

ORIGINAL

IN THE

SUPREME COURT OF OHIO

STATE OF OHIO : Case No. 2010-0854  
Plaintiff-Appellee : On Appeal from the Hamilton County  
Court of Common Pleas Case Nos.  
vs. : B-0901629 and B-0904028  
ANTHONY KIRKLAND : THIS IS A CAPITAL CASE  
Defendant-Appellant :

---

MERIT BRIEF OF PLAINTIFF-APPELLEE, STATE OF OHIO

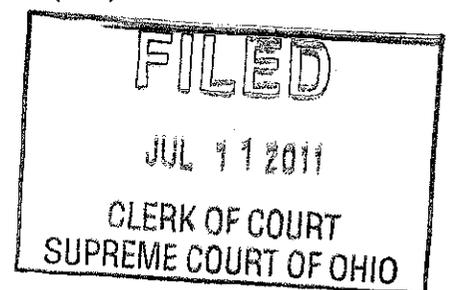
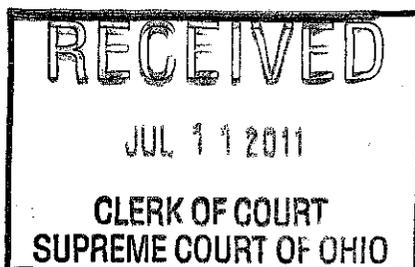
---

COUNSEL FOR APPELLANT:

Joseph T. Deters (0012084)  
Prosecuting Attorney  
William E. Breyer (0002138)  
Chief Assistant Prosecuting Attorney  
Hamilton County Prosecutor's Office  
230 E. Ninth Street, Suite 4000  
Cincinnati, Ohio 45202  
(513) 946-3244  
Fax (513) 946-3100  
[Bill.Breyer@hcpros.org](mailto:Bill.Breyer@hcpros.org)

COUNSEL FOR APPELLEE:

Herbert E. Freeman (0005364)  
Attorney at Law  
114 E. Eighth Street, The Citadel  
Cincinnati, Ohio 45202-2102  
(513) 381-8115; Fax (513) 621-2525  
Bruce K. Hust (0037009)  
Attorney at Law  
917 Main Street, 2<sup>nd</sup> Floor  
Cincinnati, Ohio 45202  
(513) 421-7700; Fax (513) 241-0154



**TABLE OF CONTENTS**

**Page No.**

<b>TABLE OF CONTENTS</b> .....	i.
<b>TABLE OF AUTHORITES</b> .....	iii
<b>STATEMENT OF THE CASE AND FACTS</b> .....	1
<b>ARGUMENT</b> .....	20
<b><u>PROPOSITION OF LAW I:</u></b>	
Evidence of “other acts” which is admissible under Evid. R. 404(A) to prove the defendant’s motive, intent, purpose and identity is relevant and admissible under Evid. R. 402.....	20
<b><u>PROPOSITION OF LAW II:</u></b>	
In order to establish a claim of ineffective assistance of counsel at a death penalty mitigation hearing, a defendant must show that counsels’ performance was deficient and that the deficiency prejudiced the defendant by denying him a fair trial.. ..	24
<b><u>PROPOSITION OF LAW III:</u></b>	
During closing argument at a capital mitigation hearing the prosecutor may discuss the facts of the case, and applicable law and the weighing process. ....	28
<b><u>PROPOSITION OF LAW IV:</u></b>	
In order to establish ineffective assistance of counsel at voir dire appellant must show a substantial error by counsel coupled with resultant prejudice. Prejudice requires a showing that there is a reasonable probability that, but for the error, the outcome of the trial would have been different.....	37

**PROPOSITION OF LAW V:**

The determination of whether or not aggravating favors outweigh mitigating circumstances beyond a reasonable doubt in a capital sentencing hearing is a determination to be made by the trier of fact. ....41

**PROPOSITION OF LAW VI:**

Ohio’s death penalty provisions are constitutional. They are not measured against “international law” or by the ruminations of the American Bar Association. Claims not raised at trial are waived. ....43

**PROPOSITION OF LAW VII:**

The failure to object to a particular jury instruction waives all but plain error.....44

**PROPOSITION OF LAW VIII:**

A trial court may assess court costs against an indigent defendant convicted of a felony as part of the sentence. ....45

**PROPOSITION OF LAW IX:**

In a challenge to the sufficiency of the evidence the appellate court must view the evidence in the light most favorable to the prosecution, and must affirm if it determines that any rational trier of fact could have found the essential elements of the crimes proven beyond a reasonable doubt. ....45

**PROPOSITION OF LAW X:**

Cumulative error doctrines cannot apply in the absence of a showing of multiple errors, nor can harmless error become prejudicial through weight of numbers. ....48

**CONCLUSION** .....49

**CERTIFICATE OF SERVICE** .....49

**APPENDIX:**

Appendix A – Blank copy of juror questionnaire ..... A-1

O.R.C. 2945.59 Proof of defendant’s motive. .... A-25

Evid. Rule 401. Definition of “Relevant Evidence” ..... A-26

Evid. Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice,  
Confusion, or Undue Delay..... A-27

Evid. R. 404. Character Evidence not Admissible to Prove Conduct;  
Exceptions; Other Crimes ..... A-28

**TABLE OF AUTHORITIES**

**Page No.**

**CASES:**

*Bobby v. Van Hook*, 558 U.S. \_\_\_\_\_, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009) .....29

*State v. Bies*, 74 Ohio St.3d 320, 1996-Ohio-276, 658 N.E.2d 754 (1996) .....34

*State v. Biros*, 78 Ohio St.3d 426, 678 N.E.2d 891 (1997).....47

*State v. Brooks*, 75 Ohio St.3d 148, 661 N.E.2d 1030 (1996).....34

*State v. Bradley*, 42 Ohio St.3d 138, 538 N.E.2d 373 (1989) .....37

*State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507,  
824 N.E.2d 959 .....30, 32, 43

*State v. Brown*, 38 Ohio St.3d 305, 538 N.E.2d 523 (1988) .....35

*State v. Campbell*, 90 Ohio St.3d 320, 738 N.E.2d 1178 (2000) .....32

*State v. Clemons*, 82 Ohio St.3d 438, 696 N.E.2d 1009 (1998).....42

<i>State v. Cook</i> , 2010-Ohio-2726 (10 <sup>th</sup> Dist. 2010).....	22
<i>State v. Craig</i> , 110 Ohio St.3d 306, 2006-Ohio-4571 .....	22, 35
<i>State v. Crotts</i> , 104 Ohio St.3d 432, 2004-Ohio-6550 .....	23, 24
<i>State v. DePew</i> , 38 Ohio St.3d 275, 528 N.E.2d 542 (1988).....	31
<i>State v. Dixon</i> , 101 Ohio St.3d 328, 2004-Ohio-1585, 805 N.E.2d 1042.....	33, 39, 40
<i>State v. Fears</i> , 86 Ohio St.3d 329, 715 N.E.2d 136 (1999).....	36
<i>State v. Ferguson</i> , 108 Ohio St.3d 451, 844 N.E.2d 806 (2006) .....	43
<i>State v. Frazier</i> , 115 Ohio St.3d 139, 2007-Ohio-4058 .....	22
<i>State v. Fry</i> , 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239.....	48
<i>State v. Garner</i> , 74 Ohio St.3d 49, 656 N.E.2d 623 (1995).....	48
<i>State v. Getsy</i> , 84 Ohio St.3d 180, 702 N.E.2d 866 (1998).....	44
<i>State v. Goff</i> , 82 Ohio St.3d 123, 694 N.E.2d 916 (1998) .....	44
<i>State v. Gumm</i> , 73 Ohio St.3d 413, 653 N.E.2d 253 (1995) .....	31, 34, 35, 36
<i>State v. Hoffner</i> , 102 Ohio St.3d 358, 811 N.E.2d 48 (2004).....	44
<i>State v. Hughbanks</i> , 99 Ohio St.3d 365, 792 N.E.2d 1081 (2003) .....	42
<i>State v. Jackson</i> , 107 Ohio St.3d 300, 2006-Ohio-1, 839 N.E.2d 362 (2006).....	35
<i>State v. Jenkins</i> , 15 Ohio St.3d 164, 473 N.E.2d 264 (1984) .....	31
<i>State v. Jenks</i> , 61 Ohio St.3d 259, 574 N.E.2d 492 (1991).....	46
<i>State v. Kehoe</i> , 133 Ohio St.3d 591, 729 N.E.2d 431 (1991).....	22
<i>State v. Leonard</i> , 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229 .....	46

<i>State v. Lyles</i> , 42 Ohio St.3d 98, 537 N.E.2d 221 (1989).....	22
<i>State v. Mink</i> , 101 Ohio St.3d 350, 805 N.E.2d 1004 (2004).....	43
<i>State v. Perez</i> , 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104 .....	22, 23, 24, 37, 43
<i>State v. Powell</i> , 49 Ohio St.3d 255, 552 N.E.2d 191 (1990).....	47
<i>State v. Rembert</i> , 2007-Ohio-2499 .....	35
<i>State v. Robb</i> , 88 Ohio St.3d 59, 723 N.E.2d 1019 (2000) .....	24
<i>State v. Scott</i> , 101 Ohio St.3d 31, 800 N.E.2d 1133 (2004) .....	36
<i>State v. Scudder</i> , 71 Ohio St.3d 263, 643 N.E.2d 524 (1994) .....	46
<i>State v. Stumpf</i> , 32 Ohio St.3d 95, 512 N.E.2d 508 (1987).....	31
<i>State v. Threatt</i> , 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164 .....	45
<i>State v. Trimble</i> , 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242.....	22, 42
<i>State v. Van Gundy</i> , 64 Ohio St.3d 230, 594 N.E.2d 604 (1992) .....	44
<i>State v. Were</i> , 118 Ohio St.3d 448, 890 N.E.2d 263 (2008) .....	25
<i>State v. White</i> , 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393.....	45
<i>State v. Williams</i> , 74 Ohio St.3d 569, 660 N.E.2d 724 (1996).....	46
<i>State v. Wogenstahl</i> , 75 Ohio St.3d 344, 662 N.E.2d 311 (1996) .....	32, 33
<i>Strickland v. Washington</i> , 464 U.S. 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	25, 29, 37
<i>Wiggins vs. Smith</i> , 539 U.S. 510, 123 S.Ct. 2527 (2003) .....	25

**STATUTES:**

O.R.C. 2945.59.....21, 22, 48

**RULES:**

Evid. R. 401.....21, 22, 23, 24

Evid. R. 403.....21

Evid. R. 404.....21

Evid. R. 404(A).....23

Evid. R. 404(B) .....21, 22, 23, 48

## STATEMENT OF THE CASE AND FACTS

a.) **Procedural Posture:**

Defendant Kirkland was charged by the Hamilton County Grand Jury in two indictments, numbered B-0901629 and B-0904028. The indictments were consolidated for trial under the earlier number, B-0901629. The twelve counts charged involved four victims as follows:<sup>1</sup>

(1.) **Casonya Crawford:** Attempted Rape, Aggravated Murder during an Attempted Rape with death specification (course of conduct, attempted rape), Aggravated Murder during an Aggravated Robbery with death specification (course of conduct, aggravated robbery), Aggravated Robbery, and Abuse of a Corpse. All offenses occurred on May 4, 2006.

(2.) **Esme Kenney:** Attempted Rape, Aggravated Murder during an Attempted Rape with two death specifications (course of conduct, attempted rape), Aggravated Robbery, Aggravated Murder during an Aggravated Robbery, with two death specifications (course of conduct, aggravated robbery) and Abuse of a Corpse. All offenses occurred on March 7, 2009.

(3.) **Mary Jo Newton:** Murder and Abuse of a Corpse. Both offenses occurred on June 14, 2006.

---

<sup>1</sup> Several Repeat Violent Offender specifications, Sexual Violent Predator specifications and with sexual motivation specifications were dismissed by the State prior to trial, and are not listed here.

(4.) **Kimya Rolison**: Murder and Abuse of a Corpse. Both offenses occurred on December 22, 2006.

On March 4, 2010, after a jury was impaneled, the defendant entered a guilty plea to Counts 6 and 7 in Case B-0901629, and Counts 1 and 2 in case B-0904028. These were the murder and abuse of a corpse counts involving victims Mary Jo Newton and Kimya Rolison. (See T.p. 825-845) Sentencing was deferred.

