

IN THE SUPREME COURT OF OHIO
2013

ORIGINAL

STATE OF OHIO,

Case No. 12-1212

Plaintiff-Appellee,

-vs-

On Appeal from the
Franklin County Court
of Common Pleas

CARON E. MONTGOMERY,

Common Pleas Case
No. 10CR-12-7125

Defendant-Appellant.

DEATH PENALTY CASE

MERIT BRIEF OF PLAINTIFF-APPELLEE STATE OF OHIO

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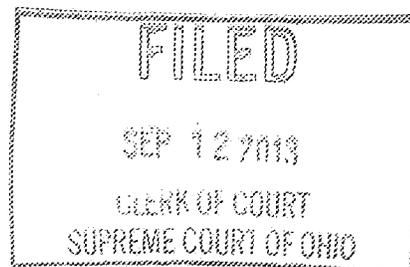


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STATEMENT OF FACTS

Defendant faced several charges in this triple-homicide case. Count One charged murder in the killing of Tia Hendricks. (R. 5-11) Counts Two and Three charged prior-calculation aggravated murder and under-13 aggravated murder in the killing of Tahlia Hendricks (age 10). (Id.) Counts Four and Five charged prior-calculation aggravated murder and under-13 aggravated murder in the killing of Tyron Hendricks (age 2). (Id.) Count Six charged domestic violence in the attack on Tia Hendricks and alleged that defendant had a previous conviction for domestic violence. (Id.) The indictment alleged that the crimes occurred on Thursday, November 25, 2010 (Thanksgiving). (Id.)

Counts Two, Three, Four, and Five included death-penalty specifications. In regard to the killing of Tahlia Hendricks, Counts Two and Three each charged three specifications: (1) the offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for the crime of murder; (2) the offense was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender; and (3) in the commission of the offense, defendant purposely caused the death of another who was under 13 at the time of the commission of the offense, and either the offender was the principal offender or committed the offense with prior calculation and design. (Id.)

In regard to the killing of Tyron Hendricks, Counts Four and Five charged the same course-of-conduct and under-13 specifications but no escaping-detection specification. (Id.)

Defendant waived jury. (R. 116; VI, 7)¹ A three-judge panel accepted defendant's guilty plea to all counts and specifications, (VII, 21; R. 130), heard evidence via testimony and exhibits, and found defendant guilty of the capital counts and specifications. (VIII, 169-72; R. 123-28)

After a mitigation hearing, in which the defense introduced evidence from several witnesses, the three-judge panel unanimously approved the death penalty on the capital counts. (VIII, 361-63; R. 132) The State elected Counts Three and Five for sentencing, (IX, 5), and the death penalty was imposed on those counts. (IX, 14)

The court filed its judgment on May 24, 2012. (R. 138-46) The court filed its sentencing opinion on June 6, 2012. (R. 153)

The historical facts were presented at the plea hearing via the testimony of Columbus Police Detective Dana Croom. (VII, 29 et seq.) Croom testified that, on the afternoon of November 26, 2010, around 3:00 p.m., police went to 465 Broadmeadows, Apartment 314, in response to reports that Tia Hendricks had not come to her family's Thanksgiving dinner the day before as expected and had not appeared at work on the 26th as expected. (Id. 29-31, 44-45) Apartment 314 was Tia's apartment. (Id. 31)

Officers Korney and Coy attempted to gain entrance to the apartment by knocking loudly, but they received no response. (Id. 31-32) There were no signs of forced entry. (Id. 63-64) A maintenance man at the apartment complex unlocked the door for the police, but they were still unable to open the door, as the door's chain lock kept the door from opening. (Id. 32) Using a bolt cutter, the police gained entry and

¹ The State will refer to the transcripts by volume number and page number, i.e., (VII, ____).

saw the deceased bodies of Tia (age 31), Tahlia (age 10),² and Tyron (age 2). (Id. 33, 36) Tia was the mother of both children; Tyron was defendant's son. (Id. 33-34) In checking on the victims, police noticed that their bodies had been dead for awhile because their bodies were cold. (Id. 36)

While searching the remainder of the apartment, Officer Coy found defendant laying on a bed in the master bedroom. (Id. 34-35)

