ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	CASE NO. 2010-1105
Appellee,	:	
vs.	:	
GREGORY C. OSIE,	:	{Capital Case}
Appellant.	:	

On Appeal from the Court of Common Pleas,
Butler County, Ohio Case No. CR2009-02-0302

MERIT BRIEF OF APPELLEE STATE OF OHIO

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STATEMENT OF THE CASE

Procedural Posture:

This appeal is from the judgment of the Court of Common Pleas of Butler County, Ohio, wherein Defendant-Appellant, Gregory C. Osie, was convicted and sentenced to death on May 12, 2010, for the aggravated murder of David Williams in violation of R.C. 2903.01(B) with two specifications pursuant to R.C. 2929.04(A)(7), and one specification pursuant to 2929.04(A)(8). Appellant was also found guilty of murder in violation of R.C. 2903.02(A), aggravated burglary in violation of R.C. 2911.11(A)(2), aggravated robbery in violation of R.C. 2911.01(A)(1), and tampering with evidence in violation of R.C. 2921.12(A)(1). (*Entry of Verdict* filed April 29, 2010, and *Judgment of Conviction Entry* filed May 12, 2010; see also *Opinion as to Sentence* filed May 12, 2010.)

Appellant was arrested on February 14, 2009, and was subsequently indicted on March 11, 2009, for the above charges by the Butler County Grand Jury; he entered a plea of not guilty at arraignment. A pretrial motion to suppress was filed and heard on September 11, 2009; this motion was denied by the trial court on the record at the September hearing, and then formally in an opinion and entry filed on March 15, 2010. Numerous other pretrial motions were filed and determined by the trial court on March 15, 2010.

On March 31, 2010, Appellant waived a jury and a three-judge panel was assigned to hear all the charges and specifications contained in the indictment. After hearing all the evidence presented at trial, the three-judge panel found appellant guilty as to all charges and specifications, except count one, in which Appellant was found guilty of a lesser included charge of murder. (*Entry of Verdict,* filed 4/29/10). After the penalty phase hearing which followed on April 28-29, 2010, the three-judge panel unanimously concluded that the aggravating circumstances of which Appellant

was found guilty outweighed the mitigating factors beyond a reasonable doubt and imposed a sentence of death as to the aggravated murder. (*Sentencing Opinion,* filed May 12, 2010). On June 25, 2010, Appellant filed a notice of appeal in this Court.

Statement of Facts:

The factual background of the present case began with the formation of United Unlimited Contractors. (T.p. 23-24)[1] The contracting company consisted of four people, Nick Wiskur, Robin Patterson, Michael Bustle and David Williams. (T.p. 24) David Williams provided the money to the business, ten thousand dollars. (T.p. 24) Robin Patterson served as the office manager. (T.p. 25) According to Wiskur, the company would conduct a financial meeting every four weeks. (T.p. 26)

At one point during the early existence of the company, Wiskur became aware that there was an issue of forged checks. (T.p. 26) Wiskur specifically investigated one such check, State's Exhibit 47, which was cashed at a Marathon gas station but which bounced because the account was closed. (T.p. 27) During his investigation, Wiskur discovered that Appellant was the person who attempted to cash the check. (T.p. 30-31) He informed Mr. Williams of his findings. (T.p. 28)

On February 13, 2009, Wiskur was with Mr. Williams when Appellant placed a call to Mr. Williams. (T.p. 28-29, 32-33) According to Wiskur, the "conversation was very heated. There was some name calling on both sides. It made reference to theft of money and property." (T.p. 45) Mr. Williams informed Appellant that "[w]ell, I'm going to go to the police. I'm going to file charges. This needs to be taken care of." (T.p. 45)

Detective Gerhardt of the Butler County Sheriff's Office was called the next day, February

[1] Unless otherwise noted, citations to the transcript of proceedings (T.p.) refer to the Bench Trial Transcript from April 19, 21, and 22, 2010.

14, 2009, to respond to the murder of Mr. Williams at approximately 5 p.m.. (T.p. 233-234) Gerhardt spoke to Williams' daughter at the scene and gathered information regarding Mr. Williams' friends and associates, including his business partners. (T.p. 234-235) Based on the information obtained, law enforcement proceeded to Appellant's residence. (T.p. 235)

Once at Appellant's residence, detectives knocked on the door, but received no answer. (T.p. . 235) Upon walking away from the residence, the detectives observed a red truck with its headlights still on, that had recently pulled into a parking space in front of the apartment complex. (T.p. 237) This vehicle fit the description that the detectives had for Appellant's vehicle. The detectives had observed it for a second when the truck suddenly went into reverse and peeled out backward. (T.p. 237) Because they believed the vehicle was potentially driven by Appellant, the detectives "ran for our cars in an attempt to catch up with that vehicle." (T.p. 237)

Eventually, the detectives were able to corral the vehicle, corner it, and get it stopped. (T.p. 237) Appellant was in fact the driver of the vehicle and was taken to the sheriff's station for an interview. (T.p. 238) At the station, Appellant was placed in an interview room and read his *Miranda* rights. (T.p. 239) The general practice at the Sheriff's department is to record statements, not an entire interview. (T.p. 239)

After being given his *Miranda* warnings and voluntarily waiving his rights, Appellant gave an audio taped statement. This statement was admitted both in its audio form, and in a written transcript. (See, State's Exhibits 54 & 55). During this interview, Appellant admitted to going to the victim's home on the night in question. (State's Exhibits 55, p. 2) Appellant then recalled that the two men discussed the fact that Williams was planning on pressing charges about Patterson, whom Appellant called "my girl." (State's Exhibits 55, p. 3) Appellant then explained that he attempted to persuade Williams not to file any charges. (State's Exhibits 55, p. 3) Thereafter,

Appellant began telling a fictitious story about Williams coming at him with a knife, and Appellant being forced to stab him in self-defense.[2] (State's Exhibits 55, p. 3-5)

Appellant then explained that he left the scene, and talked to Robin about what she did last night and what he did. (State's Exhibits 55, p. 5) Appellant admitted that as part of making contact with Robin, he sent her a text message that informed her that she did not have to worry about Dave anymore. (State's Exhibits 55, p. 7) When the detectives inquire further about what Appellant did to Williams, he admitted that he "kind of beat Dave up and stabbed him" (State's Exhibits 55, p. 8) He continued this admission by again noting that he punched Williams a couple of times, including striking Williams' face, and that "as big as I am and as small as he is, he went, when I punched him, he went flying backwards." (State's Exhibits 55, p. 9-13) When asked what he believed was going to happen with this situation, Appellant stated that he was going to jail for "murder, probably." (State's Exhibits 55, p. 15)

While Appellant continued in the early part of the interview to lie to the detectives about the full scope and breadth of his involvement in the crime, he eventually made several stunning admissions. First, Appellant admitted to stabbing Williams 4-5 times. (State's Exhibits 55, p. 21) Appellant also confessed that he sliced William's neck open after stabbing him multiple times. (State's Exhibits 55, p. 22) However, even after these admissions, Appellant still attempted to disavow stealing from he Appellant. In fact, Appellant incredulously informed the detectives that a burglar may have come into the home after he murdered Williams and stolen the items. (State's Exhibits 55, p. 26-27)

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[2] Appellant's assertion that Williams came at him with a knife in a threatening way was especially incredible considering that Williams suffered from familial or essential tremors. (T.p. 205) In fact, Williams' case of tremors was so strong that he could not really even hold a pen without shaking very badly, could not walk stairs without falling, had to drink though a straw because of the severity of the shaking and could not pick up silverware. (T.p. 18, 207-208)

Finally, after acknowledging that he has confessed to murder, Appellant admits to stealing the television, cell phone, and knife. (State's Exhibits 55, p.34, 37, 38-39, 40-41) Appellant further confesses that he pulled all the stuff out of Williams' safe in an apparent attempt to make it look like a robbery gone bad. (State's Exhibits 55, p. 35, 44)

After admitting to all of these facts, the detectives asked Appellant to tell the story in his own words. (State's Exhibits 55, p. 43) Appellant began his story with the fact that Williams was "accusing my girlfriend Robin of stealing money and things like that * * *." (State's Exhibits 55, p. 43) However, even after all of these admissions, Appellant was still clinging to the lie that Williams came at him first with the knife. (State's Exhibits 55, p. 44) At the end of this first interview where Appellant has admitted to a brutal murder, he callously asked "Can I go home?" * * * "Please." (State's Exhibits 55, p. 45)

In a second recorded interview that began shortly after the first, the detectives finally got Appellant to admit that he was the one that went into the kitchen to get a knife, and that Williams followed him. (State's Exhibits 55, Part II, p. 4-5) After stating that he grabbed a knife out of the butcher block, Appellant recollected that Williams tried to back away from him, and went into the living room. (State's Exhibits 55, Part II, p. 5, 8) When Appellant caught up with Williams, he was facing him when Appellant thrust the first stab would into Williams' chest. (State's Exhibits 55, Part II, p. 5) This wound cased Williams to fall to the ground where Appellant took knife out of Williams' body and stabbed him a few more times. (State's Exhibits 55, Part II, p. 5-6) Appellant also reaffirmed that he later sliced Williams' through, but now acknowledged that he did this out of "anger". (State's Exhibits 55, Part II, p. 6) At the conclusion of this second interview, Appellant admits to all the stabs wounds, the throat slice, and the theft of the TV and the knife. (State's Exhibits 55, Part II, p. 8-11) However, demonstrating his lack of full cooperation, Appellant still

would not admit to taking Williams' credit cards.[3] (State's Exhibits 55, Part II, p. 6)

Dr. James Swinehart is a forensic pathologist for Butler County. (T.p. 212) Dr. Swinehart conducted the autopsy on Williams. (T.p. 212) From the pictures obtained at the crime scene (State's Exhibits 81, 82, 83 & 84) Dr. Swinehart noted that "the victim is lying on his back. He's clothed, and there are multiple stab wounds present. I see four on the anterior abdominal wall. There's a lot of blood about the face. It appears that his fist is clenched indicating rigor mortis has set in." (T.p. 214) Dr. Swinehart testified that based on the body temperature, the victim died between the hours of midnight and 4:00 or 5:00 a.m. (T.p. 217)

At the autopsy, when Dr. Swinehart "examined the chest, left anterior thorax, there were five distinct stab wounds clustered basically round the left nipple area. Several of these stab wounds [] actually penetrated the chest wall and perforated the upper lobe of the left lung." (T.p. 218) In addition to the chest wounds, Swinehart "identified five additional stab wounds in the abdominal cavity. *** In addition, there were two large incised wounds of the anterior neck. The lower of these wounds measured approximately five and three-fourths inches in length and actually cut through the larynx or thyroid cartilage exposing the windpipe." (T.p. 219) Williams also suffered other injuries; when Dr. Swinehart examined the arms, "on the posterior right forearm, there were four distinct stab wounds or defense wounds where the individual had raised his arm up to fend off the knife. And then there was fifth defense wound on the tip of the right third finger. When I examined the posterior aspect of the left forearm, that would be 16, there was a large purple gray contusion which we also considered a defense injury." (T.p. 219)

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[3] However, through the testimony of John Hadden (T.p. 122-129), and Brandon Musgrove (T.p. 129-132), the State was able to prove that Appellant had indeed stolen the credit card and both used and attempted to use the card multiple times. (See, also, State's Exhibit's 42,43,44)

Thus, according to Dr. Swinehart, Williams died of "exsanguination both internal and external," which means that Williams bled to death. (T.p. 229)

After Appellant was indicted, he was incarcerated at the Butler County Jail. Donald Simpson was Appellant's cell-mate at the jail from February 15, 2009 until April of 2009. (T.p. 95, 97) During that time, Appellant discussed the crime with Simpson and told him "that David Williams was pressing charges on Robin Patterson for stealing around $18,000." (T.p. 99) According to Appellant Robin had asked him to go and speak with Williams and try to convince him not to press charges. (T.p. 99)

On the night of the murder, Appellant told Simpson that he and Robin were together, doing drugs. (T.p. 99) Appellant informed Simpson that he did go to Mr. Williams house and arrived at Williams residence around 1:30 a.m. (T.p. 100) No one else was there but Appellant and Williams. (T.p. 104) Appellant admitted that "he had stabbed him like four or five times in the chest, and that when he was laying there, that he freaked out, and so he had rushed down and took the knife and sliced his throat." (T.p. 100) And, unlike his statements to the detectives, Appellant admitted to Simpson that he stole Williams credit card and obtained gas with it, and even attempted to buy a diamond ring for Robin from the Meijer store. (T.p. 101-102)

Prior to Donald being released from jail, Appellant asked Simpson "to go and find the murder weapon and place it in Mrs. Patterson's car." (T.p. 103) Appellant even described the knife as a "hunting knife, about 12 inches, you know, long." (T.p. 103) In order to execute this plan, Appellant specifically informed Simpson of the location of the knife: at the corner of Cox road and Barret roads. (T.p. 110)

After being contacted by him, Detective Gerhardt spoke to Simpson. (T.p. 249) Based on her conversation with Simpson, the sheriff's department located a knife at the area of Cox and Barrett

roads. (T.p. 249-250; State's Exhibit 53) After locating the knife, Appellant's cell was searched. (T.p. 250)

During the search, a letter written to "baby girl" was discovered. (State's Exhibit 64) In said letter, Appellant specifically addresses Robin Patterson, indicating that she is "baby girl". (State's Exhibit 64) Additionally, Appellant repeatedly talks about the crime, how Patterson had stolen from Williams, and how he had tried to help her. (State's Exhibit 64) In a telling passage, Appellant informs Patterson that "People are saying they can't believe I gave everything up for you Robin Patterson. But they say you know how to get what you want and you will do it at any cost even killing and framing someone else. People are saying that I am a monster. * * * That you don't care anything about me or showing people texts of me sending you 'I took care of it' if you did care you would be talking to me and not showing people things. * * * I will never let anyone ever hurt you." (State's Exhibit 64, p. 29) Appellant continues noting that he will not let anything bad happen to Robin when he writes "I will not let anyone or anything hurt you. Because I love you with all my heart. I gave everything up for you, who else would do that for you." (State's Exhibit 64, p. 37)

Based upon these facts, Appellant was convicted of aggravated murder, murder, aggravated burglary, aggravated robbery, tampering with evidence, and three death penalty specifications, two pursuant to R.C. 2929.04(A)(7), one being in the course of aggravated burglary and the other being in the course of aggravated robbery, with the third specification pursuant to R.C. 2929.04(A)(8) being that the victim of the aggravated murder was a witness to an offense who was purposely killed to prevent the victim's testimony in any criminal proceeding. (See, *Entry of Verdict*, 4/19/10.)

Thereafter, in the penalty phase, Appellant presented the testimony of five different witnesses, and chose to waive his ability to give an unsworn statement. Mitigating factors relating to Appellant's history, character and background were developed through these witnesses and the

arguments of counsel. Balancing these mitigating factors against the aggravating circumstances, the three-judge panel unanimously concluded that the aggravating circumstances of which Appellant was found guilty outweighed the mitigating factors beyond a reasonable doubt. Consequently, the Appellant was sentenced to death. This appeal ensued.

ARGUMENT

Proposition of Law I:

The Panel complied with all requirements and allowed the Appellant to exercise or waive his right to Allocution.

In Appellant's first proposition of law he claims that when he is permitted to speak at the mitigation hearing, and again permitted to speak at the sentencing hearing, but voluntarily chooses not to, his right to allocution is violated. The State disagrees.

Crim.R 32.(A) states:

> (A) Imposition of sentence
> Sentence shall be imposed without unnecessary delay. Pending sentence, the court may commit the defendant or continue or alter the bail. At the time of imposing sentence, the court shall do all of the following:
>
> (1) Afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment.
> (2) Afford the prosecuting attorney an opportunity to speak;
> (3) Afford the victim the rights provided by law;
> (4) In serious offenses, state its statutory findings and give reasons supporting those findings, if appropriate.

Appellant focuses his argument on Crim.R. 32(A)(1). In Appellant's eyes, he was not afforded an opportunity to speak before his sentence was pronounced. However, the record in the present case paints a much different picture. On April 29, 2010, at the end of the mitigation phase of Appellant's trial, but before closing arguments, the following exchange occurred:

> JUDGE POWERS: Good morning, ladies and gentlemen. All right. Both the State and the defense have rested. The Court would like to ask defense counsel a couple of questions here. Mr. Howard, has the defense in any way been denied or deprived of any resources which you felt were appropriate to defend Mr. Osie in this matter?
> MR. HOWARD: No, Your Honor.

JUDGE POWERS: Very well. Mr. Osie, are you satisfied with the job that your defense counsel have provided for you over the last week and a half or so?
DEFENDANT: Yes.
JUDGE POWERS: Very well. All right, Mr. Howard, does Mr. Osie have anything he'd like to say by way of allocution?
MR. HOWARD: No, Your Honor.
JUDGE POWERS: Does he understand that he can make an unsworn statement here today?
MR. HOWARD: He does, Your Honor.
JUDGE POWERS: And he understands that if he made such an unsworn statement, unless -- it not being a sworn statement, he would not be cross-examined in this matter?
MR. HOWARD: He does, Your Honor.
JUDGE POWERS: All right. And you've explained all of that to him?
MR. HOWARD: We have.
JUDGE POWERS: Do you understand that, Mr. Osie?
DEFENDANT: Yes.
JUDGE POWERS: All right. Very well. Thank you very much.
(T.p. 144-145)

After retiring to deliberate, the Panel reached its decision, and sentenced Appellant on May 3, 2010. However, realizing that it had made a mistake that caused the sentence to be void, the Panel brought Appellant back on May 10, 2010. The May 10, 2010 hearing, began with the presiding judge addressing the parties and making the following inquiries:

JUDGE POWERS: Very well. We were last on the record one week ago today. At that time, the Court conducted a sentencing hearing on May the 3rd, 2010. At that hearing, the Court failed to advise the defendant regarding the application of post-release control to the sentence imposed by the Court in this matter. As a result thereof, the Court believes that that sentence or a portion thereof was void, and that the defendant must be resentenced to correct that error, the same to **include an advice on the application of post-release control to this matter**. Accordingly, the Court has brought Mr. Osie forward here today to perform that duty. Before I do so, does counsel wish to put anything on the record?
MR. HOWARD: No, Your Honor.
MR. WASHINGTON: No.
JUDGE POWERS: Does Mr. Osie wish to say anything?
DEFENDANT: No, Your Honor.
JUDGE POWERS: All right. Very well. I just wanted to make sure. All right.
(5/10/2010 T.p. 3-4) (emphasis added)

From the following, it is clear that the Panel was going to conduct a new hearing to include, but not be limited to the application of post-release control. (Id.) After so advising the parties of this, the Panel then inquired of both attorneys for the Appellant, and the Appellant himself if they wished to say anything before the sentence was announced.[4] This passage clearly demonstrates that before issuing its final sentencing, the Panel afforded counsel an opportunity to speak on behalf of the Appellant and address the Appellant personally, asking if he wanted to make a statement on his own behalf.

While the Panel did not use the language of Crim.R. 32(A)(1) verbatim, no error arises from this failure to quote the rule. See, *State v. Crable*, Belmont App. No. 04 BE 17, 2004-Ohio-6812 (trial court's failure at sentencing to recite verbatim the rule governing defendant's right of allocution did not deprive defendant of said right, where trial court personally asked defendant if he wanted to say anything before sentencing). See, also, *State v. Shuri*, Greene App. No. 2009-CA-39, 2010-Ohio-1616; *State v. Massey*, Stark App. No.2006-CA-00370, 2007-Ohio-3637, *State v. Hunter* (July 23, 1993), Montgomery App. No. 13614, 1993 WL 290216.

Specifically, in *Crable*, the language used was "Mr. Crable, anything that you wish to say before I impose a sentence here?" *Id.* at ¶ 20. The *Crable* court noted that "[w]hile it is true that the trial court did not use the exact words of Crim.R. 32, it did give both counsel and Crable the opportunity to make a statement. Thus, the trial court adhered to the standard imposed by Crim.R. 32(A)(1) and *Green*, since Crable was asked personally whether he wanted to speak on his behalf

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[4] It should also be noted, that any failure of allocution at the May 3, 2010 hearing should have no impact on this proposition of law since that hearing was considered void by all parties. However, if not considered void, then the State would ask this Court to follow intermediate appellate court precedent in Ohio that holds when a defendant is not immediately allowed to speak, this can be remedied after sentence is imposed. See, *State v. Gotsis* (1984), 13 Ohio App.3d 282, 469 N.E.2d 548. As such, the failure to allow Appellant to speak on May 3rd, was remedied on May 10.

before sentencing. This assignment of error lacks merit." *Id.* at ¶ 20, citing *State v. Burkey*, 6th Dist. No. S-02-008, 2003-Ohio-1407. Thus, the Panel in the present case complied with the requirements of Crim.R. 32(A)(1).

What is more, from these two passages, it is abundantly clear that the Appellant was given two opportunities to address the Panel. However, Appellant never gave even the slightest indication that he wanted to address the Panel personally. Thus, not only was Appellant given the opportunity to present a statement twice, but he clearly wished to voluntarily waive the right to allocution. As such, Appellant's first assignment of error should be denied.

Even with the clear state of the record, Appellant argues that the present case is more similar to a past precedent of this Court that would require reversal. The case cited by Appellant is *State v. Green*, 90 Ohio St.3d 352, 738, N.E.2d 1208, 2000-Ohio-182.[5] In *Green*, the sentencing judge first indicated that he would sentence the defendant on various capital and non-capital charges at the same time. The judge then addressed defense counsel and the defendant jointly. Counsel then made certain remarks, but the defendant said nothing. *Id.* at 359. This Court found a violation of Crim.R. 32(A)(1) because the sentencing judge failed to address the defendant individually. *Id.*

Green is clearly distinguishable from the case at bar. The Panel began the May 10 sentencing hearing by indicating that it was going to issue a new sentence to Appellant. Thereafter, the Panel addressed and received a waiver of comment from both defense counsel. (May 10, 2010, T.p. 3-4) The Panel then focused on Appellant and had the following exchange:

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[5] It should be noted that the *Green* case was not a unanimous opinion. In fact, two dissenting Justices stated "From the context of the entire dialogue, there should be no question that the declaration "nothing further" should be fairly interpreted as a clear indication by counsel that Green had no desire to make his own statement. Because I strongly disagree with the majority's statement that "[t]he record demonstrates a clear violation of Crim.R. 32," I respectfully dissent." *Id.* at 380, (Resnick, J., concurring in part and dissenting in part, joined by Douglas, J., concurs in the foregoing opinion.)

JUDGE POWERS: Does Mr. Osie wish to say anything?
DEFENDANT: No, Your Honor.
JUDGE POWERS: All right. Very well. I just wanted to make sure. All right.

(Id.)

What is clear from this passage is that the Panel did personally address both defense counsel and Appellant. It is clear that Appellant understood that he was personally being addressed as he responded to the panel's question. (Id.) Thus, the *Green* case is distinguishable from the case at bar, and no reversible error occurred.

Appellant also seems to latch onto the fact the this Court in *Green* seemingly was not comfortable with the trial court's statement about the charges for which it was eliciting allocution. Appellant implies that the trial court in the present case was merely asking for allocution on post release control. This argument is meritless.

First, the Panel clearly stated that the sentence was void, and that it was going to resentence the Appellant to correct that error, the same to **include an advice on the application of post-release control to this matter**. (May 10, 2010, T.p. 3)(emphasis added) Clearly, the Panel indicated two things. It had to conduct a new sentencing hearing, and the new hearing would include, but would not be limited to post release control. As such, there is no question that all parties understood the nature of this hearing and that it was a complete sentencing hearing.

Appellant waived two opportunities to exercise his right of alloction. The panel addressed both Appellant and his counsel before imposing of sentence asking if they wished to address the court as to the sentence. Based upon the state of the record, no error can be had on these facts. The first proposition of law should be denied.

However, if this Court were to read the present transcript more in line with the *Green* majority, the State would either ask this Court to reconsider the *Green* decision as it applies to three-

judge panels, or to find any error to be harmless.

In asking this Court to reconsider *Green*, the State is mindful that other cases such as *State v. Reynolds* (1998), 80 Ohio St.3d 670, 684, 687 N.E.2d 1358, and *State v. Campbell* (2000), 90 Ohio St.3d 320, 738 N.E.2d 1178, are also cited by Appellant. However, both *Reynolds* and *Campbell* involved sentencing juries. This fact distinguished them from the argument that the state will now advance to this Court concerning reconsideration.

R.C. 2929.03(C)(2)(a)(iii)(b)(i) & (ii) set out that a penalty imposed in a capital murder case shall be determined by either a panel of three judges or by a trial jury **and** a trial judge. (Emphasis added) What is clear from this division is that when a jury is waived, the three-judge panel is tasked with total responsibility in a capital case. However, when a capital case proceeds to a jury trial, both the jury and the trial judge must determine the penalty to be imposed. There is a major difference between being sentenced by two distinct sentencers, and one panel.

This difference is reinforced in R.C. 2929.03(D)(2)(b) where the legislature codified that "if the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section." This passage reflects the fact that the trial jury's sentence is not the end of the sentencing process. Rather, R.C. 2929.03(D)(3) provides in relevant part that "if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt * * * , that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender." This passage reflects that the trial judge is a second trier of fact that must perform an autonomous weighing of the evidence.

