

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Case No. 2008-2370

Appellee,

On Appeal from the Wood County  
Court of Common Pleas

v.

CALVIN NEYLAND, JR.,

Common Pleas

Appellant.

Case No. 2007CR0359

DEATH PENALTY CASE

MERIT BRIEF OF APPELLEE  
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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... iv

STATEMENT OF THE FACTS .....1

    TRIAL PHASE .....1

    MITIGATION PHASE.....1

RESPONSE TO APPELLANT’S PROPOSITIONS OF LAW .....4

Response to Proposition of Law Number One: There is not a violation of a criminal defendant’s right to due process, right to a fair trial, or cruel and unusual punishment when a capital defendant understands the nature and objective of the proceedings and is able to assist in his own defense.....4

Response to Proposition of Law Number Two: A trial court does not err or violate a criminal defendant’s due process rights when it orders a criminal defendant to wear a leg brace restraint that is not visible to the jury. ....10

Response to Proposition of Law Number Three: Trial counsel does not commit error or violate a criminal defendant’s due process rights when they choose not to object to a trial court’s order that a criminal defendant wear a leg brace restraint that is not visible to the jury. ....10

Response to Proposition of Law Number Four: The trial court did not err in concluding that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt.....13

Response to Proposition of Law Number Five: A criminal defendant is not denied due process and the right to effective assistance of counsel where the actions of his trial counsel do not fall below any accepted standard of competence.....17

Response to Proposition of Law Number Six: A prosecutor’s comments during opening and closing arguments at the mitigation phase are proper when they are relevant to the specification or argue that the nature and circumstances of the offense present little or no mitigation.....22

<u>Response to Proposition of Law Number Seven: A criminal defendant’s trial counsel are not ineffective when they choose not to file motions to suppress statements made by the defendant and choose not to seek suppression of evidence seized during search warrants.</u> .....	25
<u>Response to Proposition of Law Number Eight: Lethal injection as administered in Ohio does not constitute cruel and unusual punishment.</u> .....	28
<u>Response to Proposition of Law Number Nine: When a trial court correctly instructs the jury during the mitigation phase of a capital trial re-sentencing is not required.</u> .....	31
<u>Response to Proposition of Law Number Ten: In conducting a proportionality review of a death sentence under R.C. 2929.05(A), an appellate court is limited to a review of cases in which a criminal defendant was sentenced to death.</u> .....	34
<u>Response to Proposition of Law Number Eleven: Jurors who do not unequivocally state that they can follow the court’s instructions because of their views on the death penalty may be dismissed for cause under R.C. 2945.25.</u> .....	36
<u>Response to Proposition of Law Number Twelve: A prosecutor may comment on the circumstances of the victim of a crime because they are relevant to the crime as a whole.</u> .....	39
<u>Response to Proposition of Law Number Thirteen: A trial court does not err in admitting, at a penalty phase hearing, the transcript of testimony of a rebuttal witness regarding evidence the defendant introduced, where the witness was unavailable and had been previously subject to cross-examination by the defendant.</u> .....	40
<u>Response to Proposition of Law Number Fourteen: A trial court does not have to accept a capital defendant’s waiver of his right to counsel when there is not an unequivocal request or the request is untimely, even if the defendant is competent to stand trial.</u> .....	43
<u>Response to Proposition of Law Number Fifteen: Any admission of additional weapons and ammunition was harmless error given the overwhelming evidence of guilt.</u> .....	45
<u>Response to Proposition of Law Number Sixteen: A death sentence under the facts of this case is appropriate and in proportion to the death sentence in other cases.</u> .....	47

<u>Response to Proposition of Law Number Seventeen: Ohio’s death penalty is not unconstitutional in the abstract or as applied. ....</u>	49
<u>Response to Proposition of Law Number Eighteen: A criminal defendant cannot show cumulative error when he fails to demonstrate multiple instances of harmless error.....</u>	63
<u>Response to Proposition of Law Number Nineteen: Trial counsel adequately preserves a record for appellate purposes when they object to testimony, evidence, and court rulings, and make proffers.....</u>	64
CONCLUSION.....	65
CERTIFICATE OF SERVICE .....	66

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Adams v. Texas</i> (1980), 448 U.S. 38.....	36
<i>Alley v. Little</i> (C.A.6, 2006), 181 F.App’x 509 .....	60
<i>Baze v. Rees</i> (2008), 553 U.S. 35, 128 S.Ct 1520.....	28, 29
<i>Blystone v. Pennsylvania</i> (1990), 494 U.S. 299.....	55, 57
<i>Brady v. United States</i> (1970), 397 U.S. 742.....	51
<i>Buchanan v. Angelone</i> (1998), 522 U.S. 269.....	55
<i>Buell v. Mitchell</i> (C.A.6, 2001), 274 F.3d 337.....	54, 55, 57, 61
<i>Bush v. Singletary</i> (C.A.11, 1996), 99 F.3d 373.....	34
<i>Clemons v. Mississippi</i> (1990), 494 U.S. 738 .....	14
<i>Coker v. Georgia</i> (1977), 433 U.S. 584.....	34
<i>Cooey (Biros) v. Strickland</i> (C.A.6, 2009), 589 F.3d 210 .....	29, 30
<i>County Court of Ulster Co. v. Allen</i> (1979), 442 U.S. 140.....	53
<i>Crawford v. Washington</i> (2004), 541 U.S. 36 .....	40, 41
<i>Deck v. Missouri</i> (2005), 544 U.S. 622.....	10
<i>Deputy v. Taylor</i> (C.A.3, 1994), 19 F.3d 1485 .....	52, 53
<i>Donnelly v. DeChristoforo</i> (1974), 416 U.S. 637 .....	22
<i>Drope v. Missouri</i> (1975), 420 U.S. 162.....	4
<i>Dusky v. United States</i> (1960), 362 U.S. 402.....	4, 5
<i>Earhart v. Konteh</i> (C.A.6, 2009), 589 F.3d 337 .....	11
<i>Eddings v. Oklahoma</i> (1982), 455 U.S. 104 .....	58
<i>Edmund v. Florida</i> (1982), 458 U.S. 782 .....	34, 60

<i>Farretta v. California</i> (1975), 422 U.S. 806.....	43
<i>Franklin v. Lynaugh</i> (1988), 487 U.S. 164.....	57
<i>Furman v. Georgia</i> (1972), 408 U.S. 238.....	47, 49
<i>Gall v. Parker</i> (C.A.6, 2000), 231 F.3d 265 .....	54
<i>Godfrey v. Georgia</i> (1980), 446 U.S. 420.....	56, 58
<i>Greenwalt v. Ricketts</i> (C.A.9, 1991), 943 F.2d 1020.....	52, 53
<i>Gregg v. Georgia</i> (1976), 428 U.S. 153 .....	passim
<i>Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.</i> (1986), 28 Ohio St.3d 20.....	19
<i>Harbison v. Little</i> (C.A.6, 2009), 571 F.3d 531 .....	29
<i>Hatch v. Oklahoma</i> (C.A.10, 1995), 58 F.3d 1447 .....	34
<i>Hopper v. Evans</i> (1982), 456 U.S. 605 .....	53
<i>Indiana v. Edwards</i> (2008), 554 U.S. 208 .....	44
<i>Jackson v. Ylst</i> (C.A.9, 1990), 921 F.2d 882 .....	43
<i>Jones v. Bradshaw</i> (N.D. Ohio, 2007), 489 F.Supp.2d 786.....	5
<i>Jurek v. Texas</i> (1976), 428 U.S. 262.....	50, 52
<i>LaGrand v. Stewart</i> (C.A.9, 1998), 133 F.3d 1253 .....	60
<i>Lewis v. Jeffers</i> (1990), 497 U.S. 764.....	58
<i>Lindsey v. Smith</i> (C.A.11, 1987), 820 F.2d 1137.....	59
<i>Lowenfield v. Phelps</i> (1988), 484 U.S. 231 .....	50
<i>Martin v. Wainwright</i> (C.A.11, 1985), 770 F.2d 918 .....	53
<i>Martinez-Villareal v. Lewis</i> (C.A.9, 1996), 80 F.3d 1301 .....	58
<i>McCleskey v. Kemp</i> (1987), 481 U.S. 279 .....	34, 55
<i>McQueen v. Scroggy</i> (C.A.6, 1996), 99 F.3d 1302.....	58

<i>Mendoza v. Berghuis</i> (C.A.6, 2008), 544 F.3d 650 .....	11
<i>Miller v. Francis</i> (C.A.6, 2001), 269 F.3d 609 .....	17
<i>Miranda v. Arizona</i> (1966), 384 U.S. 436 .....	26
<i>Murphy v. Netherland</i> (C.A.4, 1997), 116 F.3d 97 .....	61
<i>Pate v. Robinson</i> (1966), 383 U.S. 375 .....	4
<i>Pulley v. Harris</i> (1984), 465 U.S. 37 .....	34, 58
<i>Robards v. Rees</i> (C.A.6, 1986), 789 F.2d 379 .....	44
<i>Roberts v. Carter</i> (C.A.6, 2003), 337 F.3d 609 .....	64
<i>Russell v. Collins</i> (C.A.5, 1993), 998 F.2d 1287 .....	35
<i>Siderman DeBlake v. Republic of Argentina</i> (C.A.9, 1992), 965 F.2d 699 .....	61
<i>Smith v. Farley</i> (C.A.7, 1995), 59 F.3d 659 .....	52, 53
<i>Smith v. Phillips</i> (1982), 455 U.S. 209 .....	22
<i>State v. Adams</i> (1980), 62 Ohio St.2d 151 .....	45
<i>State v. Ahmed</i> , 103 Ohio St.3d 27, 2004-Ohio-4190 .....	23
<i>State v. Barnes</i> , 94 Ohio St.3d 21, 2002-Ohio-67 .....	23
<i>State v. Berry</i> , 72 Ohio St.3d 354, 1995-Ohio-310 .....	4, 5
<i>State v. Bies</i> , 74 Ohio St.3d 320, 1996-Ohio-276 .....	22
<i>State v. Bock</i> (1986), 28 Ohio St.3d 108 .....	5
<i>State v. Braden</i> , 98 Ohio St.3d 354, 2003-Ohio-1325 .....	15, 48
<i>State v. Bradley</i> (1989), 42 Ohio St.3d 136 .....	17
<i>State v. Brown</i> (1988), 38 Ohio St.3d 305 .....	22
<i>State v. Bryan</i> , 101 Ohio St.3d 272, 2004-Ohio-971 .....	23
<i>State v. Buell</i> (1986), 22 Ohio St.3d 124 .....	51

<i>State v. Byrd</i> (1987), 32 Ohio St.3d 79 .....	48
<i>State v. Cappadonia</i> , Warren App. No. CA2008-11-138, 2010-Ohio-494 .....	40
<i>State v. Carter</i> , 89 Ohio St.3d 593, 2000-Ohio-172 .....	28
<i>State v. Cassano</i> , 96 Ohio St.3d 94, 2002-Ohio-3751 .....	43
<i>State v. Chinn</i> , 85 Ohio St.3d 548, 199-Ohio-288 .....	48
<i>State v. Clayton</i> (1980), 62 Ohio St.2d 45 .....	17
<i>State v. Clemons</i> , 82 Ohio St.3d 438, 1998-Ohio-406 .....	48
<i>State v. Cowans</i> , 87 Ohio St.3d 68, 1999-Ohio-250 .....	6
<i>State v. Conway</i> , 109 Ohio St.3d 412, 2006-Ohio-2815 .....	21
<i>State v. Cunningham</i> , 105 Ohio St.3d 197, 2004-Ohio-7007 .....	22
<i>State v. Davie</i> , 80 Ohio St.3d 311, 1997-Ohio-341 .....	48, 64
<i>State v. Davis</i> , 76 Ohio St.3d 107, 1996-Ohio-414 .....	39
<i>State v. DeHass</i> (1967), 10 Ohio St.2d 230 .....	5
<i>State v. Dennis</i> , 79 Ohio St.3d 421, 1997-Ohio-372 .....	48
<i>State v. Depew</i> (1988), 38 Ohio St.3d 275 .....	40
<i>State v. Dunlap</i> , 73 Ohio St.3d 308, 1995-Ohio-243 .....	40
<i>State v. Esparza</i> (1988), 39 Ohio St.3d 8 .....	48
<i>State v. Fentress</i> , Stark App. No. 2001CA00155, 2002-Ohio-2477 .....	19
<i>State v. Fox</i> (1994), 69 Ohio St.3d 183 .....	13, 31
<i>State v. Frazier</i> , 115 Ohio St.3d 139, 2007-Ohio-5048 .....	19, 28
<i>State v. Garner</i> , 74 Ohio St.3d 49, 1995-Ohio-168 .....	63
<i>State v. Getsy</i> , 84 Ohio St.3d 180, 1998-Ohio-533 .....	33
<i>State v. Gibson</i> (1975), 45 Ohio St.2d 366 .....	43