Defendant was found guilty as charged on the remaining counts in a jury trial. At the conclusion of the sentencing hearing on March 17, 2010, the jury recommended death on all the capital counts. On March 31, 2010, the trial court did impose the death penalty as recommended by the jury and maximum consecutive sentences on the remaining counts.

**b) Statement of Facts:**

Defendant Kirkland is a serial killer who was charged with the murder of four females, two of whom were teenagers, and two of whom were adults. Kirkland beat his victims; attempted to rape two of them (the young girls), and brutally killed them. He removed the clothes of the two younger victims, and burned the bodies of all four victims. The fires originated in the vaginal area of the bodies in an obvious attempt to destroy evidence. He stole property from the two younger victims.

Kirkland gave fairly detailed confessions to all of the crimes, and DNA also connected him to the Esme Kenney homicide. Guilt was not in doubt at trial. A brief statement of facts as to each victim follows:

(1) Casonya Crawford

On May 3-4, 2006, Casonya Crawford, age 14, was living with her grandmother, Patricia Crawford, who had custody of her. (T.p. 886, et seq.) Late in the evening of May 3<sup>rd</sup> Casonya left her home without telling her grandmother. In fact, Casonya had left with the intention of visiting a girlfriend, Tania Harmon, but she never made it to Tania's house. (T.p. 894 et seq.) Casonya had her cell phone with her and a backpack.

As she was walking to Tania's house, Casonya was talking on her cell phone to her boyfriend, Ra'Sheed Bowden. During their conversation her phone suddenly went dead. (T.p. 906) In fact, at this point defendant Kirkland was accosting Casonya. Kirkland removed Casonya to an out of the way location near where he lived, where he disrobed her and attempted to rape her. He then beat her to death, burned her body using an accelerant, and stole her phone and back pack. Casonya was reported missing by her grandmother. Her nude burned body was found on May 9, 2006. Her identity was confirmed through dental records. The cause of death was homicidal violence. (T.p. 954) The defendant confessed to the killing in March of 2009, after his arrest on the Esme Kenney case.

(2.) **Mary Jo Newton**

Mary Jo Newton was a drug addict who sometimes turned to prostitution to support herself. She was an acquaintance of Kirkland's and had associated with him sporadically over a period of time. On June 14, 2006, defendant picked up Mary Jo Newton in his vehicle for drugs and sex. During the course of the evening defendant killed Mary Jo. The cause of death was suffocation. (T.p. 1028) Kirkland burned her body, which was found, still smoldering on June 15, 2006, at 783 Werkman, a location close to where the defendant lived. (T.p. 966, et seq.) An accelerant was used to get the fire going. The victim was identified by the use of dental records. (T.p. 1018). The defendant confessed to the crime on in March of 2009 after his arrest on the Esme Kenney case. Defendant Kirkland was charged with non-capital murder in the death of Mary Jo Newton and abuse of a corpse.

(3.) **Kimya Rolison**

Kimya Rolison was also a drug addict who sometimes turned to prostitution. She also knew defendant Kirkland. Her badly burned and decomposed skeletal remains were found on June 13, 2008. The autopsy found indications of a stab injury to her neck. The cause of death was cutting to the neck. (T.p. 1075) The time of death was placed at about 18 months prior. The body was found on Pulte Avenue. The police were unable to identify the body, and the crime remained unsolved.

After the defendant was arrested and questioned on the Esme Kenney murder (see part 4, below) he gave an extensive statement to police. In these statements he described several other older homicides that he had committed, for example, the murders of Mary Jo Newton and Casonya Crawford. As a result, those two homicides were included with the Esme Kenney homicide in indictment B-0901629. When that indictment was returned, the police continued to try to identify some of the homicides the defendant had described, but which involved unidentified bodies and victims. Eventually they were able to identify the body found in 2008 on Pulte as that of Kimya Rolison. (T.p. 1075-1175, 1116) Because this case was not put together until after indictment B-0901629 was returned, the defendant was indicted again under new case number B-0904028. This indictment charged Kirkland with the murder of Kimya Rolison (Count 1) and Abuse of her Corpse (Count 2). On motion of the state the two indictments were consolidated.

**(4.) Esme Kenney**

On the afternoon of March 7, 2009, 13 year-old Esme Kenney left her house on Winton Ridge Lane and crossed the street to property containing a large reservoir. Her intent was to jog on a path that circled the reservoir. She had with her a watch and an I-Pod. As she was jogging she was attacked by Anthony Kirkland, who was lurking in the area. He took her to a nearby secluded area and attempted to rape her (T.p. 1651), killed her by ligature strangulation (T.p. 1827), and partially burned her body. He did

not have an accelerant to get a good fire going. (T.p. 1657) He stole her watch and I-Pod. He sat at the scene for a while and left, returning a short while later.

Esme's mother became worried when Esme did not return and began looking for her but could not find her. She called police and reported her missing. Police arrived and began searching. Eventually a canine unit arrived. Esme's body was found, and Kirkland was also located hiding in the area. (T.p. 1188) Esme's watch and I-Pod were in his possession. (T.p. 1191)

Kirkland was arrested and advised of his rights. He cooperated with police and over a period of days gave several statements admitting his guilt in all the events described above. (See Exhibits 7, 8, and 9, and testimony of Police Officer Witherell, T.p. 1522, et seq., and Police Officer Hilbert, T.p. 1771 et seq.) Esme Kenney's DNA was recovered on a penile swab taken from defendant.

Kirkland was indicted in two indictments as described earlier. After the jury was impaneled the defendant entered guilty pleas to Counts 6 and 7 in Case B-0901629, the murder and abuse of corpse of Mary Jo Newton. He also pled guilty to the murder of and abuse of a corpse of Kimya Rolison, charged in the second indictment. (T.p. 827 et seq.)

At trial the defendant did not contest his guilt. Instead, he concentrated on mitigation. Defendant was found guilty on all counts and specifications and sentenced as described earlier.

**VOIR DIRE:**

**(A) Court:**

The voir dire in this case ran from February 26, 2010 through March 2, 2010. It is transcribed in volumes 14, 15, and 16 of the transcript. (Pages 305 to 790.) A large number of jurors were summoned. For the initial voir dire introduction process they were divided into three separate groups due to space limitations in the Courtroom. Each of the three groups was brought separately to the courtroom and given some background instruction and asked some initial, basic questions. (Group 1, T.p. 315; Group 2, T.p. 340; Group 3, T.p. 371.)

Each group was told the importance of their jury duty and the need to keep an open mind, and to decide issues free from bias, prejudice and sympathy. The conduct of voir dire was explained including the need to respond honestly to all questions. All the jurors, in each group, were sworn in.

Then several issues were addressed to the group as a whole. The first issue concerned hardships. The court and counsel took notes on all of those who had hardships, but jurors were not specifically questioned at this time. Then the court went through case procedure and posed several issues for the jurors to consider. These issues concerned the following topics: hardship and scheduling problems; sequestration; whether they knew any of the attorneys; the presumption of innocence; the four possible penalties if the defendant was found guilty; feelings about the death penalty

and their willingness to follow the law in this regard. (See, for example, T.p. 320-339, where group one was dealt with. All three groups went through the same process.) The jurors were then given lengthy questionnaires (23 pages) that covered the above topics and other matters (a blank copy of that questionnaire is attached as Appendix A), and sent to the jury commissioners office. After all three groups of jurors were questioned, the Court and counsel agreed to excuse all jurors who had raised a hardship issue. This left a total of 112 prospective jurors in the pool. (T.p. 399)

The juror questionnaires covered all aspects of the jurors' backgrounds. The questionnaire contained a reminder of the presumption of innocence and the need for reasonable doubt (Appendix A, p. 8) just prior to a series of questions concerning the death penalty (Appendix A, p. 8-10), and the potential jurors' media exposure to this case (Appendix A, p. 10). These questions were specifically worded so that counsel could easily identify the jurors with problems in these areas.

After the questionnaires were completed the jurors were again returned to the Courtroom by group. (Group 1, T.p. 403; Group 2, T.p. 407; Group 3, T.p. 412.) The Court and attorneys then questioned each group concerning their ability to follow the law regarding the death penalty and those who could not do so were identified. Proceedings were then adjourned until the next day.

The next morning several jurors who expressed problems with death penalty law were individually voir dired. (T.p. Vol. XV, p. 419, et seq.) As a result, several jurors

were excused for cause. (T.p. 429 and T.p. 449 on motion of the state). One state challenge for cause was denied. (T.p. 449) A prospective juror was also excused for cause on defendant's motion because of contact with one of the victim's family. (T.p. 477)

The general voir dire of the remaining jurors then begun (T.p. 478) with the Court informing the jury that discussions during voir dire were not evidence (T.p. 480), and reminding the jurors of the defendant's presumption of innocence. (T.p. 481.) All jurors<sup>2</sup> agreed to accept and follow this concept. (T.p. 482) All jurors also agreed to accept and follow the definition of reasonable doubt (T.p. 483), and follow the Court's instruction on the law, and remain fair and impartial.

"THE COURT: Is there any one of you who feels that he or she cannot be fair and impartial to both parties?

Again, Number 41.

There have been a number of news stories regarding this case. Have you seen, heard or read anything about this case before your jury service?

How many of you have not seen or heard anything about this case?

Does anyone believe that he or she has any knowledge about this case besides what you would have seen in the news or read in the newspaper?" (T.p. 487)

Prospective jurors number 41, number 59, and number 61, indicated they had problems.

~~The parties took note of this and followed up on this during their respective voir dire.~~

This ended the Court's initial part in the voir dire.

---

<sup>2</sup> Except juror 41 who generally had problems with a host of issues and was eventually excused. (T.p. 723)

The Court and counsel had agreed to identify problems with particular jurors during the general group voir dire, but then bring back jurors with issues and do an individual voir dire on those particular jurors. This was done to keep all jurors from possibly hearing something prejudicial. Court and counsel were aware the defendant had a prior conviction for the murder of a woman, and went to great lengths to keep this from the jury for as long as possible. (T.p. 687)

**(B) State:**

The States voir dire begins at T.p. 488, covering many of the same concepts the Court covered. At T.p. 495, the prosecutor gave a brief summary of the charges, and then asked if any of the jurors knew anything about the case or had learned something through the media. Prospective jurors 41, 2, 13, and 10 all indicated they had heard about the case in the media but could set it aside. (T.p. 497-498.) Prospective juror 11 also indicated she had seen things in the media and had worked with the family of one of the victims. Further questioning of her was reserved for later. (T.p. 499.) Juror number 8 indicated a problem in dealing with crimes against children, as did juror number 85. (T.p. 502.)

The State spent extensive time questioning jurors about their ability to impose a death penalty. (T.p. 506-547.) Prospective jurors number 78, 85, and 83 responded indicating they would have a problem imposing the death penalty. (T.p. 506.)

Juror number 2 indicated he could not impose a death penalty when asked by the state if he could do so. (T.p. 520.) Juror number 16 also indicated a problem. (T.p. 538.)

At the conclusion of the State's voir dire the prosecutor moved to dismiss jurors number 2 and 16 for cause. Defense counsel did not object and the Court removed those jurors for cause. (T.p. 547.)

The State did some further voir dire dealing with juror contact with the justice system and ability to follow the law, and then rested. All jurors then left the courtroom except juror number 11, who was then questioned individually about her exposure to the media (T.p. 563, see also, T.p. 499), and then passed for cause.

**(C) The Defense:**

The defense voir dire begins at T.p. 607. Defense counsel began by explaining to the jurors that the plain facts were such that the trial would probably wind up as really a mitigation case. (T.p. 608-622) Defense counsel emphasized to the potential jurors, throughout voir dire, the need to fairly consider all mitigation (T.p. 615, et seq.), despite all facts of the crime and their emotional responses to the facts. The jurors, as a group, indicated that they could. Throughout the general portion of voir dire counsel sought to identify jurors who expressed concerns during voir dire or in their questionnaires. (T.p. 615, 618, 619, 621, 623.) The defense voir dire also discussed the jurors' ability to impose penalties other than death and to be fair and impartial. (T.p. 619-621, 623, 625,

626, 629, 631, 633, 636.) It is obvious defense counsel tried to individually address as many of the jurors as necessary. Further, counsel carefully explained to the jurors that even just one juror could prevent the death penalty from being imposed even "if all other" jurors wanted to impose it. (T.p. 619.)