Based upon this two tiered process, the unsworn statement that a defendant can give during

the mitigation hearing in front of a trial jury is not the "defendant's last opportunity to plead his case or express remorse." *Green*, at 359-360. Rather, the defendant must then be sentenced by the trial judge. Thus, Crim.R. 32(A)(1) becomes important because the defendant may wish to express differently their allocution before a judge than they would before a jury. Also, this allows the defendant allocution before both bodies that will issue a sentence.

However, when a defendant waives a jury and proceeds before a three-judge panel, there is not a two-tiered sentencing procedure. Rather, R.C. 2929.03(D)(3) states "if the panel of three judges unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender." This section does not give the three-judge panel an option. Once the Panel has heard the evidence at the mitigation phase and has weighed the evidence, if the aggravating factors outweigh the mitigation, the panel shall impose a death sentence.

This procedure seemingly makes Crim.R. 32(A)(1) in capital cases in front of a three-judge panel redundant and meaningless. A defendant's mitigation-phase unsworn statement is his "last opportunity to plead his case or express remorse." *Green*, at 359-360. If this were not true, the question is what procedure would a panel follow. R.C. 2929.03(D)(3) instructs the panel to deliberate and if they find that the aggravating circumstances outweigh, they shall impose a death sentence. But, what if the panel has made this finding, comes out to pronounce sentence, allows for a second waive of allocution, and then wants to re-retire to re-deliberate?

This is not a procedure that is permitted by the Revised Code. This procedure would not allow the State the opportunity to be heard or the ability to properly rebut anything that was said

during the defendant's second statement to the trial court.[6] This would impermissibly restrict the State and the victims while creating a windfall for a defendant. As such, to follow *Green*, is either to invite three-judge panels to create a new procedure out of whole cloth[7], or to acknowledge that panels would stand by their decision and render the second offering of allocution meaningless. As once court has already noted, when a sentencing court or judge would lack the discretion on its sentence, "the Court finds that a right to allocute before the judge in a capital case would be an empty formality." *United States v. Chong* (D.Haw. 1999), 104 F.Supp.2d 1232, 1234.

As such, in situations of a three-judge panel, the unsworn statement should serve as both the time and place for allocution. This is consistent with the definition of allocution. In *United States v. Henderson* (S.D. Ohio 2007), 485 F.Supp.2d 831, 846-847, the court utilized Black's Law Dictionary to define "allocution" as: "An unsworn statement from a convicted defendant to the sentencing judge or jury in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence. This statement is not subject to cross-examination." In giving an unsworn statement to a panel of three judges a defendant can do just this. Recognizing this asa the allocution would satisfy the need for allocution and the ability of a panel to properly consider allocution while complying with all mandates of R.C. 2929.03(D)(3).

What is more, this would be consistent with the modern trend of courts throughout the country that in a capital case the failure to provide a defendant the opportunity to make a statement

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[6] See, *State v. DePew* (1988), 38 Ohio St.3d 275, 285, 528 N.E.2d 542 ("However, to totally restrict the prosecutor from making any comment would likewise be unfair, especially where the defendant, in his unsworn statement, has offered something less than "the truth, the whole truth and nothing but the truth.")

[7] See, generally, *State v. Penix* (1987), 32 Ohio St.3d 369, 513 N.E.2d 744.

before being sentenced is not a Constitutional deprivation. One such court that has trended this way is the Supreme Court of Connecticut. In the case of *State v. Colon*, 272 Conn. 106, 311-312, 864 A.2d 666 (2004), which this Court has previously relied upon in *State v. Drummond*, 111 Ohio St.3d 14, 854 N.E.2d 1038, 2006-Ohio-5084, the Connecticut high court noted that "the procedures that the legislature prescribed for capital sentencing hearings fulfill the purposes of allocution, namely, to provide 'a defendant the opportunity to meaningfully participate in the sentencing process and to show that he or she is a complex individual and not merely an object to be acted upon.'" *Colon*, 272 Conn. at 311-312. The Court continued by finding that:

> several state courts have concluded that a defendant does not possess a constitutional right to make an allocution before a capital sentencing jury. See, e.g., People v. Robbins, 45 Cal.3d 867, 889, 755 P.2d 355, 248 Cal.Rptr. 172 (1988) (in light of defendant's opportunity to present evidence and to take stand to address jury during sentencing phase of capital trial, "we fail to see the need, much less a constitutional requirement, for a corresponding right to address the sentencer without being subject to cross-examination" [internal quotation marks omitted]), cert. denied, 488 U.S. 1034, 109 S.Ct. 849, 102 L.Ed.2d 981 (1989); People v. Kokoraleis, 132 Ill.2d 235, 281, 138 Ill.Dec. 233, 547 N.E.2d 202 (1989) (in capital case, court concluded that "[t]he failure to provide a defendant the opportunity to make a statement before being sentenced is not a constitutional deprivation"), cert. denied, 497 U.S. 1032, 110 S.Ct. 3296, 111 L.Ed.2d 804 (1990); State v. Perkins, supra, 345 N.C. at 289, 481 S.E.2d 25 ("a defendant does not have a constitutional ... right to make unsworn statements of fact to the jury at the conclusion of a capital sentencing proceeding"); Duckett v. State, supra, 919 P.2d at 22 ("there is no ... constitutional right ... to make a plea for mercy or otherwise address [the] sentencing jury"); State v. Stephenson, supra, 878 S.W.2d at 551 ("our review of the case law convinces us that a capital defendant does not have a ... constitutional right to make an unsworn statement to a jury in the sentencing phase of a capital trial").

Id. at 317

The *Colon* court concluded that "[i]t is clear to us that the purpose of allowing allocution, namely, to permit the defendant to introduce to the jury information relevant to the defendant's plea for mercy, is equally served by the structure of our capital sentencing scheme, which permits a capital defendant to present any information relevant to any mitigating factor during the penalty

phase hearing, regardless of its admissibility under evidentiary rules applicable to criminal trials." *Id.* at 317-318 (internal citation omitted).

As such, allowing the unsworn statement during the mitigation phase before a three-judge panel would satisfy R.C. 2929.03, would protect all constitutional requirements, and would not place the panel in a situation where it will have to impermissibly create new procedure or turn the right to allocute before the panel into an empty formality. Additionally, this would allow one allocution before one sentencer, rather than creating a windfall of allocution that would deprive the state and the victims of eqaul rights. Thus, if this Court finds that the facts of the case at bar place it within the penumbra of *Green*, the State asks that the *Green* case be revisited and revised.

Finally, even if this case falls under *Green*, and this Court is not inclined for all aforementioned reasons to revisit *Green*, the State would argue that any error was harmless error. In *Reynolds*, this Court noted that "[f]ailure to provide a defendant the right of allocution **could** constitute reversible error in a future case." *Id.* 80 Ohio St.3d 670, 684 (emphasis added). However, since it is clear from the record in this case that the Appellant did not intend to ever address the panel personally, no error should be found.

Appellant twice had the opportunity to address the panel. Once for an unsworn statement, and once at the sentencing hearing. Both times he personally declined any invitation to offer a statement in allocution. It is hard to fathom how error can be found when a person has been asked, and has declined and/or waived their right to allocution twice. Appellant's argument appears to ask this Court to assume error and have the panel offer him a third opportunity for allocution. Such is not necessary when the Appellant clearly had no intention of offering any statement. To hold otherwise would be to assume error from a silent record.

What is more, this Court has stated that "[t]he purpose of allocution is to permit the

defendant to speak on his own behalf or present any information in mitigation of punishment." *Reynolds*, at 684. The Appellant in the case at bar was permitted to speak twice but declined, and presented through witnesses and arguments of counsel any information in mitigation of punishment. Reversal of this case is not warranted, and proposition of law one should be denied.

Proposition of Law II:

The Panel properly admitted hearsay evidence pursuant to the forfeiture by wrongdoing exception.

In his second proposition of law, Appellant argues that the trial court improperly admitted testimony from Nick Wiskur in violation of Evid.R. 804(B)(6). Based upon the evidence presented, the forfeiture by wrong doing exception and this Court's past precedent, the State disagrees.

The Sixth Amendment to the U.S. Constitution provides a defendant the right to be confronted with the witnesses against him. *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354. This right is not absolute. It can be forfeited by one who intentionally interferes with the ability of the state to provide such confrontation.

In Ohio, forfeiture by wrongdoing is governed by Evidence Rule 804(B)(6). Specifically, the rule reads that:

> (6) Forfeiture by wrongdoing. A statement offered against a party if the unavailability of the witness is due to the wrongdoing of the party for the purpose of preventing the witness from attending or testifying. However, a statement is not admissible under this rule unless the proponent has given to each adverse party advance written notice of an intention to introduce the statement sufficient to provide the adverse party a fair opportunity to contest the admissibility of the statement.

Thus, "[u]nder Evid.R. 804(B)(6), a statement offered against a party is not excluded by the hearsay rule 'if the unavailability of the witness is due to the wrongdoing of the party for the purpose

of preventing the witness from attending or testifying.' Evid.R. 804(B)(6) was adopted in 2001 and is patterned on Fed.R.Evid. 804(B)(6), which was adopted in 1997. Staff Notes (2001), Evid.R. 804(B)(6). To be admissible under Evid.R. 804(B)(6), the offering party must show (1) that the party engaged in wrongdoing that resulted in the witness's unavailability, and (2) that one purpose was to cause the witness to be unavailable at trial." *State v. Hand*, 107 Ohio St.3d 378, 840 N.E.2d 151, 2006-Ohio-18, ¶ 84 (Internal citations omitted). See, also *State v. Irizarry*, Cuyahoga App. Nos. 93353, 93354, 2010 -Ohio- 5117, ¶ 14.

It must be noted that when faced with an issue concerning this rule, and a potential witness, this Court has found that "Evid.R. 804(B)(6) 'extends to potential witnesses.' Staff Notes (2001), Crim.R. 804(B)(6); *United States v. Houlihan*, 92 F.3d at 1279 (rule applies with 'equal force if a defendant intentionally silences a potential witness.' (Emphasis sic.)" *Hand*, 2006-Ohio-18, ¶ 90. Thus, the lack or absence of pending charges against a defendant at the time they made a witness unavailable does not preclude the admissibility of the witnesses statements. Id.

Moreover, the State need not establish that the defendant's sole motivation was to eliminate the person as a potential witness; it needed to show only that the defendant "was motivated in part by a desire to silence the witness." *Id.*, See, also, *United States v. Dhinsa* (C.A.2, 2001), 243 F.3d 635, 654; *Giles v. California* (2008), 554 U.S. 353, 128 S.Ct. 2678, 2683-84, 171 L.Ed.2d 488, (the doctrine of forfeiture by wrongdoing applies only when the defendant engaged in conduct designed to prevent the witness from testifying and found that "the rule * * * makes plain that unconfronted testimony would not be admitted without a showing that the defendant intended to prevent a witness from testifying.")

Last year, this Court again recognized the forfeiture by wrongdoing rule in a case which charged an identical capital specification to the present case. See, *State v. Fry*, 125 Ohio St.3d 163,

2010-Ohio-1017. In *Fry*, the finding was made that "[t]he jury also found Fry guilty of Specification Two of Count One for purposely killing Hardison to prevent her testimony in another criminal proceeding or killing her in retaliation for her testimony in any criminal proceeding under R.C. 2929.04(A)(8). Thus, the jury's verdict supports the conclusion that Fry forfeited his right to confront Hardison's statement to police. Based on the foregoing, Hardison's statements to Hackathorn were properly admitted." *Id.*, at ¶ 109.

What is more, it has also been held that the forfeiture by wrongdoing doctrine is applicable even when the defendant did not endeavor to procure the unavailability of any witnesses against the defendant themselves. Rather, it was concluded that "Rule 804(b)(6) applies to" the defendant "even though she had worked to procure the unavailability of potential witnesses against" another "rather than against herself." See, *United States v. Johnson*, 495 F.3d 951, 972 (8th Cir. 2007). As such, the rule is applicable when a defendant is attempting to make a person unavailable to testify against another.

In the case at bar, Appellant made Williams unavailable to testify by killing him. He did this because he did not want the victim to become a witness or complainant in any future criminal case against Appellant's girlfriend. This act of a violent killing with the motivation being to silence a witness, subjects Appellant to the forfeiture by wrongdoing evidentiary rule, and makes statements of the victim admissible that would otherwise be subject to objections on both Confrontation Clause grounds and hearsay grounds. As such, the State pursuant to Evid. R. 804(B)(6), properly utilized statements made by the victim.

Specifically, Nick Wiskur testified that he overheard a heated conversation between the victim and the defendant. (4/19/10, T.p. 45) The topic overheard concerned the fact that money and other property had been stolen. (Id.) Based upon these items being stolen, the victim was planning

on filing charges with the police. (Id.) The person identified as not returning phone calls, and the subject of the conversation was Robin Paterson. (Id.) This conversation was argumentative in nature, heated and contained expletives. (Id.) The conversation was so loud and heated that the person on the other end of the phone could be heard, that person being Appellant. (Id. at 33 & 45)

As such, when it became clear that Appellant wanted to silence Williams as a potential witness against his paramour Patterson, the trial court correctly permitted this testimony pursuant to Evid.R. 804(B)(6) and this Court's precedent. In fact, a glimpse of how the panel viewed this evidence is evinced from a passage at the May 3 hearing where it was stated "I do want to note that we gave great weight to the third aggravating circumstance which was that the defendant killed Mr. Williams in the course -- because he was a witness against him and his paramour, and that was the prime motivation in the killing." (T.p. 10) The panel reaffirmed this position at the May 10 hearing, stating that Appellant was "[m]otivated by a desire to silence a witness against his paramour and himself, the defendant menaced, stalked, assaulted, and finally killed Mr. Williams after battering, stabbing him some ten times, and slashing his throat on at least two occasions before he succumbed." (T.p. 9-10) Appellant's second proposition of law should be overruled.

While the main focus of Appellant's argument is defective, he continues to argue some smaller points. The first one of these smaller points is that the State failed to show that Appellant's motivation was to silence Williams as a witness because the State could not demonstrate that any criminal case had been filed. However, this Court's past precedent defeats this argument.

In *Hand*, 2006-Ohio-18, this Court struck down a similar contention. The defendant in *Hand* contended that the "statements were not admissible under Evid.R. 804(B)(6), because the state failed to show that Hand's purpose in killing Welch was to make him unavailable as a witness. Hand argues that when Welch was killed, there were no pending charges and no evidence that Welch

intended to testify against him at trial. We reject this argument." Id. at ¶ 89. In so rejecting, this Court reiterated that:

> Evid.R. 804(B)(6) "extends to potential witnesses." Staff Notes (2001), Crim.R. 804(B)(6); United States v. Houlihan, 92 F.3d at 1279 (rule applies with "equal force if a defendant intentionally silences a potential witness." (Emphasis sic.) Thus, the absence of pending charges against Hand at the time he killed Welch did not preclude the admissibility of Welch's statements. Moreover, the state need not establish that Hand's sole motivation was to eliminate Welch as a potential witness; it needed to show only that Hand "was motivated in part by a desire to silence the witness." (Emphasis sic.) Id. at 1279; United States v. Dhinsa (C.A.2, 2001), 243 F.3d 635, 654. Hand's admissions to Grimes clearly established that one of Hand's purposes was to eliminate Welch as a potential witness.

Id. at ¶ 90

This position is supported by other courts. For example, in *United States v. Johnson*, 495 F.3d 951, the court also rejected defense's arguments that the forfeiture by wrongdoing doctrine is inapplicable because defendant did not endeavor to procure the unavailability of any witnesses against the defendant themselves. The *Johnson* court concluded that "Rule 804(b)(6) applies to" the defendant "even though she had worked to procure the unavailability of potential witnesses against" another "rather than against herself." Id. at 972. Thus, as Appellant wanted to silence Williams as a potential witness against Patterson, the trial court correctly permitted this testimony pursuant to Evid.R. 804(B)(6) and this Court's precedent.

Appellant next argues that while the trial court found a "plethora of evidence offered by the State to allow this to be admitted," the State did not meet its burden, or correctly articulate its burden, of establishing this by a preponderance of the evidence. (4/21/10, T.p. 272) Appellant cites to *State v. Hand*, 107 Ohio St.3d 378, 392 for the standard to be used: preponderance of the evidence. (Appellant's brief, p. 18) However, Appellant argues that the State did not identify this as the correct standard to be applied, and that this somehow caused the trial court to commit an error. To the contrary, at the hearing on 4/21/10, the State was asked about the different burdens or

standards, and while not stated very artfully, the State did inform the trial court that "[s]o not only was your ruling correct, but your ruling is fully supported now by evidence that has come out. The standard, *State v Hand*, under 804(b)(6) is met, and there is a clear difference between something that is a piece of evidence under that evidence rule versus that third specification in not only the wordings, but the proofs that they must be demonstrated by, Your Honor. I hope that answers your question." (4/21/10, T.p. 269-270) (emphasis added)

Appellant next argues, without any rule or caselaw to support the argument, that the trial court's failure to hold an evidentiary hearing is reversible error. Again, it must be stated that no rule of law or decision in law has mandated such an onerous duty on an Ohio trial court to have to hold a separate evidentiary hearing each and every time a trial court decides an evidentiary issue. Therefore, Appellant's argument is misplaced and should be denied.[8]

However, even if this Court were to somehow consider this issue, it must be noted that the Panel heard complex argument on this issue. In fact, the court heard multiple arguments from all counsel, including a trial memorandum filed by the State, cases cited by defense counsel, answers to questions asked by the Panel, a proffer of evidence by the State in order to demonstrate exactly how Evid.R. 804(B)(6) was to be used, and multiple retorts and theories by both sides. (4/19/10, T.p. 32-44) It is difficult to discern how this is not the trial court holding a hearing on this issue. The discussion of this issue spans 12 pages of transcript, contains caselaw, proffers, and questions. Thus, while there is no law that requires a court to conduct a separate hearing, it is hard to fathom

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[8] The Staff Notes to Evid.R. 804(B)(6), while not binding, state: "Procedures. The trial court decides admissibility under Evid. R. 104(A); the traditional burden of persuasion (preponderance of evidence) rests with the party offering the evidence once an objection is raised." In the case at bar, as trial defense counsel did not object to this evidence until the middle of Wiskur's testimony, it is hard to fathom how the trial court could have handled the situation differently based upon defense counsel's strategic choice of when to object.

how this was not the functional equivalent of an evidentiary hearing.

Additionally, once the State rested, Appellant's trial counsel again raised this issue. On this occurrence, the exact evidence that was originally proffered by the State, plus additional evidence that was not part of the proffer, but which buttressed the decision to allow the evidence pursuant to Evid.R. 804(B)(6) was discussed. (4/21/10, T.p. 258-272) At the conclusion of this additional argument, the presiding judge stated:

> I think we're done. We can argue this case till the cows come home as they say. The Court's unanimous in the opinion that there's been a plethora of evidence offered by the State to allow this to be admitted. That does not, however, go to the weight of what we're going to decide as we go through it, but at this point, we think that there's enough there that the Court can consider it. I think that there -- in addition to the statement that Mr. Osie made, the letter that has been admitted, State's Exhibit 64, the 48-page statement, together with a number of other items indicate that that's something that we ought to consider in this case, and we're going to stay by our original decision, and once again, overrule the objection.

(Id. T.p. 272)

Next, Appellant attempts to argue against the precedent followed by the Panel through the use of an outdated staff note to Evid.R. 804(B)(6). Specifically, the notes states:

> Coverage. As the federal drafters note, "[t]he wrongdoing need not consist of a criminal act. The rule applies to all parties, including the government. It applies to actions taken after the event to prevent a witness from testifying." Fed.R.Evid. 804 advisory committee's note. Thus, the rule does not apply to statements of the victim in a homicide prosecution concerning the homicide, including a felony-murder case.

Evid.R. 804(B)(6), 2001 Staff note.

Appellant's interpretation of this note is that Evid.R. 804(B)(6) is never available for use when the statement is from the victim of a homicide. However, without going through a prolonged discussion of the language, potential interpretations and meanings of this staff note, what is clear is that this Court and the United States Supreme Court have utilized forfeiture by wrong doing from a victim of a homicide in a homicide prosecution. See, *State v. Fry*, 2010-Ohio-1017, *Giles v. California* (2008), 554 U.S. 353. What is obvious from these two cases, decided well after the staff

note in 2001, is that the forfeiture by wrongdoing rule does apply to statements of the victim in a homicide prosecution concerning the homicide. As such, Appellant's twisted interpretation of an outdated staff note[9] is not correct based upon both this Court and the United States Supreme Court's interpretation of the forfeiture of wrong doing rule. It should also be remembered that this note is attached to a rule of evidence and not a piece of legislation. As such, this Court's interpretation in *Fry* should be followed since this Court is responsible for the interpretation and promulgation of rules of evidence. See, Section 5(B), Article IV of the Ohio Constitution.

Finally, in light of all of the arguments put forth by Appellant, it must be stated that the verdict in this case supports the admission of the evidence under Evid.R. 804(B)(6). As this Court stated in *Fry*, "[t]he jury also found Fry guilty of Specification Two of Count One for purposely killing Hardison to prevent her testimony in another criminal proceeding or killing her in retaliation for her testimony in any criminal proceeding under R.C. 2929.04(A)(8). Thus, the jury's verdict supports the conclusion that Fry forfeited his right to confront Hardison's statement to police. Based on the foregoing, Hardison's statements to Hackathorn were properly admitted." 2010-Ohio-1017, ¶ 109. In the case at bar, the Panel convicted Appellant, by proof beyond a reasonable doubt of the third specification, pursuant to R.C. 2929.04(A)(8). As such, Wiskur's statements were properly admitted.

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[9] It must also be noted that Appellant's case citation, *State v. McClarley*, Summit App. No. 23607, 2008-Ohio-552, was also decided before both *Fry* and *Giles*. As such, the *McClarley* court did not have the binding interpretations of forfeiture by wrongdoing from this Court or the United States Supreme Court at the time it issued its decision.

Proposition of Law III:

The State proved by a plethora of evidence that Appellant killed Williams to prevent his testimony in a criminal proceeding.

In proposition of law three, Appellant claims that in order to be found guilty of the aggravated specification contained in R.C. 2929.04(A)(8), a criminal proceeding had to be already initiated at the time he killed Williams. Following this Court's precedent, the State disagrees.

R.C. 2929.04(A)(8) allows the death penalty if "[t]he victim of the aggravated murder was a witness to an offense who was purposely killed to prevent the victim's testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness."

But, the term "any criminal proceeding" is not limited to only currently pending criminal proceedings. See, *State v. Conway*, 109 Ohio St.3d 412, 848 N.E.2d 810, 2006-Ohio-2815, See, also, *State v. Hairston*, Lorain App. No. 05CA008768, 2006-Ohio-4925. Specifically, in *Conway*, this Court found that:

> Under the R.C. 2929.04(A)(8) specification, the state **was not required** to show that Conway was a suspect or that he had committed any underlying offense in order to prove the witness-murder specification. In addition, R.C. 2929.04(A)(8) **does not require that a criminal action be pending when the defendant kills the victim-witness**. Indeed, we have **previously upheld application of the witness-murder specification in situations where no criminal proceeding had been initiated at the time the victim was murdered**. See, e.g., *State v. Keene* (1998), 81 Ohio St.3d 646, 655, 693 N.E.2d 246; *State v. Brooks* (1996), 75 Ohio St.3d 148, 159, 661 N.E.2d 1030; *State v. Hooks* (1988), 39 Ohio St.3d 67, 69, 529 N.E.2d 429. **The plain language of the statute requires only (1) that the victim was a witness to an offense and (2) that the purpose of killing the victim was to prevent the victim from testifying in a criminal proceeding**. See *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, at ¶ 126.

Conway, 2006-Ohio-2815, ¶ 55 (emphasis added).

As such, the specification in this case need not be predicated upon an already filed or pending criminal proceeding that either party is currently involved in. Rather, it is enough that the victim was a witness to the offense, and that the victim was killed to prevent his testimony in a criminal proceeding.

What is more, this specification also applies when a person is executed in behalf of another. See, *State v. Keene* (1998), 81 Ohio St.3d 646, 654-655, 693 N.E.2d 246. In *Keene*, this Court stated that "[t]he state's evidence showed that appellant murdered Cottrill and Washington because they had seen Smith shoot Wright. However, appellant claims that, if he killed the victims to prevent their testimony against Smith, the (A)(8) specification does not apply. According to appellant, the specification would apply only if he killed them to prevent them from testifying against appellant. Appellants argument is inconsistent with the plain language of the statute. R.C. 2929.04(A)(8) says "any criminal proceeding." No language limits it to cases where the victim witnessed a crime committed by his killer. Nor would such a limitation make sense: appellant's reading of R.C. 2929.04(A)(8) would shield an organized-crime assassin who murdered witnesses to protect his fellow gangsters." *Id.* at 655. Importantly, this Court recognized that the language in R.C. 2929.04(A)(8) of "any criminal proceeding" was critically important in that it reflected an expansive interpretation of this specification.

As such, Appellant's conviction to this specification was proper where he killed Williams to prevent him from filing criminal charges against Robin Patterson.

However, based upon a case in which this Court interpreted a different criminal statute, Appellant now argues that R.C. 2929.04(A)(8) is extremely limited in its scope and applicability, and that *State v. Conway*, 109 Ohio St.3d 412, *State v. Hairston*, Lorain App. No. 05CA008768, 2006-Ohio-4925, *State v. Keene* (1998), 81 Ohio St.3d 646, *State v. Brooks* (1996), 75 Ohio St.3d

148, *State v. Hooks* (1988), 39 Ohio St.3d 67, *State v. Yarbrough*, 95 Ohio St.3d 227, should all be overruled.

