upon his arrest. Walker did not testify about the particulars he told the detective, only that it was the same version of events that he had just testified to before the jury.

Q. So right now you are doing 18 to life?

A. Yes.

Q. And what were you asked to do because you were given that sentence?

A. Testify.

Q. Testify, how?

A. To give truthful testimony of the events of October 22.

Q. And that's the same story that you gave Detective Kandel when you were arrested on October 27?

A. Yes.

Q. Before you had any deal?

A. Yes.

T.(IV) 892-893.

Lang challenges this testimony about Walker's testimony being the same story he had given a police detective when he was arrested, claiming that the testimony, which he did not

object to,⁷³ violated his confrontation rights as defined by *Crawford*, as well as Evid. R. 801(D)(1)(b).

Lang's constitutional claim is raised under *Crawford*, wherein the Supreme Court held that the proper analysis for determining whether out-of-court statements violate the Confrontation Clause is not whether they are reliable but, rather, whether they are testimonial.⁷⁴ The Court then made a distinction between testimonial hearsay evidence (not admissible) and non-testimonial hearsay evidence (admissible). Thus, the Confrontation Clause does not apply to

⁷³Lang, however, does not challenge in this appeal (as he did not at trial) earlier testimony on this very point.

Q. Did you talk to Sergeant Kandel at that time?

A. Yes.

Q. Okay. Give him a statement?

A. Yes.

Q. Did you tell him what you just told this jury?

A. Yes.

Q. At that time were you arrested?

A. Yes.

T.(IV) 891.

The decision not to specifically challenge this testimony impacts any harmless error review either under the constitutional challenge, or the challenge under the evidentiary rule.

⁷⁴*Crawford*, 541 U.S. at 61. *Crawford* overruled *Ohio v. Roberts* (1980), 448 U.S. 56, 66 (holding that the touchstone of confrontation analysis for hearsay evidence was reliability).

nontestimonial hearsay,⁷⁵ and it does not apply to non-hearsay testimony (primarily because the declarant is testifying and is subject to cross-examination).

In this case, Walker's testimony did not constitute hearsay evidence. Hearsay evidence is defined by rule to be "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."⁷⁶ The rule, however, specifically exempts from this definition certain prior statements by a witness.

Statements which are not hearsay. A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is (a) inconsistent with declarant's testimony, and was given under oath subject to cross-examination by the party against whom the statement is offered and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive, or (c) one of identification of a person soon after perceiving the person, if the circumstances demonstrate the reliability of the prior identification.

Evid. R. 801(D).

Walker did not testify specifically about any prior statement that he gave to Detective Kandel. He simply reiterated that his trial testimony was the same thing he told Detective Kandel. Contrary to Lang's assertion that he could not cross-examine Walker about this earlier statement, he in fact had the opportunity to cross-examine Walker about his earlier statement. He had a transcript of this interview with Detective Kandel and thus could have easily attacked Walker on any inconsistencies between this statement and his trial testimony. In addition, the

⁷⁵*Crawford*, 541 U.S. at 68.

⁷⁶Evid. R. 801(C).

factual issue in this case, as forcibly argued by Lang, was whether Lang or Walker was the real killer. Lang's defense was clearly that Walker had been this heinous executioner, based primarily on Lang's self-serving statement to the police. He therefore had to attack the credibility of Walker. Anticipating this obvious defense strategy, the State was laying out before the jury the good, bad, and the ugly of its witness, Antonio Walker – his involvement in the crimes, his agreement with the State for lesser punishment, and the credibility of his testimony. This credibility was supported in part by the physical evidence in this case, as well as Lang's self-serving statement to police; it was also supported by the fact that he told the same story to police when no deal was on the table for him as he did after he entered into the agreement with the State. Walker, in other words, did not attempt to enhance or otherwise increase the value of his testimony by embellishments or falsehoods in order to obtain a better deal.

Lang admits that he did not object to this testimony, and thus must meet the exacting plain-error standard under the evidentiary rule, while the State must meet the harmless-error standard for the alleged constitutional violation. Lang was not denied a fair trial under either standard. First, Lang did not object to or raise in this appeal the earlier testimony of Walker, where he testified that his trial testimony was consistent with his earlier statement to Detective Kandel. This failure to also challenge this testimony makes any showing of prejudicial error problematic for Lang. Second, the State did not have Walker testify about the specifics of his statement to Detective Kandel – only that he had spoken to Kandel, had told him what had happened concerning the deaths of Burditte and Cheek, and that his trial testimony was the same as this statement. Third, Lang had Walker's statement to police via pretrial discovery, and thus had the opportunity to cross-examine Walker about his statement to Kandel and any

inconsistencies between the statement and his trial testimony. Lang was thus not denied a fair trial as a result of this testimony.

For these reasons, the proposition of law should be rejected.

PROPOSITION OF LAW NO. 8

**ADMISSION OF IRRELEVANT AND PREJUDICIAL
EVIDENCE DURING A CAPITAL DEFENDANT'S TRIAL
DEPRIVES HIM OF A FAIR TRIAL AND DUE PROCESS.
U.S. CONSTITUTION AMEND. XIV; OHIO
CONSTITUTION ARTICLE I, § 16.**

Lang argues that the admission of irrelevant and prejudicial evidence in this case. Lang argues that certain challenged evidence was wholly irrelevant, and thus inadmissible, because it did not have any bearing or relationship to the central factual issue in this case, i.e, who the shooter was in this case who executed both Burditte and Cheek. Lang also challenges the admission of but five photographs of the crime scene in this case, which necessarily included the bodies of Burditte and Cheek. None of this evidence, however, was admitted erroneously. The flaw in the first prong of Lang's challenge is that while the identity of the executioner was the crucial factual issue in this case, it was not the only factual issue. The crimes in this case involved the robbing of a person who had and sold drugs, and the subsequent execution of this person and his innocent passenger (who simply happened to be in the wrong place at the wrong time, not being associated with the drug transaction in any way). Any evidence related to these factual issues was relevant and properly admitted. In addition, the limited number of photographs admitted in this case, without objection, were limited to show the crime scene – Burditte's motor vehicle – and the violent deaths of both Burditte and Cheek. It was not the fault of the camera or the State that the crime scene and the victims in this case looked as they did – the killer orchestrated this deadly tableau, and thus cannot complain later about its gruesomeness. A minimum number of photos were used to show the manner of these victims' deaths, and did

not deprive Lang a fair trial because of any alleged inflammatory or emotional appeal to the sensibilities of the jurors. The proposition of law is without merit.

Evidentiary Challenges.

Lang makes a number of challenges to the evidence in this case, arguing that the evidence was irrelevant because it did not directly relate to the issue of the identity of the shooter in this case. Since none of the issue went to this crucial issue, Lang argues that the evidence was erroneously admitted at trial. He further asserts that the only reason for offering this irrelevant and inadmissible evidence was to inflame the jury and attempt to obtain a guilty verdict based on emotion and passion as opposed to reason, logic, and common sense. The flaw in Lang's challenges, however, is that the factual issues of this trial, as in any trial, is not so narrowly focused. The other factual issues in this case included the drug nature of these homicides, the actions and words of the two people primarily involved in these homicides – Lang and Walker, the credibility of these two men (as well as the credibility of the other witnesses), and the manner and nature of the deaths of Burditte and Cheek. Given the broader nature of the factual issues in this case, the admission of the challenged evidence was not error or an abuse of discretion.

The particular evidence that Lang challenges include these challenges:

1. Lang challenges Walker's testimony that Lang wore red frequently. The trial court sustained his objection to the question that asked Walker to explain the significance of this color.⁷⁷ Lang argues that this reference to his frequent wearing of the color red signified to the jury that he was a gang member, and a member of a specific gang, The Bloods. This evidence

⁷⁷T.(IV) 874.

was relevant to demonstrate Lang's familiarity with firearms and firearm violence, as well as with the drug culture and its violent aspects. Given the crimes in this case, this evidence was relevant and proper.

2. Lang challenges the testimony of Detective John Dittmore that he was assigned to the Canton Police Department's gang unit.⁷⁸ Lang did not object or seek to otherwise preclude this testimony. Furthermore, the very nature of these crimes pointed to possible gang-related homicides. Two people were executed while in one of the victim's vehicles. It is not surprising that a specialized gang unit would be involved in the investigation of these homicides. Under Lang's theory of relevance, the other detectives in this case could not testify that they are homicide detectives as it would imply that homicides were committed in this case. The argument is without merit.

3. Lang challenges the testimony of Antonio Walker and Teddy Seery that Lang's nickname was "Tech." This was a name that Lang chose to go by – it wasn't the fault of Walker or Seery that he wanted to be known by his moniker. The fact that the nickname may refer to a specific semiautomatic firearm is perhaps the precise connection Lang wanted people to make. Furthermore, this evidence is connected to the gang-drug aspects of these homicides.

4. Lang attacks the testimony of Detective Dittmore that drug dealers do not sell a large amount of drugs to strangers, limiting such sales to small amounts. If the sale is for a large amount, the deals are not made on the street, but are instead made surreptitiously between parties known to one another, or with a stranger whom a known person has vouched for.⁷⁹ Lang did not

⁷⁸T.(IV) 955.

⁷⁹T.(IV) 967, 969-971.

object to this evidence. In addition, the evidence was very relevant given the nature of these homicides – two people were executed during the course of a robbery of drugs that were intended to be sold.

5. Lang also challenges Walker's testimony that Lang threw up after the homicides.⁸⁰ When Walker went to check on Lang, Lang responded that he did this (vomiting) every time he does this. First, Lang did not object to the testimony. Second, the statement was relevant to explain Lang's reaction to the double homicide. Third, Lang's veiled reference to other crimes may have included other crimes besides homicide. For example, he could have been referring robbing people of their drugs, knowing the likely danger such activity would place him in. Lang knew well enough to have a firearm when robbing someone of their drugs because of the risk of violence and retaliation. What Lang was precisely referring to in response to Walker's inquiry is only known to Lang.

6. Lang also takes issue with playing at trial his taped statement to police.⁸¹ This evidence was admissible even under Lang's narrow standard of relevancy since he exonerates himself as the killer. The fact that he opined during this interview that he might be guilty of conspiracy to murder was only stating the obvious. Lang in fact argues in this appeal that he was at most guilty of complicity to aggravated murder, and that this was his defense at trial. Lang's own *pro se* legal conclusion about his case was not prejudicial.

7. Lang also attacks Walker's testimony that he found out after the homicides that the murder weapon was a .9 millimeter handgun, even though he admitted that he knew how to

⁸⁰T.(IV) 887.

⁸¹T.(IV) 1001-1005.

chamber a round into a semiautomatic handgun. Lang argues in his brief, “[Walker’s] familiarity with how to load the weapon demonstrates that Walker was lying when he testified that he did not know, until later, the make and model of the murder weapon.”⁸² Yet Lang nebulously argues that this evidence, which was beneficial to him since it adversely impacted the credibility of his chief accuser, was nonetheless irrelevant and inadmissible. Such an argument is self-defeating on its face, and contradicts Lang’s general theory that any evidence that did not go directly to the identity of the shooter was irrelevant.

8. Finally, Lang challenges the admissibility about the DNA evidence in this case. The defect of this challenge has already been addressed in the response to the second proposition of law, and will not be repeated here. Suffice to say that the admission of this evidence was not erroneous and was clearly relevant even under Lang’s proposed narrow standard of relevance and admissibility. And the State’s comment upon this admissible evidence was not improper.⁸³

Photographs.

Lang makes the usual challenge to the admission of the photographs in this death penalty case, claiming that their gruesomeness inflamed the jury to the point where he was denied a fair trial. Lang challenges the five photographs that were admitted of the crime scene, i.e., Burditte’s vehicle where he and Cheek were executed. Lang argues that the bloody nature of these photos of two human beings who were shot at point blank range in the head should not have been admitted because of their emotional impact.

⁸²Merit Brief of Lang, at page 63.

⁸³See T.(V) 1274-1275, 1277, 1287.

At the outset, it should be noted that it's not the fault of the camera or the State that the crime scene looked the way it did. The killer is the person responsible for that. Furthermore, the instant case is a double-homicide case, where two people were executed by being shot at close range in the head. It would not be surprising, therefore, that the photographs of the crime scene with the bodies being present would be graphic and disturbing. The test for admission for such photographs, however, is not whether they are graphic, gruesome, or horrific.⁸⁴ If there were the test, which Lang implicitly suggest it is, no crime scene photographs, not to mention autopsy photos, would be admitted in any homicide prosecution. This is, however, not the test. The applicable standard instead focuses on the relevant and evidentiary value of the photos, and balances their weight against their inherently gruesome nature. The great concern this Court has had is not whether any particular photograph is particularly gruesome or horrific, but has been instead that the State would submit a myriad of such photographs in a transparent attempt to let the weight of these duplicative and repetitious photos sway the jury on an emotional level. That danger was not present in this case given the limited number of photographs selected and admitted.

The admission of relevant evidence is generally left to the sound discretion of the trial court. In some situations, relevant evidence must be excluded,⁸⁵ while in the remaining

⁸⁴*Cf. State v. Maurer* (1984), 15 Ohio St.3d 239, 265, 473 N.E.2d 768, 791 (“However, the mere fact that a photograph is gruesome or horrendous is not sufficient to render it *per se* inadmissible.”).

⁸⁵Evid. R. 403(A) (“Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.”).

circumstances, the exclusion of relevant evidence is discretionary.⁸⁶ Under either prong of Evid. R. 403, the trial court's decision on the admission of evidence is reviewed under the abuse of discretion standard.⁸⁷ Gruesome photographs in death penalty cases, however, are reviewed under a stricter standard. Under this stricter, *Maurer* standard, photos, even if gruesome, are admissible if relevant and probative relative to a factual issue or illustrative of testimony and other evidence, as long as this probative value outweighs the danger of material prejudice to the defendant and are not repetitive or cumulative in number. As this Court held in *Maurer*:

Properly authenticated photographs, even if gruesome, are admissible in a capital prosecution if relevant and of probative value in assisting the trier of fact to determine the issues or are illustrative of testimony and other evidence, as long as the danger of material prejudice to a defendant is outweighed by their probative value and the photographs are not repetitive or cumulative in number.

State v. Maurer (1984), 15 Ohio St.3d 239, 473 N.E.2d 768, at paragraph seven of the syllabus.

⁸⁶Evid. R. 403(B) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.").

⁸⁷"The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of the syllabus. See *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶ 107 (applying the *Sage* abuse of discretion standard to Evid. R. 403 determinations).

Cf. State v. Drummond, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶ 74 (applying *Sage* standard in capital case to admission of Evid. R. 404(B) evidence), and ¶ 83 (applying *Sage* standard to Evid. R. 401-relevancy determinations); *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151, ¶¶ 92, 99 (applying *Sage* standard to hearsay evidence).