When defense counsel finished their first round of general questioning the court removed two jurors for cause at defendant's request. (T.p. 654) Both parties then questioned the replacement jurors, with defense counsel emphasizing the importance of the mitigation phase (T.p. 670, et seq.) and the ability to impose a sentence of less than death.

At this point (T.p. 689), eighteen (18) jurors had been passed for cause. They were removed from the courtroom and kept apart. The remainder of the jurors were then brought back in for examination by the parties in order to select eighteen (18) more before peremptory challenges were exercised. They had been present during the earlier voir dire session so the court went right to individual voir dire.<sup>3</sup> The state began first at T.p. 692, and generally dealt with the ability of the jurors to fairly apply the law, and prior experiences with the justice system. Juror 41 stated that he had heard too much about the case to be fair. (T.p. 723) He was later excused for cause. (T.p. 733)

Defense counsel started their individual voir dire at T.p. 747. Counsel tried to identify jurors who would not be able to treat the defendant fairly and also questioned

---

<sup>3</sup> This group had already been through the original death qualification process.

them about media exposure and their ability to set it aside. (T.p. 748, 749, 751, 752, 754, 756, 757, 758, 766.) During this phase of voir dire defense counsel again emphasized the ability of a single juror to prevent the imposition of the death penalty. (T.p. 750.)

Throughout the questioning, defense counsel emphasized the need to be fair and to consider all mitigation. The defendant challenged juror number 32 for cause as to the death penalty and the challenge was granted. (T.p. 763) Juror number 53 was excused for cause due to an inability to be fair because of media exposure. (T.p. 765.) At this point there were now thirty-six (36) jurors passed for cause.

The peremptory challenge process begins at T.p. 773. The state excused six (6) jurors (T.p. 773, 773, 777, 777, 779, 780), and the defense excused six (6) jurors (T.p. 774, 777, 778, 780, 780). The defense raised one *Batson* challenge. (T.p. 773) The State explained that the juror in question had two brothers convicted of crimes, and had stated on her questionnaire that only God could take a life. (T.p. 774, et seq.) The Court found this a race-neutral explanation. (T.p. 774) The regular jury as seated contained two African-American jurors. (T.p. 781)

During the seating of the alternate jurors the state excused three (3) jurors (T.p. 784, 786, 787), and the defense excused three (3) jurors (T.p. 785, 786, 788). The defense raised two *Batson* challenges (T.p. 784, 787). In response to the first challenge the state pointed out that the juror worked at Summit Behavioral with psychologists and psychiatrists, and the defense mitigation would present a mental health professional.

The juror also stated on her questionnaire that only God could take a life. The Court found that to be a race-neutral explanation. (T.p. 785) In regards to the second *Batson* challenge, the state pointed out the jurors conflicting answers to death penalty questions. The Court found that a race-neutral explanation. (T.p. 788)

**OTHER ACTS:**

Defendant Kirkland was a serial killer of females. Two of the defendant's four victims were young girls - Esme Kenney and Casonya Crawford. The defendant was charged with two counts of death-eligible Aggravated Murder for each of these young girls. There were three death specifications on each of these victims, an Aggravated robbery specification, a Rape/Attempted Rape specifications, and a course of conduct specification. As to Esme Kenney the defendant admitted to an attempted rape, and in fact, DNA evidence was recovered which, by itself, proved the Rape/Attempted Rape specification, despite defendant's efforts to burn the body. The police were able to obtain this evidence because the defendant was captured shortly after the crime and before he could complete the burning of the body.

However, Casonya Crawford presented a different situation. She was killed by the defendant on May 3-4, 2006. The defendant, after sexually assaulting her, burned her body and buried it under debris at an isolated location. The body was found on May 9, 2006, and was nude except for one sock. No trace of her clothes, shoes, or other clothes or belongings such as her backpack or cell phone were ever recovered.

However, phone records indicate her phone was used for at least a week after her murder.

When the defendant was questioned after his apprehension on the Esme Kenney matter, he also confessed to killing Casonya Crawford, Mary Jo Newton and Kimya Rolison. All four of the victim's bodies were burned, although Esme Kenney was only partially burned because of defendant's quick apprehension.

When discussing Casonya Crawford the defendant admitted to approaching her and stated that he offered her money to "talk" to him. (T.p. 1599, et seq.) He initially offered her \$20 but said he upped the offer to \$60. The defendant told police that he became enraged when Casonya refused his advance and threw his money back at him. (T.p. 1601-1607) According to the defendant, a struggle then ensued and Casonya was killed. The defendant denied having sex with Casonya Crawford. However, her nude body and the fire set in her vaginal area contradicted this.

In order to substantiate the rape/attempted rape allegations, the state notified the defendant of "other acts" evidence it intended to use at trial. That evidence involved the defendant's conviction for importuning a 13 year-old girl named Kylah Williams. In essence, the testimony of Kylah would show that the defendant was living with Kylah's mother and Kylah, and that in the mother's absence the defendant offered Kylah \$5 if he could "be the first to eat her out." (T.p. 1852) The defendant was exposing himself when he did this. (T.p. 1851) The victim's mother threw the defendant out of the house

when told of the incident. This evidence was relevant to prove the defendant's true intent when he offered money to Casonya Crawford.

The defense was aware of this prior to trial and filed a motion in limine to exclude it. The state filed a written response on September 9, 2009. The trial court ruled the evidence admissible.

### MITIGATION:

Long before trial began defense counsel began preparing for mitigation. The defendant was looked at by five doctors. (T.p. 2025) They all came to the same conclusion, i.e., defendant Kirkland suffered from the behavior disorder of psychopathy, accompanied by all the serious problems associated with that disorder. They chose to present one of these experts, Dr. Scott Bresler, as their witness at mitigation because he had seen the defendant the most, and would be the best person to put on the stand. (T.p. 2025)

Defense counsel also obtained a mitigation expert, John Lee, from the State Public Defender's Office. He attempted for a year to get defendant's family members to cooperate in presenting mitigation. He met with the family members, although it was difficult to do so because the family members refused to cooperate and made contact difficult. (T.p. 2131 et seq.) They provided extremely negative information about the defendant<sup>4</sup> and made it clear they would not assist, even stating they would not honor

---

<sup>4</sup> A hundred hours of interviews were conducted. (T.p. 2027)

subpoenas. (T.p. 2134) As a result of the family members' damaging information and attitude, defense counsel made a strategic decision not to call them. (T.p. 2135) The prosecutor also indicated they had attempted to contact the defendant's family over a period of time and were unsuccessful. (T.p. 2136) In fact, at one time the start of trial was continued to allow further efforts to obtain mitigation. (T.p. 2136) As a result, trial counsel made a strategic decision to present only Dr. Bresler, and have the defendant make an unsworn statement. (T.p. 2049)

Because Dr. Bresler's mitigation testimony was going to focus on showing defendant's conduct resulted from his condition of psychopathy, his counsel were well aware that many negative behaviors would be discussed both during direct and cross-examination of Dr. Bresler. (T.p. 2028, et seq.) The parameters of the questioning were discussed with counsel and the Court prior to the hearing, and defense counsel raised the issue and got some favorable results and guidance from the Court. As part of this meeting, Dr. Bresler was brought in and questioned by counsel out of the jury's presence. (T.p. 2028 - 2050)

In opening statement at mitigation (T.p. 2062, et seq.), defense counsel only mentioned Dr. Bresler as a defense witness. Counsel made no mention of any of defendant's family members testifying. Counsel did a brief explanation of what would be presented as mitigation through Dr. Bresler. (T.p. 2066-2068)

Dr. Bresler was called and qualified as an expert. His report and the slides used to assist on his presentation were admitted as defense Exhibit No. 1. (T.p. 2076) Dr. Bresler described the extensive information he used in reaching his conclusion; defendants medical history, information from defendant's family, defendant's extensive (18 years worth) prison records, and his prison psychiatric records, and interviews with the defendant. (T.p. 2074.) He pointed out that the defendant did not suffer from any mental illness, was not retarded, and in fact was very intelligent, having earned a college degree while in prison.

He testified that the defendant suffered a traumatic childhood from an abusive father. He also witnessed the father abuse other family members, including raping the defendant's mother. He was a loner as a child and abused alcohol and drugs.

Dr. Bresler explained that as a result of this the defendant suffered from a permanent personality disorder that caused his behavior to deviate from the norm in several described areas (T.p. 2079); thinking, emotional response, and impulse control. The defendant specifically suffered from Anti-Social Personality Disorder, also called psychopathy (T.p. 2080), and had several active serious behavior problems including, among other things, no respect for or empathy for others, lack of impulse control, and thinking disorders. Specific symptoms of psychopathy included: unlawful behaviors, deceitfulness, impulsivity, irritability and extreme aggression, reckless disregard for safety of others, and lack of remorse. (T.p. 2082) Bresler testified that defendant

suffered from all of these things, and explained the material from defendant's history which supported his finding. He emphasized defendant had this from an early age and would have it for ever.

Dr. Bresler also indicated the childhood experiences could cause this, and that it might be genetic. (T.p. 2086) He also indicated that serotonin levels in the brain can impact psychopathy. (T.p. 2087) Further, he noted defendant had a history of treatment with medications that target serotonin levels. (T.p. 2093)

Dr. Bresler concluded that the defendant's criminal behavior reflects the symptoms of his psychopathy disorder, and was caused by it. (T.p. 2098, et seq., T.p. 2104.) He stated Kirkland could not live in society, but could do alright in prison with a life without parole sentence because he could be controlled in prison, and that in prison statistics showed those imprisoned for homicide were no more violent than other inmates. (T.p. 2104, et seq.) Dr. Bresler was cross-examined about his conclusions, including defendant's ability to function in prison. (T.p. 2106, et seq.) Dr. Bresler was an expert in "risk assessment." (T.p. 2073) Thus, his opinion in the defendant's future behavior in prison was particularly relevant to mitigation.

The defendant himself gave an unsworn statement (T.p. 2140), in which he admitted his guilt and blamed it on his problems with anger and rage.

In sum, defense counsel presented a well prepared and researched theory of mitigation in an effective manner. In fact, the only theory available.

## ARGUMENT

### PROPOSITION OF LAW I:

**Evidence of "other acts" which is admissible under Evid. R. 404(A) to prove the defendant's motive, intent, purpose and identity is relevant and admissible under Evid. R. 402.**

One of the defendant's victims in the case was Casonya Crawford. The defendant killed and attempted to rape the 14 year-old girl on the night of May 3-4, 2006. The defendant burned and concealed her mostly-nude body when he finished with her. A sock remained on one foot. The fire charred and damaged the area of her genitals. This prevented forensic testing from determining if a completed rape had occurred. (T.p. 946) This burning was done to all of the defendant's victims to destroy evidence. Casonya's body was found on May 9, 2006. The defendant confessed to the murder in March, 2009, after his arrest on the Esme Kenney murder. In his confession the defendant admitted offering Casonya money to "talk" with him. He started at \$20.00 and raised his offer to \$60.00. (T.p. 1876) When Casonya refused he became enraged and killed her. Defendant admitted to this, but blamed his rage on Casonya's refusal to "talk." Interestingly, defendant had also confessed that the night he killed Kimya Rolison he paid her \$40.00 to have sex, and he had been "talking" to her prior to killing her. (T.p. 1785) Further, victim Esme Kenney had all her clothes removed except for her shoes and socks when the defendant sexually assaulted her. She also was set on

fire to destroy evidence but was found too soon for the fire to cause as much damage as in the other cases.

At trial the defense counsel, during cross-examination of Officer Hilbert, challenged the evidence as to the attempted rape of Casonya Crawford. They questioned the lack of physical evidence. (T.p. 1777, line 17.) They challenged the claim that the defendant burned the bodies to hide evidence. (T.p. 1780) This was based on the defendant's bizarre claim that he was burning the bodies to give them a Viking funeral. They questioned Hilbert about the defendant's denial of having sex with Casonya Crawford. (T.p. 1782)

As a result, the State put on the "other acts" testimony from Kylah Williams that was set forth earlier in the statement of facts to this brief. In summary this evidence showed that the defendant offered 13 year old Kylah money to engage in sex with him. It was relevant to show the defendant's motive, purpose and intent when he offered money to Casonya Crawford. On appeal to this Court the defendant argues that this evidence was improperly admitted, relying most specifically on Evid. R. 403 and Evid. R. 404 to support his claim.

