

ORIGINAL

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO	:	NO. 2012-0405
Plaintiff-Appellee	:	Appeal taken from Hamilton County Court of Common Pleas Case Number B-9708745
vs.	:	
RAYSHAWN JOHNSON	:	This is a death penalty case.
Defendant-Appellant	:	

MERIT BRIEF OF PLAINTIFF-APPELLEE, STATE OF OHIO

Office of the Hamilton County
Prosecutor

JOSEPH T. DETERS - 0012084P
Prosecuting Attorney

WILLIAM E. BREYER - 0002138P
Assistant Prosecuting Attorney
Counsel of Record
Bill.Breyer@hcpros.org

Hamilton County Prosecutor's Office
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
DDN: (513) 946-3244
Fax No. (513) 946-3100

Office of the Ohio Public Defender

LINDA PRUCHA - 0040689
Supervisor Death Penalty Division
Linda.Prucha@opd.ohio.gov

TYSON FLEMING - 0073135
Assistant State Public Defender
Tyson.Fleming@opd.ohio.gov

Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
Fax (614) 644-0708

COUNSEL FOR APPELLEE,
STATE OF OHIO

COUNSEL FOR APPELLANT,
RAYSHAWN JOHNSON

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STATEMENT OF FACTS

I. PROCEDURAL POSTURE:

On May 18, 1998, a Hamilton County Jury found Rayshawn Johnson guilty of two counts of Aggravated Murder, each with two death specifications, as well as Aggravated Burglary and Aggravated Robbery counts as to victim Shanon Marks. Johnson was also found guilty of Kidnapping and Robbery as to victim Nicole Sroufe.

On May 21, 1998, the jury recommended a sentence of death which the trial court subsequently imposed. This Court upheld Johnson's conviction and sentence in *State v. Johnson*, 88 Ohio St.3d 95, 2000-Ohio-276, 723 N.E.2d 1054. Johnson filed a federal habeas corpus action and on April 24, 2006, the District Court affirmed the finding of guilty but reversed the death sentence because of ineffective assistance of counsel at mitigation. *Johnson v. Bagley*, 2006 WL 5388021 (April 24, 2006). The Sixth Circuit affirmed. *Johnson v. Bagley*, 544 F.3d 592 (6th Circ., Ohio, 2008). The case was remanded to the state trial court for a new sentencing hearing (guilt phase verdicts were affirmed). That hearing resulted in the imposition of a death sentence on January 10th, 2012.

II. FACTS:

This case was remanded for a new mitigation hearing only. The parties agreed that the new sentencing jury had to accept the guilty verdicts on all the underlying counts and specifications. As a result, the facts of the case were presented to the jury in summary witness fashion to some degree. (T.p. Vol. 12, p. 958)

At the time of the killing of Shanon Marks, Johnson was living in his grandmother's home located at 3055 Fairfield Avenue in the East Walnut Hills area of Cincinnati. The backyard of this property abutted the rear yard of the residence at 1741 Dexter, the home of Norman and Shanon Marks. From the rear windows of his grandmother's home, Johnson could look into the rear windows of the Marks' residence. The window in the upstairs bathroom of the Marks' home was uncurtained. Several years prior to this, Johnson had done remodeling work for the previous owner of 1741 Dexter, and he was familiar with the interior of the home.

On the morning of November 12, 1997, Norman Marks left for work at about 6:50 a.m. He neglected to lock the rear door or activate the alarm system. Shanon Marks was still in the home, and just beginning to prepare for the day. At the same time, Johnson was watching the Marks' residence from the rear of his home. He saw that Shanon Marks was home alone (only her car remained) and he decided to act. He came out of his house with a souvenir-sized metal baseball bat, went through his garage, out the garage window and into the rear yard of the Marks residence. Johnson was carrying the bat, and wearing gloves, but he did not have on a mask. [See Exhibit #5] (His intent to kill and rob was obvious. He didn't care if he was seen, but he did not intend to leave any fingerprints behind.) Johnson was wearing his new Air Jordan shoes. Johnson entered the Marks' home through the rear door and at once silently crept up the second-floor bathroom. There, Shanon Marks, having completed her shower, was looking out the window. She

was wearing a robe, and a towel was wrapped around her head. Johnson at once beat her over the head with his bat. [See Exhibit #5] Shanon tried to protect herself and received several defensive-type wounds, including a broken arm. As she lay on the floor begging for help, Johnson beat her about the head to finish her off. He rifled her purse in her bedroom, taking cash, and then fled from the Marks' home.

Norman Marks returned home at 8:00 p.m. that evening and discovered his wife's body. In hysterics, he called 9-1-1. Paramedics and police soon arrived and an investigation was begun. The victim's purse was found dumped out, with change in it, but no currency. The coroner's examination of the body placed time of death consistent with about 7:00 a.m. on November 12, 1997. Police criminalists were unable to develop any fingerprints except those of Shanon and Norman Marks. However, a partial shoe-print was found on the bathroom floor and a distinctive gym-shoe print was found on a railroad tie in the rear of the house.

As part of the investigation, the police began a canvas of neighborhood residents.¹ Johnson had been giving television interviews to the media expressing his concern over the crime. [Exhibits #2, p. 1038] The police were aware of this and wanted to speak to him to see if he could help. On November 14, 1997, Police Specialist Greg Ventre went to the Johnson's home on Fairfield Avenue and interviewed him. Johnson displayed knowledge of the victim's home, and showed Ventre how he could observe the Marks residence from

¹Early on, a youthful school crossing guard said he saw a "Dante" in the area. This name would later be used by the defendant in an attempt to create a mythical co-defendant.

the rear windows of his home. While talking to Johnson, Ventre asked him what shoes he had been wearing on the 12th. Johnson indicated a pair of Reeboks. Next to the Reeboks was a pair of Air Jordans. With Johnson's permission, Ventre looked at the Air Jordans. Ventre observed that the tread on the Air Jordans appeared similar to the pattern of the shoe print recovered from the railroad tie in the Marks yard.

After concluding the interview, Ventre obtained a pair of Air Jordans from a shoe store and had them compared to the print from the railroad tie. They appeared to be a match.