Appellant's argument is built upon this Court's decision in *State v. Malone*, 121 Ohio St.3d 244, 903 N.E.2d 614, 2009-Ohio-310. In *Malone*, this Court determined that R.C. 2921.04(B) required "a witness's involvement in a criminal action or proceeding, not his or her potential involvement." *Malone*, at ¶ 21. First, it must be noted that the *Malone* case interpreted a different statute, R.C. 2921.04(B), than the one involved in this case, R.C. 2929.04(A)(8). It is the differences in the words, context, and intents of these statutes that cause Appellant's argument to fail.

The paramount consideration in determining the meaning of a statute is legislative intent. *State ex rel. Asberry v. Payne* (1998), 82 Ohio St.3d 44, 47, 693 N.E.2d 794. The General Assembly directs courts to read statutory words and phrases in context and construe them according to the rules of grammar and common usage. R.C. 1.42 . Thus, when attempting to discern legislative intent "[c]ourts must give effect to the words of a statute and may not modify an unambiguous statute by deleting words used or inserting words not used." *State v. Waddell*, 71 Ohio St.3d 630, 631, 1995-Ohio-31, 646 N.E.2d 821.

What is more, "[i]n reviewing a statute, a court cannot pick out one sentence and disassociate it from the context, but must look to the four corners of the enactment to determine the intent of the enacting body." *State v. Jackson*, 102 Ohio St.3d 380, 811 N.E.2d 68, 2004 -Ohio- 3206, ¶34. And, words and phrases must be read in context and construed according to the rules of grammar and common usage. *Independent Ins. Agents of Ohio v. Fabe* (1992), 63 Ohio St.3d 310, 314, 587 N.E.2d 814.

In beginning to distinguish these two statutes, their language must be examined. R.C. 2929.04(A)(8) states:

> The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent the victim's testimony **in any criminal proceeding** and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for the victim's testimony in any criminal proceeding.

Whereas, R.C. § 2921.04(B) states:

> No person, knowingly and by force or by unlawful threat of harm to any person or property, shall attempt to influence, intimidate, or hinder the victim of a crime in the filing or prosecution of criminal charges or an attorney or witness **involved in a criminal action or proceeding** in the discharge of the duties of the attorney or witness.

Appellant's basic building block is that both statutes use the phrase criminal proceeding. However, even this basic premise is not true. R.C. 2921.04 uses the phrase "criminal action or proceeding". But, R.C. 2929.04(A)(8) does not include the term "action". This is important because when this Court defined "action," it found that the term "includes formal proceedings in a court of justice attendant upon the demand of a right made by one person of another in such a court, including an adjudication upon the right and its enforcement or denial by the court." *Malone*, 2009-Ohio-310, ¶ 16. Thus, as the definition makes clear, "action" indicates a very formal proceeding. This term supports Appellant's argument that a formal proceeding should be in the process of occurring. However, this term is not in R.C. 2929.04(A)(8). Thus, a major part of the reasoning in *Malone* that a formal process must have been initiated is undercut when applied to R.C. 2929.04(A)(8).

The next distinction between the two statutes is the modifier that is utilized in each statute. These modifiers are important because they give the context of the words, and clearly indicate what the intent was behind the two statutes. R.C. 2929.04(A)(8) states "in any criminal proceeding", while R.C. 2921.04(B) states "involved in a criminal action or proceeding". The modifiers of "in"

and "involved in" are very different and evince a different intent between the two statutes. The word in is defined as "expressing the length of time before a future event is expected to take place." http://oxforddictionaries.com/definition/in?region=us, 3. This definition contemplates that there will be a future event that is expected to take place. This is exactly how R.C. 2929.04(A)(8) was utilized in Appellant's case. David Williams was expected to file a criminal complaint against Robin Patterson in the near future. This is a future event that was expected to take place. In fact, Appellant expected it to take place enough that he was willing to commit menacing, assault and murder in order to prevent this.

This definition should be compared to the definition of "involved in," which is "cause to experience or participate in an activity or situation." http://oxforddictionaries.com/definition/involve?region=us., 2. This definition is written in the present tense and implicit in any analysis of this phrase is the understanding of the present tense usage. The clear directive of making this language in the present tense is to indicate that a person is actively involved or participating in something. Active participation clearly indicates that an activity or situation has already begun. This supports the holding in *Malone*, that a criminal action or proceeding be pending in order to have a valid charge under R.C. 2921.04(B).

But, it is critically important that R.C. 2929.04(A)(8) does not utilize this "involved in" language. Thus, the difference between "in" and "involved in" supports the idea that R.C. 2929.04(A)(8) does not require that a criminal proceeding already be pending. Rather, the holding in *Conway* that "R.C. 2929.04(A)(8) does not require that a criminal action be pending when the defendant kills the victim-witness" should again be upheld. *Conway*, 2006-Ohio-2815, ¶ 55.

The next piece of distinguishing language that is important is R.C. 2921.04's inclusion of and use of the word attorney. This Court, specifically commenting on this language, stated "the coupling

of witnesses with attorneys in the statute indicates that the statute does not apply until there is some process initiated that requires their participation." *Malone*, at ¶ 26. This is easily contrasted with R.C. 2929.04(A)(8), which does not utilize the word attorney. As such, the converse implication, that the omission of the word attorney in R.C. 2929.04(A)(8) indicates that the statute applies before a process is started in which an attorney is necessary, appears clear. This implication again separates the two statutes and makes the holding in *Malone* inapplicable, and this Court should again rely upon *Conway, Keene, Brooks, Hooks,* and *Yarbrough*.

Additionally, the policy statements given by this Court in *Malone* also lead to the conclusion that Appellant's argument as to R.C. 2929.04(A)(8) must fail. In *Malone*, this Court acknowledged that "the intimidation of witnesses, whether immediately after the commission of a criminal act or after charges have been filed, should not be countenanced and does real harm to the administration of justice." *Malone*, at ¶ 27. In this case, Williams was clearly intimidated, and in fact murdered for no other reason than that he was both the victim and a witness to Robin Patterson's criminal acts. The administration of justice requires that this situation not be read out of the Ohio revised code. In *Malone*, this Court noted that aggravated-menacing could have been charged. However, in the case at bar, if the R.C. 2929.04(A)(8) specification is vitiated, as requested by Appellant, victims and witnesses of crimes are given no protection on their way to the police station. Rather, those desperate to stop their reporting of a crime will have no additional deterrent. This Court should not allow the citizens of Ohio to be put in this situation, especially when the wording of R.C. 2929.04(A)(8) does not require this interpretation.

Finally, what the *Malone* case makes clear is that the legislature intended to immediately protect victims of crimes prior to the involvement of legal authorities. Specifically, this Court stated "[a]s far as a victim is concerned, R.C. 2921.04(B) makes clear that it applies immediately upon the

commission of the underlying crime, prior to the involvement of legal authorities." *Malone*, at ¶ 19. In the case at bar, Williams was not merely a witness to a crime, but was the victim of the crimes committed by Robin Patterson. Thus, if victims are given instant protection and do not need to have begun legal proceedings under R.C. 2921.04, then even if this Court accepts Appellant's invitation to utilize R.C. 2921.04 in the present case, the State urges this Court hold faithfully to the fact that the legislature intends to instantly protect victims of crimes from intimidation and execution.

This Court has already found that R.C. 2929.04(A)(8) "does not require that a criminal action be pending when the defendant kills the victim-witness." *Conway*, 2006-Ohio-2815, ¶ 55. The State asks that this holding be followed, and that based upon the myriad of ways that the *Malone* case is distinguishable, that this Court decline Appellant's invitation to limit the deterrent effect and protections that were created in R.C. 2929.04(A)(8).

Finally, Appellant argues that there was insufficient evidence that Williams was going to press charges and become a witness and victim in a case against either Appellant or Patterson. However, based upon Appellant's confession, Appellant's written letter to Patterson, Appellant's text to Patterson that her dirt was done, Appellant's text to Patterson that he did not have to worry about Dave, Nick Wiskur's testimony, and Donald Simpson's testimony, this argument is untenable. What became very clear to the Panel was that Appellant attempted to dissuade Williams from filing charges against Patterson and when his menacing did not work, he resorted to physical violence, including assault, stabbing and slashing. In the Panel's words, there was a "plethora" of evidence to support this finding. Appellant's proposition of law should be denied.

Proposition of Law IV:

The Panel properly followed the law of merger.

In proposition of law four, Appellant argues that the trial court committed reversible error in not merging the R.C. 2929.04(A)(7) [aggravated burglary] specification with the R.C. 2929.04(A)(8) [victim/witness] specification. The State disagrees.

With regards to merger of specifications, this Court has held that "[i]n the penalty phase of a capital prosecution, where two or more aggravating circumstances arise from the same act or indivisible course of conduct and are thus duplicative, the duplicative aggravating circumstances will be merged for purposes of sentencing. Should this merging of aggravating circumstances take place upon appellate review of a death sentence, resentencing is not automatically required where the reviewing court independently determines that the remaining aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt and that the jury's consideration of duplicative aggravating circumstances in the penalty phase did not affect the verdict." *State v. Jenkins* (1984), 15 Ohio St.3d 164, paragraph five of the syllabus.

In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, this Court amended the manner in which Ohio courts are to interpret allied offenses. The syllabus in *Johnson*–the only part of the decision to garner a majority of justices–instructs that "[w]hen determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered."[10]

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[10] The decision in *Johnson* is comprised of three opinions: one written by then-Chief Justice Brown, and joined by two other justices; a second, written by then-Justice O'Connor and joined by two other justices; and a third, written by Justice O'Donnell and joined by one other justice. Two justices each agreed with two different opinions (Justice Pfeiffer concurred in both Chief Justice Brown's and Justice O'Connor's opinions, and Justice Lundberg Stratton concurred in both Chief Justice Brown's and Justice O'Donnell's opinions).

In reviewing multiple convictions for possible merger, a court must determine both whether the offenses are allied and whether they are of similar import. "[O]ffenses are 'allied' when their elements align to such a degree that commission of one offense would probably result in the commission of the other offense." *Johnson*, ¶ 66 (O'Connor, J., concurring). To determine whether offenses are allied, "the question is whether it is possible to commit one offense and commit the other with the same conduct." *Id.* at ¶ 48 (Brown, C.J., concurring). Offenses are of similar import "when the underlying criminal conduct involves similar criminal wrongs and similar resulting harm." *Id.* at ¶ 67 (O'Connor, J., concurring). "If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import." *Id.* at ¶ 48 (Brown, C.J., concurring). However, if the offenses are committed separately "or if the defendant has separate animus for each offense," then the offenses do not merge. *Id.* at ¶ 51 (Brown, C.J., concurring).

In interpreting this *Johnson* case, the First District Court of Appeals recently found that "[f]ollowing *Johnson*, if the evidence presented at trial reveals that the state relied upon the same conduct to support both offenses, and that the offenses were neither committed separately nor with a separate animus as to each, then the defendant is afforded the protection of R.C. 2941.25, and the trial court errs in imposing separate sentences for both offenses." *State v. Howard*, Hamilton App. No. C-100240, 2011-Ohio-2862, ¶ 49. Specifically, in *Howard*, the court observed factually that the "aggravated robbery of Howard was complete when an armed Howard took Booker's drugs and refused to return them. Following the completion of the robbery, Howard then shot Booker. These offenses were committed separately." *Id.* at ¶ 54.

Thereafter, with respect to the animus of the crimes, the First District noted "that aggravated murder requires proof of the specific purpose to kill. After robbing Booker, Howard purposefully

chose to kill him. The murder was in fact so unnecessary for the robbery itself that it demonstrated a significant independence from that robbery. Here, Howard's actions evinced a separate animus for the aggravated murder, namely a specific purpose to kill that was not present for the commission of aggravated robbery. We accordingly conclude that Howard's convictions for the aggravated murder and aggravated robbery of Gino Booker were separately punishable under R.C. 2941.25(B)." *Howard,* at ¶ 55 (internal citations omitted).

With these standards in mind, Appellant's argument in the present case is that since the State argued the 'theory' that Appellant went to David Williams home with prior calculation and design to commit murder, then his actions in also completing an aggravated burglary were necessarily duplicative of the aggravated murder. However, while Appellant cites to the State's 'theory', the trial court found Appellant not guilty of having committed the aggravated murder with prior calculation and design. Instead, the trial court believed Appellant went to Mr. Williams' home to discuss the situation between Robin Patterson and Williams. During that conversation, things escalated to the point in which Appellant "did, by force, commit the following offenses: assault, theft, menacing, and did, at the time of the offense, have a deadly weapon on his person, to wit: a knife, on or about his person." (Sentencing Opinion, p. 3) The Panel also noted that "when coercion did not work, Defendant became enraged and assaulted and, eventually, killed Williams." (Id.)

Specific to the Aggravated Burglary specification, the Panel noted that "[r]egardless of how Defendant entered the victim's residence, the trespass, which formed the basis of the Aggravated Burglary charge, commenced with Defendant began to menace and assault Mr. Williams in his own home and to commit the predicate offense, Aggravated Burglary, which invoked the felony murder rule in this case." (Id., 6) As such, the trial court found that the facts of this case were that Appellant did not go to Williams home to kill him, but to coerce Williams into not pursuing charges

against Robin Patterson by menacing and assaulting him. However, when this menacing, pushing and punching did not work, Appellant then determined he needed to change his plan and his course of conduct and consciously decided to purposely kill Williams.

This became a new course of conduct that was committed with a separate animus. Similar to the Howard case, the murder in this case was so unnecessary to the aggravated burglary by menacing that "it demonstrated a significant independence from that" burglary. *Howard*, at ¶ 55. It is clear that menacing and assault would not necessarily result in the commission of a murder, and that a murder would not have to include attempting to menace a person. See, generally *State v. Yarbrough*, 95 Ohio St. 3d 227, 2002 -Ohio- 2126, ¶ 127 ("These two specifications are by no means 'indivisible' even though they happen to apply to the same murder. Indeed, their elements do not overlap. Hired killers do not solely kill witnesses, nor are witnesses killed only by hired killers. Thus, it is not the case that 'commission of the one [specification] will result in the commission of the other.").

What is more, to hold that these two specifications were not committed with a separate animus would be to diminish the importance and impact of the menacing and assault that underlies the aggravated burglary. This is because the underlying conduct and resulting harms of an aggravated burglary by menacing and assaulting as opposed to a murder are significantly different and must be independently policed. See, *State v. Johnson*, ¶ 67 (O'Connor, J., concurring) (two offenses are of similar import only "when the underlying conduct involves criminal wrongs and similar resulting harm.") Based upon these facts, the different acts of Appellant, and the different resulting harms from the two specifications, the trial court was correct in not merging the R.C. 2929.04(A)(7) and R.C. 2929.04(A)(8) specifications.

Appellant further argues that this Court's recent decision in *State v. Fry*, 125 Ohio St.3d 163,

926 N.E.2d 1239, 2010-Ohio-1017, is directly on point and should be followed. However, the *Fry* case has one large factual difference that distinguishes it from Appellant's case. In *Fry*, this Court found that "Fry unlawfully entered Knox's residence on July 31 **to kill Hardison** either in retaliation for filing a criminal complaint against him or to prevent her from testifying against him in future criminal proceedings." *Id.*, at ¶ 181 (emphasis added).

In the present case, Appellant, as factually found by the Panel, did not enter the residence to kill Williams, but to coerce him through menacing and assault. Thus, *Fry* is factually distinguishable because Fry's the intent to kill was formed before the entry. The trial court's finding that Appellant had no prior calculation and design clearly indicates an animus for murder to silence a witness that was separate from the aggravated burglary with was directed at coercion. Appellant's fourth proposition of law should be denied.

Proposition of Law V:

The Panel explained its sentencing decision and properly gave Appellant the individualized sentencing that is required.

In proposition of law five, Appellant makes multiple claims surrounding alleged errors that the Panel committed when balancing the aggravating circumstances against the mitigating factors and then in authoring a sentencing opinion describing the weighting process. Believing that the Panel properly undertook its responsibility and complied with all statutory requirements, the State disagrees.

The first issue Appellant argues is one that he reasserts, but that has already been briefed in proposition of law four. Basically, Appellant again raises the issue of merger of specifications. However, as the R.C. 2929.04(A)(7) and R.C. 2929.04(A)(8) specifications were based upon

different actions, different mental processes, were seperated in time, were committed with different levels of potential harm to the victim, and were committed with a separate animus, Appellant's argument must fail. See, Appellee's Brief, Proposition of Law Four, *supra*.

Appellant's next argument claims that the trial court erred in not specifying why the aggravated circumstances outweighed the mitigating factors. Pursuant to R.C. 2929.03(F), when a panel imposes the sentence of death, it is required to "state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors."

In the case at bar, the Panel explained in its sentencing opinion that:

> The weighing process is just that. The Panel must put the aggravating circumstances on one side of the balance sheet and place all of the mitigating factors on the other, and then make a determination beyond a reasonable doubt whether the aggravating circumstances outweigh the mitigating factors. * * *
>
> Pursuant to R.C. 2929.03(F), the Panel must make certain findings. The Panel must specifically find reasons why the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors.* * * To satisfy the statutory and case law requirements, the Panel performed the within weighing process, weighing each circumstance and/or factor from least important to most important in significance, as follows: no weight, some weight, moderate weight, considerable weight, substantial weight, and great weight. The Panel did not consider the aggravated murder of David Williams as aggravating circumstance.

(Sentencing Opinion, p. 5)

This passage makes clear that the Panel understood its role, understood its responsibilities, and laid out how it was going to conduct itself in meeting these responsibilities. It is hard to understand how Appellant's argument has a leg to stand on in light of the foregoing language. Appellant's argument also appears doomed to failure when the remainder of the Sentencing Opinion

is evaluated. In the remainder of the opinion, the Panel performs the exact weighing process it detailed, assigns weight to various circumstances/factors, and then makes a ruling that:

> The Panel has weighed the three specific aggravating circumstances against all of the mitigating factors and mitigating evidence. The panel has weighed the mitigating factors individually and collectively. After weighing the specific aggravating circumstances against all of the mitigating factors, the members of the Panel unanimously find that the State of Ohio has proved beyond a reasonable doubt that the specific aggravating circumstances that the Defendant was found guilty of committing outweigh the mitigating factors.

(Id. at 12)

It is hard to fathom how Appellant argues that the Panel did not explain how they came to their sentence when all of the aforementioned language is read. Simply stated, the Panel articulated how it would weigh items, laid out the statutory process for this weighing, detailed exactly what levels of weight from smallest to greatest they would place upon each circumstance or factor, went through in detail each factor and circumstance assigning it one of the designated weights, and then stated that when placed on a scale, the aggravated circumstance outweighted the mitigating factors beyond a reasonable doubt. This seems to comport perfectly, if not exceed what is required by R.C. 2929.03(F). See, *State v. Hartman* (2001), 93 Ohio St.3d 274, 303, 754 N.E.2d 1150, citing *State v. Filiaggi* (1999), 86 Ohio St.3d 230, 245, 714 N.E.2d 867, 880 ("There is 'no requirement' that the trial court explain 'how it decides how much weight to give to any one factor. The weight, if any, given to a mitigating factor is a matter for the discretion of the individual decisionmaker.'").

In *Filiaggi*, 86 Ohio St.3d at 245, this Court affirmed the trial court's opinion, finding that the "defendant argues that the panel failed to indicate with sufficient specificity how it determined the weight to be given each mitigating factor and how it balanced those factors against the aggravating circumstances. Pursuant to R.C. 2929.03(F), the trial court was required to state its specific findings as to the existence of any of the statutory mitigating factors as well as any other

mitigating factors. This is exactly what the panel did. The panel examined the statutory factors listed in R.C. 2929.04(B), and defendant's history, character, and background. The panel assigned weight to the factors it found present in defendant's case." See, also *State v. Dixon*, Lucas App. No. L-96-004, 2000 WL 1713794 (rejecting a similar argument while noting that although appellant apparently is not satisfied with the language of the trial court's opinion, the trial court did comply with the requirements of R.C. 2929.03(F).)

As such, because the Panel in the present case not only satisfied the requirements of R.C. 2929.03(F), but exceeded the requirements, Appellant's argument should be denied.

What is more, even if this Court somehow finds that the Panel could have been a touch more articulate, past precedent from this Court would not require reversal. As this Court has stated in *Hartman*, 93 Ohio St.3d at 303, "our independent reassessment of the sentence will eliminate the effect of any deficiencies found in the trial court's sentencing decision."

Appellant next takes issue with the weight assigned to his cocaine usage. In this argument, Appellant demonstrates that he understands the weight assigned to this usage (minimal) but argues that it should have been weighted more heavily. However, this Court has repeatedly found that voluntary drug usage should be given minimal weight. See, *State v. Fitzpatrick,* 102 Ohio St.3d 321, 810 N.E.2d 927, 2004-Ohio-3167 ¶ 111 ("Voluntary intoxication is at most a weak mitigating factor, entitled to little weight."); *State v. D'Ambrosio* (1995), 73 Ohio St.3d 141, 145, 652 N.E.2d 710; *State v. Dennis* (1997), 79 Ohio St.3d 421, 436, 683 N.E.2d 1096; *State v. Campbell* (2002), 95 Ohio St.3d 48, 51, 765 N.E.2d 334.

In fact, this Court has even discounted this factor entirely, going further than just finding it to be a weak or minimal factor. *State v. Moore* (1998), 81 Ohio St.3d 22, 37, 689 N.E.2d 1. In *Moore*, this Court found that "voluntary drunkenness and drug use are not mitigating factors." *Id.*

at 37, citing *State v. Slagle*, 65 Ohio St.3d 597, 614, 605 N.E.2d 916. As such, when the Panel considered this drug usage, giving it minimal weight, it acted properly and in accordance with a statutory and constitutional requirements. Appellant's argument is misplaced.

Finally, Appellant argues that the Panel created some type of "super" specification out of the R.C. 2929.04(A)(8) specification. This is simply not true. Other defendants have raised this issue before this Court. These argument have been properly dismissed as meritless.

State v. Jones, 91 Ohio St.3d 335, 744 N.E.2d 1163, 2001-Ohio-57, is one such case in which this Court heard a similar argument concerning the potential creating of a supposed "super" specification. In *Jones*, this Court stated:

> In his fourteenth proposition of law, appellant also argues that the trial court improperly accorded "exceptional weight" to the fact that the victim in this case was a law enforcement officer-the R.C. 2929.04(A)(6) aggravating circumstance. Appellant **accuses the trial court of creating "a kind of 'super' aggravating circumstance that no amount of mitigation could outweigh."** Specifically, appellant challenges the trial court's statement that "the act of killing a police officer who, in the pursuit of his duties is attempting to apprehend a person accused of a felony crime, strikes at the very heart of the justice system."
>
> We reject appellant's argument. The trial court never suggested that the mitigating evidence in this case could not outweigh this aggravating factor. The trial court's statement regarding the severity of killing a police officer was not improper. Courts are certainly entitled to consider the gravity of the aggravating circumstances. See, e.g., *State v. Keene* (1998), 81 Ohio St.3d 646, 671, 693 N.E.2d 246, 266-267 **(noting that the killing of a witness in order to avoid prosecution is an act that strikes at the heart of the criminal justice system)**; *State v. Coleman* (1999), 85 Ohio St.3d 129, 145, 707 N.E.2d 476, 491.

Id. at 352 (emphasis added).

In the present case, the same argument is put forth, and the same conclusion should result. The Panel never stated that no amount of mitigation could overcome the R.C. 2929.04(A)(8) specification. Rather, the Panel gave the R.C. 2929.04(A)(8) specification "great weight." (Sentencing Opinion, p. 7) Thereafter, the Panel evaluated all mitigating factors and conducted the statutorily mandated balancing test. The Panel never stated that the mitigation could not tip the

scales as opposed to the R.C. 2929.04(A)(8) specification. The fact that Appellant wishes the Panel did not give this specification such great weight does not equate to the Panel committing misconduct. Instead, the Panel properly performed its role, which lead to the decision to give the (A)(8) specification great weight. Appellant's dislike of the outcome of a proper decision does not make the decision any less proper. Appellant's fifth proposition of law should be denied.

Proposition of Law VI:

The aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. Thus, death is the appropriate sentence.

In proposition of law number six, Appellant argues that "[a] review of the record in this case merits the independent conclusion that the death sentence is not appropriate[.]" (Appellant's brief page 39) The State disagrees.

A. Standard

Pursuant to R.C. 2929.05(A), this Court "shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. *** They also shall review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors."

In the case at bar, the evidence supports beyond a reasonable doubt that Appellant committed the crime of Aggravated Murder in the course of Aggravated Burglary, Aggravated Robbery and that

the victim, David Williams, "was a witness to an offense who was purposely killed to prevent the victim's testimony in any criminal proceeding[.]" See, R.C. 2929.04(A)(7) & (8). Further, these three aggravating circumstances outweigh beyond a reasonable doubt Appellant's mitigating factors pursuant to R.C. 2929.04(B). As such, death is the appropriate sentence.