It is the position of the state that the Kylah Williams "other acts" testimony was relevant and was properly admitted pursuant to Evid. R. 404(B) and O.R.C. 2945.59.

Relevant evidence is defined in Evid. R. 401 as evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the

action more probably or less probable.” The admissibility requirement under the rule is thus not overwhelming. The offered evidence need only have “any tendency” to prove or disprove the point at issue. *State v. Lyles*, 42 Ohio St.3d 98, 537 N.E.2d 221 (1989); *State v. Kehoe*, 133 Ohio St.3d 591, 729 N.E.2d 431 (1999). The decision on this issue is for the sound discretion of the trial court. *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242; *State v. Cook*, 2010-Ohio-2726 (10<sup>th</sup> Dist. 2010). Reversal of admission requires a showing that the trial court abused its discretion. If evidence is relevant it is generally admissible. Evid. R. 402.

Under Evid. R. 404(B), “other acts” evidence is relevant and admissible if it has “any tendency (Evid. R. 401) to prove the defendant’s ‘motive . . . intent . . . [or] plan.’” This “other acts” evidence from Kylah Williams that the defendant offered her money in order to have sex with her was relevant to explain why the defendant offered \$60.00 to Casonya Crawford, *i.e.*, his motive and specific intent was to have sex with her. It also showed his general scheme or plan in similar situations. As such it was admissible.

This Court has issued several decisions recently regarding admission of other acts evidence pursuant to Evid. R. 404(B) and R.C. 2945.59, in the context of sexual assault cases and homicide cases. *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571 (2006) (rape, murder, evidence of prior sexual assault); *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048 (2007) (aggravated murder proof of rape); *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242 (other acts relevant to intent); *State v.*

*Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104 (aggravated murder – aggravated robbery; series of other robberies to show motive, intent, plan.) All of these cases involve the admission of “other acts” that prove one of the listed purposes in Evid. R. 404(B) (motive, intent, plan, identity, etc.) The general rule of admissibility is the same for each of the listed purposes.

In the present case the other acts testimony from Kylah Williams showed defendant’s intent and plan. Defendant’s intent was specifically at issue as to the attempted rape of Casonya Crawford and was a matter of “consequence” [Evid. R. 401] in the case. In *State v. Perez, supra*, at ¶96 this Court wrote:

[17] {¶96} The admission of other-acts evidence under Evid. R. 404(B) “lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that has created material prejudice.” *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶66.

{¶97} The argument that the nonfatal bar robberies were relevant to motive and intent is a reasonable one. The trial court’s decision to admit them for those purposes was not “unreasonable, arbitrary, or unconscionable.” *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 16 O.O.3d 169, 404 N.E.2d 144. Admitting the evidence was therefore not an abuse of discretion.

This language applies equally to the present case.

Defendant also makes an “unfair prejudice” argument under Evid. R. 404(A). No such claim can be made here. This Court dealt with the unfair prejudice issue in *State v. Crotts*, 104 Ohio St.3d 432, 2004-Ohio-6550 (2004). The court pointed out that mere prejudice is not “unfair prejudice.” Obviously, all evidence the State introduces is

designed to convict the defendant. That is not the real issue. *Crotts* points out that unfair prejudice is evidence which might result in an improper basis for conviction. That is not the case here. The defendant himself admitted in his confession that he offered money to Casonya Crawford. Nor did he contest the truth of what Kylah Williams testified to. The evidence at issue concerned a matter of consequence [Evid. R. 401] and was properly admitted.<sup>5</sup>

The issue to resolve is did the court abuse its discretion in admitting the evidence. *State v. Perez, supra*, at ¶97; *State v. Robb*, 88 Ohio St.3d 59, 723 N.E.2d 1019 (2000) (admission of evidence of uncharged murders). As the *Robb* court noted, it is not an abuse of discretion to admit other-acts evidence that proves a matter at issue in the case. No abuse of discretion can be shown here.

**PROPOSITION OF LAW II:**

**In order to establish a claim of ineffective assistance of counsel at a death penalty mitigation hearing, a defendant must show that counsels' performance was deficient and that the deficiency prejudiced the defendant by denying him a fair trial.**

Defendant argues that trial counsel were ineffective at the mitigation phase of his trial. The standard to be used in measuring such a claim is as follows:

---

<sup>5</sup> Defendant makes references in his argument to a newspaper article containing a post-trial statement by the prosecutor. This article is not part of the record, nor are the remarks an indication of significance to this appeal of this particular issue.

“To establish ineffective assistance of counsel, [defendant] must show that counsel’s performance was deficient and that the deficient performance prejudiced the defendant so as to deprive him of a fair trial.”

*State v. Were*, 118 Ohio St.3d 448, ¶218, 890 N.E.2d 263 (2008); *Strickland vs. Washington*, 464 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In *Were* this Court noted that “strategic choices made after thorough investigation of law and facts relevant to plausible options are “virtually unchallengeable” (citing *Wiggins vs. Smith*, 539 U.S. 510, at 521, 123 S.Ct. 2527 (2003)).

The statement of facts to this brief contains a detailed explanation of the preparation done by defense counsel for mitigation, and how they presented their case. Several conclusions are obvious.

First of all, counsel spent a year preparing for this hearing. They consulted five doctors who were all in agreement about the defendant’s condition. The conclusion, as stated by Dr. Bresler, was that the defendant suffered from psychopathy. This was an anti-social personality disorder that manifested itself in numerous, very unflattering symptoms or characteristics. This defendant exhibited all of these negative traits, and thus they were going to come out at trial. However, the end result of a diagnosis of psychopathy was that defendant could argue that the disorder controlled his actions and was thus mitigating.

Secondly, the defendant did not suffer from mental illness. He was not retarded. In fact, he was intelligent, and had earned a college degree in prison. Further, he was a

repugnant individual whose own family refused to support, and who told the defense team they would not support the defendant in any way nor would they testify on his behalf. The defendant had no friends.

Thirdly, the defendant's crime could even charitably only be referred to as hideous. There was no mitigation to be found of a positive nature. Counsel's thorough investigation revealed all this.

Counsel had numerous discussions with the court which were transcribed and referenced in the factual statement of the brief. Counsel made it clear to the court that their only option was to present the psychopathy disorder, with all its incumbent difficulties. As counsel noted, it was either that or nothing. It is obvious that counsel was thoroughly aware of the facts, the law and all plausible options.

In argument at mitigation, defense counsel emphasized the psychopathy diagnosis, the history and unfortunate background of the defendant, the remorse shown by confessing to all charges and pleading guilty to the non-death penalty homicides, and defendant's drug problems. They also introduced testimony that the defendant would not be a threat in prison.

On appeal to this Court the defendant raises three specific claims that supposedly show ineffective assistance.

(1.) Defendant argues that by putting Dr. Bresler on they set up cross-examination for the state on negative issues, and undercut the defense theory of

mitigation. This claim does not withstand scrutiny. The main, most significant and strongest theory of mitigation was that the defendant suffered from the disorder of psychopathy. (See T.p. 2030, for example, and both opening and closing defense arguments at mitigation.) This disorder was defined by a whole host of negative symptoms and defendant exhibited all of them, which is why the diagnosis was made. Obviously it opens up some areas of cross-examination. Defense counsel knew this, and discussed it with the court, but in the end they stated it was their only valid option. The diagnosis allowed, even justified, the argument that defendant could not control himself, thus providing mitigation. Indeed, the state's cross-examination was a double-edge sword because it reinforced the existence of key symptoms. The other mitigation arguments, difficult child hood, drug abuse, not a danger in prison, etc., were valid, but alone or as a group did not have the mitigation value of the personality disorder evidence. Defendant's claims are devoid of merit.

(2.) Defendant argues that in the mitigation opening statement defense counsel told the trial jurors that an uncle of the defendant would testify on the defendant's behalf, but such a witness was never called. Defendant argues here that the failure to explain the absence of this supposed witness was reversible error. Counsel for the state can find no such representation in defense counsels' mitigation presentation.

(3.) Defendant argues that Dr. Bresler testified that serotonin levels can indicate the presence of psychopathy. (T.p. 2087) Defendant posits that counsel should

have tested the defendant pre-trial for his serotonin levels and was ineffective for not doing so.

This claim fails for several reasons. First of all, Dr. Bresler further testified that the defendant's medical records indicated that in the past the defendant had been treated with medications designed to specifically control the level of serotonin in a patient. (T.p. 2093) Thus, the jury was told the defendant was already being treated for the problem without the necessity, or risk, of further testing. In addition, Dr. Bresler testified with reference to a question on cross that in general brain scans and chemical tests were not done for "various reasons." (T.p. 2120) Neither side followed up on this answer, and defendant obviously had a tactical reasons not to pursue it, since the record reflected he was already being treated for serotonin levels.

The state submits there was no ineffective assistance at mitigation. To the contrary, defense counsel performed at a high-level.

**PROPOSITION OF LAW III:**

**During closing argument at a capital mitigation hearing the prosecutor may discuss the facts of the case, the applicable law and the weighing process.**

Defendant argues in this proposition of law that the prosecutors committed misconduct in their mitigation phase arguments. Defendant also argues that the failure of defense counsel to object, or to object vigorously, amounted to ineffective assistance

of counsel. Defendant divides his argument into two sections, corresponding to the presentation of each of the prosecutors, and the state will format its response in the same fashion.

I. Defendant begins with a generalized citation to the American Bar Association Standards for Effective Assistance of Counsel in Capital Cases as the “gold standard” on this topic and that they “exceed” the standards set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2051, 80 L.Ed.2d 674 (1984). This claim is simply false. Not only did *Strickland* reject this, but the United States Supreme Court has continued to reject this argument. *Bobby v. Van Hook*, 558 U.S. \_\_\_\_, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009). In fact, in *Bobby v. Van Hook*, in 2009, the United States Supreme Court criticized the Federal 6<sup>th</sup> Circuit Court of Appeals for such an elevation of the ABA standard.

Defendant goes on to argue that the prosecutor’s recitation of the facts of the crimes in the opening phase of argument was error. Specifically, defendant points to the following statements:

- (1) “Even us that work in this rarely find a case this horrible.” (T.p. 2151)
- (2) “I can’t imagine a case that could be any clearer.” (T.p. 2154-2155)
- (3) “She’s petrified, she tells him just don’t hurt me.” (T.p. 2164)
- (4) “She’s not struggling, she just pounds her little hands on the ground, and digs in the dirt.” (T.p. 2166-2167)

- (5) “At that point she no longer begs Kirkland to let her live . . . she’s begging that man to let her die.” (T.p. 2167)

First of all, there were no objections to any of these remarks, so the claim of error is waived. *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959 at ¶139-141. In fact, however, the prosecutor’s remarks were not error.

As to the remark identified above as number (1) regarding how horrible was case was, this merely repeated the obvious, and in fact reflected a theme raised throughout the trial by defense counsel. During the entire voir dire the defense repeatedly told the jurors that this was truly a horrible case. (See for example T.p. 1614, line 15.) This continued into the trial. (T.p. 811, lines 15-25) The prosecutor’s remark was truthful and grounded in fact and reflected what defense counsel was also saying. Further, it was part of an introductory remark thanking the jurors for their service, not as a basis for sentencing. No error occurred.

As to the comment designated above as number (2) referencing that this case was “very clear,” it is not improper. It is the whole point of the state’s argument to convince the jury that the sentencing issue is clear. In *State v. Brinkley, supra*, this Court dealt with an identical issue and wrote:

“{¶141} The prosecutor’s comment during penalty-phase closing argument that ‘it’s not even a close call’ as to a life sentence, was not plain error. Moreover, the court accurately instructed the jurors on the weighing process, including instructing the jury to choose a life sentence ‘if any one or more of [them] conclude that the State has failed to prove’ that aggravation outweighed mitigation. Cf. *State v.*

*Brooks* (1996), 75 Ohio St.3d 148, 160, 661 N.E.2d 1030.  
Accordingly, we reject proposition XVII.”