On November 15th, Johnson agreed to come to a police facility for an interview. Police brought Johnson, his girlfriend and his brother in late in the morning. At about the same time, a search warrant was executed at Johnson's Fairfield Avenue home. (Nothing of evidentiary value was recovered.) After speaking to the Johnson's girlfriend and brother, police then questioned Johnson. During the course of the interview, Johnson admitted his guilt. That afternoon, police took taped statements from Johnson, one at 4:58 p.m., and the other at 6:18 p.m. (Exhibit #5, Exhibit #7) In these statements, Johnson gave a full description of the crime, and described how he disposed of the gloves and the baseball bat. Johnson then called his home and spoke to his grandmother, brother and girlfriend. He admitted to them that he killed Shanon Marks. When asked why, he stated he needed the money. At that point, his grandmother asked him why he didn't just get a job. (T.p. 1273)

When police efforts to locate the bat proved unsuccessful, they approached Johnson again on November 16th. Johnson told police he had further information he had neglected to provide earlier. Another taped statement was taken. (Exhibit #10) In this statement, Johnson claimed he was assisted in his crime by a nebulous figure known as "Dante." (Johnson could not provide a last name, an address, or any other identifying information. What information he did supply proved to be false. For example, he said his mother knew "Dante," but she totally denied this. The coroner testified that the physical evidence did not support Johnson's description of how "Dante" supposedly assaulted Shanon Marks.) Lab evidence confirmed that Johnson's Air Jordan shoes were consistent with the tread print found on the railroad tie.

Johnson was charged with aggravated murder (with two death specifications), aggravated burglary and aggravated robbery as to Shanon Marks. As noted earlier, Johnson was found guilty and sentenced to death at the first trial. The case was remanded from federal court for a new mitigation hearing only.

(A.) Mitigation

Prior to the start of the new mitigation hearing Johnson's objection to the use of the 9-1-1 tape was again denied. (T.p. 86, et seq., 903) Johnson presented six witnesses in mitigation.

(1.) Johnson's first witness was a retired school teacher, Nancy Bare, who now was involved in prison ministry. She described her contact with Johnson and expressed

her belief that he could now serve as a positive role model for his own son, and make a difference in the lives of other inmates. (T.p. 1212)

(2.) Johnson's second witness was his maternal grandmother, Marion Faulkner. (T.p. 1226, et seq.) She testified to an extensive family history of abusive relationships, along with drug and alcohol abuse. She testified that she was drunk virtually her entire life and that although she was always employed, she "secretly" drank at work, went to bars constantly and was always drunk at home. She stated she never wanted children, and tried unsuccessfully to self-abort her daughter Demeatra, who is Johnson's mother. She testified to constantly abusing Demeatra, even forcing her daughter to drink her own urine. She testified to constantly abusing Johnson during the extensive time she had custody of him.

Ms. Faulkner was cross-examined beginning at T.p. 1249. The prosecutor used her testimony at the first trial to demonstrate that her current version was greatly at odds with her original testimony. Much of her testimony was either directly impeached or shown to be highly implausible.

(3.) The next mitigation witness was Johnson's mother, Demeatra Johnson. (T.p. 1274) She described the abuse she suffered at the hands of her mother, Marion Faulkner. She claimed to have been heavily involved in prostitution and drugs prior to giving birth to Johnson at age 15. She testified that she did drugs, etc., while she was pregnant. (T.p. 1285, et seq.) However, at birth Johnson was a healthy baby with no indication of damage

from his mother's supposed life style, and medical forms she filled out at the time contradicted her claims. (T.p. 1301, et seq.) Initially, Faulkner had custody of Johnson, but Demeatra got custody back when Johnson got older. She testified that she then taught Johnson how to enjoy and use illegal drugs and that all Johnson's problems were her fault. (T.p. 1300) As noted above, her account did not hold up well under cross-examination. (T.p. 1301, et seq.) Besides showing medical records that contradicted her story of drug and alcohol abuse during pregnancy, the State also impeached her with her own testimony at the federal habeas hearing. (T.p. 1304)

(4.) Johnson next called Dr. Robert Smith, a clinical psychologist who had testified fifty times for defendants in capital cases. (T.p. 1382) Based on his review of records, information from Johnson's family and interviewing and testing Johnson, Dr. Smith diagnosed Johnson as alcohol and drug dependent, and suffering from depression and Dysthymic Disorder. (T.p. 1352, 1374) The witness blamed all of these problems on his abusive upbringing at the hands of his mother and grandmother. The gist of his testimony was that whenever Johnson was in a controlled setting, i.e., Hillcrest School, locally, or in prison on death row, he behaved properly and had now turned himself into a new person.

On cross-examination Dr. Smith agreed that his diagnosis was solely dependent on the truth of what he was told by Johnson, Johnson's mother, and Johnson's grandmother. (T.p. 1378) He agreed that if they were lying, his diagnosis would be flawed. (T.p. 1379)

Despite the incredible litany of serious abuse he was relying on for his diagnosis, Dr. Smith conceded there were no records of this from schools, hospitals, doctors or police. (T.p. 1378, et seq.) Indeed, if what Johnson's mother said about her behavior while she was pregnant was true, Johnson should have been suffering from obvious problems at birth. He was not, his health was normal at birth.

(5.) Johnson's son, now age 14, also testified at mitigation. (T.p. 1423) He indicated that he visited his father and received counseling from him. He was not cross-examined.

(6.) The final witness at mitigation was Johnson himself. He gave an unsworn statement and was not subject to cross-examination. He stated he was a changed person, and could provide help to his son and to other inmates.

At the conclusion of the mitigation hearing, the jury returned a verdict recommending a sentence of death. On January 10, 2012, the trial court, after argument from counsel, did impose a sentence of death.

ARGUMENT

Proposition of Law No. I:

Where a defendant raises a *Batson* challenge at trial based solely on the basis of the prospective juror race, and the state provides a valid race-neutral explanation, the defendant cannot raise on appeal alternative theories to support his *Batson* challenge, which were not raised at trial, and which the state thus did not have an opportunity to rebut at trial.

Proposition of Law No. II:

Uncertainty about how a prospective juror perceives the death penalty is a race-neutral reason for exercising a peremptory challenge. (*State v. Were*, 118 Ohio St. 448, 2008-Ohio-2762, 890 N.E.2d 263.)

[Argued Together]

During the voir dire process Johnson raised three *Batson* challenges. The prospective jurors involved were Juror #14, Mr. Ingram (T.p. 852), Juror #9, Linda Childs-Jeter (T.p. 860), and Juror #45, Deborah Middleton (T.p. 870). *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69(1986). *Batson* envisions a three-step process. First, a defendant must raise an issue regarding a race-based use of a peremptory challenge by the State. This is generally done simply by defense counsel pointing out that the subject of the peremptory challenge by the State is an African-American. That is in fact what occurred in the present case.