B. Aggravating Circumstances

A three-judge panel convicted Appellant of Aggravated Murder, including the specifications of committing the murder in the course of Aggravated Burglary and Aggravated Robbery, and that the victim was killed to prevent him from testifying in a criminal proceeding against Appellant's girlfriend. The specifications were supported by the testimony and evidence presented at trial. After stabbing the victim five times in the chest, five times in the abdominal cavity, and inflicting two incision wounds in the neck, the Appellant stole the victim's checks and debit card. (T.p. 101-102) Appellant charged $27.01 from Exxon Mobil on Appellant's card, and attempted to charge $547.66 from Meijer. (T.p. 127-128) That charge, however, was declined due to insufficient funds. (T.p. 128)

Moreover, the victim discovered that Appellant's girlfriend stole approximately $18,000 from him and was planning on pressing criminal charges against her. (T.p. 99) Further, prior to his death, the victim, in a heated phone conversation with Appellant, informed Appellant that he was "going to go to the police. I'm going to file charges. This needs to be taken care of." (T.p. 45) As such, three aggravated circumstances were established.

C. Mitigating Factors

At the mitigation hearing, Appellant presented the testimony of Jim Egbert, the retired pastor from Appellant's childhood church; Paul Rudemiller, the director of the Camp Washington

Community Board, Inc.; Kenneth Osie, Appellant's younger brother; Brian Osie, Appellant's son; and Patricia Osie, Appellant's mother. (*Mitigation Hearing* ("MH"), T.p. 54-131)

Both Mr. Egbert and Mr. Rudemiller testified that Appellant's family volunteered at the church and contributed to the community. (MH, T.p. 57-58, 65-66) However, both testified that they had not had any recent contact with Appellant. Mr. Egbert testified that since 1999, he only saw Appellant once in 2006, at the funeral of Appellant's father. (MH, T.p. 61) Similarly, Mr. Rudemiller testified he had not seen Appellant since 2006.(MH, T.p. 66-67, 78)

Mr. Egbert also stated that the neighborhood where Appellant grew up was a "meatpacking industry. It was the stockyards[.] ***[I]n the sixties, it became the ten, the number ten area in the city. It was bad, very bad." (MH, T.p. 58) Mr. Rudemiller agreed that the neighborhood was a "tough neighborhood." (MH, T.p. 63, 65) However, Mr. Rudemiller testified that Appellant had two parents to guide him, and that Appellant "led a life that kept him away from the court system, from anything like that." (MH, T.p. 73, 78) Mr. Rudemiller testified that Appellant moved out of the neighborhood after graduating from high school, where he obtained employment and got married. (MH, T.p. 66) Thus, according to Mr. Rudemiller, there was no indication from Appellant's "previous life that led to what happened here." (MH, T.p. 73-74)

According to Appellant's brother their neighborhood was a "[g]ood place to grow up. A lot of kids. We had parks that served the needs that we needed. Just a good place to grow up. There was a lot of trouble in there, but we stayed away from that." (MH, T.p. 82) Appellant's mother also stated that "it was nice raising the kids there. I mean there was some rough hooligans, but then again, there was some very nice people there." (MH, T.p. 117)

Appellant's brother testified that their parents were very caring, and that Appellant did not suffer from any physical or sexual abuse in the family; "we had the two most wonderful parents you

could ever ask for." (MH, T.p. 82, 85, 97) Appellant's mother also testified that there was no abuse in the family, and that Appellant was "very well behaved." (MH, T.p. 118, 120)

After the passing of Appellant's father in 2006, Appellant separated from his wife and they eventually obtained a divorce. (MH, T.p. 88-89) According to Kenneth Osie, losing their father was hard on Appellant and "we all looked up to my father. He was a good man." (Id.) Appellant began to change, where Appellant would call his mother and ask for money. (MH, T.p. 90-91, 124-126) Further, money from their mother's account was missing. (Id.) In addition, Appellant's presence at family functions was less in duration. (MH, T.p. 95) Appellant's son also testified that Appellant changed after the death of his father and the divorce. (MH, T.p. 104) Appellant was not around as much, would stay out all night, and was not motivated to go to work. (MH, T.p. 105-106) Similarly, Appellant's mother also noticed a change in Appellant beginning in 2007, where he did not call or come down and visit as much. (MH, T.p. 123-124)

As to the use of drugs, Mr. Rudemiller testified that he has "never known [Appellant] to have problems with drugs." (MH, T.p. 69) Similarly, Appellant's brother testified that Appellant did not use drugs growing up. (MH, T.p. 90) Appellant's son, however, testified that before moving out from living with his father in April 2008, he saw Appellant snort cocaine. (MH, T.p. 108-109) After moving out in April 2008, Appellant's son did not have much contact with Appellant. (MH, T.p. 109-110)

D. Aggravating Circumstances Outweigh Mitigating Factors

This Court should give great weight to the aggravating circumstances, and should not give much weight, if any, to the mitigating factors.

Appellant's recent drug use should be given little weight if any as a mitigating factor. In *State*

v. Ketterer, 111 Ohio St.3d 70, 2006-Ohio-5283, ¶ 200, this Court accorded "only minimal weight for his status as an alcoholic and chronic drug user[,]" where Ketterer had been a "chronic alcoholic and drug abuser for over 30 years." In the case at bar, Appellant did not use drugs growing up. (MH, T.p. 69, 90) Appellant's voluntary drug use was recent. (MH, T.p. 108-109, 123-124) Thus, no weight should be given to this factor.

Little weight as a mitigating factor should be given to Appellant's lack of criminal record and assistance to the police. In *State v. Mundt*, this Court found that "[t]his factor of lack of criminal history is entitled to little weight." *Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, ¶208. Similarly, in *State v. Perez*, this Court held that "little weight in mitigation to Perez's confession. Perez initially lied to police, denying his own guilt and trying to blame John McGhee. CF. *State v. Fox* (1994), 69 Ohio St.3d 183, 195, 631 N.E.2d 124 (defendant confessed only after initially denying involvement; confession entitle to no weight); *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶ 119 (defendant confessed, but had previously misled police as to his involvement)." *Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, ¶ 247. In the case at bar, Appellant was not forthcoming with the police regarding the crime and his involvement, and only admitted to facts after he was confronted with several inconsistencies. (State's Exhibits 54) During his first statement, Appellant claimed that the murder was in self-defense, but then in the second statement admitted that it was not in self-defense. (Id.; T.p. 244) Furthermore, Appellant deceived the police regarding the location of the weapon, which was discovered with the aid of Appellant's inmate, Mr. Simpson. (T.p. 247, 249-250) As such, little weight should be given to Appellant's lack of criminal record and his attempted deception of the police during their investigation of the crime.

There were three aggravating circumstances: the murder was committed while Appellant committed Aggravated Robbery and Aggravated Burglary, R.C. 2929.04(A)(7), and the murder was

committed to prevent the victim from testifying in any criminal proceeding, R.C. 2929.04(A)(8). Great weight should be given to these aggravating circumstances. Appellant killed the victim to prevent him from filing criminal charges against Appellant's girlfriend, and stole items from the victim, including the debit card, which he used to charge gasoline and attempted to charge over $540 from Meijer for items to his girlfriend.

Therefore, the aggravating circumstances clearly outweigh the mitigating factors. As such, death is the appropriate sentence. The death penalty is proportionate when compared with other Aggravated Murders committed during the course of an Aggravated Burglary and an Aggravated Robbery. See, *State v.* Frazier, 115 Ohio St.3d 139, 2007-Ohio-5048, ¶ 270; See, also, *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶ 168; See, also, *Ketterer*, 2006-Ohio-5283, ¶ 206; See, also, *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044; See, also, *State v. Jones*, 90 Ohio St.3d 403, 423, 2000-Ohio-187.

Similarly, the death penalty is both appropriate and proportionate when compared with other Aggravated Murders committed to prevent the testimony of the victim in a criminal proceeding. See, *State v. Fry*, 2010-Ohio-1017, ¶ 234; See, also, *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, ¶ 212, *State v. Turner*, 105 Ohio St.3d 331, 2005-Ohio-1938, ¶ 101; See, also, *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 174. As such, the death penalty is the appropriate sentence for Appellant's heinous murder of Mr. Williams.

Proposition of Law VII:

Work Product was neither taken from Appellant's cell nor admitted during the trial.

In proposition of law seven, Appellant argues that the trial court improperly admitted work product. However, because there was no work-product, this argument must fail.

For security reasons, Appellant's cell was searched once by the Butler County Sheriff's department. (11/18/09, T.p. 17) This was done based upon information from Appellant's cell mate that he was attempting to plant evidence on other persons, trying to tamper with the investigation in general, and had already sent a letter in which he forged another person's name. (Id., 17-19). Appellant now claims that work product was taken during this search. The State disagrees.

Appellant's argument boils down to being a flypaper argument. Appellant has taken a legal term of art, thrown out a bunch of random facts, and is hoping this Court will make something stick. However, the record does not support his argument.

During the motions hearing on September 11, 2009, Appellant's trial counsel for the first time indicated their concern "and this is associated with the motion, with our motion G, in that there are items that **may be** in his cell that are -- that he's preparing to assist in the defense of this matter. (9/11/09 T.p. 61) Importantly, counsel neither made a definitive statement that there was any such material in the cell nor did he indicate what this mystery work product was. Appellant's co-trial counsel then spoke up and stated "we just wanted to reiterate that that order includes them taking items out of his cell again **that may be used** in the preparation of his defense, and certainly it would be our work product, and the State's not entitled to recover those types of items, so we'd ask the Court to include that in the order." (Id., 62) Again, co-counsel neither made a definitive statement that there was any such material in the cell nor did he indicate what this mystery work product was.

The trial court in this regard stated "[s]o all I'm saying is **if they've got a work product** out there, they need -- they have a right to have that protected. And I'm just saying, I'm not trying to interfere with the security at the jail, but I am saying that they've got a right to have their work product protected, and **I'm not saying that what you did wasn't appropriate. I don't have the evidence in front of me to say whether it was or it wasn't**. But I am saying that if it's brought before me, I'm going to scrutinize it. I just want you to understand that." (Id., 66) What becomes clear from this exchange is that there was not any specific work product that was identified as being taken, and that the trial court did not have any evidence of any work product being taken.

Thereafter, at a November hearing, this general issue again arose. The reason that this issue came about was the State attempting to clarify the trial court's ruling to make sure that the Appellant's rights would not be violated. (11/18/09 T.p. 13-14) In essence, the State was asking for the trial court to protect the prosecution from having to look at any potential work product. (Id.) The State was asserting that nothing that had already been seen was work product, and the State did not want to be placed in a situation where following the trial court's orders could lead to a possible issue with work product. (Id.)

However, defense counsel took this opportunity to reiterate their bald and unspecified claim that work product had already been taken and viewed by the State. (Id., at 14) The closest counsel came to identifying an actual object, was a claimed witness list of names and phone numbers. (Id.) Yet, if this were truly a list of witnesses, it would have been subject to disclosure[11] under the Criminal Rules, and it is hard to truly believe that this was an actual witness list when it contained all the following: phone numbers and addressees to 18 different bars, the phone number to the Olive

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[11] *United States v. Neill*, 952 F.Supp. 834 (D.D.C.,1997) (the disclosure of facts is presumptively less harmful than the disclosure of trial strategy).

Garden restaurant, multiple newscasters' names and contact information, and a poem called the Halo Effect. (See, State's Answer to Discovery, 04/24/2009) Additionally, the trial court again informed defense counsel that it would entertain any motion on the subject. The fact that no motion was ever filed, and the defense never put forth a coherent argument about what exactly was supposedly work product that was obtained by the State demonstrates that defense counsel knew that no work product was contained in the materials.

What is more, State's Exhibit 64, the letter taken from Appellant's cell begins as follows; "Baby Girl, My lawyers told me I'm not to write to you." It is impossible to see this type of material as work product when it specifically disavows being something that the attorney's even wanted Appellant to be doing.

Additionally, even if this Court were to somehow take a lower court record in which the trial court explicitly stated that it did not have the evidence in front of it, and one in which factually fails, the argument must also legally fail. This search was reasonable in terms of the Forth Amendment. The Supreme Court ruled in *Hudson v. Palmer* (1984), 468 U.S. 517, 522, that an inmate has no "justifiable" expectation of privacy in his prison cell:

> Notwithstanding our caution in approaching claims that the Fourth Amendment is inapplicable in a given context, we hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell. The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions.
>
> Prisons by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial criminal, and often violent, conduct. Inmates have necessarily shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self restraint; they have shown an inability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others.

* * *

> We are satisfied that society would insist that the prisoner's expectation of privacy always yield to what must be considered the paramount interest in institutional security. We believe that it is accepted by our society that "loss of freedom of choice and privacy are inherent incidents of confinement.

Based upon the information available to the Butler County Sheriff's department, and pursuant to *Hudson v. Palmer*, the search of Appellant's cell was proper. What is more, a proper search of a prison cell may include searching the inmate's legal materials. *Mitchell v. Dupnik*, 75 F.3d 517, 523 (9th Cir.1996). Additionally, when faced with a situation in which actual work product was confiscated from a defendant's cell, an Ohio appellate court has held that if the material is not used at trial, then no prejudice results. *State v. Woods*, Cuyahoga App. Nos. 94141, 94142, 2011-Ohio-817, ¶ 31 ("This evidence was not used at trial, therefore, Woods was not prejudiced"). Thus, even if Appellant's arguments were correct, his argument would not state a cognizable issue that would raise a legally valid reason for reversal as no item that even borders on work product was used at trial. Appellant's seventh proposition of law fails both factually and legally, and should be overruled.

Proposition of Law VIII:

No *Brady* violation occurred, where the prosecutor provided Appellant with the lab report and the witnesses' criminal record as soon as it became aware if it, two weeks befroe trial, and the morning of testimony, respectively.

In proposition of law number eight, Appellant argues that the State "withheld relevant exculpatory evidence until right before and during the trial[,]" thus, "[t]he prosecutor's actions limited defense counsel's ability to effectively challenge the evidence against Osie." (Appellant's

brief page 50) The State disagrees.

A. Standard

Pursuant to *Brady v. Maryland* (1963), 373 U.S. 83, 87, 83 S.Ct. 1194, "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or punishment." For the evidence to be material, "there must be a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley* (1985), 473 U.S. 667, 682, 105 S.Ct. 3375. Moreover, the United States Supreme Court has held that the prosecution's "omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial." *United States v. Agurs* (1976), 427 U.S. 97, 112-13, 96 S. Ct. 2392.

Moreover, "Ohio courts have generally held that there is no *Brady* violation when disclosure of the possibly exculpatory evidence is made before or even during trial. *State v. Iacona*, 93 Ohio St.3d 83, 2001-Ohio-1292, 752 N.E.2d 937. However, the courts have also recognized that in some instances there may still be a violation of due process rights if the timing of the disclosure significantly impairs the fairness of the trial. The issue becomes whether the *Brady* material was disclosed to the defendant in time for it to be effectively used at trial. *Id.*, quoting *United States v. Smith Grading & Paving, Inc* (C.A. 4, 1985), 760 F.2d 527." *State v. McKinney*, Franklin App. No. 06AP-510, 2007-Ohio-1842, ¶ 13.

In the case at bar and contrary to Appellant's argument, the State's submission of the lab report indicating that there were no usable prints two weeks before trial, and the submission of the criminal record of a State's witness the day of his testimony did not deprive Appellant of a fair trial.

The evidence was disclosed in time for Appellant to effectively utilize it at trial.

B. Lab Report

Appellant acknowledges in his brief that the State provided him with the lab report indicating that no usable prints had been found on a white box, on April 8, 2010, which is when the State became aware of the report. (Appellant's brief pages 50-51) Thus, the report was submitted almost two weeks prior to the first day of trial; therefore, Appellant had sufficient time to utilize the report during trial. Moreover, Appellant also acknowledges that the report "could correctly be properly characterized as neutral[.]" (Appellant's brief page 51) Therefore, Appellant cannot demonstrate a reasonable probability that, had the report been disclosed to the defense more than two weeks prior to trial, the result of the proceeding would have been different. As such, the lab report was not material and *Brady* does not apply. See, *Bagley*, 473 U.S. 667.

C. Criminal Record of State's Witness

Appellant argues that he was denied a fair trial and was prejudiced by the State's disclosure of the criminal record of one of its witnesses the day of his testimony. (Appellant's brief page 52-54) In support of his argument, Appellant relies on the cases of *United States v. Burke* (C.A.10, 2009), 571 F.3d 1048, and *State v. Couch*, Butler App. No. CA2001-06-132, 2002-Ohio-3347. (Appellant's brief pages 52-54) Appellant's reliance on these cases is misplaced and his argument is without merit.

The Tenth Circuit's decision in *Burke* defeats Appellant's argument. In *Burke*, the Court **affirmed** appellant's convictions because "the impeachment evidence was disclosed during trial, in time for Mr. Burke to use the information during cross-examination." *Burke*, 571 F.3d 1048, 1053.

Similarly, in the case at bar, the disclosure was in time for Appellant to use the information during cross-examination.

Moreover, the facts in *Couch* are distinguishable from the case at bar. In *Couch*, the judge was the person who disclosed the information, where "a written confidential informant contract between Sharon and the Sheriff's Department was disclosed to the defense by the judge following an in camera review of the law enforcement investigative file. *** Another in camera review disclosed a pending felony case against Sharon, for receiving stolen property, that was not disclosed to the defense until the trial began." *Couch*, 2002-Ohio-3347, ¶¶ 29, 30 (emphasis added). Thus, in *Couch*, the State did not disclose the information, but rather, the judge after conducting two in camera interviews, discovered the withheld information and disclosed it. In the case at bar, however, the State disclosed the witness's criminal record as soon as it became aware of it.

During the second day of trial, the State called Donald Simpson as a witness. (T.p. 95) The State first questioned Mr. Simpson regarding his relationship with Appellant. (T.p. 95) Mr. Simpson explained that he was Appellant's cell-mate from February 2009 until April 2009 at the Butler County jail. (T.p. 95, 97) After establishing the relationship, the State questioned Mr. Simpson regarding his criminal record. (T.p. 96) Mr. Simpson confirmed that he has a felony record, which includes vehicular assault in 2001, attempted sexual battery in 2001, and sexual battery in 2001. (Id.) Mr. Simpson also confirmed that he had a misdemeanor conviction for theft in 2007. (Id.)

Prior to cross-examination, the State informed the trial court that "when we first ran his record, we were only aware of misdemeanors, and therefore, nothing was disclosed. We finally found him and located him yesterday around 3 o'clock and became aware that he had the felonies, and so we informed -- we ran a **federal CCH** on him and confirmed that and then told the defense counsel this morning, but again, based on that federal search, the only thing we were aware of the felony

solicited in direct examination and the misdemeanor theft charge, and that's what he represents as well." (T.p. 106-107) (emphasis added) The trial court then addressed Appellant's counsel: "[t]he real question is would you have done anything months ago or weeks ago had you known that there was a felony record that you have not been able to do?" (T.p. 107-108) Appellant's counsel responded: "[w]ell, I think we certainly would have given the name or given information to the private investigator to investigate any further, but at this point, I mean he's here, he's testified. We have -- it's not reflection upon the State in terms of we believe the information they've given us up to now, **so we'll use that and move forward**." (T.p. 108) (emphasis added) Appellant's counsel then proceeded to cross-examine Mr. Simpson. (T.p. 108-112)

As the record demonstrates, the State did provide Appellant with Mr. Simpson's criminal record as soon as it became aware of it. Furthermore, Appellant's counsel informed the trial court that it was not prejudiced by the delay and that "we'll use that and move forward[,]" and Appellant's counsel proceeded to cross-examine the witness. Hence, Appellant was provided with the information in time to effectively use it. Therefore, Appellant cannot demonstrate a reasonable probability that, had the criminal record been disclosed to the defense prior to the day of trial, the result of the proceeding would have been different. As such, Mr. Simpson's criminal record was not material and *Brady* does not apply. See, *Bagley*, 473 U.S. 667. Thus, Appellant's argument is without merit and should be overruled.

Proposition of Law IX:

The Butler County Court of Common Pleas followed all necessary provisions of R.C. 2945.06.

In proposition of law nine, the Appellant argues that the selection of the three-judge panel in his case violated Ohio law, and that the panel lost authority to proceed to a final judgment. The State disagrees.

In relevant part, R.C. 2945.06 states that "[i]f the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges, consisting of the judge presiding at the time in the trial of criminal cases and two other judges to be designated by the presiding judge or chief justice of that court, and in case there is neither a presiding judge nor a chief justice, by the chief justice of the supreme court."

Appellant's argument appears to turn on the word "designated" in R.C. 2945.06. What Appellant would have this Court believe is that when the two judges had their numbers picked blindly our of a bottle in Judge Powers' courtroom on April 17, 2009, they were then designated to be on the panel. However, the other two judges would never be part of a panel unless two district actions occurred. First, Appellant had to decide to waive a jury. This action by the Appellant would then mandate that a panel be officially created which would require the second action being an order to officially designate them to the panel.

On March 31, 2010, Appellant, with counsel, decided to waive a jury trial. At that moment, a three-judge panel had to be created. Therefore, also on March 31, 2010, the Butler County Court of Common Pleas put on a judgment entry that specifically assigned Judge Oney and Judge Pater to the case. This entry was not only signed by Judge Powers as the presiding judge, but was also signed by Judge Michael J. Sage, as the "Current Presiding and Administrative Judge" of the Butler County

Common Pleas Court. As such, once there was the official need for the panel to be designated, the presiding judge of the Butler County Court of Common Pleas designated a panel. Thus, there is no violation of R.C. 2945.06.

While it is true that Judge Powers oversaw the blind ball-pull selection process of the other two judges, this was done as a courtesy to the Appellant in an effort to allow him to know what judges would compose his panel if he waived a trial by jury. It was only when Judge Sage in his role as the presiding and administrative judge signed an order appointing the other two judges that they were in fact "designated." Thus, Appellant's argument is unfounded.

What is more, although it becomes unnecessary as there was no error, it should be pointed out that the defense never objected, so even if this Court were somehow find Judge Sage's signature not conclusive to the issue, the lack of an objection would lead to a plain error analysis, and no plain error can be found. See *State v. Thomas,* 97 Ohio St.3d 309, 2002-Ohio-6624 (capital defendant, by failing to object at trial, waived claim that judge who signed order establishing three-judge panel lacked authority to establish that panel because he was not a general division common pleas judge); *State v. Bays*, 87 Ohio St.3d 15, 1999-Ohio-216 (waiver by failing to object at trial to probate judge's assignment to the three-judge panel). This failure to object is evident from the April 17, 2009 hearing where Judge Powers asks three times, including both before the preliminary selection process and afterwards if there is any objection to the process being used to select the other judges. On all three occasions, lead defense counsel states that there is no objection. (Apr 17, 2009 T.p. 3-5)

As such, the trial court did not violate R.C. 2945.06, and even if this Court were to find a slight variation from 2945.06, the Appellant never objected and inasmuch waived any claim of error.

Proposition of Law X:

Appellant knowingly, intelligently, and voluntarily waived his right to a jury trial.

In proposition of law number ten, Appellant argues that the "trial court erred in accepting Osie's waiver of his Sixth Amendment right to a jury trial, because his waiver was not made knowingly, intelligently, or voluntarily." (Appellant's brief page 59) The State disagrees.

A. Standard

A waiver is the intentional relinquishment of a known right or privilege. *State v. Bays* (1999), 87 Ohio St.3d 15, 19, 716 N.E.2d 1126. Hence, a defendant who waives the right to a jury trial must have some "knowledge of the nature of the jury trial right to make a valid waiver." *Id.* at 20. As such, a jury waiver must be knowingly, intelligently, and voluntarily made. *State v. Ruppert* (1978), 54 Ohio St.2d 263, 271, 375 N.E.2d 1250.

However, "[t]here is no requirement for a trial court to interrogate a defendant in order to determine whether he or she is fully apprised of the right to a jury trial." *State v. Jells* (1990), 53 Ohio St.3d 22, 559 N.E.2d 464, paragraph one of the syllabus. Rather, the "Criminal Rules and the Revised Code are satisfied by a written waiver, signed by the defendant, filed with the court, and made in open court, after arraignment and opportunity to consult with counsel." *Id.*, at 26. "[A] written jury waiver is presumed to have been voluntary, knowing, and intelligent[.]" *State v. Turner*, 105 Ohio St.3d 331, 2005-Ohio-1938, ¶ 25. As such, "the trial court's failure to make specific inquiries of the defendant cannot be error." *State v. Filiaggi* (1999), 86 Ohio St.3d 230, 238, 714 N.E.2d 876.

Furthermore, "a defendant need not have a complete or technical understanding of the jury

trial right in order to knowingly and intelligently waive it." *Bays*, 87 Ohio St.3d 15, 20; See, also, *United States v. Martin* (C.A.6, 1983), 704 F.2d 267, 273 ("A defendant is sufficiently informed to make an intelligent waiver if he was aware that a jury is composed of 12 members of the community, he may participate in the selection of the jurors, the verdict of the jury must be unanimous, and *** a judge alone will decide guilty or innocence should he waive his jury trial right.").

In the case at bar, the record demonstrates that Appellant knowingly, intelligently, and voluntarily waived his right to a jury trial and know that instead a three-judge panel would determine his guilt and sentence.