Moreover, the jury was properly instructed on the weighing process, the *Brooks* issue, and on what the aggravating factors were. (T.p. 2221 *et seq.*)

As to the remarks labeled numbers (3) and (4) above, they are both quotes from the defendant’s own confession. (No. (3), T.p. 1651, 1706, and others; No. (4), T.p. 1722.) The jury was not told that these facts were the actual aggravating circumstances. Defendant seems to be operating under the misapprehension that the sentencing jury cannot consider the facts that make up the aggravating circumstances. This Court has thoroughly debunked this argument. *State v. Gumm*, 73 Ohio St.3d 413, 653 N.E.2d 253 (1995); *State v. Jenkins*, 15 Ohio St.3d 164, 473 N.E.2d 264 (1984). In *Gumm, supra*, this Court quoted language from an earlier decision to the effect that:

“[the sentencer] may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors.”

*State v. Stumpf*, 32 Ohio St.3d 95, 97, 512 N.E.2d 508 (1987). This same rule applies to the prosecutor’s presentation at mitigation. *State v. DePew*, 38 Ohio St.3d 275, 528 N.E.2d 542 (1988). In *Gumm, supra*, this court authored the following syllabus

paragraph:

“Subject to applicable Rules of Evidence, and pursuant to R.C. 2929.03(D)(1) and (2), counsel for the state at the penalty stage of a capital trial may introduce and comment upon (1) any evidence raised at trial that is relevant to the

aggravating circumstances specified in the indictment of which the defendant was found guilty, (2) any other testimony or evidence relevant to the nature and circumstances of the aggravated circumstances specified in the indictment of which the defendant was found guilty, (3) evidence rebutting the existence of any statutorily defined or other mitigating factors first asserted by the defendant, (4) the presentence investigation report, where one is requested by the defendant, and (5) the mental examination report, where one is requested by the defendant. Further, counsel for the state may comment upon the defendant's unsworn statement, if any. (R.C. 2929.03[D], construed; *State v. DePew* [1988], 38 Ohio St.3d 275, 528 N.E.2d 542, affirmed and followed.)

Defendant's complaints listed above are clearly devoid of merit.

As to defendant's claim labeled number (5) above, defendant's analysis is likewise flawed. In his confession the defendant stated that Esme Kenney begged for her life saying she would do anything he wanted in order to live. (T.p. 1650, line 11; T.p. 1651, line 17; T.p. 1652, line 15, line 24.) Defendant also admitted to viciously beating Esme during the attack. Further, as noted above, defendant confessed that while he was garroting Esme from behind she was digging her fingers into the dirt and pounding her fists into the ground. (T.p. 2166-2167) It is entirely permissible at a criminal trial for the prosecutor to make reasonable inferences from facts presented at trial. *State v. Brinkley, supra*, at ¶136; *State v. Campbell*, 90 Ohio St.3d 320 at 336, 738 N.E.2d 1178 (2000). The prosecutors argument here was not the type of "speculation" covered by *State v. Wogenstahl*, 75 Ohio St.3d 344, 662 N.E.2d 311 (1996). It was a legitimate inference, and it was a legitimate comment on the nature and circumstances

of the case to show they were not mitigating. In *State v. Dixon*, 101 Ohio St.3d 328, 805 N.E.2d 1042 (2004), the trial court wrote as follows in its opinion:

“{¶94} ‘When considering the manner in which Christopher A. Hammer was brutally beaten and then buried alive by this defendant; *the fear and torture the victim must have endured before he lapsed into a welcomed state of unconsciousness*, the Court finds that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt.’ (Emphasis added.)”

This Court rejected a defense claim that this violated the strictures of *State v. Wogenstahl, supra*, finding that the conclusion in italics in the above quote was based on the facts of the crime. The same conclusion applies to the present case. The actual facts of Kirkland’s assault on Esme Kenney support the prosecutor’s argument at issue here.

The trial court gave the jury a detailed explanation of what the aggravating circumstances were (T.p. 2221 *et seq.*), so there was no confusion on this issue. In sum, no error occurred, but even if it was error, it was not objected to, and this court has repeatedly held such minimal comment is not plain error.

## II.

The defendant next proceeds to the second portion of the state’s mitigation argument.

(1) First defendant claims that it was improper for the state during mitigation to point out that the defendant could reoffend in prison. In fact, one of the reasons for

mitigation advanced by the defendant was that he would not be a danger in prison. (T.p. 2176-2177) The state's rebuttal argument pointed out that the evidence in the mitigation record showed that the defendant was a danger to prison staff having made serious threats in past incarcerations toward prison staff. (See testimony of Dr. Bresler, for example T.p. 2122.) The law is clear that the state may rebut a defendant's mitigation evidence. *State v. Gumm, supra*, syllabus paragraph.

In pointing out that the record refuted this "no threat" claim the state said that the defendant's argument in this regard was misleading ("pepper in your eyes"). Even if this particular terminology was too strong, it was unobjected to and was not plain error. *State v. Bies*, 74 Ohio St.3d 320, at 326, 1996-Ohio-276, 658 N.E.2d 754 (1996).

Defendant next argues the prosecutor told the jurors they could not "hold out." (T.p. 2199-2200) This is simply untrue. Through out voir dire defense counsel emphasized to every juror that they, by themselves, could force a life verdict. They made the same argument in closing. They were certainly entitled to do this. *State v. Brooks*, 75 Ohio St.3d 148, 661 N.E.2d 1030 (1996). However, the defendant's argument here was somewhat excessive, and ignored the jurors' duty to deliberate together in an effort to reach agreement. The defendant objected before the prosecutor could finish his argument, and the court told the jury he would instruct them on this topic. (T.p. 2200)

The prosecutor was then able to conclude his remark by finishing with, "I believe

you're going to deliberate with the objective of reaching an agreement." (T.p. 2200, line 11) No error occurred.

Defendant raises a similar claim regarding the prosecutor's argument at T.p. 2214. After explaining that the aggravating factors outweigh the mitigating by an overwhelming margin, which they clearly do, the prosecutor argues that the jurors' oath requires them to impose death, and that defendant's only hope is that they won't. A defense objection is made and sustained (T.p. 2214), and the prosecutor finishes by saying he believes the jurors will follow their oath. No error occurred. If there was error, the sustained objection removed it. *State v. Rembert*, 2007-Ohio-2499 at ¶38; *State v. Jackson*, 107 Ohio St.3d 300, at ¶159, 2006-Ohio-1, 839 N.E.2d 362 (2006).

Defendant next makes the claim that the prosecutor said the jurors would be no better than the defendant if they did not recommend death, citing to T.p. 2201. This claim is bizarrely false. During defense closing at T.p. 2189, defense counsel in fact tells the jurors that if they act out of anger or rage and impose death they are just like the defendant. The prosecutor's response, at T.p. 2201, was to rebut the defendant's claim that the jurors would be acting like the defendant. Pursuant to *State v. Gumm, supra*, the state may respond to, rebut and comment on defense arguments at mitigation. The prosecutor's comment was well within the wide latitude allowed counsel at mitigation. *State v. Brown*, 38 Ohio St.3d 305, 528 N.E.2d 523 (1988); *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, 853 N.E.2d 621.

Defendant makes another false statement when he says that the prosecutor referred to Dr. Bresler as a "paid mouthpiece," citing to T.p. 2202. The prosecutor actually said "the psychologist was paid by the defense." The word "mouthpiece" was never used, nor did the prosecutor state that the "taxpayers" were footing the bill. *State v. Fears*, 86 Ohio St.3d 329 at ¶144, 715 N.E.2d 136 (1999) (holds that using the term "mouthpiece" and stating that taxpayers are footing the bill is improper). It allows mention that an expert is paid. No error occurred.

Defendant's next complaint regarding closing is that the prosecutor commented on the defendant's unsworn statement. (T.p. 2204-2205) The prosecutor can comment that a statement was unsworn, *State v. Scott*, 101 Ohio St.3d 31, 800 N.E.2d 1133 (2004). Further, the prosecutor can comment on, rebut and explain away defendant's mitigation. *State v. Gumm, surpa.*

Defendant's final complaint is that the prosecutor pointed out that without a death penalty there would be no penalty for the murders of Esme and Casonya (T.p. 2216), since he would already be doing life for the homicide of Kimya Rolison and Mary Jo Newton. An objection was made and the court indicated it would explain the law to the jury. (T.p. 2216) The remark was proper because it pointed out one reason why the aggravating factors outweighed mitigation. One of the death specifications on both Esme and Casonya was a course of conduct specification involving four victims. The significance is that one of the reasons death was appropriate was the number of victims.

Mention of Mary Jo Newton and Kimya Rolison was proper. None of the issues raised by defendant are serious enough to have prejudiced the defendant.

**PROPOSITION OF LAW IV:**

**In order to establish ineffective assistance of counsel at voir dire appellant must show a substantial error by counsel coupled with resultant prejudice. Prejudice requires a showing that there is a reasonable probability that, but for the error, the outcome of the trial would have been different.**

Defendant argues that trial counsel provided ineffective assistance at the voir dire stage of trial. Defendant argues that counsel conducted only a "garden variety" felony voir dire, and failed to emphasize issues such as the death penalty and the ability of one juror to prevent the imposition of a death sentence. These claims are devoid of merit.

The test for ineffective assistance set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *State v. Bradley*, 42 Ohio St.3d 138, 538 N.E.2d 373 (1989) also applies to ineffective assistance claims at voir dire. *State v. Perez*, 124 Ohio St.3d 122, at 151, 920 N.E.2d 104 (2009). *Perez* formulated the test as:

"To establish ineffective assistance, Perez must show (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that but for counsel's errors, the proceedings result would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraphs two and three of the syllabus."

An examination of the voir dire in this case shows that trial counsel performed effectively. This was no "garden variety" voir dire.

The factual statement of this brief contains an extensive examination of all aspects of the voir dire. That will not be repeated here, although reference to it will be made when appropriate.

First of all, the prospective jurors all filled out 23 page long questionnaires, which are part of the record in this appeal. This questionnaire covered all pertinent areas of the jurors' background, including a full examination of their views on the death penalty. During initial general voir dire the court, defense counsel, and the state questioned jurors extensively on the death penalty. (See Statement of the Case to this brief, "Voir Dire" section, pages 7 to 14.) Jurors with problems were individually voir dired (T.p. 419, et seq.) and several were excused for cause. (See for example p. 429, 449, 477)

The state and the defense counsel then each conducted an even more focused voir dire on the jurors and more jurors were excused for death penalty related reasons. (See Statement of the Case to this brief, "Voir Dire" section, pages 7 to 14.) The jury was thoroughly death qualified. (T.p. 770)

The voir dire was for the most part conducted with all potential jurors together in large groups. Thus, the questions asked by the court, the prosecutor and defense counsel were heard by all and did not need to be separately repeated by each party.

The court thoroughly explained the entire range of penalties to the jurors. (T.p. 333, 360, 388.) The state emphatically told the jurors that if they “recommended” a death penalty they should count on the court imposing it. (T.p. 517-518, 520) The jury was fully aware of the gravity of a death penalty recommendation.

The defense began its voir dire by making it clear to the jurors that the state had a strong case, and that the defense emphasis would be on mitigation. (T.p. 607, et seq.) Defense counsel then questioned every potential juror about their ability to consider a life sentence, and to hold out for life when others favored death. (T.p. 615, 619, 631, 633, 641, 648, 672, 673, 674, 747, 750, 755, 756.) It is important to note that this was not an individual voir dire. All jurors were present when all of the above referenced questions were asked, and heard the factual representations contained therein. Indeed, several of these questions and fact statements were addressed to the entire panel. The ability of a lone juror to hold out for life was made clear. (T.p. 631, 642, 670, 672, 673, 674, 714, 750, 751.)

The voir dire in this case was done similar to the format for voir dire used in *State v. Dixon*, 101 Ohio St.3d 328, 2004-Ohio-1585, 805 N.E.2d 1042, although the questioning in the present case was much more focused and in depth than that done in *Dixon*. In rejecting a claim of ineffective assistance of voir dire in *Dixon*, this Court wrote:

“{¶46} During voir dire, the trial court and counsel questioned prospective jurors individually about their views

on capital punishment. The trial court asked prospective jurors whether they were 'morally, religiously, philosophically, or otherwise opposed to the death penalty'; whether, if appropriate, they could vote for the death penalty; and, whether they would fairly consider the two other sentencing options of life imprisonment with parole eligibility after 20 or 30 years. The trial court also asked prospective jurors whether they would automatically vote to impose the death penalty regardless of the facts of the case.

