

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

ANTHONY BELTON,

Defendant-Appellant.

* Case No: 2012-0902
 * On appeal from the Lucas County
 Court of Common Pleas
 *
 * DEATH PENALTY CASE
 *
 * Common Pleas Case No.: 2008-2934
 *

BRIEF OF PLAINTIFF-APPELLEE

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STATEMENT OF THE CASE

On August 25, 2008, Anthony Belton was charged with aggravated murder in violation of R.C. 2903.01(B) and (F), with specifications pursuant to R.C. 2929.04(A)(3) and 2929.04(A)(7); aggravated robbery in violation of R.C. 2911.01(A)(1); and aggravated robbery in violation of R.C. 2911.01(A)(3). All three counts carried a firearm specification pursuant to R.C. 2941.145.

Trial in this case occurred almost four years after the indictment was filed. Defense counsel requested several continuances in order to secure expert opinions related to both the guilt and the mitigation phases of the trial. (Tr. Feb. 19, 2009 at p.17; Tr. Jan. 21, 2010 at pp. 3-6, 12-16; Tr. Dec. 20, 2011 at pp. 9-10, 13.)

Additional continuances were requested and granted in order to permit an extensive pre-trial motion practice. (Tr. Sept. 10, 2009 at p.13; Tr. Apr. 29, 2010 at pp. 5-6.) In all, defense counsel filed approximately 40 such motions. Among these was a "motion for determination of the constitutionality of R.C. 2929.03 and Criminal Rule 11(C)(3)," designated in the trial court as Motion #25. (R. 106.) On November 30, 2009, the trial court denied Motion #25. (R. 160.) On October 25, 2010, the court denied reconsideration of Motion #25. (R. 298 and 300.)

Belton moved to stay the case pending the outcome of a related case pending in another appellate district, and the trial court granted a continuance, but before the case was decided, Belton filed an interlocutory appeal. The appeal process led to several more delays. (Tr. Oct. 29, 2010 at pp. 2-7; Dec. 22, 2010 at pp. 6-7; Feb. 24, 2011 at pp. 3-5; May 20, 2011 at pp.3-5; June 9, 2011 at pp. 14-15; and Oct.11, 2011at pp. 6-7.) Eventually this court issued a writ of prohibition to prevent consideration of the

appeal because the order was not a final and appealable order. *State ex rel. Bates v. Court of Appeals for the Sixth Appellate District*, 130 Ohio St.3d 326, 2011-Ohio-5456, 958 N.E.2d 162.

Delay was not caused by any failure of the State to provide discovery as required. In fact, the prosecution provided a full copy of the file for defense counsel and invited defense counsel to inspect the State's file. (Discovery Supplements of July 13, 2010 at R. 212 and 213.)

On several occasions, defense counsel mentioned on the record the possibility that Belton might waive his right to a trial by jury. On July 29, 2010, the trial court provided a lengthy explanation of the consequences of proceeding to trial before a three judge panel. The court told Belton that if jurors recommended a death sentence, the trial court would review that recommendation before imposing sentence, while the panel's sentence would be reviewed only on appeal. The trial court also noted that Belton's counsel would have no opportunity to voir dire the panel of judges, and no peremptory strikes as he would have in the course of a jury trial. However, the trial court identified the judges who would serve on the panel, if Belton did in fact decide to waive his right to a jury trial. (Tr. July 29, 2010 at pp. 45-56.)

On August 5, 2010, Belton signed a written waiver of his right to a trial by jury. (R. 246.) The trial court again provided a detailed explanation of the consequences of a waiver of the right to a jury trial, and the court engaged Belton in an extensive colloquy to ensure that he understood the consequences of proceeding to trial before a three-judge panel. (Tr. Aug. 5, 2010 at pp. 28-39.) The court also verified that Belton had consulted with his trial counsel, and that, with knowledge of the judges' identity, Belton

wished to proceed before the three-judge panel. The trial court provided another opportunity for counsel to discuss the matter with Belton, after which he confirmed that he did indeed wish to waive his rights to a jury trial. (*Id.* at pp. 41-42.) Finally, the trial court distinguished the waiver from entry of a guilty plea. (*Id.* at p. 47.)

Belton signed a second waiver of his right to a jury trial on March 27, 2012. (R. 420.) The trial court again provided a lengthy explanation of the consequences of the waiver. The court also informed Belton that he could withdraw the waiver at any time until trial began. (*Id.* at pp. 10-20.)

On April 2, 2012, the court reiterated the consequences of a waiver of a right to trial by jury. (Tr. Apr. 2, 2012 at pp. 8-17.) Belton executed a third waiver of his right to a trial by jury. (R. 427.) He also withdrew his former plea of not guilty and entered a plea of no contest to the charges. Trial began before a three-judge panel, and on April 4, 2012, the panel found Belton guilty of the offenses charged. (Tr. Vol. IV at pp. 561-563.)

Belton's counsel orally renewed a motion to empanel a jury for the mitigation phase, but the motion was denied. (Tr. Vol. IV at pp. 573-574.) The trial court found that the two death penalty specifications arose from the same act or indivisible course of conduct and merged, and the State elected to proceed in the mitigation hearing on the specification set forth in R.C. 2929.04(A)(7). (Tr. Vol. V at pp. 581, 586-587.)

Both the State and defense counsel waived opening statements for the mitigation phase of the trial. (*Id.* at pp. 583-584.) The State moved to admit the exhibits and the testimony related to the exhibits from the guilt phase of the trial. (*Id.* at

pp. 585-586.) The court granted the motion, and the State rested. The defense began presentation of mitigation evidence. (*Id.* at p. 587.) The State then presented rebuttal evidence.

On April 5, 2012, the three judge panel found that the aggravating circumstance outweighed all mitigating factors, and the panel sentenced Belton to death. (Tr. Vol. VIII at pp. 1144-1146.) Additionally, the court found that the two counts of aggravated robbery and the three firearm specifications merged. The court imposed a sentence of ten years for aggravated robbery, with three years to be served consecutively for the firearm specification. (Tr. Vol. VIII at pp. 1153-1156.)

STATEMENT OF THE FACTS

I. **Guilt Phase.**

Discovery of Matthew Dugan's Body. On August 13, 2008, at just after 7 a.m., Tiffany Greenlee stopped at a BP carry out and service station located at the corner of Dorr and Secor Roads in Toledo, Ohio. She intended to purchase a muffin and a coffee, but no one was present to take her money. She set the muffin and the coffee on the counter, and as she did so, she noticed two red sodas already sitting on the counter that had begun to perspire. Ms. Greenlee went outside. Glancing back inside the store's window, she saw a man lying on the floor behind the counter in a pool of blood. She called 911. (Tr. Vol. I at pp. 139-145.)

Samuel Baiz, the owner of the BP carry out, was called to the store early in the morning of August 13, 2008, after the discovery of the body. Mr. Baiz testified that he saw had employed Dugan as a clerk at the carry-out for about two months, and he saw emergency personnel removing Dugan's body from the store. About \$600 in cash and several pre-paid phone cards were missing from the store. (Tr. Vol. I at pp. 130-132.)

Investigation. Several law enforcement officers testified about the investigation of the shooting, including Sergeant Paul Csurgo, with the University of Toledo Police Department; Officer Chris Sargent with the Ottawa Hills Police Department; and Detective William Goetz, Officers Jason Lenhardt, Ruben Jurva, and Corey Russell, Detectives Scott Smith and Jeffrey Clark, all with Toledo Police Department.

Detective William Goetz processed the scene with Detective Jerry Schriefer. When Goetz arrived at the store, he found the victim's body lying in a large pool of fresh

blood. Several items were on the counter, including two perspiring bottles of fruit punch, a muffin and a cold cappuccino drink, as well as paper and coin currency. A spent 9 mm shell casing was located near the cash register. A spent projectile was also located within two to three feet of the body (Tr. Vol. II at pp. 180-189.)

Goetz obtained a print-out of the last few transactions from the cash register. The print-out showed that the last sale occurred at 07:00:15 on August 13, 2008 for \$2.15. Goetz also had TPD's video unit collect the security video recordings from the carry-out. (Tr. Vol. II at pp.186-187, 194-196, 235-236.)

Goetz testified that he watched and photographed Schriefer lift a latent fingerprint from the driver side rear quarter panel, behind the passenger door, of a 1997 Skylark. The latent print matched a known fingerprint of Anthony Belton on 10 points, and Goetz verified the 10 points identified by Schriefer. Goetz testified that there were more matching points that weren't marked, but he and Schriefer stopped after identifying the first 10. (Tr. Vol. II at pp. 220-221, 224-226, 236-237, 254-258.)

Finally, Goetz also authenticated Exhibit 99, a diagram with measurements of the interior floor plan of the carry-out. Goetz noted that the counter was 37 inches from its front to its back edge, and that there was a second counter behind the customer service counter. The front edge of the second counter was 31 inches from the back edge of the customer service counter. (Tr. Vol. II at p. 241.)

Video of the shooting. The security video collected from the BP station was played during the testimony of the lead detective on the case, Jeffrey Clark. (Tr. Vol. III at pp. 471-478; Exhibit 88.) Clark identified Belton on the video entering the carry-out

at approximately 6:03 a.m., according to the time stamp on the video.¹ (Exhibit 88 at 6:03:50; Tr. Vol. III at p. 474.) Belton was wearing a dark jacket with a hood. (Tr. Vol. III at p. 475.) Another customer entered the carry-out, and Belton left.

Less than two minutes later, at 6:05, Belton entered again wearing the same black jacket. (Exhibit 88 at 6:05:07; Tr. Vol. III at p. 475.) He brought two bottled drinks to the counter where the clerk was waiting. But after he placed the drinks on the counter, a customer walked in. Belton left the carry-out for the second time. Dugan returned the drinks to the cooler.

Belton entered the carry-out a third time at about 6:10:41, and he again brought two bottled drinks to the counter. Dugan began ringing up the sale, but he left the cash register to retrieve something from behind the counter. When he turned back, he saw Belton pointing a handgun at him. Dugan leapt back, raising his hands. He quickly opened the register and removed all the bills from the drawer, and then he gave the cash to Belton.

Dugan turned away from the counter, apparently in response to Belton's instructions. Dugan removed some items from behind the counter, which he handed over to Belton. Belton gestured at something behind the counter, and Dugan turned away again. Belton then leaned forward, raised the firearm so that it was pointing at the back of Dugan's head, and he fired a shot. Dugan fell to the floor, and blood pooled around his head.

¹Clark testified that the time stamp on the video itself was approximately 50 minutes slow, based on the time of the 911 call and the arrival of police. (Tr. Vol. III at p. 471.) Times referred to in this brief are the times indicated on the recording.

The video continued, showing customers arrive and depart, including Greenlee's arrival and departure, and finally, the arrival of police. (Tr. Vol. III at pp. 471-475; Exhibit 88 at 6:55:20 to 6:44:23.)

Execution of search warrant. Clark reported that the investigation focused on Belton after an employee of the Secor Carryout gave Clark a receipt with Belton's name written on it. (Tr. Vol. III at pp. 430-432; Exhibit 12.) An officer in field operations, Jason Lenhardt, was familiar with Belton, whose street names were "Ant" or "Mohican" or "Hican." Lenhardt had seen Belton at around 9 p.m. the night before the shooting. At that time, Belton was wearing his hair in a Mohawk style, shaved on the sides and longer in the middle. Belton was wearing a black hooded sweatshirt, gray cargo style sweatpants and black sneakers. Lenhardt learned that Belton had recently moved to 1018 Ranch. (Tr. Vol. III at pp. 327-330.)

After learning that Belton had recently moved to 1018 Ranch, Clark obtained a search warrant for 1018 Ranch. (Tr. Vol. III at p. 434.) Lenhardt and his partner Ruben Jurva executed the warrant. Belton, Dymon Bolton and Christopher Wilson were all there. Belton was wearing a black t-shirt, gray cargo pants and black sneakers, and two hoodies were found in plain sight on top of an older car parked in the driveway of the house. Lenhardt could see from the appearance of Belton's hair follicles that his hair had been freshly shaved to remove the Mohawk he had sported the night before. (*Id.* at pp. 333-336.)

All three men were taken into custody, but before they left for the Safety Building, Belton asked the arresting officers to "grab my shoes from the car." (Tr. Vol.

III at p. 347.) Two pairs of sneakers and the receipts for the sneakers were recovered from the car. (Tr. Vol. II at pp. 199-201, 342-343.) Belton had \$147 cash on his person when he was arrested, as well as two \$25 Page Plus pre-paid phone cards and six \$10 cards. (*Id.* at pp. 462-464.) Belton's cell phone was a pre-paid Page Plus phone. (*Id.* at p. 465; Exhibits 98 and 13.)

Belton's recorded statements to police. Officers took all three men back to the Safety Building, where Belton was interviewed twice. Before the first interview began, Belton executed a written waiver of his *Miranda* rights, and he never asked for an attorney or asked to stop the interview. (Tr. Vol. III at pp. 442-443; Exhibit 97; Exhibit 90A at 0:55.03.)

The State prepared a redacted copy of the first interview, but the defense stipulated to playing the entire, unredacted recording for the panel. (Tr. Vol. III at pp. 444-445; Exhibit 90A.) During the course of that interview, Belton initially denied any involvement in the murder or robbery. He said that he spent the night at his brothers Aaron and Christopher Belton's apartment, but he got up at 8:30 or 9:30 a.m. and went into the neighborhood to try to "catch" some drug sales. He went to his mother's house, where he learned that someone had been shot the night before. He went to Burger King on Anthony Wayne Trail and then to the mall to buy shoes. (01:01.20 -1:09.13.)

Belton's next story was that on the morning of the shooting, he had met up with someone named "D," and that they rode around together for a while, discussing Belton's money troubles. "D" proposed that Belton rob someone and said he could provide a gun for Belton to use. According to Belton, "D" gave him the gun, and Belton

went into the B.P. carry-out and put two pops on the counter. When a customer came in, Belton felt there were too many people in the store to commit the robbery. He left the store and took off the hoodie he was wearing. "D" was supposed to be waiting in the car, but he had left.

After they met up again, Belton said that "D" went into the store, and that he wore a dark hoodie, while Belton and Dymon Bolton waited in the car. Belton and Bolton heard a pop, and Belton drove off in the car. "D" ran up the street, and they picked him up. "D" reported that he had shot the clerk in the back, and they went to Belton's brother's apartment where they counted the money. Belton's share was \$170. They went to Burger King where "D" had breakfast. (1:26:20-2:09:24)

Belton acknowledged that he went in the store twice and that he had bought cigarillos and "milds" earlier that night because Dymon didn't have an ID. (2:12:40; Tr. Vol. III at p. 488.) He also admitted he left the store without committing a robbery because he was concerned that customers might try to be a "hero." (2:15:27-2:15:53.)

A third detective, Lou Vasquez, then spoke to Belton. Belton admitted that he went into the store and that he had the gun, but "I went to put the safety on and the gun went off." (2:51:20; 2:53:50-2:54:08.)

After the first interview, Lenhardt, Jurva, Detective Scott Smith, and Belton went to 1018 Ranch where Belton instructed officers to look in some bushes for the firearm. (Tr. Vol. III at p. 455.) The firearm was not located in bushes where Belton told officers to look, but it was eventually located beneath a log in the same yard. Three live cartridges were in the magazine and one live cartridge was in the chamber. The gun was a Hi Point 9 mm with a broken grip. The missing pieces could not be located in the

area. (Tr. Vol. II at pp. 290, 337-339, 354-355, 445-456.)

After retrieving the gun, Belton was interviewed a second time, and the recording of that interview was also played at the trial. (Tr. Vol. III at pp. 459-460; Exhibit 90B.) During the course of that interview, Belton stated that "me and dude [Dugan] were cool," and "I'm sorry I killed the dude." (5:46:15.) He then began questioning officers about the potential punishments for the charges he might face.

Belton's voluntary statements to companions. Toledo Police Sergeant Corey Russell was in the Safety Building finishing paperwork for an unrelated arrest in the early morning of August 14, 2008. He was working in the area of several holding cells, where Dymon Bolton, Christopher Wilson and Belton were being held. Russell could easily hear conversations of all three as they talked between their individual cells. (Tr. Vol. III at pp. 359-365; 374-381.)

Russell heard Belton tell Wilson that Bolton "had given him up." Belton also told Wilson to make up t-shirts with his picture on them and have people wear them to the trial. Belton said to send money and "naked pictures" to him while he was in jail. (Tr. Vol. III at p. 375.) Belton also reported that Dymon Bolton told detectives "everything about how he had been carrying a gun for the last two or three days and about the fact that they had been riding around in a car and talking about it." Belton told Wilson that "when he got out he was to go back and tell everybody the reason he was down there, which was because Mr. Bolton couldn't keep his mouth shut." (*Id.* at pp. 375-377.) Belton complained "that everything they said in the car they knew word for word and that Mr. Bolton had told them everything." Finally, Belton said "he was the one that had

done it, he didn't know why Mr. Wilson was still being held." (*Id.* at pp. 378-379.)

Coroner's testimony. Lucas County Deputy Coroner Diane Scala-Barnett testified that she performed the autopsy on Matthew Dugan's body. (Tr. Vol. III at p. 392.) Dugan sustained a gunshot wound to the back of his head in the high cervical region. (*Id.* at p. 394.) There was a single entrance wound about five inches below the top of the head. (*Id.*) Stippling around the wound and the absence of soot indicated that the gun was fired between 12 to 24 inches from the back of Dugan's head. (*Id.* at pp. 398-399.) Barnett described the bullet's trajectory as entering from the back of the skull through the first cervical vertebrae on the left side, traveling toward the front where it exited the left cheek. She opined that the shot was not instantaneously fatal, based on evidence indicating that Dugan exhaled blood. (*Id.* at pp. 394-396; 417-418.)

Dr. Scala-Barnett reviewed State's Exhibit 99, depicting the counter as 37 inches wide, with a space behind the counter of 31 inches. (Tr. Vol. III at p. 415.) She was asked, "If the shooter is over 60 inches away from the victim and the pattern is 12 to 24 inches, how does the shooter close that gap?" She replied that the shooter leaned forward across the counter in order to be able to shoot within a distance of 12 to 24 inches. (*Id.* at pp. 416-417.)

Dr. Scala-Barnett testified that Dugan suffered from Hashimoto's thyroiditis, but that his physical condition did not affect the manner or cause of his death. She also said that toxicology tests were negative for drugs, alcohol or poisons. (Tr. Vol. III at pp. 399-400.) She concluded that the cause of death was a gunshot wound to the head, and that the manner of death was homicide. (*Id.* at p. 419.)

Ballistics reports. Exhibits at trial included Exhibit 85, a report from forensic scientist Todd Wharton with BCI. Wharton reported that testing revealed the Hi-Point Model C9 9mm Luger was capable of firing a chambered cartridge, despite the fact that it was missing part of the right grip plate, hold open spring and the magazine catch cover/button. The report also indicated that the fired cartridge case submitted for analysis matched individual breech face characteristics "confirming that the evidence cartridge case was fired in the submitted pistol." A second report from Wharton, admitted as Exhibit 86, stated that his examination of the Luger revealed that "the trigger cannot be pulled when the safety is engaged," and the firearm could only be fired upon exertion of 5 1/4 pounds of pressure on the trigger. A report from Thomas Deeb, president of Hi-Point Firearms, stated that the firearm was functional. (Exhibit 100B.)

Belton submitted a report from John Nixon with Athena Research and Consulting, indicating that the gun was test-fired numerous times, and it required anywhere from 3.384 to 5.733 pounds of force to pull the trigger. (Defense Exhibit B, at pp. 3-5)

II. Mitigation Phase.

Defendant called as witnesses Ohio Public Defender investigator Mark Rooks; Belton's mother, Kim Harold; Belton's great aunt, Linda Berry; and Dr. Robert Stinson, a forensic psychologist. The State called Dr. David Connell, a clinical psychologist, in rebuttal.

Family history. Belton's trial counsel introduced evidence of Belton's family

history beginning before his birth. Dr. Stinson characterized the family history as one of "multi-generational distress," noting that Belton's maternal grandmother was only 15 when his mother was born. Belton's mother was one of 14 children, and she was "bounced from home to home early on." (Tr. Vol. VI at pp. 790-793.)

Belton's own mother, Kim Harold, testified that she was molested by her stepfather when she was young. When Harold reported the abuse to her mother, her mother initially did not believe the story. Harold's mother subsequently attempted to commit suicide. (Tr. Vol. V at p. 641-645; Vol. VI at p. 704.) Harold began to use alcohol and marijuana after she was molested. (Tr. Vol. V at p. 645; Vol. VI at p. 794.)

Harold was 21 years old when Belton was born. Belton's father served in the military and was home only on leaves, so he saw little of Belton. (Tr. Vol. VI at pp. 630-636, 682.) During one of those leaves, Harold conceived Belton's brother, Aaron. (Connell Report, Exhibit 96, at p. 6.) She was 22 when Aaron was born. (Tr. Vol. V at p. 633.)

During her twenties and thirties, Harold used marijuana and crack cocaine. (Tr. Vol. V at p. 645; Vol. VI at pp. 793-797.) By the time Belton was four, Belton's father had ceased contact with the family. (Tr. Vol. VI at pp. 633-634.) Harold reportedly attempted suicide while she was using drugs, when Belton was between 9 and 10 years old. (*Id.* at p. 704, 800.) She and her children moved frequently during those years, staying with friends or family members. (Tr. Vol. V at pp. 645-647, 702.) Anthony Belton, Sr.'s mother, Fanny Belton, allowed Harold and the children to live with her about two years. (*Id.* at pp. 637-638.) They also stayed with Marian Dotson, Harold's grandmother, and with Linda Berry, her aunt and a state licensed, registered and

certified psychiatric nurse. (*Id.* at pp. 643, 698-699.)

Except during a period of incarceration, Harold "always had my kids with me." She insisted that the children remain with her, even when she moved out of her mother's house and her mother offered to keep the children. (Tr. Vol. V at pp. 647, 702.) When interviewed during the mitigation investigation, Belton's father indicated that he also offered to take his sons when Belton was about 8 or 9. (Exhibit R.)

While Belton was still a young child, Harold fell into a tumultuous relationship with Christopher Belton, Anthony Belton, Sr.'s nephew and defendant Belton's cousin. She lived with him from 1989 until 1996, and had a third child by him when she was 24. (Connell Report, Exhibit 96, at p.6; Tr. Vol. V at pp. 629, 633.) Police were occasionally called to break up disturbances between Christopher and Harold, at times when the children were present. On one occasion, police came to break up a fight and sprayed her with mace, which blew into Belton's face. (*Id.* at p. 658; Vol. VI at p. 803.)

When Belton was in about the fifth grade, Harold was incarcerated. Belton and his brother Aaron were sent to California to live with their father, who had little contact with the family after he ended the relationship with Harold. (Tr. Vol. V at p. 637; Vol. VI at pp. 794, 804.) Belton's father was a strict disciplinarian who grounded or whipped the boys to maintain order. According to Dr. Stinson, his discipline was abusive, but in Aaron's opinion, the discipline did not rise to the level of abuse. (*Id.* at p. 807; Exhibit K - Mar. 30, 2009 Interview of Anthony Belton; Connell Report Exhibit 96 at p. 8.)

In California, Belton initially did well at school and reported liking his father's girlfriend, with whom they lived. (Exhibit K - Mar. 30, 2009 Interview of Anthony Belton; Tr. Vol. VI at p. 806.) However, his father's relationship with the woman ended, and he

moved in with another woman and her children. Belton did not like the new arrangement because he was expected to care for the other children and because the new girlfriend tried to be "motherly." (Exhibit K - Mar. 30, 2009 Interview of Anthony Belton.)