The trial court's decision to admit photos under the *Maurer* standard is subject to review under the deferential abuse of discretion standard.⁸⁸

In this case, Lang challenges the five photographs that were admitted by the trial court. Five is neither duplicative nor cumulative. The five are of the crime scene: a view of the blood saturated interior of Burditte's vehicle⁸⁹ (Exh. 33R); a view of both Burditte and Cheek in the front seat of the Durango (Exh. 33P); a view of Burditte's face, with blood present and the damage to his teeth and gums from the gunshot visible (Exh. 32B); the view of the side of Cheek's head with blood (Exh. 31B); and, a view of the other side of Cheek's head, showing the gunshot wound and the blood from that wound (Exh. 31A). Lang did not object to the admission of this limited number of photographs, thus he has waived any error in the admission of the photographs but for plain error.⁹⁰ The probative value of these photographs was to show the manner of death, as well as the intent of the shooter. They also illustrate and corroborate the testimony of Walker and Seery. The five photographs do not constitute improper duplication or cumulation of gruesome photographs with minimal probative value. Lang cannot therefore

⁸⁸*State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, 827 N.E.2d 285, ¶ 21; *State v. Dunlap*, 73 Ohio St.3d 308, 317, 1995-Ohio-243, 652 N.E.2d 988, 996-997; *State v. Jackson* (1991), 57 Ohio St.3d 29, 37, 565 N.E.2d 549, 559; *Maurer*, 15 Ohio St.3d at 264, 473 N.E.2d at 791.

⁸⁹See *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 86 (holding that photographs of bloodstain areas of the crime scene without the bodies did not prejudice the capital defendant); *State v. Smith*, 80 Ohio St.3d 89, 108, 1997-Ohio-355, 684 N.E.2d 668, 687 (same); *State v. DePew* (1988), 38 Ohio St.3d 275, 281, 528 N.E.2d 542, 550-551 (same).

⁹⁰*Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, 827 N.E.2d 285, ¶¶ 25, 27.

satisfy the *Maurer* standard or the plain-error standard that the admission of these photos were outcome-determinative.

In conclusion, the admission of the challenged evidence in this case did not constitute error, and the trial court did not abuse its considerable discretion in admitting the evidence. In addition, the challenged evidence that Lang did not object to did not constitute plain error. Lang was not denied a fair trial by the admission of relevant, probative evidence that was not improperly or unfairly prejudicial. The proposition of law should be accordingly overruled.

PROPOSITION OF LAW NO. 9

A CAPITAL DEFENDANT IS DENIED HIS SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS TO A FAIR TRIAL AND RELIABLE SENTENCING AS GUARANTEED BY U.S. CONSTITUTION AMENDS. VIII AND XIV; OHIO CONSTITUTION ARTICLE I, §§ 9 AND 16 WHEN A PROSECUTOR COMMITS ACTS OF MISCONDUCT DURING THE TRIAL PHASE OF HIS CAPITAL TRIAL.

PROPOSITION OF LAW NO. 12

A CAPITAL DEFENDANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL ARE DENIED WHEN A PROSECUTOR ENGAGES IN MISCONDUCT DURING THE PENALTY PHASE. U. S. CONST. AMENDS. VIII, XIV; OHIO CONST. ART. 1 §10.

I. Introduction

Lang's Proposition of Law Nos. 9 and 12 raise claims of prosecutorial misconduct both in the guilt phase (No. 9) and the penalty phase (No. 12) of his trial. His claims of prosecutorial misconduct range from conduct during voir dire to closing arguments. These arguments fails because Lang mischaracterizes the conduct of the prosecutor, he suffered no prejudice and there was no plain error.

II. General law governing claims of prosecutorial misconduct.

The law governing prosecutorial misconduct is well-settled - while the prosecution is entitled latitude to strike hard blows, it must nonetheless not strike foul ones. The United States Supreme Court, in the familiar passage from *Berger*, explained the role of the prosecutor in a criminal prosecution:

...[H]e is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence

suffer. He may prosecute with earnestness and vigor - indeed he should do so. But, while he may strike hard blows, he is not a liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to ring about a just one.

Berger v. United States (1935), 295 U.S. 78, 88.

See also *State v. Lott* (1990), 51 Ohio St.3d 160, 555 N. E.2d 293, *cert denied* (1990), 498 U.S. 1017 (“These comments apply with equal force to Ohio prosecuting attorneys.”).

Challenged conduct of the prosecutor is reviewed in the context of the entire trial.

This review thus necessitates a review of the evidence and its strengths and weaknesses relative to the defendant’s guilt. Corrective measures, such as curative instruction taken by the trial court are also considered. *State v. Keenan* (1993), 66 Ohio St.3d, 402, 410, 613 N.E.2d 209 (“we consider the effect the misconduct had on the jury in the context of the entire trial. . . . One factor relevant to the due-process analysis is whether the misconduct was an isolated incident in an otherwise properly tried case.”).

In determining whether a prosecutor’s comments constitute misconduct warranting a reversal on appeal, the reviewing court must decide (1) whether the remarks were improper, and if so, (2) whether the remarks prejudicially affected an accused’s substantial rights.⁹¹

The touchstone of the analysis “is the fairness of the trial, not the culpability of the prosecutor.” *State v. Phillips* (1982), 455 U.S. 209, 219.

Certain conduct of a prosecutor is generally improper. For example, a prosecutor may not express a personal opinion about the credibility of a witness or the guilt of the defendant.

⁹¹*State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883.

Such assertions constitute vouching for the witness and is improper.⁹²

Likewise, it is improper for a prosecutor to make arguments that incite a jury to convict based upon public demand and community outrage, or to consider public opinion in rendering its verdict. Reminders, however, that the community has a right and an expectation that the jury will do its duty are not improper.⁹³

Finally, alleged acts of prosecutorial misconduct that are not objected to at trial are waived on appeal, subject to plain error analysis under Crim. R. 52(B). Under this standard, the improper conduct will not constitute plain error unless, but for the conduct, the outcome of the trial clearly would have been otherwise. As this Court has consistently stated, [n]otice of plain error under Crim. R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.⁹⁴ The entire trial is reviewed, including the strength of the evidence.

Where the defendant has objected to the conduct of the prosecutor, the standard of review is whether comments prejudicially affected the defendant's substantial rights. The

⁹²*State v. Liberatore* (1982), 69 Ohio St.2d 583, 589, 23 O.O.3d 489, 433 N.E.2d 561, 566.

⁹³See, e.g., *State v. Hicks* (1989), 43 Ohio St.3d 72, 76, 538 N.E.2d 1030, 1035-1036, cert. denied (1990), 494 U.S. 1038 (“‘The people in this community have the right to expect that you will do your duty.’ This statement was proper. It was the jury’s duty to convict if the evidence proves guilt beyond a reasonable doubt.”).

⁹⁴*State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, at paragraph three of the syllabus.

reviewing court must conclude that absent the offending conduct of the prosecutor, the jury would not have found the defendant guilty beyond a reasonable doubt.⁹⁵

III. Alleged acts of prosecutorial misconduct in the guilt phase.

A. Voir Dire

Lang first claims that the prosecutor's questions to the jurors asking whether they could impose the death penalty on the defendant were improper. There are was no objection from Lang at the trial and therefore this error is waived.⁹⁶ What is more, there is no plain error. The record demonstrates the prosecutor asked the jurors if they could follow the law – if they were convinced beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors they could sentence Edward Lang to death.⁹⁷ Correct statements of the law do not constitute prosecutorial misconduct. Meanwhile, this Court has rejected a similar argument in *State v. Evans*, (1992), 63 Ohio St.3d 231, 250, 586 N.E.2d 1042 (holding that question to jurors asking whether they could impose the death penalty “upon the defendant” was not improper.

B. Lang's gang involvement and propensity for violence

Lang accuses the prosecutor of injecting Lang's gang membership during the testimony of witnesses. Walker testified that he knew Lang as “Tech” from Baltimore.⁹⁸ Lang notes that Tech

⁹⁵*State v. Fears*, 86 Ohio St.3d 329, 1999-Ohio-111, 715 N.E.2d 136, *cert. denied* (2000) 529 U.S. 1039.

⁹⁶*State v. Hale*, 119 Ohio St. 3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶202.

⁹⁷See e.g., T.(I) 213.

⁹⁸T.(IV) 873. Notably, Teddy Seery testified that he knew Lang as “Tech”; Lang makes no similar claim that Seery's testimony constituted prosecutorial misconduct.

is shorthand for a type of 9 millimeter handgun claiming that the moniker suggested to the jury that Lang was violent. Lang's argument is sheer speculation as there is nothing in the record that the prosecutor explained to the jury the shorthand nomenclature Lang now expounds.

Lang also accused the prosecutor of injecting gang references by asking Walker the color of the shirt he was wearing the night of the killings and whether Lang wore the color frequently. Again, Lang did not object and this argument is waived. When Lang objected to the question of the prosecutor regarding the significance of the color, the trial court sustained the objection and the prosecutor continued his questioning of Walker on a different subject. This isolated question did not constitute reversible prosecutorial misconduct particularly when the trial court sustained the objection. Again, Lang engages in speculation when he argues that the jury inferred he was a member of the gang, the Bloods. There was no testimony that wearing of the color red was the Bloods uniform.

Lang also finds offensive Officer's Dittmore's identification as a member of the gang task force. Lang mischaracterizes Dittmore's testimony. When asked his current duties, Dittmore explained that he supervised the police's department's Gang Unit and that he also worked with the police vice unit.⁹⁹ Dittmore then explained that a task force with the United States Marshall service assembled the day of Lang's arrest to execute arrest warrants. This identification by Dittmore as a current member of the police gang unit did not prejudice Lang and did not draw an objection from Lang at trial. This alleged error, therefore, is also waived.

⁹⁹T.(IV) 956.

C. Drug sale testimony

Next, Lang accuses the prosecutor of committing misconduct by failing to qualify Dittmore as a drug sales expert before asking him to testify whether “drug dealers sell to people they don’t know.”¹⁰⁰ Admitting that Lang knew Burditte was relevant, Lang’s argument merely faults the prosecutor for not qualifying Dittmore as an expert. Again, however, Lang did not object to the failure to qualify Dittmore as an expert. Indeed, Lang used Dittmore as a “drug expert” in cross examination to establish that drug dealers sell to people they don’t know:

[BEANE] What about people standing on the corner selling rocks to cars that pull up. Ever see that?

[DITTMORE] Yes, I have.

[BEANE] Stranger, stop at the light, knock on the window, do you want a bump?

[DITTMORE] That is occasional.

T.(IV) 967. See also T.(IV) 970-971.

Because Lang used Dittmore for his own drug expert purpose, did not object to his testimony and was not prejudiced, this argument must fail.

D. “Throwing up” comment

Lang also accuses the prosecutor of misconduct when he asked Walker whether Lang said anything while he was throwing up after the shootings and Walker responded, [H]e said every time I do this, this same thing happens.”¹⁰¹ Again, Lang did not object to this testimony at trial and his argument is, therefore, waived.

¹⁰⁰T.(IV) 867. In Lang’s statement to police following his arrest, he confirmed that after the shootings he “hurled.” T.(IV) 1004.

¹⁰¹T.(IV) 887.

The testimony was admissible under Evid. R. 804(B)(3) as an admission against interest.¹⁰² The prosecutor did not commit misconduct when he commented on the testimony during closing argument as he fairly and accurately commented on the evidence. This argument of Lang must also be rejected.

E. Lang's statement that he was guilty of conspiracy.

After his arrest, Lang gave a tape recorded statement to police detectives generally admitting his involvement in the robbery that led to the shootings and killings of Burditte and Cheek, but denying that he was the actual killer. At most, according to Lang, he was guilty of conspiracy to murder:

[LANG] Basically that he used my gun and then that I was in the car when that shit happenin'. And than as though, you know what I'm saying', that's conspiracy to murder.

State's Exh. 3.

While Lang objected to the playing of the taped statement at trial, he filed no motion in limine or other motion to redact portions of it, notwithstanding that trial counsel had the statement long before trial.¹⁰³ And following the playing of the statement for the jury, the trial court instructed it not to consider any legal conclusion and that conspiracy to murder was not

¹⁰²Evid. R. 804(B) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as witness: (3) Statement against interest. A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the truthworthiness of the statement..

¹⁰³Tr. IV, 1002.

among the charges.¹⁰⁴ Now, Lang claims that the prosecutor committed misconduct when it played the tape during its case in chief. To demonstrate prejudice, Lang points to the prosecutor's closing argument that Lang could be guilty as an aider and abettor to the murders. Yet because the jury found Lang to be the actual killer- the principal offender, no prejudice is demonstrated.

The crux of Lang's argument is not that the prosecutor committed misconduct, but that the trial court abused its discretion in admitting the unredacted tape recorded statement of Lang. The admission or exclusion of relevant evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.¹⁰⁵

The trial court did not abuse its discretion in admitting the tape recorded statement of Lang, especially when it took the precautionary step of instructing the jury that it was not to reach any legal conclusions from Lang's presumption that at most, he was guilty of conspiracy to murder – a theory that Lang espoused.

F. The prosecutor presented false testimony

Lang argues that the prosecutor presented false testimony when Walker testified that he found out after the murders that the gun was a .9 millimeter pistol. In a stretch, Lang argues that the prosecutor knew Walker was lying because he also testified in the same direct examination that he knew how to chamber a round on a .9 millimeter.¹⁰⁶

¹⁰⁴Tr. IV, 1006.

¹⁰⁵*State v. Sage* (1987), 31 Ohio St. 3d 173, 510 N.E. 2d 343, paragraph two of the syllabus.

¹⁰⁶T.(IV) 879, 883.

The prosecutor has a constitutional duty to assure the defendant a fair trial. In doing so, he must refrain from knowingly using perjured testimony. *Mooney v. Holohan* (1935), 294 U.S. 103. In *State v. Iacona* (2001), 93 Ohio St.3d 83, 97, 2001-Ohio-1292, 752 N.E.2d 951 this Court explained:

The knowing use of false or perjured testimony constitutes a denial of due process if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. ...Such a claim is in the nature of an allegation of prosecutorial misconduct, and the burden is on the defendant to show that (1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false.

Here, Lang cannot meet even the first threshold - the statement was actually false.

Not knowing that the gun was a .9 millimeter pistol until after the shootings and knowing how to chamber a round on a .9 millimeter pistol do not contradict each other and are not inconsistent.

There is nothing in the record to suggest that this testimony or any other testimony or evidence for that matter offered by the state at trial was false. This argument must fail.

G. DNA evidence

In this argument, Lang returns to his theme of Proposition of Law No. 2, that the DNA evidence on the gun did not demonstrate that Lang was the actual killer of Burditte and Check.