<i>State v. Goodwin</i> , 84 Ohio St.3d 331, 1999-Ohio-356 .....	48
<i>State v. Halder</i> , Cuyahoga App. No. 87974, 2007-Ohio-5940.....	43
<i>State v. Hale</i> , 119 Ohio St.3d 118, 2008-Ohio-3426 .....	23
<i>State v. Hill</i> (1996), 75 Ohio St.3d 195.....	22
<i>State v. Huckabee</i> (March 9, 2001), Geauga App. No. 99-G-2252 .....	63
<i>State v. Hughbanks</i> , 99 Ohio St.3d 365, 2003-Ohio-4121.....	15, 40
<i>State v. Jalowiec</i> , 91 Ohio St.3d 220, 2001-Ohio-26.....	40
<i>State v. Jenkins</i> (1984), 15 Ohio St.3d 164.....	50
<i>State v. Jordan</i> , 101 Ohio St.3d 216, 2004-Ohio-783 .....	5
<i>State v. Joseph</i> , 73 Ohio St.3d 450, 1995-Ohio-288.....	31
<i>State v. Landrum</i> (1990), 53 Ohio St.3d 107 .....	14, 32
<i>State v. Lindsey</i> , 87 Ohio St.3d 479, 2000-Ohio-465 .....	33
<i>State v. Long</i> (1978), 53 Ohio St.3d 91.....	23
<i>State v. Longworth</i> , Allen App. No. 1-02-28, 2002-Ohio-4602 .....	19
<i>State v. Lorraine</i> (1993), 66 Ohio St.3d 414.....	39
<i>State v. Lott</i> (1990), 51 Ohio St.3d 160 .....	13
<i>State v. Maurer</i> (1984), 15 Ohio St.3d 239.....	13
<i>State v. McNeill</i> , 83 Ohio St.3d 438, 1998-Ohio-293 .....	39
<i>State v. Mills</i> (1992), 62 Ohio St.3d 357.....	13, 31
<i>State v. Mosley</i> , Mahoning App. No. 03MA52, 2004-Ohio-5187.....	5
<i>State v. Noling</i> , 98 Ohio St.3d 44, 2002-Ohio-7044.....	45
<i>State v. Perez</i> , 124 Ohio St.3d 122, 2009-Ohio-6179.....	17
<i>State v. Perry</i> , 101 Ohio St.3d 118, 2004-Ohio-297.....	45

<i>State v. Powell</i> , Clermont App. No. CA2009-05-028, 2009-Ohio-6552 .....	25
<i>State v. Price</i> (1979), 60 Ohio St.2d 136 .....	31
<i>State v. Reed</i> (1996), 74 Ohio St.3d 534.....	43
<i>State v. Sage</i> (1987), 31 Ohio St.3d 173 .....	45
<i>State v. Sallie</i> , 81 Ohio St.3d 673, 1998-Ohio-343.....	17
<i>State v. Sheppard</i> (1998), 84 Ohio St.3d 230 .....	22
<i>State v. Skatzes</i> , 104 Ohio St.3d 195, 2004-Ohio-6391 .....	32
<i>State v. Smith</i> (1984), 14 Ohio St.3d 13.....	22
<i>State v. Smith</i> , 89 Ohio St.3d 323, 2000-Ohio-166.....	6
<i>State v. Steele</i> , 155 Ohio App.3d 659, 2003-Ohio-7103.....	43
<i>State v. Steffen</i> (1987), 31 Ohio St.3d 111 .....	35, 47, 48, 59
<i>State v. Thomas</i> , Allen App. No. 1-08-36, 2008-Ohio-6067 .....	25
<i>State v. Thompson</i> (1987), 33 Ohio St.3d 1 .....	31
<i>State v. Treesh</i> , 90 Ohio St.3d 460, 2001-Ohio-4.....	48
<i>State v. Trimble</i> , 122 Ohio St.3d 297, 2009-Ohio-2961 .....	27, 45, 46
<i>State v. Vrabel</i> , 99 Ohio St.3d 184, 2003-Ohio-3193.....	5, 43
<i>State v. Watts</i> , Butler App. No. CA2005-08-364, 2007-Ohio-221 .....	26
<i>State v. White</i> , 82 Ohio St.3d 16, 1998-Ohio-363 .....	39
<i>State v. Williams</i> (1986), 23 Ohio St.3d 16.....	5
<i>State v. Williams</i> , 99 Ohio St.3d 493, 2003-Ohio-4396.....	36, 39
<i>State v. Willis</i> , Franklin App. No. 08AP-536, 2009-Ohio-325 .....	43
<i>Strickland v. Washington</i> (1984), 466 U.S. 668 .....	17, 64
<i>Tison v. Arizona</i> (1987), 481 U.S. 137 .....	52, 53, 60

<i>United States v. Bush</i> (C.A.4, 2005), 404 F.3d 263 .....	43
<i>United States v. Edlemann</i> (C.A.8, 2006), 458 F.3d 791 .....	43
<i>United States v. Emerson</i> (C.A.5, 2001), 270 F.3d 203 .....	29
<i>United States v. George</i> (C.A.9, 1995), 56 F.3d 1078 .....	44
<i>United States v. Hasting</i> (1983), 461 U.S. 499 .....	63
<i>United States v. Mackovich</i> (C.A.10, 2000), 209 F.3d 1227 .....	43-44
<i>United States v. Mayes</i> (C.A.11, 1998), 158 F.3d 1215 .....	12
<i>United States v. McKissick</i> (C.A.10, 2000), 204 F.3d 1282 .....	12
<i>United States v. Miller</i> (C.A.6, 2008), 531 F.3d 340 .....	11
<i>United States v. Phillips</i> (C.A.6, 2008), 516 F.3d 479 .....	11
<i>United States v. Saenz</i> (C.A.6, 1990), 915 F.2d 1046 .....	53
<i>United States v. Smith</i> (C.A.10, 2005), 413 F.3d 1253 .....	43
<i>United States v. Tipton</i> (C.A.4, 1996), 90 F.3d 861 .....	52, 53
<i>Wainwright v. Witt</i> (1985), 469 U.S. 412 .....	17, 36
<i>Waldron v. I.N.S.</i> (C.A.2, 1993), 17 F.3d 511 .....	61
<i>Walton v. Arizona</i> (1990), 497 U.S. 639 .....	54, 58
<i>Wiggins v. Smith</i> (2003), 539 U.S. 510 .....	19
<i>Williams v. Taylor</i> (2000), 529 U.S. 362 .....	19
<i>Witherspoon v. Illinois</i> (1968), 391 U.S. 510 .....	36
<i>Workman v. Bredesen</i> (C.A.6, 2007), 486 F.3d 896 .....	60
<i>Zant v. Stephens</i> (1983), 462 U.S. 862 .....	57

<u>CODE</u>	<u>PAGE</u>
R.C. 2903.01 .....	51
R.C. 2903.01(B).....	51
R.C. 2903.01(D).....	51
R.C. 2903.01(D)(1).....	53
R.C. 2929.03(C).....	56
R.C. 2929.03(D)(1).....	13, 31, 56
R.C. 2929.03(D)(3).....	56
R.C. 2929.03(F) .....	13
R.C. 2929.04(A).....	50, 51, 55, 56
R.C. 2929.04(A)(1)-(8).....	55
R.C. 2929.04(A)(5).....	15
R.C. 2929.04(A)(7).....	51, 52
R.C. 2929.04(B).....	13, 22, 41
R.C. 2929.04(B)(1)-(7) .....	56
R.C. 2929.04(B)(3) .....	14, 32
R.C. 2929.04(B)(5) .....	14
R.C. 2929.04(B)(7) .....	14, 32
R.C. 2929.05(A).....	passim
R.C. 2945.25 .....	36
R.C. 2945.37(G).....	4, 5
R.C. 2945.371(G)(3).....	6

RULES

PAGE

Crim.R. 11(C)(3).....51

Crim.R. 52(A).....45

Evid.R. 401 .....45

Fed.R.Crim.P. 32(b)(1).....53

## STATEMENT OF FACTS

### TRIAL PHASE

The State agrees with the statement of facts regarding the trial phase as present in Neyland's merit brief.

### MITIGATION PHASE

Initially, the State moved to admit evidence from the trial phase that was relevant to the aggravating circumstance that the jury found beyond a reasonable doubt. (Sent. Tr. Vol. 1 at 24.) The trial court, without objection from defense counsel, admitted the relevant evidence and the State rested. (Sent. Tr. Vol. 1 at 24.) Neyland then made an unsworn statement to the jury that he had prepared in advance. (Sent. Tr. Vol. 1 at 6-9, 25-29.)

Following Neyland's unsworn statement, he presented the testimony of Dr. Thomas Sherman, who had evaluated Neyland in December 2007 to determine whether he was competent to stand trial. (Sent. Tr. Vol. 1 at 30-78.) The vast majority of Dr. Sherman's testimony focused on his opinion that Neyland was not competent to stand trial because Neyland suffered from a mental illness. Dr. Sherman was the first person to evaluate Neyland and only spent one hour with him. In making his diagnosis, Dr. Sherman had the opportunity to review the crime reports, descriptions of items in Neyland's storage unit, and an illegible handwritten clinical note from a screening Neyland had undergone in 1999. (Sent. Tr. Vol. 1 at 34, 63.)

Dr. Sherman was the only expert to opine that Neyland was incompetent to stand trial. Dr. Sherman only spent a little over an hour with Neyland and even admitted that it was not the ideal situation for an evaluation. (03/21/08 Tr. at 19.) Dr. Sherman went as far as to say, "I was hoping somebody could keep him at a hospital." (03/21/08 Tr. at 19.) Fortunately, Dr.

Sherman's wish was granted and Neyland was observed for approximately thirty days at Twin Valley for twenty-four hours a day.

The trial court then allowed Neyland to supplement his unsworn statement to the jury. (Sent. Tr. Vol. 1 at 81-88.) After the trial court admitted defense exhibits, including a presentence investigation report, the defense rested. (Sent. Tr. Vol. 1 at 88-89.)

Next, the State presented rebuttal testimony. First, the State called Dr. Bergman, who had conducted a second competency evaluation on Neyland while he was at Twin Valley Behavioral Healthcare for approximately thirty days in January 2008. (Sent. Tr. Vol. 1 at 90-118.) The State also called Dr. Haskins, who had attempted to perform a third competency evaluation on Neyland in February 2008. (Sent. Tr. Vol. 1 at 119-145.)

Between Dr. Bergman and Dr. Haskins, the State presented the previous testimony of Dr. Delaney Smith from the competency hearing on March 21, 2008. Prior to opening statements and out of the presence of the jury, the State informed the trial court and defense counsel that it intended to have the prior testimony of Dr. Delaney Smith read for the jury during rebuttal, if appropriate. The State conceded that Dr. Smith's statements would be testimonial under *Crawford*, but that Dr. Smith was unavailable and she had previously been subject to cross-examination by Neyland on March 21, 2008, at a competency hearing. (Sent. Tr. Vol. 1 at 12.) The State later admitted State's Exhibit 225, a letter from Dr. Smith's employer, Twin Valley, that stated she was not available to testify. (Sent. Tr. Vol. 1 at 145.) The trial court, over objection from defense counsel, allowed Dr. Smith's previous testimony to be read to the jury. (Sent. Tr. Vol. 1 at 118.) Contrary to Neyland's position, Dr. Smith opined that Neyland was competent to stand trial. (03/21/08 Tr. at 49.)

After Dr. Sherman's testimony, the State presented rebuttal testimony of Dr. Smith, Dr. Bergman, and Dr. Haskins, who offered a different opinion regarding Neyland's mental condition. Dr. Smith and Dr. Haskins, along with Dr. Bergman who reviewed Neyland's medical records from Twin Valley, had the advantage of the extensive observation in determining that Neyland suffered from a personality disorder. All three doctors unequivocally stated to a reasonable degree of medical certainty that Neyland's personality disorder did not affect his ability to understand the nature or the objective of the proceedings against him. Further, all three doctors unequivocally stated to a reasonable degree of medical certainty that Neyland's personality disorder did not affect Neyland's ability to assist in his defense. (03/21/08 Tr. at 38, 49, 68, 84, 94.)

None of the experts offered an opinion as to whether Neyland lacked substantial capacity to appreciate the criminality of his conduct due to a mental condition. When asked directly, Dr. Sherman side stepped this issue and merely stated that Neyland had a severe mental illness. (Sent. Tr. Vol. 1 at 45-46.) On the other hand, Dr. Bergman and Dr. Haskins both stated that they could not offer an opinion regarding this matter because Neyland refused to talk to either of them about the criminal behavior. (Sent. Tr. Vol. 1 at 102, 138.)

## RESPONSE TO APPELLANT'S PROPOSITIONS OF LAW

Response to Proposition of Law Number One: There is not a violation of a criminal defendant's right to due process, right to a fair trial, or cruel and unusual punishment when a capital defendant understands the nature and objective of the proceedings and is able to assist in his own defense.

The trial court did not abuse its discretion when, after a competency hearing where two psychiatrists and two psychologists testified, it determined that Neyland was able to understand the nature and objective of the proceedings and was able to assist in his defense. Further, the record does not reflect sufficient indicia of the Neyland's incompetence to stand trial, especially when Neyland participated in hearings and had discussions with his attorneys. None of the points raised by Neyland to support his position that the trial court erred in finding him competent suggest that Neyland either did not understand the nature and objective of the proceedings, or that he was unable to assist in his own defense.

A criminal defendant cannot be tried while legally incompetent. *State v. Berry* (1995), 72 Ohio St.3d 354, 359, 1995-Ohio-310, citing *Pate v. Robinson* (1966), 383 U.S. 375, and *Drope v. Missouri* (1975), 420 U.S. 162. A defendant is competent to stand trial when he has sufficient present ability to consult with his lawyer and has a factual understanding of the proceedings against him. *Dusky v. United States* (1960), 362 U.S. 402.

R.C. 2945.37, which controls competency determinations in Ohio, states in pertinent part:

(G) A defendant is presumed to be competent to stand trial. If, after a hearing, the court finds by a preponderance of the evidence that, because of the defendant's present mental condition, the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense, the court shall find the defendant incompetent to stand trial and shall enter an order authorized by section 2945.38 of the Revised Code.

To rebut the presumption of competency, a defendant bears the burden to prove by a preponderance of the evidence that he is incompetent. *State v. Jordan*, 101 Ohio St.3d 216, 2004-Ohio-783, ¶28; R.C. 2945.37(G). This Court defined the test for determining a criminal defendant's competency as "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him." *Berry*, 72 Ohio St.3d at 359, quoting *Dusky*, 362 U.S. 402. Further, a trial court's finding that a defendant is competent to stand trial will not be disturbed where there is some reliable, credible evidence supporting that finding. *State v. Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193; *State v. Williams* (1986), 23 Ohio St.3d 16.