Belton began attending Gompers High School, which Dr. Stinson characterized as a "horrific place" plagued with violence. After Anthony was attacked by the Crips gang, he joined the Bloods. (Tr. Vol. VI at pp. 808-811; Connell Report, Exhibit 96, at p. 5.) He began to use alcohol and marijuana around age 15 or 16. (*Id.* at p. 811.)

While the boys were living in California, Belton was accused of assaulting a female classmate, and the girl's mother threatened to press charges. (Tr. Vol. VI at p. 894) The boys left California and returned to Toledo, where Belton lived with his mother and attended Rogers High School for a time. (*Id.* at p. 895.) However, Belton's attendance was poor and he joined his cousins in using and dealing drugs. He was involved in fights at school and was ultimately expelled from Rogers for fighting. (Tr. Vol. V at p. 662, 679; Vol. VI at 815-816; Connell Report, Exhibit 96, at p.5.) Records indicated he began school at the Glass City Academy, but he was suspended for behavioral problems and eventually expelled. (*Id.* at p. 4.) A subsequent effort to obtain his GED from Life Skills also failed, because he just "stopped going." (Tr. Vol. V at p. 680.)

Harold got Belton a job at the Arby's where she worked, but he was fired when he was told to take out trash and he responded by saying he "doesn't take out trash." (Tr. Vol. V at p. 681.) She said that Belton did not want to follow the rules at work, and that he didn't want to follow her rules at home. Harold made Belton move out, after

which he moved in with her sister. Eventually Belton had a disagreement with his aunt, and he moved in with Marian Dotson or "Big Mama," where he could do whatever he wanted. (*Id.* at pp. 650, 654, 669-670, 680.)

Dr. Stinson noted that for much of Belton's life, his father was absent. But Belton lived with his father for approximately five years in California. (Tr. Vol. V at p. 682.) When the boys returned to Toledo from California, Belton's father came with them and got a job in the Toledo area. He enrolled Belton in Connecting Point. In fact, the admissions form for the program lists Anthony Belton Sr. as an emergency contact. (Exhibits R - Interview of Anthony Belton Sr. and D - Connecting Point Records.)

During his testimony, Dr. Connell noted that there is "something to be said" for a mother who wishes to keep her children with her, and that the extended family was supportive by lending assistance when she required it. (Tr. Vol. VII at pp. 995-996.) He also noted that although Belton and his two brothers had much the same family history and upbringing, there was no evidence that either of his brothers robbed or killed anyone. (Tr. Vol. VI at p. 897.) Other witnesses agreed that although Aaron accompanied Belton to California and lived with him in the same household, Aaron handled the move without major problems. Aaron did not join a gang, and neither Aaron nor Christopher had any problems with the law, other than traffic violations. (*Id.* at 893; Tr. Vol. V at pp. 677, 720.)

Medical history. Dr. Stinson made much of Belton's alleged medical conditions, reporting that Belton "experienced a number of traumatic events that were out of his control--literally starting with a complicated birth process." (Stinson Reports, Exhibits H

and I, at pp. 2.) Stinson said that Harold sought treatment for an abdominal contusion during her pregnancy with Belton, and that the birth followed a premature rupture of membranes. (Tr. Vol. VI at pp. 795, 823.) However, Harold and Berry testified that Belton's birth was not complicated, and Dr. Connell's records review confirmed that assessment. (Id. at 901, 993; Tr. Vol. V at pp. 676, 717.) Dr. Stinson also acknowledged that the records did not reflect an abruption of membranes due to the contusion. (Id. at pp. 898-899.)

Dr. Stinson likewise noted that Belton reported a history of head injuries, including one specific reported injury. (Stinson Report, Exhibit I, at p. 2; Tr. Vol. VIII at p. 942.) But Berry testified that Belton never had any serious injuries, accidents, illnesses or hospitalizations, which was consistent with her pre-trial interviews. (Tr. Vol. V at pp. 717-718; Vol. VI at p. 902.) And Dr. Connell testified that he saw no indication of head injuries in the records. (Tr. Vol. VII at p. 1007.) Neither Aaron Belton nor Linda Berry had ever heard Belton complain about headaches. (Connell Report, Exhibit 96, at pp. 5-8; Tr. Vol. VII at p. 719; Vol. VII at 1007; Exhibit V - Interview of Linda Berry.)

Mental health. Dr. Stinson reported that Belton "developed and suffered from an untreated mental illness," and that he was "polysubstance dependent." (Stinson Reports, Exhibits H and I, at p. 2.) Dr. Stinson opined at trial that Belton suffers from untreated bipolar disorder with a recent depressive episode, as well as cannabis and alcohol dependencies. (Tr. Vol. VI at pp. 854-862, 948.) He said that if a counselor described Belton as "even tempered" after seeing him weekly during his incarceration,

such testimony would be inconsistent with both Stinson's evaluation and the totality of the jail records. (*Id.* at p. 947.)

Upon returning to Toledo, Belton established a relationship with Kim Harold's brother George. (Tr. Vol. V at pp. 655-656.) When George died in an accident, Belton fell into such severe depression that Linda Berry recommended professional counseling. (*Id.* at p. 713, 817.) Connecting Point records indicate that Belton exhibited symptoms consistent with dysthymia, major depressive disease and attention deficit and hyperactivity disorder. (Tr. Vol. VI at p. 819.) Belton went for an initial evaluation at Connecting Point, but he failed to keep his appointment for treatment. (Tr. Vol. V at pp. 715, 718-719.) As late as 2008 and 2009, Belton denied suicidal thoughts, any prior mental health history, and any problems with drugs or alcohol. (Tr. Vol. VI at pp. 928-931.)

Stinson acknowledged that he did not conclude that Belton has diminished capacity or is legally insane. (Tr. Vol. VI at pp. 781-782.) Stinson also admitted Belton could appreciate choices and consequences and knows right from wrong. (*Id.* at p. 937.) That assessment echoed statements by Belton's family members, who said that Belton is intelligent and knows the difference between right and wrong, although he "doesn't like to listen" or follow rules. (Tr. Vol. V at pp. 716, 720.) A forensics counselor testified that Belton gave no indication of mental illness during his time in jail awaiting trial. (*Id.* at p. 733.)

Stinson administered the Wechsler Adult Intelligence Scale (WAIS-IV) and concluded that Belton's verbal comprehension, working memory and processing speed

were all in the average range. His perceptual reasoning, full scale and general ability were all in the low average range. The test showed a full scale IQ of 89. (Tr. Vol. VI at p. 938.)

Stinson did not administer the Minnesota Multiphasic Personality Inventory-2. He also did not administer either the structured inventory of reporting symptoms to detect malingered psychopathy, or the test of memory malingering, or the validity indicator profile for malingering cognitive deficits. (Tr. Vol. VI at pp. 941, 961-962.) Dr. Connell testified that an MMPI would be important to perform in an evaluation of Belton's psychological state, because it is very difficult to manipulate the results of the MMPI. (Tr. Vol. VII at p. 1011.)

Dr. Connell noted that there was no evidence Belton suffered any kind of anxiety disorder, suggesting that there was not much evidence of post-traumatic stress syndrome. (Tr. Vol. VII at pp. 1000-1001.) He also noted that one criteria for a dysthymia diagnosis is that the depression not be caused by substance abuse or addiction and that Belton reported using an "amazing amount" of marijuana on a daily basis. Connell testified that a diagnosis cannot be made for six months or a year after an individual is sober because it takes that long for a person's brain to become clear after substantial drug use. (*Id.* at pp. 1002-1003.) Finally, he noted that not all individuals who are drug or alcohol dependent commit violent crimes. (*Id.* at p. 1005.)

Dr. Connell summarized his findings by saying there was no evidence of any major mental illness. (Tr. Vol. VII at p. 1066.) He found no evidence of auditory hallucinations and said that hearing voices is one of the most common forms of intentionally fabricated psychiatric symptoms. (*Id.* at p. 1019.) He also reported seeing

no evidence of mania or clinical depression in Belton's records. He testified that a past history of using Depakote was not necessarily consistent with a diagnosis of bipolar syndrome, and he was skeptical that an individual with bipolar disorder could be jailed and manage mood swings without coming to the attention of the professionals in the jail. (*Id.* at pp. 1023-1025.)

Based on his review of the records, Connell said that Belton's behavior might be consistent with antisocial personality disorder, a disorder characterized by consistent and persistent violations of social norms and social rules. However, Connell said that diagnoses of that disorder or psychopathy or bipolar disorder should occur only after observation over time after a history of the characteristic behavior. (Tr. Vol. VII at pp. 1021, 1027.)

Remorse. Detective Clark said that Belton expressed remorse once or twice during his interview. (Tr. Vol. III at p. 481.) Stinson testified that he reviewed a report indicating that news stories of the victim's death "seemed to shake Ant up," and that Belton had expressed sincere remorse to him. (Tr. Vol. VI at p. 968.) Dr. Connell, on the other hand, stated that he found no indication that Belton went through any significant period of remorse, regret or reflection. (Tr. Vol. VII at p. 1066.)

Adaptation to incarceration. Matthew Martin, a counselor in the Lucas County jail, testified that Belton was initially assigned to a medical floor on suicide watch. Belton was reassigned to the fifth floor and subsequently reassigned to the sixth floor, a maximum security area. (Tr. Vol. V at pp. 726-727.) Martin reported that Belton was in some physical altercations when he was first admitted, but after he was assigned to the

sixth floor he was polite, followed rules, and had hardly any write-ups for infractions of jail rules. (*Id.* at p. 728.) Martin stated that Belton was eventually made a trustee because of his good behavior. Belton ultimately lost that status because a captain thought his case was too high profile, not because he had any discipline problems. (*Id.* at p. 730.)

Martin testified that Belton was even tempered and posed no difficulties during the time he had been assigned to the sixth floor. (Tr. Vol. V at pp. 735-738.) However, Martin acknowledged that he was not aware that Belton had a fight in 2008, two fights in 2009, and one fight in 2011, while he was in custody. (*Id.* at p. 731.)

Dr. Stinson testified that he had been provided with jail records in two groups. He received one group of records "sometime back" and the received updated records about a month before trial. (Tr. Vol. VI at p. 771.) He opined that Belton's behavior improved the longer he stayed in jail, with approximately six disciplinary actions in 2009, but only 3 each in 2010 and 2011. (*Id.* at p. 870.) He viewed the fact that Belton was made a trustee as evidence that "he's conforming to the environment and structure" of the jail. (*Id.* at p. 871.)

Jail records. Records from the Lucas County jail showed that Belton was in four fights while in custody from 2008 to 2011. (Tr. Vol. VI at pp. 920-922; Exhibits 200A, B, C, and D.) One of those records reported that Belton challenged an officer to a fight because "I am facing the death penalty" and "I ain't got nothing to lose." (Exhibit 200C.) The records noted the confrontation with officers and described him as "becoming a hard placement" and more angry than depressed. (*Id.* at pp. 932-935.)

Jail records also showed that Belton sought Flexeril, a muscle relaxer, on numerous occasions from September 17, 2010 to December 28, 2011, and on two of those occasions, the chart specifically stated, "No Flexeril." (Tr. Vol. VI at pp. 922-923; Exhibits 200 E through L.) Dr. Connell agreed that repeated requests for painkillers including Flexeril could be seen as "drug seeking." (Tr. Vol. VII at pp. 1005-1006.)

The jail counselor case notes generally indicated that Belton denied thoughts of suicide, denied any mental health history, and denied any substance abuse. (Exhibits 200 N through V.) Those same records indicated that Belton was being "manipulative," because he wanted to be moved to the sixth floor. Belton was reported to have been interested in the move because "Katie" was a counselor on the sixth floor. When he was told that he would not get special treatment from her, he replied he would be able to "touch her." Other records indicated that Belton developed problems in each module of the fifth floor. (Exhibits 200 X through Z.)

The records contain various references to contraband. On December 29, 2010, he was reported to have received a large envelope containing marijuana and tobacco in a magazine. (Vol. VI at p. 936; Exhibit 200CC.) On another occasion, he was found to possess a broomstick with the bristles removed. (Disciplinary Board Hearing Decision Dec. 8, 2010.) On two other occasions, he was found to have non-prescribed medications. (Disciplinary Board Hearing Decisions Mar. 18, 2011 and Sept. 14, 2011.)

ARGUMENT

Counterproposition of Law No. 1: Trial counsel does not render ineffective assistance by failing to argue that the amendments to sentencing statutes in 2011 Am.Sub.H.B. No. 86 effectively abolish capital punishment in Ohio.

In order to prevail on a claim that counsel was ineffective, appellant must first show that his counsel's representation was deficient in that it fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-9, 1104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989). Appellant must also show that the deficient performance prejudiced appellant to such a degree that there is a reasonable probability that, but for trial counsel's errors, the result of the trial would have been different. *Strickland*, 466 U.S. at 691-696; *Bradley* at paragraph 3 of the syllabus. Of course, judicial review of counsel's actions is highly deferential. *Strickland* at 689; *State v. Post*, 32 Ohio St.3d 380, 388, 513 N.E.2d 754 (1987). Neither state nor federal case law permits careless second-guessing of counsel's tactics and actions: "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland* at 689, cited by *Bradley* at 142. See also *State v. Mason*, 82 Ohio St.3d 144, 157-58, 1998-Ohio-370, 694 N.E.2d 932.

In this case, appellant can meet neither prong of the *Strickland* test.

A. Belton's counsel rendered objectively reasonable professional assistance.

An objective standard of reasonableness does not require advancement of the argument that H.B. 86 effectively abolishes the death penalty. H.B. 86 does not

explicitly state that it repeals the death penalty, and Belton offers absolutely no authority adopting his theory that H.B. 86 "effectively repeals" Ohio's death penalty statute.

Because H.B. 86 does not specifically state that it repealed Ohio's capital punishment statutes, and since no prior precedent supports the argument, Belton's theory is novel. But numerous courts have held that a failure to advance novel legal theories or arguments will not amount to ineffective assistance of counsel. See, e.g., *Ledbetter v. Commr. of Corr.*, 275 Conn. 451, 461, 880 A.2d 160 (2005) (trial counsel did not provide ineffective assistance by failing to argue an issue raised but not resolved in one earlier case without a decision); *Daly v. State*, 285 Ga.App. 808, 811-812, 648 S.E.2d 90 (2007) (failure to challenge a statute's constitutionality is not ineffective assistance when a similar challenge was raised but never decided in a previous case); *Schoger v. State*, 148 Idaho 622, 630, 226 P.3d 1269 (2010) (trial counsel did not render ineffective assistance by failing to advance the novel argument that Idaho conferred a statutory right to plead guilty); and *Scott v. Werholtz*, 38 Kan.App.2d 667, 673, 171 P.3d 646 (2007) (ineffective assistance of counsel was not demonstrated when no previous cases had raised a similar issue).

B. Belton was not prejudiced by his counsel's assistance.

The same argument regarding H.B. 86 was advanced in a capital case pending before the same judge who presided over Belton's case. The court rejected the argument, holding "the Ohio legislature, through its passage of House Bill 86, has not repealed the death penalty," and that denial of the motion to prohibit the court from

considering the death penalty as a sentencing option "does not deny the Defendant due process as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding rights as guaranteed by the Ohio Constitution." See Order, *State v. Winfield*, Lucas C.P. No. CR 2010-3253 (Apr. 3, 2013) (Appendix at 1). Even if the argument had been raised, the trial court would certainly have rejected it, and the outcome of the proceeding would have been unaffected.

Because neither prong of the test for ineffective assistance of counsel is met, the first proposition of law should be overruled. However, the proposition of law also fails on its merits because H.B. 86 neither explicitly nor by implication abolishes Ohio's death penalty.

Counterposition of Law No. 2: Am.Sub.H.B. 86 may not be construed to abolish the death penalty in Ohio, and imposition of the death penalty cannot be construed to violate Ohio or international law.

Belton argues that the failure to follow state law renders the death penalty invalid under international law. (Brief of Appellant at p. 24.) That argument depends on the assumption that H.B. 86 effectively abolishes the death penalty, but nothing in H.B. 86 affects the statutes implementing capital punishment.

A. Imposition of capital punishment is governed by R.C. 2929.02, 2929.022, 2929.03, and 2929.04.

R.C. 2929.02, captioned "Penalties for aggravated murder or murder," provides

Whoever is convicted of or pleads guilty to aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.022 [2929.02.2], 2929.03, and 2929.04 of the Revised Code ***

R.C. 2929.02(A). The statute is unambiguous: the penalties for aggravated murder or murder are either life imprisonment or death, to be determined pursuant to R.C. 2929.022, 2929.03 and 2929.04. R.C. 2929.022 provides for the determination of the aggravating circumstances of a prior conviction. R.C. 2929.03, captioned "Imposing sentence for aggravated murder," includes a description of the circumstances in which the death penalty may be imposed. R.C. 2929.03(D). Finally, R.C. 2929.04 sets forth the criteria for imposition of a death sentence or imprisonment for a capital offense.

R.C. 2929.02, 2929.022 and 2929.03 were last amended January 1, 2008. R.C. 2929.04, the statute setting forth criteria for imposition of the death penalty, was last amended effective May 15, 2002. H.B. 86 does not directly amend any one of these statutes.

B. Revised R.C. 2929.11 does not preclude imposition of capital punishment.

Belton's argument focuses on the provision in H.B. 86 instructing a court imposing a definite prison term to look to "the minimum sanctions" required to protect the public and punish the offender:

A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources.

R.C. 2929.11(A). Nothing in the statute purports to abolish capital punishment.

C. Revised R.C. 2929.11 may not be interpreted to abolish the death penalty by implication.

Although nothing in revised R.C. 2929.11 purports to abolish the death penalty, Belton argues that the revised statute must be construed to abolish Ohio's death penalty provisions.

Belton's argument makes two critical assumptions. First, Belton assumes that the only legitimate purpose of sentencing is "to protect the public from future crime." But revised R.C. 2929.11 clearly recognizes that the "overriding purposes" are not only to protect the public, but also "to punish the offender." Capital punishment legitimately serves the punitive interests of incapacitation, retribution, and deterrence of future capital crimes by other individuals. *Ewing v. California*, 538 U.S. 11, 25, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003). And nothing in H.B. 86 requires the court to elevate resource conservation above other sentencing factors such as seriousness and recidivism. *State v. Wilson*, 2nd Dist. No. 24978, 2012-Ohio-4756, ¶6; *State v.*

Luyando, 8th Dist. No. 97203, 2012-Ohio-1947, ¶14; *State v. Martin*, 5th Dist. No. 12-COA-020, 2012-Ohio-6282, ¶25; *State v. Anderson*, 11th Dist. No. 2011-G-3044, 2012-Ohio-4203, ¶36.

Second, Belton's argument is fundamentally inconsistent with Ohio law, which disfavors any repeal by implication. *State ex rel. Evans v. Dudley*, 1 Ohio St. 437, 441 (1853). This court has held on several occasions that a statute may not be construed to repeal another by implication unless the two are irreconcilable. See *General Motors Corp. v. McAvoy*, 63 Ohio St.2d 232, 235, 407 N.E.2d 527 (1980); *State v. Hollenbacher*, 101 Ohio St. 47, 48, 129 N.E. 702 (1920), paragraph one of the syllabus; *Cass v. Dillon*, 2 Ohio St. 607, 611 (1853), quoting *Dodge v. Gridley*, 10 Ohio 173, 178 (1840). Likewise, "[i]t is a well-settled rule of statutory interpretation that statutory provisions be construed together and the Revised Code be read as an interrelated body of law." *Riffle v. Physicians & Surgeons Ambulance Serv.*, 135 Ohio St.3d 357, 2013-Ohio-989, ¶21, quoting *Summerville v. Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522, ¶24, and *State v. Moaning*, 76 Ohio St.3d 126, 128, 1996-Ohio-413, 666 N.E.2d 1115 (1996).

The statutes in this case may certainly be interpreted to give effect to both revised R.C. 2929.11 as well as to the statutes governing the imposition of capital punishment. Simply put, R.C. 2929.11 governs the imposition of definite prison terms for felonies. R.C. 2929.02, 2929.022, 2929.03 and 2929.04 apply to the very exceptional cases in which life sentences or capital punishment may be sought.

The State acknowledges that Belton argues that R.C. 1.51 requires that the

"general" provision in amended R.C. 2929.11 trumps the "specific" provisions governing the imposition of capital punishment. However, even R.C. 1.51 requires that statutes be construed "if possible, so that effect is given to both." In this case, there is no irreconcilable conflict to be resolved by looking to the more recently adopted "general provision." *Id.* If R.C. 2929.11 provides "general" rules of sentencing, the provisions governing imposition of the death penalty must be interpreted to provide an exception to those general rules in order to give effect to both. *See, e.g., Riffle*, ¶¶22.

H.B. 86 can be construed as a limitation on sentences imposed for classified felonies, but not as a limitation on the decision to charge death specifications or to impose death sentences. Accordingly, the second proposition of law should be rejected.

Counterproposition of Law No. 3: Ohio law does not infringe on the right to a jury trial by permitting a three-judge panel to preside at sentencing in a capital case after a defendant enters a plea of guilty or no contest and requests a jury determination in the penalty phase.

- A. This court has held that Ohio law does not provide for a hybrid procedure in which a defendant may enter a plea of guilty to charges of a crime with capital specifications but be sentenced by a jury.**

This court has rejected the argument that a capital defendant is deprived of his constitutional right to a jury determination of his penalty when a he enters a plea of guilty or no contest, because (1) the defendant waived his right to a jury trial and pled guilty as charged; (2) R.C. 2945.06 and Crim.R. 11(C)(3) provide no mechanism for waiving a jury with a three-judge panel determining guilt followed by a jury deciding penalties; and (3) trial courts may not create hybrid, nonstatutory procedures for determining guilt and penalties. See *State ex rel. Bates*, 130 Ohio St.3d 326, 2011-Ohio-5456, 958 N.E.2d 162, ¶¶29, citing *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶¶122-125.

In *Ketterer*, the defendant waived his right to a jury trial and entered a plea of guilty. After a penalty phase hearing, the three-judge panel sentenced him to death for aggravated murder and imposed prison terms for other felonies. On appeal, he argued that the trial court denied him a constitutional right to have a jury determine the penalty to be imposed.

Ketterer determined that the defendant made a knowing, intelligent and voluntary waiver of the right to a jury trial: "When a defendant pleads guilty he or she, of course, foregoes not only a fair trial, but also other accompanying constitutional guarantees." *Id.* ¶¶122, citing *United States v. Ruiz*, 536 U.S. 622, 628, 122 S.Ct. 2450,

153 L.Ed.2d 586 (2002), and *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Accord *United States v. Bradley*, 400 F.3d 459, 463 (6th Cir.2005) (a plea agreement "most pertinently [waives] the right to a trial by jury").

Significantly, *Ketterer* considered the holdings in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) and *Apprendi v. New Jersey*, 530 U.S. 366, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). *Ketterer*, ¶121. Close examination of those cases indicate that neither *Ring* nor *Apprendi* requires a jury determination of the penalty under Ohio law.

B. The Ohio statutes and procedural rules do not violate the principles articulated in *Apprendi* or *Ring*.

In *Apprendi*, the Supreme Court held that except for prior convictions, the sentencing facts necessary to increase the defendant's maximum punishment served as elements of the enhanced or separate offense and were required to be found by a jury. *Apprendi* at 490, 492. *Apprendi* was not a capital case, and the Supreme Court specifically noted that its decision did not invalidate capital sentencing schemes which allow judges to determine the existence of aggravating factors necessary to impose a sentence of death after a jury convicts a defendant of a capital crime. *Id.* at 496-97.