The second *Batson* step requires the State to set forth a race-neutral explanation to support his challenge. In fact, the State did so. As to Juror #14, Ingram, the prosecution stated that its challenge was based on the prospective juror's response on his questionnaire involving opposition to the death penalty, the juror's past contacts with

the criminal justice system, the juror's prison ministry work, and his study of "apologetics", a field of Christian study that, among other things, opposes the death penalty. (T.p. 852-853) As to the third *Batson* criteria, defense counsel made no response to the State's explanation and the court ruled that the State had provided a race-neutral explanation.

The second *Batson* challenge was raised when the State used a peremptory challenge on Juror #9, Linda Childs-Jeter. (T.p. 860) Johnson's counsel at once stated there would be a *Batson* challenge because of the juror's race. The State gave a lengthy explanation as follows at T.p. 861-862:

MR. PIEPMEIER: The main reason, Judge, her answer on her questionnaire to number 51 with reference to your views on the death penalty. She put I do not want to make that decision. Umm, she also put that death penalty is inappropriate in most murder cases, one of those. And since that's the only real thing we are dealing with here it certainly troubles the State. There was one other thing in her questionnaire that - - the main reason was her views on the death penalty.

She also said something that the major causes of crime, she indicated no father, no mother, grandparents raising children, which is exactly what happened with the defendant Rayshawn Johnson, he was raised by grandparents. So again, since she says that is the cause of crime it seems to me that she would attribute what he did to the fact that he wasn't raised by his parents. So those are the reasons. We are uncomfortable with her sitting on the case.

Once again defense counsel made no further argument and the court found that a valid race-neutral explanation had been provided. (T.p. 862)

The final *Batson* challenge involved perspective Juror #45, Deborah Middleton. (T.p. 869, et seq.) When the State made the peremptory challenge, defense counsel

identified the juror as an African-American and raised a *Batson* challenge. The State's response was as follows at T.p. 870:

MR. PIEPMEIER: She also was very weak on the death penalty, felt it was inappropriate in most cases. Her questionnaire, the vast majority of her answers was I don't know or just didn't fill it out. She has a son that was convicted of a crime. But, again, we are only here for sentencing and she was very weak on the death penalty so that's our reason.

Once again defense counsel made no further argument, and the Court ruled the State had given a valid race-neutral explanation.

In his first proposition of law, Johnson argues that the State's reason given for using peremptory challenges on Juror #9, Linda Childs-Jeter, and Juror #40, Deborah Middleton, were in fact not race-neutral, but were in fact pretextual, used to hide a racial motivation. Johnson also argues that the trial court failed to conduct an adequate investigation into the State's proffered reasons for the use of its peremptory challenges. Johnson argues that if the Court had investigated more diligently it would have discovered this. As a result, Johnson argues he was tried by a jury from which members of his race had been improperly excluded.

(1) Waiver

The first step in a *Batson* challenge establishes a requirement that defense counsel must make a prima facie showing of discriminatory intent. *Batson v. Kentucky, supra; State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263; *State v. Murphy*, 91 Ohio St.3d 516, 2001-Ohio-112, 747 N.E.2d 765.

In fact, in *Murphy*, this Court wrote, "Appellant offered no evidence of discriminatory intent. The burden of proving intentional racial discrimination was his."

In the present case, Johnson makes three *Batson* challenges, as described above. In each case Johnson's entire argument was that the prospective juror was African-American. No further argument was made. No references were raised to other non-minority jurors who were not challenged despite similar answers.

However, even though no prima facie showing of discriminatory intent was shown, the State in fact did provide a valid non-discriminatory explanation on each occasion referencing attitudes about the death penalty [*see State v. Esparza*, 39 Ohio St.3d 8, 13-14, 529 N.E.2d 192 (1988)], and other factors, and pointing out a factual basis in the record, generally the juror questionnaires. (T.p. 852-853, 860-863, 870) Defense counsel presented no rebuttal argument contrary to the State's position. Specifically, defense counsel never referenced the seating of Juror #1, Julie Nipper, or any other particular juror, as evidence of discriminatory intent. The matter, on each instance, was submitted to the judge who found that the provided reasons were race-neutral, and denied the *Batson* challenge.

The explanation of a peremptory challenge need not rise to the level of a challenge for cause. *State v. Murphy, supra; Wainwright v. Witt*, 469 U.S. 412, 106 S.Ct. 844, 83 L.Ed.2d 841 (1985). The trial court's ruling on a *Batson* issue will not be reversed unless there is a showing that it was "clearly erroneous." *State v. Murphy, supra*, at ¶ 61.

The trial court obviously sat through the entire voir dire and was familiar with what occurred. Johnson's claims that the Court had an additional duty to conduct some type of further investigation (Part G of Johnson's argument in Proposition of Law I) is totally without basis in law or fact. Defense counsel's only argument was to point out the race of the juror. That alone, after the State provided an un rebutted explanation, is insufficient to show discriminatory intent. The State's explanation was more than adequate and satisfied the court's duty to look into the *Batson* claim. In sum, since the Johnson never advanced any rebuttal argument to show discriminatory intent, and never raised at trial an issue regarding the seating of juror Nipper, this claim is waived.

2. Juror Comparison

In his second proposition of law, Johnson argues that trial counsel were ineffective in their handling of their *Batson* challenges. *Batson v. Kentucky, s upra*. Specifically, Johnson argues that trial counsel failed to rebut the race-neutral explanation offered by the prosecution. Johnson states that if trial counsel had properly reviewed the juror questionnaires, they would have seen that Juror #1, a white female, Julie Nipper, had expressed views similar to those of Jurors #9 (Childs-Jeter) and #45 (Middleton), concerning the death penalty. Since these jurors (#9 & #45) were black females, who had been successfully peremptorily challenged by the State, Johnson now argues that if counsel had brought up a comparison argument as to Juror Nipper (#9), the State's peremptory challenge would have been denied. Thus, the claim of

ineffective assistance. Johnson relies on *Miller-El v. Dretke*, 545 U.S. 231, 241, 125 S.Ct. 2137, 162 L.E.2d 196 (2005), and *United States v. Odeneal*, 517 F.3d 406 (6th Cir. 2008), to support this claim.

Miller-El involves a situation where the prosecution used ten (10) peremptory challenges on black prospective jurors. The Supreme Court ruled that if the reasons advanced for the challenge to the black jurors applied equally as well to sitting white jurors that could be evidence of discriminatory use of a peremptory challenge. The *Odeneal* decision cited by Johnson in this case uses a comparison-of-jurors-answers approach to show discriminatory use. Of course, defense counsel did not make this claim at trial, so Johnson's first proposition of law is repackaged in the second proposition of law as a claim of ineffective assistance.