Simply because a defendant has a mental illness does not mean he is legally incompetent to stand trial. *Berry*, 72 Ohio St.3d 354, syllabus. A defendant may be emotionally disturbed or even psychotic and still be capable of understanding the charges against him and of assisting his counsel. *State v. Bock* (1986), 28 Ohio St.3d 108, 110.

Moreover, this Court has held that a capital murder defendant's refusal to cooperate with counsel did not compel a finding that he was incompetent to stand trial. *Vrabel*, at ¶21; *Berry*, 72 Ohio St.3d at 361. The fact that a defendant may not trust appointed counsel does not render him unable to consult with them or to understand the trial proceedings. *Jones v. Bradshaw* (N.D. Ohio, 2007), 489 F.Supp.2d 786. A defendant's unwillingness to participate or assist in his defense does not equate to his inability to do so. *Berry*, 72 Ohio St.3d at 362.

Where there is a difference of opinion among experts, the issue becomes a matter of credibility. *State v. Mosley*, Mahoning App.No. 03MA52, 2004-Ohio-5187, ¶60. In that situation, "the weight to be given the evidence and the credibility of the witnesses are primarily

for the [judge].” *Mosley* at ¶60, quoting *State v. DeHass* (1967), 10 Ohio St.2d 230, syllabus. In other words, deference should be given “to those who see and hear what goes on in the courtroom.” *State v. Smith*, 89 Ohio St.3d 323, 330, 2000-Ohio-166; *State v. Cowans*, 87 Ohio St.3d 68, 84, 1999-Ohio-250.

Neyland wants this Court to do what it cannot do – supplant its opinion regarding competency for that of the trial Court. Even if this Court could do so, Neyland wants this Court to lend more credibility to Dr. Sherman, who could not even prepare his report correctly even though he has done thousands of them<sup>1</sup>, than to three other experts who opined that Neyland was competent to stand trial. Because the record indicates that the trial court acted well within its discretion, this Court should defer to the trial court’s finding.

The record is devoid of evidence suggesting that the trial court abused its discretion in finding Neyland competent to stand trial. The trial court reviewed the reports of three expert witnesses and heard testimony of four experts. The trial court then concluded that Neyland did not prove by a preponderance of the evidence that he was incompetent to stand trial. Further, none of Neyland’s actions during the course of the case provide sufficient indicia of incompetency. To the contrary, there is sufficient evidence in the record to support the trial court’s conclusions that Neyland understood the nature and objective of the proceedings against him and that he was able to assist in his own defense.

A. Neyland understood the nature and objective of the proceedings against him.

The record contains ample evidence that Neyland understood the nature and objective of the proceedings against him. Neyland has been keenly aware of all of his legal rights, as was

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<sup>1</sup> Dr. Sherman’s initial report did not comply with all of the requirements of R.C. 2945.371(G)(3) and the trial court had to ask him to file a supplement in order to comply with the statute.

first apparent when he invoked his *Miranda* rights when he was arrested in Michigan. (09/12/07 Tr. at 6-7.) In discussing a possible waiver of speedy trial time, Neyland also indicated to his attorneys that he was not going to sign any of his rights away. (10/23/07 Tr. at 3.) Many times during the competency evaluations, Neyland refused to discuss the circumstances surrounding the charges, indicating to the various evaluators that he had a right to remain silent and to not incriminate himself. (12/11/07 Tr. at 3; 03/21/08 Tr. at 34; Joint Exhibit 1, 03/21/08 Competency Hearing.) Additionally, Neyland refused to continue to cooperate with the evaluation at Twin Valley Behavioral Healthcare because he knew that the statute only permitted them twenty days to conduct the evaluation. (02/12/08 Tr. at 4.)

In assessing Neyland's knowledge of the court process, Dr. Haskins specifically talked to Neyland regarding the indictment and specifications, the way a capital case proceeds slightly differently than a typical criminal case, and the various pleas and the consequences. Dr. Haskins opined that Neyland understood the entire process. (03/21/08 Tr. at 63-64.) In fact, Neyland told Dr. Smith that if he was found guilty at trial, he was aware and intended to take full advantage of the appeals process. (03/21/08 Tr. at 47-48.) Dr. Sherman, Neyland's expert witness, even admitted that Neyland understood the basics of the courtroom, such as the roles of the judge, prosecutor, jury, and his own attorneys. (Joint Exhibit 1, 03/21/08 Competency Hearing.)

Further, Neyland acted appropriately while in the courtroom. The record does not suggest that Neyland ever acted out of control. In fact, Neyland's own attorney stated that Neyland respected the court enough that he would not act out of control. (03/21/08 Tr. at 17.) Neyland's counsel claim that Neyland "wander[ed] off topic and [spoke] of irrelevancies." (Appellant's Brief, p. 20.) However, in reviewing all of Neyland's in-court statements that were

attached in “Appellant’s Appendix,” Neyland’s statements were pertinent to the topics being discussed in court.

There are other examples throughout the pendency of the case that Neyland understood the nature and objective of the proceedings against him. First, Neyland filed a *pro se* addendum to Defense Motion 44 and used correct legal terminology. Additionally, there are numerous references during the criminal proceedings by Neyland to the 800 pages of prosecution discovery. In fact, during the mitigation phase, Neyland was able to go through and discuss in detail the facts contained in those 800 pages of discovery. Simply because Neyland may not have understood the intricacies of the evidentiary rules does not make him incompetent to stand trial.

Because the record contains evidence showing that Neyland understood the roles of those in the courtroom, acted appropriately during the course of the case, and never went too far off course when addressing the court and/or jury, the trial court acted well within its discretion in making this finding.

B. Neyland was capable of assisting in his own defense.

The record also shows that Neyland was able to assist in his own defense. Simply because he did not do what his attorneys thought was in his best interest and focused on things that his attorneys found irrelevant does not render him incompetent to stand trial. Dr. Haskins addressed this concern and stated that it is fairly common for criminal defendants who are not legally trained to focus on things that may not seem relevant to attorneys. (03/21/08 Tr. at 71.)

Similarly, Neyland’s perceived lack of cooperation with his attorneys, investigators, and evaluators does not mean he was incompetent to stand trial. Dr. Smith, Dr. Haskins, and Dr. Bergman all opined that Neyland was able to assist in his defense should he choose to do so.

(03/21/08 Tr. at 38, 68, 84, 95.) Dr. Smith testified that Neyland was cooperative with things that he felt were beneficial to him, but Neyland made it very clear that he was unwilling to discuss certain things with her because it was not in his best interest. She went on to say that Neyland's unwillingness to discuss certain matters resulted from a conscious choice he made, not a mental illness. (03/21/08 Tr. at 33.) Dr. Smith further stated that Neyland's personality disorder did not impact his ability to make choices. (03/21/08 Tr. at 50-51.) Neyland's own expert even testified that Neyland was unwilling to address hypotheticals and share information during the evaluation, but that Neyland was able to do so. (03/21/08 Tr. at 17; Sent. Tr. Vol. 1 at 59.)

Again, there are several examples throughout the court proceedings that demonstrate Neyland's ability to assist in his defense. The record illustrates several attorney-client discussions between Neyland and his counsel. In fact, Neyland participated in the competency hearing by suggested that his attorney ask an additional question of Dr. Smith. (03/21/08 Tr. at 53.) Again, Neyland filed his own addendum to Defense Motion 44. He also wrote several pages of notes to his attorneys during the guilt phase of the trial. (Trial Tr. Vol. 7 at 1189-1190.) As this Court found in *Berry*, Neyland could assist his attorneys when he chose to do so. *Berry*, 72 Ohio St.3d at 441.

The trial court acted well within its discretion in finding that Neyland was able to assist in his own defense.

Response to Proposition of Law Number Two: A trial court does not err or violate a criminal defendant's due process rights when it orders a criminal defendant to wear a leg brace restraint that is not visible to the jury.

Response to Proposition of Law Number Three: Trial counsel does not commit error or violate a criminal defendant's due process rights when they choose not to object to a trial court's order that a criminal defendant wear a leg brace restraint that is not visible to the jury.

Because Neyland argues these related propositions of law together, the State will do the same.

The use of physical restraints, during trial and sentencing, implicates a defendant's rights to due process. *Deck v. Missouri* (2005), 544 U.S. 622, 629. The United States Supreme Court held that the Constitution forbids the use of *visible shackles* unless that use is justified by an essential state interest. *Id.* The Supreme Court noted that the *visible shackling* undermines the presumption of innocence and the related fairness of the fact-finding process. *Id.* According to *Deck*, shackles often interfere with the defendant's ability to communicate with his attorney. *Id.* at 631. The *Deck* court also found that the routine use of shackles, in the presence of juries, would erode the public's confidence in the judicial system and undermine the dignity of courtrooms as fair and impartial. *Id.* at 630.

Neyland's leg brace was not visible to the jury. In fact, at a pretrial hearing, defense counsel and the trial court thoroughly discussed the use of table skirting with shackles versus the use of the leg brace with long pants in order to avoid accidental viewing by the jurors. (09/24/08 Tr. at 10-14.) Neyland communicated regularly with his counsel during the trial, and he participated fully in his own defense. When the discussion of the leg brace took place, no one from the public was present nor did the jury have any indication as to its use. (09/24/08 Tr. at 3.)

In *Mendoza v. Berghuis* (C.A.6, 2008), 544 F.3d 650, the petitioner sought habeas relief because he had worn leg shackles that were not visible to the jury. The trial court deferred to the recommendation of the local sheriff's department and skirted both counsel tables with brown paper for the duration of the trial. *Id.* at 651. In reviewing the writ, the Sixth Circuit examined what *Deck* had established as a constitutional right. Because the Supreme Court had stressed the limitation as to *visible restraints*, the Michigan court denied the appeal. *Id.* at 655. This principle was also examined in *Earhart v. Konteh* (C.A.6, 2009), 589 F.3d 337, wherein Earhart wore a stun belt during trial. The appeals court narrowed the question to "if the stun belt was visible, due process mandates an individualized finding of necessity before the state courts could require the belt be worn." *Earhart*, 589 F.3d at 349. "If the stun belt was not visible, then there is not a violation of clearly established federal law sufficient to grant the writ." *Earhart*, 589 F.3d at 349, citing *Mendoza*, 544 F.3d at 654. Because the stun belt was not visible to the jury, the appellate court rejected a due process violation based upon the belt.

In *United States v. Miller* (C.A.6, 2008), 531 F.3d 340, the court, on plain-error review, found that due process requires an individual hearing on the use of a stun belt during trial, even if non-visible. The *Miller* court went on to discuss that "non-structural" constitutional errors are subject to harmless-error analysis and that plain-error analysis applies where the defendant did not object to the use of a stun belt at trial. *Id.* at 346. Because counsel for Neyland did not object, this Court should review the issue under a plain-error analysis, requiring Neyland to show "(1) error (2) that was obvious or clear (3) that affected defendant's substantial rights and (4) that affected the fairness, integrity, or public reputation of the judicial proceedings. *United States v. Phillips* (C.A.6, 2008), 516 F.3d 479, 487. The plain error doctrine "is to be used sparingly, only in exceptional circumstances, and solely to avoid a miscarriage of justice." *Id.* at 487.

Prejudice cannot be shown if there is no evidence indicating that the leg brace was visible to the jury. See *United States v. McKissick* (C.A. 10, 2000), 204 F.3d 1282, 1299. Where there is no evidence in the record that any member of the jury noticed the stun belt, the court will not “presume prejudice.” *United States v. Mayes* (C.A.11, 1998), 158 F.3d 1215, 1226-1227. Here, Neyland cannot show plain error. He actively participated in his defense, conferred with counsel, and in fact provided questions for witnesses. The record is devoid of any mention that a juror saw the leg brace on Neyland. Neyland thus cannot show any prejudice.

Because the leg brace was not visible and Neyland failed to demonstrate prejudice, his counsel was not ineffective for failing to object to the use of the restraint. Further, Neyland was not prevented from participating in his trial. He cannot demonstrate any constitutional violation.

The second and third propositions of law should be rejected.

Response to Proposition of Law Number Four: The trial court did not err in concluding that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt.

The trial court did not err in determining that the aggravating circumstance, the killing of two people during a course of conduct, outweighed the mitigating factors presented by Neyland. The assessment and weight to be given mitigating evidence are matters for the trial court's determination. *State v. Lott* (1990), 51 Ohio St.3d 160, 171; *State v. Fox* (1994), 69 Ohio St.3d 183, 191. Further, the "decisionmaker need not weigh mitigating factors in a particular manner. The process of weighing mitigating factors, as well as the weight, if any, to assign to a given factor is a matter for the discretion of the individual decisionmaker." *Fox*, 69 Ohio St.3d at 193, citing *State v. Mills* (1992), 62 Ohio St.3d 357, 376.

R.C. 2929.04(B) delineates the mitigating factors a trial court or jury is to weigh against an aggravating circumstance charged in an indictment and proven beyond a reasonable doubt. In addition to the seven mitigating factors, the decisionmaker is also to weigh the nature and circumstances of the offense and the history, character, and background of the offender. In weighing the required factors here, the trial court did not err in determining that the State had proven beyond a reasonable doubt that the aggravating circumstance outweighed the mitigating factors, as required by R.C. 2929.03(D)(1).