Medics responded. (Id. 35-36) When police rolled defendant over on the bed, they saw that he had a knife in his neck. (Id. 36) It was "barely" in the neck, and it fell out when defendant was moved. (Id. 36) There was a little bit of blood. (Id. 35) The wound to the neck appeared to be superficial and fresh, (Id. 37, 107-108), which showed that the victims suffered their injuries before defendant's injury to his neck. (Id. 37)

A friend of Tia's, Fred Taylor, reported to police that she had left his residence at about 3:30 a.m. in the early morning hours of Thanksgiving. (Id. 38-40) They had engaged in a sexual relationship, which explained why Taylor's DNA was found in the rape kit collected from Tia's body at the coroner's office. (Id. 39, 140-41)

Police discovered that a 911 call had come from the area at 7:02 a.m. on Thanksgiving morning. (Id. 40) It was a hang-up call, and police were unable to triangulate the exact location when they investigated it that morning. (Id. 40-42) The female caller was Tia Hendricks, who was yelling, "Caron, Caron." (Id. 40) The call occurred, as follows:

Dispatcher: 911. What is your emergency?

² While the detective referred to Tahlia as being age 9, (VII, 33), the coroner's report established that Tahlia was age 10. (State's Ex. 5B, at 1)

Female Voice: Caron.

Dispatcher: Hello?

Female Voice: Oh, my God. Caron.

Dispatcher: Hello?

Female Voice: Caron. No.

(Caller hangs up.)

(Id. 43; State's Ex. 11)

A family member informed police that Tia's car was now parked on the east side of 425 Broadmeadows, which was a whole different apartment parking lot. (VII, 45-46) You could not even see her apartment building from the place where the car was parked. (Id. 45-46) Her usual habit was to park very close to the doors to her apartment building. (Id. 46) A neighbor informed police that she had seen a black male get out of the car around 9:00 p.m. on Thanksgiving Day and walk away in a direction toward 465 Broadmeadows. (Id. 47-48, 52) Later analysis determined that defendant's blood was present on the driver's side windshield frame, the front and back of the steering wheel, and the gearshift knob. (Id. 137-38)

Tia's mother informed police about the turbulent relationship between Tia and defendant. (Id. 48-49) They argued a lot. (Id. 49) The mother had kicked him out of her house because he broke the door to her house. (Id. 49) Defendant had a prior conviction for domestic violence in harming Tia on April 9, 2009. (Id. 50-51)

Photographs were taken of the crime scene, and a sketch of the apartment was made. (Id. 53-55) Detective Croom described several of these items in his testimony.

(Id. 57 et seq.)

The sketch shows that the decedents were laying in the living room of the apartment, with Tahlia and Tyron laying together, and Tia laying apart from them. (Id. 55-56; State's Ex. 1)

There was apparent blood on the door-chain mechanism, on the inside door knob, and nearby on the wall. (State's Ex. 2A-27, 2A-28, 2A-29)

There were a pair of men's shoes in the hallway leading into the living room, bearing the same shoe pattern as found in blood in the apartment. (State's Ex. 2A-35)

There was apparent blood on the floor and counter in the kitchen. (State's Ex. 2A-39, 2A-40)

Several photos depicted the bloody living room. Tia's body is shown with her pants partially removed. (State's Ex. 2A-44) There was a cigarette ash tucked into her belt area. (State's Ex. 2A-120; VII, 94) The bodies of the children are shown laying close to each other, with one of Tahlia's legs laying on top of Tyron's upper torso.

(State's Ex. 2A-48, -49, -50, -51, -52, -54)

There was blood on the floor and low and high on the walls just outside Tyron's room. (State's Ex. 2A-78, -79, -80, -81, -82)

There was also blood on the floor in Tyron's room and two large amounts of blood on his bed, later confirmed to be Tyron's blood. (State's Ex. 2A-86, -88, -89, -90; VII, 140)

In Tahlia's room, a spot of blood was found on a space heater. (VII, 86; State's Ex. 2A-147) There was no blood on her bed. (VII, 87)

Some blood appeared on the bed in the master bedroom where defendant had been found. (VII, 88-89) Two cellphones were found on the bed, one belonging to defendant and the other to Tia. (Id. 90-92) There was some apparent blood on an open bottle of bleach that was found on a dresser in the master bedroom. (Id. 92; State's Ex. 2A-111)

The knife depicted on the bed in the master bedroom was 12 inches in length, consisting of a 5 ½ inch handle and 6 ½ inch blade. (State's Ex. 2A-118) There was a large amount of blood on the knife. (Id.)