In *State v. Were*, 118 Ohio St.3d 458, 2008-Ohio-2762, 890 N.E.2d 263, where a *Batson* claim was not raised below (as is the case here as to the juror comparison issue), the issue will be waived absent a showing of plain error. *State v. Phillips*, 74 Ohio St.3d 112, 656 N.E.2d 643 (1995). A court's finding of no discriminatory intent will not be reversed unless clearly erroneous. *State v. Hernandez*, 63 Ohio St.3d 577, 589 N.E.2d 1310 (1992). Nor does the trial court have any duty to step in and make *Batson* claims not raised by defense counsel. *State v. Rogers*, 8th Dist. No. 98292, 98585, 98586, 98587, 98588, 98589, 98590, 2013-Ohio-1027, ___ N.E.2d ___, ¶ 13.

There is no issue with the proposition that a prospective juror's views on the death penalty are a legitimate basis for a peremptory challenge in a capital case. *State v. Were, supra*; *State v. White*, 85 Ohio St.3d 433, 709 N.E.2d 140 (1997); *State v. Cunningham*, 2nd Dist. No. 10-CA-57, 2012-Ohio-2794, ¶ 38 *et seq.* Even if the prospective juror is later “rehabilitated”, the original statement is sufficient to overcome a *Batson* challenge. In *Cunningham, supra*, the Court wrote:

{¶42} We acknowledge that the juror did state after further questioning that she believed that she could recommend the death penalty if the evidence warranted such a recommendation, in spite of her beliefs. But that fact alone does not establish that the State’s race-neutral reason was a pretext. Rather, “[w]hile a prospective juror’s answers may be sufficient to survive a challenge for cause, both prosecutors and defense attorneys must remain free to challenge on a peremptory basis jurors whose answers create overall concerns on the subject at issue.” *State v. White*, 85 Ohio St.3d 433, 437, 709 N.E.2d 140 (1997).

This is the applicable law as to the issue raised by Johnson.

The actual facts of this case do not support the Johnson’s claims that prospective Juror #1, Nipper, held the same views on the death penalty as prospective Juror #9, Childs-Jeter, and Juror #10, Middleton. Question #51 on the Juror Questionnaire was as follows:

“51. Please describe your views on the death penalty.”

The jurors answered this question as follows:

Juror #1, Nipper: “I believe in the death penalty once there isn’t a shadow of a doubt that the defendant is guilty. I feel there has to be overwhelming proof.”

Juror #9, Childs-Jeter: "Putting someone to death is difficult for me. However, sometimes it is necessary. I do not want to make that decision."

Juror #45, Middleton: "Don't know sometimes yes, and sometimes no."

At the same time, all three jurors did check the same box in Question 53 concerning the death penalty.

- Appropriate in some murder cases, but inappropriate in most murder cases.

Obviously, the questions (51 and 53) must be compared as a whole and with the facts of this case – they cannot be read in isolation.

Juror Nipper's response in Question 51 was a strong endorsement of the death penalty in this case because here guilt was no longer at issue. The only issue to be determined by the jury was punishment. In contrast, the answers given to Question 51 by Juror Childs-Jeter and Middleton were much weaker. Nothing they (Childs-Jeter, Middleton) were asked about the death penalty during the rest of the voir dire did anything to affect their responses on the questionnaire. (Childs-Jeter, T.p. 681-682; Middleton T.p. 717-718, 776-780)

In sum, the prosecutor's explanations were race-neutral, and Johnson's efforts at comparison with Juror #1, Nipper, are without basis in fact. Johnson's claims of ineffective assistance by trial counsel fall woefully short.

Proposition of Law No. III:

R.C. 2929.04(B) provides that the nature and circumstances of the offense must be examined by the sentencing jury to determine whether they are mitigating. The prosecutor may point out to the jury that the nature and circumstances of the offense are not mitigating. R.C. 2929.03(D) provides that during the sentencing phase, the jury "shall consider" evidence relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing.

In his third proposition of law Johnson challenges the admission at the mitigation hearing of three items: (1) the coroner's photos, (2) the 9-1-1 phone call, and (3) the media interview given by Johnson.

Johnson's legal argument is found in the opening portion of §B of his third proposition of law. There he states ". . . [b]ut only the aggravating circumstances may be weighed against Johnson's mitigation. . . the homicide itself is not an aggravating factor and it may not be weighed against the mitigation." (Johnson's brief p. 24.) Johnson's brief goes on to state, "Johnson's case was remanded back to the trial court only for a new penalty phase proceeding. Therefore, Johnson's new jury was to hear evidence that was relevant to the appropriate penalty. This meant the State could only present evidence that was "relevant to aggravating circumstances [Johnson] was found guilty of committing." (Johnson's brief at p. 25.)

This argument omits key provisions concerning what is admissible at mitigation², i.e., O.R.C. 2929.03(D)(1) and O.R.C. 2929.04(B). These provisions allow admission of and discussion concerning the “nature and circumstances” of the aggravating circumstances, and evidence of the “nature and circumstances of the offense itself.” See *State v. DePew*, 38 Ohio St.3d 275, 282-283, 528 N.E.2d 542 (1988); *State v. Sheppard*, 84 Ohio St.3d 230, 238, 703 N.E.2d 286 (1998); and, *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶179. Because these statutes require the jury to search the “nature and circumstances” of the offense and the aggravating circumstances for the presence or absence of mitigation, these cases authorize the State to introduce “nature and circumstances” evidence at mitigation, and to comment thereon. The jury was charged on this issue. (T.p. 1564) See *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 211. The term “nature and circumstances of the offense” connotes more than a simple statement than, for example, “the defendant shot the victim.” At the least it involves the facts of the crime, the planning and cover-up, and the immediate results. These are controlling standards about admission and use of evidence at the mitigating hearing in the present case.

² Johnson’s formulation also ignores the fact that if his procedure was adopted to a remand situation such as this case, the new jury would have no understanding of the context of what had actually occurred.

1. Gruesome Photographs of Shanon Marks

Johnson argues that it was error to admit the photographs of the victim's body taken at the crime scene at the new mitigation hearing. This exact issue was raised in the appeal of the original decision to this Court, and was rejected. *State v. Johnson*, 88 Ohio St.3d 95, 2000-Ohio-276, 723 N.E.2d 1054. That decision is dispositive of this claim.