Ring, on the other hand, was a capital case in which the defendant was convicted of a capital crime by a jury and sentenced to death by the trial judge. See *Ring*, 536 U.S. at 588-89. The Court reversed, holding that "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the defendant also has a right to have them submitted to the jury for its determination. *Id.* at 609. *Ring* thus established that a defendant who has exercised

his right to a jury trial on a capital offense is also entitled to a jury determination of the aggravating factors necessary to impose the sentence of death.

Of course, the statutory scheme at issue in *Ring* stands in sharp contrast to Ohio's laws. In Arizona, the first phase of a capital trial did not involve a determination of the aggravating factors that make a defendant eligible for the death penalty. *Ring*, 536 U.S. at 592. By contrast, in Ohio, the death penalty may only be imposed when a defendant is indicted with aggravated murder in violation of R.C. 2903.01 and one or more specifications listed in R.C. 2929.04. R.C. 2929.03(B) requires that the verdict specifically state whether the defendant is found guilty of each specification:

If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge *** and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard. The instruction to the jury shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but the instruction shall not mention the penalty that may be the consequence of a guilty or not guilty verdict on any charge or specification.

Ohio law thus requires that before the death penalty may be imposed, the jury must find beyond a reasonable doubt that he is guilty of a violation of R.C. 2903.01 as well as one or more specifications in R.C. 2929.04. These findings occur before the mitigation phase of the trial, and in the absence of findings with respect to both the crime and the specification, death cannot be imposed as a punishment. Once these requirements are met, R.C. 2929.03(D) permits the defendant to offer evidence in mitigation.

Other cases have held that *Ring* and *Apprendi* do not invalidate a statutory

scheme in which a defendant entering a guilty plea waives the right to have a jury determine his sentence. See, e.g., *Lewis v. Wheeler*, 609 F.3d 291, 309-310 (4th Cir.2010) (" . . . neither *Apprendi* nor *Ring* holds that a defendant who pleads guilty to capital murder and waives a jury trial under the state's capital sentencing scheme retains a constitutional right to have a jury determine aggravating factors.")

In *Lewis*, the defendant argued that an individual who waives his right to a jury trial retains a constitutional right to have a jury determine the existence of aggravating factors. The Fourth Circuit rejected that argument:

However, neither *Apprendi* nor *Ring* stand for that proposition. In both cases, the challenged sentencing procedures denied defendants the option of having a jury determine a sentence enhancement, or aggravating factor, *regardless* of whether the defendant pleaded guilty or not guilty to the charged offense. In *Apprendi*, the defendant pleaded guilty but expressly preserved his right to challenge any hate-crime enhancement. And in *Ring*, the defendant was convicted of capital murder by a jury. Thus, in neither case did the defendant waive his right to a jury determination of facts upon which the enhancement or aggravating factor rested.

In short, the *Ring* decision did not clearly establish or even necessarily forecast that a capital defendant who pleads guilty and waives his right to a jury trial can insist upon a jury trial on aggravating factors. As noted by the district court, the claim that "a defendant who pleads guilty to a capital offense is nonetheless entitled to a jury determination of the aggravating factors would have been an *extension* of" that precedent. J.A. 2698 (emphasis added).

Lewis, supra, 609 F.3d at 310 (emphasis in original). Accord *Leone v. State*, 797 N.E.2d 743, 750 (Ind.2003); *People v. Altom*, 338 Ill.App.3d 355, 78 N.E.2d 55 (2003); *Colwell v. State*, 118 Nev. 807, 59 P.3d 463 (2002); *State v. Downs*, 361 S.C. 141, 146, 604 S.E.2d 377, 380 (2004); and *State v. Crisp*, 362 S.C. 412, 608 S.E.2d 429 (2005).

C. Ketterer's holding is consistent with federal and state law holding that there is no right to enter a plea of guilty on certain terms.

Both state and federal law uniformly hold that there is no constitutional right to enter a guilty plea. See *State ex rel. Bates*, 130 Ohio St.3d 326, 2011-Ohio-5456, 958 N.E.2d 162, ¶27, citing among other authorities *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). Accord *United States v. Benson*, 640 F.2d 136, 139 (8th Cir.1981); *Price v. Johnson*, 218 Fed. Appx. 274, 275 (4th Cir.2007); *United States v. Nguyen*, 1997 U.S. App. LEXIS 28900, at [*7] (9th Cir.1997); *United States v. Alvarez*, 987 F.2d 77, 81 (1st Cir.1993); *People v. Chadd*, 28 Cal.3d 739, 754 (1981). As the United States Supreme Court has held, a trial judge need not "accept every constitutionally valid guilty plea merely because a defendant wishes so to plead . . . although the States may by statute or otherwise confer such a right." *North Carolina v. Alford*, 400 U.S. 25, 38, 27 L. Ed. 2d 162, 91 S. Ct. 160 n.11 (1970) (citation omitted).

Ohio may therefore prescribe the conditions under which a guilty plea is accepted, and one of those conditions is the waiver of the right to have a jury determine the sentence to be imposed:

When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding. If appropriate waivers are procured, **States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty.** Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial.

Blakely v. Washington, 542 U.S. 296, 310, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2002)

(citations omitted; emphasis added).

Belton advocates a rule that any offer of a reward for giving up the trial by jury unconstitutionally impairs that right. (Brief of Appellant at pp. 30-31.) The argument proves too much. Any plea agreement to reduced charges will provide an advantage to the defendant. A broad rule that it is unconstitutional to offer an advantage to a defendant in exchange for relinquishing a right to a jury trial will undermine most plea agreements, but as the United States Supreme Court has reminded litigants, "criminal justice today is for the most part a system of pleas." *Lafler v. Cooper*, 132 S.Ct. 1376, 1388, 182 L.Ed.2d 398 (2012).

D. Ohio's mitigation phase is a subjective weighing of whether to impose death, as opposed to a factfinding process to determine whether death may be imposed.

Numerous courts have held that the factfinding necessary to impose the death penalty is qualitatively distinct from the weighing process that occurs in the mitigation phase of a capital trial. The Sixth Circuit of the United States Court of Appeals recently highlighted the distinction between the factual findings necessary in order to impose capital punishment and the subjective weighing of the punishment to be imposed. See *United States v. Gabrion*, 2013 Fed. App. 0151P, 6th Cir. Nos.02-1386/1461/1570, 2013 U.S. App. LEXIS 10621 (May 28, 2013).

Gabrion concluded that *Apprendi* "does not apply to every 'determination' that increases a defendant's maximum sentence." *Id.* at [*51]. Rather, *Apprendi* "applies only to findings of 'fact' that have that effect." Factual findings such as whether "the defendant acted with a particular state of mind, or possessed a particular quantity of

drugs, or was himself the triggerman," are "binary," requiring a determination of whether a particular fact existed or not. *Id.* at [*52]. In contrast, the decision to impose the death penalty requires consideration of whether one type of factor sufficiently outweighs another and justifies a particular sentence:

Those terms—consider, justify, outweigh—reflect a process of assigning weights to competing interests, and then determining, based upon some criterion, which of those interests predominates. The result is one of judgment, of shades of gray; like saying that Beethoven was a better composer than Brahms. Here, the judgment is moral—for the root of "justify" is "just." What § 3593(e) requires, therefore, is not a finding of fact, but a moral judgment. ***

Here, Gabrion was already "death eligible" once the jury found beyond a reasonable doubt that he intentionally killed Rachel Timmerman and that two statutory aggravating factors were present. *Jones*, 527 U.S. at 377. At that point the jury did not need to find any additional facts in order to recommend that Gabrion be sentenced to death. It only needed to decide, pursuant to the weighing of factors described in the statute, that such a sentence was "just[]." 18 U.S.C. §§ 3591(a), 3593(e). And in making that moral judgment, the jury did not need to be instructed as if it were making a finding of fact.

Gabrion, supra, at [*50].

Similarly, the Supreme Court of Maryland has held that the process of determining whether "the aggravating circumstances outweigh the mitigating circumstances" is not a finding of fact to which *Ring* is applicable:

Mitigating circumstances do not negate aggravating circumstances, as alibi negates criminal agency or hot blood negates malice. The statutory circumstances specified or allowed under § 413(d) and (g) are entirely independent from one another — the existence of one in no way confirms or detracts from another. The weighing process is purely a judgmental one, of balancing the mitigator(s) against the aggravator(s) to determine whether death is the appropriate punishment in the particular case. This is a process that not only traditionally, but quintessentially, is a pure and Constitutionally legitimate sentencing factor, one that does not require a determination to be made beyond a reasonable doubt.

Miles v. State, 421 Md. 596, 604-607, 28 A.3d 667 (2011), quoting *Borchardt v. State*, 367 Md. 91, 786 A.2d 631 (2001). Accord *State v. Nunley*, 341 S.W.3d 611, 627 (Mo.2011), at f.n.3 (holding that "judgment" facts are not subject to *Ring* and *Apprendi*).

The weighing process that occurs in the mitigation phase of an Ohio capital trial is not the factfinding encompassed by *Ring* and *Apprendi*. Crim.R. 11(C)(3) does not violate the right to trial by jury, and the third proposition of law should be overruled.

Counterproposition of Law No. 4: Lethal injection is not unconstitutional, and an absence of a state review mechanism of the lethal-injection protocol does not render the protocol cruel and unusual.

- A. Lethal injection is not per se cruel and unusual, but is accepted as the humane method of execution by a majority of the states and under federal law.**

This court has previously rejected challenges to the constitutionality of lethal injection. See *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 1211, ¶¶227; *State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, ¶¶210; *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶¶131; *State v. Carter*, 89 Ohio St.3d 593, 608, 2000-Ohio-172, 734 N.E.2d 345.

Not only has this court systematically rejected this facial challenge to Ohio's current method of capital punishment, but the United States Supreme Court has also held that lethal injection is not per se cruel and unusual. See *Baze v. Rees*, 553 U.S. 35, 62, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) (recognizing the consensus that lethal injection is the humane method of execution).

- B. The absence of a state procedural mechanism for litigating the constitutionality of Ohio's lethal injection protocol does not invalidate the protocol.**

Much of Belton's argument focuses on the lack of a state postconviction forum for litigation of whether a lethal injection protocol is constitutional. This court has held that the General Assembly has not provided a cause of action under Ohio law for assertion of a challenge to a lethal injection protocol. *Scott v. Houk*, 127 Ohio St.3d 317, 2010-Ohio-5805, 939 N.E.2d 835, ¶¶4. After reviewing various state procedural mechanisms, *Houk* noted the existence of "review available on this issue through

Section 1983, Title 42, U.S.Code, for injunctive relief against appropriate officers or federal habeas corpus petitions." See also *Hill v. McDonough*, 547 U.S. 573, 126 S.Ct. 2096, 165 L.Ed.2d 44 (2006) (holding that an inmate can challenge lethal injection protocol through 28 U.S.C. 1983). The existence of the available remedies led this court to conclude in *Houk* that "we need not judicially craft a separate method of review under Ohio law." *Id.* ¶4.

Belton argues that the lack of a state review mechanism "demonstrates in vivid fashion the unreasonableness of any means of execution, whether it be lethal injection or otherwise," and questions how the protocol can "pass constitutional muster when there is no state court mechanism to mount a challenge." (Brief of Appellant at p. 35.) However, Belton offers absolutely no authority for his assumption that every component of a capital sentencing structure must have a *state* review mechanism in order to be constitutional. Certainly the federal mechanisms mentioned in *Houk* have been employed by litigants with some degree of success. For example, the Sixth Circuit has affirmed an order to stay an execution because of deviations from Ohio's lethal injection protocol. See *In re Ohio Execution Protocol Litigation*, 671 F.3d 601 (6th Cir.Jan. 13, 2012), affirming *Cooley v. Kasich*, 801 F. Supp. 2d 623, 643-644 (S.D.Ohio 2011).

The notion that a state review mechanism must exist for every conceivable issue is unsupported by any authority, and the effectiveness of the existing federal mechanism has been demonstrated in Ohio. The fourth proposition of law should be rejected.

Counterproposition of Law No. 5: A trial court does not unconstitutionally undermine the right to trial by jury when the trial court denies meritless defense motions.

Belton argues that the trial court's denial of several motions left him "with no choice other than to waive his right to a trial by jury and try his case to a three-judge panel." The identified motions were to (1) prohibit the use of peremptory challenges to exclude potential jurors who express reservations about the death penalty; (2) prohibit the prosecution from referring to the nature and circumstances of the offense in the mitigation phase; (3) limit the prosecution's argument regarding aggravating factors to those proven in the first phase of the trial; (4) instruct the jury that the defendant has no burden of proof in the mitigation phase; (5) instruct the jury that mercy may be considered in weighing mitigating factors; (6) permit the defense to argue last in the mitigation phase of the trial; and (7) permit jurors to view death row or a video recording of death row.

The right to a jury trial does not require that the trial court accede to every demand a defendant makes. And making multiple motions unsupported by Ohio or federal constitutional law does not have a cumulative effect of improperly infringing on the right to a jury trial. Quite simply, the trial court properly denied the pre-trial motions in question. The collective effect of those denials does not create a stronger right to trial than existed in the absence of the motions.

A. The trial court properly permitted the use of peremptory challenges to exclude potential jurors who expressed reservations about the death penalty.

The use of peremptory challenges is by its nature "exercised without a reason

stated, without inquiry, and without being subject to the court's control." *Swain v. Alabama*, 380 U.S. 202, 220, 85 S.Ct. 824, 836, 13 L.Ed.2d 759, 772 (1965). Such exercise is a "crucial substantive right" in Ohio. *State v. Greer*, 39 Ohio St.3d 236, 245, 530 N.E.2d 382 (1988).

This court has likewise upheld the prosecution's use of peremptory strikes against prospective jurors who are opposed to the death penalty. *State v. Esparza*, 39 Ohio St.3d 8, 13-14, 529 N.E.2d 192. *Esparza* reasoned that "prosecutors can exercise a peremptory challenge for any reason, without inquiry and without a court's control," with exceptions only for the use of peremptories to exclude "any identifiable group of the community which may be the subject of prejudice" by virtue of, for example, their race. *Accord State v. Seiber*, 56 Ohio St.3d 4, 13, 564 N.E.2d 408 (1990); and *State v. Watson*, 61 Ohio St.3d 1, 10, 572 N.E.2d 97 (1991).

Both this court and the United States Supreme Court have held that "a jury may be death qualified with general questions concerning the prospective jurors' opinions on capital punishment." *State v. Rogers*, 17 Ohio St.3d 174, 178, 478 N.E.2d 984 (1985); and *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). The court may properly excuse for cause jurors who express views on the death penalty which would "prevent or substantially impair the performance of their duties" according to their instructions and oath. *See Rogers*; and *State v. Lawrence*, 44 Ohio St.3d 24, 30, 541 N.E.2d 451 (1989). *See also* R.C. 2945.25(C) (permitting a juror to be challenged for cause if he "unequivocally states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of

death").

Prospective jurors who meet the standard in *Witt* and *Rogers* are not a distinctive, identifiable group and may be excused from jury service without violating the a defendant's constitutional rights. *Lockhart v. McCree*, 476 U.S. 162, 176-177, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986). See also *State v. Jenkins*, 15 Ohio St.3d 164, 188, 473 N.E.2d 264 (1984). If death qualification does not violate constitutional rights, the prosecution's use of peremptories to remove individuals with reversations about the penalty is equally permissible: "If those persons who unequivocally oppose the death penalty do not constitute an 'identifiable group' for fair cross-section purposes, even less so do those persons who have some reservations about the death penalty but state that they are able to put those feelings aside and follow the instructions of the trial court." *Esparza*, 39 Ohio St.3d at 14, 529 N.E.2d 192.

The trial court's denial of the motion to restrict the prosecution's peremptory strikes was therefore proper and did not deny Belton's right to a jury trial.

B. Prosecutors may properly refer to the nature and circumstances of the offense in the mitigation phase.

Belton's trial counsel argued that if he did "not put the nature and circumstances of the offense at issue, then either instructing the jury or permitting the State to make adduce evidence or make argument along these lines would violate his constitutional rights." (Defendant's Motion 18 at unnumbered page 2; sic.)

This court has upheld the denial of a similar motion, in which the defendant sought "to weigh the aggravating circumstances against mitigating factors abstractly, without giving any consideration to the facts surrounding the aggravating circumstance."

See *State v. Newton*, 108 Ohio St.3d 13, 21, 2006-Ohio-81, 840 N.E.2d 593, ¶47. *Newton* held that ". . . R.C. 2929.03(D)(1) requires that the trial court and jury 'hear' testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing." Further, the "capital penalty-phase hearing is not limited to evidence that pertains only to the aggravating circumstances." *Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶132, quoting *State v. Wogenstahl*, 75 Ohio St.3d 344, 352-354, 1996-Ohio-219, 662 N.E.2d 311.

Neither statutes nor constitutions require that mitigation evidence be considered without reference to the factual context of the crime:

We will not interpret Ohio's capital sentencing statute to require a jury to make its recommendation between life and death in a factual vacuum. We will not sanction a procedure by which counsel for a criminal defendant is provided full opportunity to vigorously argue the full range of mitigating evidence while his adversary, the prosecutor, is precluded from vigorously arguing the entire scope of facts surrounding the act of murder of which the defendant has been convicted. In short, a capital defendant in Ohio is not statutorily or constitutionally entitled to protection during the sentencing process from the facts he himself created in committing the crime.

State v. Hill, 75 Ohio St.3d 195, 201, 1996-Ohio-222, 661 N.E.2d 1068; and *Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶180.

This court has explicitly held that "a trial court may properly allow repetition of much or all that occurred in the guilt phase pursuant to R.C. 2929.03(D)(1)." *State v. Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193, 790 N.E.2d 303, ¶73. The trial court properly denied the defense motion, and that denial did not undermine Belton's right to a jury trial.

C. During the mitigation phase, the prosecutor is not limited to evidence that pertains to the aggravating circumstances.

The penalty phase of a capital trial is not limited to evidence that pertains only to the aggravating circumstances proven at trial. This court has noted that "the fact that a particular murder was, for instance, particularly cruel or heinous is relevant to the determination of the appropriateness of actually imposing a death sentence on a death-eligible perpetrator, even though the fact of cruelty or heinousness would not, of itself, be sufficient to bring the crime within the scope of any section of R.C. 2929.04(A), nor could the fact be used to cause the defendant to become death eligible." *State v. Gumm*, 73 Ohio St.3d 413, 421, 1995-Ohio-24, 653 N.E.2d 253. Accordingly, the prosecution may properly comment on evidence in addition to the aggravating factors, including:

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

Id. at syllabus.

The prosecution is permitted to refer to the nature and circumstances of a crime to refute the suggestion that they were mitigating and to explain why specified circumstances and course of conduct outweighed mitigating factors. See *State v.*

Combs, 62 Ohio St.3d 278, 283, 581 N.E.2d 1071 (1991). The trial court properly denied the motion for an order prohibiting the State from offering evidence at the mitigation phase other than the aggravating circumstances alleged and proven at the trial phase.

D. The jury need not be instructed that the defense has no burden of proof during the mitigation phase.

In Motion 27, Belton's counsel requested an instruction that the defendant bears no burden of proof in the mitigation phase of trial. In essence, the motion sought a determination that requiring the defendant to prove the existence of any mitigating factors is unconstitutional. Similar arguments were rejected by *State v. Seiber*, 10th Dist. No. 87AP-530, 1989 Ohio App.LEXIS 2225.

The defendant has the burden of proving mitigating factors exist, although the State carries the burden of proof beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors:

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

R.C. 2929.03(D)(1). The "burden of going forward" with evidence of mitigating factors requires proof by a preponderance of the evidence, although the prosecution must prove beyond a reasonable doubt that the aggravating circumstances outweigh mitigating factors. See *State v. Jenkins*, 15 Ohio St.3d 164, 171-172, 473 N.E.2d 264 (1984). Under R.C. 2929.03(D)(1) and *Jenkins*, the requested instruction is erroneous,

and the trial court did not abuse its discretion in denying the request.

E. Mercy need not be considered a mitigating factor.

This court has rejected arguments that "mercy" is a mitigating factor. *State v. O'Neal*, 87 Ohio St.3d 402, 416, 2000-Ohio-449, 721 N.E.2d 73. See also *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶143 (the trial court did not err in refusing an instruction to consider the mitigating factors "in fairness and mercy"); and *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, 793 N.E.2d 446, ¶93 (trial court need not refer to "fairness and mercy" in reference to mitigating factors). The trial court therefore properly denied Belton's motion to consider mercy as a mitigating factor.

F. Denying the defense an opportunity for rebuttal in the mitigation phase was proper.

R.C. 2945.10 provides that in the trial of a criminal case, the prosecution concludes argument to the jury:

When the evidence is concluded, unless the case is submitted without argument, the counsel for the state shall commence, the defendant or his counsel follow, and the counsel for the state conclude the argument to the jury.

R.C. 2945.10(F). Any decision to vary the order of proceedings is within the trial court's discretion, and a claim that the trial court erred in following the statutory provision "must sustain a heavy burden to demonstrate the unfairness and prejudice of following that order." *State v. Jenkins*, 15 Ohio St.3d 164, 166, 473 N.E.2d 264, paragraph 11 of the syllabus.

Here, denial of the motion was proper, because ultimately, the State bears the

burden of proving beyond a reasonable doubt that aggravating circumstances outweigh mitigating factors. See R.C. 2929.03(D)(1) and (2) and *Jenkins*. Because the State must prove beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors, the trial court properly denied the motion to vary the order of arguments. See *State v. Rogers*, 17 Ohio St.3d 174, 478 N.E.2d 984 (1985), at paragraph 6 of the syllabus.

G. The trial court did not improperly deny a motion for a jury view of death row or a video recording of death row.

On appeal, Belton asserts that the trial court improperly denied a motion for a jury view or a video recording of death row. Belton does not support his argument with any citation to the record, and the undersigned has been unable to find any indication in the record that trial counsel made a request for a jury view of death row. However, the trial court did deny a request for a jury view of a maximum security prison. The trial court's denial of that motion is the subject of two additional propositions of law and will be addressed in Counterproposition of Law Nos. 14 and 15.

A defendant does not have a right to a trial by jury under his own terms. The right is governed by rules, statutes, and constitutional principles. Belton has failed to demonstrate that the denial of any of his pre-trial motions was improper under those rules, statutes, or constitutional principles, and his fifth proposition of law should therefore be overruled.

Counterposition of Law No. 6: In the absence of evidence that the prosecution has not honored its obligation to provide discovery, a trial court does not err in denying a motion for production of the prosecutor's file to be sealed for appellate review.

This court has consistently rejected arguments that a trial court must subject a prosecutor's file to an in camera inspection for exculpatory materials or to seal the file for appellate review:

The trial court was not required to examine the prosecutor's file to determine the prosecutor's truthfulness or seal the prosecutor's file for purposes of appellate review. Cf. *State v. Chinn* (1999), 85 Ohio St.3d 548, 569, 709 N.E.2d 1166; *State v. Williams* (1995), 75 Ohio St.3d 153, 172, 652 N.E.2d 721. The prosecutor was fully aware of his continuing obligation to divulge exculpatory evidence. Appellant's claim that the prosecution may have withheld other exculpatory evidence from the defense is purely speculative. The record discloses no such evidence, and we reject appellant's eighth proposition.

State v. Hanna, 95 Ohio St.3d 285, 2002-Ohio-2221, 767 N.E.2d 678, ¶¶60.