The State recognizes that the trial court did not comply with the requirements of R.C. 2929.03(F) in that there were no specific reasons given for its determination that the aggravating circumstance outweighed the mitigating factors. However, this Court has recognized on several occasions that any flaws in the trial court's sentencing opinion will be cured by this Court's independent review of the sentence as required by R.C. 2929.05(A). *Fox*, 69 Ohio St.3d at 191-192; *Lott*, 51 Ohio St.3d at 170-173; *State v. Maurer* (1984), 15 Ohio St.3d 239, 247. See, also,

*Clemons v. Mississippi* (1990), 494 U.S. 738; *State v. Landrum* (1990), 53 Ohio St.3d 107, 124. The flaw in the trial court's opinion here does not equate to an error in its determination that the aggravating circumstance outweighed the mitigating factors beyond a reasonable doubt.

The trial court correctly indicated on the record that the only two applicable factors were R.C. 2929.04(B)(5) and R.C. 2929.04(B)(7): the offender's lack of significant criminal history and any other factors that are relevant to the issue of whether the offender should be sentenced to death. (Sent. Tr. Vol. 1 at 221-222.) First, the State recognizes that Neyland had a minimal criminal history. Second, the State agrees that the trial court properly considered and weighed Neyland's mental condition and employment history as R.C. 2929.04(B)(7) factors.

While Neyland urges this Court to consider his mental condition, whether it be a mental illness or a personality disorder, under R.C. 2929.04(B)(3), Neyland never proved that this subdivision applied to his case. For R.C. 2929.04(B)(3) to apply, Neyland needed to present some evidence that a mental disease or defect caused him to lack substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law at the time he committed the offenses. None of the experts, including Dr. Sherman when specifically asked, ever testified that Neyland lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law at the time he committed the offenses. (Sent. Tr. Vol. 1 at 46.) Dr. Haskins and Dr. Bergman both testified that they were not able to offer an opinion on that matter because Neyland had refused to talk to either of them about the crimes. (Sent. Tr. Vol. 1 at 102, 138.) Because Neyland did not prove that he had lacked substantial capacity to appreciate his conduct or to conform his conduct to the requirements of the law at the time he committed the offenses, the trial court did not err in deciding not to consider R.C. 2929.04(B)(3).

This Court has previously upheld other trial courts' determinations that aggravating circumstances outweighed mitigating factors beyond a reasonable doubt when those appellants presented the same or more mitigating factors than Neyland presented during the penalty phase. For example, in *State v. Hughbanks*, 99 Ohio St.3d 365, 2003-Ohio-4121, ¶141, Hughbanks failed to establish that he had lacked substantial capacity to appreciate the criminality of his conduct or conform to the requirements of the law, similar to Neyland. *Id.* at ¶141. Hughbanks, like Neyland, had a personality disorder rather than a mental illness. *Id.*

Additionally, *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, is similar to this case. Braden received a death sentence for killing his girlfriend and her father after an argument he had had with his girlfriend. Braden's course-of-conduct killings are comparable to Neyland's course of conduct killings of Doug Smith and Tomm Lazar. Like Braden's, Neyland's course-of-conduct killings followed an upsetting event. In fact, Neyland became upset upon learning that Liberty Transportation was terminating his driving privileges with its Department of Transportation number. In both *Braden* and this case, the only aggravating circumstance was a course-of-conduct killing of two or more persons pursuant to R.C. 2929.04(A)(5). Further, both Braden and Neyland were diagnosed with paranoid personality disorders. Both men thought people were out to get them and that people were trying to set them up. Like Neyland, Braden also lacked a substantial criminal history and had problems dealing with people at work. Like *Braden*, the aggravating circumstance here pales in comparison to Neyland's mitigation evidence. Although this Court gave significant weight to Braden's mental condition and lack of criminal history, this Court stated that "[w]hen compared with the 'course of conduct' aggravating circumstance, though, Braden's mitigation evidence pales in significance." *Braden*, at ¶161.

The trial court thus did not err in determining that Neyland's purposeful killings of two persons during a course of conduct outweighed his lack of a significant criminal record, his employment history, and his mental condition beyond a reasonable doubt.

Response to Proposition of Law Number Five: A criminal defendant is not denied due process and the right to effective assistance of counsel where the actions of his trial counsel do not fall below any accepted standard of competence.

Neyland's ineffective assistance of counsel claim is without merit. There is a strong presumption that trial counsel's decisions fall within the range of reasonable professional judgment. *State v. Sallie*, 81 Ohio St.3d 673, 675, 1998-Ohio-343. Trial strategies and tactics, even debatable ones, generally do not amount to ineffective assistance of counsel. *State v. Clayton* (1980), 62 Ohio St.2d 45. In order to succeed on an ineffective assistance of counsel claim, Neyland must show that counsel's performance was deficient, and that but for trial counsel's errors, there is a reasonable probability that a different result would have occurred. *Strickland v. Washington* (1984), 466 U.S. 668, 691-696; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus.

None of trial counsel's actions or omissions prejudiced Neyland. Even if this Court finds deficient performance, there is not a reasonable probability that, but for the errors, a different result would have occurred.

A. Voir dire – lack of follow up

Neyland first argues that trial counsel rendered ineffective assistance in deciding not to ask follow-up questions of three prospective jurors. The record shows though that Neyland's rights were well preserved.

In order to protect Neyland's Constitutional right pursuant to *Wainwright v. Witt* (1985), 469 U.S. 412, an individual voir dire of over one hundred people was conducted to insure that only death-qualified jurors were chosen. "Counsel's actions during voir dire are presumed to be matters of trial strategy." *Miller v. Francis* (C.A.6, 2001), 269 F.3d 609, 615; *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, ¶206.

Juror 87 stated at least five times during questioning by the trial court and the prosecutor that his religious views would impact his ability to impose the death penalty. (Trial Tr. Vol. 2 at 309-313.) Juror 81 stated that even if the jurors would find beyond a reasonable doubt that the aggravating circumstance outweighed the mitigating factors, she could not conscientiously impose the death penalty, even if instructed to do so by the court. (Trial Tr. Vol. 2 at 323-329.) When it came time for defense counsel to question Juror 91, counsel stated, "I wish I had some questions to ask, but I don't at this time." (Trial Tr. Vol. 2 at 415.)

Throughout questioning, trial counsel had the opportunity to observe the demeanor and tone of the answers of each of these prospective jurors while they were subject to thorough questioning by the court and the prosecutor. Trial counsel questioned multiple prospective jurors who stated they could not impose the death penalty, and the record does not suggest that the decision to forego further questioning resulted from deficient conduct. Trial counsel's reason for deciding not to ask additional questions of these three prospective jurors is presumed to be trial strategy. Further, Neyland cannot show that but for the lack of questioning, the outcome would have been different.

B. Failure to object to the exclusion, for cause, of an otherwise qualified juror

Neyland's argument that trial counsel were ineffective for failing to object to the State's request to exclude Juror 24 for cause is without merit. As indicated in Neyland's brief, trial counsel did object to the State's request, but the objection was overruled by the trial court. (Trial Tr. Vol. 2 at 158.) Simply because the trial court did not side with Neyland's trial counsel, does not establish deficient performance.

### C. Mitigation

Neyland next argues that trial counsel failed to conduct a background investigation or prepare for mitigation.

In certain situations, trial counsel's failure to investigate a capital defendant's background and to present mitigating evidence to a jury could constitute ineffective assistance of counsel under *Strickland*. *Williams v. Taylor* (2000), 529 U.S. 362. Typically, counsel must conduct a thorough background investigation for mitigation. *Wiggins v. Smith* (2003), 539 U.S. 510.

Pursuant to the invited error doctrine, a "party will not be permitted to take advantage of an error which he himself invited or induced." *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, ¶148, quoting *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.* (1986), 28 Ohio St.3d 20, paragraph one of the syllabus. In *Frazier*, at ¶148, this Court held that Frazier had invited any error in his absence during a jury question during the guilt phase deliberations because he would not cooperate in getting dressed for court. Further, in the context of ineffective-assistance claims, Ohio courts have held that a defendant's decision to proceed *pro se* amounts to invited error. *State v. Longworth*, Allen App.No. 1-02-28, 2002-Ohio-4602, ¶14; *State v. Fentress*, Stark App. No. 2001CA00155, 2002-Ohio-2477.

Similarly, Neyland invited any error in trial counsel's investigation and presentation of evidence during the mitigation phase and therefore cannot claim that his counsel were ineffective. Trial counsel vigorously attempted to investigate Neyland's background and prepare for the mitigation phase months before the trial had ever started, only to be impeded by Neyland's lack of cooperation. At an ex-parte hearing on August 5, 2008, defense counsel and Neyland meet with the trial judge to discuss the progress of preparing for a likely mitigation phase. (08/05/08 Tr. at 3-4.) Trial counsel received funds for Dr. Wayne Graves, a forensic

psychologist, and for Kelly Hieby, a mitigation specialist with the State Public Defender's Office. (08/05/08 Tr. at 4.) Both trial counsel, Dr. Graves, Ms. Hieby, and Beth Ann Crum, an investigator with the Wood County Public Defender's Office, attempted to meet with Neyland to discuss mitigation. Neyland though refused to cooperate with any of these individuals. (08/05/08 Tr. at 4-5.) Neyland specifically told the trial court that he did not "have anything to say for mitigation." (08/05/08 Tr. at 9.) Further, Neyland refused to sign any releases of information that defense counsel needed to assist in preparing for mitigation. (08/05/08 Tr. at 9.)

Trial counsel did everything that they could, given Neyland's lack of cooperation. They requested that a pre-sentence investigation report be prepared in order to get Neyland's background information before the jury. Additionally, they presented the testimony of Dr. Sherman, who testified, albeit contrary to three other experts, that Neyland suffered from a severe mental illness. Further, trial counsel argued during closing arguments of mitigation that, based upon admitted jail records, Neyland would not be a behavioral problem should he be given a sentence less than death. (Sent. Tr. Vol. 1 at 155.) Because Neyland created the situation by refusing to speak about mitigation and/or sign necessary releases of information, he cannot now claim his trial counsel were ineffective for failing to investigate his background and present mitigation evidence.

D. Other errors under other propositions

As discussed under Response to Proposition of Law Numbers Two and Three, defense counsel was not ineffective in deciding not to object to Neyland's leg brace. Because the leg brace was not visible to the jury, Neyland suffered no prejudice. Contrary to Neyland's assertion, defense counsel did object to the prosecutor's closing argument during the mitigation phase and were thus not ineffective, as will be discussed in Response to Proposition of Law

Number Six. Even though there was no objection during opening statements of mitigation, the decision not to object is generally viewed as a trial strategy and alone will not establish an ineffective assistance claim. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶103. Additionally, as will be discussed in Response to Proposition of Law Number Seven, defense counsel's decision not to file motions to suppress statements or evidence obtained during search warrants was a trial strategy and not ineffective assistance of counsel. Finally, because there was nothing improper about the penalty phase jury instructions, as will be discussed in Response to Proposition of Law Number Nine, trial counsel was not ineffective for failing to object to the instructions.

Response to Proposition of Law Number Six: A prosecutor's comments during opening and closing arguments at the mitigation phase are proper when they are relevant to the specification or argue that the nature and circumstances of the offense present little or no mitigation.

The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips* (1982), 455 U.S. 209, 219. Isolated comments by a prosecutor are not to be taken out of context and given their most damaging meaning. *State v. Hill* (1996), 75 Ohio St.3d 195, 204, citing *Donnelly v. DeChristoforo* (1974), 416 U.S. 637, 647. As a general rule, a prosecutor is entitled to a certain degree of latitude during closing argument. *State v. Brown* (1988), 38 Ohio St.3d 305, 317. The test regarding prosecutorial misconduct in closing arguments is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant. *State v. Smith* (1984), 14 Ohio St.3d 13, 14.

Describing the killing of two or more persons as “a heinous crime” is a fair characterization of the murders. In *State v. Cunningham*, 105 Ohio St.3d 197, 2004-Ohio-7007, ¶87, the prosecutor's characterization of the murder as “the most cold-blooded calculated inhumane murder” was found to be well within the latitude permitted. The court noted that even if the comments were improper, nothing suggested that but for the comments, the outcome would have been otherwise. See, also, *State v. Bies*, 74 Ohio St.3d 320, 326, 1996-Ohio-276.

In *State v. Sheppard* (1998), 84 Ohio St.3d 230, 238, the court stated:

[a]lthough \* \* \* prosecutors cannot argue that the nature and circumstances of an offense are aggravating circumstances, the facts and circumstances of the offense must be examined to determine whether they are mitigating. R.C. 2929.04(B). Thus, a prosecutor may legitimately refer to the nature and circumstances of the offense, both to refute any suggestion that they are mitigating and to explain why the specified aggravating circumstances outweigh mitigating factors.

A prosecutor can argue that the nature and circumstances of the offense presented little or no mitigation. *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, ¶179. In this case, the prosecutor neither characterized nor labeled any of the facts of the offense as aggravating circumstances. Rather, the prosecutor argued that the nature and circumstances of the offense were not mitigating. (Sent. Tr. Vol. 1 at 150-151.) See *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190.

Neyland complains that a reference to his ability to make choices was inappropriate in that it asked the jurors to “stack” the aggravating factors. However, the prosecutor referenced his ability to make choices made as a factor to consider in weighing the mitigating factors. (Sent. Tr. Vol. 1 at 166.) In *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶199, the prosecutor made a similar reference to choices in reloading a gun and shooting the decedent twice. Hale complained that the circumstances of the murder could not be used as aggravating circumstances. However, this Court noted that the “prosecutors argument dealt with prior calculation and design, which were elements of the felony-murder specification and which were therefore, relevant to the sentencing.” *Id.* at ¶200. The discussion of the choices made by Neyland is likewise relevant to weighing the factors.

Because Neyland failed to object to some of the prosecutor’s arguments, the claim is waived unless the statement was plain error. An alleged error is plain error only if the error is “obvious,” and “but for the error, the outcome of the trial clearly would have been otherwise.” *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-67; *State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of the syllabus. Given the amount of evidence presented, Neyland cannot show that, but for these arguments, the outcome would have been different. Also, the trial court’s correct instructions on the aggravating circumstances and on the proper standard to apply in the

weighing process would have negated any confusion caused by the prosecutor's remarks. (Sent. Tr. Vol. 1 at 168-171.)