2. Mr. Mark's 9-1-1 Call

Johnson argues that it was error for the trial court to admit the 9-1-1 telephone call made by the victim's husband when he discovered the body some twelve hours after the crime. The call (in edited form, T.p. 89) was admitted over Johnson's objection, and was played after the husband testified at the mitigation hearing. Johnson's position is that the call was not relevant to any issue at mitigation, and was inflammatory. Johnson's theory is stated in his brief, at page 29, as follows:

The 911 call itself added little to no additional information to the testimony of Mr. Marks, making it of low probative value. It is clear that the only real value that the 911 tape had at that point would have been to play to the jurors' emotions.

Petitioner's counsel, William Welsh and Daniel Burke, objected to the State's presentation of the 911 call because it was not relevant to the aggravating circumstances in this case. The admission of the irrelevant 911 call, over defense counsels' objections, injected the trial with reversible constitutional error.

While the call may or may not be relevant to the “aggravating circumstances”, in this case, it is undisputedly relevant to the “nature and circumstances of the offense,” and is thus admissible. *State v. Davis, supra*.

Admission of evidence lies within the sound discretion of the trial court. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 62. Such a standard requires more than an error of law, but rather the complaining party must demonstrate that the decision was unreasonable, arbitrary or unconscionable. *State v. Cameron*, 10th Dist. No. 10AP-240, 2010-Ohio-6042. Such a finding cannot be made here. The call was clearly part of the “nature and circumstances of the offense” and was generally cumulative to the testimony of Norman Marks. If error occurred, it was certainly harmless. *State v. Finley*, 1st Dist. No. C-061052, 2010-Ohio-5203, ¶ 54.

3. Media Coverage of Johnson

Johnson contends the trial court erred in admitting the videos of his interview with the news media given shortly after the crime. In the interview, Johnson presents himself as being concerned that such a crime occurred in his neighborhood. In his brief at page 29, Johnson states, “The State presented this evidence solely as an attempt to make Johnson look bad to the jury. The State did not disagree with defense counsels’ assessment that the ‘interviews show Mr. Johnson denying it, being smug . . .’” (T.p. 1451, lines 10-18)

This remark could be referred to politely as incorrect. In fact, what happened in reality is that the discussion ended at T.p. 1451, lines 19-20, where the prosecutor stated, "Mr. Deters: Judge, we'll bring in a cite for you tomorrow in the case." And, as promised, the next day at T.p. 1461, et seq., the State presented case law to the effect that the media interviews were admissible as "nature and circumstances of the offense," which the jury would have to examine for mitigation value. *State v. Davis, supra.*

Defense counsel acknowledged this as correct at T.p. 1463, line 17, but argues that the State will use it to show negative information about Johnson. With all due respect, when the State shows that the "nature and circumstances of the offense" have no mitigating value, that certainly will not be helpful to the defense, but the State has the legal right and duty to make that showing. The trial court, after further argument, denied Johnson's motion in limine as to this evidence. Johnson's argument here is specious. If the State is not allowed to demonstrate a lack of sufficient mitigation, then why conduct a hearing? This claim of error is void of merit.

Proposition of Law No. IV:

In order to substantiate a claim of perjury based on sworn testimony at two separate proceedings, there must be a showing that the statements were contradictory and that one or the other had to be false.

Johnson alleges in his fourth proposition of law that the prosecutor engaged in misconduct in two regards. First, he argues that the State allowed one of its witnesses to make a false statement at the new mitigation hearing. Second, Johnson argues that

the prosecutor improperly gave the jury his personal opinion as to the truthfulness of defense witness Marion Faulkner. The State will respond to each claim separately.

1. Perjury

When Johnson was brought in for questioning on November 15, 1997, he was interviewed in a non-taped setting by Officers Englehart and Couch. This interview was observed by their supervisor, Sgt. Brown, from outside the room. (First trial, T.p. 1594 *et seq.*) As he watched the interview in progress, Sgt. Brown felt that Johnson was ready to confess, and he took over the questioning. Sgt. Brown spoke to him for a period of time, and eventually Johnson did confess. Sgt. Brown, at the first trial, described the confession as follows at T.p. 1594:

And with that he just broke down and started crying, saying, "yes, I do care, I did kill her, and I'm sorry for it."

Johnson then gave his first taped statement admitting guilt.³

At Johnson's second mitigation hearing on remand in 2011, Sgt. Brown again testified as to Johnson's interview at the police facility on November 15, 1997. (T.p. 1113, *et seq.*) Sgt. Brown described the same scenario as earlier, as to watching the initial interview and forming a belief that Johnson might be ready to confess. (T.p. 1117) Sgt. Brown then described what happened as follows:

A. He did not. And so I explained that to him, about not having a conscience. And this was just a brutal crime. And I indicated

³ Sometime later, Johnson gave another taped statement in which he said someone named Dante had killed the victim and had told him, "I killed the bitch." (First trial, Exhibit #10).

that he needed to let someone know, let people know that he wasn't the kind of person who could do something like this and not feel, not have any emotions.

We talked about that for some time. And out of the blue – actually, he stunned me. And I'm sitting there, I asked him, you know, what had occurred. And out of the blue he said, I killed the bitch.

Q. How did you react to that?

A. Well, kind of took me back. I mean, he stunned me. You know, I knew he was coming but I just wasn't ready for that. I regrouped and continued the interview and to let him tell me what happened and why it happened.

And at that point I knew he needed to get this on tape. I talked to him a few minutes more to calm him down. And, you know, what we do, no matter what happens, we try to let these individuals know we have seen it all. You are not going to shock me. And I can understand what you did and why you did it. So I calmed him down, went back and got Detective Couch. And at that point, Billy and I, Detective Couch, continued to interview and it was recorded. (T.p. 1118-1119) (Emphasis added.)

There was no objection raised by counsel at this point.

Cross-examination began at T.p. 1125. At T.p. 1127, defense counsel cross-examined Sgt. Brown about the incident described above and about his earlier testimony that Johnson broke down and said he was sorry. (T.p. 1129) Sgt. Brown responded to defense counsel's questioning on the issue. Defense counsel then asked Sgt. Brown why he felt it necessary to "change the testimony." (T.p. 1130) To which Sgt. Brown responded:

Well, I'm not changing the testimony. I'm just saying exactly what occurred during the interview - -

MR. WELSH: Thank you, Your Honor. (T.p. 1130)

Thus, Sgt. Brown explicitly stated that he affirmed his prior testimony from the first trial, concerning Johnson's crying and expression of sorrow. He was simply mentioning details that had been omitted earlier.⁴ At trial, defense counsel appropriately and forcefully examined Sgt. Brown about this statement.