Defendant's pants were found at the scene with apparent blood on them. (VII, 94-95)

There were close-up views of the victims' fatal knife wounds to their necks. (State's Ex. 2A-134, -137, -143)

Photographs of defendant at the hospital showed blood on his arm, on the top of his head, and on both hands. (VII, 107-109) He also had cuts on the inside of his fingers on his right hand and under his right thumb, indicative of his right hand sliding down onto the blade as he was stabbing with a knife. (Id. 109-110)

Blood found on the west wall of the hallway was found to be Tia's blood. (VII, 143)

Blood found on the space heater, the knife blade, defendant's jeans, the bleach bottle, and in fingernail scrapings from defendant were found to match defendant's blood. (Id. 143-44)

The autopsy of Tia revealed that Tia had suffered 23 stab wounds and 23 cutting

wounds, for a total of 46 wounds. (Id. 147-48) The cause of death was a cutting wound that cut her left carotid and right jugular. (Id. 148)

Tia had injuries to her hands and arms. (Id. 148) There were injuries to her elbows, wrists, hands, fingers, pinkie, and even on her back. (Id. 149) She had been wearing a jacket when she was found at the crime scene, and there were multiple stab wounds through the jacket. (Id. 150)

Tahlia had suffered a stab wound to her back/neck area and had suffered injuries to her hands and arms. (Id. 154) These are commonly considered to be defensive wounds. (Id. 154) There were a total of 14 injuries to Tahlia. (Id. 154) There were five stab wounds to her neck, including several to the left carotid artery, left internal jugular, and right carotid. (Id. 155) These were the fatal injuries. (Id. 156-57) She also had 9 cutting wounds on her right arm and forearm. (Id. 155)

There were no signs of defensive wounds on Tyron. (Id. 157-58) There were two cutting injuries to his neck that started behind his ear and went around to the front, cutting the right jugular and the trachea and esophagus. (Id. 159)

ARGUMENT

RESPONSE TO FIRST PROPOSITION OF LAW

UPON A PLEA OF GUILTY TO A CAPITAL SPECIFICATION, THE PROSECUTION NEED NOT PROVIDE PROOF TO SUPPORT CONVICTION ON SUCH SPECIFICATION.

Defendant challenges the sufficiency of the evidence supporting the “escaping detection * * *” death specification on the counts for killing 10-year-old Tahlia. He contends that the State needed to prove that the killing of Tia occurred first so that his

killing of Tahlia was for the purpose of escaping detection in relation to the murder of Tia. But defendant pleaded guilty to this specification, and there was no requirement that the State prove the specification thereafter. Even if there was such a requirement, the State sufficiently proved it.

A.

After defendant's guilty plea to all specifications, the State was not required to provide proof to support the specifications. "[A] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case." *State v. Wilson*, 58 Ohio St.2d 52, 54, 388 N.E.2d 745 (1979), quoting *Menna v. New York*, 423 U.S. 61, 62 n. 2, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975) (emphasis in *Menna*). A guilty plea is a complete admission of guilt. Crim.R. 11(B)(1). "A plea of guilty is more than a voluntary confession made in open court. It also serves as a stipulation that no proof by the prosecution need b[e] advanced * * *. It supplies both evidence and verdict, ending controversy." *Boykin v. Alabama*, 395 U.S. 238, 243 n. 4, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) (quoting another case).

Ohio case law recognizes that there is no general constitutional requirement of a stated factual basis for a plea-based conviction. *State v. Ricks*, 48 Ohio App.2d 128, 131, 356 N.E.2d 312 (8th Dist. 1976) ("the Constitution does not require that a factual basis be shown before a guilty plea can be accepted."); see, also, *State v. Post*, 32 Ohio St.3d 380, 386, 513 N.E.2d 754 (1987) ("Crim. R. 11 does not require the trial court to establish a factual basis for the plea before its acceptance.").