{¶47} Both state and defense counsel were then permitted to question prospective jurors as to their views on capital punishment. In most instances, defense counsel merely asked whether prospective jurors would follow the law and the judge's instructions and whether they would consider other penalty options besides death.

{¶48} Defense counsel's performance in this regard was not deficient. See *Bradley*, 42 Ohio St.3d at 143-144, 538 N.E.2d 373. See, also, *State v. Watson* (1991), 61 Ohio St.3d 1, 13, 572 N.E.2d 97 (counsel need not repeat questions about topics already covered by group voir dire, the trial judge, or the prosecutor). The record demonstrates appropriate questioning. Whenever a prospective juror indicated a possible pro-death-penalty bias, the court and defense counsel inquired further into his or her beliefs.

(101 Ohio St.3d 328 at 336). As detailed above, trial counsel in the present case went well beyond the scope of voir dire in *Dixon*.

In sum, the defense voir dire thoroughly covered all aspects of mitigation. It is clear that the entire defense voir dire was directed to finding jurors who would fairly consider mitigation, would consider penalties other than death, and who could hold out for a life sentence. Defense counsel performed effectively.

**PROPOSITION OF LAW V:**

**The determination of whether or not aggravating factors outweigh mitigating circumstances beyond a reasonable doubt in a capital sentencing hearing is a determination to be made by the trier of fact.**

Defendant argues that the mitigation evidence presented raised a reasonable doubt as to the appropriateness of the death penalty. A review of the evidence presented at trial refutes this claim.

Defendant was sentenced to death for the aggravated murders of Esme Kenney and Casonya Crawford. The death specifications as to the two Casonya Crawford counts were:

- Count 2: Aggravated Murder – Attempted Rape
- Specification 1 – Course of Conduct
  - Specification 2 – Principal offender during attempted rape/aggravated murder.
- Count 4: Aggravated Murder – Aggravated Robbery
- Specification 1 – Course of Conduct
  - Specification 2 – Principal offender during aggravated robbery/aggravated murder

The death specifications as to the two Esme Kenney counts were:

- Count 9: Aggravated Murder – Rape
- Specification 1 – Course of Conduct
  - Specification 2 – Principal offender during rape/aggravated murder
- Count 11: Aggravated Murder – Aggravated Robbery
- Specification 1 – Course of Conduct
  - Specification 2 – Principal offender during aggravated robbery/aggravated murder

The course of conduct specification in these cases, standing alone, presents a particularly compelling reason for the death penalty. This defendant killed four females, two of whom were juveniles who were also the victims of sexual attacks by the defendant. The defendant then burned each of the four bodies, starting the fires in the victims' genital areas. Despite the obvious attempt to destroy evidence apparent in this act, the defendant was so cold and callous to claim he was giving the victims a "Viking funeral." As the prosecutor pointed out, the subsequent covering of the bodies with old tires and other trash hardly was part of the Viking purification ritual. The course of conduct specification is a particularly grave one, especially in this case. *State v. Trimble*, 122 Ohio St.3d 297, at ¶328, 911 N.E.2d 242 (2009); *State v. Clemons*, 82 Ohio St.3d 438, at 456, 696 N.E.2d 1009 (1998); *State v. Hughbanks*, 99 Ohio St.3d 365 at ¶144, 792 N.E.2d 1081 (2003). Of course, added to the course of conduct specifications are the aggravated robbery and rape/attempted rape specifications involving young female victims. Just as compelling is the total and complete absence of mitigation in the nature and circumstances of the offense.

The mitigation offered cannot overcome the massive weight of the aggravated circumstances. Trial counsel did an impressive job in presenting a mitigation case under the circumstances involved. Dr. Bresler managed to provide an explanation based on a personality disorder to attempt to account for defendant's behavior. However, no one could quarrel with either the jury or the trial court's conclusion.

Defendant's contrived remorse, his difficult youth and troubled life are simply not enough. For example, see this Court's independent sentence evaluation in *State v. Perez*, 124 Ohio St.3d 122 at ¶236, et seq. 2009-Ohio-6179, 920 N.E.2d 104.

**PROPOSITION OF LAW VI:**

**Ohio's death penalty provisions are constitutional. They are not measured against "international law" or by the ruminations of the American Bar Association. Claims not raised at trial are waived.**

In his Proposition of Law No. 6 the defendant challenges the constitutionality of Ohio's death penalty. Defendant includes in his arguments reliance on international law and treaties, as well as references to the American Bar Association's anti-death penalty positions. All of defendant's individual arguments have been considered and rejected by this Court in the past. In particular, see the decisions in *State v. Ferguson*, 108 Ohio St.3d 451, ¶84 et seq., 844 N.E.2d 806 (2006); *State v. Mink*, 101 Ohio St.3d 350, ¶101 set seq., 805 N.E.2d 1004 (2004).

In situations such as this, the Court has declined to rehash well-settled issues. *State v. Brinkley*, 105 Ohio St.3d 231, at ¶163, 2005-Ohio-1507, 824 N.E.2d 959. In *Brinkley*, this Court wrote:

"{¶163} **Constitutionality.** We summarily reject Brinkley's proposition of law XXIV, which challenges the constitutionality of Ohio's death-penalty statute. *Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, 793 N.E.2d 446, ¶104."

Appellee submits that the Ohio death penalty statutes are constitutional, and are constitutionally implemented.

**PROPOSITION OF LAW VII:**

**The failure to object to a particular jury instruction waives all but plain error.**

Defendant argues that the statutory definition of “reasonable doubt” found in O.R.C. 2901.05 given at the guilt phase of trial (T.p. 1919) is unconstitutional. No such objection was raised at trial. In fact, trial counsel had no objection to the guilt phase charge as given. (T.p. 1863) The failure to object to the charge on “reasonable doubt” waives all but plain error. Crim. R. 52(B); *State v. Hoffner*, 102 Ohio St.3d 358, at ¶61, 811 N.E.2d 48 (2004). Therefore, this claim is waived.

Further, this Court has repeatedly upheld the constitutionality of the R.C. 2901.05 definition of reasonable doubt. *State v. Hoffner, supra*; *State v. Van Gundy*, 64 Ohio St.3d 230 at 232, 594 N.E.2d 604 (1992); *State v. Getsy*, 84 Ohio St.3d 180, 202, 702 N.E.2d 866 (1998); *State v. Goff*, 82 Ohio St.3d 123, 132, 694 N.E.2d 916 (1998). Defendant’s claim of error is devoid of merit.

**PROPOSITION OF LAW VIII:**

**A trial court may assess court costs against an indigent defendant convicted of a felony as part of the sentence.**

The defendant argues that “the imposition of costs as an indigent defendant violates the spirit of the Eighth Amendment.” However, as the defendant concedes, this Court has already upheld the imposition of costs on indigent felony defendants. See *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164 (2006) and *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393. These cases answer all questions regarding the indigent defendant costs situation.

Defendant requests this Court to reconsider its decision in the *Threatt* and *White* cases. He supports his position by referencing cases that were decided long before this Court’s decisions in *Threatt* and *White*. In other words, defendant had found nothing remotely recent that is relevant to his position and yet he still calls this Court’s decisions into question. Appellee submits this claim of error is devoid of merit.

**PROPOSITION OF LAW IX:**

**In a challenge to the sufficiency of the evidence the appellate court must view the evidence in the light most favorable to the prosecution, and must affirm if it determines that any rational trier of fact could have found the essential elements of the crimes proven beyond a reasonable doubt.**

In his Proposition of Law No. 9 the defendant argues that his convictions for the attempted rape and aggravated robbery of Casonya Crawford are based on insufficient evidence. This claim requires the reviewing court to review the evidence in the light most favorable to the state. If such review demonstrates that any rational trier of fact could have found guilt beyond a reasonable doubt then the reviewing court must affirm. *State v. Leonard*, 104 Ohio St.3d 54, at ¶77, 2004-Ohio-6235, 818 N.E.2d 229; *State v. Williams*, 74 Ohio St.3d 569, 660 N.E.2d 724 (1996); *State v. Jenks*, 61 Ohio St.3d 259, second syllabus, 574 N.E.2d 492 (1991). Such a review here leaves no doubt as to the defendant's guilt.

Casonya Crawford's body was found a few days after she disappeared. She was entirely nude, except for one sock. Her body had been burned, and the fire was started in her vaginal area – an obvious attempt to destroy evidence. She had been badly beaten, with two teeth knocked out. The defendant confessed to doing all of this. [See defendant's confession, State's Trial Exhibit 9(c).] He explained that he had offered the victim \$60.00 if she would "talk" to him. When she refused and threw the money back at him, Kirkland claims he became enraged, beat her to death and gave her a "Viking funeral."

The sexual motivation to this assault is readily apparent. There have been several aggravated murder convictions grounded in an attempted rape felony where virtually identical fact patterns have been found sufficient to support a conviction.

*State v. Scudder*, 71 Ohio St.3d 263, 643 N.E.2d 524 (1994); *State v. Biros*, 78 Ohio St.3d 426, at 448, 678 N.E.2d 891 (1997); *State v. Powell*, 49 Ohio St.3d 255, 552 N.E.2d 191 (1990). In all of these cases an attempted rape conviction was upheld in essence based on a murdered female victim being found unclothed. This was found to be evidence of the defendant's motive. Physical injury indicative of a possible sexual assault was present in at least one of these cases, and in the present case the defendant set the victim's body on fire, concentrating on the vaginal area. This indicates an intent to cover up evidence of a sexual assault.

However, the present case contains even more evidence of the defendant's sexual intent through the other acts evidence involving Esme Kenney and Kylah Williams. The stark similarities between the defendant's attack on Esme Kenney, i.e., the beating, the vaginal burning, the nude body, are particularly relevant. And, of course, DNA evidence proved sexual conduct with Esme Kenney. The Kylah Williams other-acts evidence demonstrated defendant's purpose in offering money to Casonya Crawford was not to "talk," but to obtain sex. Defendant's motive was clearly proven, and getting Casonya nude was a significant step in pursuing a rape. The attempted rape conviction is appropriate.

The aggravated robbery conviction is likewise sufficient. Casonya Crawford's cell phone and backpack were missing. Phone records demonstrated the continued use of the phone after Casonya's death. Obviously, force was used in the taking of the

victim's property. Finally, the defendant's aggravated robbery of Esme Kenney was also relevant to prove the aggravated robbery of Casonya Crawford. The circumstances were identical. R.C. 2945.59; Evid. R. 404(B). Defendant's claim of error is without merit.

**PROPOSITION OF LAW X:**

**Cumulative error doctrines cannot apply in the absence of a showing of multiple errors, nor can harmless error become prejudicial through weight of numbers.**

Defendant makes a brief cumulative error argument. The predicate for such an argument is a showing of multiple, prejudicial error. Defendant has made no such showing, so his argument must be rejected. *State v. Garner*, 74 Ohio St.3d 49, at 64, 656 N.E.2d 623 (1995); *State v. Fry*, 125 Ohio St.3d 163, at ¶217, 2010-Ohio-1017, 926 N.E.2d 1239.

CONCLUSION

Appellee submits that the verdicts and sentence below must be affirmed.

Respectfully submitted,

JOSEPH T. DETERS, 0012084  
PROSECUTING ATTORNEY

William E. Breyer

William E. Breyer [0002138]  
Counsel of Record for the State of Ohio  
Chief Assistant Prosecuting Attorney  
Hamilton County Prosecutor's Office  
230 E. Ninth Street, Suite 4000  
Cincinnati, Ohio 45202  
513/946-3244; Fax (513) 946-3100  
[Bill.Breyer@hcpros.org](mailto:Bill.Breyer@hcpros.org)

CERTIFICATE OF SERVICE

I hereby certify that on this 8<sup>th</sup> day of July, 2011, a copy of the foregoing Merit Brief of Plaintiff-Appellee, State of Ohio, was served by regular U.S. mail upon Herbert E. Freeman, Co-Counsel for Appellant, at 114 E. Eighth Street, Cincinnati, Ohio 45202, and Bruce K. Hust, Co-Counsel for Appellant, 917 Main Street, 2<sup>nd</sup> Floor, Cincinnati, Ohio 45202.