In *Hanna*, this Court approved denial of a motion to seal the file even in the face of evidence during trial that certain exculpatory materials had not been turned over to the defense. *Id.* at ¶¶58-59. Here, defendant's claim that exculpatory evidence might be contained in the file is even more speculative because there is not one shred of evidence that exculpatory evidence existed and was not produced. See also *Powell*, 123 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶¶174-175; *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶¶136; *State v. Hancock*, 108 Ohio St.3d 57, 68, 2006-Ohio-160, 840 N.E.2d 1032, ¶¶64. Certainly there is no reason to seal the file when, as in this case, the prosecutor provided the defense with open-file discovery and on several occasions invited defense counsel to review the entire file.

See *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, 873 N.E.2d 1263, ¶123.

Belton's argument relies upon *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858. In *Brown*, the trial court did grant the motion to copy the prosecutor's file and seal it for appellate review. *Id.* at ¶42. However, *Brown* does not indicate whether the prosecution agreed to the motion or the trial court's rationale in sealing the file.

More important, *Brown* did not decide the issue or indicate in any way that sealing the prosecutor's file was appropriate as a routine pre-trial procedure, especially where, as here, there was no evidence suggesting that the State did not fulfill its discovery obligations. To the contrary, the prosecution noted that it was "well aware of its obligations under Crim.R. 16, *Brady* and its progeny, *Giglio* and its progeny, and the Code of Professional Conduct." See, e.g., State's Memorandum in Opposition to Motions for an Order Directing that a Complete Copy of the Prosecutor's File Be Made (No. 14) at p.2 (R. 52).

This court has refused in the past to find error in the trial court's refusal to sanction a speculative effort to seal the prosecution's file for appellate purposes. Nothing in this case requires a departure from this court's past precedents, and the sixth assignment of error should be overruled.

Counterproposition of Law No. 7: Ohio's statutory definition of reasonable doubt is constitutional.

This court has repeatedly upheld the constitutionality of Ohio's statutory definition of reasonable doubt. See, e.g., *Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 1211, ¶¶173; and *Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, 873 N.E.2d 1263, ¶¶242. Federal courts have also upheld Ohio's reasonable doubt definition, both as applied in any criminal case and when applied specifically to a capital case. See *Franklin v. Bradshaw*, 695 F.3d 439 (6th Cir.2012).

Belton has acknowledged this point but notes that he is preserving the issue for federal review. Accordingly, this assignment of error may be overruled summarily. See *State v. Poindexter*, 36 Ohio St.3d 1, 520 N.E.2d 568 (1988).

Counterproposition of Law No. 8: "Residual doubt" is not a proper mitigating factor for the trial court or this court to consider.

Residual doubt has been described as "a lingering uncertainty about facts, a state of mind that exists somewhere between 'beyond a reasonable doubt' and 'absolute certainty.'" *Franklin v. Lynaugh*, 487 U.S. 164, 188, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) (O'Connor, J., concurring). The United States Supreme Court has never interpreted the Eighth Amendment to provide a capital defendant the right to introduce evidence at sentencing designed to cast "residual doubt" on his guilt of the basic crime of conviction. *Id.* A plurality of the Supreme Court has said it is "quite doubtful" that there exists a constitutional right to argue "residual doubt" as a mitigating factor, and two other justices have rejected the concept entirely. See *Oregon v. Guzek*, 546 U.S. 517, 525, 528-530, 126 S.Ct. 1226, 163 L.Ed.2d 1112 (2006).

As this court has held, it is illogical to require proof of guilt beyond a reasonable doubt in the guilt phase, but then permit "doubt" as to the certainty of the guilty verdict to be considered to recommend mercy in the event a mistake might have occurred. See *State v. McGuire*, 80 Ohio St.3d 390, 403-404, 1997-Ohio-335, 668 N.E.2d 1112. This court has therefore consistently refused to permit "residual doubt" to be considered either in the sentencing phase or in its independent review of the sentence imposed. See *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151, ¶260; and *State v. Cunningham*, 105 Ohio St.3d 197, 2004-Ohio-7007, 824 N.E.2d 504, ¶112.

Belton has acknowledged that *McGuire* controls this issue and that he is preserving the issue for federal review. Accordingly, this assignment of error should be overruled.

Counterposition of Law No. 9: When a defendant unambiguously waives his Miranda rights and no specific threats or inducements to his confession are identified, his subsequent confession is admissible.

"Appellate review of a decision on a motion to suppress presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St. 3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶8. The trial court serves as the trier of fact and is the primary judge of the credibility of the witnesses and the weight to be given to the evidence presented. *State v. Johnson*, 137 Ohio App.3d 847, 850, 739 N.E.2d 1249 (12th Dist.2000). Reviewing courts must accept the trial court's findings of facts so long as they are supported by competent, credible evidence. *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶100. The appellate court must then review the application of the law to the facts de novo. *Burnside*, ¶8.

A suspect in police custody must be warned before questioning that "he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires." *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Any custodial statement given without such warnings is subject to suppression. However, the statement will not be suppressed when the suspect voluntarily, knowingly, and intelligently waived his Miranda rights.

"[A]n express written or oral statement of waiver of the *** right to counsel is usually strong proof of the validity of that waiver." *North Carolina v. Butler*, 441 U.S. 369, 60 L.Ed.2d 286, 99 S.Ct. 1755 (1979). See also *State v. Moore*, 81 Ohio St.3d 22,

32, 1998-Ohio-441, 689 N.E.2d 1. A suspect's decision to waive his Miranda rights will be deemed voluntary in the absence of evidence that his will was overborne and his capacity for self-determination was critically impaired because of coercive police conduct. *State v. Daily*, 53 Ohio St.3d 88, 91-92, 559 N.E.2d 459 (1990), and paragraph two of the syllabus.

In determining whether a suspect knowingly, intelligently and voluntarily waived his *Miranda* rights, the court must evaluate the totality of the circumstances. *State v. Clark*, 38 Ohio St.3d 252, 261, 527 N.E.2d 844 (1988). The court may consider such factors as "the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of the interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *State v. Edwards*, 49 Ohio St.2d 31, 358 N.E.2d 1041 (1976), paragraph two of the syllabus.

Belton acknowledges that he received Miranda warnings before he confessed. He was reminded of those rights before his second interview. Belton also acknowledges that he waived his right to counsel and his right to remain silent, and he agreed to speak with police. Belton identifies the relevant issue as "whether confession was the product of threats and inducements designed to overcome his free will and result in a coerced confession." (Brief of Appellant at p. 60.) According to Belton, detectives "essentially promise[d] leniency" and implied "that confessing or not confessing would literally make the difference between life and death." (Brief of Appellant at p.63.) A review of the interview indicates that Belton's claims are unfounded.

A. The waiver was knowing and intelligent.

Belton does not contend that limited intellectual capacity precluded his understanding his Miranda rights. And any such argument would doubtlessly have failed, as courts have upheld waivers from individuals with comparable or even lesser intellectual capacity. See *State v. Edwards*, 49 Ohio St.2d 31, 39, 358 N.E.2d 1051 (1976), paragraph two of the syllabus; and *Garner v. Mitchell*, 557 F.3d 257, 263 (6th Cir.2009).

Belton was 22 years old at the time of his interviews. He had some previous experience in the criminal justice system; he identified a photograph of himself as having been taken when he was at "Stryker" and mentioned he had spent time in jail before. (Tr. Dec. 19, 2008 at p. 163; Exhibit 90A.) Even one previous experience with Miranda warnings enhances the suspect's ability to understand his rights. *United States v. Cristobal*, 293 F.3d 134, 142 (4th Cir.2002).

And there was no evidence to suggest that Belton's normal abilities were impaired at the time he was interviewed. Officer Jason Lenhardt testified that he knew Belton and had interacted with him on at least half a dozen times. On one of those occasions, Belton had obviously been drinking, because he smelled of alcohol and was glassy eyed. (Tr. Dec. 19, 2008 at pp. 42, 44.) Lenhardt had also seen Belton on the night before the shooting, August 12, at 9:30 p.m., and he did not appear to be under the influence of drugs or alcohol. (*Id.* at pp. 40, 42.)

Lenhardt was among the officers executing the search warrant on August 13, 2008. When Belton was arrested, Lenhardt did not notice anything unusual in Belton's

appearance or demeanor, or anything to suggest Belton was under the influence of drugs or alcohol. His eyes appeared normal, and his speech patterns were normal and unslurred, and he did not smell of alcohol, marijuana, or hashish. (Tr. Dec. 19, 2008 at pp. 44-48.) Corey Russell took Belton to the restroom some time after 2:30 a.m., and Belton said nothing to him about any recent use of medications, illicit drugs, or alcohol. (*Id.* at pp. 103-104, 118.)

Detective Clark began the interview at approximately 1 a.m. Clark agreed that Belton did not smell of marijuana or alcohol, and he did not show any other physical signs of being under the influence of a substance that would affect his ability to understand his rights. Belton did not appear drowsy, and he answered questions appropriately, without slurring or mumbling. (*Id.* at pp. 158, 165-167.)

Particularly because Belton "appeared perfectly normal and very coherent" when he signed his waiver, his "conduct, speech and appearance" offered no "outwardly observable indications that he did not understand the warnings or the circumstances surrounding the interrogation." *Garner*, 557 F.3d at 264. At no time did Belton manifest signs that he could not understand his rights. *Cf. United States v. Garibay*, 143 F.3d 534, 539 (9th Cir.1998). Belton's age, mentality, and physical condition at the time of questioning, as well as his prior experience, thus support a finding that his waiver was knowing and intelligent.

B. The waiver was voluntary.

This court has considered certain tactics, such as "physical abuse, threats, deprivation of food, medical treatment, or sleep," to be inherently coercive. Such tactics

trigger a "totality of the circumstances analysis." *State v. Getsy*, 84 Ohio St.3d 180, 189, 1998-Ohio-533, 702 N.E.2d 866.

The evidence is uncontroverted that Belton signed a written waiver of his rights. Further, the police conduct in this case was not abusive in any respect. Detective Clark testified that he and Detective Kermit Quinn interviewed Belton beginning at about 1 a.m., and that the interview lasted approximately two hours. They offered Belton drinks, cigarettes, and food. (Tr. Dec. 19, 2008 at pp. 155, 160-161, 167-170.)

Belton arrived in the holding area at about 9 p.m. In the first half hour, Lenhardt got him water and took him to the bathroom. Belton lay on a bench and went to sleep about a half hour after he arrived, and he slept until he was taken into the interview room just before 1 a.m. (*Id.* at pp. 72-74.)

However, Belton contends that his waiver was involuntary due to improper threats or promises. Of course, Belton executed his waiver very soon after he entered the interview room. No promises or threats induced him to sign the waiver. (*Id.* at pp. 174-175, 185, 208-209). And no threats or promises coerced Belton's eventual confession. In fact, in at least one point in the interview, Detective Quinn states, "I ain't making you no promises." (1:44.50.)

Nevertheless, Belton complains that officers offered various statements suggesting that the killing may have been a mistake: "I don't think he meant to kill that man." (1:28.15); ". . . he made a mistake, if he could take it back . . ." (1:28.22); ". . . everyday people make mistakes. . ." (1:29.45); ". . . if you didn't mean to do do it . . . intent and accident are two different things." (2:19.40). Such statements merely suggest that the crime may not have been intentional, and appellant offers no support

for the view that discussing the elements of a crime renders a waiver involuntary.

Belton also complains that one of the detectives said, "I hope your grandmother doesn't hear it on the news." (2:46.00.) That statement cannot be construed as a threat or a promise contingent upon Belton's confession.

Belton points to various statements as improper promises of leniency: "admission goes a long way," and "if you didn't mean to kill him . . . give him something," "gotta give [Detective Clark] something to take to the prosecutors," and "courts could have mercy." (1:39.54; 1:41.20; 1:40.57; 1:40.00.)

These general statements do not rise to the level of coercion or improper inducement. Officers may properly discuss the advantages of speaking the truth, or tell suspects that cooperation will be considered in the disposition of the case, or even suggest that the court may be "lenient" if the suspect tells the truth. *Edwards*, 49 Ohio St.2d 31, 41, 358 N.E.2d 1051. "Promises that a defendant's cooperation would be considered in the disposition of the case, or that a confession would be helpful, does not invalidate an otherwise legal confession." Such statements are admonitions to tell the truth, and "are considered to be neither threats nor promises." *See State v. Loza*, 71 Ohio St.3d 61, 67, 1994-Ohio-409, 641 N.E.2d 1082.

In this case, none of the detectives promised to reduce charges or that the death penalty would not be sought. To the contrary, the officers merely encouraged Belton to tell the truth by suggesting that he could benefit from cooperating with the investigation. The discussion is no more specific than a discussion described in detail by the Second District:

. . . after Dobbs waived his Miranda rights, Detective Clay encouraged

Dobbs to cooperate. She told him that the "truth is the best way to go" and that, when he goes before a judge, the judge will want to know if Dobbs had been cooperative, remorseful, and if there was a possibility of getting him help. Detective Clay told Dobbs that she could not tell him what he "can get out of this," but it would be best for him to "work with" her. Detective Clay emphasized the importance of cooperation and stated that before she could give a good report to a court about him, she would need information and details from him. Throughout the interview, Detective Clay encouraged Dobbs to tell the truth.

Detective Clay's statements to Dobbs were not unlawful promises of leniency. Although Detective Clay repeatedly encouraged Dobbs to cooperate and to tell the truth and she stated that she could inform the judge of his cooperation and remorse, the detective did not promise Dobbs that he would receive a more lenient sentence. To the contrary, Detective Clay told Dobbs that she had no control over his sentence. Detective Clay's statements to Dobbs did not render his confession involuntary.

State v. Dobbs, 2nd Dist. No. 2009 CA 70, 2010-Ohio-3649, ¶¶61, 63. *See also State v. Simms*, 10th Dist. No. 10AP-1063, 2012-Ohio-2321, ¶59 (encouraging honesty, "stating it could help him," was not impermissible). Even a statement that the officer will recommend to the prosecutor that the death penalty not be sought if the defendant tells the truth is not a promise or a guarantee but merely a suggested recommendation. *State v. Scott*, 503 So.2d 1173, 1178 (La.App.1987).

Finally, Belton complains that various references to potential punishment for the crime were impermissible: ". . . put you away for the rest of your life or put you in the chair," "save yourself brother," "death or life without parole," "it could be your saving grace," "now is your chance to save yourself," and "that's what is going to hang you." (1:37.34; 1:39.23; 1:42.15; 1:43.00; 1:48.10; 2:53.30.) But allusions to potential punishment for a crime, even capital punishment, will not be viewed as a coercive threat. *See Gary v. Jones*, 2010 U.S. Dist. LEXIS 46908 (M.D.Al.2010); and *People v.*

Thompson, 50 Cal.3d 134, 169, 785 P.2d 857 (1990). Officers may also properly warn a suspect that a lie can have adverse consequences:

Cooey also claims that Hammond "threatened" him by warning him that, if he had lied, he had "buried" himself. We disagree. In *United States v. Barfield* (C.A. 5, 1975), 507 F. 2d 53, a defendant was told that it would be in "his best interest" to tell the "real story," whereas lying might leave him "holding the bag." *Id.* at 55. These statements were held to be neither threats nor promises, but permissible admonitions to tell the truth. *Id.* at 56. See, also, *State v. Edwards* (1976), 49 Ohio St. 2d 31, 39-41, 3 O.O. 3d 18, 23-24, 358 N.E. 2d 1051, 1059, vacated on other grounds (1978), 438 U.S. 911. Hammond's tactic closely resembles the tactics approved in *Barfield* and *Edwards*. We think that it, too, was no more than an admonition to tell the truth.

State v. Cooey, 46 Ohio St.3d 20, 544 N.E.2d 895 (1989).

Repeated admonitions to tell the truth, even to the point of "badgering" a suspect, do not render the statement involuntary. *State v. Estep*, 3d Dist. No. 13-07-14, 2007-Ohio-6554, ¶24. And even explicit (though impossible) threats will not invalidate a voluntary statement. See, e.g., *State v. Slaughter*, 1st Dist. No. C-980702, 2000 Ohio App. LEXIS 1821, [*42] (cursing and assuring a suspect that his "ass would burn" in the courtroom and in hell were not coercive). Such threats are distinguishable from "more specific threats, such as threats to charge the accused with a greater offense, or to arrest and charge the accused's girlfriend if the accused does not confess." *Id.*

Belton attempts to distinguish *Cooey*, *Estep* and *Slaughter* by arguing that in this case the officers "had the ability to influence the charging decision and the charging decision was exactly what the officers told Mr. Belton he could avoid by giving a confession." (Brief of Appellant at p. 63.) But Belton actually identifies no promises of a reward in exchange for truth, and no explicit threat of harsher punishment if he failed

to provide a truthful statement.

Belton compares his interview to the statement provided by a defendant in *State v. Tyren*, 91 Ohio Misc.2d 67, 697 N.E.2d 293 (1998). Tyren was involved in an abuse and neglect proceeding in juvenile court when he was told that if he entered a sex offender treatment program, "no further proceedings" would be instituted against him. The program required him to make a statement of responsibility to his sex abuse counselor, who invited an investigator into the room to tape record the statement, without *Miranda* warnings. His attorney testified that he had negotiated with an assistant prosecutor and discussed cessation of criminal prosecution if the defendant made a complete and truthful statement, participated in the sexual abuse program and obtained therapy for the entire family. The prosecutor did not deny the allegations.

This case is far removed from *Tyren*. While defendant Tyren was promised a specific benefit if he confessed, Detectives Clark and Quinn never made any such specific promises. Their statements can be more accurately characterized as admonitions to tell the truth, which do not invalidate Belton's waiver of rights.

Because Belton's waiver and his subsequent statements were voluntary and knowing, the ninth proposition of law should be rejected.

Counterproposition of Law No. 10: Admission of testimony regarding fingerprint analysis is not a violation of due process when the print evidence is collected and the comparison is verified by a competent witness.

Questions involving the admissibility of evidence, including the admissibility of expert opinions, are left to the sound discretion of the trial court, and the trial court's ruling on evidentiary issues will not be reversed on appeal absent an abuse of discretion and a showing that the accused has suffered material prejudice. *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343 (1987), paragraph two of the syllabus. The general rule applies to expert testimony. In fact, the trial court has "broad" discretion to admit expert opinion. *Terry v. Caputo*, 115 Ohio St.3d 351, 2007-Ohio-5023, 875 N.E.2d 72, ¶16.

Evid.R. 702 permits expert testimony which "either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons." The witness must be qualified as an expert "by specialized knowledge, skill, experience, training, or education." Evid. R. 702(A) and (B). Such testimony must be "based on reliable scientific, technical, or other specialized information." Evid.R. 702(C).

The Rule also provides for a framework for assessing reliability of "a procedure, test, or experiment:"

(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

- (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;
- (2) The design of the procedure, test, or experiment reliably implements

the theory;

(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

Various factors are considered in determining the admissibility of expert testimony. See, e.g., *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). The "ultimate touchstone is whether the expert's technique or principle [is] sufficiently reliable so that it will aid the jury in reaching accurate results." *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 613-614, 1998-Ohio-178, 687 N.E.2d 735 (1998), quoting *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 956 (3d Cir.1990).

Significantly, Belton has offered no authority rejecting the admissibility of fingerprint analysis. And in fact, the case law is clear that fingerprint analysis may properly be the subject of expert testimony because the process is derived from widely accepted knowledge, facts or principles.

Several federal court cases have upheld the admissibility of latent fingerprint examination and identification as "technical knowledge." *United States v. Mitchell*, 365 F.3d 215, 234 (3d Cir.2004). Admittedly, fingerprint analysis is an assessment relying on human judgment. The analysis is obviously different than tests determining, for example, whether segments of DNA are chemically identical. Nevertheless, expert testimony is not limited to scientific evidence and may certainly encompass the matching process involved in fingerprint analysis. *United States v. Herrera*, 704 F.3d 480, 485 (7th Cir.2013). "Fingerprint comparison is a well-established method of

identifying persons" and has been upheld against *Daubert* challenges. *United States v. Avitia-Guillen*, 680 F.3d 1253, 1260 (10th Cir.2012).

The reliability of print analysis has not been called into serious question. "Of the first 194 prisoners in the United States exonerated by DNA evidence, none had been convicted on the basis of erroneous fingerprint matches, whereas 75 percent had been convicted on the basis of mistaken eyewitness identification." *Herrera*, 704 F.3d at 487. Errors in analysis "appear to be very rare, though the matching process is judgmental rather than scientifically rigorous because it depends on how readable the latent fingerprint is and also on how distorted a version of the person's patent fingerprint it is." *Id.* See also *Mitchell*, 365 F.3d at 236 (describing FBI experiments and studies analyzing the question of whether prints are indeed unique to each individual).

Ohio courts have also admitted fingerprint analysis and relied on such evidence to sustain convictions. *State v. Miller*, 49 Ohio St.2d 198, 361 N.E.2d 419 (1977), syllabus. See also *State v. Boone*, 6th Dist. No. L-08-1409, 2010-Ohio-1481, f.n.2 and *United States v. Scott*, 403 Fed.Appx. 392 (11th Cir.2010).

In this case, Detective Goetz testified that he was trained by FBI Academy personnel for the chemical development of latent prints in a one week, 40-hour course. (Tr. Vol. II at p. 204) He had 80 hours of training in fingerprinting through Bureau of Criminal Investigation, as well as semi-annual training for Ohio officers. (*Id.* at pp. 204-205.) Goetz testified that he was unaware of any error rate for fingerprint analysis, any peer review process, or any organization that recognizes print collection and identification as a science. (*Id.* at p. 213.) However, he stated that he has collected

prints for 16 years and made thousands of print comparisons. He has testified as an expert on print analysis more than 20 or 25 times. (*Id.* at p.217.) The testimony thus supported admission of his opinion as an expert.

Goetz's testimony also supported the reliability of the procedures followed in this case. Goetz testified that the first step is to analyze the object for any visible or "patent" prints. (Tr. Vol. II at p. 218.) If no patent prints are detected, the technician applies a dual use powder which adheres to the moisture left behind from the ridges of the fingerprint. That powder is then transferred to a white card. (*Id.*) After a print is collected, one technician compares the print to an inked card, a card with fingerprints of a known person. (*Id.* at p. 219.) The technician looks for points of identification, including "identical ridge detail, bifurcations, ending ridges, dots, islands, the different patterns which would be a loop, a whirl, or an arch." (*Id.* at p. 219.) Once the latent print has been compared and a positive identification has been made, another examiner in the office verifies the identification. (*Id.* at p. 224.)

The process described by Detective Goetz was "conducted in a way that will yield an accurate result." See Evid.R. 702(C)(3). Goetz detailed the process by which an analyst collects the unknown print and determines whether sufficient detail exists in the unknown print, then compares the print with a known print's ridges and formations. Finally, the first analyst's conclusion is verified by a second analyst. That description of the process corresponds with the ACE-V method for comparing and identifying fingerprints, and courts have repeatedly upheld the validity and reliability of that process. See, e.g., *Herrera*, 704 F.3d at 484; *United States v. Hatcher*, 2013 U.S. App.

LEXIS 2670 (6th Cir.2013), citing *United States v. Watkins*, 450 F. App'x 511, 515-16 (6th Cir. 2011) (rejecting the defendant's argument regarding the scientific validity of the ACE-V method); *United States v. Pena*, 586 F.3d 105, 110 (1st Cir. 2009) ("Numerous courts have found expert testimony on fingerprint identification based on the ACE-V method to be sufficiently reliable under *Daubert*.").

The trial court properly admitted Goetz's testimony, and Belton's assigned error should be overruled.

Counterproposition of Law No. 11: Even when a defendant enters a plea of no contest to a charge of aggravated murder with attendant specifications, the prosecution must still provide the court with evidence to support the elements of the charge and the specifications.