Johnson's claims of perjury are patently false. Sgt. Brown's testimony at the retrial does not contradict his earlier testimony in any fashion, and, in fact, it specifically affirms his earlier testimony.

Adding previously omitted, non-contradictory information is not perjury. In *State v. Iacona*, 93 Ohio St.3d 83, 2001-Ohio-1292, 752 N.E.2d 937, the Court held that when a defendant raises a claim such as this, the burden is on the defendant to show that (1) the statement was actually false; (2) the statement was material; and, (3) the prosecutor knew it was false. Johnson cannot meet this burden. The record itself, laid out above, refutes any claim that the witness' testimony was inconsistent (and thus false). The witness specifically reaffirmed all his previous testimony. That should end the issue. Further, the analysis below, dealing with Johnson's second claim of misconduct, demonstrates that nothing said in any way impacted the outcome of the sentencing hearing.

⁴ During cross-examination, T.p. 1128, Sgt. Brown told defense counsel, "Well, 14 years ago, you know, I really didn't think it was appropriate to say then. But, you know, now looking back on it I should have said exactly what he said, and that's exactly what I said [today]."

2. Marion Faulkner

Johnson's second claim of misconduct is that the prosecutor made disparaging remarks about defense witness, Marion Faulkner. Johnson's claim is based on a question asked of Mrs. Faulkner by the prosecutor at T.p. 1263, which is fourteen pages into the cross-examination. That question and the answer are as follows:

Q. Ma'am, don't get me wrong. I think you are a very good lady, and I said that to you on the stand the last time you testified. But I also believe that you will say anything to try to get this jury to ignore their oath.

A. I wouldn't just say anything.
MR. WELSH: I would object to that.

In order to understand the setting of this, some background is in order.

In the first trial of this case, Johnson's grandmother, Marion Faulkner, presented herself as a caring grandmother who tried to do her best for Rayshawn. In this Court's opinion in his first case, *State v. Johnson*, 88 Ohio St.3d 95, 2000-Ohio-276, 723 N.E.2d 1054, this Court mentioned Johnson's grandmother, Marion Faulkner, only once, in the following words:

In mitigation, appellant presented the testimony of his grandmother and other witnesses. Appellant presented evidence that his parents never married, that they lived apart, that his mother became addicted to drugs as early as age nine, and that she gave birth to appellant when she was just fifteen years old. Because appellant's mother did not take care of him, and because she continued to pursue her drug habit, appellant lived most of his childhood with his grandmother. When appellant was three years old, he spent approximately a year in a foster home. Like his mother, appellant's father was also a drug addict. Appellant's mother and father both spent time in prison. Appellant never had a male role model and his environment was not nurturing. Appellant

had some contact with his mother, but mostly she would promise to visit him and not show up. She has never functioned as a mother and at the time of trial was still involved with drugs. (Emphasis added.)

One of the main changes in approach presented in federal habeas corpus, possibly the most significant change, was to expand the testimony of Marion Faulkner. That same new testimony was presented at the retrial. Attached to this brief is **Appendix A**, which details the differences between the 1998 and 2012 testimony of Johnson's grandmother. The "extreme makeover" of Marion Faulkner is enough to make her a modern day meaner, more violent version of the portrayal of Joan Crawford as the "screaming witch-mother" in the book and movie titled "Mommie Dearest."

In any event, the availability of Mrs. Faulkner's prior testimony, coupled with the total absence of police and medical records to support much of her testimony, made her an easy subject for significant impeachment. In fact, that is what happened.

Cross-examination began at T.p. 1249, and contains one item of impeachment after another. Eventually, at T.p. 1263, the prosecutor made the challenged remark. No matter what grammatical form it is in, it was clearly designed to elicit a response. It did. This was followed by sixteen additional pages of significant impeachment.

Ohio law prohibits an attorney from vouching for, criticizing, or commenting on the credibility of a witness based on his personal knowledge. *State v. Davis*, supra; *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 117; *State v. Griffith*, 8th

Dist. No. 97366, 2013-Ohio-256, ¶ 9; *State v. Jester*, 12th Dist. No. CA2010-10-264, 2012-Ohio-544, ¶ 36. In *Davis*, this Court wrote:

{¶232} 1. Vouching. Davis argues that the prosecutor improperly vouched for several of the state's witnesses. An attorney may not express a personal belief or opinion as to the credibility of a witness. *State v. Williams* (1997), 79 Ohio St.3d 1, 12, 679 N.E.2d 646. Vouching occurs when the prosecutor implies knowledge of acts outside the record or places his or her personal credibility in issue. See *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 117.

As can be seen, the key issue is whether the prosecutor implies that he is in possession of information that the jurors are privy to. In fact, the prosecutor did not imply that his remark was based on facts outside the record. The statement was made only after over twelve pages of cross-examination during which Mrs. Faulkner was repeatedly and seriously impeached. It was followed by more of the same for about sixteen additional pages. The record, at the time the statement was made, unequivocally supported what the prosecutor asked. It was material in the record and before the jury.

If what occurred was error, the test to be used in review is stated as:

{¶9} A prosecutor may not express a personal opinion as to the credibility of a witness. Nevertheless, the test for prosecutorial misconduct is whether the remarks were improper, and if so, whether they prejudicially affected the accused's substantial rights. The touchstone is the fairness of the trial. In examining whether the statements rendered the trial unfair, a court should consider several factors, including: (1) whether the evidence is strong, (2) whether the statements misled the jury, (3) whether the remarks were isolated or extensive, and (4) whether the remarks were deliberate or accidental. *Slagle v. Bagley*, 457 F.3d 501 (6th Cir.2006); and *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31.

State v. Griffith, 8th Dist. No. 97366, 2013-Ohio-256, ¶ 9. All four of the factors listed support a conclusion of harmless error. (1) The case was particularly strong for the death penalty. Guilt was not at issue. The key defense witnesses, Mrs. Faulkner and Johnson's mother, were repeatedly impeached. Almost none of their testimony was verified by medical, police or school records, even though such verification should have been present considering what they were testifying about. The defense expert conceded that his opinion depended entirely on the truthfulness of Johnson's grandmother and mother.

(2) The prosecutor's statement could not have misled the jury. They merely reflected the information in the record.