William E. Breyer

William E. Breyer (0002138)  
Chief Assistant Prosecuting Attorney

# APPENDIX

# Appendix A

A-1

#30

COURT OF COMMON PLEAS  
CRIMINAL DIVISION  
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	Case No. B0901629
Plaintiff,	:	Judge Charles J. Kubicki, Jr.
-vs-	:	
ANTHONY KIRKLAND	:	
Defendant.	:	

**INSTRUCTIONS FOR JURORS**

**YOUR ANSWERS TO THESE QUESTIONS  
ARE BEING GIVEN UNDER OATH.**

The attached questions must be answered by you under oath. They will assist the Judge and the lawyers in selecting a jury. Your complete written answers will save a great deal of time for the Judge, for the lawyers, and for you. Take your time. Answer all the questions to the best of your ability. **DO NOT ASK FOR HELP.** There are no right or wrong answers. The only requirement is that the answers be full and honest.

We need your candid answers so that we pick a fair and impartial jury for a trial involving criminal accusations. The judge and the lawyers realize that every person has beliefs and opinions concerning many things. You should answer with your true feelings, whatever they may be. Do not assume that any of your answers will qualify you or disqualify you from serving on this jury.

If you cannot answer a question because you do not understand it, write "Do not understand" in the space after the question. If you cannot answer because you do not know, write "Do not know" in the space after the question. Write only on the front side of each page. If you need additional space for an answer, there are blank pages at the end of the questionnaire for that purpose. Write "see back page" on your answer. On the back page(s), be sure to include the question number to which you are responding.

**Under Ohio law, your responses may be subject to public disclosure. Nevertheless, certain information such as your Social Security number, telephone number, and driver's license number are not subject to disclosure and would be redacted from your questionnaire prior to disclosure. ~~You have the right to request an in-court private hearing, on the record and with the prosecutor and defense counsel present, regarding any written question if you believe legally your response should not be disclosed. Any request for a private hearing should be made in writing on the specific question of your completed questionnaire and only made to protect a sincerely legitimate privacy interest.~~**

### JUROR QUESTIONNAIRE

JUROR NAME AND NUMBER \_\_\_\_\_

1. Age: \_\_\_\_\_

2. What is your gender? Male \_\_\_\_\_ Female \_\_\_\_\_

3. What is your race? (please circle)

- a) White/Caucasian
- b) Black/African American
- c) Hispanic/Latino
- d) Asian/Pacific Islander
- e) Other (please state) \_\_\_\_\_

4. If you have children, please list (include children not living with you):

<u>Sex</u>	<u>Age</u>	<u>Does child live with you</u>	<u>Level of education</u>	<u>Occupation</u>

5. Do you have any medical or physical condition that might make it difficult for you to serve as a juror? (Please include any hearing or eyesight problem.) Yes \_\_\_\_\_ No \_\_\_\_\_

Please describe: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

6. Are you taking any medications that might make it difficult for you to serve as a juror?  
Yes \_\_\_\_\_ No \_\_\_\_\_

7. Do you have any problems or areas of concern at home or at work that might interfere with your duties as a juror during trial? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please describe: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

8. What part of town do you live in? (Please circle one.)

City \_\_\_\_\_ Suburb \_\_\_\_\_ Rural \_\_\_\_\_

9. How long have you lived at your present residence?

\_\_\_\_\_

10. Do you own or rent? Own \_\_\_\_\_ Rent \_\_\_\_\_

11. List areas of past residence within the last ten years and indicate how long you lived in each location (you do not need to give addresses):

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

12. Where were you born? \_\_\_\_\_

13. Where were you raised? \_\_\_\_\_

14. Is English your first language? Yes \_\_\_\_\_ No \_\_\_\_\_

If no, what is your first language? \_\_\_\_\_

15. Do you have any difficulty:

Reading English? Yes \_\_\_\_\_ Sometimes \_\_\_\_\_ No \_\_\_\_\_

Understanding spoken English? Yes \_\_\_\_\_ Sometimes \_\_\_\_\_ No \_\_\_\_\_

16. Are you currently employed outside the home? Yes \_\_\_\_\_ No \_\_\_\_\_

If so, by whom are you employed? \_\_\_\_\_

Full or part-time? \_\_\_\_\_

If part-time, how many hours per week? \_\_\_\_\_

How long have you been so employed? \_\_\_\_\_

17. What are your specific duties and responsibilities on the job? \_\_\_\_\_

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

18. Do you have the authority to hire and fire employees or have a significant say in these decisions if someone else has the final word? Yes \_\_\_\_\_ No \_\_\_\_\_

19. If not currently employed outside the home, please check the category that applies to your employment status:

- Homemaker
- Student
- Unemployed-looking for work
- Retired
- Unemployed-not looking for work
- Disabled
- Other (please explain) \_\_\_\_\_

20. If you are not currently employed outside the home, but were previously so employed, please describe your most recent form of employment, stating the name of your employer, whether you were employed full or part-time, when and for how long you were so employed: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

21. Please list your work experience over the past ten years and state when and for how long you were employed at each job. Please give a brief description of each job.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

22. Have you ever worked in journalism or the news industry in any capacity?

Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please state where and when you were so employed and give a brief description of your duties: \_\_\_\_\_

\_\_\_\_\_

23. Do you have any close friends or relatives who either have worked or are currently working in journalism or in the news industry in any capacity? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please state where and when he or she was so employed and give a brief description of his or her duties: \_\_\_\_\_

\_\_\_\_\_

24. Have you ever worked in a laboratory or in any medical research or testing facility?  
Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please describe your duties and when and for how long you were so employed:

---

---

25. Do you now work or have you ever worked in law enforcement or the security field (including federal, military, state, county, corrections, city, auxiliary, volunteer, etc.)?  
Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please describe the position(s) and dates in detail: \_\_\_\_\_

---

---

26. Have any of your relatives and/or close friends ever worked in law enforcement or the security field (including federal, military, state, county, corrections, city, auxiliary, volunteer, etc.)? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please describe in detail: \_\_\_\_\_

---

---

27. What is the highest grade in school that you completed? \_\_\_\_\_

28. Please name any educational programs you have attended (vocational schools, certification programs, part-time study):

---

---

29. If you attended any schools or colleges after high school, please name the schools and colleges you attended, your major areas of study, and the field in which you obtained your degree(s):

---

---

---

30. Are you currently in school? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, which school and what are you studying? \_\_\_\_\_

---

---

31. Do you plan to attend school in the future? Yes \_\_\_\_\_ No \_\_\_\_\_  
If yes, where do you plan to go and what do you plan to study? \_\_\_\_\_

\_\_\_\_\_

32. What special training or skills do you have? (Please include any technical, medical, psychology or scientific training and special skills acquired on the job.) \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

33. While in school, what was your favorite subject? \_\_\_\_\_

34. What was your least favorite subject? \_\_\_\_\_

35. Do you have any legal training or have you taken any law course? Yes \_\_\_\_\_ No \_\_\_\_\_  
If yes, please explain: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

36. Do you know anyone who has been a victim of a sexually motivated crime? Yes \_\_\_\_\_  
No \_\_\_\_\_

If yes, please explain? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

37. Why do you think people commit sex offenses?

\_\_\_\_\_  
\_\_\_\_\_

38. This case involves allegations of sexual assault. Knowing that, would that prevent you from serving as an impartial juror?

Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please explain \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

A.7

39. Have you ever served in the military? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please list: Branch of service: \_\_\_\_\_

Rank: \_\_\_\_\_ Dates of service: \_\_\_\_\_

40. Do you have combat experience? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please explain: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

41. Were you ever involved in any way with military law enforcement, court martial or investigations? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please explain: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

42. Was your spouse or significant other ever in the military? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, what branch and when? \_\_\_\_\_

43. Please complete regarding your current spouse or partner:

Spouse/partner's place of birth? \_\_\_\_\_

Spouse/partner's race or ethnic background? \_\_\_\_\_

Spouse/partner's current employment status? \_\_\_\_\_

Spouse/partner's occupation? (If that person is retired, unemployed or disabled, what his or her occupation?) \_\_\_\_\_

By whom is he or she employed? \_\_\_\_\_

How long has he or she worked there? \_\_\_\_\_

What is the last level of education he or she completed? (Please list any degrees he or she has.) \_\_\_\_\_

\_\_\_\_\_

44. What are/were your parents' (and/or step-parents') occupations? (If retired or deceased, what did they do?)

Mother \_\_\_\_\_

Step-Mother \_\_\_\_\_

Father \_\_\_\_\_

Step-Father \_\_\_\_\_

45. Do you have any brothers or sisters with whom you were raised? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please list:

<u>Sex</u>	<u>Age</u>	<u>Occupation</u>

46. Have you ever been in a courtroom before? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, how many times and for what purpose(s)? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

47. Have you or any family members or close friends ever sued or been sued in a civil action?  
Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please explain the nature of the dispute(s): \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

48. Have you ever served on a trial jury before? Yes \_\_\_\_\_ No \_\_\_\_\_

For each time you have sat on a trial jury, please indicate whether it was a criminal case or a civil case:

<u>Type of case</u>	<u>Year</u>	<u>Was a verdict reached?</u> <u>(Please DO NOT state the verdict)</u>

49. Have you ever served on a grand jury? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, was it state or federal and when was it? \_\_\_\_\_

50. Have you ever been the foreperson of a trial jury or grand jury? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please state what type of case and when: \_\_\_\_\_  
\_\_\_\_\_

**In this case, the defendant is presumed innocent. No issue about the potential penalty could possibly arise unless the State of Ohio first proves beyond a reasonable doubt that the defendant is guilty of a capital murder crime. In any case where a *possible* punishment may be the death penalty, the law requires that jurors answer questions regarding their thoughts, feelings and opinions about the Death Penalty. You must not assume from any of the questions asked that the Defendant is in fact guilty of anything.**

51. Please describe your views on the death penalty:

---

---

---

---

---

---

52. Have you ever held a different view on the death penalty? Yes \_\_\_\_ No \_\_\_\_

If "yes," what caused you to change your view?

---

---

---

---

53. Which of the following statements best reflects your view of using the death penalty (check one)?

- Appropriate in every case where someone has been murdered.
- ~~Appropriate with very few exceptions where someone has been murdered.~~
- Appropriate in some murder cases, but inappropriate in most murder cases.
- Opposed with very few exceptions.
- Opposed in all cases.

54. DIRECTIONS: Place a check in one of the spaces next to each statement indicating your agreement and/or disagreement with the statement at the left.

<u>Statement</u>	<u>Strongly Agree</u>	<u>Agree</u>	<u>Slightly Agree</u>	<u>Slightly Disagree</u>	<u>Disagree</u>	<u>Strongly Disagree</u>
The death penalty should <b>never</b> be used as the punishment for any murder.						
The death penalty should <b>always</b> be used as the punishment for every murder.						
The death penalty should <b>sometimes</b> be used as the punishment in certain murder cases.						
Only a guilty person would object to a search of his or her home.						
A person sentenced to death in Ohio will probably never be executed.						
It does not make any difference to me whether or not we have a death penalty in Ohio.						
Convicted criminals always get out of prison too soon.						
The testimony of a law enforcement officer is entitled to more weight simply because he or she is a law enforcement officer.						
The testimony of a law enforcement officer is entitled to less weight simply because he or she is a law enforcement officer.						
The courts have made it too difficult to prosecute and convict criminals.						
If the prosecution goes to the trouble to bring someone to trial, that person is probably guilty.						

People in prison have a better life than most of the taxpayers who pay for the prisons.						
---	--	--	--	--	--	--

55. A defendant in a criminal case has a right to testify and produce evidence, but a defendant does not have to testify or produce any evidence. Do you believe that a defendant in a criminal case should testify or produce some evidence to prove that he or she is not guilty?  
 Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please explain why: \_\_\_\_\_  
 \_\_\_\_\_

56. Because this case has received some publicity, some of you may have heard or read something about this case at some time. It is vitally important that you truthfully answer the following questions concerning what you have learned about this case from the media.