B. Waiver Colloquy

On March 31, 2010, at a scheduling hearing, Appellant's counsel submitted to the lower court a jury waiver signed by Appellant. (Scheduling Hearing 03-31-2010 ("SH"), T.p. 3) Upon receiving the waiver, the lower conducted a colloquy with Appellant to ascertain whether the waiver was knowingly, intelligently, and voluntarily made. (SH, T.p. 4-13) Prior to conducting the colloquy, Appellant's counsel informed the trial court that counsel had met with Appellant on two occasions regarding the jury waiver. (SH, T.p. 4-5)

The lower court then explained to Appellant the process of a jury trial, where Appellant would be a participant in choosing the twelve jurors, the requirement that all twelve jurors must unanimously agree to convict him, and also, that the jury would determine his sentence if he was found guilty:

> "[a]nd you understand that if you chose to have a jury, a jury would be impaneled consisting of twelve people.***Those twelve people would be picked by the court with the assistance of the prosecuting attorneys, your attorneys, ***, and yourself. You would play an active role in picking that jury.*** And you understand that that jury would listen to all of the evidence in the case, and unless they were unanimous in their belief that the prosecuting attorneys on behalf of the State of Ohio had proven

> your guilty beyond a reasonable doubt, that's the requisite degree of proof with respect to a jury trial, and to the unanimous satisfaction of each of those twelve, they would all have to agree that the prosecution had done so, you could not be found guilty of the charges against you or any of the specifications that are attached thereto. ***
>
> And do you understand that if -- in the event that you were found guilty of the charges and any of what we call the capital specifications, that's the specifications that could result in you being given a death sentence, that those things would also be determined by the jury. *** And once again, *it would have to be by a unanimous verdict*. All twelve of them would have to agree.*** And you understand that they would base that upon whether the State had proven that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. *** <u>You understand that in waiving a jury here today, you're going to give that up</u>, and instead, <u>you're going to ask a three-judge panel to make those determinations, both in the trial phase and in what we call the sentencing phase</u>[.]" (SH, T.p. 5-8) (emphasis added)

Appellant answered affirmatively to each of the lower court's inquiries, and even verified to the lower court his understanding: "THE COURT: All right. And how many of them would have to vote guilty for you to be found guilty, Mr. Osie? DEFENDANT: All twelve. THE COURT: And how many of them have to vote for you to be given the death penalty? DEFENDANT: All twelve." (SH, T.p. 8-9) Moreover, after informing the lower court of his request to waive his right to a jury, Appellant confirmed his understanding that a three-judge panel would be deciding his guilt and sentence, and even indicated the three judges that have been picked: "THE COURT: And has anybody represented to you who this three-judge panel is going to be? DEFENDANT: You, Judge Oney, and Judge Pater." (SH, T.p. 11)

The lower court then requested that Appellant sign the jury waiver and made the finding that Appellant "has knowingly, intelligently, and voluntarily chosen to waive his right to trial by jury and has elected to proceed by way of a three-judge panel, and I'm going to find that this waiver was knowing, intelligent, and voluntary, and I will evidence that by my signature on the judgment entry which is at the bottom of the waiver of trial by jury which I've just submitted to Mr. Osie which has been signed by him and countersigned by both of his counsel in this matter." (SH, T.p. 13-14)

C. The Waiver Was Knowingly, Intelligently, and Voluntarily Made.

Appellant argues that "the trial court failed to ask whether Osie was on any medication or inquire about his mental health[,]" and that a review of Appellant's letters, entered as an exhibit in trial, "would have led anyone to have concerns about Osie's mental health." (Appellant's brief page 60) Further, Appellant argues that the trial court failed "to inquire into Osie's background, IQ, or level of education-information[.]" (Id.) Appellant's arguments are both without merit.

First, contrary to Appellant's argument, the record before the lower court at the time of the waiver would not "have led anyone to have concerns over Osie's mental health." Nothing in the record demonstrates that Appellant had mental health issues at the time of the waiver or in the past. Prior to the jury waiver, Appellant did not file any motion to indicate that he has mental health issues or that his mental health was an issue, either in his capability to assist his attorneys in representing him, or that his mental health was a factor for his heinous murder of Mr. Williams. Thus, there is nothing in the record that indicates that Appellant was unable to make a decision concerning the jury waiver. Further, even a defendant with mental illness and who is on medication can knowingly, intelligently and voluntarily waive their right to a jury trial. See, *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, ¶ 71; See, also, *State v. Fitzpatrick,* 102 Ohio St.3d 321, 2004-Ohio-3167, ¶¶ 36, 39.

Second, Appellant consulted with both his attorneys on waiving his right to a jury ten days prior to the filing of the waiver, and the night before, he consulted with one of his lawyers. (SH, T.p. 4-5) Therefore, the record demonstrates that Appellant's waiver was voluntary. See, *Fitzpatrick*, 2004-Ohio-3167, ¶38 ("A defendant's having had the advice of counsel is a factor supporting a finding of voluntariness.")

Third, Appellant's waiver was knowing and intelligent. In *Fitzpatrick* this Court stated: "*Martin* recognized that a defendant's awareness of certain features of a jury trial, including the unanimity, is *sufficient* knowledge for a knowing and intelligent jury waiver. But the court did not say that this knowledge was a constitutional minimum for a knowing and intelligent waiver. Furthermore, the *Martin* court *recommended* that trial courts advise defendant, on the record, of those features, but it refused to *require* such notification." *Fitzpatrick*, 2004-Ohio-3167, ¶46, citing *United States v. Martin* (C.A.6, 1983), 704 F.2d 267, 273.

In the case at bar, the trial court did not simply make Appellant aware of certain features of a jury trial, but rather, the trial court informed Appellant of all aspects of a jury trial. Appellant was informed that a jury of twelve persons will be chosen; that he and his attorneys would be participants in the choosing of the jury; that the jury would listen to all evidence presented, after which, Appellant would only be convicted if the jury unanimously agrees; that the jury must also unanimously agree as to the specifications; that if the jury finds Appellant guilty of the charges and the specifications, the jury would determine the sentence; and that the jury must also be unanimous on the sentence. (SH, T.p. 5-8) Thus, as the record demonstrates, Appellant was informed of all aspects of a jury trial before he elected to waive his right to a jury trial.

Finally, simply because Appellant provided the trial court with a signed jury waiver before it conducted its colloquy does not negate the presumption that it was knowing, intelligent, and voluntary. In *Turner*, the defendant "submitted to the court a written, signed jury waiver[,]" before the trial court conducted its colloquy. *Turner*, 2005-Ohio-1938, ¶23. This Court upheld the waiver and held: "[n]othing in the record overcomes the presumption that Turner's written waiver was voluntary, knowing, and intelligent. The record shows that Turner understood that he had a choice between a jury of 12 and a three-judge panel. He was expressly told on October 24 that he had a

'right to have a jury of 12 persons hear and decide the case *** and render a unanimous verdict.' *** Turner failed to make 'a plain showing that [his] waiver was not freely and intelligently made." *Id.*, ¶¶ 27-28. In the case at bar, the trial court was presented with a signed jury trial waiver before it conducted its colloquy. (SH, Tp. 3) However, after the colloquy and determining that Appellant's waiver was knowingly, intelligently, and voluntarily made, the trial court requested that Appellant and his counsel sign it again before the trial court signed it. (SH, T.p. 13-14)

As such, Appellant has failed to overcome the presumption that his written waiver was knowing, intelligent and voluntary. Hence, his assignment of error should be overruled.

Proposition of Law XI:

There was sufficient evidence establishing Appellant's conviction for aggravated robbery.

In proposition of law number eleven, Appellant argues that "the three-judge panel concluded that the theft occurred subsequent to the homicide and with independent motivation. The panel concluded that the theft occurred to make the homicide look like a burglary gone awry. Consequently, the evidence is insufficient to sustain the conviction." (Appellant's brief page 64) Appellant's argument is without merit.

A. Thee-Judge Panel's Decision

The three-judge panel found Appellant guilty of Aggravated Robbery: "[v]erdict of the three-judge panel with respect to count four, the aggravated robbery charge. We, the three-judge panel, do unanimously find Gregory Osie guilty beyond a reasonable doubt of aggravated robbery as charged in count four of the indictment." (T.p. 349-350) As the record demonstrates, the three-judge panel

in announcing the verdict did not indicate any belief that the aggravated robbery was a cover-up. During the disposition hearing held on May 3, 2010, where the three-judge panel were determining whether death was the appropriate sentence, the court stated: "[w]e believe that both the aggravated burglary and the aggravated robbery specifications were largely part of the commission of the aggravated murder itself or the cover-up which followed immediately thereafter. We did accord each of those aggravating circumstances some weight. *** With respect to the aggravated robbery, we found that once again, that was more related to the cover-up in terms of trying to make it look like it was burglary gone awry. Nevertheless, the panel was mindful of the fact that the defendant took various items of property belonging to Mr. Williams which he used to commit a theft offense against Mr. Williams even after his death. *** This circumstance the panel accorded moderate weight." (Disposition Hearing ("DP"), T.p. 8-9)[12]

In the sentencing opinion, in which the three-judge panel determined the appropriate sentence of death, the court stated: "[o]f the two predicate felony murder specification, the Panel found the Aggravated Robbery to be less compelling. That offense (specification) was more related to the cover-up, in terms of trying to make the murder look like a burglary gone awry. Nevertheless, the Panel was mindful of the fact that the Defendant took various items of property belonging to Mr. Williams, which he used to commit a theft against the victim, even after his death. For example, within minutes after leaving the residence, Defendant was at a local UDF store filling his gas tank on the victim's credit card and, later, proceeded to Meijer's Department store, where he used that

[12] On May 10, 2010, a re-disposition hearing was conducted to correct the lack of any postrelease control notification at the disposition hearing held on May 3, 2010. (Re-Disposition Hearing ("RDP"), T.p. 1-18) During this hearing, the three-judge panel simply stated: "[t]hat defendant purposely caused the death of David Williams while he was committing or attempting to commit the offense of aggravated robbery and was the principal offender in the aggravated murder, the panel accorded that aggravating circumstance moderate weight." (Id., T.p. 8)

same card in an attempt to buy a ring, jewelry and a red negligee, ostensibly, to present to his paramour, Robbin Patterson, as a Valentine's gift. This circumstance the Panel has also accorded moderate weight." (Sentencing Opinion, May 12, 2010, pages 6-7)

B. Standard of Review

In reviewing the record for sufficiency, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. And when deciding a sufficiency of the evidence issue, the reviewing court will not substitute its evaluation of witness credibility for that of the trier of fact. See, *State v. Benge* (1996), 75 Ohio St.3d 136, 661 N.E.2d 1019. The State can use either direct evidence or circumstantial evidence to prove the elements of a crime. See, *State v. Nicely* (1988), 39 Ohio St.3d 147, 529 N.E.2d 1236. Furthermore, "circumstantial evidence and direct evidence inherently possess the same probative value." *Jenks*, paragraph one of the syllabus.

C. Appellant's Conviction Is Supported By Sufficient Evidence

Appellant "does not take issue with the factual findings of the panel. Rather, Osie contends that the panel erroneously applied the law to those facts." (Appellant's brief page 65) The State disagrees as the three-judge panel correctly applied the law as announced by this Court to the facts.

Appellant was convicted of Aggravated Robbery in violation of R.C. 2911.01(A)(1), which provides: "[n]o person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following: (1) [h]ave a deadly weapon on or about the offender's person or under the offender's

control and either display the weapon, brandish it, indicate that the offender possesses it, or use it[.]" Appellant was also found to have committed felony murder pursuant R.C. 2929.04(A)(7), which provides: "[i]mposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt: (7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design."

Pursuant to this Court's decision in *State v. Williams* (1996), 74 Ohio St.3d 569, 660 N.E.2d 724, the three-judge panel correctly convicted Appellant of Aggravated Robbery and felony murder. In *Williams*, this Court held "[n]either the felony murder statute nor Ohio case law required the intent to commit a felony to precede the murder in order to find a defendant guilty of a felony-murder specification." *Williams*, 74 Ohio St.3d 569, paragraph one of the syllabus. In reaching this decision, this Court concluded that the term "while" does "not indicate *** that the killing must occur at the same instant as the attempted rape, or that the killing must have been caused by the attempt, but, rather, indicates that the killing must be directly associated with the attempted rape as part of one continuous occurrence." *Id.*, at 577, citing *State v. Cooey* (1989), 46 Ohio St.3d 20, 544 N.E.2d 895; *State v. Cooper* (1977), 52 Ohio St.2d 163, 370 N.E.2d 725.

In the case at bar, Appellant within minutes of murdering the victim charged $27.01 of gas on the victim's debit card, and also went to Meijer and attempted to purchase over $540 worth of items for his girlfriend. (T.p. 127-128; State's Exhibits 42, 43, 44, 46) Appellant caused the victim's

death with the use of a knife, by stabbing the victim five times in the chest and five times in the abdominal cavity, and caused two incision wounds to the neck. (T.p. 218-219) Appellant was still in possession of the knife when he took the victim's debit card, and the knife was located away from the crime scene; specifically, it was located at the corner of Cox and Barrett road. (T.p. 249-250; State's Exhibit 50) As such, pursuant to *Williams*, Appellant's conviction should be upheld.

Realizing this, Appellant is requesting that the Court "reconsider the scope of Williams and prohibit its application in situations where the murder happens before the felony and the three-judge panel specifically finds that the intent to commit the requisite felony did not occur until after the murder." (Appellant's brief page 68) Appellant is requesting that this Court abandon its holding in *Williams* and instead adopt the holding in the Maryland case of *State v. Allen* (2005), 387 Md. 389, 875 A.2d 724. This Court should deny his request.

In *Allen*, the Maryland Court of Appeals stated that "[w]e agree with the majority view expressed by the courts of this country. In order to sustain a conviction for felony-murder, the intent to commit the underlying felony must exist prior to or concurrent with the performance of the act causing the death of the victim. An afterthought felony will not suffice as a predicate for felony-murder." *Id.*, at 402. In reaching this decision, the Maryland court analyzed the felony-murder statute, which provides: "[a] murder is in the first degree if it is: (4) **committed in the perpetration** of or an attempt to perpetrate: (ix) robbery under §3-402 or §3-403 of this article[.]" *Id.*, at 396-397, citing Md. Code §2-201(a) (emphasis added). The Maryland court also referenced the Tennessee case of *State v. Buggs* (1999), 995 S.W.2d 102. Similar to the felony murder statute of Maryland, the Tennessee felony murder statute provides: "(a) first degree murder is: (2) A killing of another **committed in the perpetration** of or attempt to perpetrate any first degree murder, act of terrorism, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, aggravated child neglect,

rape of a child, aggravated rape of a child or aircraft piracy[.]" §39-13-202.

Ohio's felony murder statute, on the other hand, provides: "The offense was committed **while the offender was committing**, attempting to commit, or **fleeing immediately after** committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design." R.C. 2929.04(A)(7) (emphasis added). Thus, unlike the Maryland and Tennessee felony murder statutory provisions, Ohio's statutory provision includes the terms "while" and "fleeing immediately after," which are indicative of temporal proximity.

Furthermore, this Court in 2006, which is after the Maryland's *Allen* case, continued to uphold the *Williams* decision. *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404. In *Johnson*, this Court held:

> "[T]he term 'while' does not indicate *** that the killing must occur at the same instant as the [predicate felony], or that the killing must have been caused by the [felony]." *State v. Cooper* (1977), 52 Ohio St.2d 163, 179-180, 6 O.O.3d 377, 370 N.E.2d 725. Nor does it mean that the felony must have been the motive for the killing. *State v. Williams* (1996), 74 Ohio St.3d 569, 577, 660 N.E.2d 724; *State v. McNeil* (1998), 83 Ohio St.3d 438, 441, 700 N.E.2d 596.
> Rather, "while" means that "the killing must be directly associated with the [felony] as part of one continuous occurrence ***." *Cooper*, 52 Ohio St.2d at 179-180, 6 O.O.3d 377, 370 N.E.2d 725. See also *State v. Cooey* (1989), 46 Ohio St.3d 20, 23, 544 N.E.2d 895. "[T]he term 'while' means that the death must occur as part of acts leading up to, or occurring during, or immediately subsequent to the [relevant felony]." *Williams*, 74 Ohio St.3d at 577, 660 N.E.2d 724. "The sequence of events" may be "examined in light of time, place, and causal connection" to determine whether it "amounts to 'one continuous occurrence.'" *McNeil*, 83 Ohio St.3d at 441, 700 N.E.2d 596, quoting *Cooey*, 46 Ohio St.3d at 23, 544 N.E.2d 895."

Johnson, at ¶¶ 55-56.

Moreover, recently the Second District Court of Appeals rejected the argument that a conviction for Aggravated Robbery cannot be upheld when the theft occurs after the victim left the scene of the crime. *State v. Engle*, Montgomery App. No. 22934, 2009-Ohio-4787. In that case, the

defendant argued "that the speakers were taken as an afterthought, independent from the confrontation over the ring[,]" where the defendant pointed a gun at the victim. *Id.*, at ¶ 19. Citing to this Court's decision in *Johnson* for the definition of the term "while," the Second District overruled the argument and held that "[a] defendant 'cannot escape the effect of the felony-murder rule by claiming that the aggravated robbery was simply an afterthought.' *State v. Biros* (1997), 78 Ohio St.3d 426, 450, 678 N.E.2d 891, citing *State v. Smith* (1991), 61 Ohio St.3d 284, 574 N.E.2d 510. *** There is sufficient evidence to support the State's argument that it was Engle's act of pointing a gun at Dilbeck that caused Dilbeck to flee, which in turn gave Engle the opportunity to exert control over Dilbeck's speakers without his permission." *Id.*, at ¶¶20-21.

Similarly, in a more recent case, the Tenth District Court of Appeals held: "'[T]he question whether [the defendant] killed before he stole or stole [or attempted to steal] before he killed is of no consequence.' (Bracketed material sic.) *McNeill* at 440-41, 700 N.E.2d 596, quoting *State v. Palmer*, 80 Ohio St.3d 543, 571, 687 N.E.2d 685, 1997-Ohio-312. 'A robber cannot avoid the effect of the felony-murder rule by first killing a victim, watching her die, and then stealing her property after the death.' *Smith* at 290, 574 N.E.2d 510, citing *State v. Jester* (1987), 32 Ohio St.3d 147, 151-52, 512 N.E.2d 962, and *Conrad v. State* (1906), 75 Ohio St. 52, 78 N.E. 957." *State v. Lockhart*, Franklin App. Nos. 09AP-613 & 09AP-614, 2010-Ohio-173, ¶ 16.

The Tenth District also stated that "'Appellant's intent to steal need not have preceded the murder for purposes of R.C. 2903.01(B).' *State v. Biros*, 78 Ohio St.3d 426, 451, 678 N.E.2d 891, 1997-Ohio-204, citing *State v. Williams*, 74 Ohio St.3d 569, 660 N.E.2d 724, 1996-Ohio-91. 'Appellant cannot escape the effect of the felony-murder rule by claiming that the aggravated robbery was simply an afterthought.' *Biros* at 451, 678 N.E.2d 891." *Lockhart*, at ¶ 20.

Likewise in the case at bar, Appellant should not escape the effect of the felony murder rule

by exerting control over the victim's debit card after killing the victim. Furthermore, this Court should not deviate from its holding in *Williams*, which this Court continued to apply in 2006. See, *Johnson*, 2006-Ohio-6404. Therefore, this Court should not adopt the Maryland's decision in *Allen*, because Maryland's felony murder statutory provision is clearly distinguishable from Ohio's provision, which includes the terms "while" and "immediately after." As such, Appellant's argument is without merit and should be overruled.

Proposition of Law XII:

Appellant received effective assistance of counsel.

In proposition of law number twelve, Appellant argues that his attorneys' "performance failed to meet the prevailing standards of practice." (Appellant's brief page 71) The State disagrees.

This Court has held that "[u]nder *Strickland*, a defendant claiming ineffective assistance of counsel 'must show that counsel's representation fell below an objective standard of reasonableness, " and the defendant "[m]ust also show that the ineffective representation prejudiced his case." *State v. Burke*, 97 Ohio St.3d 55, 776 N.E.2d 79, 2002-Ohio-5310, ¶ 6, citing *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. In order to establish the first prong, the Court in *Strickland* stated that the defendant must show that his "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Attorneys are given a "heavy measure of deference" to their judgments, and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.s. at 681, 691. In Ohio, a properly licensed attorney is presumed competent. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164.

In order to establish the second prong, the Court in *Strickland* stated that the defendant must show "a reasonable probability that, but for counsel's actions, the result of the proceeding would have been different," where it continued; "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Therefore, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. A failure to make an adequate showing on either the "performance" or "prejudice" prongs of the *Strickland* standard will doom the defendant's ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 687, 697.

A. Investigator

Appellant argues that his attorneys were ineffective for failing to retain an investigator. (Appellant's brief page 71) Appellant's argument is without merit. Appellant does not assert what information the investigator would have discovered, and if the investigator did discover any information how that information would have affected the outcome of the case. Thus, Appellant's argument is solely based on speculation. This Court has previously held that "[s]uch speculation is insufficient to establish ineffective assistance" of counsel. *State v. Short* (July 28, 2011), 2011-Ohio-3641, ¶ 119; See, also *State v. Perez*, 2009-Ohio-6179, ¶ 217. Therefore, Appellant's argument must fail.

B. Motion to Suppress

Appellant argues that his attorneys were ineffective for failing to file a motion to suppress the admission of attorney work product and for failing to object to the admission of the document

during trial. (Appellant's brief pages 71-72). Appellant's argument is without merit. Appellant cannot demonstrate that if his attorneys had filed said motion or that if they had made an objection during trial, either would have been granted.

This Court has held that neither the failure to file, nor the withdrawal of, a motion to suppress amounts to ineffective assistance of counsel "when doing so was a tactical decision, there was no reasonable probability of success, or there was no prejudice to the defendant." *State v. Nields*, 93 Ohio St.3d 6, 34, 2001-Ohio-1291; See, also, *Kimmelman v. Morrison* (1986), 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.E.2d 305 ("Failure to file a suppression motion does not constitute *per se* ineffective assistance of counsel.").

In the case at bar, as previously discussed in proposition of law number seven, Appellant's cell was searched in accordance with the law, the documents were rightfully seized, and further, the document was not attorney work product. Criminal Rule (16)(J) provides that "Work product includes, but is not limited to, reports, memoranda, or other internal documents made by the prosecuting attorney or defense counsel, or their agents in connection with the investigation or prosecution or defense of the case." Crim.R. 16(J) In the case at bar, the document was written **by Appellant** in the form of a letter **to his girlfriend**, not to his counsel. (State's Exhibit 64) Therefore, the document does not meet the definition of attorney work product. As such, even had Appellant's attorneys filed a motion to suppress or objected to its admission at trial, neither would have been granted. Thus, his argument must fail.

C. Admission of Statement

Appellant argues that his attorneys performance was deficient because they failed to object to the admission of his selectively recorded statement. (Appellant's brief page 71) Appellant's

argument is without merit as Appellant cannot demonstrate that had his attorneys objected, their objection would have been sustained.

As more fully addressed in proposition of law number eighteen, Evid.R. 106 does not apply, because Appellant was provided with the complete recording of both of his statements. See, *State v. Anderson*, 2007 WL 1958641 (Tenn.Crim.App. July 06, 2007). Appellant waived his *Miranda* rights and spoke to the police. Appellant's complete conversation with the police was not recorded. Contrary to Appellant's argument, there is no requirement that the police record all conversations with him. See, *State v. Elliott*, 2002 MT 26, 308 Mont. 227, 43 P.3d 279 (2002) (tape recordings of two interviews defendant had with police were admissible in prosecution for deliberate homicide, even though defendant alleged that the tapes were incomplete and did not reflect all of the interviews). Thus, in the case at bar, the selected statements were the complete conversations that were recorded. As such, Appellant cannot demonstrate that had his attorneys objected, their objection would have been sustained. Therefore, his argument must fail.

D. Competency Evaluation

Appellant argues that his attorneys were ineffective for failing to request a competency evaluation. (Appellant's brief page 71) Appellant's argument is without merit.

The test of competency to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him." *State v. Berry* (1995), 72 Ohio St.3d 354, 359, 650 N.E.2d 433, 1995-Ohio-310. "R.C. 2945.37(G) creates a rebuttable presumption that a defendant is competent to stand trial. This presumption remains valid under R.C. 2945.37(G) unless, after a hearing, the court finds by a preponderance of the evidence that the

defendant is not competent. *** The decision as to whether to hold a competency hearing once trial has commenced is in the court's discretion."[Internal citation omitted] *State v. Barton*, 108 Ohio St.3d 402, 2006-Ohio-1324, ¶ 56.

In the case at bar, the record demonstrates that Appellant was able to consult with his attorneys and further that he understood the proceedings against him. Simply because Appellant wrote a forty-page letter to his girlfriend in which his thoughts are jumbled, is not an indication that Appellant did not understand the trial proceedings or was unable to consult with his attorneys. Thus, Appellant's claim with respect to both performance and prejudice rests on mere speculation. "Such speculation is insufficient to establish ineffective assistance" of counsel. *Short*, 2011-Ohio-3641, ¶ 119; See, also *State v. Perez*, 2009-Ohio-6179, ¶ 217. Further, Appellant cannot demonstrate that had his attorneys requested a competency hearing, the trial court would have found Appellant incompetent. As such, Appellant's argument must fail.