Claims of prosecutorial misconduct are subject to a plain error standard of review if no objection was made in the trial court. See, e.g., *State v. Slagle*, 65 Ohio St.3d 597, 604, 605 N.E.2d 916 (1992); *State v. Morgan*, 12th Dist. No. CA2008-08-035, 2009-Ohio-6050, ¶¶39; and Crim.R. 52(B). Application of the plain error standard requires appellant to demonstrate misconduct that prejudicially affected his substantial rights. *State v. Twyford*, 94 Ohio St.3d 340, 355-56, 2002-Ohio-894, 763 N.E.2d 122.

Belton complains that the prosecutor should not have elicited testimony from the deputy coroner regarding the effect of the gunshot on Matthew Dugan. (Brief of Appellant at p. 74.) However, trial counsel did not object to the testimony, so the plain error standard applies.

The absence of objection was appropriate, because there was no objectionable misconduct. The prosecution was entitled--and indeed required--to establish the elements of the crimes charged as well as the capital specifications. The Revised Code provides that even when a defendant pleads guilty to a capital offense, the three judge panel taking such plea must, based upon evidence presented by the State, determine whether the defendant is guilty after presentation of the evidence:

If the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly.

R.C. 2945.06.

This court's decisions confirm that the prosecution must still prove guilt when a defendant enters a plea of guilty to an aggravated murder charge: ". . . when the offense charged is a capital offense, R.C. 2945.06 and Crim.R. 11(C)(3) require the state to prove guilt of an aggravated murder charge with death specifications even when an accused pleads guilty." *Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶93, citing *State v. Green*, 81 Ohio St.3d 100, 1998-Ohio-454, 689 N.E.2d 556, syllabus. The elements include the capital specifications. *Ketterer*, ¶93. And victim impact evidence is permissible if it is relevant to the offense or specifications. *Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶134.

Belton complains that Dr. Scala-Barnett should not have been permitted to testify to the distance of the gun from the victim, the injuries sustained by the victim, the time it took for him to expire, and "what he must have experienced during that time." (Brief of Appellant at p. 74.) However, Dr. Scala-Barnett's testimony was relevant to establish the elements of the crimes charged in this case. Based on the stippling around the wound and the absence of soot around the wound to Dugan's head, she concluded that the gun was between 12 to 24 inches from the victim's head when it was fired, and that a shooter standing on one side of a store counter would have had to lean forward across the counter in order to achieve the distance in question. A close range shot to the head was relevant to the shooter's purpose to cause the death of another, an element of aggravated murder in violation of R.C. 2903.01(B).

At no time did Dr. Scala-Barnett testify as to the victim's emotional state. Her testimony was confined to her examination of the victim's body and the conclusions that

she drew from that examination. While certain inferences may be drawn from the fact that the victim did not die immediately, her testimony regarding the shot's effect on Matthew Dugan's body was not unduly inflammatory or prejudicial.

In any event, Belton cannot prove that but for the actions of the prosecutor, the outcome of the trial would have been different. The court is presumed to consider only relevant and admissible evidence in a bench trial, and so too when a panel of judges sits as a trier of fact in a capital trial. *State v. Post*, 32 Ohio St.3d 380, 384, 513 N.E.2d 754 (1987); and *Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶133, quoting *State v. Davis*, 63 Ohio St.3d 44, 48, 584 N.E.2d 1192 (1992).

The testimony of the coroner was permissible, and trial counsel acted reasonably in not objecting to that testimony. The eleventh assignment of error should be rejected.

Counterproposition of Law No. 12: Trial counsel does not render ineffective assistance of counsel by failing to object to testimony and evidence supporting the elements of the charge and specifications during the first phase of a capital trial.

The State properly elicited testimony from Dr. Scala-Barnett regarding the circumstances of the victim's death. Dr. Scala-Barnett's testimony was necessary to establish that a gunshot caused Matthew Dugan's death, an element of an aggravated murder charge. See R.C. 2903.01(B). Dr. Scala-Barnett's testimony was also relevant to establish Belton's purpose in firing that shot, and purpose is a necessary element of both the offense of aggravated murder and the capital specification set forth in R.C. 2929.04(A)(3).

This court has held that "the failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel." *State v. Holloway*, 38 Ohio St.3d 239, 244, 527 N.E.2d 831 (1988). In this case, the failure to object was reasonable, because any objection by counsel would properly have been overruled. Trial counsel is not expected to make objections when they have no merit. *State v. Gross*, 97 Ohio St.3d 121, 151, 2002-Ohio-5524, 776 N.E.2d 1061, ¶121. Moreover, because the matter was being tried to the bench, "counsel could reasonably assume that the judges would be unaffected by any inflammatory material * * * ." *State v. Campbell*, 69 Ohio St. 3d 38, 43, 630 N.E.2d 339 (1994).

Failure to object to Dr. Scala-Barnett's testimony did not represent ineffective assistance of counsel. The twelfth proposition of law should be rejected.

Counterposition of Law No. 13: Ohio's death penalty statutes are constitutional.

Belton's thirteenth assignment of error attacks the constitutionality of Ohio's death-penalty statutes on 24 separate grounds:

- (1) Uncontrolled prosecutorial discretion in charging capital crimes leads to imposition in an arbitrary, capricious and discriminatory manner;
- (2) Proof of aggravating circumstances during the guilt phase fails to permit individualized determination and narrowing of categories of defendants eligible for the death penalty;
- (3) The aggravating circumstances may merely repeat the elements of aggravated felony murder, which precludes "effective and meaningful narrowing;"
- (4) The trial court's lack of discretion in dismissing death penalty specifications when a defendant does not enter a plea of guilty penalizes capital defendants who exercise their constitutional right to trial;
- (5) The statutory scheme does not require either the conscious desire to kill or premeditation and deliberation as the culpable mental states for a death sentence;
- (6) Any pre-sentence report is submitted to the sentencer, even if its contents are prejudicial or irrelevant;
- (7) Ohio does not require the prosecution to prove that there are no mitigating factors or that death is the only appropriate penalty;
- (8) There is no means of ensuring proper and consistent weighing of aggravating and mitigating circumstances;
- (9) The burden of proof is shifted to the defendant during the mitigation phase;
- (10) Sympathy and mercy may not be considered by the jury;
- (11) There is no option of imposing a life sentence in the absence of mitigating factors;
- (12) Ohio fails to permit a sentencer to grant mercy based on mitigation if mitigation is outweighed beyond a reasonable doubt by aggravating circumstances;
- (13) The sentencer may not consider whether the death sentence is proportional to the offense and offender;
- (14) Meaningful appellate review is impossible because the jury need not identify the mitigating factors it found;
- (15) Appellate proportionality review is provided only by reference to cases in which the death sentence has been imposed;
- (16) Appellate review does not include a review of whether the death penalty was appropriate;
- (17) The death penalty is cruel and unusual;

- (18) The death penalty is not the least restrictive means of serving the state's interest;
- (19) Lethal injection is cruel and unusual;
- (20) The penalty inflicts extreme psychological, emotional and physical distress and anxiety prior to the execution;
- (21) Ohio's death penalty violates the Organization of American States Treaty;
- (22) Ohio's penalty violates the custom and practice of civilized nations;
- (23) The death penalty violates the United Nations Charter and other international treaties; and
- (24) The death penalty violates the International Covenant on Civil and Political Rights and other charters.

The list is remarkably similar, both in content and order, to a list considered by the Second Appellate District. See *State v. Sapp*, 2nd Dist. No. 99 CA 84, 2002-Ohio-6863, ¶165. *Sapp* noted that of the first fifteen issues, all but the third was overruled in *State v. Jenkins*, 15 Ohio St.3d 164, 473 N.E.2d 264 (1984), and *State v. Buell*, 22 Ohio St.3d 124, 489 N.E.2d 795 (1986). The third argument was addressed and overruled in *State v. Henderson*, 39 Ohio St.3d 24, 29, 528 N.E.2d 1237(1989).

Sapp also noted that the sixteenth issue challenge to proportionality has survived constitutional review by this court. *Sapp*, ¶166, citing *State v. Steffen*, 31 Ohio St.3d 111, 509 N.E.2d 383, at paragraph one of the syllabus, and *State v. Loza*, 71 Ohio St.3d 61, 84, 1994-Ohio-409, 641 N.E.2d 1082. This court has also previously rejected challenges to the constitutionality of lethal injection, the seventeenth issue raised. See *Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶227; *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶131; and *State v. Carter*, 89 Ohio St.3d 593, 608, 2000-Ohio-172, 734 N.E.2d 345. Likewise, the court has rejected arguments that the death penalty inflicts extreme psychological, emotional and physical distress. See *State v. Morales*, 32 Ohio St.3d 252, 260, 513 N.E.2d 267 (1987).

The last four issues also lack merit. See *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶¶138, and authorities cited therein. Additionally, the Sixth Circuit has concluded that the Charter of the Organization of American States does not "specifically prohibit capital punishment," and in any event, the OAS charter was adopted with the reservation that "none of its provisions shall be considered as . . . limiting the powers of the several states . . . with respect to any matters recognized under the Constitution as being within the reserved powers of the several states." *Buell v. Mitchell*, 274 F.3d 337, 371 (6th Cir.2001), citing Charter of the Organization of American States, 1951, 2 U.S.T. 2394, 2484.

Likewise, *Buell* held that "the International Covenant does not require its member countries to abolish the death penalty." *Buell* at 371. "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." *Id.* Finally, the Covenant specifically recognizes the death penalty: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime . . ." *Id.*, citing Article 6, Paragraph 2.

Belton's checklist of constitutional claims breaks no new ground. This court has denied similar claims in the past and should follow those well-established precedents in this case. The thirteenth proposition of law should be rejected.

Counterproposition of Law No. 14: Evidence in mitigation may not include a jury view of a maximum security prison.

The Eighth and Fourteenth Amendments permit the sentencer in a capital case to consider "as a mitigating factor, any aspect of a defendant's character or record or any of the circumstances of the offense." *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Neither statute nor case law has expanded the range of mitigating evidence in Ohio.

Ohio's Revised Code defines permissible mitigating factors as "the nature and circumstances of the offense, the history, character, and background of the offender," as well as certain specified factors, including "[a]ny other factors that are relevant to the issue of whether the offender should be sentenced to death." R.C. 2929.04(B)(1)-(7). This court has noted that mitigating factors "are facts about the defendant's character, background, or record, or the circumstances of the offense, that may call for a penalty less than death." *State v. White*, 85 Ohio St.3d 433, 448, 1999-Ohio-281, 709 N.E.2d 140.

White rejected the argument that a defendant in a capital trial should be permitted to introduce evidence of potential prison sentences as an alternative to death. Likewise, evidence of prison conditions is irrelevant to the defendant and his background and does not relate to the nature and circumstances of the crime. Such evidence has the further disadvantage of uncertainty, requiring speculation as to what officials in another branch of government will or will not do at some point in the future. *State v. Hanna*, 95 Ohio St.3d 285, 2002-Ohio-2221, 767 N.E.2d 678, ¶¶130-131.

White and *Hanna* are consistent with current federal case law. The Sixth Circuit

of the United States Court of Appeals recently considered--and rejected--a similar effort to expand the concept of mitigating factors to include matters other than the character of the defendant and the circumstances of the crime. See *Gabrion*, 6th Cir. No. 02-1386/1461/1570, 2013 U.S. App. LEXIS 10621 (May 28, 2013).

Defendant Gabrion committed a murder in a national forest so that it was a federal crime subject to capital punishment. However, the forest was in Michigan, which does not have the death penalty. Gabrion argued on appeal that the murder's location in Michigan should have been considered a mitigating factor. The Sixth Circuit rejected the argument, noting that mitigating factors are governed by "the principle that punishment should be directly related to the personal culpability of the criminal defendant." *Id.* at [*19], citing *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), overruled on other grounds by *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). *Gabrion* held that "mitigation evidence is evidence relevant to a reasoned moral response to the defendant's background, character and crime," as opposed to "an argument against the death penalty in general." *Id.*, quoting *Penry*. See also *Strouth v. Colson*, 680 F.3d 596, 607 (6th Cir.2012) (statistical evidence of the deterrent effect of the death penalty is not admissible in mitigation phase)

Conditions in a maximum security prison do not relate to the defendant's background, character or culpability, and the trial court properly denied the motion for the jury view. The fourteenth proposition of law should be overruled.

Counterproposition of Law No. 15: Denial of a jury view of a maximum security prison does not violate due process rights by unduly influencing a defendant's decision to proceed to trial before a three-judge panel.

Because the trial court properly denied a jury view of a maximum security prison, the denial of Belton's motion for the jury view did not violate his due process rights. See *Hanna*, 95 Ohio St.3d 285, 2002-Ohio-2221, 767 N.E.2d 678, ¶¶130-131.

Counterproposition of Law No. 16: Trial counsel does not render ineffective assistance of counsel by not seeking a neuropsychological evaluation based merely on the violence of the crime and a potential diagnosis of "anti-social personality disorder."

Trial counsel may, in the exercise of reasonable professional judgment, make a decision not to call an expert witness. See, e.g., *State v. Mundt*, 115 Ohio St.3d 22, 2003-Ohio-4836, 873 N.E.2d 828, ¶118. Further, speculation about an expert's potential testimony cannot serve as the basis for an ineffective assistance of counsel claim. *Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶86. There must be a "reasonable likelihood that the outcome of the trial would have been different had his counsel obtained" the expert in question. *Mundt* at ¶118.

Strickland, 466 U.S. 668, 1104 S.Ct. 2052, 80 L.Ed.2d 674, is a factually similar case that demonstrates the complex considerations in weighing whether to seek expert assistance. In *Strickland*, the defendant claimed his counsel was ineffective because, among other reasons, he failed to obtain a psychiatric evaluation of his client. The Supreme Court rejected the argument, because introduction of any such report could permit the introduction of additional contrary evidence and undermine other aspects of the defense. *Id.* at 699.

In this case, the decision not to seek a neuropsychological evaluation was a deliberate decision by counsel. During the examination of Dr. Stinson, trial counsel remarked, "We chose not to" have testing done. He then questioned Stinson about what effect a test showing no brain damage would have on Stinson's opinion. Stinson stated that it would have no effect, and that all his opinions assumed Belton suffered no brain impairment. Dr. Stinson also admitted that he could have ordered that the

evaluation be performed if he thought the testing was necessary, but he said, "We determined after additional discussion we would not do that testing." (Tr. Vol. VI at pp. 874-876.)

In the judgment of Belton's trial counsel, the opinion of a neuropsychological evaluation would not have impacted Dr. Stinson's opinion. Dr. Stinson's testimony was sufficient to raise the possibility of brain impairment, and the risk of having a neuropsychological evaluation was, of course, that the evaluation would be negative or that the prosecution would then seek an independent evaluation that might lead to contrary results. Because a neuropsychological evaluation would not offer much incremental benefit to the defendant, but posed a risk of undermining the defendant's case, counsel's decision not to seek an evaluation was reasonable.

The Eighth Appellate District has rejected a virtually identical argument that defense counsel rendered ineffective assistance of counsel by failing to obtain the services of a neuropsychological expert. As in this case, defense counsel was able to rely on other witnesses to suggest that defendant possibly suffered from brain damage. A neuropsychological expert might "have found defendant suffered from brain damage, but it is equally possible that such an expert would have reached a contrary conclusion." *State v. Kafaru*, 8th Dist. No. 92543, 2010-Ohio-3401, ¶149.

There is no basis for the claim that trial counsel rendered ineffective assistance by failing to obtain a neuropsychological evaluation. Trial counsel's decision was reasonable in light of the slight possible benefits and the great possible risks of such an evaluation. The sixteenth proposition of law should be overruled.

Counterposition of Law No. 17: A claim of ineffective assistance of counsel may not be premised on claims of failure to preserve the record for appellate review when no issues are specifically identified.

Belton's seventeenth proposition of law is that trial counsel were ineffective in that they failed to preserve issues for appellate review. However, Belton fails to cite a single issue that his trial counsel failed to preserve. His claim should therefore be rejected:

Brinkley claims that his counsel failed to preserve meritorious issues, but Brinkley never cites any record references or any specific meritorious issues that counsel failed to preserve. Because he failed to cite any example, Brinkley fails to establish deficient performance or prejudice.

State v. Brinkley, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶133.

Belton's argument assumes that his trial counsel had an obligation to raise every conceivable objection or issue, but this court has rejected that assumption. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88, ¶134, citing *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Accordingly, the seventeenth proposition of law should be rejected.

Counterposition of Law No. 18: Trial counsel did not render ineffective assistance of counsel by waiving a jury, waiving an opening statement during the penalty phase of the trial, failing to obtain opinions from a drug or alcohol abuse expert, or calling a counselor from the jail.

A. A jury trial waiver is a matter of trial strategy to be afforded deference on appeal.

The waiver of a jury trial "is very often a matter of trial strategy, an area where an experienced attorney's advice should greatly benefit a client's interests" and "an area where courts generally defer to trial counsel's judgment." *State v. Linehan*, 2nd Dist. No. 16841, 1998 Ohio App. LEXIS 4134, at *16. *Accord State v. Bird*, 81 Ohio St.3d 582, 585, 692 N.E.2d 1013 (1998) (judicial scrutiny of counsel's tactical decisions, including recommending that a client enter a no-contest plea, must be highly deferential). Even when debatable, trial tactics do not generally constitute ineffective assistance of counsel. *State v. Phillips*, 74 Ohio St.3d 72, 85, 1995-Ohio-171, 656 N.E.2d 643 (1995).

The jury trial waiver in this case was very much a matter of trial tactics. Belton initially signed a jury trial waiver on August 5, 2010, but subsequently signed additional waivers on March 27, 2012 and April 2, 2012. His written waivers are presumptively voluntary, knowing and intelligent and should not set be aside without a plain showing that the waiver was not freely and intelligently made. *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶149.

And nothing in this record suggests that the waiver was involuntary. The trial court engaged in an extensive colloquy each time Belton signed a waiver to ensure that he understood the consequences of his waiver. By July 29, 2010, Belton's counsel was

aware of the identity of the three judges who would serve on the panel, should he elect to waive his right to a jury trial. Belton's defense attorneys were thus able to advise him of their professional experiences with each of the judges who would serve on the panel. On April 2, 2012, when Belton entered his plea of no contest, the court once more engaged in an extensive colloquy to determine whether he was knowingly and voluntarily waiving his right to a jury. (Tr. Apr. 2, 2012 at pp. 3-10.)

The decision to try the case to a three judge panel was reasonable under the circumstances of this case. Belton's crime was recorded, and he subsequently confessed to shooting Matthew Dugan. Given the overwhelming evidence of Belton's guilt and the lack of the victim's resistance, trial counsel could reasonably have chosen to try the case to the three-judge panel rather than a jury for fear that a jury might be less able to set aside their emotional response to the evidence. See, e.g., *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶¶48-44.

Because of the numerous factors to be weighed in determining whether to waive a jury trial, "at the time when an accused defendant must choose between a trial before a jury and a trial to the court, it simply cannot be said which is more likely to result in the imposition of death." *Lockett v. Ohio*, 438 U.S. 586, 634, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (Rehnquist, J., concurring in part and dissenting in part). Moreover, the hope that judges will afford greater leniency than a jury is "entirely rational." *Johnson v. Commonwealth*, 103 S.W.3d 687, 695 (Ky.2003). The decision to waive a jury was reasonable and does not support a claim of ineffective assistance of counsel.

B. Defense counsel's waiver of an opening statement during the mitigation phase of a capital trial is a matter of trial strategy, particularly when the prosecution first waives an opening statement.

The decision of whether to make an opening statement is a tactical decision to which a reviewing court should be highly deferential. See, e.g., *State v. Williams*, 74 Ohio App.3d 686, 700, 600 N.E.2d 298 (8th Dist.1991); *State v. Magers*, 3d Dist. No. 13-03-48, 2004-Ohio-4013, ¶18; *State v. Crager*, 3d Dist. No. 9-04-54, 2008-Ohio-3223, ¶17.

Uncertainties about whether witnesses are available, and if so, whether they may be relied upon to provide certain testimony are legitimate considerations when weighing the decision to make an opening statement. A waiver is particularly reasonable when the prosecution waived its opening statement in the second phase of the trial. Without a roadmap as to the state's strategy, defense counsel makes a sensible decision to waive his own opening statement.

C. Defense counsel were not ineffective in failing to retain and call a substance abuse expert.

Belton claims that his trial counsel were ineffective for failing to call a substance abuse expert, but this court has held that it is not ineffective for the defense to employ alternative devices that fulfill the same functions as a particular expert. See, e.g., *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, ¶106. This court has also held that where defense counsel presents a mitigation psychologist who testifies concerning the defendant's history and pattern of alcohol and drug abuse, as an alternative to calling a drug and alcohol specialist, no ineffectiveness of counsel can be shown. *Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, 873 N.E.2d 1263; and *Powell*,

132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 1211, ¶¶210.

Here, defense counsel relied upon Dr. Stinson to develop mitigating evidence concerning Belton's drug and alcohol abuse. Belton has not demonstrated what a substance abuse specialist could have provided that was not brought before the jury by Dr. Stinson's extensive testimony. Belton has also failed to establish that a substance abuse sub-specialist would have convinced the court to impose a life term. Given the thoroughness of Dr. Stinson's testimony, prejudice has not and cannot be demonstrated.

D. Defense counsel's decision to call a counselor at the jail may not be second guessed on appeal.

In general, "counsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court." *State v. Treesh*, 90 Ohio St.3d 460, 490, 2001-Ohio-4, 739 N.E.2d 749. *See also Hanna*, 95 Ohio St.3d 285, 2002-Ohio-2221, 767 N.E.2d 678, ¶¶118.

Belton complains that calling Matthew Martin, a counselor at the Lucas County jail, was ineffective assistance. Belton argues that Martin's testimony "was a disaster" because "he was not prepared and had no real knowledge of Mr. Belton, given his answers on cross-examination," and that his testimony "permitted the prosecution to introduce evidence of Mr. Belton's altercations at the jail." (Brief of Appellant at p. 104.) But the defense advanced a theory during mitigation that Belton's disciplinary record at the jail improved over time, a legitimate factor to be considered when assessing Belton's character. Martin testified several times that Belton had been well-behaved and posed no problems during his interactions at the jail. He also testified that Belton

was made a trustee for his good behavior and was removed only because of the perception that his case was too high-profile to permit trustee status, not because of poor behavior.

Moreover, much of the negative information from the jail records could have been brought out to rebut Dr. Stinson's testimony and opinions. Dr. Stinson acknowledged that he read jail records early on in his evaluation of Belton's case, and that he received updated records about a month before he testified. The prosecution could have cross-examined Dr. Stinson about those records regardless of whether Martin testified. Given the advantages of his testimony, the decision to call Martin as a witness was a reasonable trial strategy. See *Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶¶217-219.

E. Other allegations of ineffective assistance also fail.

Belton asserts that trial counsel also committed other acts of ineffective assistance. However, those remaining allegations are addressed in other propositions of law and will not be repeated here. See Counterpropositions of Law Nos. 1, 12 and 16.

Trial counsel in this case made difficult strategic decisions. Those decisions do not amount to ineffective assistance, and the eighteenth proposition of law should be overruled.

Counterposition of Law No. 19: Imposition of the death penalty was appropriate and proportional when the defendant committed an armed robbery, the victim complied with all demands, offered no resistance and presented no threat, but the defendant nevertheless shot the victim in the back of the head.

A. Aggravating circumstances were proven beyond a reasonable doubt.

The evidence established beyond a reasonable doubt that Belton was guilty of both capital specifications charged. However, the State elected to proceed in the mitigation phase on the specification that Belton committed a murder while committing, attempting to commit or fleeing after committing aggravated robbery. See R.C. 2929.04(A)(7).