Response to Proposition of Law Number Seven: A criminal defendant's trial counsel are not ineffective when they choose not to file motions to suppress statements made by the defendant and choose not to seek suppression of evidence seized during search warrants.

As an initial matter, it should be noted that a complete copy of the documentary evidence, including all police reports, defendant's invocation of his *Miranda* rights, and search warrants, was provided to defense counsel was proffered by the State and admitted by the trial court for purposes of appeal. (Trial Tr. Vol. 4 at 685.)

“[F]ailure to file a motion to suppress is not per se ineffective assistance of counsel. Even when some evidence in the record supports a motion to suppress, counsel is presumed to be effective if the counsel could have reasonably concluded that the filing of a motion to suppress would have been a futile act. In such a case, where probability of success is slim, appellant fails to establish prejudice.”

*State v. Powell*, Clermont App. No. CA2009-05-028, 2009-Ohio-6552, ¶13, quoting *State v. Thomas*, Allen App. No. 1-08-36, 2008-Ohio-6067, ¶13. (Internal citations omitted.)

In order to suppress evidence, there has to be a constitutional violation of a criminal defendant's rights. Defense attorneys routinely examine reports and circumstances surrounding statements and search warrants and do not file motions to suppress because there was no constitutional violation and are not necessary or because of a trial strategy. Considering the evidence provided to defense counsel during discovery, defense counsel could have reasonably determined that filing motions to suppress Neyland's statements and/or challenging the search warrants were not necessary because the statements and evidence was properly obtained or that the motions were not filed because of trial strategy.

A. Suppression of statements made to police officers

There can only be a constitutional violation necessitating suppression of a suspect's statements if there is a custodial interrogation. *Miranda v. Arizona* (1966), 384 U.S. 436. "Spontaneous or voluntary statements are not considered the product of 'custodial interrogation,'" and therefore are admissible even though Miranda warnings were not issued at the time they were made. *State v. Watts*, Butler App. No. CA2005-08-364, 2007-Ohio-221, ¶16.

The evidence provided to defense counsel during discovery and introduced at trial indicate that Neyland's statements to police were spontaneous, not the product of a custodial interrogation. In fact, Neyland invoked his right to remain silent when police attempted to question him at the Monroe County Sheriff's Office, at which time the police did not ask any questions of Neyland. Because defense counsel could have reasonably and easily determined that Neyland's statements were not obtained in violation of his constitutional rights, their decision not to file a motion to suppress Neyland's spontaneous statements did not constitute ineffective assistance.

B. Suppression of evidence seized during execution of search warrants

To be successful in suppressing evidence seized during the execution of a search warrant, there has to be a showing that the officers did not have probable cause to obtain the search warrant. Neyland now complains that counsel were ineffective for failing to file a motion to suppress evidence seized from his hotel, specifically the weapons. Defense counsel objected, on the grounds of relevancy, multiple times throughout the trial, starting with the prosecutor's opening statement, to the reference of the weapons and evidence seized during the search warrants at the hotel at which the defendant was apprehended and his rented storage units. The

trial court allowed limited evidence of the weapons and evidence seized to be admitted under the State's theory that it showed Neyland's prior calculation and design.

Trial counsel acted reasonably in deciding not to file a motion suppress the evidence based upon their review of the discovery, but instead to argue that it was not relevant to the charges. Given the voluminous information available to trial counsel, it cannot be said that they were ineffective in deciding against filing a motion to suppress the evidence. Even assuming that trial counsel had filed a motion to suppress the evidence obtained during the search warrant, it is highly unlikely that the evidence would have been suppressed because this Court had not yet decided *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961. Neyland thus cannot show a reasonable probability that the outcome would have been different.

Response to Proposition of Law Number Eight: Lethal injection as administered in Ohio does not constitute cruel and unusual punishment.

Neyland alleges that his execution by lethal injection will constitute the imposition of cruel and unusual punishment in violation of his constitutional rights. Neyland has no viable argument regarding capital punishment or lethal injection, generally. *Frazier*, 2007-Ohio-5048; *State v. Carter*, 89 Ohio St.3d 593, 2000-Ohio-172.

When a state permissibly chooses to impose the death penalty on a properly convicted criminal, the state itself not the federal courts, is in charge of carrying out the sentence, but it may not impose “cruel and unusual” punishment in imposing that sentence. *U.S. Const. Amend. VIII*. The U.S. Supreme Court has said that punishments are cruel when they involve the torture or a lingering death, something inhuman and barbarous, unnecessary pain, or wanton infliction of pain, or when they do not accord with the dignity of man, which is the basic concept underlying the Eighth Amendment. *Gregg v. Georgia* (1976), 428 U.S. 153, 173. Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of “objectively intolerable risk of harm” that qualifies as cruel and unusual. *Baze v. Rees* (2008), 553 U.S. 35, 128 S.Ct 1520, 1537. Because “capital punishment is constitutional, it necessarily follows that there must be a means of carrying it out. Some risk of pain is inherent in any method of execution, no matter how humane, if only from the prospect of error in following the required procedure.” *Id.* at 1529. The Court noted that an inmate cannot overcome this “heavy burden” by simply arguing that state’s protocol “created opportunities for human error.” *Id.* at 1533. While the Eighth Amendment does provide a necessary and not insubstantial check on states’ authority to devise execution protocols, its purpose is not to substitute the court’s judgment of best practices for each detailed step in the

procedure for that of corrections officials. *Id.* at 1537. The Supreme Court opined that a method of execution only violates the Eighth Amendment if: (1) the state, without a penological justification, (2) rejects an alternative method of execution, (3) that is feasible, (4) and readily available, (5) and would significantly reduce a substantial risk of pain. *Id.* at 1532. Permitting constitutional challenges to lethal injection protocols based on speculative injuries and the possibility of negligent administration is not only unsupported by Supreme Court precedent but is also beyond the scope of judicial authority. *Gregg*, 428 U.S. at 174-175. The complete eradication of all risk of accident, however, is not yet possible, and the assertion that the mere possibility of future improper administration of the lethal injection despite the training and safeguards is too attenuated and speculative and certainly not intended to constitute cruel and unusual punishment. *United States v. Emerson* (C.A.5, 2001), 270 F.3d 203, 262.

Until November 30, 2009, Ohio employed the same three-drug IV injection that twenty-seven other states and the federal government used (two grams of thiopental sodium, followed by 100 milligrams of pancuronium bromide, and then 100 milliequivalents of potassium chloride). *Baze*, 128 S. Ct. at 1527. The use of pancuronium bromide and potassium chloride formed the basis of most of the challenges to lethal injection protocols in federal and state courts. *Id.* In fact, in the challenges to both Kentucky and Tennessee's three-drug protocol, the prisoners advocated the one-drug injection adopted by Ohio as a more humane alternative to the risk of pain arising from the use of the three drugs. *Baze*, at 1531-1532; *Harbison v. Little* (C.A.6, 2009), 571 F.3d 531, 538-539.

As the Sixth Circuit discussed in *Cooney (Biros) v. Strickland* (C.A.6, 2009), 589 F.3d 210, as of December 1, 2009, Ohio switched its procedure using only thiopental sodium. In implementing the new procedure, "a person qualified to administer and prepare drugs for

intravenous and intramuscular injections” will prepare five labeled syringes containing five grams of thiopental sodium. Five additional labeled syringes and five grams of thiopental sodium are to be on hand in case the initial dosage does not produce death. As a back-up procedure, for use if the prisoner’s veins prove difficult to access, a two-drug injection of ten milligrams of midazolam and forty milligrams of hydromorphone shall be administered in a single syringe intramuscularly. A second syringe of the same mixture will be available if necessary, as will a third syringe of sixty milligrams of hydromorphone. In examining whether a new execution method is constitutional, the same framework of challenges alleged in Eighth Amendment violations must be analyzed. The court in *Cooley* discussed the following regarding lethal injection: a) The possibility that maladministration of the IV sites could lead to severe pain does not set forth a basis for relief under the Eighth Amendment; b) Ohio’s requirements for the competency and training of execution personnel are constitutionally sufficient; c) There is no constitutional requirement that Ohio employ a physician to supervise members of the execution team; d) There is no constitutional requirement that Ohio place a time limit for accessing the prisoner’s veins; e) Ohio’s intramuscular “back up” is not unconstitutional simply because it has not been used previously; f) There is no evidence or facts to show more than a mere possibility that the drugs used in Ohio’s “back up” procedure will cause severe pain or discomfort; g) Ohio’s efforts to reduce the likelihood of discomfort for those whom it must lawfully execute cannot be seen as unconstitutionally hasty. *Cooley*, 589 F.3d 210.

For all the foregoing reasons Neyland’s challenge to the constitutionality of the death penalty as being cruel and unusual punishment should be denied.

Response to Proposition of Law Number Nine: When a trial court correctly instructs the jury during the mitigation phase of a capital trial re-sentencing is not required.

Neyland did not object to the mitigation phase jury instructions and thus waived all but plain error. Plain error does not exist unless, but for the error, the outcome of the trial would have been different. *State v. Joseph*, 73 Ohio St.3d 450, 1995-Ohio-288. Further, a “jury instruction \* \* \* must be viewed in the context of the overall charge, \* \* \* rather than in isolation.” *State v. Thompson* (1987), 33 Ohio St.3d 1, quoting *State v. Price* (1979), 60 Ohio St.2d 136. In reviewing the record, plain error in the trial court’s mitigation phase jury instructions is not apparent.

The trial court correctly instructed the jury that “the State of Ohio must prove beyond a reasonable doubt that the aggravating circumstance of which the defendant was found guilty is sufficient to outweigh the factors in mitigation of the death sentence.” (Sent. Tr. Vol. 1 at 167-168.) This language tracks R.C. 2929.03(D)(1) almost verbatim. Additionally, contrary to Neyland’s assertion that the instructions were silent on his burden of providing mitigating factors, the court explicitly, and correctly, instructed the jury that the defendant has no burden of proof. (Sent. Tr. Vol. 1 at 168.) This instruction is consistent with the principal that a “decisionmaker need not weigh mitigating factors in a particular manner. The process of weighing mitigating factors, as well as the weight, if any, to assign to a given factor is a matter for the discretion of the individual decisionmaker.” *Fox*, 69 Ohio St.3d at 193, citing *Mills*, 62 Ohio St.3d at 376.

Neyland’s argument that the trial court’s instructions limited the jury to consider only one mitigating factor, rather than all or a combination of mitigating factors, is without merit. The trial court specifically instructed the jury that it was “not limited to the specific mitigating factors

that have been described” and that it “should consider any other mitigating factors that weigh in favor of a sentence other than death.” (Sent. Tr. Vol. 1 at 170.) In fact, the trial court went on to say that “the cumulative effect of the mitigating factors will support a sentence of life imprisonment if the aggravating circumstance is not sufficient to outweigh the mitigating factors beyond a reasonable doubt.” (Sent. Tr. Vol. 1 at 170.) The instructions clearly indicate that the jurors could weigh all or a combination of the mitigating factors against the aggravating circumstance.

Further, the trial court did not commit plain error in deciding not to instruct the jury that it could consider Neyland’s mental condition under R.C. 2929.04(B)(7) even if it did not find it to be a mitigating factor under R.C. 2929.04(B)(3). The trial court did instruct the jury that it could consider any other factors that are relevant to the issue of whether the offender should be sentenced to death. (Sent. Tr. Vol. 1 at 169-170.) Failure of the trial court to tailor instructions more to the evidence is neither required nor erroneous. *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, ¶172; *Landrum*, 53 Ohio St.3d at 122.

Finally, there was no plain error in the trial court’s instructions that the jury should only consider the trial phase evidence that is relevant to the aggravating circumstance. The trial court instructed the jurors that the aggravating circumstance was that the offense was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons. The trial court went on to instruct the jury that the aggravated murder itself was not an aggravating circumstance. (Sent. Tr. Vol. 1 at 168-169.)

Neyland complains that the trial court’s instructions fail to specifically tell the jurors what evidence from the guilt phase was relevant in the mitigation phase. The State does not dispute that the trial court is responsible for determining which evidence is relevant during the

mitigation phase. *State v. Lindsey*, 87 Ohio St.3d 479, 484-485, 2000-Ohio-465; *State v. Getsy*, 84 Ohio St.3d 180, 201, 1998-Ohio-533. Unlike the trial court in *Getsy* that specifically instructed the jury to determine which evidence it deemed relevant, the court here provided the jury with the evidence it deemed relevant. The court admitted, without objection from defense counsel, the exhibits the State moved to admit based upon its determination that they were relevant to the aggravated circumstance of the course-of-conduct killing. (Sent. Tr. Vol. 1 at 4.) The jurors had these exhibits deemed relevant to the aggravating circumstance. In essence, the trial court determined which evidence was relevant and provided that evidence to the jury.

Looking at the overall mitigation phase jury instructions, the trial court did not commit plain error in instructing the jury.

Response to Proposition of Law Number Ten: In conducting a proportionality review of a death sentence under R.C. 2929.05(A), an appellate court is limited to a review of cases in which a criminal defendant was sentenced to death.

Neyland asks this Court to revisit the question of what cases it must consider in conducting a proportionality review and to include all cases in which a death specification has been charged. In *Pulley v. Harris* (1984), 465 U.S. 37, 42-43, the U.S. Supreme Court held that proportionality review, for the purposes of the Federal Constitution, is confined only “to an abstract evaluation of the appropriateness of a sentence for a particular crime.” The U.S. Supreme Court has sparingly struck down death sentences under the Eighth Amendment when the death sentence is disproportionate to the nature of a particular crime or category of crime. *Id.* at 43. For example, the rape of an adult woman is insufficient, without a resulting death, to support a death sentence under the Constitution. *Coker v. Georgia* (1977), 433 U.S. 584. Also, the death penalty is inappropriate for a defendant who aids and abets a felony murder, but does not take a life, attempt to take a life, or intend to take a life. *Edmund v. Florida* (1982), 458 U.S. 782.