E. Mitigation Specialist

Appellant argues that his attorneys "[f]ailed to retain a proper mitigation specialist." (Appellant's argument page 71) Appellant, however, does not present any evidence from the record to demonstrate that the mitigation specialist did not perform his assignment. Simply because Appellant received the death sentence is not sufficient. In *Short*, this Court overruled an effective assistance of counsel argument where counsel did not retain a mitigation specialist. In the case at bar, Appellant's attorneys retained a mitigation specialist. Pursuant to *Strickland*, Appellant must demonstrate both that his attorneys' performance fell below an objective standard of reasonableness and also that he was prejudiced. Appellant cannot demonstrate either here. As such, Appellant's argument must fail.

F. Three-Judge Panel

Appellant argues that his attorneys failed to "ensure that the three-judge panel was created in accordance with R.C. §2945.06." (Appellant's brief page 72) As previously addressed in proposition of law number nine, there was no violation of R.C. 2945.06. A three- judge panel was assigned prior to any jury waiver as a courtesy to Appellant. The official entry assigning the three-judge panel was not only signed by the presiding judge, but it was also signed by the "Current Presiding and Administrative Judge." As such, Appellant cannot demonstrate any prejudice from his attorneys' representation. Therefore, his argument must fail.

G. Jury Waiver

Appellant argues that his attorneys "[f]ailed to ensure that Osie had a proper understanding of the jury waiver and its subsequent consequences." (Appellant's brief page 72) Appellant's argument is not supported by the record. Appellant met with his cattorneys twice to discuss the jury waiver, once with both and once with only one of them. (SH, T.p. 4-5) Even though Appellant signed the jury waiver when he presented it to the court, the lower court nevertheless conducted the proper colloquy to ensure his understanding of the waiver. (SH, T.p. 5-13) As previously discussed in proposition of law number ten, Appellant understood the complete process of a jury trial. He knowingly, intelligently and voluntarily waived his right to a jury trial and instead requested that a three-judge panel preside over his case. Further, Appellant at the jury waiver hearing knew the three-judge panel that will be handling his case. (SH, T.p. 11) Furthermore, at the hearing, Appellant informed the court that he reviewed the waiver form with his attorneys, that he discussed it with them, and that they answered all of his questions. (SH, T.p. 9-10) As such, Appellant cannot demonstrate that their representation fell below an objective standard of reasonableness. Therefore,

his argument must fail.

H. Witness Statements

Appellant argues that his sttorneys "failed to request that witness statements be sealed for appellate review." (Appellant's brief page 72) Appellant's argument is without merit as he fails to demonstrate how the failure to seal these witness statements prejudiced him. For the statement of Nicholas Wiskur, the only statement he provided was previously given to Appellant's attorneys. (T.p. 22-23) Appellant does not assert how the failure to seal the statement prejudiced him.

Similarly, for the statement of Tim Purvis, the court stated that "there are no inconsistencies between the testimony this witness has made and the statement he gave to the police." (T.p. 61) Appellant's counsel was then provided a copy of the statement and agreed that there were no inconsistencies in the statement. (T.p. 62) Likewise, for the statement of witness Donald Simpson, "[t]he judges are in agreement, we observed no inconsistencies between the written statement and the statement given by the defendant on the stand." (T.p. 105-106) Thus, Appellant cannot demonstrate how the failure to seal the written statements prejudiced him. As such, his argument must fail.

I. Prosecutorial Misconduct

Appellant argues that his attorneys "[f]ailed to object to numerous instances of prosecutorial misconduct." (Appellant's brief page 72) As will be discussed in proposition of law number twelve, no prosecutorial misconduct occurred. Thus, Appellant cannot demonstrate that had his attorneys objected, their objection would have been sustained. As such, his argument must fail.

J. Right Of Allocution

Appellant argues that his attorneys "[f]ailed to ensure that Osie was afforded his right to allocution." (Appellant's brief page 75) As previously addressed in proposition of law number one, Appellant was afforded the right to allocution. As such, his argument must fail.

J. Mitigation

Appellant argues that his attorneys "did not take the necessary time or expense to prepare a case sufficient to convince the court that the aggravating circumstance did not outweigh the mitigating factors[.]" (Appellant's brief page 74) Specifically, Appellant argues that his attorneys failed to provide information regarding Appellant's "background, education, mental and emotional stability, family relations[.]" (Id.) The record does not support Appellant's argument. The evidence presented at the mitigation hearing established that Appellant contributed to his childhood community, which was a "tough neighborhood;" that he graduated from high school and then obtained gainful employment to support his family; that his parents were supportive and Appellant was "very well behaved;" and that after the passing of his father, Appellant changed and as of April 2008, Appellant snorted cocaine. (MH, T.p. 57-58, 65-66, 82, 85, 88-89, 90-91, 97, 104-106, 108-109, 118, 120, 124-126) As such, Appellant's attorneys did present mitigating evidence. In *Perez*, this Court overruled an effective assistance of counsel argument when the defense presented only one witness in the penalty phase. In the case at bar, Appellant's attorneys presented five witnesses in the penalty phase. Also, contrary to Appellant's assertion, there were three aggravating circumstances, not just one. Thus, his argument must fail.

Proposition of Law XIII:

R.C. 2929.04(A)(7) is Constitutional.

In proposition of law thirteen, Appellant argues that R.C. 2929.04(A)(7) is unconstitutional because it does not properly narrow the class of death eligible offenders. However, as this identical claims has been repeatedly denied by this Court, the State disagrees.

Appellant's argument is premised on the fallacy that R.C. 2929.04(A)(7) and R.C. 2903.01(B) are identical or at least are duplicative of each other. However, the Court has stated that "[i]t is noteworthy that R.C. 2903.01(B) and 2929.04(A)(7) are not identical. First, crimes such as robbery, arson and burglary, contained under R.C. 2903.01(B), are noticeably absent from R.C. 2929.04(A)(7). More importantly, while a conviction under R.C. 2903.01(B) cannot be sustained unless the defendant is found to have intended to cause the death of another, the state, in order to prevail upon an aggravating circumstance under R.C. 2929.04(A)(7), must additionally prove that the offender was the principal offender in the commission of the aggravated murder or, if the offender was not the principal offender, that the aggravated murder was committed with prior calculation and design." *State v. Jenkins* (1984), 15 Ohio St.3d 164, at 177, N. 17, 473 N.E.2d 264. As such, the initial premise that underpins Appellant's argument is simply invalid.

Two years after the *Jenkins* decision, this Court again addressed this issue. In *State v. Buell* (1986), 22 Ohio St.3d 124, 137, 489 N.E.2d 795, a short and concise directive was offered by this Court: "appellant further argues that there is no genuine narrowing of the class of felony murders as is constitutionally required since R.C. 2929.04(A)(7) merely repeats the definition of felony murder. We disagree. As noted by the appellate court, 'R.C. § 2929.04(A) narrows the class of felony murders subject to the death penalty by excluding those who commit arson, robbery, burglary or escape, unless they are charged with a different aggravating circumstance.' We find no merit in this

contention."

During the same calendar year, this Court was again made to answer the question of narrowing. In *State v. Barnes* (1986), 25 Ohio St.3d 203, 206-207, 495 N.E.2d 922, this Court definitively found:

> Appellant first contends that he was denied Eighth and Fourteenth Amendment protections by the state's use of aggravating circumstances which duplicated both elements of the underlying crime, and each other, contrary to the United States Supreme Court's rulings in Zant v. Stephens (1983), 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235, and Godfrey v. Georgia (1980), 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398. * * * We have considered appellant's claims, however, and have found them to be without merit. The elements of the aggravating circumstances of aggravated burglary and aggravated robbery do not merely duplicate the elements of the underlying crime of aggravated murder. * * *
>
> R.C. 2929.04(A)(7), which sets forth the aggravated burglary and aggravated robbery aggravating circumstances, accomplishes that function by allowing the death penalty to be imposed for those felony murders only when the defendant was the principal offender or when the murder was premeditated. Thus, both the robbery and burglary aggravating circumstances require an additional fact, independent of the elements of aggravated murder, be proven before an offender is eligible for capital punishment. The trial court had to find that appellant committed murder while committing or attempting to commit burglary and/or robbery and, further, that appellant was the principal offender or that the murder was premeditated. An accomplice could be convicted of aggravated murder but would not be subject to the death penalty. By such a limitation, the category of death-eligible aggravated murderers is narrowed in compliance with Zant and no constitutional violation arises.

Based upon the clear and decisive holdings from this Court the arguments concerning narrowing and duplicity of R.C. 2929.04(A)(7) and R.C. 2903.01(B) appeared settled. However, again in 2004, an appellant unsuccessfully invited this Court to revisit its rulings. The result was *State v. Bryant*, 101 Ohio St.3d 272, 804 N.E.2d 433, 2004-Ohio-971, ¶¶52-54, in which this Court found:

> In Jurek v. Texas (1976), 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929, the Supreme Court upheld the Texas capital scheme that imposed capital punishment in five circumstances. The Supreme Court noted the appellate court's holding that the law " 'limits the circumstances under which the State may seek the death penalty to a small group of narrowly defined and particularly brutal offenses. This insures that the

> death penalty will only be imposed for the most serious crimes [and] * * * that [it] will only be imposed for the same type of offenses which occur under the same types of circumstances.' " Id. at 270, 96 S.Ct. 2950, 49 L.Ed.2d 929, quoting Jurek v. State (Texas Crim.App.1975), 522 S.W.2d 934, 939. Similarly, R.C. 2903.01(E) narrows the class of persons eligible for the death penalty by focusing on the purposeful murder of a law enforcement officer or murder occurring while the law enforcement officer is engaged in his or her duties.
>
> The narrowing requirement may occur at either the guilt phase or the sentencing phase of a capital trial but need not occur at both. In Lowenfield v. Phelps (1988), 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568, the Supreme Court reviewed a death sentence where the sole aggravating circumstance was identical to an element of the charged capital crime. In upholding the death sentence, the Supreme Court ruled that "the 'narrowing function' was performed by the jury at the guilt phase * * *. The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm." Id. at 246, 108 S.Ct. 546, 98 L.Ed.2d 568.
>
> This court addressed an analogous statutory scheme in State v. Jenkins (1984), 15 Ohio St.3d 164, 15 OBR 311, 473 N.E.2d 264. Jenkins upheld the constitutionality of the death penalty for a defendant convicted of felony murder under R.C. 2903.01(B) and sentenced in accordance with the aggravating circumstance equivalent to it, R.C. 2929.04(A)(7). Jenkins noted that "any duplication is the result of the General Assembly having set forth in detail when a murder in the course of a felony rises to the level of a capital offense, thus, in effect, narrowing the class of homicides in Ohio for which the death penalty becomes available as a sentencing option." Id. at 178, 15 OBR 311, 473 N.E.2d 264. See, also, State v. Henderson (1988), 39 Ohio St.3d 24, 28-29, 528 N.E.2d 1237; Coe v. Bell (C.A.6, 1998), 161 F.3d 320, 349 (duplication of felony murder conviction and felony murder aggravating circumstance is constitutional because the narrowing function was performed by the jury during the guilt phase).

Again in 2010, this Court, based upon the fact that the "United States Supreme Court has previously rejected similar arguments" denied a claim that R.C. 2929.04(A)(7) was unconstitutional. See, State v. Fry, 125 Ohio St.3d 163, 926 N.E.2d 1239, 2010-Ohio-1017, ¶ 185. With this weight of authority and no new legal grounds to support their argument, the State asks this Court to follow the well-reasoned logic of its past precedent and overrule Appellant's constitutional challenge to R.C. 2929.04(A)(7).

A. This Court Should Continue To Follow *Fontes*

In the second section of proposition of law thirteen, Appellant again urges this Court to disregard precedent and require that the purpose to commit a criminal offense be formed either previous to or concurrently with a trespass for a burglary charge to be valid. The State urges this Court to follow its precedent.

The Appellant's argument boils down to a call to the return to the authority of *State v. Lewis* (1992), 78 Ohio App.3d 518, 605 N.E.2d 451; *State v. Waszily* (1995), 105 Ohio App.3d 510, 664 N.E.2d 600; and *State v. Flowers* (1984), 16 Ohio App.3d 313, 475 N.E.2d 790. However, as correctly noted by the Twelfth District Court of Appeals, these cases were **unanimously** abrogated by this Court in *State v. Fontes*, 87 Ohio St.3d 527, 721 N.E.2d 1037, 2000-Ohio-472. See, *In the Matter of: C.W.*, Butler App. No. CA2004-12-312, 2005-Ohio-3905, ¶ 28 ("The holding in *Lewis* was specifically rejected by the Ohio Supreme Court in *State v. Fontes*, 87 Ohio St.3d 527, 721 N.E.2d 1037, 2000-Ohio-472.").

In *Fontes*, this Court wrote in its syllabus that "[f]or purposes of defining the offense of aggravated burglary pursuant to R.C. 2911.11, a defendant may form the purpose to commit a criminal offense at any point during the course of a trespass." In deciding *Fontes*, this Court was guided by its previous decision and found that in *State v. Powell* (1991), 59 Ohio St.3d 62, 571 N.E.2d 125, "we held at paragraph one of the syllabus that [t]he crime of aggravated burglary continues so long as the defendant remains in the structure being burglarized. (R.C. 2911.11 and 2911.21, construed.) In so holding, we reasoned that [t]he crime of aggravated burglary continues so long as the defendant remains in the structure being burglarized because the trespass of the defendant has not been completed." *Fontes*, 87 Ohio St. 3d at 530 (internal citations omitted).

The *Fontes* court also noted that it agreed with the logic of the lower appellate court. See *id.*

("Furthermore, we agree with the rationale espoused by the court of appeals wherein it found our decision in *State v. Powell* instructive."). The lower court had reasoned:

> In *Pow*ell, the Supreme Court held that "[t]he crime of aggravated burglary continues so long as the defendant remains in the structure being burglarized because the trespass of the defendant has not been completed." *Id.* at 63, 571 N.E.2d 125. Similarly, a person who by force, stealth, or deception, trespasses in an occupied structure, is continuing a criminal trespass (a lesser included offense of aggravated burglary) so long as he is there without permission. See R.C. 2911.21. Thus, if during the course of this trespass a defendant forms the purpose to commit a felony offense, the crime of aggravated burglary is committed at that time. Because the "purpose to commit * * * any criminal offense" element of R.C. 2911.11(A)(1) may be formed while the trespass is in progress, we find no error in the trial court's jury instruction to this effect. Appellant's fifth assignment of error is overruled.

State v. Fontes, Union App. No. 14-97-45, 1998 WL 786447, *6.

Additionally, while Appellant cites to committee notes for the statute defining simple burglary, not aggravated burglary, to attempt to insinuate that the *Fontes* case is against legislative intent, this premise is simply not true. In fact, the legislative intent is clearly to broaden the scope of Aggravated Burglary, not narrow the scope. This is demonstrated by the 1973 committee notes to 2911.11, which states:

> Under former law, distinctions among types of breaking and entering offenses were generally predicated on one or more of three factors: whether the offense was committed in daylight or nighttime; the type of property entered; **and the offender's specific reason for entering**. The prime distinguishing factor among such offenses in the new code, however, is the relative potential for harm to persons.

(Emphasis added)

As can be easily discerned from this language, the legislature was not as concerned with the offender's reason for entering the home (to commit a criminal offense or not), as they were in the potential for harm to persons (if an offender forms intent once inside and commits a criminal act). Thus, the *Fontes* case is directly in line with what the legislature intended.[13] As such, Appellant's

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[13]Appellant argues that this Court should view its position as a minority position amongst the 50 States by citing a footnote from a Delaware Court. However, it is important to note that while the Delaware court cited 9 cases in its favor, it cited 6 that hold the same as *Fontes*.

argument asking this Court to reverse *Fontes* should be denied.

B. This Court Should Continue To Follow *Steffen*

In the second prong of his argument, Appellant asks this Court to reverse another longstanding case, *State v. Steffen* (1987), 31 Ohio St.3d 111, 509 N.E.2d 383. Appellant makes this request because he believes that his assault on David Williams did not make him a trespasser. Appellant argues that he should be able to strike many blows against a home owner, but if he is never given time to leave, and instead continues to beat, or stab to death a home owner, then he never committed a trespass. Appellant's argument borders on the absurd. The State urges this Court to follow its well versed and settled precedent. See, *State v. Holloway* (1988), 38 Ohio St.3d 239, 243, 527 N.E.2d 831("This court held in State v. Steffen, supra, that a defendant who initially gains entry to one's home by consent may subsequently become a trespasser if consent is withdrawn. We further held that a jury could justifiably infer from the facts that a victim terminated the accused's privilege to remain after commencement of an assault.").

C. Ample Evidence Supports A Conviction For Aggravated Burglary

In Appellant's final prong of proposition of law thirteen, Appellant argues that the State did not provide adequate evidence to sustain a conviction for Aggravated Burglary. The State disagrees.

Curiously, the *Fontes* case was not used in this list, neither was the California case of *People v. Sparks*, 28 Cal.4th 71, 47 P.3d 289, Cal.,2002. Thus, the numbers are a relatively even split with a multitude of jurisdictions still unaccounted for. As such, Appellant's argument about a majority view is weak and unavailing.

In *State v. Jenks* (1981), 61 Ohio St.3d 259, 574 N.E.2d 492, this Court set forth the standard of review when a claim of insufficiency of the evidence is made. "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Id.* at paragraph two of the syllabus.

R.C. 2911.11 states, in relevant part, as follows:

> "(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:
> (1) The offender inflicts, or attempts or threatens to inflict physical harm on another;"

Where a defendant commits an offense against a person in the person's private dwelling, the defendant forfeits any privilege, becomes a trespasser and can be culpable for aggravated burglary. See, e.g., *Steffen*, 31 Ohio St.3d at115. Appellant argues that the State needed to prove that there was force, stealth, or deception used to complete the trespass. Remarkably, while Appellant notes that the trial court's decision points out that an **assault**, involving punches, stabs, and slashes, was taking place, he does not equate that to the force necessary. (Appellant's Brief, p., 83, citing Sentencing Opinion, p. 6) This is an incredible position, and clearly, the State proved all elements of an aggravated burglary in the case at bar.

Proposition of Law XIV:

No prosecutorial misconduct was committed.

In proposition of law number fourteen, Appellant argues that the State committed acts of misconduct that deprived him of a fair trial and a reliable sentence. (Appellant's brief pages 85-91) The State disagrees.

A. Standard

The test for prosecutorial misconduct is whether the statements made by the State were improper, and if so, whether they prejudicially affected substantial rights of the accused. *State v. Smith* (1984), 14 Ohio St.3d 13, 470 N.E.2d 883. When reviewing a claim of prosecutorial misconduct, an appellate court must review the context of the entire trial to determine if a prosecutor's remarks are prejudicial to the accused. *State v. Tumbleson* (1995), 105 Ohio App.3d 693, 664 N.E.2d 1318. A conviction will not be reversed because of prosecutorial misconduct unless it so taints the proceedings that a defendant is deprived of a fair trial. *State v. Smith* (2000), 87 Ohio St.3d 424, 442, 721 N.E.2d 93. As the United States Supreme Court has succinctly stated, "it is not enough to find that the comments were inappropriate or even universally condemned. * * * The relevant question is whether they 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Donnelly v. DeChristoforo* (1974), 416 U.S. 637, 643; See, also, *State v. DePew* (1988), 38 Ohio St.3d 275, 528 N.E.2d 542, cert. denied (1989), 489 U.S. 1042.

A prosecutor's closing remarks are generally not considered prejudicial unless they are "so inflammatory as to render the jury's decision a product solely of passion and prejudice * * *." *State v. Williams* (1986), 23 Ohio St.3d 16, 20, 490 N.E.2d 906; See, also, *DeChristoforo*, 416 U.S. at 643

(to be prejudicial, remarks must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process"). Moreover, instances of prosecutorial misconduct can be deemed harmless when they are isolated. See *State v. Lorraine* (1993), 66 Ohio St.3d 414, 613 N.E.2d 212. A reviewing court must examine the final argument as a whole, not in isolated parts, and must examine the argument in relation to that of opposing counsel. *State v. Moritz* (1980), 63 Ohio St.2d 150, 407 N.E.2d 1268.

B. Prosecutor Did Not Withhold Exculpatory Evidence

As previously addressed in proposition of law number eight, the State did not withhold any exculpatory evidence. Appellant acknowledges that the BCI report "relating that no usable prints had been found on a white box containing the possible murder weapon[,]" was provided to him two weeks before trial, which is when the prosecutor "had just been made aware of the existence of the report." (Appellant's brief page 85) Appellant cannot demonstrate that the prosecutor intentionally withheld this "neutral" information. Therefore, he cannot establish the culpability of the prosecutor. Furthermore, the lab result was "neutral." (Appellant's brief page 51) As such, the failure to provide the report more than two weeks before trial cannot be said to have deprived Appellant of a fair trial. See, *Smith*, 87 Ohio St.3d 424.

Moreover, the State did not commit misconduct when it provided Appellant with the criminal record of one of its witnesses the day of testimony. Prior to the cross-examination of the State's witness, the State informed the court "when we first ran his record, we were only aware of misdemeanors, and therefore, nothing was disclosed. We finally found him and located him yesterday around 3 o'clock and became aware that he had the felonies, and so we informed -- we ran a **federal CCH** on him and confirmed that and then told the defense counsel this morning, but again,

based on that federal search, the only thing we were aware of the felony solicited in direct examination and the misdemeanor theft charge, and that's what he represents as well." (T.p. 106-107) (emphasis added) Thus, as the record demonstrates, the State disclosed the information as soon as it became aware of it. Therefore, Appellant cannot establish that the State intentionally withheld the information.

In addition, the record also demonstrates that the Appellant received a fair trial because he was provided with the information in time for him to effectively use it. See, *State v. Iacona*, 2001-Ohio-1292. Appellant's counsel, prior to cross-examining the witness, informed the court: "[w]e have -- it's not reflection upon the State in terms of we believe the information they've given us up to now, **so we'll use that and move forward.**" (T.p. 108) (emphasis added) Appellant's counsel then proceeded to cross-examine Mr. Simpson. (T.p. 108-112)

Furthermore, Appellant's reliance on *State v. Couch*, is again misplaced. In *Couch*, the State did not provide the defendant with the required information, but rather, the judge after conducting two in camera interviews, discovered the information, and the **judge** then provided the defendant with the information. *Couch*, 2002-Ohio-3347, ¶¶ 29, 30. In the case at bar, the State provided the information as soon as it became aware of it. As such, Appellant's argument is without merit and should be overruled.

C. Prosecutor Relied On Evidence Admitted At Trial

As previously addressed in proposition of law number seven, the letter Appellant wrote and addressed to his girlfriend was not attorney work product. Further, contrary to Appellant's argument, the State did not concede that the letter was attorney work product. (Appellant's brief page 88) During the November 18, 2009 hearing, the prosecutor requested revision of the trial court's

previous entry ordering the State's review of documents obtained from Appellant's cell:

> Something we did discuss in the motions about, and I don't believe this has occurred again, but about the possible search of the defendant's cell, and in the return, in regards to work product that may be in the cell. I believe the Court's preliminary order was that those materials be turned over to the State for the State to turn over to the defense. *** I believe we could find ourselves in a bigger appellate issue or anything else **if the State actually looks** at work product information before it has to be turned over. A quick glossary review of federal cases, some have been reversed when that situation happened and a prosecutor then looked at that information before disclosing it to trial defense counsel, **if that would happen**, I would just ask that we would come in front of the Court to address that matter. *** [A]sk Your Honor to, **if that happens**, that you would just indulge us to maybe have a hearing first which is a minor deviation from the Court's previous order[.]

(Jury Excuse Hearing ("JEH"), T.p. 13-14) (emphasis added)

Moreover, the letter was admitted at trial as State's Exhibit 64. This Court has held that "it is not 'prosecutorial misconduct' to introduce evidence that the trial court has determined to be admissible. CF. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 163 (it was not misconduct 'for the prosecutor to engage in conduct that the trial court had discretion to allow and did allow')." *State v. Perez*, 2009-Ohio-6179, ¶ 187. As such, since the letter was not attorney work product and was admitted at trial, Appellant's argument that the prosecutor committed misconduct must fail.

D. Closing Argument

Appellant argues that the "prosecutor made several improper comments during the closing arguments of the mitigation phase of trial." (Appellant's brief page 88) Appellant's argument is without merit.

Appellant failed to object, thus his argument is waived unless there is plain error. See, *Perez*, 2009-Ohio-6179, ¶ 198. Crim.R. 53(B) states that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Therefore, "there are

three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial. First, there must be an error, *i.e.*, a deviation from a legal rule. *** Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. *** Third, the error must have affected 'substantial rights.'" *State v. Lynn*, 129 Ohio St.3d 146, 2011-Ohio-2722, ¶ 13. For an error to affect a substantial right, the error must have affected the outcome of the case. *State v. Barnes*, 94 Ohio St.3d 21, 2002-Ohio-68.

Further, prosecutors are entitled to latitude in arguing what the evidence has shown and what the jury may infer from the evidence. *State v. Hanna*, 95 Ohio St.3d 285, 2002-Ohio-2221, citing *State v. Tibbetts*, 92 Ohio St.3d 146, 2001-Ohio-132. In addition, prosecutors may properly argue all reasonable inferences from the evidence admitted at trial. *State v. Stephens* (1970), 24 Ohio St.2d 76, 263 N.E.2d 773. Moreover, "[p]rosecutors can urge the merits of their cause and legitimately argue that defense mitigation evidence is worthy of little or no weight." *State v. Wilson* (1996), 74 Ohio St.3d 381, 399, 659 N.E.2d 292.