The prosecutor's comments on the DNA found on the gun were a proper comment on the evidence. Foster testified that Walker was excluded as the major source of DNA on the pistol used in the killings. Foster further testified that Lang could not be excluded as a minor source of the DNA found on the pistol used in the killings.¹⁰⁷

¹⁰⁷T.(IV) 1128.

During closing argument, the prosecutor properly commented upon the evidence – Walker was excluded; Lang was not.

Again, there was no objection from Lang to the comments of the prosecutor. Instead, during his closing argument, Lang reminded the jury that the DNA only demonstrated that Lang was not excluded as a minor source.¹⁰⁸

It was not plain error for the prosecutor to comment on the DNA testimony offered by Foster. Even then, the trial court gave the jury the standard limiting instruction – that the statements of the parties in closing arguments is not evidence.

H. Speculations of prosecutor during closing arguments

Lang argues that the prosecutor improperly speculated on the evidence during closing argument and points to the comment of the prosecutor that the external injury to Cheek's left hand demonstrated a defensive wound. This comment was a proper inference from the evidence. Both Short, a firearms expert and Murthy, the coroner, testified that the back of Cheek's left hand showed stippling, demonstrating that the back of Cheek's left hand was in close proximity to the muzzle of a gun – 1-1/2 to 2 feet.¹⁰⁹

I. Vouching for witnesses.

Next, Lang argues that the prosecutor improperly vouched for witnesses during his closing argument.

¹⁰⁸T.(V) 1296.

¹⁰⁹T.(IV) 1084 and T.(V) 1215.

Certain comments by a prosecutor are generally improper. A prosecutor may not express a personal opinion about the credibility of a witness or the guilt of the defendant.¹¹⁰ A review of the closing argument of the prosecutor do not support Lang's contention. The prosecutor merely commented on the witnesses who put the murder weapon in the hands of Lang and requested that the jury judge their credibility. The comments made by the prosecutor were nothing more than effective advocacy.

IV. Alleged prosecutorial misconduct during penalty phase

A. Prosecutor's comments on mitigation

Lang accuses the prosecutor of diminishing the role of Lang's childhood abuse in explaining his killing of Burditte and Cheek. Again, the prosecutor is entitled to comment upon the evidence and draw inferences from it. Such comments were not plain error.

B. Gang affiliation

Lang's argument that the use of his nickname "Tech" somehow inferred a gang affiliation is specious. There was no testimony that the nickname "Tech" somehow demonstrated Lang's propensity to use guns in a gang setting.

C. Victim-Impact

Lang points to an isolated comment by the prosecutor reminding the jury that the victims, as well as Lang, had children as impermissible victim impact conduct. This argument has no merit and was specifically rejected by this Court in *State v. Evans* (1992), 63 Ohio St.3d 231, 586 N.E.2d 1042, *cert. denied* (1992), 506 U.S. 886.

D. Justice

¹¹⁰*Keenan*, 66 Ohio St.3d at 408, 613 N.E.2d at 208.

The prosecutor's reminder that the jury should render justice was not misconduct. It is improper for a prosecutor to make argument that incite a jury to convict based upon public demand and community outrage, or to consider public opinion in renders its verdict. Reminders, however, that the community has a right and an expectation that the jury will do its duty are not improper.¹¹¹

Lang's accusations of prosecutorial misconduct are without merit and propositions of law numbers 9 and 12 should be summarily overruled.

¹¹¹*State v. Williams* (1986), 23 Ohio St.3d 16, 20, 490 N.E.2d 906, 911, *cert. denied* (1987), 480 U.S. 923 ("A request that the jury maintain community standards is not equivalent to the exhortation that the jury succumb to public demand. . .").

PROPOSITION OF LAW NO. 10

THE DEFENDANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IS VIOLATED WHEN COUNSEL'S PERFORMANCE DURING THE CULPABILITY PHASE OF A CAPITAL TRIAL IS DEFICIENT TO THE DEFENDANT'S PREJUDICE. U.S. CONSTITUTION AMEND. VI AND XIV; OHIO CONSTITUTION ARTICLE I, § 10.

PROPOSITION OF LAW NO. 13

THE DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IS VIOLATED WHEN COUNSEL'S PERFORMANCE, DURING THE PENALTY PHASE OF HIS CAPITAL TRIAL, IS DEFICIENT TO THE DEFENDANT'S PREJUDICE. U.S. CONSTITUTION AMEND. VI; OHIO CONSTITUTION ARTICLE I, § 10.

I. Introduction

Lang's propositions of law numbers 10 and 13 consist of a series of complaints alleging ineffective assistance of trial counsel in the guilt phase (proposition of law no. 10) and the penalty phase (proposition of law no. 13). The complaints range from failure to object to DNA to failure to present mitigation evidence, a subject more properly raised in Lang's petition for post conviction relief.

II. General principles governing ineffective assistance of counsel claims

The legal principles that govern claims of ineffective assistance of counsel are established by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668. To establish ineffective assistance, the defendant must prove that (1) trial counsel's performance fell below an objective standard of reasonableness, and (2) the substandard performance actually

prejudiced the defendant. “To show that a defendant has been prejudiced by counsel’s deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel’s error, the result of the trial would have been different.” Reversal is warranted only where a defendant demonstrates that there is a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.¹¹²

Finally, trial counsel’s performance is scrutinized with deference, making every effort to eliminate the distorting effect of hindsight and evaluate the conduct from counsel’s perspective at the time.¹¹³

III. Alleged claims of ineffective assistance during guilt phase of trial

A. Failure to challenge weak DNA evidence

Lang first claims that he was prejudiced when his trial counsel mounted a weak defense to the testimony of Foster that Lang could not be excluded as a minor source of DNA found on the pistol that was conclusively identified as the murder weapon. Again, Lang attacks the opinion of Foster because she was not able to opine to a reasonable degree of medical certainty that the DNA belonged to Lang. As noted in response to proposition of law number 2, however, this court has rejected the claim that an expert’s opinion, especially in a criminal case, must be based on a reasonable degree of medical certainty. *State v. D’Ambrosio*, supra.

Indeed, Lang’s trial counsel during Foster’s cross examination pointed out that the DNA found on the pistol was so small that it couldn’t be submitted for CODIS and that the second

¹¹²*State v. Bradley* (1989), 42 Ohio St.3d 136, 142, 538 N.E.2d 373, paragraph three of syllabus.

¹¹³*Bell v. Cone* (2002), 535 U.S. 685, 698.

minor source of the DNA found on the pistol could not be identified because there was not enough.¹¹⁴

Still, trial counsel's DNA defense did not prejudice Lang. Lang never denied that the pistol belonged to him and the gun was found in the car he was driving when he was arrested. It stands to reason that a gun belonging to him and that was handled by him would contain his DNA. His defense was that he gave the pistol to Walker and Walker was the actual killer. The relevant portion of Foster's testimony, then, was that Walker was excluded as the major source of the DNA found on the pistol.

Trial counsel's examination on the DNA did not constitute ineffective assistance of counsel.

B. Lynch mob reference in closing argument

Lang now faults his trial counsel for the lynch mob comments it made during closing argument. This argument fails as Lang is now doing nothing more than second guessing a trial strategy, a practice that does not lead to a finding of ineffective assistance.

During the closing argument, trial counsel exhorted the jury to take its role seriously, weigh the evidence, and act as jurors who took an oath to do justice. Trial counsel contrasted the role of the jury to a lynch mob who does the opposite. Lang's appellate counsel attempts to distort the remarks and turn them into ineffective assistance do not merit a finding of ineffective assistance. This argument must be rejected.

¹¹⁴T.(IV) 1135, 1139.

C. Failure to voir dire Jury 386.

Lang complains that his trial counsel was ineffective in the manner in which it handled Juror No. 386. Lang argues that somehow trial counsel should have ferreted out that Juror No. 386 knew the Cheek family. Yet, Lang point to no conduct his trial counsel should have done to remove Juror No. 386 before she was sworn in. And Lang can demonstrate no prejudice from trial counsel's actions. The juror was removed and the other jurors were asked by the trial court if any actions of Juror No. 386 would affect their deliberations and their ability to be fair and impartial. The State incorporates its response to proposition of law number one.

D. Failure to object to (A)(7) specifications

Lang argues that somehow his trial counsel was ineffective in failing to object to the omission of the prior calculation and design element. The State incorporates its answer to proposition of law number four which argues that indeed Lang was not prejudiced and in fact benefited from the trial court's intentional omission of prior calculation and design. Lang's defense was that while he planned and participated in the aborted robbery and even got in Burditte's Durango, he was not the actual killer – Walker was. If the jury had accepted his defense and received the prior calculation and design instruction, it could have sentenced him to death. Lang's argument fails and demonstrates the adage, “[B]e careful what you ask for, because you might get it.”

E. Failure to object to prejudicial testimony

In this argument, Lang returns to his theme that evidence of a gang affiliation was inserted into the trial when the jury learned of Lang's nickname “Tech.” Again, Lang

introduces evidence that is not in the record. The jury heard no evidence that the nickname Tech was somehow identified with a TEK-9.

Lang's argument that the jury should not have heard Walker's statement that Lang threw up after the shootings is also unavailing. Such evidence was admissible because it was an admission against interest and any attempts to have it excluded would have failed.

F. Failure to Test Walker's clothes

Lang now makes the claim that trial counsel should have employed a forensic examiner to test the pants of Walker when the State did not. Yet, Lang cannot demonstrate how Lang was prejudiced. Indeed by not testing, Lang was able to argue that the State's investigation was not complete and raise the mantle of reasonable doubt – one that his appellate counsel had adopted in its arguments to this court. Lang is again second guessing trial counsel's strategy – a practice that does not lead to a finding of ineffective assistance.

G. Ineffective cross examination of coroner

During the cross examination of Murthy, the coroner, his trial counsel mistakenly read the coroner's report to contain the finding that a firearm was found on victim Burditte. In fact, no firearm was found on either victim. The mistake was immediately corrected by trial counsel in his questioning of the coroner. The trial court clarified that the firearm was the cause of death and not found on Burditte.¹¹⁵ Lang now points to this minor mistake as a demonstration of ineffective assistance. Yet, Lang cannot demonstrate how this minor error which was immediately remedied affected the outcome of the trial and prejudiced Lang.

¹¹⁵T.(V) 1230.

H. Remainder of Lang's claims.

The State incorporates by reference its response to proposition of law numbers one through eighteen. Lang cannot demonstrate that the remainder of his claims of ineffective assistance during the guilty phase were ineffective at all or rose to the level of a violation of the Sixth Amendment.

IV. Alleged claims of ineffective assistance during penalty phase

A. Failure to present mitigating evidence

Lang claims that his trial counsel was ineffective in failing to present in mitigation evidence that the victim, Marnell Cheek facilitated the offense. This argument is frivolous. The jury here apparently painted the victims with a different brush when it sentenced Lang to life without parole for the killing of Burditte and death for the killing of Cheek.

Lang now argues that his trial counsel was ineffective for failing to present evidence to the jury of Cheeks criminal lifestyle.

This argument is offensive and wholly based on speculation. The record demonstrates that Cheek was nothing more than an innocent victim. Walker and Lang set up the robbery with Burditte, not Cheek. Both were surprised when a woman accompanied Burditte. Walker backed out while Lang did not. Cheek's autopsy revealed absolutely no drugs or alcohol in her system when she was shot point blank by Lang.¹¹⁶ Any attempts to paint Cheek with a criminal brush would have done nothing more than anger the jury as it should this Court.

¹¹⁶T.(V) 1128.

B. Failure to investigate and prepare mitigation evidence.

At Lang's mitigation, his mother and sister testified to his childhood in Baltimore, Maryland and the abuse he suffered from the hands of his biological father. The jury heard of Lang's frequent hospitalizations because of his mental illness.

While the records demonstrates that a psychologist, mitigation expert and private investigator were appointed by the trial court, no reports were presented in mitigation.¹¹⁷

Failure to present mitigating evidence does not constitute proof of ineffective assistance of counsel. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 157, 524 N.E.2d 747; accord *Burger v. Kemp* (1987), 483 U.S. 776. It may well be that counsel conducted a diligent investigation but was unable to find more substantial mitigation evidence. *State v. Coleman* (1999), 85 Ohio St.3d 129, 707 N.E.2d 476. In his various propositions of law, Lang complains that evidence of his gang affiliations impermissibly infected the guilt phase of his trial. Perhaps the experts that he employed found nothing more than evidence that Lang was a cold-hearted gang killer who had killed before.

The record here does not indicate that other mitigating evidence was available and Lang's assertions to the contrary are pure speculation. His claims are more properly reserved for a review of his petition for post conviction relief where he is not confined to a trial record. *State v. Davis*, 116 Ohio St.3d 404, 451, 2008-Ohio-2, 880 N.E.2d 31, 80.

C. Lang's other claims of ineffective assistance.

The State incorporates by reference its response to Lang's propositions of law numbers one through eighteen.

¹¹⁷T. (Time Waiver Hearing), Jan. 17, 2007, at 7.

PROPOSITION OF LAW NO. 11

WHERE THE JURY RECOMMENDS THE DEATH SENTENCE FOR ONE COUNTY OF AGGRAVATED MURDER, BUT RECOMMENDS LIFE SENTENCE ON ANOTHER COUNT, AND THE AGGRAVATING CIRCUMSTANCES AND MITIGATING FACTORS ARE IDENTICAL, THE RESULTING DEATH SENTENCE IS ARBITRARY AND MUST BE VACATED. U.S. CONSTITUTION AMENDS. VIII, XIV.

Lang argues in his eleventh proposition of law that the death sentence in this case was arbitrary since the jury did not recommend a death sentence for the Burditte homicide. The jury recommended a life sentence without parole for killing Burditte, but recommended a sentence of death for the senseless killing of Cheek. Lang's argument is essentially a proportionality one, claiming that the death sentence for killing Cheek is disproportionate to the life sentence for killing Burditte. Proportionality of death sentences with other non-capital sentences is not required, and therefore different sentences do not offend the Eighth Amendment. In addition, Lang argues that these sentence recommendations are inconsistent verdicts, and that this inconsistency was not cured by the trial court's separate sentencing decision, but was in fact replicated. The verdicts, however, are not inconsistent, but reflect the very individualized sentencing that the Eighth Amendment requires. For these reasons, Lang's proposition of law is without merit and should be rejected.

The aggravating circumstances for both killings in this case were the same – the felony-murder specification under R.C. 2929.04(A)(7) (for the underlying felony of aggravated robbery), and the multiple-murder specification under R.C. 292904(A)(5). Lang argues that his mitigating factors were the same, thus the jury lost its way in weighing these same aggravating

circumstances against the same mitigating factors. Lang's argument, however, is flawed since it argues implicitly that his death sentence for killing Cheek is inconsistent and disproportional with his life sentence without parole for the killing of Burditte. Lang's argument therefore hinges upon a constitutional requirement for proportionality.