In *Edmund*, the U.S. Supreme Court unequivocally stated that the Constitution only requires “focus on relevant facets of the character and record of the individual offender.” *Edmund*, 458 U.S. at 798. Likewise, in *McCleskey v. Kemp* (1987), 481 U.S. 279, 307-308, the United States Supreme Court further opined that a defendant could not “prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty.” See, also, *Hatch v. Oklahoma* (C.A.10, 1995), 58 F.3d 1447 (non-shooter death sentence upheld even though co-defendant shooter sentenced to life on remand); *Bush v. Singletary* (C.A.11, 1996), 99 F.3d 373 (death sentence upheld even though co-defendant’s death

sentence vacated on appeal); *Russell v. Collins* (C.A.5, 1993), 998 F.2d 1287 (death sentence upheld even though co-defendant pled guilty and received sixty-year sentence).

Although not required by the Federal Constitution, R.C. 2929.05(A) requires an appellate court to determine whether a death sentence is excessive or disproportionate to the penalty imposed in similar cases. In *State v. Steffen* (1987), 31 Ohio St.3d 111, syllabus, this Court held that this statutorily required proportionality review is limited to the pool of case decided by the appellate court where the death penalty was actually imposed. This Court clarified that “proportionality review in this court will be limited to a review of cases we have already announced.” *Id.* at 124. Neyland has offered no reason for this Court to diverge from this standard.

Response to Proposition of Law Number Eleven: Jurors who do not unequivocally state that they can follow the court's instructions because of their views on the death penalty may be dismissed for cause under R.C. 2945.25.

While a criminal defendant has a right to have jurors who express conscientious objections to capital punishment, a state has a legitimate interest in excusing jurors whose opposition to capital punishment would not allow them to view the proceedings impartially, and who therefore might frustrate the administration of a state's death penalty scheme. *Witherspoon v. Illinois* (1968), 391 U.S. 510. The trial court must attempt to determine which jurors will follow its instructions on the law even though they may be opposed to the death penalty. *Witt*, 469 U.S. 412. Specifically, a trial court must determine "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id.* at 424, quoting *Adams v. Texas* (1980), 448 U.S. 38, 45. This Court has held that the constitutional standard for determining when a prospective juror in a capital case may be excluded for cause is whether the juror's views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath, rather than whether the juror unequivocally states that he would not recommend death under any circumstances. *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, ¶40. Thus, contrary to Neyland's position, there is no requirement that a prospective juror say that he will automatically vote against the death penalty in order for the State to excuse him for cause.

Despite Neyland's complaint, Juror 17 never unequivocally indicated that he would follow the court's instructions. Additionally, Juror 17 not only expressed his desire to sit as a juror, but also mentioned jury nullification. He discussed on several occasions that there were higher powers than the court. (Trial Tr. Vol. 1 at 21-29.) Based upon the totality of the

questioning, the trial court acted appropriately in determining that Juror 17's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath.

Regarding Juror 24, she vacillated during voir dire on her ability to follow the trial court's instructions. The trial court correctly indicated that she had never, even given multiple opportunities to say so, said she would follow its instructions. (Trial Tr. Vol. 1 at 150-158.) Given her strong opposition to the death penalty and her questionable ability to follow the instructions, the trial court did not err in determining that Juror 24's views would prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and oath.

Juror 55 indicated in her questionnaire that she would not be able to follow the judge's instruction requiring the imposition of the death penalty. She also indicated on her questionnaire that "[she would] have a hard time sentencing someone to death. God will ultimately decide the punishment." (Trial Tr. Vol. 1 at 251.) As the trial court indicated, Juror 55 seemed to want to please the court by saying that she could follow the court's instructions, but never unequivocally stated that she would in fact follow the instructions. (Trial Tr. Vol. 1 at 255.) Given her responses during voir dire and those on her written questionnaire, the trial court accurately determined that Juror 55's views would prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and oath.

With respect to Juror 111, he too seemed to want to please the court. However, he indicated several times throughout his questioning and on his written questionnaire that he believed that God should make the decision on whether a person lives or dies. He indicated that his religious beliefs would impact his ability to fairly and impartially weigh the aggravating

circumstances versus the mitigating factors. Juror 111 even went as far as to indicate that he hoped that God would not make him have to make a decision on whether to follow the court's instructions. (Trial Tr. Vol. 2 at 471-478.) Given his responses during voir dire and those on his written questionnaire, the trial court did not err in determining that Juror 111's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath.

The trial court correctly excused the four jurors for cause, even though, contrary to Neyland's contention, they were all four excused over objection by defense counsel.

Response to Proposition of Law Number Twelve: A prosecutor may comment on the circumstances of the victim of a crime because they are relevant to the crime as a whole.

Generally, some latitude is granted to both parties in closing and opening statements. Because Neyland did not object to the statements about which he now complains, the standard of review is that of plain error. *State v. White*, 82 Ohio St.3d 16, 1998-Ohio-363.

The fact that one of the victims had a fiancé did nothing other than to humanize him and explain the witness' relationship. The "circumstances of the victims are relevant to the crime as a whole. The victims cannot be separated from the crime." *State v. Lorraine* (1993), 66 Ohio St.3d 414, 420. In *Williams*, at ¶42, the prosecutor referred to the victim "as a wife, a widow, a grandmother, a great-grandmother, a friend, and a sister."

In *State v. McNeill*, 83 Ohio St.3d 438, 445, 1998-Ohio-293, the prosecutor made the following statement:

Blake Fulton was a human being. He had a family, you may have noticed, that sat through a lot of this trial. His picture is in his personal effects. He was a master locksmith. He had a life.

This Court found the statements were not outcome determinative, and therefore, the admission of the statements was not plain error. *Id.* at 446. See, also, *State v. Davis*, 76 Ohio St.3d 107, 1996-Ohio-414.

Because it cannot be said that the outcome of Neyland's trial would not have been different, the statements of the prosecutor were not prejudicial and Neyland was not denied a fair trial.

Response to Proposition of Law Number Thirteen: A trial court does not err in admitting, at a penalty phase hearing, the transcript of testimony of a rebuttal witness regarding evidence the defendant introduced, where the witness was unavailable and had been previously subject to cross-examination by the defendant.

Neyland complains that Dr. Delancy Smith's testimony from the March 21, 2008, Competency Hearing should not have been read to the jury during the mitigation phase even though she was unavailable and had previously been subject to cross-examination.

The trial court has the discretion of determining what evidence is relevant and admissible during rebuttal. *State v. Dunlap*, 73 Ohio St.3d 308, 316, 1995-Ohio-243. The State may present rebuttal testimony during a mitigation phase of a capital murder trial to establish its burden of proving beyond a reasonable doubt that the aggravating circumstance outweighs the mitigating factors. *Hughbanks*, at ¶¶84-95; *State v. Jalowiec*, 91 Ohio St.3d 220, 232-233, 2001-Ohio-26; *State v. DePew* (1988), 38 Ohio St.3d 275, 285-286.

Under *Crawford v. Washington* (2004), 541 U.S. 36, a criminal defendant has the right to confront and cross-examine a witness who provides testimonial statements, offered to establish the truth of the matter asserted, unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. *State v. Cappadonia*, Warren App.No. CA2008-11-138, 2010-Ohio-494, ¶25. If both of these requirements are met, there is no violation of a defendant's Sixth Amendment right.

During his presentation of evidence in the mitigation phase, Neyland provided the testimony of Dr. Sherman, who had evaluated Neyland for competency after spending one hour with him. (Sent. Tr. Vol. 1 at 31-78.) Dr. Sherman's testimony and opinion centered on his interaction with Neyland for the one-hour evaluation. The one time that Dr. Sherman was asked if he could offer an opinion on whether Neyland's mental illness, as diagnosed by Dr. Sherman,

caused him to lack substantial capacity to conform his conduct to the requirements of the law, Dr. Sherman merely stated that Neyland had a severe mental illness. (Sent. Tr. Vol. 1 at 45-46.) Dr. Sherman never opined that the “severe mental illness” had caused Neyland to lack substantial capacity to conform his conduct to the requirements of the law. This question was the only one posed to Dr. Sherman about the R.C. 2929.04(B) mitigating factors. The remainder of his testimony focused on his diagnosis of Neyland with a mental illness, based upon his competency evaluation.

During trial, the State has conceded that Dr. Delaney Smith’s statements were testimonial pursuant to *Crawford*. (Sent. Tr. Vol 1 at 12.) However, after discussions with the legal department at Twin Valley where Dr. Smith was employed, the State determined that Dr. Smith would be unavailable to testify at the mitigation hearing. Twin Valley sent the State a letter indicating that she would be unavailable. (See State’s Exhibit 225.) Dr. Smith’s testimony was admissible under *Crawford* though because she had previously testified and cross-examined by Neyland at the competency hearing.

Further, the trial court correctly ruled that Neyland had introduced evidence relating to his competency evaluations when he had Dr. Sherman testify. That, in essence, opened the door for the State to rebut the evidence presented by Dr. Sherman.

Neyland argues that he was prejudiced by his inability to cross-examine Dr. Smith about her opinion on the R.C. 2929.04(B) mitigating factors. The State presented live testimony of Dr. Bergman and Dr. Haskins and at no time during either of their testimony did trial counsel cross-examine them on their lack of an opinion on the R.C. 2929.04(B) factors. (Sent. Tr. Vol. 1 at 103-109, 139-142.) Instead, trial counsel strategically chose to cross-examine Drs. Bergman and Haskins on their diagnosis of a personality disorder. Trial counsel had the same opportunity to

cross-examine, and in fact did cross-examine, Dr. Smith regarding her diagnosis during the competency hearing on March 21, 2008.

Because Dr. Smith was unavailable and had previously been subject to cross-examination on matters that Neyland raised during mitigation, the trial court acted well within its discretion in allowing the State to have her previous testimony read to the jury during rebuttal.

Response to Proposition of Law Number Fourteen: A trial court does not have to accept a capital defendant's waiver of his right to counsel when there is not an unequivocal request or the request is untimely, even if the defendant is competent to stand trial.

“[A] defendant in a state criminal trial has an independent constitutional right to self-representation and \* \* \* may proceed to defend himself without counsel when he voluntarily, and knowingly and intelligently elects to do so.” *State v. Gibson* (1975), 45 Ohio St.2d 366, paragraph one of the syllabus, citing *Faretta v. California* (1975), 422 U.S. 806. This Court held that when a defendant properly invokes the right to self-representation, denial of that right is per se reversible error. *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, ¶32, citing *State v. Reed* (1996), 74 Ohio St.3d 534. The right to self-representation, however, is not absolute. *State v. Halder*, Cuyahoga App. No. 87974, 2007-Ohio-5940, ¶51, quoting *United States v. Bush* (C.A.4, 2005), 404 F.3d 263. Further, the right “is waived if it is not timely and unequivocally asserted.” *Cassano* at ¶38, quoting *Jackson v. Ylst* (C.A.9, 1990), 921 F.2d 882, 888.

On December 11, 2007, Neyland never unequivocally asserted that he wanted to represent himself. Instead, he stated, “I might be able, I might have to defend myself because I am not getting the cooperation that I need from the public defender’s office.” (12/11/07 Tr. at 16.) The next request on October 30, 2008, while unequivocal, was untimely, as it was made just prior to the beginning of closing arguments of the guilt phase. (Trial Tr. Vol. 7 at 1178, 1183-1192.) Absent timeliness, a denial of the motion is proper. *State v. Willis*, Franklin App. No. 08AP-536, 2009-Ohio-325, ¶8 (request made mid-trial); *United States v. Edlemann* (C.A.8, 2006), 458 F.3d 791, 808-809 (five days before trial after several continuances); *United States v. Smith* (C.A.10, 2005), 413 F.3d 1253, 1281 (six days before trial); *Vrabel*, at ¶50 (day of trial); *State v. Steele*, 155 Ohio App.3d 659, 2003-Ohio-7103, ¶50 (day of trial); *Cassano*, at ¶40 (three days before trial); *United States v. Mackovich* (C.A.10, 2000), 209 F.3d 1227, 1237 (six to ten

days before trial); *United States v. George* (C.A.9, 1995), 56 F.3d 1078, 1084 (on the eve of trial); *Robards v. Rees* (C.A.6, 1986), 789 F.2d 379, 384 (day of trial).

Additionally, in *Indiana v. Edwards* (2008), 554 U.S. 208, the Supreme Court recognized that competency to stand trial is not always equivalent to competency to waive the right to counsel and represent one's self. The Court held that the Constitution does permit a state to insist that a defendant not be allowed to represent himself when, although found competent to stand trial, there remain residual concerns about the defendant's competency to represent himself. *Id.* at 2386. Neyland's trial counsel were still raising the issue of his competency to stand trial approximately one week prior to the beginning of trial. If there were questions regarding his competency to stand trial, it logically flows that there were residual concerns about Neyland's competency to represent himself.

Thus, the trial court did not err in denying Neyland's request to represent himself.

Response to Proposition of Law Number Fifteen: Any admission of additional weapons and ammunition was harmless error given the overwhelming evidence of guilt.

Neyland alleges that the admission of additional weapons in defendant's possession deprived him of a fair trial.

This Court has held that the admission of evidence is addressed to the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decision in the absence of an abuse of discretion resulting in material prejudice. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044. This Court has repeatedly held that the term abuse of discretion implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151. Evid.R. 401 provides: "Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence." 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.