B. Mitigating factors were outweighed by aggravating circumstances.

Belton stated at trial that his mitigation would focus on his youth (R.C. 2929.04(B)(4)); his lack of a criminal record or juvenile adjudications (R.C. 2929.04(B)(5)); and "other factors that are relevant to the issue of whether the offender should be sentenced to death" (R.C. 2929.04(B)(7)).

1. Youth (R.C. 2929.04(B)(4)).

The video recording, coupled with Belton's statements, reveals that his crime was not an impulsive, rash decision. Belton entered the BP carryout three times, but left twice without committing the robbery out of fear of the consequences of committing a robbery when witnesses were present. His planning and concerns with the potential consequences of his crimes suggest that the impulsivity of youth is not a factor in the crimes committed in this case. And in fact, Belton was an adult, aged 22, at the time of the crimes. His youth is therefore entitled to some weight. *Scott*, 101 Ohio St.3d 31, 2004-Ohio-10, 800 N.E.2d 1133, ¶105. *But see State v. Ballew*, 76 Ohio St.3d 244,

257, 1996-Ohio-81, 667 N.E.2d 369 (a defendant's alleged youth was "entitled to little weight, since Ballew was twenty-two at the time of the offense"); and *State v. Wiles*, 59 Ohio St.3d 71, 94, 571 N.E.2d 97 (1991) (where the offender was 22 years old, his youth was not afforded great weight).

2. Lack of a criminal record (R.C. 2929.04(B)(5)).

Belton's lack of a significant criminal record is entitled to weight. *State v. Cooley*, 46 Ohio St.3d 20, 544 N.E.2d 895 (1989). However, that weight is diminished by his admitted activity in using and dealing drugs. *Ballew* at ¶257; Tr. Vol. VI at p. 958; Exhibit 90A.

3. Other relevant factors (R.C. 2929.04(B)(7)).

Family background. A poor family background, even when the father is in prison and the mother is alcoholic and neglectful, is entitled to only "some" mitigating weight. *State v. White*, 85 Ohio St.3d 433, 456, 1999-Ohio-281, 709 N.E.2d 140, 161. Such backgrounds may provide less "stability and moral instruction than most people have," but "even backgrounds far worse . . . are seldom accorded major weight." *Id.* See also *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶265 (decisive weight seldom given to unstable childhoods). Particularly where there is no connection between the alleged dysfunction and the crime, such background evidence is entitled to little weight. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶331.

Mental health concerns. Belton's alleged bipolar disorder, ADHD, and chemical dependencies are not mental diseases or defects that preclude Belton from

appreciating the criminality of his conduct or conforming his conduct to the requirements of the law. Additionally, there is no evidence that the alleged bipolar disorder, ADHD or chemical dependencies were causally related to the crime. *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961; 911 N.E.2d 242, ¶¶325-326; and *Lang*, ¶¶336.

Under the most compelling circumstances, such traits, when proven by the preponderance of the evidence, are entitled to "some weight." *State v. Scott*, 101 Ohio St.3d 31, 2004-Ohio-10, 800 N.E.2d 1133, ¶¶106. *But see State v. Johnson*, 88 Ohio St.3d 95, 123, 2000-Ohio-276, 723 N.E.2d 1054 (personality disorder and drug dependence entitled to "some, but very little, weight" in mitigation).

Remorse. The video recording of the shooting and its aftermath does not show Belton exhibiting any remorse or making any efforts to assist Dugan. Likewise, Belton's own account of his activities after the shooting fail to suggest any significant sorrow-- Belton went to Burger King and shopped for shoes in the hours immediately after he robbed and shot Mr. Dugan.

Even after Belton was arrested, remorse is not evident in his behavior. In fact, he asked police to bring his new shoes when he was being taken to the police station for questioning. And once there, he was heard instructing Christopher Wilson to tell everyone that Bolton had given him up, to make shirts with Belton's pictures on them to wear to the trial, and to send money and naked pictures while he was in jail. As Dr. Connell's report stated, "This stunning lack of remorse and display of callousness and grandiosity, provides possibly the best insight into Mr. Belton's emotional connection to

the killing of Mr. Dugan." (Connell Report, Exhibit 96, at p. 10.)

Certainly Belton is reported to have expressed regret for his actions. Dymon Bolton reported that Belton stated "I think I killed him," but "he didn't mean to do it." (Exhibit T.) Linda Berry said that Belton told her that he leaned across the counter to have Dugan get him something, that he was working with the safety when the shot was fired, and that he seemed remorseful. (Exhibit V.) However, some of his regrets were expressed in the context of realizing the potential consequences to himself: "Rest of my 22 years is going down the fucking drain. Got yourself in some shit." (Exhibit 90A)

Belton's actions immediately after the shooting fail to reveal any remorse. Those actions carry more weight than his words to other witnesses after the evidence against him was substantial. As this court has noted, "retrospective remorse is to be accorded little weight in mitigation," while "remorse which leads to surrender and confession is a more impressive factor." *State v. Wiles*, 59 Ohio St.3d 71, 93, 571 N.E.2d 97 (1991), quoting *Post*, 32 Ohio St.3d 380, 394, 513 N.E.2d 754, 768 (1987) and citing *State v. Hicks*, 43 Ohio St.3d 72, 80, 538 N.E.2d 1030, 1039 (1989).

Cooperation with police. Belton initially denied any involvement with the homicide or having a pistol. Eventually, Belton said that "D" had committed the shooting, but that he could assist police by getting the gun and hoodie "D" wore during the shooting. Belton finally confessed to being the shooter, but said that he gave the gun back to "D" and "D" hid it in some bushes. The gun was not found in the bushes but nearby in a hole, covered over by a stump or a log.

Belton's assistance with the recovery of the firearm are entitled to some weight,

but that assistance is diminished by his initial lies to law enforcement. See *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶247 (confession and cooperation are mitigating, but their weight is diminished when the defendant initially blamed other individuals); and *White*, 85 Ohio St.3d 433, 456, 1999-Ohio-281, 709 N.E.2d 140 (turning one's self in and confessing are entitled to significant weight but the weight is limited by the lack of defendant's complete honesty).

Of course, Belton also entered a plea of no contest to the charges and specifications. Such recognition of responsibility is entitled to little weight when it occurs only after changing stories several times. *State v. Stumpf*, 32 Ohio St.3d 95, 106, 512 N.E.2d 598 (1987).

Adaptation to prison life. Belton also argued that he adapted well to prison life, with a decreasing number of disciplinary incidents as he awaited trial. However, there was evidence that he was disciplined for conduct such as engaging in physical altercations, possession of illicit pills on two separate occasions, possession of a broom stick without bristles, and yelling obscenities to a shift commander and ultimately challenging the commander to fight, saying "I'm facing the death penalty. I ain't got nothing to lose." (Exhibit 200.)

The evidence related to Belton's adaptation to prison life was not uniformly favorable. Given the inconsistency in the evidence, Belton's adaptation to prison life and the ability to function well in the confines of the penal system should be assigned "very minimal weight in mitigation." *State v. Allard*, 75 Ohio St.3d 482, 501-502, 1996-Ohio-208, 663 N.E.2d 1277.

Other mitigating factors are simply inapplicable. Belton did not contend that the victim induced or facilitated the offense. See R.C. 2929.04(B)(1). He did not contend that he was under duress, coercion or strong provocation at the time of the crime. R.C. 2929.04(B)(2). Belton's own expert conceded that he did not believe Belton that lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law because of a mental disease or defect. R.C. 2929.04(B)(3). Finally, there was no suggestion that Belton was not the principal offender in the crime.

C. The death sentence is proportionate to other, similar cases in which death was imposed.

Belton argues that this court "has reviewed a number of death sentences," but "not one of those cases bears any significant relationship to this one." (Brief of Appellant at p. 110.) In fact, this court has found the death penalty to be appropriate and proportionate in similar cases involving murder during the course of aggravated robbery. See, e.g., *State v. Eley*, 77 Ohio St.3d 174, 1996-Ohio-323, 672 N.E.2d 640 (murder by shooting of store clerk in a market); *State v. Bey*, 85 Ohio St.3d 487, 1999-Ohio-283, 709 N.E.2d 484 (murder by stabbing of employee of retail store during robbery); and *State v. Mills*, 62 Ohio St.3d 357, 582 N.E.2d 972 (1992) (murder committed during the course of a bank robbery). Prior to the availability of direct review, the Sixth Appellate District had also upheld the death penalty in a robbery-murder case. See *State v. Esparza*, 6th Dist. No. L-84-225, 1986 Ohio App. LEXIS 7956, 1-2, affirmed 39 Ohio St.3d 8, 529 N.E.2d 192 (1988) (murder by shooting during robbery of carry out).

The nature and circumstances of Belton's crime do not provide any mitigation. Belton "participated in a robbery where, under the circumstances, a murder was likely to occur." *Eley, supra*, 77 Ohio St.3d at 189. Moreover, the victim "fully complied with the demands appellant made of him, offered no resistance, and presented no threat," but Belton nevertheless "did not simply walk away from the robbery" after taking money and the phone cards. Rather, Belton also took Dugan's life, despite the lack of need to do so. *Cf. State v. Raglin*, 83 Ohio St.3d 253, 274, 1998-Ohio-110, 699 N.E.2d 482. Immediately afterward, Belton did not demonstrate remorse, but went with friends for a meal at Burger King and to shop for new shoes. *Cf. Bey, supra*, 85 Ohio St.3d at 508 (defendant ransacked store, taking money and merchandise and finally the victim's car from the parking lot).

This court has approved the death penalty in these cases when mitigating evidence was comparable or stronger than in this case. *See Bey*, 85 Ohio St.3d at 506-509 (defendant was abandoned as a baby, raised in an abusive atmosphere, suffered long-term depression and serious personality disorder with antisocial and paranoia features, had some college and employment and drug and alcohol use); and *State v. McNeill*, 83 Ohio St.3d 438, 454, 1998-Ohio-293, 700 N.E.2d 596 (troubled upbringing, nineteen years old, borderline intelligence with dyslexia, drug and alcohol use, did as much as possible for his illegitimate child).

In fact, this court has considered a remarkably similar case in which the defendant shot a non-threatening victim after robbing him, but sought to mitigate the crime with evidence of his dysfunctional upbringing. *See Raglin, supra*. Like Belton,

Raglin moved frequently as a young child, and like Belton's mother, Raglin's mother abused alcohol and drugs. Raglin witnessed his mother shoot and wound his father during a domestic dispute, and Raglin's father was incarcerated on several occasions. His father testified during the second phase of Raglin's trial from a prison where he was serving a 20-year sentence. Raglin's mother had numerous boyfriends and gave birth to two additional children from liaisons with different men, and she raised her children in homes "characterized by extreme filth and inadequate facilities," or lived with them in tack rooms near horse stables with no kitchen, electricity, plumbing or privacy. Raglin had a history of self-destructive behavior as a child, including the use of alcohol (furnished by his mother) beginning at nine years of age. *Id.* at 268-270.

Raglin found that the combined mitigating factors were stronger than the mitigation in most death penalty cases, but concluded that the mitigating factors were heavily counterbalanced by the aggravating circumstance of R.C. 2929.04(A)(7). The same result is appropriate in this case, in which the circumstances of the crime are comparable, but the mitigating factors are weaker.

Counterproposition of Law No. 20: The doctrine of cumulative error is inapplicable when no error exists.

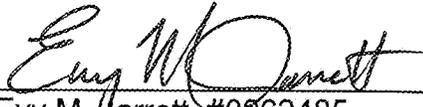
Belton has not shown the existence of multiple harmless errors. The doctrine of cumulative error is therefore inapplicable and provides no basis for reversing the panel's verdict and judgment in this case. *State v. Garner*, 74 Ohio St.3d 49, 64, 1995-Ohio-168, 656 N.E.2d 623. See also *Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 1211, ¶222.

CONCLUSION

For all the reasons set forth, the judgment and sentence should be affirmed.

Respectfully submitted,

JULIA R. BATES, PROSECUTING ATTORNEY
LUCAS COUNTY, OHIO

By: 
Evy M. Jarrett, #0062485
Assistant Prosecuting Attorney

CERTIFICATION

I certify that a copy of the foregoing was sent via ordinary U.S. Mail this 3^d
day of July, 2013, to Spiros P. Cocoves at scocoves@gmail.com and 610 Adams
Street, 2nd Floor, Toledo, Ohio 43604-1423.


Evy M. Jarrett, #0062485
Assistant Prosecuting Attorney

APPENDIX

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LUCAS COUNTY

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO 2013 APR 3 P 2:50

COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

STATE OF OHIO

CASE NO. CR 201003253

PLAINTIFF,

JUDGE RUTH ANN FRANKS

VS.

ORDER

JOHN F. WINFIELD

DEFENDANT,

This cause is before the Court on Defendant's Motion to Prohibit the Court from Presenting the Death Penalty to the Jury as a Sentencing Option. Prior to ruling on the motion, the Court has carefully read the memoranda of counsel and the relevant law.

The Defendant argues that the motion must be granted based on the claim that House Bill 86, which became effective on September 30, 2011, amended O.R.C. 2929.11(A) and such amendment effectively repealed the death penalty in Ohio.

After a careful examination of Defendant's arguments, within the context of House Bill 86, O.R.C. 2929.11(A) and the relevant law, the Court finds that the Ohio legislature, through its passage of House Bill 86, has not repealed the death penalty. The Court further finds that the denial of the instant motion does not deny the Defendant due process as guaranteed by the Fifth,

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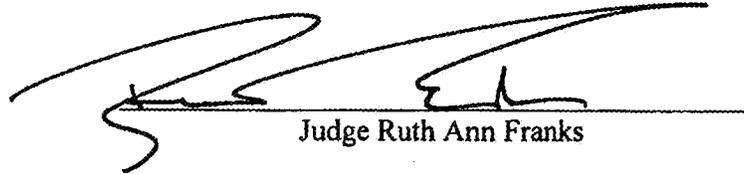
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Sixth, Eighth and Fourteenth Amendments to the United State Constitution and the corresponding rights as guaranteed by the Ohio Constitution.

Based upon the foregoing, the Court finds Defendant's Motion to Prohibit the Court from Presenting the Death Penalty to the Jury as a Sentencing Option not well taken and denied.

April 3, 2013



Judge Ruth Ann Franks

cc: J. Christopher Anderson
Frank H. Spryszak
Spiros P. Cocoves
Jane E. Roman

SCANNED
SCANNED

Case Number: G-4801-CR-0201003253-000
STATE OF OHIO V. JOHN F WINFIELD

PRAECIPE

TO THE CLERK:

Within three days of journalization, please serve upon all parties notice of the judgment in a manner prescribed by Civ. R. 5(B) and note the service in the appearance docket (see below).

April 3, 2013



JUDGE RUTH ANN FRANKS

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42 USCS § 1983

UNITED STATES CODE SERVICE

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*** Current through PL 113-14, approved 6/13/13 ***

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS
GENERALLY

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42 USCS § 1983

THE CASE NOTES SEGMENT OF THIS DOCUMENT HAS BEEN SPLIT INTO 13
DOCUMENTS.

THIS IS PART 1.

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§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

History:

(R. S. § 1979; Dec. 29, 1979, P.L. 96-170, § 1, 93 Stat. 1284; Oct. 19, 1996, P.L. 104-317, Title III, § 309(c), 110 Stat. 3853.)

42 USCS § 1983

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Page's Ohio Revised Code Annotated:

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*** Annotations current through April 22, 2013 ***

TITLE 29. CRIMES -- PROCEDURE

CHAPTER 2903. HOMICIDE AND ASSAULT

HOMICIDE

Go to the Ohio Code Archive Directory

ORC Ann. 2903.01 (2013)

§ 2903.01. Aggravated murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, trespass in a habitation when a person is present or likely to be present, terrorism, or escape.

(C) No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense.

(D) No person who is under detention as a result of having been found guilty of or having pleaded guilty to a felony or who breaks that detention shall purposely cause the death of another.

(E) No person shall purposely cause the death of a law enforcement officer whom the offender

knows or has reasonable cause to know is a law enforcement officer when either of the following applies:

- (1) The victim, at the time of the commission of the offense, is engaged in the victim's duties.
- (2) It is the offender's specific purpose to kill a law enforcement officer.

(F) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(G) As used in this section:

- (1) "Detention" has the same meaning as in section 2921.01 of the Revised Code.
- (2) "Law enforcement officer" has the same meaning as in section 2911.01 of the Revised Code.

History:

134 v H 511 (Eff 1-1-74); 139 v S 1 (Eff 10-19-81); 146 v S 239 (Eff 9-6-96); 147 v S 32 (Eff 8-6-97); 147 v H 5 (Eff 6-30-98); 147 v S 193 (Eff 12-29-98); 149 v S 184. Eff 5-15-2002; 2011 HB 86, § 1, eff. Sept. 30, 2011.

Section Notes:

Editor's Notes

Not analogous to former RC § 2903.01 (GC § 12423-1; 109 v 45; 121 v 557 (572); Bureau of Code Revision, 10-1-53; 126 v 114), repealed 134 v H 511, § 2, eff 1-1-74.

EFFECT OF AMENDMENTS

The 2011 amendment inserted "trespass in a habitation when a person is present or likely to be present" in (B).

1974 Committee Comment to H 511

The first part of this section restates the former crime of premeditated murder so as to embody the classic concept of the planned, cold-blooded killing while discarding the notion that only an instant's prior deliberation is necessary. By judicial interpretation of the former Ohio law, murder could be premeditated even though the fatal plan was conceived and executed on the spur of the moment. See, *State v. Schaffer*, 113 OApp 125, 17 O.O. 2d 114, 177 N.E.2d 534 (Lawrence Co.

App., 1960). The section employs the phrase, "prior calculation and design," to indicate studied care in planning or analyzing the means of the crime, as well as a scheme compassing the death of the victim. Neither the degree of care nor the length of time the offender takes to ponder the crime beforehand are critical factors in themselves, but they must amount to more than momentary deliberation.

The second part of the section defines the offense of felony murder. The requirement that the killing must be purposeful is retained. See, *Turk v. State*, 48 OApp 489, 2 O.O. 96, 194 N.E. 425 (Cuyahoga Co. App., 1934), *aff'd* 129 Ohio St. 245, 194 N.E. 453. The section expands upon the former offense of felony murder by listing kidnapping and escape, in addition to rape, arson, robbery and burglary, as the felonies during which a purposeful killing constitutes aggravated murder.

Aggravated murder is a capital offense, for which the penalty may be death or imprisonment for life. In addition, the offender may be fined up to \$ 25,000. If any one of seven aggravating circumstances is specified in the indictment and proved beyond a reasonable doubt, and none of three mitigating circumstances is established by a preponderance of the evidence, the penalty is death. Otherwise, the penalty is life imprisonment. The penalties, the procedure for determining the penalty to be imposed in a given case, and the lists of aggravating and mitigating circumstances are set forth in sections 2929.02, 2929.03, and 2929.04.

Transition -- capital offenses.

Persons charged with a capital offense committed prior to January 1, 1974, must be tried under the law as it existed at the time of the offense and, if convicted, sentenced to life imprisonment. If the section defining the offense provides for a lesser penalty under the circumstances of a particular case, then the lesser penalty must be imposed in that case.

Persons committing aggravated murder (the only capital offense in the new code) on and after January 1, 1974, must be charged and tried under the new law and, if convicted, may be subject to the death penalty. See, sections 2903.01, 2929.02 to 2929.04, and 2941.14.

ORC Ann. 2903.01

ORC Ann. 2911.01

Practitioner's Toolbox History Case Notes Section Notes Resources & Practice Tools Related Statutes & Rules Cross-References to Related Statutes > Penalties, RC § 2929.11 et seq. > Category two offense, RC § 2152.02. > Offense of violence, RC § 2901.01. More... Comparative Legislation > CA--Cal Pen Code § 212.5 > FL--Fla. Stat. § 812.13 > IL--720 Ill. Comp. Stat. § 5/18-2 More...

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TITLE 29. CRIMES -- PROCEDURE

CHAPTER 2911. ROBBERY, BURGLARY, TRESPASS AND SAFECRACKING
ROBBERY

Go to the Ohio Code Archive Directory

ORC Ann. 2911.01 (2013)

§ 2911.01. Aggravated robbery

(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;

(2) Have a dangerous ordnance on or about the offender's person or under the offender's control;

(3) Inflict, or attempt to inflict, serious physical harm on another.

(B) No person, without privilege to do so, shall knowingly remove or attempt to remove a deadly weapon from the person of a law enforcement officer, or shall knowingly deprive or attempt to deprive a law enforcement officer of a deadly weapon, when both of the following apply:

(1) The law enforcement officer, at the time of the removal, attempted removal, deprivation, or attempted deprivation, is acting within the course and scope of the officer's duties;

(2) The offender knows or has reasonable cause to know that the law enforcement officer is a law enforcement officer.

(C) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

(D) As used in this section:

(1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

(2) "Law enforcement officer" has the same meaning as in section 2901.01 of the Revised Code and also includes employees of the department of rehabilitation and correction who are authorized to carry weapons within the course and scope of their duties.

History:

134 v H 511 (Eff 1-1-74); 139 v S 199 (Eff 1-5-83); 140 v S 210 (Eff 7-1-83); 146 v S 2 (Eff 7-1-96); 147 v H 151. Eff 9-16-97.

Section Notes:

Editor's Notes

Not analogous to former RC § 2911.01 (RS § 7076; 70 v 39; 73 v 20; 74 v 41; GC § 13104; 124 v 466; Bureau of Code Revision, 10-1-53; 129 v 344), repealed 134 v H 511, § 2, eff 1-1-74.

1974 Committee Comment to H 511

This section is framed around the precept that the difference between simple theft and robbery should be that robbery contains an element of actual or threatened personal harm to the victim; and that the degree of actual or potential harm involved should determine the seriousness of a robbery. Thus, aggravated robbery includes not only robbery while armed, but also robbery in which the offender inflicts or attempts serious personal harm, whether he is armed or not, since in both cases there is a high degree of actual or potential harm to persons.

Theft is the basic element in the section, although attempted theft, actual commission of a theft, and flight after the attempt or commission are all included. Thus, a shoplifter who brandishes a gun during his getaway is guilty of an offense under the section. Under former law, the force was required to be in the taking and not in the escape. See, *State v. Strear*, 10 Ohio N.P.(NS) 204, 25 O. D. 277 (1910); *Hanson v. State*, 43 Ohio St. 376, 1 N.E. 136 (1885). Examples of violation include the purse-snatcher who knocks an old lady down and thus causes her to break her hip, the pickpocket who when discovered makes a break for freedom and seriously injures a bystander impeding his flight, and the stick-up artist who relieves another of his wallet at knifepoint but does not harm or attempt to harm his victim.

Aggravated robbery is a felony of the first degree.

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Citation: **orc 2929.02**

ORC Ann. 2929.02

Practitioner's Toolbox

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR MURDER

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ORC Ann. 2929.02 (2013)

§ 2929.02. Penalties for aggravated murder or murder

(A) Whoever is convicted of or pleads guilty to aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.022 [2929.02.2], 2929.03, and 2929.04 of the Revised Code, except that no person who raises the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code and who is not found to have been eighteen years of age or older at the time of the commission of the offense shall suffer death. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) (1) Except as otherwise provided in division (B)(2) or (3) of this section, whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life.

(2) Except as otherwise provided in division (B)(3) of this section, if a person is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code, the victim of the offense was less than thirteen years of age, and the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, the court shall impose an indefinite prison term of thirty years to life pursuant to division (B)(3) of section 2971.03 of the Revised Code.

(3) If a person is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code and also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that were included in the indictment, count in the

indictment, or information that charged the murder, the court shall impose upon the offender a term of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(4) In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to the offender or to the dependents of the offender, or will prevent the offender from making reparation for the victim's wrongful death.