The United States Supreme Court, however, has held that the Eighth Amendment does not require proportionality review.¹¹⁸ Thus, the only proportionality review pertinent to Ohio death penalty cases is that which is imposed by statute (R.C. 2929.05(A)). This statutory proportionality review is directed at the reviewing courts, not the juries, in capital cases. Furthermore, this Court has construed the statute to require proportionality review with only other cases in which the death penalty has been recommended and imposed. In its *Steffen* case, this Court specifically held in its syllabus law of the case that the reviewing court need only compare the death penalty case under review with other cases in which the death penalty had been imposed.¹¹⁹

Under this standard, Lang's death sentence for killing Cheek is not measured, weighed, or compared with the life sentence he received for his killing of Burditte. Thus, the issue for the trial court (as well as this Court) is whether the aggravating circumstances attendant to the Cheek homicide outweigh beyond a reasonable doubt the mitigating factors presented by Lang. The

¹¹⁸See *Pulley v. Harris* (1984), 465 U.S. 37, 50; *McCleskey v. Kemp* (1987), 481 U.S. 279, 306-307.

¹¹⁹*State v. Steffen* (1987), 31 Ohio St.3d 111, 509 N.E.2d 383, paragraph one of the syllabus ("The proportionality review required by R.C. 2929.05(A) is satisfied by a review of those cases already decided by the reviewing court in which the death penalty has been imposed.").

jury's recommendation of a life sentence for the Burditte homicide has no weight in this review process.

But Lang nonetheless argues that the jury's sentencing recommendations are inconsistent, despite the acknowledged fact that inconsistent jury verdicts are not a violation of due process.¹²⁰ The sentencing recommendations, however, are not inconsistent. As part of the weighing process, the jury is to weigh the aggravating circumstances against the mitigating factors, the jury is to weigh the mitigating factor of the nature and circumstances of the offense against these circumstances.¹²¹ And mitigating factors differed for each of the homicides, being greater for the killing of Burditte than for the execution of Cheek. Burditte was a known drug dealer in the community who was also known to carry a large amount of cash, an indication of the scope and success of his illegal business. Cheek, however, was in no way connected to this drug activity. She was simply Burditte's date, and hence was in the wrong place at the wrong time. Her execution was more senseless, and her presence should have mitigated against the robbery (as it did for Walker). Instead, Lang opted to proceed and to leave no one alive behind in the vehicle.

¹²⁰See, e.g., *Dowling v. United States* (1990), 493 U.S. 342, 353-354; *Standefer v. United States* (1980), 447 U.S. 10, 25; *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, ¶ 138 (citing cases).

In addition, this proportionality argument has been rejected when co-defendants in a capital case receive different sentences, i.e., one receives a death sentence and the other receives a non-capital sentence. See, e.g., *Getsy v. Mitchell* (C.A. 6, 2007), 495 F.3d 295 (*en banc*); *State v. Sneed* (1992), 63 Ohio St.3d 3, 17, 584 N.E.2d 1160, 1172 (upholding death sentence of defendant who executed his victim in the back of the head after getting into the victim's car in an attempt to rob him, while co-defendant received a life sentence).

¹²¹R.C. 2929.04(B) (“ . . . the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, **the nature and circumstances of the offense**, the history, character, and background of the offender, and all of the following factors . . .”) (emphasis added).

Thus, a mitigating factor in the Burditte homicide was Burditte's connection to the violent world of drug trafficking.¹²² This mitigating factor is absent in the Cheek execution – she was not a willing participant in this drug trafficking world and thus did not accept the risk of violence that is part and parcel of that world.

For these reasons, Lang's death sentence does not offend the Eighth or Fourteenth Amendments, and the proposition of law should be rejected.

¹²²*Cf.* R.C. 2929.04(B)(1) (listing as a mitigating factor “[w]hether the victim of the offense induced or facilitated it”).

PROPOSITION OF LAW NO. 14

**A CAPITAL DEFENDANT'S RIGHT TO DUE PROCESS
AND AGAINST CRUEL AND UNUSUAL PUNISHMENT
ARE VIOLATED BY INSTRUCTIONS THAT RENDER
THE JURY'S SENTENCING PHASE VERDICT
UNRELIABLE. U.S. CONSTITUTION AMENDS. VIII, XIV;
OHIO CONSTITUTION ARTICLE I, §§ 9, 16.**

Lang next challenges the jury instructions the trial court gave regarding the weighing of the aggravating circumstances against the mitigating factors during its preliminary instructions, as well as its instruction during the sentencing phase of his capital trial that allowed the jury to determine the relevance of the evidence presented at the guilty phase of the trial that was readmitted during the sentencing phase in making its sentencing recommendation. Both of Lang's claims are without merit. First, the trial court's preliminary instructions given during the lengthy voir dire process were corrected by the court's instructions to the jury during the penalty phase of the trial. The presumption is that the jury followed these final instructions, which were given to the jury in written form as well as orally, rather than the preliminary instructions. Second, the trial court's jury instruction with regard to the relevance of guilt-phase evidence presented at the sentencing phase was correct and did not require the jury to make a determination of the relevancy of evidence. The trial court in fact instructed the jury at the penalty phase that the trial court had made this relevancy determination of the guilt-phase evidence, and it would only consider this relevant evidence admitted by the court into the penalty phase. Accordingly, the proposition of law is without merit.

Lang first takes issue with the jury instructions the trial court gave throughout the lengthy voir dire process. The court did tell the jury that this case was a death penalty case, and that it

could impose a death sentence if it found the aggravating circumstances outweighed any of the mitigation factors. To the extent that this preliminary instruction gave the impression that the jury could impose a death sentence if it found that the aggravating circumstances outweighed any single mitigating factor, the instruction was erroneous.¹²³ Lang, however, did not object to the preliminary instructions, thus review is limited to plain error, i.e., outcome-determinative review. The preliminary instructions were not plain error since the trial court later gave the correct instruction regarding the weighing process including the cumulative weight of the mitigating factors against the aggravating circumstances. This correct instruction was given at the penalty phase, perhaps the most crucial part of Lang's capital trial. The jury was also given these instructions in written form. The presumption is that the jury followed these later correct instructions rather than the preliminary instructions given during voir dire.

With regard to the jury instruction regarding the relevance of evidence, Lang argues that the trial court improperly instructed the jury to determine what guilt-phase evidence was relevant in the penalty phase for its sentencing determination. In this respect, this Court has held that it is error for the trial court, which has admitted all the evidence from the trial phase into the penalty phase, to instruct the jury to consider "all the evidence, including exhibits presented in the first phase of this trial which you deem to be relevant."¹²⁴ This Court ruled that it was the trial court's duty and not the jury's to determine what evidence is relevant.

¹²³See *State v. Smith*, 89 Ohio St.3d 323, 332, 2000-Ohio-166, 731 N.E.2d 645, 654-655 (holding that a trial court erred in instructing the jury to weigh the aggravating circumstance against each mitigating factor, instead of all the mitigating factors raised at the mitigation hearing, but that such error was not plain error). See also R.C. 2929.03(D)(2).

¹²⁴*State v. Getsy*, 84 Ohio St.3d 180, 201, 1998-Ohio-533, 702 N.E.2d 866, 887.

In this case, however, the trial court did not readmit all the evidence from the guilt phase; the State in fact made a careful review of the guilt-phase exhibits and selected which ones were relevant to the issues in the sentencing phase.¹²⁵ In addition, the trial court did not give the instruction that was given in *Getsy* which this Court held was erroneous (but not plain error).

Some of the evidence and testimony that you considered in the trial phase of this case may not be considered in this sentencing phase. We went through the exhibits. I've culled out only certain exhibits that will be with you in the jury room.

For purposes of this proceeding, only that evidence admitted in the trial phase that is relevant to the aggravating circumstances and to any of the mitigating factors is to be considered by you. You will also consider all of the evidence admitted during the sentencing phase.

T.(Mitigation Hearing), at 113.¹²⁶

The trial court, therefore, did not give the instruction that was found erroneous in *Getsy*. Furthermore, Lang, like the defendant in *Getsy*, did not object to the challenged instruction. Thus, the standard of review is plain error. Given the fact that the State and the trial court culled through the evidence admitted during the guilt phase and only admitted a portion of them for purposes of the penalty phase, the jury did not have the task of making the relevancy determinations that the trial court allocated to the jury in *Getsy*. Thus, to the extent that the

¹²⁵T.(Mitigation Hearing), at 3-8.

¹²⁶Lang also cites in his merit brief to another part of the transcript of the trial court's mitigation phase instructions in support of this claim; this page reference, however, has no relevance to the claim. On that page – T.(Mitigation Hearing), at 107 – the court simply instructed the jury that the aggravated murder itself is not an aggravating circumstance, and stated the aggravated circumstances for the Check aggravated murder.

instruction in the instant case approached the prohibited parameters in *Getsy*, it was nonetheless not plain error.

In conclusion, therefore, Lang was not deprived a fair trial by the challenged instructions in this case, and any error that occurred was not plain error and was cured by subsequent instructions. For these reasons, the proposition of law is without merit and should be rejected.

PROPOSITION OF LAW NO. 15

**A CAPITAL DEFENDANT’S RIGHTS AGAINST CRUEL
AND UNUSUAL PUNISHMENT AND DUE PROCESS ARE
VIOLATED BY ADMISSION OF PREJUDICIAL AND
IRRELEVANT EVIDENCE IN THE PENALTY PHASE OF
THE TRIAL. U.S. CONSTITUTION AMENDS. VIII, XIV;
OHIO CONSTITUTION ARTICLE I, §§ 9, 16.**

Lang challenges the admission of certain evidence during the sentencing part of his capital trial, claiming that the evidence was irrelevant and prejudicial. At the start of the penalty phase of the trial, the State moved to readmit certain and not all of the exhibits admitted during the guilty phase. Lang objected to the admission of the limited number of autopsy photos, the autopsy report, the handgun, and the bullets. The trial court overruled the objection and admitted these limited exhibits.¹²⁷ Lang now argues that this evidence had marginal relevance and put undue emphasis on the homicide.¹²⁸ He also argues that the admission of the victim impact evidence in this case – through the limited testimony of one family member per victim – was

¹²⁷In so doing, the trial court noted the State’s burden of proof in this phase of the trial:

The State is correct, the burden of proof is on the State at all times to prove that the aggravating circumstances in this case as it relates to each count outweigh the mitigating factors that may be presented throughout the course of the trial. The Court would, therefore, admit the exhibits and note the objections of the Defendant.

T. (Mitigation Hearing), at 7-8.

¹²⁸This brief assumes that Lang is referring to the homicide of Check, since this killing resulted in Lang’s death sentence. Lang’s argument that the jury were affected adversely by errors committed by the trial court during the penalty phase of his trial is of course mitigated by the fact that this same jury was able to assess and weigh the evidence during this phase in a manner dispassionate enough as to recommend a life sentence for the execution of Burditte.

irrelevant and prejudiced him. The challenged evidence, however, was properly admitted. Thus, Lang's arguments are without merit.

Lang first challenges the readmission of certain pieces of evidence during the penalty phase, asserting that this evidence had marginal relevance and unduly emphasized the homicide (of Cheek). Lang's argument ignores the fact that the existence of the aggravating circumstances in this case – that each aggravated murder was committed during the commission of the offense of aggravated robbery, and that each aggravated murder was committed as part of a course of conduct involving the purposeful killing of two persons by the offender – and that the State had to burden to prove that these aggravated circumstances outweighed Lang's mitigation evidence beyond a reasonable doubt. The trial court, therefore, did not abuse its discretion in readmitting this limited evidence (especially given the fact that the so-called prejudicial effect of this evidence did not persuade the jury to return a death sentence for the execution of Burditte).

Lang next challenges the admission of the victim impact evidence in this case. The State presented only two witnesses in this regard, a close relative for each victim. For Burditte, his sister, LaShonda Burditte, testified; and for Cheek, her brother, Rashu Jeffires, testified. Their testimony was limited to an unemotional recitation of who these two victims were as human beings; the witnesses did not testify as to what punishment they thought was appropriate in this case.

The United States Supreme Court held in *Payne*¹²⁹ that the admission of victim impact evidence is relevant evidence and is not barred by Eighth Amendment capital jurisprudence. The

¹²⁹*Payne v. Tennessee* (1991), 501 U.S. 808 (overruling *Booth v. Maryland* (1987), 482 U.S. 496, and *South Carolina v. Gathers* (1989), 490 U.S. 805).

Court specifically held that Accordingly, the court held that “if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.”¹³⁰ The rationale for this ruling is that it permits the jury to not just view the picture of who the capital defendant is through mitigation evidence, but also to view the picture of the harm he has been convicted of doing. As the *Payne* Court reasoned, “for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant.”¹³¹ A balance between who the defendant is and who were his victims is only proper. ““It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant * * * without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.””¹³²

This Court has held that properly circumscribed victim-impact evidence is admissible in both the guilt and the penalty phases of a capital trial.¹³³ Thus, victim impact evidence is admissible as long as it relates to the circumstances of the murder, the existence of the statutory

¹³⁰*Payne*, 501 U.S. at 827.

¹³¹*Payne*, 501 U.S. at 825.

¹³²*Payne*, 501 U.S. at 826 (quoting *State v. Payne* (Tenn.1990), 791 S.W.2d 10, 19).

¹³³*State v. Fautenberry*, 72 Ohio St.3d 435, 440, 1995-Ohio-209, 650 N.E.2d 878, 883.

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.¹³⁴

The limited victim-impact evidence in this case fell within the permissible parameters set forth by *Payne-White*, and thus was relevant and admissible. LaShonda Burditte testified about her brother's age, that they grew up in Los Angeles but that her brother graduated from high school in Canton, Ohio. She also told the jury that Burditte had served in the United States Navy, worked as an electrician, was married and had two daughters, and that he had legal troubles relating to his involvement with drugs.¹³⁵ Rashu Jeffries testified that his sister, Marnell Cheek, attended high school in Canton, Ohio, that she was the band mascot, and that she had been married and had two children. Jeffries also told the jury Cheek's age if she had lived, as well as her job as a M.R.D.D. bus driver.¹³⁶ This evidence was properly admitted, and did not deprive Lang of a fair sentencing hearing (especially given the fact that the jury recommended a life sentence for his execution of Burditte).

The trial court, in conclusion, did not err or abuse its discretion in admitting at the penalty phase some of the exhibits from the guilt phase. In addition, the court did not err or abuse its discretion in allowing the presentation of limited victim-impact evidence that was within the scope of permissible victim-impact evidence. Finally, any claim of prejudice from the admission

¹³⁴See *State v. White*, 85 Ohio St.3d 433, 442-446, 1999-Ohio-281, 709 N.E.2d 140, 151-154.