Appellant states that the "prosecutor argued that in order for Osie's background to be mitigating, it had to be something other than the evidence of the 'normal' family Osie presented in mitigation." (Appellant's brief page 88) However, the record does not support Appellant's characterization of the prosecutor's argument. Rather, the record demonstrates that the State argued that Appellant's mitigation evidence, which included having a normal background, did not outweigh the aggravating circumstances, not that it was not mitigation:

> So why is this a case where we're even making these argument? It's because there are aggravating circumstances that were proved, and now let's weigh that and think, **an aggravated circumstance is something that goes beyond what we expect to see. It's beyond the norm**. But what did we hear yesterday from questions, from answers about the defendant? We heard his childhood, normal. It's great, normal. He was at one point married, normal. Two kids, normal. It's the human existence. We

> heard what's normal. **That mitigation was in a word normal. It's the typical human experience is what we heard, but aggravated circumstances are anything but normal. Those are abnormal.**
> If this were the only evidence we had, the (A)(7) aggravating circumstances against these feathers, these normal parts of human existence, the State would still submit to this Court that beyond a reasonable doubt it was outweighed. That the normalcy of feathers, they don't outweigh what happened in that home, the aggravated burglary and aggravated robbery, but Your Honors, there's a third aggravated circumstance under (A)(8) that doesn't tip the scale, it doesn't weigh the scale, Your Honors, it almost breaks the scale it weighs so heavy.

(*Mitigation Hearing*, Vol. II ("MH2"), T.p. 151-152) (emphasis added)

Therefore, the prosecutor argued that Appellant's mitigation evidence did not outweigh the aggravating circumstances, not that "in order for Osie's background to be mitigating, it had to be something other than the evidence of the 'normal' family Osie presented in mitigation." As such, Appellant's argument must fail.

Appellant also states that the "State argued that nothing could outweigh the aggravating circumstance of silencing a witness," and that "[t]hese arguments were improper. The trial court was obligated to weigh the aggravating circumstances against the mitigating circumstances, not Osie's failure to present evidence of some mitigating factor." (Appellant's brief pages 88-89) The record, however, demonstrates that the State argued that the mitigating evidence Appellant had provided did not outweigh the aggravating circumstances, not that "nothing could outweigh" as Appellant characterizes it:

> Now, turning for a moment to what the defense put on their side. What did they put forward yesterday? We heard a lot from friends and family. Friends and family and a lot that I would -- the State would put forth to the Court that would fall under what would be known as a (B)(7) factor, anything that's relevant, and it comes through friends and family, and then probably under (B)(5) factor, they put forth that Mr. Osie doesn't have a huge amount of or lack of criminal history. But what weight should be given to those things? How do we give anything other than very little weight to that mitigation that's been tendered before us?
> The fact that something is admissible, admissible under R.C. 2929.04(B)(7), anything that could be relevant evidence, that doesn't mean it automatically has to be given weight. In fact, that ascertainment, **the weight to be given to that thing in mitigation, are matters solely for this Court's determination.**

> What else have we possibly heard? Maybe substance abuse, possibly a drug, substance abuse, voluntary intoxication, all of those things are to be given little weight. They're not full cups.
> The final thing I think that we heard was that before 2006, Mr. Osie may have been a bit different, but we're here in 2010 evaluating whether those aggravated circumstances he committed in 2009 outweigh what's able to put forward to you again here in 2010. And I think that the way to look at this and a way to put them on the scales is they are like these feathers. **Friends and family saying they love you, that I haven't really done too much before this, those are feathers. They're not entitled to much weight.**

(MH2, T.p. 149-151) (emphasis added)

Thus, as the record demonstrates, Appellant's characterization of the State's argument is erroneous. The State clearly indicated that what weight should be given to mitigating evidence is solely for the court to determine. The State argued, however, that little weight should be given. "Prosecutors can urge the merits of their cause and legitimately argue that defense mitigation evidence is worthy of little or no weight." *Wilson*, 74 Ohio St.3d 381, 399. As such, contrary to Appellant's assertion, the State did not argue that "nothing could outweigh the aggravating circumstance of silencing a witness." Therefore, his argument must fail.

Moreover, Appellant waived his right to a jury trial, thus a three-judge panel presided over his case. This Court has previously held that "the three-judge panel is presumed to have 'considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary.'" *Ketterer*, 2006-Ohio-5283, ¶ 168, quoting *State v. Post* (1987), 32 Ohio St.3d 380, 384, 513 N.E.2d 754. As such, Appellant cannot demonstrate that he was deprived of a fair trial. Thus, his argument should be overruled.

Proposition of Law XV:

Appellant's confession complied with *Miranda*, in that Appellant knowingly, intelligently, and voluntarily waived his rights.

In proposition of law fifteen, Appellant claims that the waiver he signed of his *Miranda* rights was not voluntary. However, as both the law and facts indicate otherwise, the State disagrees.

In deciding whether a defendant's confession is involuntarily induced, the court should consider the totality of the circumstances. *State v. Sapp*, 105 Ohio St.3d 104, 2004-Ohio-7008 at ¶ 82, citing *State v. Edwards* (1976), 49 Ohio St.2d 31, 3 O.O.3d 18, 358 N.E.2d 1051, paragraph two of the syllabus, vacated in part on other grounds (1978), 438 U.S. 911, 98 S.Ct. 3147, 57 L.Ed.2d 1155. The totality of the circumstances includes "the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *Edwards*, at paragraph two of the syllabus. The same considerations apply to whether appellant understood and voluntarily waived his *Miranda* rights. See *State v. Green* (2000), 90 Ohio St.3d 352, 366, 738 N.E.2d 1208, 200-Ohio-182. However, " 'police overreaching' is a prerequisite to a finding of involuntariness." *State v. Clark* (1988), 38 Ohio St.3d 252, 261, 527 N.E.2d 824, citing *Colorado v. Connelly* (1986), 479 U.S.157, 107 S.Ct. 515, 93 L.Ed.2d 473. "Evidence of use by the interrogators of an inherently coercive tactic (e.g., physical abuse, threats, deprivation of food, medical treatment, or sleep) will trigger the totality-of-the-circumstances analysis." *Clark*, at 261; see, also, *State v. Dailey* (1990), 53 Ohio St.3d 88, 91, 559 N.E.2d 459. Thus, at the threshold, appellant must show that the detectives used "an inherently coercive tactic."

In *Connelly*, the Supreme Court held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of

the Fourteenth Amendment." 479 U.S. at 167. As to any inquiry into a defendant's unique mental condition, absent such police misconduct, "the Constitution rightly leaves this sort of inquiry to be resolved by state laws governing the admission of evidence and erects no standard of its own in this area." *Id.* Absent coercive police conduct causally connected to a defendant's confession, a defendant's mental condition will not render a confession involuntary. *Id.* at 164; *State v. Ferguson* (1991), 71 Ohio App.3d 342, 350, 594 N.E.2d 23.

"An accused's signed waiver form is strong proof that the waiver was valid." *State v. Moore* (1998), 81 Ohio St.3d 22, 32, 689 N.E.2d 1, 1998-Ohio-441; see *North Carolina v. Butler* (1979), 441 U.S. 369, 374-375, 99 S.Ct. 1755, 60 L.Ed.2d 286. Promises of help with "collateral problems," such as psychological problems, are not inherently coercive. See *Miller v. Fenton* (C.A.7, 1986), 796 F.2d 598, 610; *Hall v. State* (1986), 180 Ga.App. 366, 367, 349 S.E.2d 255. Moreover, simply suggesting that "telling the truth would relieve defendant of a psychological burden" is not coercive. *People v. Jones* (1998), 17 Cal.4th 279, 298, 949 P.2d 890.

In the case at bar, Appellant specifically points to his alleged ingestion of drugs and alcohol to support the theory that his *Miranda* waiver was not voluntarily given. However, the facts as testified to at the September 11, 2009 motion to suppress hearing paint a very different picture. At the hearing, detective Whitlock testified that once the Appellant was brought into the Sheriff's staion, he was placed in an interview room and Mirandized. (9/11/09 hearing T.p. 10) After being advised of these rights, Appellant waived his rights and proceeded to talk with the detectives.

In regards to any alcohol or drug usage, the Appellant did tell the Detectives that he had some beers that day. (Id., 25), and that he had used drugs the previous evening. (Id., 26) However, Detective Whitlock also testified that Appellant understood the questions being asked of him, did not smell of alcohol, and never indicated that he was under the influence of drugs or alcohol. (Id.,

26,29,38) Additionally, Whitlock believed that the Appellant's mind was sound as he was try to minipulate the interview by creating fictions and wanting the detectives to buy into these false and misleading versions of events. (Id., 33) Finally, Whitlcock answered that Appellant had no indication or any appearance of being intoxicated in any way. (Id., 39).

As such, Appellant's argument fails on its factual assertions because the record bears out that Appellant was not under the influence of drugs or alcohol at the time he voluntarily waived his *Miranda* rights. Once these facts are properly drawn out from the record, the law also supports the conclusion that Appellant's waiver was voluntary.

This Court has time and again held that when only an Appellant's self-serving indications are presented that they were intoxicated, this will not overcome clear testimony from a detective that the person did not appear to be under the influence of any drugs or alcohol. See *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, at ¶ 72 (no coercive police activity or overarching even when the defendant claimed that he was under the influence of drugs or alcohol at the time of the interview), *State v. Otte*, 74 Ohio St.3d 555, 562, 1996-Ohio-108 ("In support of his claim that his confessions were not voluntary, Otte points to his alleged intoxication, but we have only Otte's word for the amount of whiskey and drugs he consumed on February 13; Det. Bomba testified that Otte did not appear to be under the influence that night."); *State v. Brown*, 100 Ohio St. 3d 51, 2003-Ohio-5059 (testimony by detectives who interviewed defendant that defendant was cooperative and alert, and that they did not smell alcohol or observe anything that would indicate defendant was under the influence of drugs or alcohol, was sufficient to establish that defendant was not intoxicated and under the influence of drugs when he made statement to police and signed *Miranda* waiver); *State v. Campbell*, 90 Ohio St. 3d 320, 2000-Ohio-183; *State v. Brinkley*, 105 Ohio St. 3d 231, 2005-Ohio-1507. As such, Appellant's proposition of law must be denied as there is no evidence that he was

intoxicated, and therefore, he voluntarily waived his *Miranda* rights.

However, even if this Court were to consider Appellant's unsupported claim of being intoxicated at the time he signed his *Miranda* waiver, a suspect's impaired mental condition at the time of the waiver and the confession have only some bearing on the issue of the voluntariness. This issue would only be weighed as to whether police officers deliberately exploit the suspect's mental condition to coerce the waiver and confession. *Connelly*, 479 U.S. at 164; *State v. Nobles* (1995), 106 Ohio App.3d 246, 279, 665 N.E.2d 1137. In *Nobles*, the defendant had taken the prescription narcotic Xanax nearly twelve hours before admitting to police she had drowned her son and claimed she was still under the influence of the drug when she confessed. *Id.*, at 278. This Court held that her confession was voluntary since there was no evidence to affirmatively show that the police officers deliberately took advantage of her alleged impaired state to coerce her into confessing. *Id.*; accord, *State v. Smith* (1997), 80 Ohio St.3d 89, 112, 684 N.E.2d 668 (holding that intoxication affecting one's state of mind, absent coercive police activity, is an insufficient reason to exclude his voluntary confession, citing *Colorado v. Connelly*).

Similarly, in the case at bar, even if this Court were to accept the myth that is Appellant's claimed intoxication, nothing in the record indicated that the detectives deliberately took advantage of his alleged impaired state to coerce him into confessing. As such, Appellant's fifteenth proposition of law should be denied.

Proposition of Law XVI:

The Detectives did not conduct themselves in a way that would render Appellant's confession involuntarily given due to police coercion.

In proposition of law sixteen, Appellant claims that his will was overborne when Detectives asked him about his relationship with a girlfriend and her possible involvement in this case. This line of questioning is permissible and not the type of coercive police questioning that requires suppression.

Appellant was at one point in a relationship with Robin Patterson. The police knew that Appellant had gone as far as to contact Robin shortly after the murder. However, while normal investigations would clearly indicate that the police would need to speak with Robin, Appellant now argues that verbalizing this point with him during an interrogation somehow transforms this into a coercive atmosphere in which he was helpless from making a free and rational choice. This argument must fail.

The voluntariness of a confession is to be determined based on the totality of the circumstances. *State v. Edwards* (1976), 49 Ohio St.2d 31, 358 N.E.2d 1051, paragraph two of the syllabus. However, the use of an inherently coercive tactic by police is a necessary prerequisite to a finding of involuntariness. *Colorado v. Connelly* (1986), 479 U.S. 157, 167, 107 S.Ct. 515. Thus, a court need not assess the totality of the circumstances unless it first determines that a coercive tactic was utilized. *State v. Treesh* (2001), 90 Ohio St.3d 460, 472, 739 N.E.2d 749.

What Appellant fails to recognize is that this Court has already decided this issue. In *State v. Loza* (1994), 71 Ohio St.3d 61, 641 N.E.2d 1082 (overruled on other grounds), this Court "found no impermissible coercion in detectives' playing on Loza's strong feelings for his girlfriend and his unborn child in attempting to secure a confession." *State v. White*, Franklin App. No. 99AP-63,

1999 WL 1256598, *5. This Court has also found that while "threats to arrest members of a suspect's family may cause a confession to be involuntary," the issue turns on "whether the threat could have been lawfully executed.' If the police had probable cause to arrest the person in question, a threat to do so is not coercive and thus does not render a confession involuntary." *State v. Perez*, 124 Ohio St.3d 122, 920 N.E.2d 104, 2009-Ohio-6179, ¶ 72, quoting *United States v. Johnson* (C.A.6, 2003), 351 F.3d 254, 263. See also, *State v. Burton*, Hamilton App. No. C-080173, 2009-Ohio-871, ¶ 13 ("We cannot hold that Burton's statements were the result of coercive police conduct. * * * [Officer] Bode did suggest the possibility of charging Burton's girlfriend for permitting drug abuse. Burton immediately stated that the drugs were his and that his girlfriend was not involved. This tactic was not coercive because Bode had probable cause to believe that Burton's girlfriend had committed an offense, and it did not render Burton's statements involuntary."), *United States v. Jones* (C.A.11, 1994), 32 F.3d 1512, 1517 ("The agent did tell Jones that, unless Jones explained the participation of his girlfriend, she would continue to be considered a suspect. He further told Jones that, if his girlfriend was part of the robbery, then she was subject to prosecution. Jones was never told that his girlfriend would not be prosecuted if he cooperated.").

In the present case, the detectives did not make threats to arrest Robin. Rather, Robin was already involved in the investigation as she was the reason the Appellant went to the victim's home. Second, she was the individual who received the text message shortly after the murder stating that she would not have to worry about the victim any more. These facts were always going to make her part of the investigation. The detective's statements about the Appellant being able to have her not be involved or questioned were mere puffery, as she was always going to be involved and her role in the crime investigated.

The facts that there were no threats made, and that Robin was clearly involved is also evident

from the record. The detectives start this line of inquiry by asking who the "one person that you send the text to, after everything was done?" (Trial Exhibit 55, p. 31) The detective then lead the Appellant into connecting the dots by correctly noting that Robin "is the only person besides you that knows that something has happened to David." (Id., at 32) This is an absolutely correct factual statement that in no way constitutes misconduct.

Next, the Detectives make Appellant realize that Robin is a crucial person of interest who knows the second-most amount of details concerning the murder. (Id.) Again, this is factually correct and not misleading. The detectives then state that Robin's fingerprints are going to be at the murder scene, which Appellant agrees with, and then they again encourage Appellant to tell the whole story so that Robin will be implicated less. (Id., at 33) However, they never threaten to charge Robin, never threaten to arrest Robin, they never say that Robin is a suspect, and they never state anything to Appellant about Robin that is untrue or not based on probable cause that they have derived from the facts known to them at that point in the investigation. Additionally, Robin was found and interviewed prior to the detectives even arriving at the Sheriff's office with Appellant. (9/11/09 hearing, p. 32-33) As such, this was a perfectly permissible and truthful line of questioning.

Appellant next argues that he was so intoxicated that his will was easily overborne. However, the only support he offers for this proposition is his own self-serving statements. The factual underpinnings he attempts to use to support this claim is that the Detective admitted he was "nervous." (Appellant's Brief, p. 99) However, "nervous" and "intoxicated" are not synonymous. In fact, the detective testified that Appellant did not smell like alcohol, never indicated to detectives he was under the influence of drugs or alcohol, and Appellant gave neither an indication nor the appearance of being intoxicated in any way. (9/11/09 hearing, T.p. 29-30, 38, 39) Thus, Appellant offers no support for his argument and it should be dismissed.

Finally, Appellant argues in a similar vein that the detectives engaged in coercion by urging him to tell them where the knife was by stating that they did not want another person, including Appellant's family members, to come in contact with the knife. However, as the above caselaw demonstrates, this is not a coercive line of questioning. Further, factually, the Appellant was obviously not persuaded by this line of questioning as his response to the question was "I did not - -" (Trial Exhibit 55, p. 36) The question then simply became, "Is it just far enough where nobody will find it, Greg?" (Id., at 37) To this, Appellant answers "Yeah." (Id., at 37) It is also important to note that this line of questioning occurred after Appellant had already admitted to committing murder.

Because the detectives did not use a line of questioning that violated Appellant's constitutional rights, this Court should affirm the trial court's finding that "[a]ll of these things seem to indicate that there was little, if any, coercive activity" and therefore overrule proposition of law sixteen. (9/11/09 hearing p. 49)

Proposition of Law XVII:

The presiding judge was never asked to disqualify himself and did not have a valid reason that would necessitate such an extreme action.

In proposition of law seventeen, Appellant argues that the appointment of his requested and hand picked mitigation specialist caused such an appearance of impropriety that Judge Powers should have recused himself. The State disagrees.

It must first be stated that Christopher J. Pagan was specifically requested by Appellant to be the mitigation specialist. (9/11/09 hearing T.p. 55) Second, when any issues concerning the

potential conflict between Pagan and Judge Powers was raised, they were raised by the State. Rather than join in these concerns, Appellant's trial counsel reaffirmed their desire to have Pagan appointed in front of a second common pleas judge. However, Appellant now claims that this is error that must be attributable to the State or the court. This argument must fail.

This Court held in 1927, in regards to the disqualification of a trial judge, that "[s]uch disqualification is waived, unless objection be made thereto at the earliest available opportunity, and, if known to the complaining party at or before the trial, and no objection be made in the trial court, will be deemed to be waived." *Tari v. State* (1927), 117 Ohio St. 481, 159 N.E. 594, syllabus. By 1935, this proposition was not only being followed, but was discussed as being "settled in Ohio that, where a claim is made that a judgment should be reversed because the judge rendering the same was disqualified from hearing and determining the cause, such disqualification is waived unless objection is made thereto at the earliest available opportunity; and if, after discovering such disqualification, no objection is made or exception taken to his trying the cause, the disqualification of the judge is waived and is not a ground for reversal of the judgment rendered." *Montalto v. State* (1935), 199 N.E. 198, 199-200; *Moore v. State* (1928), 118 Ohio St. 487, 161 N.E. 532; *State ex rel. Bowman v. Board of Commissioners of Allen County* (1931), 124 Ohio St. 174, 191-92, 177 N.E. 271.

As recently as 2008, this Court, in a capital muder appeal, reaffirmed this position of waiver. See, *State v. Were*, 118 Ohio St.3d 448, 890 N.E.2d 263, 2008-Ohio-2762. Specifically in *Were*, this Court held:

> Under R.C. 2701.03(A), when a party believes that the trial judge is biased, the proper avenue for redress is the filing of an affidavit of disqualification. See Section 5(C), Article IV, Ohio Constitution. "An affidavit of disqualification must be filed as soon as possible after the incident giving rise to the claim of bias and prejudice occurred or affiant becomes aware of circumstances that support disqualification. A party may be considered to have waived its objection to the judge when the objection is not raised in a timely fashion and the facts underlying the objection have been known to the party for some time." *In re Disqualification of O'Grady* (1996), 77

> Ohio St.3d 1240, 1241, 674 N.E.2d 353. Because Were failed to file an affidavit of disqualification against the trial judge, he waived his complaint.

Id. at ¶ 56.

Absent the filing of an affidavit of disqualification, then, a defendant waives any error that results from a trial court's denial of a motion to recuse itself. See, also, *State v. Fannin*, Cuyahoga App. No. 80014, 2002-Ohio-4180. As such, this Court's 1927 decision that was considered well-settled law by 1935 and has been steadfastly followed up and through 2008 bars Appellant's argument as waived.

What is more, even if this Court were to consider Appellant's argument, it should also be found to fall within the invited error doctrine as it was Appellant that hand-picked and argued for Pagan's appointment. "The doctrine of invited error is a corollary of the principle of equitable estoppel. Under the doctrine of invited error, an appellant, in either a civil or a criminal case, cannot attack a judgment for errors committed by himself or herself; for errors that the appellant induced the court to commit; or for errors into which the appellant either intentionally or unintentionally misled the court, and for which the appellant is actively responsible. Under this principle, a party cannot complain of any action taken or ruling made by the court in accordance with that party's own suggestion or request." *State v. Minkner*, Champaign App. No. 2010 CA 8, 2011-Ohio-3106, ¶ 24 (internal citations omitted); see also, *State ex rel. DeWine v. Burge*, 128 Ohio St.3d 236, 943 N.E.2d 535, 2011-Ohio-235.

As such, Appellant's seventeen proposition of law should be rejected.

Proposition of Law XVII:

The recording of Appellant's interview did not violate Evid.R. 106.

In the eighteenth proposition of law, Appellant attempts to rewrite Evid.R. 106. Through his proposed revision, Appellant wants to mandate that if a police interview is played, the entire interaction of the defendant with the police must have also been recorded or played, or else a due process violation has occurred and suppression must be granted. However, as Evid.R. 106 is neither written in that manner, nor that all-powerful, this argument should be denied.

Ohio Evid R 106 states that "when a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which is otherwise admissible and which ought in fairness to be considered contemporaneously with it." This evidence rule is based upon the doctrine of completeness which states that additional writing or tape recording is required to be read or heard where necessary to explain admitted writing or recording, to place admitted portion in context, avoid misleading trier of fact, or to insure fair and impartial understanding of admitted portion. See, *United States v. Sweiss* (C.A.7. 1987), 814 F.2d 1208. The "doctrine of completeness" provides that a party may place remainder of a statement or document before the jury after opposing party has introduced a portion of that statement or document into evidence, to prevent one party from misleading the jury by presenting statements out of context, but the remainder of the statement or document is subject to general rules of admissibility and portions found immaterial, irrelevant or prejudicial must be redacted. See, e.g., *Evans v. State* (Ind. 1994), 643 N.E.2d 877.

However, when the entirety of a recorded statement has been admitted, "[w]hen, as here, the entire recorded statement was furnished, Evidence Rule 106 does not apply to this issue." *State v.*

Anderson, 2007 WL 1958641 (Tenn.Crim.App. Jul 06, 2007), citing *State v. Wilson*, 164 S.W.3d 355, 365 (Tenn.Crim.App.2003), See, e.g., *United States v. Spearman*, 186 F.3d 743, 755 (6th Cir.1999) (under Federal Rule of Evidence 106, defendant had opportunity to present videotape in its entirety after government played only portions of video).

In the case at bar, the Appellant gave two audio taped interviews. Both were played in their entirety, and entirety of both were provided to the defense. As such, Evid.R. 106 does not apply to this situation. Evid.R. 106 would have only applied if the State had attempted to present parts of these two interviews. However, this is not the factual setting of the present case. As such, it is hard to understand Appellant's argument as anything other that a speculative attempt to rewrite the evidence rules in a manner that would require police to record every second they spend with a suspect or risk the possibility of never being able to introduce an entire written or recorded statement. This argument must fail as it fails under the legal analysis of Evid.R. 106 and the common sense understanding of police work. See, *State v. Scales*, Champaign App. No. 2002–CA–27, 2004 -Ohio- 175, ¶ 9 ("we are unaware of any authority for the proposition that a defendant has a constitutional right to have his police interview recorded.").

This is the position that was taken in the case of *Murphy v. State* (Ark. Ct. App. 1990), 1990 WL 210635, where the court said that Ark. R. Evid. 106 does not provide that a statement may not be introduced unless all conversations between the parties are made a part of the written or taped statement. In so finding, the court rejected an argument of a criminal defendant that under Rule 106 a taped conversation with a police officer could not be introduced in evidence because the prior conversations had not been taped. *Id.* Thus, the Arkansas court noted that the "rule does not provide that a statement may not be introduced unless all conversations between the parties are made a part of the written or taped statement." *Id.*, at *2, see also *State v. Elliott*, 2002 MT 26, 308 Mont. 227,

43 P.3d 279 (2002) (tape recordings of two interviews defendant had with police were admissible in prosecution for deliberate homicide, even though defendant alleged that the tapes were incomplete and did not reflect all of the interviews; police agent testified at trial concerning what happened during the interviews in the time periods in which the tape recorder was not operated, and defendant was provided the opportunity to cross-examine agent but declined to do so).