(D) (1) In addition to any other sanctions imposed for a violation of section 2903.01 or 2903.02 of the Revised Code, if the offender used a motor vehicle as the means to commit the violation, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of section 4510.02 of the Revised Code.

(2) As used in division (D) of this section, "motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

History:

134 v H 511 (Eff 1-1-74); 139 v S 1 (Eff 10-19-81); 146 v H 180 (Eff 1-1-97); 147 v S 107. Eff 7-29-98; 151 v H 461, § 1, eff. 4-4-07; 152 v S 10, § 1, eff. 1-1-08.

Section Notes:

Editor's Notes

The effective date is set by § 3 of 152 v S 10.

EFFECT OF AMENDMENTS

152 v S 10, effective January 1, 2008, rewrote (B).

151 v H 461, effective April 4, 2007, added (D).

1974 Committee Comment to H 511

This section establishes the penalty for aggravated murder as life imprisonment or death, plus an optional fine of up to \$ 25,000. The penalty to be imposed in a given case of aggravated murder is determined by the procedure given in sections 2929.03 and 2929.04. The penalty for murder is given as imprisonment for 15 years to life, plus an optional fine of \$ 15,000. A fine for aggravated murder or murder may not be imposed unless the crime was committed for hire or profit, or in support of organized crime. Also, a fine or fines may not be imposed, which to the extent not suspended exceeds the amount the offender can pay without undue hardship to himself or his dependents, or which will prevent him from making reparation for the victim's death.

Related Statutes & Rules:

Cross-Reference to Related Statutes:

Additional fine for certain offenders; collection of fines; crime victims recovery fund, RC § 2929.25.

Aggravated murder, RC § 2903.01.

Annual capital case status report, RC § 109.97.

Basic prison terms, RC § 2929.14.

Execution of death sentence, RC §§ 2949.21 to 2949.31.

Guidance by degree of felony, RC § 2929.13.

Murder, RC § 2903.02.

Sentencing of sexually violent offender with predator specification, RC § 2971.03.

Time of execution in capital cases, RC § 2947.08.

Ohio Constitution:

Cruel and unusual punishment, Ohio Const. art I, § 9.

Ohio Rules:

Sentence, Crim.R. 32.

OH Administrative Code:

Department of rehabilitation and correction --

Institutional rules: death row. OAC 5120-9-12.

Sentencing: life sentences; eligibility for parole. OAC 5120-2-10.

Practice Manuals & Treatises:

Anderson's Ohio Criminal Practice and Procedure § 5.102 Generally

ALR

Application of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) to state death penalty proceedings. 110 ALR5th 1.

Downward departure under state sentencing guidelines permitting downward departure for defendants with significantly reduced mental capacity, including alcohol or drug dependency. 113 ALR5th 597.

Propriety of carrying out death sentences against mentally ill individuals. 111 ALR5th 491.

Case Notes:

ANALYSIS

Constitutionality

Generally

- ☒ Evidence
- ☒ --Sufficient
- ☒ Fine
- ☒ Guilty or no contest plea
- ☒ Prior convictions
- ☒ Ranges
- ☒ Resentencing
- ☒ Rights of capital defendant
- ☒ Sentence
- ☒ Sentence improper
- ☒ Sentence proper

☒ CONSTITUTIONALITY.

There was no Blakely violation under U.S. Const. amend. VI or Ohio Const. art. 1, § 10 by the trial court's imposition of a sentence of 15 years to life after defendant was convicted of murder, pursuant R.C. 2903.02(D) and 2929.02(B), as there was only the one indefinite term of punishment to impose on such a conviction for violation of R.C. 2929.03, and no additional findings were required. *State v. Haney*, 2006 Ohio App. LEXIS 3855, 2006 Ohio 3899, (July 31, 2006).

☒ GENERALLY.

Where the non-minimum, consecutive terms of imprisonment imposed on defendant's convictions were within the statutory limits pursuant to R.C. 2929.02(B) and 2929.14(A)(1) and (E), the trial court did not abuse its discretion in imposing such sentences upon resentencing post-Foster. Imposition of sentences post-Foster did not constitute an ex post facto law under U.S. Const. art. I, § 10, did not violate defendant's due process rights under U.S. Const. amend. XIV, and did not violate the rule of lenity under R.C. 2901.04. *State v. Robinson*, 2007 Ohio App. LEXIS 3265, 2007 Ohio 3577, (July 13, 2007).

☒ EVIDENCE.

Weight and sufficiency supported defendant's conviction for murder, in violation of R.C. 2903.02 (A) and 2929.02, as well as a firearm specification under R.C. 2941.145, such that denial of defendant's acquittal motion under Crim.R. 29 was proper; there were multiple witnesses who saw defendant with a gun, standing behind the victim when the victim was fatally shot in the back, such that defendant's actions were inferred to have been committed purposefully. *State v. White*, 2008 Ohio App. LEXIS 2524, 2008 Ohio 2990, (June 20, 2008).

☒ --SUFFICIENT.

Defendant's convictions for attempted burglary and possession of criminal tools, in violation of R.C. 2929.02, 2911.12, and 2923.24, were supported by the weight and the sufficiency of the evidence, where the State proved that defendant's actions in peering into the windows of a house and walking along the side of the house, without any apparent purpose to be on the premises, and the fact that he had a screwdriver, gloves, and a face-covering mask on his person, as well as his admission to a police officer that he was initially thinking of robbing the house but then changed his mind, were a "substantial step" towards the conduct that was to culminate in the criminal act. *State v. Bacon*, 2005 Ohio App. LEXIS 5616, 2005 Ohio 6238, (Nov. 23, 2005).

☒ FINE.

As the court erred as a matter of law by imposing a fine of \$ 20,000, given that that under R.C. 2929.02(B)(4) the maximum allowable fine for murder was \$ 15,000, the matter had to be remanded for imposition of the correct fine. *State v. Warmus*, 197 Ohio App. 3d 383, 967 N.E.2d 1223, 2011 Ohio App. LEXIS 4732, 2011 Ohio 5827, (2011), writ of certiorari denied by 133 S. Ct. 335, 184 L. Ed. 2d 157, 2012 U.S. LEXIS 6486, 81 U.S.L.W. 3167 (U.S. 2012).

Where a fine is imposed upon the conviction of a defendant and that defendant dies prior to the collection of the fine, and before there has been a levy against the property of the defendant, the fine cannot be collected from the estate of the defendant: *State v. Blake*, 53 Ohio App. 2d 101, 371 N.E.2d 843 (1977).

☛ GUILTY OR NO CONTEST PLEA.

Sentence imposed upon defendant's plea of guilty to murder, under R.C. 2903.02, was not contrary to defendant's constitutional jury trial rights as outlined in *Blakely* because the statutory scheme made defendant susceptible to only one punishment: an indefinite prison term of 15 years to life, under R.C. 2929.02(B). *State v. Orta*, 2006 Ohio App. LEXIS 1866, 2006 Ohio 1995, (Apr. 24, 2006).

Trial counsel did not render ineffective assistance of counsel pursuant to Ohio Const. art. I, § 10 by coercing the inmate's guilty plea to aggravated murder by stating that if the inmate did not accept the plea, the inmate was to face the death penalty; there was no coercion, as trial counsel's statement was correct, given that aggravated murder pursuant to R.C. 2903.01 was a capital offense under R.C. 2929.02. *State v. Isbell*, 2004 Ohio App. LEXIS 2053, 2004 Ohio 2300, (2004).

☛ PRIOR CONVICTIONS.

The provisions of R.C. 2941.14.2 and 2929.11 concerning the effect of a prior conviction do not apply in a prosecution for murder. It is error for the court in a prosecution for murder to instruct the jury that defendant's prior voluntary manslaughter conviction may be considered as bearing on defendant's defense of accident or mistake: *State v. Banks*, 78 Ohio App. 3d 206, 604 N.E.2d 219, 1992 Ohio App. LEXIS 456 (1992).

☛ RANGES.

Defendant's sentence of 23 years to life for murder, with a firearm specification, and having a weapon while under a disability, fell within the applicable ranges for the offenses for which he was convicted. *State v. Trollinger*, 2012 Ohio App. LEXIS 2113 (May 30, 2012).

☛ RESENTENCING.

Because the trial court considered the purposes and principles of sentencing under R.C. 2929.11 and the seriousness and recidivism factors required by R.C. 2929.12, the trial court did not engage in impermissible judicial fact-finding when it resentenced defendant to a total of 23 years under R.C. 2929.02, 2929.14(A)(1), for murder and aggravated robbery, both with firearm specifications. *State v. Thomas*, 2009 Ohio App. LEXIS 4056, 2009 Ohio 4812, (Sept. 10, 2009).

☛ RIGHTS OF CAPITAL DEFENDANT.

The defendant was entitled to the full rights of a capital defendant because he was indicted for a capital crime with death-penalty specifications, even though he could not receive the death penalty. Thus the victim's family should not have been allowed to make sentencing

recommendations. *State v. Harwell*, 149 Ohio App. 3d 147, 776 N.E.2d 524, 2002 Ohio App. LEXIS 4500, 2002 Ohio 4349, (2002), affirmed by 102 Ohio St. 3d 128, 2004 Ohio 2149, 807 N.E.2d 330, 2004 Ohio LEXIS 1041 (2004).

SENTENCE.

Defendant's sentence of life without parole for aggravated murder was allowed under the law; the trial judge indicated that the instant murder was the worst murder he had ever seen with the victim, defendant's spouse, suffering both physical and psychological harm at a time when she was severely incapacitated and noted that defendant deliberately planned the attack and carried it out ruthlessly and never showed any remorse afterward. The trial court obviously concluded that although defendant's cognitive abilities and emotional state were compromised, defendant still understood right from wrong and carried out a deliberate plan to kill his wife in a ruthless manner. *State v. Beach*, 2012 Ohio App. LEXIS 2068, 2012 Ohio 2338, (May 25, 2012).

Defendant's 36-year-to-life sentence, imposed upon his conviction for aggravated murder with firearm and gang specifications, was not contrary to law as it was within the statutory range in R.C. 2903.03(A); 2929.02; 2929.03(A)(1); 2941.145(A); 2929.14(D)(1)(a)(ii); 2941.142; 2929.14(I); the trial court expressly stated that it had considered the principles and factors contained in R.C. 2929.11 and 2929.12; and defendant was afforded his allocution rights pursuant to Crim.R. 32(A)(1). *State v. Bickerstaff*, 2012 Ohio App. LEXIS 1488, 2012 Ohio 1693, (Mar. 30, 2012).

Trial court committed no error in sentencing because it was presumed that it considered the factors in R.C. 2929.11 and 2929.12 and defendant did not present any evidence to rebut that presumption. In addition, each of the sentences fell within the prescribed range for the degree of felony committed. *State v. Fetty*, 2011 Ohio App. LEXIS 3284, 2011 Ohio 3894, (Aug. 5, 2011).

SENTENCE IMPROPER.

Defendant's sentence for murder, in violation of R.C. 2903.02, was contrary to law. Pursuant to R.C. 2929.02(B)(1), defendant should have been sentenced to an indefinite term of 15 years to life instead of life in prison with eligibility for parole after 15 years. *State v. Kemp*, 2013 Ohio App. LEXIS 126, 2013 Ohio 167, (Jan. 24, 2013).

Trial court erred in sentencing defendant to 18 years' to life imprisonment for murder, when the lawful term of incarceration for murder under R.C. 2929.02(B)(1) was 15 years to life. *State v. Garnett*, 2010 Ohio App. LEXIS 2823, 2010 Ohio 3303, (July 16, 2010).

SENTENCE PROPER.

Defendant did not receive a void sentence because he was ordered to serve 15 full years' before he would be eligible for parole as under R.C. 2929.02(B), the minimum term for murder was 15 years', and defendant was not entitled to good time credit under R.C. 2967.13. *State v. Agosto*, 2012 Ohio App. LEXIS 4050, 2012 Ohio 4606, (Oct. 4, 2012).

Since defendant did not receive the death penalty for aggravated murder under R.C. 2903.01(B), the trial court had no choice but to sentence him to life in prison on that offense. All of the sentences were within the statutory ranges and were not so disproportionate to the offenses as to shock the community's sense of justice because the case involved the brutal and horrific murder of defendant's wife (defendant raped her with a knife). *State v. Dieterle*, 2009 Ohio App. LEXIS 1656, 2009 Ohio 1888, (Apr. 24, 2009).

Because the sentence imposed for each count was within the terms authorized by the applicable statute, defendant's 57-year to life sentence for murder, attempted murder, and felonious

assault, was not a cruel and unusual punishment in violation of the Eight Amendment or Ohio Const. art. I, § 9. Further, the trial court's sentence, whether viewed incrementally as to each count or in its aggregate, was not shocking to a reasonable person nor was the penalty so greatly disproportionate to the offense as to shock the sense of justice of the community because defendant beat a two-year old girl to death, seriously injured her brother, and had a prior record. *State v. Stiles*, 2009 Ohio App. LEXIS 82, 2009 Ohio 89, (Jan. 12, 2009).

Maximum sentence imposed under R.C. 2929.02(B) for defendant's murder conviction under R.C. 2903.02 was appropriate as defendant had a weapon despite a prior felony record and shot the victim after a brief altercation, including a fatal shot after the victim had already fallen wounded to the ground. *State v. Reuelta*, 2007 Ohio App. LEXIS 5656, 2007 Ohio 6468, (Dec. 3, 2007).

Where the non-minimum, consecutive terms of imprisonment imposed on defendant's convictions were within the statutory limits pursuant to R.C. 2929.02(B) and 2929.14(A)(1) and (E), the trial court did not abuse its discretion in imposing such sentences upon resentencing post-Foster; imposition of sentences post-Foster did not constitute an ex post facto law under U.S. Const. art. I, § 10, did not violate defendant's due process rights under U.S. Const. amend. XIV, and did not violate the rule of lenity under R.C. 2901.04. *State v. Robinson*, 2007 Ohio App. LEXIS 3265, 2007 Ohio 3577, (July 13, 2007).

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Citation: **orc 2929.02**

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§ 2929.022. Determination of aggravating circumstances of prior conviction

Citation: **orc 2929.022**

ORC Ann. 2929.022

Practitioner's Toolbox

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR MURDER

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ORC Ann. 2929.022 (2013)

§ 2929.022. Determination of aggravating circumstances of prior conviction

(A) If an indictment or count in an indictment charging a defendant with aggravated murder contains a specification of the aggravating circumstance of a prior conviction listed in division (A) (5) of section 2929.04 of the Revised Code, the defendant may elect to have the panel of three judges, if the defendant waives trial by jury, or the trial judge, if the defendant is tried by jury, determine the existence of that aggravating circumstance at the sentencing hearing held pursuant to divisions (C) and (D) of section 2929.03 of the Revised Code.

(1) If the defendant does not elect to have the existence of the aggravating circumstance determined at the sentencing hearing, the defendant shall be tried on the charge of aggravated murder, on the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code, and on any other specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code in a single trial as in any other criminal case in which a person is charged with aggravated murder and specifications.

(2) If the defendant does elect to have the existence of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code determined at the sentencing hearing, then, following a verdict of guilty of the charge of aggravated murder, the panel of three judges or the trial judge shall:

(a) Hold a sentencing hearing pursuant to division (B) of this section, unless required to do otherwise under division (A)(2)(b) of this section;

(b) If the offender raises the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and is not found at trial to have been eighteen years of age or older at the time of the commission of the offense, conduct a hearing to determine if the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt. After conducting the hearing, the panel or judge shall proceed as follows:

(i) If that aggravating circumstance is proven beyond a reasonable doubt or if the defendant at trial was convicted of any other specification of an aggravating circumstance, the panel or judge shall impose sentence according to division (E) of section 2929.03 of the Revised Code.

(ii) If that aggravating circumstance is not proven beyond a reasonable doubt and the defendant at trial was not convicted of any other specification of an aggravating circumstance, except as otherwise provided in this division, the panel or judge shall impose sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender. If that aggravating circumstance is not proven beyond a reasonable doubt, the defendant at trial was not convicted of any other specification of an aggravating circumstance, the victim of the aggravated murder was less than thirteen years of age, and the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, the panel or judge shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(B) At the sentencing hearing, the panel of judges, if the defendant was tried by a panel of three judges, or the trial judge, if the defendant was tried by jury, shall, when required pursuant to division (A)(2) of this section, first determine if the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt. If the panel of judges or the trial judge determines that the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt or if they do not determine that the specification is proven beyond a reasonable doubt but the defendant at trial was convicted of a specification of any other aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, the panel of judges or the trial judge and trial jury shall impose sentence on the offender pursuant to division (D) of section 2929.03 and section 2929.04 of the Revised Code. If the panel of judges or the trial judge does not determine that the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt and the defendant at trial was not convicted of any other specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, the panel of judges or the trial judge shall terminate the sentencing hearing and impose sentence on the offender as follows:

(1) Subject to division (B)(2) of this section, the panel or judge shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(2) If the victim of the aggravated murder was less than thirteen years of age and the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, the panel or judge shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

History:

139 v S 1, Eff 10-19-81; 152 v S 10, § 1, eff. 1-1-08.

⚡ Section Notes:

Editor's Notes

The effective date is set by § 3 of 152 v S 10.

EFFECT OF AMENDMENTS

152 v S 10, effective January 1, 2008, in (A)(2)(b)(ii), inserted "except as otherwise provided in this division", and added the last sentence; rewrote (B); and made gender neutral changes.

⚡ Related Statutes & Rules:

Cross-Reference to Related Statutes:

Aggravated murder, RC § 2903.01.

Appellate review of death sentence, RC § 2929.05.

Parole eligibility, RC § 2967.13.

Penalties for murder, RC § 2929.02.

Reasonable doubt defined, RC § 2901.05.

ALR

Application of Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) to state death penalty proceedings. 110 ALR5th 1.

Application of death penalty to nonhomicide cases. 62 ALR5th 121.

Sufficiency of evidence, for death penalty purposes, to establish statutory aggravating circumstance that murder was committed in course of committing, attempting, or fleeing from other offense, and the like -- post-Gregg cases. 67 ALR4th 887.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant committed murder while under sentence of imprisonment, in confinement or correctional custody, and the like -- post-Gregg cases. 67 ALR4th 942.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant was previously convicted of or committed other violent offense, had history of violent conduct, posed continuing threat to society, and the like -- post-Gregg cases. 65 ALR4th 838.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstances that murder was committed for pecuniary gain, as consideration or in expectation of receiving something of monetary value, and the like -- post-Gregg cases. 66 ALR4th 417.

⚡ Case Notes:

ANALYSIS

⚡Constitutionality

⚡Generally

- ⌘ Applicability
- ⌘ Federal habeas corpus
- ⌘ Multiple counts

⌘ CONSTITUTIONALITY.

Court agreed with a state inmate's claim that a warden's complete failure to address the portion of the inmate's 28 U.S.C.S. § 2254 habeas corpus petition that challenged the constitutionality of Ohio's death penalty statute could only be taken as a concession that the claim was not defaulted or as a waiver of any default defense; the court allowed the claim to proceed. *Stojetz v. Ishee*, 389 F. Supp. 2d 858, 2005 U.S. Dist. LEXIS 27113 (2005).

⌘ GENERALLY.

R.C. 2929.022(A) does not provide a defendant with a blanket statutory right to preclude introduction of all evidence pertaining to prior purposeful killings which is otherwise admissible: *State v. Skatzes*, 104 Ohio St. 3d 195, 819 N.E.2d 215, 2004 Ohio LEXIS 2859, 2004 Ohio 6391, (2004).

⌘ APPLICABILITY.

R.C. 2929.03(A) was not in conflict with R.C. 2929.022 or R.C. 2929.03(C)(1), neither of which applied because the State did not allege an aggravating circumstance specification. As such, the trial court properly sentenced defendant under R.C. 2929.03(A) to a life prison term with parole eligibility after 30 years for aggravated murder. *State v. Phillips*, 2012 Ohio App. LEXIS 5133, 2012 Ohio 5950, (Dec. 17, 2012).

⌘ FEDERAL HABEAS CORPUS.

Court agreed with a state inmate's claim that a warden's complete failure to address the portion of the inmate's 28 U.S.C.S. § 2254 habeas corpus petition that challenged the constitutionality of Ohio's death penalty statute could only be taken as a concession that the claim was not defaulted or as a waiver of any default defense. *Stojetz v. Ishee*, 389 F. Supp. 2d 858, 2005 U.S. Dist. LEXIS 27113 (2005).

⌘ MULTIPLE COUNTS.

Because the federal habeas court was required to accept as binding the Ohio Supreme Court's interpretation of the interaction between the capital specification-election provision of R.C. 2929.022(A) and the rules for joinder and severance of criminal charges under Crim.R. 8, the court found that a death-sentenced Ohio inmate was not entitled to habeas relief under 28 U.S.C.S. § 2254 on the alleged ground that his waiver of a jury trial under R.C. 2945.05 was rendered involuntary by the state trial court's denial of his motion to sever offenses under R.C. 2903.01(A) and 2923.13(A)(2); the denial of the inmate's motion for severance did not constitute a denial of the inmate's U.S. Const. amend. XIV due process right to a fair trial and, therefore, the ruling did not render his waiver of a jury trial involuntary. *Davis v. Coyle*, 475 F.3d 761, 2007 U.S. App. LEXIS 1878 (6th Cir. 2007).

The court was not required to grant a motion to sever the counts of the indictment where the evidence of the prior killing was necessary to prove the offense of having a weapon while under a disability: *State v. Davis*, 38 Ohio St. 3d 361, 528 N.E.2d 925 (1988).

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ORC Ann. 2941.145

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2941. INDICTMENT
FORM AND SUFFICIENCY

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ORC Ann. 2941.145 (2013)

§ 2941.145. Specification that offender displayed, brandished, indicated possession of or used
firearm

(A) Imposition of a three-year mandatory prison term upon an offender under division (B)(1)(a) of section 2929.14 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense. The specification shall be stated at the end of the body of the indictment, count, or information, and shall be stated in substantially the following form:

"SPECIFICATION (or, SPECIFICATION TO THE FIRST COUNT). The Grand Jurors (or insert the person's or the prosecuting attorney's name when appropriate) further find and specify that (set forth that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense)."

(B) Imposition of a three-year mandatory prison term upon an offender under division (B)(1)(a) of section 2929.14 of the Revised Code is precluded if a court imposes a one-year or six-year mandatory prison term on the offender under that division relative to the same felony.

(C) The specification described in division (A) of this section may be used in a delinquent child proceeding in the manner and for the purpose described in section 2152.17 of the Revised Code.

(D) As used in this section, "firearm" has the same meaning as in section 2923.11 of the Revised Code.

Return to Practitioner's Toolbox History:

146 v S 2 (Eff 7-1-96); 148 v S 107 (Eff 3-23-2000); 148 v S 179, § 3. Eff 1-1-2002; 2011 HB 86, § 1, eff. Sept. 30, 2011.

Return to Practitioner's Toolbox Section Notes:

Editor's Notes

The effective date is set by section 5 of SB 179.

EFFECT OF AMENDMENTS

The 2011 amendment substituted "division (B)(1)(a)" for "division (D)(1)(a)" in the first sentence of the introductory language of (A) and in (B).

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TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2945. TRIAL
 TRIAL PROCEEDINGS

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ORC Ann. 2945.10 (2013)

§ 2945.10. Order of proceedings of trial

The trial of an issue upon an indictment or information shall proceed before the trial court or jury as follows:

- (A) Counsel for the state must first state the case for the prosecution, and may briefly state the evidence by which he expects to sustain it.
- (B) The defendant or his counsel must then state his defense, and may briefly state the evidence which he expects to offer in support of it.
- (C) The state must first produce its evidence and the defendant shall then produce his evidence.
- (D) The state will then be confined to rebutting evidence, but the court, for good reason, in furtherance of justice, may permit evidence to be offered by either side out of its order.
- (E) When the evidence is concluded, either party may request instructions to the jury on the points of law, which instructions shall be reduced to writing if either party requests it.
- (F) When the evidence is concluded, unless the case is submitted without argument, the counsel for the state shall commence, the defendant or his counsel follow, and the counsel for the state conclude the argument to the jury.