¹³⁵T.(Mitigation Hearing), at 34-38.

¹³⁶T.(Mitigation Hearing), at 39-42.

of evidence is undercut by the jury's split verdict, returning a jury recommendation of a life sentence for the Burditte killing instead of a death sentence, which it recommended for the Cheek homicide. The proposition of law should be rejected.

PROPOSITION OF LAW NO. 16

A CAPITAL DEFENDANT'S DEATH SENTENCE IS INAPPROPRIATE WHEN THE EVIDENCE IN MITIGATION OUTWEIGHS THE AGGRAVATING CIRCUMSTANCES O.R.C. §§ 2929.03; 2929.04; U.S. CONSTITUTION AMENDS. VIII, XIV; OHIO CONSTITUTION ARTICLE I, §§ 9, 16.

Lang argues in his sixteenth proposition of law that the mitigating evidence in this case outweighs the aggravating circumstances. He essentially makes his appropriateness argument before this Court pursuant to this Court's statutory obligation under R.C. 2929.05(A) to determine the appropriateness of his death sentence. Lang reiterates the mitigation evidence that was presented at the sentencing hearing. This recitation, however, ignores the harm that Lang caused, as well as his lack of remorse or responsibility for the two lives he senselessly and callously snuffed out. This mitigation evidence that Lang recites does not outweigh the aggravating circumstances in this case, and therefore this Court should affirm Lang's death sentence for the cold execution of Marnell Cheek.

Lang repeats his mitigation evidence that was presented at trial.¹³⁷ This evidence includes his young age at the time of the offenses – 19 years old – as well as his history and background, which included a troubled childhood, which apparently contributed to his mental problems. Lang also asserts that Burditte induced the homicides by being a drug dealer, and pointed out the fact that Walker, despite being a co-defendant, received a non-capital sentence. According to Lang,

¹³⁷Lang asserts that he has additional mitigation evidence which he hopes to present at the post-conviction relief proceeding that is currently pending. Likewise, the State is aware of additional evidence that will refute and negate the weight if not credibility of this proposed mitigation evidence.

he was “doomed from the start” because of his childhood, growing up on the streets of Baltimore. Despite the obvious flaw in this deterministic approach to one’s past, this mitigation evidence does not outweigh the aggravating circumstances in this case. Lang made heinous choices when he decided to go through with his plan to rob a drug dealer, despite the presence of an innocent bystander as Burditte’s passenger. Instead of walking away, as Walker did, Lang opted to proceed with his plan. This plan included executing both Burditte and his innocent passenger, Marnell Cheek, despite her effort to defend herself. This Court should therefore uphold Lang’s death sentence.

In addition, Lang’s mitigation evidence is of limited value and weight. While his young age is a mitigating factor that deserves some weight, this weight is lessened by the fact that Lang was a street-smart individual having grown up in Baltimore before coming to Canton. Furthermore, a capital defendant’s young age is not a per se bar to a death sentence (as long as he is not under the age of 18). The recently executed Richard Cooley was 19 when he committed his double homicides. The more relevant component is the defendant’s relative experience and maturity, and not simply his or her young age.¹³⁸

Lang also wants significant weight attached to the fact that the co-defendant received a non-capital sentence. This fact, however, is entitled to little if any weight under both the appropriateness and proportionality review process.¹³⁹

Lang also argues that victim-inducement should also be considered a mitigating factor. He asserts that Burditte being involved in drugs somehow contributed to Lang’s decision to shoot

¹³⁸See *State v. Cooley* (1989), 46 Ohio St.3d 20, 39, 41, 544 N.E.2d 895, 917-918, 919.

¹³⁹See *Sneed*, 63 Ohio St.3d at 17, 584 N.E.2d at 1172.

and kill both him and Cheek. While this factor differentiates the homicides of Burditte and Cheek – Cheek not being involved with drugs – Burditte’s drug history has no relevance to the killing of Cheek, who did not do anything to induce her execution other than being in the wrong place at the wrong time.

Lang executed two people in cold blood for no legitimate reason. Robbing a drug dealer is not a legitimate reason for executing the drug dealer or his companion. Lang in fact has not taken responsibility for his crimes, continuing to assert that it was Walker and not him who executed these two people. This Court has upheld numerous death sentences of defendants who have killed in the course of an aggravated robbery, as well as defendants who kill more than one person as part of a course of conduct.¹⁴⁰ The Court should therefore uphold Lang’s death sentence.

¹⁴⁰See, e.g., *State v. Scott*, 101 Ohio St.3d 31, 2004-Ohio-10, 800 N.E.2d 1133.

PROPOSITION OF LAW NO. 17

**WHEN THE TRIAL JUDGE TRIVIALIZES AND
MINIMIZES MITIGATING EVIDENCE, IT VIOLATES A
CAPITAL DEFENDANT'S RIGHT TO A RELIABLE
SENTENCE. O.R.C. §§ 2929.03; 2929.04; U.S.
CONSTITUTION AMENDS. VIII, XIV; OHIO
CONSTITUTION ARTICLE I, §§ 9, 16.**

Lang's seventeenth proposition of law attacks the trial court's sentencing entry, wherein the court performed its statutory duty and weighed the aggravating circumstances and the mitigation evidence to determine whether the jury's recommendation of death was appropriate. Lang does not challenge the trial court's sentencing decision on the ground that it did not consider or weigh the statutory mitigation factors, but instead disagrees with the weight that the trial court gave this evidence, and how it weighed this mitigation evidence against the aggravated factors. Lang simply disagrees with the court's conclusion, and repeats his jury argument that the mitigation evidence should outweigh the aggravating circumstances. This disagreement is not grounds for finding that the trial erred in performing its independent statutory obligation to weigh this evidence. The proposition of law is therefore without merit.

In support of his argument, Lang attempts to tarnish the reputation of Marnell Cheek yet again. The trial court properly found that none of the evidence presented at trial connected her to Burditte's drug activity and that she was a participant in the pre-arranged drug transaction with Lang and Walker. Lang engages in unsupported speculation about Cheek, hoping to convince this Court that she was somehow involved in this nefarious drug world (and thus apparently somehow induced her and Burditte's executions).

Furthermore, Lang attacks the trial court's review of the multiple-murder specification, arguing that killing more than one person doesn't justify a more significant punishment for the second killing. A person who kills more than one person is more deserving of a death sentence. This is true especially when the second victim is innocent and unrelated to the underlying drug activity in this case. Lang apparently had no qualms about executing a drug dealer or an innocent bystander and witness.

In addition, the trial court did consider Lang's youth as a mitigating factor, but did not give it the weight Lang would like. After reviewing the evidence in this case, which include Lang's conduct and his taped statement, the court properly concluded that Lang was a "street-hardened individual." Lang argues that his conduct were more consistent with a scared, immature boy than as this street-hardened individual. Entering a vehicle with the purpose to rob a drug dealer, and then immediately shooting him in the head, then turning towards the innocent passenger and shooting her in the head too are hardly the actions of a scared, immature boy. He has coolly dealt with his serious legal troubles by attempting to blame his crimes on Walker, who opted to withdraw from the planned robbery when he saw Cheek in the Burditte's vehicle.

In conclusion, the trial court carefully examined and weighed the mitigation evidence presented in this case. It simply did not give it the weight Lang would like, and this assessment of the trial court is supported by the evidence in this case. The trial court's sentencing judgment entry is well reasoned, and carefully reviewed the evidence in this case in reaching the conclusion that the death sentence was appropriate, i.e., that the aggravating circumstances outweighed the mitigation evidence beyond a reasonable doubt. This Court should therefore affirm the trial court's sentencing judgment entry.

PROPOSITION OF LAW NO. 18

**THE CUMULATIVE EFFECT OF TRIAL ERROR
RENDERS A CAPITAL DEFENDANT'S TRIAL UNFAIR
AND HIS SENTENCE ARBITRARY AND UNRELIABLE.
U.S. CONSTITUTION AMENDS. VI, XIV; OHIO
CONSTITUTION ARTICLE I, §§ 5, 16.**

Lang next makes a *DeMarco* argument¹⁴¹ that if the individual propositions of law are without merit, the cumulative effect of the claims nonetheless denied him a fair trial and produced a death sentence that was arbitrary and unreliable. This argument is contingent upon a finding that all of Lang's claims in this appeal have legal merit. None of them, however, have the desired merit. Contrary to Lang's assertion that his capital trial was replete with prejudicial error from beginning to end, the fact of the matter is that the trial court, as well as the State, made every effort to ensure that Lang received a fair trial. Lang apparently concludes that his receiving a death sentence in this case makes his trial unfair. The conclusion and supporting arguments are not supported by the record in this case, and are accordingly without merit.

One point that Lang makes in claiming that he was denied a fair trial by the trial court, the prosecution, and his own defense counsel (despite the fact that these counsel obtain a life sentence of one of his senseless executions), is that he was deprived from making an effective defense that it was Antonio Walker and not him who was the shooter in this case. Lang's defense was made by via his taped statement to the police, which was played by the State. The only other evidence that could have been presented under the facts and circumstances of this case

¹⁴¹See *State v. DeMarco* (1987), 31 Ohio St.3d 191, 509 N.E.2d 1256, paragraph two of the syllabus (holding that while individual evidentiary errors, singularly, may not rise to the level of prejudicial error, a conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial).

was for Lang to testify himself. He choose not to do so, apparently concerned about what evidentiary doors might be opened by his testimony. Lang was not prevented from presenting the only plausible defense available in this case during the guilt phase.

But this defense undercuts Lang's mitigation arguments. His failure to admit to killing both Burditte and Cheek is indicative of a lack of remorse, as well as a moral failure on his part. In making a coherent and consistent argument in this capital appeal, Lang needs to decide whether he is the actual killer of these two people or not. His failure to do so undercuts his mitigation arguments.

It is perhaps inevitable in every death penalty appeal that the defendant asserts that he or she was not only denied a fair trial, but in fact received a trial that is as far removed from due process requirements as can be imagined. A review of the record in this case will show that the trial court carefully and conscientiously ensured that Lang's due process rights, as a capital defendant, would be protected. The trial was a relatively simple case factually. Lang tried to cast suspicion on the credibility of Walker, pointing the finger of guilt towards him and away from himself. The jury rejected this attempt, based upon the physical evidence as well as Lang's conduct. The trial court's, the prosecution's, the defense counsel's, and the jury's conduct was all in accord with due process.

The proposition of law should accordingly be rejected.

PROPOSITION OF LAW NO. 19

**IMPOSITION OF COSTS ON AN INDIGENT DEFENDANT
VIOLATES THE SPIRIT OF THE EIGHTH AMENDMENT.
U.S. CONSTITUTION AMENDS. VIII AND XIV; OHIO
CONSTITUTION ARTICLE I, §§ 10, 16.**

In this proposition of law, Lang attacks the court costs imposed on him by the trial court at his sentencing hearing.¹⁴² As noted by Lang, he did not object to the imposition of costs and therefore, once again, this proposition is analyzed under a plain error standard.

The law is well settled in the area of imposition and collection of court costs from a convicted felon who alleges indigency. In *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 796 N. E.2d 534, this court made two notable rulings. This Court ruled that R. C. 2947.33 requires a trial court to assess court costs against all criminal defendants, even if the defendant is indigent. Following the *White* decision, this Court decided *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164. Recognizing that court costs is not viewed as punitive in nature, but more akin to a civil judgment for money, this Court held that the state may use any collection method that is available for collection.¹⁴³ This Court specifically approved the detailed administrative procedure in place for collection from prisoner's accounts set forth in R.C. 5120.133. The Court stated: "Therefore, we hold that the state may use any collection method that is available for collection of a civil judgment for money, as well as the procedures set out in R.C. 5120.133 if the defendant is incarcerated." And finally, this Court, in paragraph

¹⁴²T.(Sentencing) 36.

¹⁴³*Threatt*, supra, ¶16.

two of the syllabus held that a motion by an indigent criminal defendant to waive payment of costs must be made at the time of sentencing.

On February 13, 2007, this Court revisited the court cost issue in *State v. Clevenger*, 114 Ohio St.3d 258, 2007-Ohio-4006, 871 N.E.2d 859. This Court held that a trial court may waive the payment of court costs only upon statutory authority and only if the defendant moves for waiver of costs at the time of sentencing.¹⁴⁴

Lang cites no statutory authority for waiver of payment of court costs and the record demonstrates that he did not move for waiver of costs at the time of sentencing. Recognizing these factors, Lang argues that *White* and *Threatt* should be overruled because collection of costs from an indigent defendant is an “additional punishment,” particularly to those who are incarcerated. Yet, this Court has recognized that court costs are not designed to punish the defendant but rather to act as a civil judgment to reimburse the taxpayers of this state for costs incurred. The Ohio legislature did not intend to give convicted felons who plead indigency a free ride and impose an additional burden on the taxpayers.

Lang also argues that collection from prisoner accounts imposes an additional burden because inmates use their accounts to buy commissary items. The Ohio Legislature, however, has provided a detailed administrative procedure that not only allows collection from prisoner’s accounts but also allows a prisoner to challenge collection attempts. See R.C. 5120.133. In *State v. Logan*, Trumbull App. No. 2003-T-0016, 2003-Ohio-5425, Inmate Biros filed an original action in prohibition and mandamus seeking to prevent the clerk of courts from garnishing funds from his prison account for court costs imposed at sentencing. Biros is

¹⁴⁴*Clevenger*, supra, ¶11.

incarcerated on death row for his 1991 convictions for aggravated murder, felonious sexual penetration, aggravated robbery and attempted rape.¹⁴⁵ Biros sought an order enjoining the clerk of courts from garnishing funds from his prison account. Biros argued that funds cannot be garnished from his prison account because, like Lang, he was found to be indigent during the criminal case which led to his death penalty conviction. The Eleventh District Court of Appeals rejected the arguments and dismissed the petition, holding that imposition of court costs could only be contested on direct appeal and Biros had adequate legal remedies under R.C. 5120.133 to challenge collection.

Finally, this Court has recently rejected the identical “spirit-of-the-Eighth Amendment” arguments in *State v. Hale*, 119 Ohio St. 3d 118, 2008-Ohio-3426, 892 N.E.2d 864.

Because the collection of court costs is not designed to be punishment, but rather a civil attempt to reimburse taxpayers for costs incurred, it does not violate the Eighth Amendment to the United States Constitution. Lang’s proposition of law should be rejected.

¹⁴⁵*State v. Biros* (1997), 78 Ohio St.3d 426, 678 N.E.2d 891, *cert. denied* (1997), 522 U.S. 1002.