Here, the State elicited testimony in regards to the numerous weapons owned by Neyland and argued that it was relevant to show prior calculation and design. The State recognizes this Court's recent decision in *Trimble*, 2009-Ohio-2961, and concedes that the trial court probably should not have admitted the evidence of additional weapons. However, like *Trimble*, the admission of the evidence here was harmless error.

Pursuant to Crim.R. 52(A), any error will be deemed harmless if it did not affect an accused's substantial rights. Under a Crim.R. 52(A) analysis, the conviction will be reversed unless the State can demonstrate that the defendant suffered no prejudice as a result of the error. *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, ¶15. The admission of evidence on

Neyland's other weapons caused him no prejudice because overwhelming evidence existed to show Neyland's guilt. Such evidence included two eyewitnesses that saw Neyland shoot the victims. (Trial Tr. Vol. 4 at 724, 742.) Forensic evidence tied Neyland to the murders, too. (Trial Tr. Vol. 6 at 1086-1088, 1095-1099.) Finally, Neyland made incriminating spontaneous statements. (Trial Tr. Vol. 5 at 850, 865.)

Although this Court's opinion in *Trimble* suggests that evidence of additional weapons should not have been admitted, Neyland cannot demonstrate any prejudice.

Response to Proposition of Law Number Sixteen: A death sentence under the facts of this case is appropriate and in proportion to the death sentence in other cases.

R.C. 2929.05(A) provides in pertinent part that this Court “shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate.” In *Steffen*, 31 Ohio St.3d at syllabus, this Court held that this statutorily required proportionality review is limited to the pool of cases decided by the appellate courts where the death penalty was actually imposed. This Court clarified that “proportionality review in this court will be limited to a review of cases we have already announced.” *Id.* at 124. Further, the Eighth Amendment requires individualized sentencing determinations based on the particular circumstances of the defendant and the defendant’s crimes. See *Gregg*, 428 U.S. 153; *Furman v. Georgia* (1972), 408 U.S. 238. The decision on whether to impose the death sentence must be guided by established standards “so that the sentencing authority [can] focus on the particularized circumstances of the crime and the defendant.” *Gregg*, 428 U.S. at 199.

In Neyland’s case, the jury and trial judge did focus on the particularized circumstances of the murders, as well as Neyland’s culpability, as required by *Furman*. Ohio’s system of capital punishment does not allow the sentencer to exercise unbridled discretion in deciding whether to impose a death sentence. Rather, Ohio’s capital sentencing structure requires the jury/three judge panel to find statutory aggravating factors and then weigh those factors against the mitigating circumstances before a death sentence may be imposed. There is no question that the jury here performed this statutory function in deciding to impose the death sentence. (See

Response to Proposition of Law Number Four for an analysis on weighing the aggravating factor against the mitigating circumstances.)

Moreover, this Court has universally applied a comparative proportionality review that determines whether a defendant's punishment is comparable/disproportionate to death sentences imposed upon those convicted of the same or similar crime. *Steffen*, 31 Ohio St.3d at 122-124. See, also, *Braden*, 2003-Ohio-1325; *State v. Treesh*, 90 Ohio St.3d 460, 2001-Ohio-4; *State v. Chinn*, 85 Ohio St.3d 548, 1999-Ohio-288; *State v. Goodwin*, 84 Ohio St.3d 331, 1999-Ohio-356; *State v. Dennis*, 79 Ohio St.3d 421, 1997-Ohio-372; *State v. Esparza* (1988), 39 Ohio St.3d 8; *State v. Byrd* (1987), 32 Ohio St.3d 79. Additionally, this Court has upheld death sentences for individuals involved in work place shootings. See *State v. Clemons*, 82 Ohio St.3d 438, 1998-Ohio-406; *State v. Davie*, 80 Ohio St.3d 311, 1997-Ohio-341.

Neyland's death sentence is not disproportionate to the cases cited above and should be affirmed.

Response to Proposition of Law Number Seventeen: Ohio's death penalty is not unconstitutional in the abstract or as applied.

In his seventeenth claim, Neyland raises many of the same, enervated constitutional challenges to Ohio's death penalty that have been repeatedly rejected by the Ohio and federal courts for more than two decades. Furthermore, these claims are the same ones that this Court has rejected and the United States Supreme Court has refused to review on numerous occasions.

The State will address the issues by the same corresponding number raised by Neyland in his brief.

1. Discretionary stages in Ohio's capital punishment scheme are fully constitutional.

Neyland contends that Ohio's capital punishment scheme allows for uncontrolled discretion of prosecutors in indictment decisions. In *Gregg*, 428 U.S. at 199, the United States Supreme Court noted the existence of "discretionary stages" in capital proceedings, including prosecutorial discretion whether to prosecute and to plea bargain, jury discretion to convict of a lesser-included offense, and gubernatorial discretion to commute a sentence. These "discretionary stages" do not implicate the concerns expressed in *Furman*. The *Gregg* court held:

At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. *Furman*, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.

*Gregg*, 428 U.S. at 199.

The fact that prosecutors in Ohio exercise discretion -- in deciding whether or not to present a capital case for indictment -- is fully constitutional. Without a specific allegation of an improper motive, Neyland's claim fails.

2-3. Considering aggravating circumstances at both phases is permissible.

Neither the U.S. Constitution nor the U.S. Supreme Court has prohibited the same trier of fact from considering the aggravating circumstances at both phases of a bifurcated capital trial. *Jurek v. Texas* (1976), 428 U.S. 262, 271; See, also, *State v. Jenkins* (1984), 15 Ohio St.3d 164, 174.

Neyland argues that the Ohio death penalty scheme is unconstitutional as it permits an aggravating circumstance to merely repeat an element of aggravated murder without a narrowing when one is charged with and convicted of felony murder.

One manner in which a state can meet the constitutional requisite of narrowing the class of persons eligible for the death penalty is by having "the legislature, itself, narrow the definition of capital offenses so that the jury finding at the guilt phase responds to this concern." *Lowenfield v. Phelps* (1988), 484 U.S. 231, 246. As such, the duplicative nature of the statutory aggravating circumstances does not render Neyland's sentence infirm, inasmuch as the constitutionally mandated narrowing function was performed at the guilt phase. *Lowenfield*, 484 U.S. at 232.

Consistent with *Lowenfield*, Ohio has met the constitutional requisite of narrowing the class of death-eligible defendants. R.C. 2929.04(A). Although the aggravating circumstances are considered at the guilt phase of the trial for the purpose of determining whether the defendant is death-eligible, Neyland has not established that such a consideration is unconstitutional.

4. Ohio's statutory scheme does not impose an impermissible risk of death.

Ohio law does not impose an impermissible "risk of death" on defendants who exercise their right to a jury trial. *Brady v. United States* (1970), 397 U.S. 742; *State v. Buell* (1986), 22 Ohio St.3d 124, *cert. denied*, 479 U.S. 871. The "risk" of receiving the death penalty is no greater for a defendant who pleads guilty and avoids a jury trial than for a defendant who proceeds to trial with a jury. Crim.R. 11(C)(3) does not guarantee that the judge will dismiss the specifications that provide for the aggravating circumstances. The rule merely gives the judge the same latitude that she would possess after a jury returns with a sentence of death to either accept the sentence or to sentence the defendant to life imprisonment. The claim that capital defendants somehow run an increased "risk" of death by exercising their right to a jury is without merit.

5. R.C. 2929.04(A)(7) sufficiently narrows the class of individuals eligible for the death penalty for Eighth Amendment purposes.

R.C. 2903.01 provides for two categories of aggravated murder: premeditated murder and "felony murder." R.C. 2903.01(B) defines "felony murder" as purposely causing the death of another "while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape." R.C. 2903.01(D) provides that a person may not be convicted of aggravated murder "unless he is specifically found to have intended to cause the death of another." According to R.C. 2929.04(A), imposition of the death penalty for aggravated murder is precluded unless one or more of eight listed aggravating circumstances is specified in the indictment and proven beyond a reasonable doubt. R.C. 2929.04(A)(7) sets forth as an aggravating circumstance that "[t]he 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."

However, as noted by this Court in *Jenkins*, the United States Supreme Court has upheld a statutory scheme wherein the conduct that convicts also aggravates. *Jurek*, 428 U.S. 262. In any event, the critical question is whether the statutory scheme sufficiently narrows the class of homicides for which the death penalty is available. Here, Ohio's death penalty statute does provide for such a narrowing. Even if proof of felony murder also tends to establish an aggravating circumstance supporting the death penalty, R.C. 2929.04(A)(7) further narrows the type of felony murder subject to capital punishment, e.g., (1) the underlying felony offenses are confined, and (2) the offender must be a principal, or have committed the murder with prior calculation and design.

The Constitution does not require that premeditated murder be dealt with in a harsher manner than felony murder. In fact, reckless disregard for human life and a major role in the crime are sufficient for death penalty eligibility. *Tison v. Arizona* (1987), 481 U.S. 137, 157-158; See, also, *United States v. Tipton* (C.A.4, 1996), 90 F.3d 861, 890; *Smith v. Farley* (C.A.7, 1995), 59 F.3d 659, 663, *cert. denied*, (1996), 516 U.S. 1123; *Deputy v. Taylor* (C.A.3, 1994), 19 F.3d 1485, 1497-1498, *cert. denied*, 512 U.S. 1230; *Greenwalt v. Ricketts* (C.A.9, 1991), 943 F.2d 1020, 1028-1029, *cert. denied*, (1992), 506 U.S. 888.

Neyland argues that Ohio law unconstitutionally permits imposition of the death penalty based on a less than adequate showing of culpability. According to Neyland, Ohio statutes are

specifically deficient in “failing to require a conscious desire to kill, premeditation, or deliberation.” The Constitution does not require proof of intent to kill as a prerequisite to the imposition of a capital sentence - reckless disregard for human life and a major role in the crime are sufficient. *Tison*, 481 U.S. at 157-158; See, also, *Tipton*, 90 F.3d at 890; *Smith*, 59 F.3d at 663; *Taylor*, 19 F.3d at 1497-1498; *Greenwalt*, 943 F.2d at 1028-1029. According to the U.S. Supreme Court, the death penalty only requires a major participation in a felony, combined with reckless indifference to human life, in order to satisfy the culpability required by the Eighth Amendment. *Tison*, 481 U.S. at 158. Furthermore, instructions allowing for a permissible inference based on proof of a particular fact are valid, so long as there is a rational connection between the inference and the fact; and that instructions on lesser offenses are required constitutionally only where raised by the evidence. *Id.*; *Hopper v. Evans* (1982), 456 U.S. 605, 610-614; *County Court of Ulster County v. Allen* (1979), 442 U.S. 140, 152.

6. R.C. 2929.03(D)(1) passes constitutional muster and certainly does not render Ohio’s entire death penalty statutory scheme unconstitutional.

“When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court” R.C. 2929.03(D)(1). Ohio’s psychological evaluations are not cause for constitutional concern because defendants are not entitled to favorable psychiatric opinions. *Martin v. Wainright* (C.A.11, 1985), 770 F.2d 918, 935. And a defendant’s inability to manipulate his report is irrelevant as R.C. 2929.03(D)(1) is only triggered when the defendant *specifically asks* for the pre-sentence report. Also, the Sixth Circuit has recognized that defendants can never waive pre-sentence reports in federal cases. Fed.R.Crim.P. 32(b)(1). See *United States v. Saenz* (C.A.6, 1990), 915 F.2d 1046, 1048, fn. 2.

If pre-sentence reports are mandatory under federal law, Neyland is unable to show a federal constitutional violation for state pre-sentence reports.

In the present case, the trial court provided funds for Neyland for mitigation experts and investigators. Neyland, however, choose not to cooperate with those individuals, as was discussed in Response to Proposition of Law Number Five.

7-8. The State is not required to prove the absence of mitigating factors.

Neyland argues that Ohio's statutes unconstitutionally fail to require the state to prove beyond a reasonable doubt the absence of mitigating factors. The Supreme Court of the United States has held that a state may constitutionally require the defendant to bear the risk of non-persuasion as to the existence of mitigating circumstances. *Walton v. Arizona* (1990), 497 U.S. 639, 650, reversed on other grounds. Accordingly, it may be reasonably and objectively concluded that there is no constitutional requirement that the state disprove the existence of mitigating factors. See *Buell v. Mitchell* (C.A.6, 2001), 274 F.3d 337, 367 (rejecting the claim that Ohio's death penalty scheme is unconstitutional because it fails to require the prosecution to prove the absence of mitigating factors).

9. Requiring proof of a mitigating factor beyond the preponderance of the evidence is not unconstitutional.

Neyland contends that Ohio's death penalty scheme is unconstitutional because it requires capital defendants to prove all mitigating factors by a preponderance of the evidence. However, no impropriety is present where a jury is expressly instructed that a defendant carries a burden of proof during mitigation proceedings. *Gall v. Parker* (C.A.6, 2000), 231 F.3d 265, 324 (The court's instruction that petitioner bore the burden of proving mitigating factors by a preponderance of the evidence is constitutional).

10. A “mercy” option is not required by the Constitution.

Neyland next contends that Ohio’s death penalty scheme is impermissibly mandatory because it does not allow the jury to adjudge a sentence of life imprisonment notwithstanding a jury finding that the aggravating circumstances outweigh the mitigating factors. In other words, the jury is legally precluded from electing a “mercy” option when the aggravating factors clearly outweigh the mitigating factors. The United States Supreme Court specifically upheld a death penalty scheme that required the imposition of the death penalty where the jury finds that statutorily provided aggravating circumstances outweigh any mitigating factors. *Blystone v. Pennsylvania* (1990), 494 U.S. 299, 305. Accordingly, it is objectively reasonable to conclude that Ohio’s statutory scheme meets constitutional requirements. See *Buell*, 274 F.3d at 367-368 (rejecting claim that Ohio’s death penalty is unconstitutional because it limits jury’s ability to recommend a life sentence only where aggravating circumstances do not outweigh mitigating factors).