(G) The court, after the argument is concluded and before proceeding with other business, shall forthwith charge the jury. Such charge shall be reduced to writing by the court if either party requests it before the argument to the jury is commenced. Such charge, or other charge or instruction provided for in this section, when so written and given, shall not be orally qualified, modified, or explained to the jury by the court. Written charges and instructions shall be taken by the jury in their retirement and returned with their verdict into court and remain on file with the papers of the case.

The court may deviate from the order of proceedings listed in this section.

History:

GC § 13442-8; 113 v 123(180), ch 21, § 8; Bureau of Code Revision. Eff 10-1-53.

Related Statutes & Rules:

Cross-Reference to Related Statutes:

Magistrate courts; rules of evidence and procedure, RC § 2938.15.

Ohio Rules:

Instructions, CrimR 30.

Verdict, CrimR 31.

Comparative Legislation:

ORDER OF PROCEEDINGS: CA--Cal Pen Code § 1093

IL--725 Ill. Comp. Stat. § 5/111-2

IN--Burns Ind. Code Ann. § 35-37-2-1 et seq

KY--Ky RCr 9.42

NY--NY CLS CPL § 360.05

PA--Pa. R.C.P. No. 223, 224

Practice Manuals & Treatises:

Anderson's Ohio Criminal Practice and Procedure § 24.101 Generally

Jury Instructions:

OJI-CR 405.01 Delivery

ALR

Exclusion of public from state criminal trial in order to avoid intimidation of witness. 55 ALR4th 1196.

Exclusion of public from state criminal trial in order to prevent disturbance by spectators or

defendant. 55 ALR4th 1170.

Power of trial court to dismiss prosecution or direct acquittal on basis of prosecutor's opening statement. 75 ALR3d 649.

Propriety and prejudicial effect of prosecuting attorney acquiring new matter or points in closing summation in criminal case. 26 ALR3d 1409.

Propriety of court's limitation of time allowed counsel for summation or argument in criminal trial. 6 ALR3d 604.

Propriety of reopening criminal case in order to present omitted or overlooked evidence, after submission to jury but before return of verdict. 87 ALR2d 849.

Propriety of specific jury instructions as to credibility of accomplices. 4 ALR3d 351.

Prosecutor's reference in opening statement to matters not provable or which he does not attempt to prove as ground for relief. 16 ALR4th 810.

Right of accused to additional argument on matters covered by amended or additional instructions. 15 ALR2d 490.

⌘ Case Notes:

ANALYSIS

- ⌘ Generally
- ⌘--Opening statement by defense
- ⌘ Capital cases
- ⌘--Sentencing phase
- ⌘ Charge to jury
- ⌘--Included in record
- ⌘ Charges and instructions
- ⌘--Time for instructions
- ⌘--Chalkboard clarification
- ⌘--Comments by judge
- ⌘--Criminal Rule 30
- ⌘--Included in record on appeal
- ⌘--Special instructions
- ⌘--Time for instructions
- ⌘--Written jury instructions
- ⌘ Closing arguments
- ⌘ Comments by judge
- ⌘ Continuance
- ⌘ Deviation from usual order
- ⌘ Objections
- ⌘ Opening statement by prosecution
- ⌘ Presumptions
- ⌘ Rebuttal
- ⌘ Rebuttal evidence
- ⌘ Reopening for further testimony
- ⌘ Right to present a defense
- ⌘ Varying order of proceedings
- ⌘--Discretion of court

⌘ GENERALLY.

Where the trial court issued a judgment in the State's favor after the State's case-in-chief and where there was no evidence in the record that defendant waived his right to present a defense, defendant was deprived of an opportunity to present a defense in violation of U.S. Const. amend. V, VI and R.C. 2315.01, 2945.10, 2938.11. *State v. Bailey*, 2005 Ohio App. LEXIS 6008, 2005 Ohio 6694, (Dec. 19, 2005).

☛--OPENING STATEMENT BY DEFENSE.

Since defendant stated at trial that he did not have any evidence to present, it was difficult to see how defendant could have been prejudiced by not being permitted to present an opening statement outlining his evidence when he had no evidence to present. *State v. Dobrovich*, 2005 Ohio App. LEXIS 4314, 2005 Ohio 4688, (Aug. 31, 2005).

☛CAPITAL CASES.

☛--SENTENCING PHASE.

During the sentencing phase of a capital trial the state, having the burden of proving that aggravating circumstances outweigh the mitigating factors has the right to open and close arguments to the jury: *State v. Rogers*, 17 Ohio St. 3d 174, 478 N.E.2d 984 (1985).

☛CHARGE TO JURY.

☛--INCLUDED IN RECORD.

Pursuant to R.C. 2945.10(G), written instructions that are provided to a jury must be returned to the trial court, following the jury's deliberations, and the written instructions must then remain on file with the papers of the case, and, while the failure of a trial court to maintain written jury instructions with the "papers of the case" in violation of § 2945.10(G) is not a structural error, trial courts are, nevertheless, obligated to follow that provision's requirements. *State v. Hover*, 2005 Ohio App. LEXIS 5308, 2005 Ohio 5897, (Nov. 7, 2005).

☛CHARGES AND INSTRUCTIONS.

Defendant was not entitled to a new trial because he failed to allege any prejudice from the trial court instructing the jury the morning following the closing arguments. Defendant's mere statement that because the court did not follow R.C. 2945.10(G), defendant deserved a new trial, did not comply with the requirement of demonstrating prejudice and unfairness. *State v. Hawkins*, 2004 Ohio App. LEXIS 790, 2004 Ohio 855, (2004), reversed without opinion at 104 Ohio St. 3d 582, 2004 Ohio 7124, 820 N.E.2d 931, 2004 Ohio LEXIS 3074 (2004).

In a murder and felonious assault prosecution, where the trial court's written jury instructions on self-defense were of general application, and, in response to a question from the jury, it orally advised them that self-defense applied to both charges, it did not err in clarifying the written instructions, and defendant's substantial rights were not affected because the jury was fully instructed concerning the affirmative defense of self-defense as it applied to both charges. *State v. Hibbard*, 2003 Ohio App. LEXIS 4610, 2003 Ohio 5104, (2003).

A delay of twenty-five minutes between the conclusion of final argument to the jury and the charge of the court does not constitute error under R.C. 2945.10: *State v. Eaton*, 19 Ohio St. 2d 145, 249 N.E.2d 897 (1969).

⚡--TIME FOR INSTRUCTIONS.

Court did not err when it failed to charge the jury on the same day oral arguments ended because when both sides finished with their closing arguments on Friday afternoon, the trial judge noted that it was 4:45 p.m; the judge then allowed the jury to vote on whether they would like to hear the jury instructions that evening or whether they would rather return and be charged Monday morning. Based on the jury's vote, the court adjourned for the day, the jury was charged first thing Monday morning, and the court engaged in no other court business during the adjournment. *State v. Nunez*, 2010 Ohio App. LEXIS 4711, 2010 Ohio 5589, (Nov. 18, 2010).

⚡--CHALKBOARD CLARIFICATION.

Where the court wrote on a chalkboard to clarify its jury instructions, failure to include the contents of the chalkboard in the record on appeal was not prejudicial to the defendant: *State v. Morton*, 147 Ohio App. 3d 43, 768 N.E.2d 730, 2002 Ohio App. LEXIS 814, 2002 Ohio 813, (2002), appeal denied by 96 Ohio St. 3d 1469, 2002 Ohio 3910, 772 N.E.2d 1204, 2002 Ohio LEXIS 1837 (2002).

⚡--COMMENTS BY JUDGE.

Defendant's due process rights under Ohio Const. art. I, § 10 were not violated by the trial court's instructions to the jury on the definition of "constructive possession" for purposes of his drug charges, as it did not constitute an unconstitutional amendment of the indictment and the concept of possession involved actual and constructive possession. The trial court's deviation from the written instructions did not violate defendant's due process rights or R.C. 2945.10(G), although the court's interjection of comments and examples within the instructions did not strictly comply with the statutory mandates, as the comments were unbiased, the jury received the written instructions, and defendant failed to show how he was prejudiced. *State v. Felder*, 2006 Ohio App. LEXIS 5311, 2006 Ohio 5332, (Oct. 12, 2006).

⚡--CRIMINAL RULE 30.

Criminal Rule 30 supersedes R.C. 2945.10(G). Even where a court has reduced the jury instructions to writing, it is not precluded from answering the jury's questions of law during deliberations: *State v. Kersey*, 124 Ohio App. 3d 513, 706 N.E.2d 818, 1997 Ohio App. LEXIS 5660 (1997).

⚡--INCLUDED IN RECORD ON APPEAL.

The trial court is required to maintain the written jury instructions with the "papers of the case" and its failure to do so is an error, but such an error is a statutory, rather than constitutional, defect, and thus is not a structural error requiring automatic reversal; the court of appeals erred by reversing defendant's conviction without finding that, pursuant to the "plain error" standard of Crim.R. 52(B), his substantial rights were affected by the error. *State v. Perry*, 101 Ohio St. 3d 118, 802 N.E. 2d 643, 802 N.E.2d 643, 2004 Ohio LEXIS 263, 2004 Ohio 297, (Feb. 11, 2004).

The failure of the trial court to maintain written jury instructions with the "papers of the case" in violation of R.C. 2945.10(G) is not a structural error: *State v. Perry*, 101 Ohio St. 3d 118, 802 N.E.2d 643, 2004 Ohio LEXIS 263, 2004 Ohio 297, (2004).

Defendant failed to demonstrate that the failure to include the written instructions in the record resulted in prejudice to him as defendant pointed to no prejudice whatsoever from this, and the record showed that neither party objected to the court's instructions as read to the jury; absent a

showing of prejudice, the court's failure to include the written instructions in the record was harmless error. *State v. Gooden*, 2003 Ohio App. LEXIS 2620, 2003 Ohio 2864, (2003), appeal denied by 100 Ohio St. 3d 1432, 2003 Ohio 5396, 797 N.E.2d 512, 2003 Ohio LEXIS 2725 (2003).

Failure to include the written jury instructions in the record on appeal, or required by R.C. 2945.10(G), is a violation of the defendant's due process rights: *State v. Smith*, 87 Ohio App. 3d 480, 622 N.E.2d 677, 1993 Ohio App. LEXIS 1962 (1993), dismissed by 67 Ohio St. 3d 1479, 620 N.E.2d 851, 1993 Ohio LEXIS 2146 (1993).

When written instructions are submitted to the jury, they must be returned along with the verdict and must remain on file with the papers of the case to become part of the record on appeal: *Columbus v. Marcum*, 65 Ohio App. 3d 530, 584 N.E.2d 1233 (1989).

It is incumbent upon a trial judge when he reduces a charge to writing, upon proper request, to make certain that the written charge is included in the record on appeal, otherwise, the reviewing court will be unable to determine whether the requirements of sub-section (G) of this section have been complied with: *State v. Gerhardt*, 115 Ohio App. 83, 184 N.E.2d 516 (1961).

⚡--SPECIAL INSTRUCTIONS.

Where a special instruction in writing before argument is given by the trial court, it is error for the court to identify to the jury the party who requested that instruction: *State v. Stanton*, 15 Ohio St. 2d 215, 239 N.E.2d 92 (1968).

⚡--TIME FOR INSTRUCTIONS.

As defendant did not challenge the content of the jury instructions, merely the timing of when they were presented, defendant failed to demonstrate plain error. *State v. Gooden*, 2003 Ohio App. LEXIS 2620, 2003 Ohio 2864, (2003), appeal denied by 100 Ohio St. 3d 1432, 2003 Ohio 5396, 797 N.E.2d 512, 2003 Ohio LEXIS 2725 (2003).

The rule in Ohio is that in the trial of a criminal case it is not mandatory upon the trial court to give any instructions before argument. But under R.C. 2945.10(E), if requested special instructions, reduced to writing, are correct, pertinent and timely presented, they must be included, at least in substance, in the general charge: *State v. Phipps*, 3 Ohio App. 2d 226, 210 N.E.2d 138 (1964).

⚡--WRITTEN JURY INSTRUCTIONS.

Although the trial court's failure to include the written jury instructions with the "papers of the case" under R.C. 2945.10(G) was an obvious error and a deviation from a legal rule, defendant failed to meet his burden of demonstrating that the trial court's failure to preserve its written jury instructions affected the outcome of his trial. The record did not support a conclusion that a manifest miscarriage of justice would result in upholding defendant's conviction despite the trial court's noncompliance with § 2945.10(G). *State v. Johnson*, 2008 Ohio App. LEXIS 4932, 2008 Ohio 5869, (Nov. 13, 2008).

⚡CLOSING ARGUMENTS.

Criminal defendant waives the sixth amendment right to present a closing argument when he or she neither requests a closing argument nor objects to its omission: *State v. McCausland*, 124 Ohio St. 3d 8, 918 N.E.2d 507, 2009 Ohio LEXIS 3193, 2009 Ohio 5933, (2009).

Reversal was required where the court made it clear that closing argument would not be allowed, based on a mistaken belief that a litigant has no right to closing argument in a bench trial *State v. Jack*, 156 Ohio App. 3d 260, 805 N.E.2d 187, 2004 Ohio App. LEXIS 727, 2004 Ohio 775, (2004).

☛COMMENTS BY JUDGE.

Defendant's due process rights under Ohio Const. art. I, § 10 were not violated by the trial court's instructions to the jury on the definition of "constructive possession" for purposes of his drug charges, as it did not constitute an unconstitutional amendment of the indictment and the concept of possession involved actual and constructive possession; the trial court's deviation from the written instructions did not violate defendant's due process rights or R.C. 2945.10(G), although the court's interjection of comments and examples within the instructions did not strictly comply with the statutory mandates, as the comments were unbiased, the jury received the written instructions, and defendant failed to show how he was prejudiced. *State v. Felder*, 2006 Ohio App. LEXIS 5311, 2006 Ohio 5332, (Oct. 12, 2006).

☛CONTINUANCE.

Trial court did not abuse its discretion by permitting the State to reopen its case after it had rested because the trial court had denied the State's motion for a continuance when a witness did not appear, but then allowed the State to reopen the case when the witness did appear. *State v. Fitts*, 2006 Ohio App. LEXIS 603, 2006 Ohio 678, (Feb. 13, 2006).

☛DEVIATION FROM USUAL ORDER.

Court did not err in permitting witnesses to be called out of order because the defense was unable to finish cross examination of a witness due to her hospitalization, and she was re-called once she was released from the hospital. Additionally, once the witness's cross examination was complete, the trial court asked defense counsel if he wished to recall any earlier witnesses, and counsel responded that he had consulted with defendant and that they did not wish to recall any witnesses. *State v. Zander*, 2010 Ohio App. LEXIS 528, 2010 Ohio 631, (Feb. 24, 2010), appeal denied by 125 Ohio St. 3d 1464, 2010 Ohio 2753, 928 N.E.2d 739, 2010 Ohio LEXIS 1523 (2010).

Trial court judge's numerous deviations from the written jury instructions in defendant's criminal trial did not prejudice defendant pursuant to R.C. 2945.10(G), as there was no confusion by the jury based on the trial court's comments and modifications to the instructions. *State v. Gaines*, 2009 Ohio App. LEXIS 540, 2009 Ohio 622, (Feb. 12, 2009).

Deviating from the procedural order of R.C. 2945.10 by allowing defendant to open and close final arguments was not an abuse of discretion. *State v. Calwise*, 2003 Ohio App. LEXIS 3146, 2003 Ohio 3463, (2003).

The trial court did not abuse its discretion by refusing to allow defense counsel in a murder case to defer making an opening statement until after the state rested: *State v. Gumm*, 73 Ohio St. 3d 413, 653 N.E.2d 253, 1995 Ohio LEXIS 1850, 1995 Ohio 24, (1995), writ of certiorari denied by 516 U.S. 1177, 116 S. Ct. 1275, 134 L. Ed. 2d 221, 1996 U.S. LEXIS 1854, 64 U.S.L.W. 3623 (1996).

Any decision to vary the order of proceedings as established in R.C. 2945.10 is within the sound discretion of the trial court. Thus, the court has discretion as to whether to allow a request by defense counsel for rebuttal of arguments made by the prosecution for the first time in the final portion of the state's closing argument: *State v. Mahoney*, 34 Ohio App. 3d 114, 517 N.E.2d 957 (1986).

Any decision to vary the order of proceedings in R.C. 2945.10 is within the sound discretion of the trial court, and any claim that the trial court erred in following the statutorily mandated order of proceedings must sustain a heavy burden to demonstrate the unfairness and prejudice of following that order: *State v. Jenkins*, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984).

Any decision to vary the order of proceedings at trial in R.C. 2945.10 is within the sound discretion of the trial court, and any claim that the trial court erred in following the statutorily mandated order of proceedings must sustain a heavy burden to demonstrate the unfairness and prejudice of following that order: *State v. Bayless*, 48 Ohio St. 2d 73, 357 N.E.2d 1035 (1976).

OBJECTIONS.

Trial court did not err by generally restricting the time at which counsel could elaborate on objections. Under the circumstances, the trial court did err by not allowing counsel to object during opening statement: *State v. Sellers*, 173 Ohio App. 3d 60, 877 N.E.2d 387, 2007 Ohio App. LEXIS 5417, 2007 Ohio 4681, (2007).

OPENING STATEMENT BY PROSECUTION.

An opening statement by the state in a criminal case as provided in R.C. 2945.10(A) is discretionary and not mandatory, and may be waived. It is error for the trial court to discharge a defendant in a criminal case because the state did not make an opening statement: *State v. Shaker*, 68 Ohio App. 2d 135, 427 N.E.2d 537 (1980).

Where, in a criminal proceeding, the state's statement of its case indicates that the accused was charged with the offense for which he is being tried and there is no admission of fact showing that no offense was committed or that the accused was not guilty of the offense charged, a motion by the accused for judgment on such statement should be overruled: *State v. Karcher*, 155 Ohio St. 253, 98 N.E.2d 308 (1951).

PRESUMPTIONS.

Where the state proves that the established procedure for giving notice of a driver's license suspension was followed, a rebuttable presumption is created that the defendant received notice. A conclusive presumption unconstitutionally shifts the burden of proof to the defendant to disprove an element of the crime charged: *State v. Webb*, 126 Ohio App. 3d 808, 711 N.E.2d 711, 1998 Ohio App. LEXIS 1962 (1998).

REBUTTAL.

Trial court did not abuse its discretion in denying defendant an opportunity to present a rebuttal argument as defendant did not show any unfairness or prejudice due to the trial court's compliance with R.C. 2945.10. *City of Upper Arlington v. Wilson*, 2005 Ohio App. LEXIS 3947, 2005 Ohio 4353, (Aug. 23, 2005).

REBUTTAL EVIDENCE.

Trial court, by letting a prosecution witness testify, essentially let the State of Ohio reopen its case-in-chief, and the court therefore should have used its discretion under R.C. 2945.10(D) to let defendant reopen defendant's case-in-chief to call two witnesses to challenge the new evidence presented by the testimony of the prosecution's witness. *State v. Carrasquillo*, 2010 Ohio App. LEXIS 4265, 2010 Ohio 5063, (Oct. 18, 2010).

Generally, evidence which does not contradict or refute evidence presented by the opposing party but is merely cumulative to evidence presented during the party's case-in-chief is not proper rebuttal evidence: *State v. Hawn*, 138 Ohio App. 3d 449, 741 N.E.2d 594, 2000 Ohio App. LEXIS 2951 (2000), dismissed by 90 Ohio St. 3d 1449, 737 N.E.2d 53, 2000 Ohio LEXIS 2743 (2000).

The trial court did not commit prejudicial error in permitting a prosecution rebuttal witness to testify as to matters which did not contradict defendant's evidence but merely bolstered the state's case in chief, since the trial judge is granted discretion in admittance of evidence out of order by R.C. 2945.10(D), which discretion was not abused by the court: *State v. Graven*, 54 Ohio St. 2d 114, 374 N.E.2d 1370 (1978).

Where, in the trial of a criminal case, evidence is introduced in rebuttal by the state to meet a claim or theory of the defense, the fact that such evidence also tends to prove some element or elements of the state's case in chief does not make such testimony inadmissible, nor is the state deprived of the benefit thereof as tending to prove the commission of the offense alleged in the indictment, since such admission rests in the sound discretion of the court: *Holt v. State*, 107 Ohio St. 307, 140 N.E. 349 (1923).

REOPENING FOR FURTHER TESTIMONY.

Trial court properly allowed the State to reopen its case in order to present evidence regarding defendant's attempted escape during the trial pursuant to R.C. 2945.10(D), as such decision was within the trial court's discretion and evidence regarding defendant's flight was probative as to a consciousness of guilt. *State v. Cline*, 2008 Ohio App. LEXIS 1312, 2008 Ohio 1500, (Mar. 28, 2008).

Trial court did not abuse its discretion by permitting the State to reopen its case after it had rested because the trial court had denied the State's motion for a continuance when a witness did not appear, but then allowed the State to reopen the case when the witness did appear. *State v. Fitts*, 2006 Ohio App. LEXIS 603, 2006 Ohio 678, (Feb. 13, 2006).

Trial court did not abuse its discretion, after defendant moved for an acquittal because a detective improperly identified a name on a label for one of the images that was taken from defendant's computer harddrive, in allowing the State of Ohio to reopen its case and recall the detective to testify and properly identify the image. *State v. Steele*, 2005 Ohio App. LEXIS 954, 2005 Ohio 943, (2005).

In a criminal case, the question of opening up the case for the presentation of further testimony is within the sound discretion of the trial court, and the court's action in that regard will not be disturbed on appeal unless under the circumstances it amounted to an abuse of discretion: *Columbus v. Grant*, 1 Ohio App. 3d 96, 439 N.E.2d 907 (1981).

RIGHT TO PRESENT A DEFENSE.

Where the trial court issued a judgment in the State's favor after the State's case-in-chief and where there was no evidence in the record that defendant waived his right to present a defense, defendant was deprived of an opportunity to present a defense in violation of U.S. Const. amend. V, VI and R.C. 2315.01, 2945.10, 2938.11. *State v. Bailey*, 2005 Ohio App. LEXIS 6008, 2005 Ohio 6694, (Dec. 19, 2005).

VARYING ORDER OF PROCEEDINGS.

--DISCRETION OF COURT.

Trial court did not abuse its discretion in denying defendant an opportunity to present a rebuttal argument as defendant did not show any unfairness or prejudice due to the trial court's compliance with R.C. 2945.10. *City of Upper Arlington v. Wilson*, 2005 Ohio App. LEXIS 3947, 2005 Ohio 4353, (Aug. 23, 2005).

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Ohio Crim. R 52

OHIO RULES OF COURT SERVICE
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*** Rules current through rule amendments received through June 1, 2013 ***
*** Annotations current through April 8, 2013 ***

Ohio Rules Of Criminal Procedure

Ohio Crim. R 52 (2013)

Review Court Orders which may amend this Rule.

Rule 52. Harmless error and plain error

(A) Harmless error.

Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(B) Plain error.

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

NOTES: Cross-References to Related Statutes

Causes for new trial, RC § 2945.79.

Time for filing petition; appeals, RC § 2953.23.

Ohio Rules

Plain error, Evid.R. 103(D).

Reports and information, Sup.R. 37.