PROPOSITION OF LAW NO. 20

**THE ACCUSED’S RIGHT TO DUE PROCESS UNDER THE
FOURTEENTH AMENDMENT TO THE UNITED STATES
CONSTITUTION IS VIOLATED WHEN THE STATE’S
BURDEN OF PERSUASION IS LESS THAN PROOF
BEYOND A REASONABLE DOUBT.**

Lang’s twentieth proposition of law argues that his due process rights were violated because the State’s burden of persuasion was less than proof beyond a reasonable doubt. Lang specifically attacks the trial court’s strict adherence to the statutory definition of reasonable doubt set forth in R.C. 2901.05(D). Lang asserts that this statutory definition is more akin to the standard for clear and convincing evidence and thus lower than the required standard of proof beyond a reasonable doubt. Lang candidly admits that this Court has repeatedly rejected this challenge and argument, and apparently raises it in order solely to preserve the claim for federal habeas corpus. The Court should nonetheless reject the proposition of law based upon its consistent line of precedent.

Lang attacks the statutory definition of proof beyond a reasonable doubt set forth in R.C. 2901.05(D), which provides *in toto*:

“Reasonable doubt” is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. “Proof beyond a reasonable doubt” is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.

Lang argues that this definition is really more akin to the clear and convincing evidence standard than a definition of reasonable doubt, in contravention of the due process requirement for proof in a criminal case.¹⁴⁶ Lang concedes that this Court has rejected this argument, specifically in its *Van Gundy* decision.¹⁴⁷ In *Van Gundy*, the Court noted that the General Assembly, by enacting the reasonable doubt statute, has expressed a clear intent of defining the standard of proof in both qualitative and quantitative terms.

The definition of “reasonable doubt” relates to the jurors’ state of mind; the phrase “firmly convinced” describes the nature of that belief. To this extent, the standard is explained in qualitative terms. See, e.g., *United States v. Newport* (C.A.9, 1984), 747 F.2d 1307, 1308. The definition of “proof beyond a reasonable doubt” relates to the amount of proof that is required, with the phrase “willing to rely and act” describing that amount. To this extent, the standard is explained in quantitative terms.

Van Gundy, 64 Ohio St.3d at 233, 594 N.E.2d at 606.

The Court held that the statutory definition of reasonable doubt complied with due process requirements as outlined in *In re Winship*. In doing so, the Court cautioned Ohio’s trial courts that amplification of this statutory definition is inadvisable. The Court noted that “there is

¹⁴⁶See *In re Winship* (1970), 397 U.S. 358, 364. As the Supreme Court later amplified:

The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course . . . so long as the court instructs the jury on the necessity that the defendant’s guilt be proved beyond a reasonable doubt. . . . the Constitution does not require that any particular form of words be used in advising the jury of the government’s burden of proof.

Victor v. Nebraska (1994), 511 U.S. 1, 5.

¹⁴⁷*State v. Van Gundy* (1992), 64 Ohio St.3d 230, 1992-Ohio-108, 594 N.E.2d 604.

always danger in giving instructions that go beyond the statutory definitions,” and this particularly so in defining reasonable doubt since “[t]here is inherent difficulty in any attempt to define the abstract concept of reasonable doubt and further attempts do not usually result in making it any clearer in the minds of the jury.”¹⁴⁸

This Court has continually and repeatedly rejected challenges to the statutory definition of reasonable doubt, per *Van Gundy*, in capital cases as well.¹⁴⁹ And while Lang asserts that his primary purpose for raising the claim is to preserve it for federal habeas corpus review, he neglects to note that the Court of Appeals for the Sixth Circuit has also similarly and consistently rejected this due process challenge to Ohio’s statutory definition of reasonable doubt.¹⁵⁰

As Lang notes, this Court has recognized that capital litigants raise a myriad of legal issues simply to preserve the claim for subsequent federal review, and that it may dispose of these issues summarily and need not reconsider and discuss these issues at length. This is

¹⁴⁸*Van Gundy*, 64 Ohio St.3d at 235, 594 N.E.2d at 608.

¹⁴⁹See, e.g., *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, 873 N.E.2d 1263, ¶ 242, *cert. denied* (2008), ___ U.S. ___, 128 S.Ct. 2077, 170 L.Ed.2d 811; *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 76; *State v. Jackson*, 107 Ohio St.3d 53, 70-71, 2005-Ohio-5981, 836 N.E.2d 1173, 1196, *cert. denied* (2006), 548 U.S. 912; *State v. Stallings*, 89 Ohio St.3d 280, 293-294, 2000-Ohio-164, 731 N.E.2d 159, 174; *State v. Goff*, 82 Ohio St.3d 123, 132, 1998-Ohio-369, 694 N.E.2d 916, 924, *cert. denied* (1999), 527 U.S. 1039; *State v. Cooney* (1989), 46 Ohio St.3d 20, 37, 544 N.E.2d 895, 915, *cert. denied* (1991), 499 U.S. 954; *State v. Maurer* (1984), 15 Ohio St.3d 239, 271, 473 N.E.2d 768, 796-797, *cert. denied* (1985), 472 U.S. 1012; *State v. Nabozny* (1978), 54 Ohio St.2d 195, 8 O.O.3d 181, 375 N.E.2d 784, paragraph two of the syllabus, *vacated in part on other grounds* (1978), 439 U.S. 811.

¹⁵⁰See, e.g., *White v. Mitchell* (C.A. 6, 2005), 431 F.3d 517, 534 (“We have specifically ruled that Ohio’s articulation of the reasonable doubt standard does not offend due process.”); *Buell v. Mitchell* (C.A. 6, 2001), 274 F.3d 337, 366 (“This court has determined that Ohio’s statutory definition of reasonable doubt does not offend due process.”); *Coleman v. Mitchell* (C.A. 6, 2001), 268 F.3d 417, 437; *Thomas v. Arn* (C.A. 6, 1983), 704 F.2d 865, 867-869.

especially true of issues that have been raised before this Court and repeatedly and consistently rejected.

Initially, it should be noted that although R.C. Chapter 2929 requires this court to review capital cases in a certain manner, that chapter does not mandate that this court address and discuss, in opinion form, each and every proposition of law raised by the parties. While we recognize that certain issues of law must be raised to preserve a party's right of appeal in federal court, we will not reconsider and discuss such issues at length in each case. We, therefore, hold that when issues of law in capital cases have been considered and decided by this court and are raised anew in a subsequent capital case, it is proper to summarily dispose of such issues in the subsequent case.

State v. Poindexter (1988), 36 Ohio St.3d 1, 3, 520 N.E.2d 568, 570.

Similarly, this Court should summarily reject Lang's challenge to Ohio's statutory definition of reasonable doubt, and reject the twentieth proposition of law.

PROPOSITION OF LAW NO. 21

OHIO DEATH PENALTY LAW IS UNCONSTITUTIONAL. O.R.C §§ 2903.01, 2929.02, 2929.01, 2929.022, 2929.023, 2929.03, 2929.04 AND 2929.05 DO NOT MEET THE PRESCRIBED CONSTITUTIONAL REQUIREMENTS AND ARE UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED TO EDWARD LANG. U.S. CONSTITUTION AMENDS. V, VI, VIII AND XIV; OHIO CONSTITUTION ARTICLE I, §§ 2, 9, 10 AND 16. FURTHER, OHIO'S DEATH PENALTY STATUTE VIOLATES THE UNITED STATES' OBLIGATIONS UNDER INTERNATIONAL LAW.

Lang's final proposition of law argues that Ohio's death penalty is unconstitutional for a number of reasons. These claims have been repeatedly raised in capital litigation, and has been repeatedly rejected by this Court. Lang's apparent reason for raising these claims is to preserve them for purposes of federal habeas corpus review. This Court should therefore accordingly reject the claims raised in this proposition of law, and should dispose the issues summarily.

This Court held in *Poindexter* that it will summarily dispose of legal issues that have been repeatedly raised in capital litigation and have been repeatedly decided.

When issues of law in capital cases have been considered and decided by this court and are raised anew in a subsequent capital case, it is proper to summarily dispose of such issues in the subsequent case.

Poindexter, 36 Ohio St.3d 1, 520 N.E.2d 568, at syllabus.

Thus, each of Lang's legal challenges in this proposition of law will be dealt with summarily.

1. Arbitrary and Unequal Punishment

Lang argues that Ohio's death penalty scheme is unconstitutional because it allows unbridle prosecutorial discretion in seeking capital indictments, results in its application in a racially discriminatory manner, and is not the least restrictive means to achieve legitimate and compelling state interests. Each of these claims, however, have been repeatedly rejected by this Court.¹⁵¹ The Court should once again reject them.

2. Unreliable Sentencing Procedures

Lang also challenges Ohio's statutory death penalty scheme on vagueness grounds. He specifically argues that the scheme is unconstitutionally vague with regard to its weighing mechanism, i.e., to determine whether the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt, as well as the alleged vagueness attached to the aggravating circumstances. Finally, Lang argues that too much discretion is accorded to juries, which results in an arbitrary imposition of the death sentence.

¹⁵¹For cases rejecting the prosecutorial-discretion challenge, see, e.g., *State v. Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, 805 N.E.2d 1064, ¶ 103; *State v. Nields*, 93 Ohio St.3d 6, 38, 2001-Ohio-1291, 752 N.E.2d 859, 895; *State v. Coleman* (1989), 45 Ohio St.3d 298, 308, 544 N.E.2d 622, 633-634; *State v. Jenkins* (1984), 15 Ohio St.3d 164, 171-172, 473 N.E.2d 264, 273-274; *State v. Maurer* (1984), 15 Ohio St.3d 239, 241-242, 473 N.E.2d 773-774.

For cases rejecting the racially-discrimination challenge, see, e.g., *Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, 805 N.E.2d 1064, ¶ 103; *State v. Bey*, 85 Ohio St.3d 487, 503, 1999-Ohio-283, 709 N.E.2d 484, 499; *State v. Carter*, 72 Ohio St.3d 545, 563, 1995-Ohio-104, 651 N.E.2d 965, 980; *State v. Byrd* (1987), 32 Ohio St.3d 79, 86, 512 N.E.2d 611, 619; *State v. Zuern* (1987), 32 Ohio St.3d 56, 64, 512 N.E.2d 585, 593, and at syllabus ("There can be no finding that the death penalty is imposed in a discriminatory fashion absent a demonstration of specific discriminatory intent.") (following *McCleskey v. Kemp* (1987), 481 U.S. 279).

For cases rejecting the "least restrictive means" challenge, see, e.g., *Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, 805 N.E.2d 1064, ¶ 103; *State v. Van Hook* (1988), 39 Ohio St.3d 256, 264-265, 530 N.E.2d 883, 891; *State v. Stumpf* (1987), 32 Ohio St.3d 95, 103, 512 N.E.2d 598, 607; *Zuern*, 32 Ohio St.3d at 63-64, 512 N.E.2d at 592-593; *State v. Martin* (1985), 19 Ohio St.3d 122, 133, 483 N.E.2d 1157, 1167; *Jenkins*, 15 Ohio St.3d at 168, 473 N.E.2d at 272-273.

Again, this Court has repeatedly addressed each of these challenges, and has repeatedly rejected them.¹⁵² For the reasons set forth in those cases, this Court should continue to reject these challenges.

3. Defendant's Right to a Jury is Burdened

Lang challenges the constitutionality of Crim. R. 11(C)(3) that permits the judge to dismiss the death penalty specification "in the interest of justice," and thereby unconstitutionally impinges upon a capital defendant's right to jury trial since there is no corresponding provision for capital jury trials. This claim has been soundly rejected by this Court on numerous occasions,¹⁵³ and should once again reject it.

4. Mandatory Submission of Reports and Evaluations

Lang also argues against the constitutionality of R.C. 2929.03(D)(1) on the basis that it requires the submission of presentence investigation reports and mental evaluations to the judge and jury if requested by a capital defendant. Lang asserts that the statute's parameters deny him

¹⁵²See, e.g., *State v. Ferguson*, 108 Ohio St.3d 451, 2006-Ohio-1502, 844 N.E.2d 806, ¶ 92; *Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, 805 N.E.2d 1064, ¶ 109; *State v. McNeil*, 83 Ohio St.3d 438, 453, 1998-Ohio-293, 700 N.E.2d 596, 610; *State v. Gumm*, 73 Ohio St.3d 413, 416-423, 1995-Ohio-24, 653 N.E.2d 253, 259-264. See also *Tuilaepa v. California* (1994), 512 U.S. 967, 973-980.

¹⁵³See, e.g., *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 51; *State v. Dickerson* (1989), 45 Ohio St.3d 206, 214, 543 N.E.2d 1250, 1258; *State v. Sowell* (1988), 39 Ohio St.3d 322, 336, 530 N.E.2d 1294, 1309; *Van Hook*, 39 Ohio St.3d at 264, 530 N.E.2d at 891; *State v. Bedford* (1988), 39 Ohio St.3d 122, 132, 529 N.E.2d 913, 923; *Zuern*, 32 Ohio St.3d at 64, 512 N.E.2d at 593; *State v. Buell* (1986), 22 Ohio St.3d 124, 138, 489 N.E.2d 795, 808; *Nabozny*, 54 Ohio St.2d at 200, 8 O.O.3d at 183-184, 375 N.E.2d at 789, and at paragraph one of the syllabus.

effective assistance of counsel. This claim, however, has been repeatedly rejected,¹⁵⁴ and the Court should reject again.

5. Double Counting – R.C. 2903.01(B) and R.C. 2929.04(A)(7)

Lang renews a rejected challenge to Ohio’s capital statutory scheme that permits the use of an underlying felony to establish both felony murder under R.C. 2903.01(B) and the felony-murder death penalty specification under R.C. 2929.04(A)(7). The challenge has been disavowed and rejected by both this Court¹⁵⁵ and the United States Supreme Court.¹⁵⁶ Based on this line of authority, the Court should reject it once again.

6. Constitutional Vagueness – R.C. 2929.03(D)(1) and R.C. 2929.04

Lang argues that R.C. 2929.03(D)(1)’s “nature and circumstances” of the aggravated murder incorporates this circumstance as an aggravated circumstance instead of a mitigating

¹⁵⁴See, e.g., *Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, 805 N.E.2d 1064, ¶ 107; *Coleman*, 45 Ohio St.3d at 305, 544 N.E.2d at 630-631; *State v. Esparza* (1988), 39 Ohio St.3d 8, 9-10, 529 N.E.2d 192, 194-195; *Buell*, 22 Ohio St.3d at 137-138, 489 N.E.2d at 807-808.

¹⁵⁵*Ferguson*, 108 Ohio St.3d 451, 2006-Ohio-1502, 844 N.E.2d 806, ¶ 88; *Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, 805 N.E.2d 1064, ¶ 107; *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, ¶ 76; *State v. O’Neal*, 87 Ohio St.3d 402, 416-417, 2000-Ohio-449, 721 N.E.2d 73, 88; *State v. Dunlap*, 73 Ohio St.3d 308, 317, 1995-Ohio-243, 652 N.E.2d 988, 997; *State v. Benner* (1988), 40 Ohio St.3d 301, 306, 533 N.E.2d 701, 708; *State v. Henderson* (1988), 39 Ohio St.3d 24, 28-29, 528 N.E.2d 1237, 1242, and at paragraph one of the syllabus; *Jenkins*, 15 Ohio St.3d at 177-178, 473 N.E.2d at 279-280.