Neyland suggests that Ohio’s death penalty statute is unconstitutionally vague because it does not guide the sentencer’s “weighing and consideration” for mitigating factors. However, the Supreme Court has held that a state is not required to give such guidance. *Buchanan v. Angelone* (1998), 522 U.S. 269. Despite Neyland’s contentions, the State of Ohio does in fact provide a detailed, structured scheme pursuant to which the jury can weigh specific aggravating circumstances against mitigating factors. See *McCleskey*, 481 U.S. 279.

First, R.C. 2929.04(A) provides that the death penalty for aggravated murder is prohibited unless at least one of eight aggravating circumstances is explicitly specified in the indictment and proved beyond a reasonable doubt at trial. The eight aggravating circumstances are found in R.C. 2929.04(A)(1)-(8). Individuals guilty of aggravated murder but not guilty of

any of these aggravating circumstances are not eligible for the death penalty. See R.C. 2929.04(A).

Second, if a criminal defendant is found guilty of aggravated murder and at least one of the above-mentioned specifications, a second phase of the trial is necessary. R.C. 2929.03(C). In this second phase, the defendant is accorded great latitude in presenting mitigating factors, under R.C. 2929.04(B)(1)-(7).

Third, as specified by R.C. 2929.03(D)(1), while the defendant bears the burden of going forward with the evidence on mitigating factors, the prosecution bears the burden of proving, beyond a reasonable doubt, that the aggravating circumstances outweigh the factors in mitigation. If the jury recommends a sentence of death, the trial court must independently review the full record to determine whether, by proof beyond a reasonable doubt, the aggravating circumstances outweigh the mitigating factors. R.C. 2929.03(D)(3). Only if the court so finds can the sentence of death be imposed in Ohio. R.C. 2929.03(D)(3).

The Ohio capital punishment scheme, then, does not permit the arbitrary imposition of the death penalty upon the conclusory finding that the offense “was outrageously or wantonly vile, horrible and inhuman.” *Godfrey v. Georgia* (1980), 446 U.S. 420, 428 (plurality). Rather, it is a non-arbitrary scheme that permits a defendant to go forward at the mitigation phase of trial and to present evidence pursuant to specified standards. Further, it is a scheme that gives the jury detailed instruction on how to consider and weigh the aggravating circumstances against the mitigating factors.

The Ohio scheme does set forth a constitutionally adequate, non-arbitrary standard for the assessment of aggravating circumstances and mitigating factors.

11. The Constitution does not require proportionality review, much less that juries make findings concerning mitigation factors after rejecting a death sentence.

Neyland next contends that Ohio's death penalty is constitutionally deficient because it does not require the jury to explain its reasons for adjudging a *life* sentence, thereby failing "to provide a meaningful basis for distinguishing between life and death sentences." The Supreme Court of the United States has upheld a state statutory scheme that did not enunciate specific factors to consider or a specific method of balancing the competing considerations. *Franklin v. Lynaugh* (1988), 487 U.S. 164, 172-173; *Zant v. Stephens* (1983), 462 U.S. 862, 875. Accordingly, it is objectively reasonable to conclude that the constitution does not require a jury to explain its reasons for adjudging a life sentence. See *Buell*, 274 F.3d at 368 (rejecting claim that Ohio's statute is unconstitutional because it does not require jury to identify mitigating factors when life sentence is imposed).

- 12-14. Ohio's death penalty scheme that requires a finding of death if the aggravating factors "outweigh" the mitigating factors does not violate the Constitution.

Neyland next contends that Ohio's death penalty in effect is impermissibly mandatory because it does not allow the jury to adjudge a sentence of life imprisonment notwithstanding a jury finding that the aggravating circumstances outweigh the mitigating factors. The Supreme Court of the United States specifically has upheld a death penalty scheme that required the imposition of the death penalty where the jury finds that statutorily provided aggravating circumstances outweigh any mitigating factors. *Blystone*, 494 U.S. at 305. Accordingly, it is objectively reasonable to conclude that Ohio's statutory scheme meets constitutional requirements. See *Buell*, 274 F.3d at 367-368 (rejecting claim that Ohio's death penalty is unconstitutional because it limits jury's ability to recommend a life sentence only where aggravating circumstances do not outweigh mitigating factors).

Neyland's claim that the appropriateness inquiry is inadequate is equally without merit. There is no constitutional requirement that the State prove that death is the only appropriate punishment. The only such requirement that the Supreme Court has imposed on capital sentencing is the requirement to channel the sentencer's discretion and allow the consideration of any relevant mitigating evidence. *Godfrey*, 446 U.S. at 428; *Eddings v. Oklahoma* (1982), 455 U.S. 104, 110. The fact that Ohio appellate courts that are reweighing a sentence by a more restrictive standard than what is constitutionally required states no claim.

15-17. Proportionality review is not constitutionally required and Ohio's appellate review is more than adequate.

Neyland claims that the Ohio statutory scheme prohibits adequate proportionality review and therefore does not prevent arbitrary and excessive sentences. Specifically, Neyland claims the Ohio death penalty statute fails to require courts to consider relevant cases when conducting the review, for example, cases where the jury rejected the death penalty and recommended a life sentence. These claims should be denied as meritless. The expedient response to this argument is that proportionality review is not constitutionally required. *Walton*, 497 U.S. 639; *Lewis v. Jeffers* (1990), 497 U.S. 764, 779; *Pulley*, 465 U.S. at 44-51. See, also, *McQueen v. Scroggy* (C.A.6, 1996), 99 F.3d 1302; *Martinez-Villareal v. Lewis* (C.A.9, 1996), 80 F.3d 1301, 1306-07.

In any event, Ohio law does provide for proportionality review. The Supreme Court of Ohio has described this state-mandated review as follows:

The purpose of proportionality review is to determine whether the penalty of death is unacceptable in the case under review because it is disproportionate to the punishment imposed on others convicted of the same crime \* \* \*. For the following reasons, we are persuaded that the proportionality review contemplated by R.C. 2929.05(A) should be limited to cases already decided by the reviewing court in which the death penalty has been imposed.

Logic dictates that only those cases which result in a conviction have any use in proportionality review, since only then will a penalty result with which the death sentence under review may be compared. It is equally logical that only convictions of a capital crime are relevant for comparison purposes, since such cases are necessarily so qualitatively different from all others that comparison with non-capital offense would be a profitless exercise. In fact, R.C. 2929.05(A), in requiring proportionality review, limits the scope of such review to 'similar' cases. We are further persuaded that a court cannot make a meaningful proportionality review unless the pool of cases is restricted to those which the reviewing court has itself decided. Comparison with cases not passed upon by the reviewing court would be unrealistic since the reviewing court could not possess the requisite familiarity with the particular circumstances of such cases so essential to a determination of appropriateness \* \* \*.

We hold, therefore, that 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. Thus, a court of appeals need only compare the case before it with other cases actually passed on by that court to determine whether the death sentence is excessive or disproportionate. Similarly, proportionality review in this court will be limited to a review of cases we have already announced. No reviewing court need consider any case where the death penalty was sought but not obtained or where the death sentence could have been sought but was not.

*Steffen*, 31 Ohio St. 3d at 123-124.

Because proportionality review is not constitutionally required, states are accorded great latitude in defining the pool of cases used for comparison. See *Lindsey v. Smith* (C.A.11, 1987), 820 F.2d 1137, *cert. denied* (1989), 489 U.S. 1059. Ohio has defined the pool of cases to be used in its proportionality review in a rational manner. As such, no constitutional provision is implicated by this process.

18. Retribution and deterrence are valid purposes advanced by the death penalty scheme.

Neyland argues that the death penalty denies due process because it is not the least restrictive means of achieving the compelling state interests of deterrence, incapacitation, and retribution. This issue has been resolved by the United States Supreme Court in *Gregg*, 428 U.S. 153. In *Gregg*, the argument was made, as it is here, that the death penalty is not the least severe penalty possible. *Id.* at 175. The Court concluded that the death penalty does serve the purposes of retribution and deterrence and that the death penalty is not "invariably disproportionate to the crime" of murder. *Id.* at 183-187. Since *Gregg*, the Court has repeatedly reaffirmed that retribution and deterrence are valid purposes advanced by the death penalty. See e.g., *Tison*, 481 U.S. 137; *Edmund*, 458 U.S. 782.

19. Lethal injection is constitutional.

Neyland claims that the use of lethal injection constitutes cruel and unusual punishment. The United States Supreme Court has never held that lethal injection violates the Eighth Amendment. In fact, the Ninth Circuit has held that lethal injection is a constitutional method of execution. *LaGrand v. Stewart* (C.A.9, 1998), 133 F.3d 1253, 1264. Concerning lethal injection, the Sixth Circuit has twice opined that a condemned inmate has "little chance" of demonstrating that lethal injection violates the Eighth Amendment. *Workman v. Bredesen* (C.A.6, 2007), 486 F.3d 896, 905-906; *Alley v. Little* (C.A.6, 2006), 181 F. App'x 509, 512. Thus, this Court's decision was not contrary to United States' Supreme Court precedent, and no reasonable jurist would debate that this issue was rightfully denied.

- 20-24. The death penalty does not violate international law.

Finally, Neyland argues that Ohio's death penalty violates international law. However, Neyland does not cite any treaty or international agreement by the terms of which the United

States has obligated itself to prohibit a sentence of death as punishment for a criminal offense, where such a sentence is otherwise permitted by U.S. law. Moreover, it is reasonable to argue that customary international law does not categorically prohibit capital punishment. See *Buell*, 274 F.3d at 370-376 (“whether customary international law prevents a State from carrying out the death penalty, when the State otherwise is acting in full compliance with the Constitution, is a question that is reserved to the executive and legislative branches of the United States government, as it is their constitutional role to determine the extent of this country’s international obligations and how best to carry them out.”). Accordingly, it is objectively reasonable to conclude that Ohio’s death penalty does not contravene international law.

Further, no United States Supreme Court case law has found lethal injection violates international obligations. The Sixth Circuit has specifically found Ohio’s death penalty does not violate international obligations. See *Buell*, 274 F.3d at 371-376. Federal courts have consistently found rights under international treaties do not equal constitutional rights or constitutional violations. See *Murphy v. Netherland* (C.A.4, 1997), 116 F.3d 97, 100 (holding “the Supremacy Clause does not convert violations of treaty provisions... into violations of constitutional rights.”); *Waldron v. I.N.S.* (C.A.2, 1993), 17 F.3d 511, 518 (holding that the right to consular access under the Vienna Convention is not the equivalent of fundamental rights, such as the right to counsel). Furthermore, the United States is not bound to follow “customary international law.” *Siderman de Blake v. Republic of Argentina* (C.A.9, 1992), 965 F.2d 699, 715.

Because Neyland was found guilty and sentenced to a constitutionally based punishment, his rights under the Fifth, Sixth, Eighth, Ninth, Fourteenth Amendments to the United States

Constitution were not violated. Thus, his sentence is permissible under the Ohio Constitution and pursuant to International Law.

Response to Proposition of Law Number Eighteen: A criminal defendant cannot show cumulative error when he fails to demonstrate multiple instances of harmless error.

Neyland contends that the cumulative effect of several harmless errors deprived him of a fair trial.

“[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and \* \* \* the Constitution does not guarantee such a trial.” *United States v. Hasting* (1983), 461 U.S. 499, 508-509. “Although a criminal defendant is not entitled to a perfect trial, he is entitled to a fair one.” *State v. Huckabee* (Mar. 9, 2001), Geauga App. No. 99-G-2252. Pursuant to the doctrine of cumulative error, “a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal.” *State v. Garner*, 74 Ohio St.3d 49, 64, 1995-Ohio-168. The doctrine of cumulative error does not apply when the defendant fails to demonstrate “multiple instances of harmless error.” *Id.* at 64.

Neyland cannot show cumulative error because he failed to demonstrate multiple instances of harmless error, and the eighteenth proposition of law should be overruled.

Response to Proposition of Law Number Nineteen: Trial counsel adequately preserves a record for appellate purposes when they object to testimony, evidence, and court rulings, and make proffers.

For Neyland to establish a violation of the Sixth Amendment right to counsel, he must satisfy two components. First he must show that his counsel's performance was deficient, which "requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed him by the Sixth Amendment." *Strickland*, 466 U.S. at 687. He "must show that the deficient performance prejudiced the defendant, which requires showing that counsel's errors were so serious as to deprive him of a fair trial, a trial whose result is reliable." *Id.* To demonstrate that counsel's performance was deficient, Neyland must show that counsel's representation fell below an objective standard of reasonableness. *Roberts v. Carter* (C.A.6, 2003), 337 F.3d 609, 614. "Acts or omissions by trial counsel which cannot be shown to have been prejudicial may not be characterized as ineffective assistance." *Davie*, 1997-Ohio-341.

Counsel for Neyland objected to testimony, evidence, and rulings of the court throughout the trial. Proffers were also made when necessary.

Trial counsel thus adequately preserved the record for appellate purposes.

CONCLUSION

For the foregoing reasons, Neyland's claims of error lack merit. Accordingly, this Court should affirm the conviction and sentence imposed by the Wood County Court of Common Pleas. Furthermore, this Court should independently determine that a sentence of death is appropriate.

Respectfully submitted,



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CERTIFICATE OF SERVICE

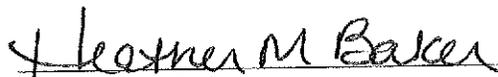
This is to certify that a copy of this Merit Brief was sent by ordinary U.S. mail to counsel of record for appellant, Spiros P. Cocoves, 610 Adams Street, Second Floor, Toledo, Ohio 43604-1423, and Ann M. Baronas, 413 N. Michigan Avenue, Toledo, Ohio 43624, on March 10, 2010.



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