(3) The remark was isolated. In fact, Johnson complains of only one sentence in a lengthy record.

(4) The statement was not intended as improper or to gain an unfair advantage, and was based on a truthful analysis of the material before the jury.

Appellee submits that Johnson's arguments in support of his fourth proposition of law are void of merit.

Proposition of Law No. V:

Rayshawn Johnson's "senseless, brutal and incomprehensible act of inhumanity defies the imagination and is unquestionably the type of crime for which the General Assembly intended the death penalty be invoked." *State v. Johnson*, 88 Ohio St.3d 95, 123, 2000-Ohio-276, 723 N.E.2d 1054.

In his fifth proposition of law, Johnson argues that the Court should use its O.R.C. 2929.03(A) authority to determine that the death penalty is not appropriate. Johnson supports his argument with references to the material he presented at his mitigation hearing, i.e., his history and background in a chaotic and abusive home, where he was supposedly grossly abused by his mother and grandmother. He also references his age at the time of the crime, and his claim of present remorse.

This case was sent back by the federal courts on a claim of ineffective assistance of counsel. Johnson presented six witnesses at the new mitigation hearing.

(1) Johnson's first witness was a retired school teacher, Nancy Bare, who now was involved in prison ministry. She described her contact with Johnson and expressed her belief that he could now serve as a positive role model for his own son, and make a difference in the lives of other inmates. (T.p. 1212)

(2) Johnson's second witness was his maternal grandmother, Marion Faulkner. (T.p. 1226, et seq.) She testified to an extensive family history of abusive relationships, along with drug and alcohol abuse. She testified that she was drunk virtually her entire life and that although she was always employed, she "secretly" drank at work, went to bars constantly and was always drunk at home. She stated she never wanted children,

and tried unsuccessfully to self-abort her daughter Demeatra, who is Johnson's mother. She testified to constantly abusing Demeatra, even forcing her daughter to drink her own urine. She testified to constantly abusing Johnson during the extensive time she had custody of him.

Mrs. Faulkner was cross-examined beginning at T.p. 1249, and ending at T.p. 1276. The prosecutor used her testimony at the first trial to demonstrate that her current version was greatly at odds with her original testimony. She was repeatedly and effectively impeached on most of the major claims of abuse that she testified to. Appendix A, attached, contrasts her testimony from the first trial with her testimony from the second. The difference is remarkable. She was a thoroughly discredited witness when she left the stand.

(3) The next mitigation witness was Johnson's mother, Demeatra Johnson. (T.p. 1274) She described the abuse she suffered at the hands of her mother, Marion Faulkner. She claimed to have been heavily involved in prostitution and drugs prior to giving birth to Johnson at age 15. She testified that she did drugs, etc., while she was pregnant. (T.p. 1285, et seq.) However, at birth Johnson was a healthy baby with no indication of damage from his mother's supposed life style, and medical forms she filled out at the time contradicted her claims. (T.p. 1301, et seq.) Initially Faulkner had custody of Johnson, but Demeatra got custody back when Johnson got older. She testified that she then taught Johnson how to enjoy and use illegal drugs and that all Johnson's problems were her fault.

(T.p. 1300) As noted above, her account did not hold up well under cross-examination.

(T.p. 1301, et seq.) Besides showing medical records that contradicted her story of drug and alcohol abuse during pregnancy, the State also impeached her with her own testimony at the federal habeas hearing. (T.p. 1304)

(4) Johnson next called Dr. Robert Smith, a clinical psychologist who had testified fifty times for defendants in capital cases. (T.p. 1382) Based on his review of records, information from Johnson's family and interviewing and testing Johnson, Dr. Smith diagnosed Johnson as alcohol and drug dependent, and suffering from depression and Dysthymic Disorder. (T.p. 1352, 1374) The witness blamed all of these problems on his abusive upbringing at the hands of his mother and grandmother. The gist of his testimony was that whenever Johnson was in a controlled setting, i.e., Hillcrest School, locally, or in prison on death row, he behaved properly and had now turned himself into a new person.

On cross-examination Dr. Smith agreed that his diagnosis was solely dependent on the truth of what he was told by Johnson, Johnson's mother, and Johnson's grandmother.

(T.p. 1378) He agreed that if they were lying, his diagnosis would be flawed. (T.p. 1379)

Despite the incredible litany of serious abuse he was relying on for his diagnosis, Dr. Smith conceded there were no records of this from schools, hospitals, doctors or police.

(T.p. 1378, et seq.) Indeed, if what Johnson's mother said about her behavior while she

was pregnant was true, Johnson should have been suffering from obvious problems at birth. He was not; his health was normal at birth.

(5) Johnson's son, now age 14, also testified at mitigation. (T.p. 1423) He testified that he visited his father and received counseling from him. He was not cross-examined.

(6) The final witness at mitigation was Johnson. He gave an unsworn statement and was not subject to cross-examination. He stated he was a changed person, and could provide help to his son and to other inmates.

The only significant difference between what was presented here and what was presented at the first trial was the change in the testimony of Marion Faulkner, and testimony from Johnson's mother that essentially mirrored what had been said about her at the first trial. Neither of these witnesses was credible in the least, and the new expert with an alternative theory to that presented by Johnson at his first trial, conceded all his conclusions were based on the truthfulness of Marion Faulkner, and Johnson's mother Demeatra. In sum, the mitigation was insignificant.

In upholding the death sentence in Johnson's first trial in *State v. Johnson, supra*, this Court summarized the mitigation in this fashion:

Upon a review of the evidence in mitigation, it appears that appellant had a chaotic and troubled childhood. We find that appellant's history, character, and background, and specifically his personality disorder and drug dependence, are entitled to some, but very little, weight in mitigation. We have also considered the youth of the offender (appellant was nineteen years old at the time of the offense), the fact that

he expressed some remorse, and, in addition, the nature and circumstances of the offenses. These factors are all entitled to some weight in mitigation.

This Court then concluded:

Finally, we have undertaken a comparison of the sentence imposed in this case to those in which we have previously affirmed the death penalty. We find that appellant's death sentence is neither excessive nor disproportionate to the penalty imposed in similar cases. See, e.g., *State v. Holloway* (1988), 38 Ohio St.3d 239, 527 N.E.2d 831; *State v. Murphy* (1992), 65 Ohio St.3d 554, 605 N.E.2d 884; *State v. Slagle* (1992), 65 Ohio St.3d 597, 605 N.E.2d 916; and *State v. Spivey* (1998), 81 Ohio St.3d 405, 692 N.E.2d 151. Indeed, this senseless, brutal, and incomprehensible act of inhumanity defies the imagination and is unquestionably the type of crime for which the General Assembly intended that a sentence of death could be invoked. *State v. Johnson, supra*.