¹⁵⁶See *Lowenfield v. Phelps* (1988), 484 U.S. 231; *Williams v. Taylor* (2000), 529 U.S. 362, 392. See also *Cooley v. Coyle* (C.A. 6, 2002), 289 F.3d 882, 900-901; *Coe v. Bell* (C.A. 6, 1998), 161 F.3d 320, 349-350.

factor, and is thereby unconstitutional on vagueness grounds. This challenge has been rejected by this Court,¹⁵⁷ and should be rejected yet again.

7. **Proportionality and Appropriateness Review**

Lang argues with this challenge the Ohio's statutory death penalty scheme does not provide for adequate proportionality and appropriateness review that comports with constitutional requirements. With regard to his proportionality challenge, Lang asserts that the basic defect with Ohio's scheme, reflected in part by R.C. 2929.021, is its failure to compare death penalty cases with those capital cases in which the death penalty was not imposed. And with regard to his appropriateness claim, Lang argues that the appropriateness review required by R.C. 2929.05(A) is constitutionally infirm because of the cursory review that this Court engages in when making its independent review. In other words, Lang argues that this Court has repeatedly violated R.C. 2929.05(A) with recourse, and that this deficient review renders the appropriateness statute unconstitutional. Both claims, however, have been rejected by this Court.

First, Lang's proportionality challenge is without merit since proportionality review is not constitutionally required.¹⁵⁸ The comparative proportionality review that Lang complains about

¹⁵⁷See, e.g., *State v. Newton*, 108 Ohio St.3d 13, 2006-Ohio-81, 840 N.E.2d 593, ¶ 105; *Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, 805 N.E.2d 1064, ¶ 109; *McNeil*, 83 Ohio St.3d at 453, 700 N.E.2d at 610; *State v. Wogenstahl*, 75 Ohio St.3d 344, 352-355, 1996-Ohio-219, 662 N.E.2d 311, 319-321; *State v. Hill* (1996), 75 Ohio St.3d 195, 199-202, 661 N.E.2d 1068, 1075-1077. See also *Tuilaepa v. California* (1994), 512 U.S. 967, 973-980.

¹⁵⁸See *Pulley v. Harris* (1984), 465 U.S. 37, 50. The Supreme Court reaffirm its *Harris* holding in *McCleskey v. Kemp* (1987), 481 U.S. 279, 306-307 (holding that a defendant cannot "prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty") (emphasis in original).

is created by statute in Ohio.¹⁵⁹ And this Court has interpreted this statute – R.C. 2929.05(A) – as only requiring comparison of a death penalty case with cases in which the death penalty has also been imposed. This Court specifically held in *Steffen* that “[t]he proportionality review required by R.C. 2929.05(A) is satisfied by a review of those cases already decided by the reviewing court in which the death penalty has been imposed.”¹⁶⁰ Since proportionality review in capital cases is not required, this holding comports with the constitutional requirements for death penalty cases, as this Court has consistently held.¹⁶¹ For these reasons, the Court should continue to reject this challenge.

Second, Lang’s appropriateness challenge hinges upon his claim that this Court has repeatedly and consistently violated the appropriateness review required by R.C. 2929.05(A). He accuses the Court of conducting but cursory appropriateness reviews. Lang does not point to specific cases where this Court allegedly violated R.C. 2929.05(A)’s requirements, and simply makes a bald and unsubstantiated accusation. His challenge, however, has been rejected by the Court of Appeals for the Sixth Circuit, as well as federal district courts that have reviewed the claim.¹⁶² As the federal court of appeals has noted, “An Ohio appellate court’s review of a death

¹⁵⁹*State v. Sneed* (1992), 63 Ohio St.3d 3, 17, 584 N.E.2d 1160, 1172.

¹⁶⁰*Steffen*, 31 Ohio St.3d 111, 509 N.E.2d 383, at paragraph one of the syllabus.

¹⁶¹See, e.g., *Nields*, 93 Ohio St.3d at 31, 752 N.E.2d at 890; *O’Neal*, 87 Ohio St.3d at 417, 721 N.E.2d at 88-89; *State v. Combs* (1991), 62 Ohio St.3d 278, 289, 581 N.E.2d 1071, 1080-1081; *State v. Smith* (1991), 61 Ohio St.3d 284, 297, 574 N.E.2d 510, 512; *Steffen*, supra, at paragraph one of the syllabus; *Jenkins*, 15 Ohio St.3d at 175-176, 473 N.E.2d at 278-279.

¹⁶²See, e.g., *Bies v. Bagley* (C.A. 6, 2008), 519 F.3d 324, 336-338; *Buell v. Mitchell* (C.A. 6, 2001), 274 F.3d 337, 367-368; *Benge v. Johnson* (S.D. Ohio, 2004), 312 F.Supp.2d 978, 1035; *Lawson v. Warden of Mansfield Correctional Institution* (S.D. Ohio, 2002), 197 F.Supp.2d 1072, 1099; *Scott v. Anderson* (N.D. Ohio, 1998), 58 F.Supp.2d 767, 797-79, reversed in part on other

sentence is not only rigorous, it is sweeping.”¹⁶³ Lang’s challenge is therefore without merit and should be rejected.

8. International Law

Finally, Lang argues that Ohio’s death penalty scheme violates international law, and specifically treaties that the United States is a signatory to. Pursuant to the Supremacy Clause of the United States Constitution, Lang argues, this Court should find Ohio’s death penalty unconstitutional. This Court, however, has already reviewed and rejected these challenges,¹⁶⁴ and should once again reject this current challenge.

Conclusion

None of Lang’s constitutional challenges have merit as they have been repeatedly and consistently rejected by either this Court or by the United States Supreme Court, or both. For these reasons, this Court should summarily reject them once again.

grounds (C.A. 6, 1998), 209 F.3d 854, *cert. denied* (2000), 531 U.S. 1021.

¹⁶³*Bies*, 519 F.3d at 336-337.

¹⁶⁴See, e.g., *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, 873 N.E.2d 1263, ¶ 244; *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 179; *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶ 242; *State v. Bey*, 85 Ohio St.3d 487, 502, 1999-Ohio-283, 709 N.E.2d 484, 499; *State v. Phillips*, 74 Ohio St.3d 72, 103-104, 1995-Ohio-171, 656 N.E.2d 643, 671.

CONCLUSION

The Court of Appeals for Stark County (Fifth Appellate District) should overrule the 21 propositions of law, and affirm the judgment of conviction and sentence entered by the Stark County Court of Common Pleas. In addition, the Ohio Supreme Court should find that Lang's death sentence appropriate and not disproportional.

**JOHN D. FERRERO, #0018590
PROSECUTING ATTORNEY,
STARK COUNTY, OHIO**

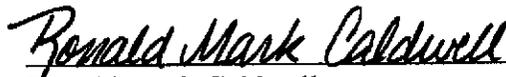
By: *Ronald Mark Caldwell*
Ronald Mark Caldwell
Ohio Sup. Ct. Reg. No. 0030663
Assistant Prosecuting Attorney
Appellate Section

Kathleen O. Tatarsky
Kathleen O. Tatarsky
Ohio Sup. Ct. Reg. No. 0017115
Assistant Prosecuting Attorney
Appellate Section
Stark County Prosecutor's Office
110 Central Plaza, South - Suite 510
Canton, Ohio 44702-1413
(330) 451-7897
FAX: (330) 451-7120

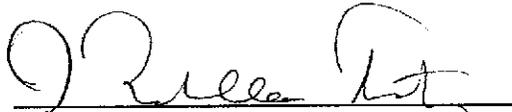
Counsel for Plaintiff-Appellee

PROOF OF SERVICE

A copy of the foregoing BRIEF OF APPELLEE was sent by ordinary U.S. mail, postage prepaid, this 27th day of October, 2008, to Joseph E. Wilhelm, Kelly L. Culshaw and Benjamin D. Zober, of the Ohio of the Ohio Public Defender, counsel for defendant-appellant, at 8 East Long Street, 11th Floor, Columbus, Ohio 43215.



Ronald Mark Caldwell
Ohio Sup. Ct. Reg. No. 0030663
Assistant Prosecuting Attorney
Appellate Section



Kathleen O. Tatarsky
Ohio Sup. Ct. Reg. No. 0017115
Assistant Prosecuting Attorney
Appellate Section

Stark County Prosecutor's Office
110 Central Plaza, South - Suite 510
Canton, Ohio 44702-1413
(330) 451-7897
FAX: (330) 451-7120

Counsel for Plaintiff-Appellee

APPENDIX

STATE OF OHIO,

Plaintiff-Appellee,

v.

EDWARD LEE LANG,

Defendant-Appellant.

IN THE COURT OF COMMON PLEAS

CLERK OF COURT
STARK COUNTY, OHIO

STARK COUNTY, OHIO

STATE OF OHIO,

2007 JUL 16 AM 10:09

Plaintiff,

vs.

EDWARD LEE LANG,

Defendant.

CASE NO. 2006CR1824 (A)

HON. LEE SINCLAIR

VERDICT: COUNT ONE

(AGGRAVATED MURDER:
JARON N. BURDITTE)

(VERDICT FORM 1)

WE, THE JURY IN THIS CASE, BEING DULY IMPANELED AND SWORN, DO FIND THE DEFENDANT, EDWARD LEE LANG, Guilty Beyond a Reasonable Doubt (ENTER "GUILTY BEYOND A REASONABLE DOUBT" OR "NOT GUILTY") OF THE OFFENSE OF AGGRAVATED MURDER IN VIOLATION OF R.C. §2903.01(B) AS CHARGED IN COUNT ONE OF THE INDICTMENT.

EACH OF US JURORS CONCURRING IN SAID VERDICT SIGNS HIS/HER NAME HERETO

THIS 13th DAY OF JULY, 2007.

Allen R. Conde 403
FOREPERSON
Linda Khoury 380
Tom Lish 398
Sharon Giaccone 420
Kristina Zancovides 381
Margaret Kolonel 436

Linda Poufton 515
Mira Peter 484
Rebecca J. Smith 387
Melissa E. Shockey 447
Mary Joyen 407
Vicki Lutz 424

****If you found the defendant "Guilty Beyond a Reasonable Doubt" of Aggravated Murder as set forth in Count One of the indictment, continue your deliberations as to Specifications One, Two, and Three as to Count One (Verdict Forms 2, 3, and 4). If you found the defendant "Not Guilty of Aggravated Murder," do not consider these specifications and continue your deliberations as to Count 2 (Verdict Form 5).****

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

STATE OF OHIO,)
Clerk of Court)
Stark County, Ohio)
Plaintiff,)
2007 JUL 16 AM 10:09)
vs.)
EDWARD LEE LANG,)
Defendant.)

CASE NO. 2006CR1824 (A)
HON. LEE SINCLAIR
VERDICT: SPECIFICATION
ONE TO COUNT ONE
(FIREARM SPECIFICATION:
JARON N. BURDITTE)
(VERDICT FORM 2)

WE, THE JURY IN THIS CASE, BEING DULY IMPANELED AND SWORN, HAVING FOUND THE DEFENDANT, EDWARD LEE LANG, GUILTY BEYOND A REASONABLE DOUBT OF AGGRAVATED MURDER AS SET FORTH IN COUNT ONE OF THE INDICTMENT, DO FURTHER FIND THE DEFENDANT, EDWARD LEE LANG, Guilty Beyond Reasonable Doubt (ENTER "GUILTY BEYOND A REASONABLE DOUBT" OR "NOT GUILTY") OF HAVING A FIREARM ON OR ABOUT HIS PERSON OR UNDER HIS CONTROL WHILE COMMITTING THE OFFENSE OF AGGRAVATED MURDER, AND THAT THE DEFENDANT, EDWARD LEE LANG, USED THE FIREARM TO FACILITATE THE OFFENSE OF AGGRAVATED MURDER.

EACH OF US JURORS CONCURRING IN SAID VERDICT SIGNS HIS/HER NAME HERETO

THIS 13th DAY OF JULY, 2007.

Quill Coade 403
FOREPERSON
Chala Khouy 380
Tom Rush 398
Sharon Jacano 420
Kristine Zancovides 381
Margaret Glendon 436

Justa Poulton 515
Maria Reta 484
Lebecca Jane Smith 387
Melissa E. Shockey 447
Mary Owen 407
Vicki L. Katz 424

****Do not complete this verdict form if you found the defendant "Not Guilty" of Aggravated Murder as set forth in Count One.****

IN THE COURT OF COMMON PLEAS
CLEARING HOUSE
STARK COUNTY, OHIO

STATE OF OHIO,

2007 JUL 16 AM 10:09

CASE NO. 2006CR1824 (A)

Plaintiff,

HON. LEE SINCLAIR

vs.

VERDICT: SPECIFICATION
TWO TO COUNT ONE

EDWARD LEE LANG,

(PURPOSEFUL KILLING OF
TWO OR MORE PEOPLE
SPECIFICATION:
JARON N. BURDITTE)

Defendant.

(VERDICT FORM 3)

WE, THE JURY IN THIS CASE, BEING DULY IMPANELED AND SWORN, HAVING FOUND THE DEFENDANT, EDWARD LEE LANG, GUILTY BEYOND A REASONABLE DOUBT OF AGGRAVATED MURDER AS SET FORTH IN COUNT ONE OF THE INDICTMENT, DO FURTHER FIND THE DEFENDANT, EDWARD LEE LANG, ^{Guilty} Beyond a Reasonable Doubt (ENTER "GUILTY BEYOND A REASONABLE DOUBT" OR "NOT GUILTY") OF COMMITTING THE AGGRAVATED MURDER OF JARON N. BURDITTE AS PART OF A COURSE OF CONDUCT INVOLVING THE PURPOSEFUL KILLING OF TWO OR MORE PERSONS BY HIM.

EACH OF US JURORS CONCURRING IN SAID VERDICT SIGNS HIS/HER NAME HERETO

THIS 14 DAY OF JULY, 2007.

Quinn Coade 403
FOREPERSON
Shirley Poulton 515
Tom Rush 398
Sharon Jackson 420
Kristine Zancourides 381
Maryann Kolndus 436

Linda Mauer 380
Mary Peters 484
Lebecca Jane Smith 387
Melissa E. Shockey 447
Mary Owen 407
Vicki D. Hartz 424

****Do not complete this verdict form if you found the defendant "Not Guilty" of Aggravated Murder as set forth in Count One.****

000003

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

CLERK OF COURT
STARK COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

vs.