Please indicate from what sources you have learned about this case (check as many as apply):

- Television \_\_\_\_\_ Newspapers \_\_\_\_\_
- Radio \_\_\_\_\_ Have had conversations with other people \_\_\_\_\_
- Have overheard other people discuss it \_\_\_\_\_
- Other \_\_\_\_\_ (Please specify) \_\_\_\_\_

57. Based on what you may have heard about this case, do you have an impression or opinion about what happened and who is responsible? Yes \_\_\_\_\_ No \_\_\_\_\_

If "yes," please explain: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

58. Do you know or are you acquainted with any persons in the following positions (if so, please check the appropriate boxes):

- The Judge
- The Bailiff
- The Clerk of Courts
- Other Employees in the Courthouse
- The County Prosecutor or an employee in that Office
- Law Enforcement Officers working in this County
- The Defense Attorneys or someone employed by them

59. Do you have a family member or close friend who works in the Legal System (e.g., lawyers, police officers, probation officers, federal agents, prison or jail guards or other institutional employees)?

Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, what are their names and please describe how you know them: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

60. What are your opinions, if any, about prosecuting attorneys in general? \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

61. What are your opinions, if any, about criminal defense attorneys in general? \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

62. Since the deaths of the Sherree Crawford, Mary Jo Newton, Kimya Rolison, and Esme Kenney, have you had occasion to form an opinion about who you think murdered them?

Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please explain: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

63. Did you know any of these 4 people named above or ever encounter any of them before they died?

Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please explain: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

64. Do you know any of any of their relatives? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please explain: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

65. Do you know Anthony Kirkland? Yes \_\_\_\_\_ No \_\_\_\_\_  
If yes, please explain: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

66. Do you know any of Anthony Kirkland's relatives? Yes \_\_\_\_\_ No \_\_\_\_\_  
If yes, please explain: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

67. When you were growing up, what was the racial and ethnic make-up of your neighborhood?  
\_\_\_\_\_  
\_\_\_\_\_

68. Is there any racial or ethnic group that you do not feel comfortable being around?  
Yes \_\_\_\_\_ No \_\_\_\_\_  
If yes, please explain: \_\_\_\_\_  
\_\_\_\_\_

69. With respect to the issue of racial discrimination against African-Americans in our society, do you think it is:  
A very serious problem \_\_\_\_\_ A somewhat serious problem \_\_\_\_\_  
Not too serious \_\_\_\_\_ Not at all serious \_\_\_\_\_ Not a problem \_\_\_\_\_

70. Have you ever had a negative or frightening experience with a person of another race?  
Yes \_\_\_\_\_ No \_\_\_\_\_  
If yes, please explain the circumstances: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

71. Have you ever been exposed to persons who exhibited racial, sexual, religious and/or ethnic prejudice? Yes \_\_\_\_\_ No \_\_\_\_\_  
If yes, please describe the experience: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

72. Are you a member of any group or organization which is concerned with racial or ethnic issues? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please identify the groups: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

73. Are you a member of any private club, civic, professional or fraternal organization which limits its membership on the basis of race, ethnic origin, gender or religion?

Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please identify the group(s) or organization(s): \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

74. Do you feel that people are overly sensitive about racial and ethnic jokes?

Yes \_\_\_\_\_ No \_\_\_\_\_

75. Do you identify with any religious or spiritual group, denomination, or set of teachings?

Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please provide the following information:

How active are you? \_\_\_\_\_

Have you ever held a position of responsibility in your religious community? \_\_\_\_\_

76. Are you active in politics? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please explain: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

77. Generally speaking, do you consider yourself to be (check one):

Very Conservative	_____	Liberal	_____
Conservative	_____	Very Liberal	_____
Moderate	_____	Other	_____

78. Have you ever consulted with an expert other than a medical doctor?

Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please specify the type of expert and the purpose for which she or he was consulted:

---

---

---

79. Are you familiar with psychological testing? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, how do you feel about the validity of these tests? \_\_\_\_\_

---

---

80. Have you ever studied psychiatry, psychology, or any related subjects?

Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please explain: \_\_\_\_\_

---

---

81. Have you, or any member of your family, or close friend ever consulted a psychiatrist or psychologist for professional services? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, how did this consultation affect your opinion about the value of psychiatry or psychology? Please explain: \_\_\_\_\_

---

---

82. If not answered elsewhere, have you, or any member of your family, or a close friend ever received treatment for drug or alcohol use? Yes \_\_\_\_\_ No \_\_\_\_\_

83. There is a wide range of opinions about psychologists, psychiatrists, counselors and therapists. Generally, how do you regard these professions? \_\_\_\_\_

---

---

84. Do you know anyone who has a mental health problem? Yes \_\_\_\_\_ No \_\_\_\_\_

If so, without violating your sense of the right to privacy, please briefly describe the situation: \_\_\_\_\_

---

---

---

85. Do you think people are born with mental health problems or do they develop after birth or both?

Born with \_\_\_\_\_ After birth \_\_\_\_\_ Both \_\_\_\_\_

86. Do you have any specialized training or course work in medicine, science or biology?

Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please describe: \_\_\_\_\_

\_\_\_\_\_

87. Did you take science or math courses in college? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, what types of course(s) (e.g., biology, chemistry, physics, math): \_\_\_\_\_

\_\_\_\_\_

88. Please check the answer which best describes how comfortable you usually feel dealing with mathematical concepts:

\_\_\_\_\_ Usually very comfortable

\_\_\_\_\_ Usually fairly comfortable

\_\_\_\_\_ Usually fairly uncomfortable

\_\_\_\_\_ Usually very uncomfortable

89. Have you ever taken any courses in statistics? Yes \_\_\_\_\_ No \_\_\_\_\_

If so, please state when and where: \_\_\_\_\_

\_\_\_\_\_

90. Are you or have you been a member of Neighborhood Watch? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, what was the nature of your involvement? \_\_\_\_\_

\_\_\_\_\_

91. Do you have: (please check)

Security bars \_\_\_\_\_

Alarms \_\_\_\_\_

Guard dog \_\_\_\_\_

Weapons for self-protection \_\_\_\_\_

92. Have you or anyone close to you ever had a negative experience with a person who was high on drugs or drunk? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please describe: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

93. Do you belong to any group or organization which is concerned with drug or alcohol abuse? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please describe: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

94. Do you belong to any group or organization which is concerned with crime prevention or victims' rights? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please describe: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

95. Have you ever been a victim of a crime? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, how many times? \_\_\_\_\_

What type of crime(s)? \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

96. Did you or anyone else report it to the police? Yes \_\_\_\_\_ No \_\_\_\_\_

If no, why not? \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

97. Were you interviewed by police? Yes \_\_\_\_\_ No \_\_\_\_\_

98. Was the suspect caught? Yes \_\_\_\_\_ No \_\_\_\_\_

99. Do you feel the job the police did on it was

Satisfactory \_\_\_\_\_ Why? \_\_\_\_\_

Unsatisfactory \_\_\_\_\_ Why? \_\_\_\_\_

100. Did you testify in court? Yes \_\_\_\_\_ No \_\_\_\_\_

101. How has that experience affected your impressions about the criminal justice system?

\_\_\_\_\_  
\_\_\_\_\_

102. Other than answers you may have already given, have you had a good or positive experience with any police officers? Yes \_\_\_\_\_ No \_\_\_\_\_

Please explain and indicate the police agency involved: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

103. Other than answers you may have already given, have you had a bad or negative experience with any police officers? Yes \_\_\_\_\_ No \_\_\_\_\_

Please explain and indicate the police agency involved: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

104. In the past several years there has been much public discussion concerning the issue of crime in our society. Please describe your personal feelings about this issue.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

105. What are your thoughts about whether the police carefully and completely investigate crimes?

---



---



---

106. Do you think that crime is:

Going up \_\_\_\_\_ Going down \_\_\_\_\_ Remaining the same \_\_\_\_\_

107. Do you feel that people convicted of crimes are treated:

Too leniently \_\_\_\_\_ Too harshly \_\_\_\_\_ Justly \_\_\_\_\_

108. What do you believe are the major causes of crime? \_\_\_\_\_

---



---



---

109. Have you, or a member(s) of your family, or someone close to you ever been accused of or charged with a criminal offense? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, how was this person related to you? \_\_\_\_\_

What was the crime? \_\_\_\_\_

Were you (they) convicted? Yes \_\_\_\_\_ No \_\_\_\_\_

How has that experience affected your impressions about the criminal justice system?

---



---

110. Have you ever visited or been inside a prison/jail? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please explain the circumstances and describe how it made you feel: \_\_\_\_\_

---



---

111. Have you ever spoken with someone who works at a prison/jail or an inmate in a prison/jail about their experiences? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please explain the circumstances: \_\_\_\_\_

---



---

112. Do you currently, or have you during the past five (5) years, done any volunteer work?

Yes \_\_\_\_\_ No \_\_\_\_\_

If so, for what organization(s): \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

113. Are there any charities or political organizations to which you make donations?

Yes \_\_\_\_\_ No \_\_\_\_\_

If "yes," please explain: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

114. What type of books do you prefer? (Example: non-fiction, historical, romance, espionage, mystery) \_\_\_\_\_

115. Do you read a newspaper on a regular basis?

Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, which newspaper(s): \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

116. Do you read any magazines or periodicals on a regular basis?

Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, which ones? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

117. Which television shows do you watch on a regular basis? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

118. Do you ever watch television programs that show real life police activities such as "Cops," "America's Most Wanted," or "First 48"? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, Very often \_\_\_\_\_ Occasionally \_\_\_\_\_ Almost never \_\_\_\_\_

119. When you have the time, what are your leisure time interests, hobbies, and activities?

---

---

---

120. What, if any, groups or organizations do you belong to now or have you belonged to for a significant period of time in the past?

A. Now: \_\_\_\_\_

B. Previously: \_\_\_\_\_

---

121. Have you served as an officer in any one of these groups? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, which group(s): \_\_\_\_\_

---

---

122. In what sorts of situations would you consider yourself to be --

A Leader: \_\_\_\_\_

---

A Follower: \_\_\_\_\_

---

123. Is there any reason why, if you were the defendant, you would not want someone in your state of mind on the jury? Yes \_\_\_\_\_ No \_\_\_\_\_

124. Apart from what you may have read or heard, do you have any personal knowledge of this case or the charges that have been referred to? Yes \_\_\_\_\_ No \_\_\_\_\_

If the answer is yes to the above, please state what your personal knowledge consists of:

---

---

---

---

125. Do you know any of the other prospective Jurors in this case? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please explain:

---

---

---

---

126. If selected to serve as a juror on this case, the Court would order you not to read, listen to or watch any accounts of this case reported by television, radio or other news media. Will you have any difficulty following this order?

Yes \_\_\_\_\_ No \_\_\_\_\_ Do not know \_\_\_\_\_

127. If you are selected as a juror in this case, the Court would order you not to discuss this case with anyone unless and until permitted to do so by the Court. Will you have any difficulty in following this order?

Yes \_\_\_\_\_ No \_\_\_\_\_ Do not know \_\_\_\_\_

128. As a result of answering this Juror Questionnaire, have you started to form any opinions about this case? Yes \_\_\_\_\_ No \_\_\_\_\_

If yes, please explain:

---

---

---

---

129. Is there anything going on in your life either at home or at work that might make it difficult for you or distract you if your were seated as a juror in this case? Yes \_\_\_\_\_ No \_\_\_\_\_

If "Yes", please explain:

---

---

---

---

130. Is there any matter not covered by this questionnaire that you think the attorneys or Court might want to know about when considering you as a juror in this case? \_\_\_\_\_

---

---

---

---

**I DO HEREBY SOLEMNLY SWEAR OR AFFIRM THAT THE ANSWERS TO THE FOREGOING QUESTIONS ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.**

Date: \_\_\_\_\_

Signature: \_\_\_\_\_



**2945.59 Proof of defendant's motive.**

In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

Effective Date: 10-01-1953

ARTICLE IV. RELEVANCY AND ITS LIMITS

**RULE 401. Definition of "Relevant Evidence"**

"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 be without the evidence.

[Effective: July 1, 1980.]

**RULE 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Undue Delay**

(A) **Exclusion mandatory.** Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

(B) **Exclusion discretionary.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.

[Effective: July 1, 1980; amended effective July 1, 1996.]

**RULE 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes**

(A) **Character evidence generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, subject to the following exceptions:

(1) **Character of accused.** Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable.

(2) **Character of victim.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable.

(3) **Character of witness.** Evidence of the character of a witness on the issue of credibility is admissible as provided in Rules 607, 608, and 609.

(B) **Other crimes, wrongs or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[Effective: July 1, 1980; amended effectively July 1, 2007.]