Appellee submits Johnson has presented nothing that would change this conclusion.

Proposition of Law No. VI:

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

Johnson challenges the constitutionality of Ohio's death penalty scheme in this proposition of law. Each of the claims raised have been repeatedly rejected by this Court in the past. In particular, see the decisions in *State v. Ferguson*, 108 Ohio St.3d 451, 2006-Ohio-1502, 844 N.E.2d 806, ¶ 84 *et seq.*; *State v. Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, 805 N.E.2d 1004, ¶101 *et seq.*

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

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

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

Proposition of Law No. VII:

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

Johnson makes a brief cumulative error argument. The predicate for such an argument is a showing of multiple, prejudicial error. Johnson has made no such showing, so his argument must be rejected. *State v. Garner*, 74 Ohio St.3d 49, 64, 656 N.E.2d 623 (1994); *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239, ¶ 217.

CONCLUSION

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

Respectfully submitted,

JOSEPH T. DETERS, 0012084
PROSECUTING ATTORNEY


William E. Breyer – 0002138P

Chief Assistant Prosecuting Attorney
Counsel of Record

Hamilton County Prosecutor's Office
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202

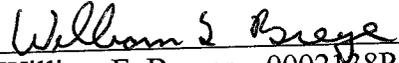
DDN: 513.946.3244; Fax: 513.946.3100

Bill.Breyer@hcpros.org

COUNSEL FOR APPELLEE,
STATE OF OHIO

PROOF OF SERVICE

I hereby certify that a true copy of this **MERIT BRIEF OF PLAINTIFF-APPELLEE, STATE OF OHIO** was served by regular U.S. mail on Linda Prucha, Supervisor Death Penalty Division, and Tyson Fleming, Assistant State Public Defender, at the Ohio State Public Defender's Office, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215 on this 22 day of May, 2013.


William E. Breyer – 0002138P
Chief Assistant Prosecuting Attorney

State of Ohio vs. Rayshawn Johnson, No. 2012-0405

Testimony Comparison of Marion Faulkner

	<p>Q: What about Rayshawn? A: I thought I was. I tried to be. But, I mean, when you are drinking every day in life, there's probably a lot of things – I mean, as the drinking for worse, I mean, I would have black-outs. I couldn't remember how I'm at home, that I thank God I didn't kill somebody while I was driving drunk." (T.p. 1247).</p> <p>"Q: Now, your drinking, did it ever cause you problems physically? A: Yes. As the years went on, and the drinking was taking control of me, instead of me being in control of the drinking." (T.p. 1243)</p>
<p><u>Discipline of Grandchildren (1998)</u></p> <p>No mention of beating her grandchildren in 1998.</p>	<p style="text-align: center;"><u>2012</u></p> <p>"Q: How would you discipline them? A: Oh, I would whoop them with – I had a special leather belt that I had, I would use that, and I would use the iron cord on them and I had a bat. I kept a bat in the house." (T.p. 1242).</p> <p>"A: I was calling off – like I would have bad sinus headaches. I mean, my head pounding. It was like when I tried to get my head up off the pillow, it would just like bang, bang, bang, and I would reach for the phone and try to call my job, and make up an excuse for why I couldn't come to work.</p> <p>Q: What would happen if the boys came in in the morning and this bang, bang, bang – A: If they banged on my door and my head is hurting, that just pounded, well, when I got up, they got a good whooping." (T.p. 1243-1244).</p>

State of Ohio vs. Rayshawn Johnson, No. 2012-0405

Testimony Comparison of Marion Faulkner

	<p>“Q: Did you hit them with that [baseball] bat? A: If I got my hands on it if I couldn’t find a belt, because they were good at hiding my belt. Q: So your testimony today is that you struck those boys with a baseball bat? A: They might have got a couple hits.” (T.p. 1251-1252)</p>
<p><u>Resented raising Rayshawn (1998)</u></p> <p>No mention of resentment in 1998.</p>	<p style="text-align: center;"><u>2012</u></p> <p>Q: How did you feel about that? A: Of course I didn’t want it, I didn’t want to take care of a, you know, little kid (Rayshawn). But my mom, you know, she talked me into it. So I went on and took care of him. Q: Were you resentful of the fact that now you are watching your – A: I was very resentful, very resentful that Demeatra could have her life and go fancy free and do her drugs and do whatever she wanted to do and here I am, I’m trying to hold down a job and I got to take care of her kids.” (T.p. 1239).</p> <p>“Q: And now you are watching Rayshawn, are you watching any other kids? A: I’m watching his brother. She had come back pregnant with another kid. And so there, she never took care of him, so everything, you know, was on me and my mom. Q: And, once again, the second time, how did you feel about that? A: Oh, it wasn’t any better, I can tell you that. Because now I’m stuck with trying to take care of two kids. . .” (T.p. 1241).</p>

State of Ohio vs. Rayshawn Johnson, No. 2012-0405
Testimony Comparison of Marion Faulkner

<p><u>Foster home/Norma Berry/1998</u></p> <p>Describes how Rayshawn was sent to live in a foster home for a year, with Norma Berry. Indicates that she believed Norma properly raised Rayshawn, and that he was happy living out in the country with her. He was behaving and taken care of. Even after Marian Faulkner regained custody, she would take the boys out to visit Norma Berry and they enjoyed themselves out there. (T.p. 1986-1988).</p>	<p><u>2012</u></p> <p>No mention of Norma Berry in 2012.</p>
<p><u>Three-way call with Rayshawn; why he did it.</u></p> <p><u>1998</u></p> <p>“Q: And he called and talked on a three-way call with you and Abby and his brother, Ronnie? A: Yes. Q: Did he tell you why he did it? A: He said he didn’t know why. He said he didn’t know what happened. Q: Didn’t he tell you, ma’am, that he did it because he thought you were going to put him out and he needed the money? A: Well, he said – I don’t know if he told me that or if he – it was in the paper. He told the press that. They don’t print half of the whole truth about anything. But, yeah.” (T.p. 2006).</p>	<p><u>2012</u></p> <p>“Q: You asked him why he did it? A: I don’t think I asked him why he did it. Q: You gave – well, first of all, you testified in the last trial that he did tell you why he did it, do you want me to show you? A: Yeah. Well, I can’t remember everything that was said.” (T.p. 1268-1269).</p>