EDWARD LEE LANG,

Defendant.

2007 JUL 16 AM 10:09

CASE NO. 2006CR1824 (A)

HON. LEE SINCLAIR

VERDICT: SPECIFICATION
THREE TO COUNT ONE

(PRINCIPAL OFFENDER
(ACTUAL KILLER)
SPECIFICATION: JARON N.
BURDITTE)

(VERDICT FORM 4)

WE, THE JURY IN THIS CASE, BEING DULY IMPANELED AND SWORN, HAVING FOUND THE DEFENDANT, EDWARD LEE LANG, GUILTY BEYOND A REASONABLE DOUBT OF AGGRAVATED MURDER AS SET FORTH IN COUNT ONE OF THE INDICTMENT, DO FURTHER FIND THE DEFENDANT, EDWARD LEE LANG, GUILTY BEYOND A REASONABLE DOUBT (ENTER "GUILTY BEYOND A REASONABLE DOUBT" OR "NOT GUILTY") OF COMMITTING SAID OFFENSE WHILE HE WAS COMMITTING, ATTEMPTING TO COMMIT, OR FLEEING IMMEDIATELY AFTER COMMITTING OR ATTEMPTING TO COMMIT AGGRAVATED ROBBERY AND HE WAS THE PRINCIPAL OFFENDER (ACTUAL KILLER) IN THE AGGRAVATED MURDER.

EACH OF US JURORS CONCURRING IN SAID VERDICT SIGNS HIS/HER NAME HERETO

THIS 14 DAY OF JULY, 2007.

Aunt Claude 403
FOR PERSON
Linda Boulton 515
Tom Rush 398
Sharon Jacovitz 420
Kristine Goncowski 381
Margaret Kolander 436

Linda Khoury 380
Mary Peters 484
Rebecca Jane Smith 387
Melissa E. Shockey 447
Mary Sawyer 407
Vale L. Platz 424

****Do not complete this verdict form if you found the defendant "Not Guilty" of Aggravated Murder as set forth in Count One of the indictment.****

000004

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

CLERK OF COURT
STARK COUNTY, OHIO
2007 JUL 16 AM 10:05)
)
)
)
)
)
)
)
)
)

STATE OF OHIO,

Plaintiff,

vs.

EDWARD LEE LANG,

Defendant.

CASE NO. 2006CR1824 (A)

HON. LEE SINCLAIR

VERDICT: COUNT TWO

(AGGRAVATED MURDER:
MARNELL M. CHEEK)

(VERDICT FORM 5)

WE, THE JURY IN THIS CASE, BEING DULY IMPANELED AND SWORN, DO FIND THE DEFENDANT, EDWARD LEE LANG, Guilty Beyond a Reasonable Doubt (ENTER "GUILTY BEYOND A REASONABLE DOUBT" OR "NOT GUILTY") OF THE OFFENSE OF AGGRAVATED MURDER IN VIOLATION OF R.C. §2903.01(B) AS CHARGED IN COUNT TWO OF THE INDICTMENT.

EACH OF US JURORS CONCURRING IN SAID VERDICT SIGNS HIS/HER NAME HERETO

THIS 13th DAY OF JULY, 2007.

Debra L. Conde 403
FOREPERSON
Travis K. Brown 380
Tom Rush 398
Sharon Yacovino 420
Kristine Goncayzides 381
Margaret Kolachuk 436

Linda P. Houston 515
Maria Peters 484
Rebecca Jane Smith 387
Melissa E. Shockey 447
Mary Jayen 407
Vicki P. Glats 424

****If you found the defendant "Guilty Beyond a Reasonable Doubt" of Aggravated Murder as set forth in Count Two of the indictment, continue your deliberations as to Specifications One, Two, and Three as to Count Two (Verdict Forms 6, 7, and 8). If you found the defendant "Not Guilty of Aggravated Murder" as set forth in Count Two, do not consider these specifications and continue your deliberations as to Count 3 (Verdict Form 9) .****

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

vs.

EDWARD LEE LANG,

Defendant.

CLERK OF COURTS
STARK COUNTY, OHIO
2007 JUL 16 AM 10:05

CASE NO. 2006CR1824 (A)

HON. LEE SINCLAIR

VERDICT: SPECIFICATION
ONE TO COUNT TWO

(FIREARM SPECIFICATION:
MARNELL M. CHEEK)

(VERDICT FORM 6)

WE, THE JURY IN THIS CASE, BEING DULY IMPANELED AND SWORN, HAVING FOUND THE DEFENDANT, EDWARD LEE LANG, GUILTY BEYOND A REASONABLE DOUBT OF AGGRAVATED MURDER AS SET FORTH IN COUNT TWO OF THE INDICTMENT, DO FURTHER FIND THE DEFENDANT, EDWARD LEE LANG, Guilty Beyond a Reasonable Doubt (ENTER "GUILTY BEYOND A REASONABLE DOUBT" OR "NOT GUILTY") OF HAVING A FIREARM ON OR ABOUT HIS PERSON OR UNDER HIS CONTROL WHILE COMMITTING THE OFFENSE OF AGGRAVATED MURDER, AND THAT THE DEFENDANT, EDWARD LEE LANG, USED THE FIREARM TO FACILITATE THE OFFENSE OF AGGRAVATED MURDER.

EACH OF US JURORS CONCURRING IN SAID VERDICT SIGNS HIS/HER NAME HERETO

THIS 16th DAY OF JULY, 2007.

Dee R. Bond 403
FOREPERSON
Jude Gray 380
Tom Rush 398
Sharon Jacora 420
Kristine Zancouides 381
Margaret Kolondus 436

Kinda Youston 515
Mary Peters 484
Rebecca Jane Smith 387
Melissa E Shockey 447
Mary Boyen 407
 Vicki L. Hutz 424

****Do not complete this verdict form if you found the defendant "Not Guilty" of Aggravated Murder as set forth in Count Two.****

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

vs.

EDWARD LEE LANG,

Defendant.

CLEARING SERVICE
STARK COUNTY, OHIO

2007 JUL 16 AM 10:01

CASE NO. 2006CR1824 (A)

HON. LEE SINCLAIR

VERDICT: SPECIFICATION
TWO TO COUNT TWO

(PURPOSEFUL KILLING OF
TWO OR MORE PERSONS
SPECIFICATION: MARNELL)
M. CHEEK)

(VERDICT FORM 7)

WE, THE JURY IN THIS CASE, BEING DULY IMPANELED AND SWORN, HAVING FOUND THE DEFENDANT, EDWARD LEE LANG, GUILTY BEYOND A REASONABLE DOUBT OF AGGRAVATED MURDER AS SET FORTH IN COUNT TWO OF THE INDICTMENT, DO FURTHER FIND THE DEFENDANT, EDWARD LEE LANG, GUILTY BEYOND A REASONABLE DOUBT (ENTER "GUILTY BEYOND A REASONABLE DOUBT" OR "NOT GUILTY") OF COMMITTING THE AGGRAVATED MURDER OF MARNELL M. CHEEK AS PART OF A COURSE OF CONDUCT INVOLVING THE PURPOSEFUL KILLING OF TWO OR MORE PERSONS BY HIM.

EACH OF US JURORS CONCURRING IN SAID VERDICT SIGNS HIS/HER NAME HERETO

THIS 13 DAY OF JULY, 2007.

Debra R. Corde 403

FOREPERSON

Linda Murray 380

Tan Rush 398

Sharon Greco 420

Kristina Zancovick 381

Margaret Kolodziej 436

Jana Poulton 515

Mary Peters 484

Rebecca Jane Smith 387

Melina E. Shockey 447

Mary Jayer 407

Vicki Glatz 424

****Do not complete this verdict form if you found the defendant "Not Guilty" of Aggravated Murder as set forth in Count One.****

000007

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

CLERK OF COURT
STARK COUNTY, OHIO

2007 JUL 16 AM 10:05

STATE OF OHIO,

Plaintiff,

vs.

EDWARD LEE LANG,

Defendant.

CASE NO. 2006CR1824 (A)

HON. LEE SINCLAIR

VERDICT: SPECIFICATION
THREE TO COUNT TWO

(PRINCIPAL OFFENDER
(ACTUAL KILLER)
SPECIFICATION: MARNELL M.
CHEEK)

(VERDICT FORM 8)

WE, THE JURY IN THIS CASE, BEING DULY IMPANELED AND SWORN, HAVING FOUND THE DEFENDANT, EDWARD LEE LANG, GUILTY BEYOND A REASONABLE DOUBT OF AGGRAVATED MURDER AS SET FORTH IN COUNT TWO OF THE INDICTMENT, DO FURTHER FIND THE DEFENDANT, EDWARD LEE LANG, GUILTY BEYOND A REASONABLE DOUBT (ENTER "GUILTY BEYOND A REASONABLE DOUBT" OR "NOT GUILTY") OF COMMITTING SAID OFFENSE WHILE HE WAS COMMITTING, ATTEMPTING TO COMMIT, OR FLEEING IMMEDIATELY AFTER COMMITTING OR ATTEMPTING TO COMMIT AGGRAVATED ROBBERY AND HE WAS THE PRINCIPAL OFFENDER (ACTUAL KILLER) IN THE AGGRAVATED MURDER.

EACH OF US JURORS CONCURRING IN SAID VERDICT SIGNS HIS/HER NAME HERETO THIS 14 DAY OF JULY, 2007.

Debra Cordell 403
FOR PERSON
Jinora Poulton 515
Tom Rush 398
Sharon Yacono 420
Kristine Zancowides 381
Margaret Kolonchuk 436

Linda Murray 380
Mary Riter 484
Rebecca Jane Smith 387
Melissa E Shockey 447
Mary Jayen 407
Vicki J. Platz 424

****Do not complete this verdict form if you found the defendant "Not Guilty" of Aggravated Murder as set forth in Count Two of the indictment.****

000008

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

CLERK OF COURTS
STARK COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

vs.

EDWARD LEE LANG,

Defendant.

2007 JUL 15 AM 10:00

CASE NO. 2006CR1824 (A)

HON. LEE SINCLAIR

VERDICT: COUNT THREE

(AGGRAVATED ROBBERY)

(VERDICT FORM 9)

WE, THE JURY IN THIS CASE, BEING DULY IMPANELED AND SWORN, DO FIND THE DEFENDANT, EDWARD LEE LANG, Guilty Beyond a Reasonable Doubt (ENTER "GUILTY BEYOND A REASONABLE DOUBT" OR "NOT GUILTY") OF THE OFFENSE OF AGGRAVATED ROBBERY IN VIOLATION OF R.C. §2911.01(A)(1) AS CHARGED IN COUNT THREE OF THE INDICTMENT.

EACH OF US JURORS CONCURRING IN SAID VERDICT SIGNS HIS/HER NAME HERETO

THIS 14 DAY OF JULY, 2007.

Christy Cordy 403
FOREPERSON
Linda Bouffon 515
Tom Bush 398
Sharon Giacoma 420
Kristine Zancanides 381
Margaret Koloneluk 436

Linda Kliney 380
Mary Peters 484
Rebecca Gausemire 387
Melissa E Shockey 447
Mary Jayem 407
Vicki L. Slutz 424

****If you found the defendant "Guilty Beyond a Reasonable Doubt" of Aggravated Robbery as set forth in Count Three of the indictment, continue your deliberations as to the Specification to Count Three (Verdict Form 10). If you found the defendant "Not Guilty" of Aggravated Robbery as set forth in Count Three of the indictment, do not consider the specification and notify the bailiff that you have concluded your deliberations.****

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

vs.

EDWARD LEE LANG,

Defendant.

CLERK OF COURTS
STARK COUNTY, OHIO
2007 JUL 16 AM 10:0

CASE NO. 2006CR1824A

HON. LEE SINCLAIR

VERDICT: SPECIFICATION
ONE TO COUNT THREE

(FIREARM SPECIFICATION)

(VERDICT FORM 10)

WE, THE JURY IN THIS CASE, BEING DULY IMPANELED AND SWORN, HAVING FOUND THE DEFENDANT, EDWARD LEE LANG, GUILTY BEYOND A REASONABLE DOUBT OF AGGRAVATED ROBBERY AS SET FORTH IN COUNT THREE OF THE INDICTMENT, DO FURTHER FIND THE DEFENDANT, EDWARD LEE LANG, Guilty Beyond a Reasonable Doubt (ENTER "GUILTY BEYOND A REASONABLE DOUBT" OR "NOT GUILTY") OF HAVING A FIREARM ON OR ABOUT HIS PERSON OR UNDER HIS CONTROL WHILE COMMITTING THE OFFENSE OF AGGRAVATED ROBBERY, AND THAT THE DEFENDANT, EDWARD LEE LANG, USED THE FIREARM TO FACILITATE THE OFFENSE OF AGGRAVATED ROBBERY.

EACH OF US JURORS CONCURRING IN SAID VERDICT SIGNS HIS/HER NAME HERETO

THIS 14th DAY OF JULY, 2007.

Aunt Corde 403
FOREPERSON
Ainda Patton 515
Tom Rush 398
Sharon Jacans 420
Kristine Zancourides 381
Margaret Kolndul 436

Linda Kham 380
Mary Peters 484
Lebecca Jane Smith 387
Melissa E Sheekey 447
Mary Teyen 407
Vicki L. Glatz 424

****Do not complete this verdict form if you found the defendant "Not Guilty" of Aggravated Robbery as set forth in Count Three.****

R.C. § 5120.133

Baldwin's Ohio Revised Code Annotated Currentness

Title LI. Public Welfare

*Chapter 5120. Department of Rehabilitation and Correction (Refs & Annos)*General Provisions***5120.133 Payment of obligations from prisoners' accounts**

(A) The department of rehabilitation and correction, upon receipt of a certified copy of the judgment of a court of record in an action in which a prisoner was a party that orders a prisoner to pay a stated obligation, may apply toward payment of the obligation money that belongs to a prisoner and that is in the account kept for the prisoner by the department. The department may transmit the prisoner's funds directly to the court for disbursement or may make payment in another manner as directed by the court. Except as provided in rules adopted under this section, when an amount is received for the prisoner's account, the department shall use it for the payment of the obligation and shall continue using amounts received for the account until the full amount of the obligation has been paid. No proceedings in aid of execution are necessary for the department to take the action required by this section.

(B) The department may adopt rules specifying a portion of an inmate's earnings or other receipts that the inmate is allowed to retain to make purchases from the commissary and that may not be used to satisfy an obligation pursuant to division (A) of this section. The rules shall not permit the application or disbursement of funds belonging to an inmate if those funds are exempt from execution, garnishment, attachment, or sale to satisfy a judgment or order pursuant to section 2329.66 of the Revised Code or to any other provision of law.

CREDIT(S)

(1994 H 571, eff. 10-6-94)

OHIO ADMINISTRATIVE CODE REFERENCES

000011