As such, because Evid.R. 106 in its plain language and interpretation does not extend to the bounds of Appellant's argument, the eighteenth proposition of law should be denied.

Proposition of Law XIX:

Ohio's death penalty law is Constitutional.

In proposition of law number nineteen, Appellant argues that the Ohio's death penalty is unconstitutional. (Appellant's brief pages 112-131) The State disagrees.

A. Not Arbitrary

Appellant argues that Ohio's death penalty scheme is arbitrary and that it is administered in a racially discriminatory manner. (Appellant's brief pages 112-114) This Court was previously faced with this argument, which it rejected. See, *State v. Short*, 2011-Ohio-3641, ¶ 139; *State v. Jenkins* (1984), 15 Ohio St.3d 164, 168-169, 473 N.E.2d 264; *State v. Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, ¶ 103; *State v. Steffen* (1987), 31 Ohio St.3d 111, 124-125, 509 N.E.2d 383.

B. Reliable Sentencing Procedures

Appellant argues that Ohio's death-penalty scheme is unconstitutional because of unreliable

sentencing procedures. (Appellant's brief pages 114-115) This Court has previously rejected this argument and thus, should continue to follow its precedents and reject Appellant's argument. See, *State v. Ferguson*, 108 Ohio St.3d 451, 2006-Ohio-1502, ¶87; *State v. Esparza* (1988), 39 Ohio St.3d 8, 12-13, 529 N.E.2d 192, certiorari denied (1989), 490 U.S. 1012, 109 S.Ct. 1657; *State v. Stumpf* (1987), 32 Ohio St.3d 95, 104, 512 N.E.2d 598; *State v. Jenkins*, 15 Ohio St.3d 164, 172-173.

C. No Burden

Appellant argues that Ohio's death-penalty scheme is unconstitutional because it imposes an impermissible risk of death on capital defendants who choose to exercise their right to a jury trial. (Appellant's brief pages 115-116) Appellant's argument is without merit and has previously been rejected by this Court. *Ferguson*, 2006-Ohio-1502, ¶ 89; *State v. Buell* (1986), 22 Ohio St.3d 124, 138, 489 N.E.2d 795.

D. R.C. 2929.03(D)(1) Is Constitutional

Appellant argues that Ohio's capital statutes are unconstitutional because they require submission of the presentence investigation report and the mental evaluation to the jury or judge once requested by a capital defendant. (Appellant's brief page 116) This Court has previously rejected Appellant's argument in *State v. Buell*, 22 Ohio St.3d 124. In *Buell*, this Court held that pursuant to R.C. 2929.03(D)(1), "the defendant decides whether to expose himself to the risk of potentially incriminating presentence investigations, including mental examinations. There is no constitutional infirmity in providing the defendant with such an option." *Id.*, at 138; See, also, *State v. Esparza*, 39 Ohio St.3d 8, 10. As such, this Court should overrule Appellant's argument.

E. R.C. 2929.04(A)(7) Is Constitutional

Appellant argues that R.C. 2929.04(A)(7) fails to narrow the class of individuals eligible for the death penalty. (Appellant's brief pages 116-118) This Court was faced with a similar argument in *State v. Jenkins*, which it rejected. In *Jenkins*, this Court upheld the death sentence of Jenkins, who was convicted of felony murder pursuant to R.C. 2903.01(B) and sentenced in accordance with R.C. 2929.04(A)(7). *Jenkins*, 15 Ohio St.3d 164. In affirming the conviction, this Court stated that "any duplication is the result of the General Assembly having set forth in detail when a murder in the course of a felony rises to the level of a capital offense, thus, in effect, narrowing the class of homicides in Ohio for which the death penalty becomes available as a sentencing option." *Id.*, at 178. More recently, in *State v. Fry*, this Court again rejected this argument and indicated that "the United States Supreme Court has previously rejected similar arguments. See *Lowenfield v. Phelps* (1988), 484 U.S. 231, 108 S.Ct. 546, 98 L.E.2d 568; See also *State v. Bryant*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 55 ("The narrowing requirement may occur at either the guilt phase or the sentencing phase of a capital trial but need not occur at both")." *Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, ¶ 184. As such, this Court should also overrule Appellant's argument.

F. R.C. 2929.03(D) Is Not Vague

Appellant argues "R.C. 2929.03(D)(1) makes Ohio's death penalty weighing scheme unconstitutionally vague because it gives the sentencer unfettered discretion to weigh a statutory mitigating factor as an aggravator." (Appellant's brief page 119) This Court has previously rejected this argument. See, *Ferguson*, 2006-Ohio-1502, ¶ 92; *State v.* Newton, 108 Ohio St.3d 13, 2006-Ohio-81, ¶ 105; State *v. McNeil* (1998), 83 Ohio St.3d 438, 453, 700 N.E.2d 596. As such, this Court should also overrule Appellant's argument.

G. Proportionality and Appropriateness Review Constitutional

Appellant argues that the "appropriateness analysis" and "comparison method" pursuant to R.C. 2929.05(A) is "constitutionally infirm." (Appellant's brief page 121) This Court has previously rejected Appellant's argument. In *State v. Steffen* this Court held "[t]he proportionality review required by R.C. 2929.05(A) is satisfied by a review of those cases already decided by the reviewing court in which the death penalty has been imposed." *Steffen*, 31 Ohio St.3d 111, paragraph one of the syllabus. This Court has continued to uphold the constitutionality of R.C. 2929.05(A). See, *Short*, 2011-Ohio-3641, ¶ 140; State *v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶ 381; *State v. Lamar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶ 23. As such, this Court should also overrule Appellant's argument.

H. Ohio's Death Penalty Scheme Does Not Violate International Law

Appellant argues that Ohio's death penalty scheme violates international law. (Appellant's brief pages 122-131) The State disagrees.

First, contrary to Appellant's argument and as previously addressed *infra* in subsections A through G, Ohio's death penalty statutory scheme does not allow for arbitrary and unequal treatment in punishment; the procedures are reliable; provides for individualized sentencing; does not burden a defendant's right to jury trial; the requirement to mandatory submission of reports and evaluations does not preclude the effective assistance of counsel; and does not allow arbitrary selection of certain defendant's who may be automatically eligible for death. Thus, Ohio's death penalty statutory scheme is constitutional and is not cruel and unusual punishment.

Second, Ohio's death penalty statutory scheme does not violate international law. Recently, the Twelfth District Court of Appeals in *State v. Davis* held:

> The Sixth Circuit has explained that international law agreements and treaties to which the United States belong (such as the International Covenant and Charter of the Organization of American States) do not prohibit the death penalty. *Buell v. Mitchell* (C.A.6, 2001) 274 F.3d 337. 'Moreover, the United States has approved each agreement with reservations that preserve the power of each of the several states and of the United States, under the Constitution.' Id. at 371. The effect of this reservation is that United States courts are not bound by international law on the issue of capital punishment where the death penalty is upheld as constitutional.
> In *State v. Williams*, we discussed the application and effect of international law on death penalty issues, and quoted the Fifth Circuit for the proposition that '[h]ow these issues are to be determined is settled under American Constitutional law. Not a single argument is advanced directed to proving that the United States in these international agreements agreed to provide additional factors for decision or to modify the decisional factors required by the United States Constitution as interpreted by the Supreme Court.' Butler App. Nos. CA91-04-060, CA92-06-110, [1992 WL 317025], 19, citing *Celesteine v. Butler* (C.A.5, 1987), 823 F.2d 74, 79-80, certiorari denied (1987), 483 U.S. 1036, 108 S.Ct. 6.
> The *Buell* Court specifically noted that in relation to the International Covenant's Article VII, 'the United States agreed to abide by this prohibition only to the extent that the Fifth Eighth, and Fourteenth Amendments ban cruel and unusual punishment.' 274 F.3d 371. As we have previously determined that the years Davis has spent on death row do not constitute cruel and unusual punishment, his challenge under the guise of international law must also fail."

Davis, Butler App. No. CA2009-10-263, 2011-Ohio-787, ¶¶ 124-126.

In addition, while the United States is a party to the International Covenant on Civil and Political Rights ("ICCPR"), the U.S. government and its constituent states are not necessarily required to enforce the provisions of the treaty as binding federal law. During the United States' ratification process of the ICCPR, the U.S. specifically stated that the treaty would not be self-executing and that its provisions cannot be enforced in U.S. courts absent enabling legislation. *Commonwealth of Pennsylvania v. Judge* (Penn. 2007), 916 A.2d 511, 523, citing generally 138 Cong. Rec. S4781, S4783; See, also, Restatement (Third) of the Foreign Relations Law of the United States Sec. 111 (1987). To date, Congress has not enacted any such law with regard to the ICCPR. See *Sosa v. Alvarez-Machian* (2004), 542 U.S. 692.

Furthermore, this Court has consistently rejected claims where customary international law is used as a defense against an otherwise constitutional action as recently as July 28, 2011 in *Short*,

2001-Ohio-3641, ¶¶ 137-138. See, *Fry*, 2010-Ohio-1017, ¶ 216; *Davis*, 2008-Ohio-2, ¶ 383; *Ferguson*, 2006-Ohio-1502, ¶ 85; *State v. Bey* (1999), 85 Ohio St.3d 487, 502, 709 N.E.2d 484.

As such, this Court should follow its precedents and reject Appellant's arguments. Therefore, Appellant's convictions and sentences should be upheld.

CONCLUSION

For the foregoing reasons, the death penalty should be affirmed.

Respectfully submitted,

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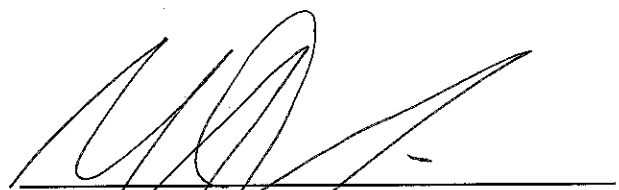
Butler County Prosecuting Attorney



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PROOF OF SERVICE

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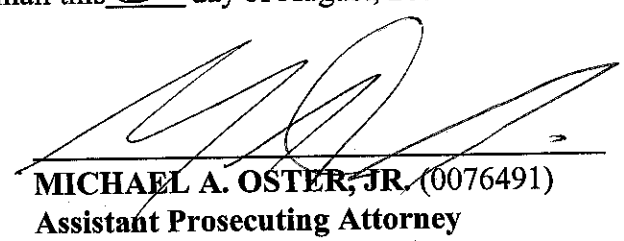

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OH Const. Art. IV, § 5

(A) (1) In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court.

(2) The supreme court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas or a division thereof temporarily to sit or hold court on any other court of common pleas or division thereof or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas or division thereof and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.

(B) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

(C) The chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or division thereof. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

R.C. 2941.25

Multiple counts

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

R.C. 2701.03

Affidavit of disqualification of judge of common pleas court for prejudice; procedure; replacement

(A) If a judge of the court of common pleas allegedly is interested in a proceeding pending before the court, allegedly is related to or has a bias or prejudice for or against a party to a proceeding pending before the court or a party's counsel, or allegedly otherwise is disqualified to preside in a proceeding pending before the court, any party to the proceeding or the party's counsel may file an affidavit of disqualification with the clerk of the supreme court in accordance with division (B) of this section.

(B) An affidavit of disqualification filed under section 2101.39 or 2501.13 of the Revised Code or division (A) of this section shall be filed with the clerk of the supreme court not less than seven calendar days before the day on which the next hearing in the proceeding is scheduled and shall include all of the following:

(1) The specific allegations on which the claim of interest, bias, prejudice, or disqualification is based and the facts to support each of those allegations or, in relation to an affidavit filed against a judge of a court of appeals, a specific allegation that the judge presided in the lower court in the same proceeding and the facts to support that allegation;

(2) The jurat of a notary public or another person authorized to administer oaths or affirmations;

(3) A certificate indicating that a copy of the affidavit has been served on the probate judge, judge of a court of appeals, or judge of a court of common pleas against whom the affidavit is filed and on all other parties or their counsel;

(4) The date of the next scheduled hearing in the proceeding or, if there is no hearing scheduled, a statement that there is no hearing scheduled.

(C)(1) Except as provided in division (C)(2) of this section, when an affidavit of disqualification is presented to the clerk of the supreme court for filing under division (B) of this section, all of the following apply:

(a) The clerk of the supreme court shall accept the affidavit for filing and shall forward the affidavit to the chief justice of the supreme court.

(b) The supreme court shall send notice of the filing of the affidavit to the probate court served by the judge if the affidavit is filed against a probate court judge, to the clerk of the court of appeals served by the judge if the affidavit is filed against a judge of a court of appeals, or to the clerk of the court of common pleas served by the judge if the affidavit is filed against a judge of a court of common pleas.

(c) Upon receipt of the notice under division (C)(1)(b) of this section, the probate court, the clerk of the court of appeals, or the clerk of the court of common pleas shall enter the fact of the filing of the affidavit on the docket of the probate court, the docket of the court of appeals, or the docket in the proceeding in the court of common pleas.

(2) The clerk of the supreme court shall not accept an affidavit of disqualification presented for filing under division (B) of this section if it is not timely presented for filing or does not satisfy the requirements of divisions (B)(2), (3), and (4) of this section.

(D)(1) Except as provided in divisions (D)(2) to (4) of this section, if the clerk of the supreme court accepts an affidavit of disqualification for filing under divisions (B) and (C) of this section, the affidavit deprives the judge against whom the affidavit was filed of any authority to preside in the proceeding until the chief justice of the supreme court, or a justice of the supreme court designated by the chief justice, rules on the affidavit pursuant to division (E) of this section.

(2) A judge against whom an affidavit of disqualification has been filed under divisions (B) and (C) of this section may do any of the following that is applicable:

(a) If, based on the scheduled hearing date, the affidavit was not timely filed, the judge may preside in the proceeding.

(b) If the proceeding is a domestic relations proceeding, the judge may issue any temporary order relating to spousal support pendente lite and the support, maintenance, and allocation of parental rights and responsibilities for the care of children.

(c) If the proceeding pertains to a complaint brought pursuant to Chapter 2151. or 2152. of the Revised Code, the judge may issue any temporary order pertaining to the relation and conduct of any other person toward a child who is the subject of a complaint as the interest and welfare of the child may require.

(3) A judge against whom an affidavit of disqualification has been filed under divisions (B) and (C) of this section may determine a matter that does not affect a substantive right of any of the parties.

(4) If the clerk of the supreme court accepts an affidavit of disqualification for filing under divisions (B) and (C) of this section, if the chief justice of the supreme court, or a justice of the supreme court designated by the chief justice, denies the affidavit of disqualification pursuant to division (E) of this section, and if, after the denial, a second or subsequent affidavit of disqualification regarding the same judge and the same proceeding is filed by the same party who filed or on whose behalf was filed the affidavit that was denied or by counsel for the same party who filed or on whose behalf was filed the affidavit that was denied, the judge against whom the second or subsequent affidavit is filed may preside in the proceeding prior to the ruling of the chief justice of the supreme court, or a justice designated by the chief justice, on the second or subsequent affidavit.

(E) If the clerk of the supreme court accepts an affidavit of disqualification for filing under divisions (B) and (C) of this section and if the chief justice of the supreme court, or any justice of the supreme court designated by the chief justice, determines that the interest, bias, prejudice, or disqualification alleged in the affidavit does not exist, the chief justice or the designated justice shall issue an entry denying the affidavit of disqualification. If the chief justice of the supreme court, or any justice of the supreme court designated by the chief justice, determines that the interest, bias, prejudice, or disqualification alleged in the affidavit exists, the chief justice or the designated justice shall issue an entry that disqualifies that judge from presiding in the proceeding and either order that the proceeding be assigned to another judge of the court of which the disqualified judge is a member, to a judge of another court, or to a retired judge.

Crim R 16 Discovery and inspection

(A) Purpose, Scope and Reciprocity. This rule is to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system and the rights of defendants, and to protect the well-being of witnesses, victims, and society at large. All duties and remedies are subject to a standard of due diligence, apply to the defense and the prosecution equally, and are intended to be reciprocal. Once discovery is initiated by demand of the defendant, all parties have a continuing duty to supplement their disclosures.

(B) Discovery: Right to Copy or Photograph. Upon receipt of a written demand for discovery by the defendant, and except as provided in division (C), (D), (E), (F), or (J) of this rule, the prosecuting attorney shall provide copies or photographs, or permit counsel for the defendant to copy or photograph, the following items related to the particular case indictment, information, or complaint, and which are material to the preparation of a defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant, within the possession of, or reasonably available to the state, subject to the provisions of this rule:

(1) Any written or recorded statement by the defendant or a co-defendant, including police summaries of such statements, and including grand jury testimony by either the defendant or co-defendant;

(2) Criminal records of the defendant, a co-defendant, and the record of prior convictions that could be admissible under Rule 609 of the Ohio Rules of Evidence of a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal;

(3) Subject to divisions (D)(4) and (E) of this rule, all laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings, or places;

(4) Subject to division (D)(4) and (E) of this rule, results of physical or mental examinations, experiments or scientific tests;

(5) Any evidence favorable to the defendant and material to guilt or punishment;
(6) All reports from peace officers, the Ohio State Highway Patrol, and federal law enforcement agents, provided however, that a document prepared by a person other than the witness testifying will not be considered to be the witness's prior statement for purposes of the cross examination of that particular witness under the Rules of Evidence unless explicitly adopted by the witness;
(7) Any written or recorded statement by a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal.

(C) Prosecuting Attorney's Designation of "Counsel Only" Materials. The prosecuting attorney may designate any material subject to disclosure under this rule as "counsel only" by stamping a prominent notice on each page or thing so designated. "Counsel only" material also includes materials ordered disclosed under division (F) of this rule. Except as otherwise provided, "counsel only" material may not be shown to the defendant or any other person, but may be disclosed only to defense counsel, or the agents or employees of defense counsel, and may not otherwise be reproduced, copied or disseminated in any way. Defense counsel may orally communicate the content of the "counsel only" material to the defendant.

(D) Prosecuting Attorney's Certification of Nondisclosure. If the prosecuting attorney does not disclose materials or portions of materials under this rule, the prosecuting attorney shall certify to the court that the prosecuting attorney is not disclosing material or portions of material otherwise subject to disclosure under this rule for one or more of the following reasons:

(1) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will compromise the safety of a witness, victim, or third party, or subject them to intimidation or coercion;
(2) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will subject a witness, victim, or third party to a substantial risk of serious economic harm;

(3) Disclosure will compromise an ongoing criminal investigation or a confidential law enforcement technique or investigation regardless of whether that investigation involves the pending case or the defendant;

(4) The statement is of a child victim of sexually oriented offense under the age of thirteen;

(5) The interests of justice require non-disclosure.

Reasonable, articulable grounds may include, but are not limited to, the nature of the case, the specific course of conduct of one or more parties, threats or prior instances of witness tampering or intimidation, whether or not those instances resulted in criminal charges, whether the defendant is pro se, and any other relevant information.

The prosecuting attorney's certification shall identify the nondisclosed material.

(E) Right of Inspection in Cases of Sexual Assault.

(1) In cases of sexual assault, defense counsel, or the agents or employees of defense counsel, shall have the right to inspect photographs, results of physical or mental examinations, or hospital reports, related to the indictment, information, or complaint as described in section (B)(3) or (B)(4) of this rule. Hospital records not related to the information, indictment, or complaint are not subject to inspection or disclosure. Upon motion by defendant, copies of the photographs, results of physical or mental examinations, or hospital reports, shall be provided to defendant's expert under seal and under protection from unauthorized dissemination pursuant to protective order.

(2) In cases involving a victim of a sexually oriented offense less than thirteen years of age, the court, for good cause shown, may order the child's statement be provided, under seal and pursuant to protective order from unauthorized dissemination, to defense counsel and the defendant's expert. Notwithstanding any provision to the contrary, counsel for the defendant shall be permitted to discuss the content of the statement with the expert.

(F) Review of Prosecuting Attorney's Certification of Non-Disclosure. Upon motion of the defendant, the trial court shall review the prosecuting attorney's decision of nondisclosure or designation of "counsel only" material for abuse of discretion during an in camera hearing conducted seven days prior to trial, with counsel participating.

(1) Upon a finding of an abuse of discretion by the prosecuting attorney, the trial court may order disclosure, grant a continuance, or other appropriate relief.

(2) Upon a finding by the trial court of an abuse of discretion by the prosecuting attorney, the prosecuting attorney may file an interlocutory appeal pursuant to division (K) of Rule 12 of the Rules of Criminal Procedure.

(3) Unless, for good cause shown, the court orders otherwise, any material disclosed by court order under this section shall be deemed to be "counsel only" material, whether or not it is marked as such.

(4) Notwithstanding the provisions of (E)(2), in the case of a statement by a victim of a sexually oriented offense less than thirteen years of age, where the trial court finds no abuse of discretion, and the prosecuting attorney has not certified for nondisclosure under (D)(1) or (D)(2) of this rule, or has filed for nondisclosure under (D)(1) or (D)(2) of this rule and the court has found an abuse of discretion in doing so, the prosecuting attorney shall permit defense counsel, or the agents or employees of defense counsel to inspect the statement at that time.

(5) If the court finds no abuse of discretion by the prosecuting attorney, a copy of any discoverable material that was not disclosed before trial shall be provided to the defendant no later than commencement of trial. If the court continues the trial after the disclosure, the testimony of any witness shall be perpetuated on motion of the state subject to further cross-examination for good cause shown.

(G) Perpetuation of Testimony. Where a court has ordered disclosure of material certified by the prosecuting attorney under division (F) of this rule, the prosecuting attorney may move the court to perpetuate the testimony of relevant witnesses in a hearing before the court, in which hearing the defendant shall have the right of cross-examination. A record of the witness's testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state.

(H) Discovery: Right to Copy or Photograph. If the defendant serves a written demand for discovery or any other pleading seeking disclosure of evidence on the prosecuting attorney, a reciprocal duty of disclosure by the defendant arises without further demand by the state. The defendant shall provide copies or photographs, or permit the prosecuting attorney to copy or photograph, the following items related to the particular case indictment, information or complaint, and which are material to the innocence or alibi of the defendant, or are intended for use by the defense as evidence at the trial, or were obtained from or belong to the victim, within the possession of, or reasonably available to the defendant, except as provided in division (J) of this rule:

(1) All laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings or places;
(2) Results of physical or mental examinations, experiments or scientific tests;
(3) Any evidence that tends to negate the guilt of the defendant, or is material to punishment, or tends to support an alibi. However, nothing in this rule shall be construed to require the defendant to disclose information that would tend to incriminate that defendant;
(4) All investigative reports, except as provided in division (J) of this rule;
(5) Any written or recorded statement by a witness in the defendant's case-in-chief, or any witness that it reasonably anticipates calling as a witness in surrebuttal.

(I) Witness List. Each party shall provide to opposing counsel a written witness list, including names and addresses of any witness it intends to call in its case-in-chief, or reasonably anticipates calling in rebuttal or surrebuttal. The content of the witness list may not be commented upon or disclosed to the jury by opposing counsel, but during argument, the presence or absence of the witness may be commented upon.

(J) Information Not Subject to Disclosure. The following items are not subject to disclosure under this rule:

(1) Materials subject to the work product protection. Work product includes, but is not limited to, reports, memoranda, or other internal documents made by the prosecuting attorney or defense counsel, or their agents in connection with the investigation or prosecution or defense of the case;
(2) Transcripts of grand jury testimony, other than transcripts of the testimony of a defendant or co-defendant. Such transcripts are governed by Crim. R. 6;
(3) Materials that by law are subject to privilege, or confidentiality, or are otherwise prohibited from disclosure.

(K) Expert Witnesses; Reports. An expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications. The written report and summary of qualifications shall be subject to disclosure under this rule no later than twenty-one days prior to trial, which period may be modified by the court for good cause shown, which does not prejudice any other party. Failure to disclose the written report to opposing counsel shall preclude the expert's testimony at trial.

(L) Regulation of discovery.

(1) The trial court may make orders regulating discovery not inconsistent with this rule. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

(2) The trial court specifically may regulate the time, place, and manner of a pro se defendant's access to any discoverable material not to exceed the scope of this rule.

(3) In cases in which the attorney-client relationship is terminated prior to trial for any reason, any material that is designated "counsel only", or limited in dissemination by protective order, must be returned to the state. Any work product derived from said material shall not be provided to the defendant.

(M) Time of motions. A defendant shall make his demand for discovery within twenty-one days after arraignment or seven days before the date of trial, whichever is earlier, or at such reasonable time later as the court may permit. A party's motion to compel compliance with this rule shall be made no later than seven days prior to trial, or three days after the opposing party provides discovery, whichever is later. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon showing of cause why such motion would be in the interest of justice.

T. C. A. § 39-13-202

§ 39-13-202. First degree murder

(a) First degree murder is:

(1) A premeditated and intentional killing of another;

(2) A killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, act of terrorism, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, aggravated child neglect, rape of a child, aggravated rape of a child or aircraft piracy; or

(3) A killing of another committed as the result of the unlawful throwing, placing or discharging of a destructive device or bomb.

(b) No culpable mental state is required for conviction under subdivision (a)(2) or (a)(3), except the intent to commit the enumerated offenses or acts in those subdivisions.

(c) A person convicted of first degree murder shall be punished by:

(1) Death;

(2) Imprisonment for life without possibility of parole; or

(3) Imprisonment for life.

(d) As used in subdivision (a)(1), "premeditation" is an act done after the exercise of reflection and judgment. "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.