Absent special circumstances, such as the defendant entering a so-called *Alford* guilty plea, there is no constitutional requirement that a factual basis independent of the guilty plea be stated. Factual-basis requirements regarding guilty pleas are “not a requirement of the Constitution, but rather a requirement created by rules and statutes.” *United States v. Tunning*, 69 F.3d 107, 111 (6th Cir. 1995); *Post v. Bradshaw*, 621 F.3d 406, 427 (6th Cir. 2010) (following *Tunning*). “[D]ue process does not mandate a factual basis inquiry by state courts.” *Willbright v. Smith*, 745 F.2d 779, 780 (2nd Cir. 1984); see, also, *Meyers v. Gillis*, 93 F.3d 1147, 1148, 1151-52 (3rd Cir. 1996) (“following well-established and uniform authority”); *Smith v. McCotter*, 786 F.2d 697 (5th Cir. 1986); *Rodriguez v. Ricketts*, 777 F.2d 527 (9th Cir. 1985). Even in the *Alford* setting, a recitation by the prosecutor will be sufficient. See *Tunning*, 69 F.3d at 112 (factual basis can be provided by “a statement on the record from government prosecutors”).

The inapposite nature of defendant’s argument is shown by his claim that the escaping-detection specification was not supported by “sufficient evidence,” a standard which is drawn from *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997), and which is based on *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The *Jackson* standard for evidentiary sufficiency is “inapplicable to convictions based on a guilty plea.” *Smith v. McCotter*, 786 F.2d at 702-703.

Upon defendant pleading guilty to the escaping-detection specification, there was no constitutional need to “prove” the specification, defendant having fully admitted that specification. His guilty plea to the specification was “sufficient” in itself to find him

guilty of that specification.

B.

The notion that the prosecution must introduce additional evidence in support of a plea-based conviction for a capital specification arises out of a misunderstanding of R.C. 2945.06. The statute provides that, when a defendant enters a guilty plea to an aggravated murder charge, “a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or some other offense, and pronounce sentence accordingly.” Criminal Rule 11(C)(3) similarly provides that the panel shall “determine whether the offense was aggravated murder or a lesser offense.” But these requirements are directed toward the question of determining whether the defendant is guilty of aggravated murder or some lesser *offense*. As stated in *State v. Green*, 81 Ohio St.3d 100, 105, 689 N.E.2d 556 (1998), “a three-judge panel must unanimously determine whether the defendant is guilty beyond a reasonable doubt of *aggravated murder or of a lesser offense*.” (Emphasis added) These requirements are not directed toward requiring proof of the accompanying death *specifications*.

In *State v. Ford*, 128 Ohio St.3d 398, 2011-Ohio-765, 945 N.E.2d 498, this Court recognized that there is a difference between an offense and its accompanying specification(s). The question in *Ford* was whether a firearm specification could merge under R.C. 2941.25 with the underlying offense of discharging a firearm into a habitation. This Court concluded that a firearm specification is not an “offense” but rather “merely a sentencing provision that requires an enhanced penalty upon certain findings.” *Id.* ¶ 16. The specification “define[s] a sentence enhancement that attaches to

a predicate offense.” Id. ¶ 16. “[T]he firearm specification is merely a sentence enhancement, not a separate criminal offense.” Id. at ¶ 17.

Equally so, in a death-penalty case, the “offense” is aggravated murder, and the specifications are a sentencing enhancement. “Imposition of the death penalty for aggravated murder is precluded unless the indictment or count in the indictment *charging the offense* specifies one or more of the aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code.” R.C. 2941.14(B) (emphasis added). R.C. 2929.04(A) provides that such specifications involve whether “the offense was committed” in a certain way, with a certain purpose, or against certain victims. As can be seen, the “offense” is aggravated murder; the specification determines only whether the enhanced penalty of death will be available for that “offense.”

Ford drew significance out of the placement of the pertinent specification provisions in R.C. Chapters 2941 and 2929. “Offenses” are defined elsewhere. “For example, R.C. Chapter 2903 addresses homicide and assault; within that chapter are statutory provisions that define criminal offenses such as aggravated murder, R.C. 2903.01 * * *.” *Ford*, ¶ 17. In contrast, “R.C. Chapter 2941 * * * addresses the indictment, and * * * R.C. Chapter 2929 * * * addresses penalties and sentencing. Generally, provisions within R.C. Chapter 2941 address the content that is required in an indictment, and provisions within R.C. Chapter 2929 address sentencing. Notably, no provisions within either chapter appear to define a criminal offense.” *Ford*, ¶ 17.

In light of *Ford*, it becomes plain that, when R.C. 2945.06 refers to having an examination of witnesses to “determine whether the accused is guilty of aggravated

murder or some other offense,” the provision is directed solely toward proof of the “offense,” i.e., aggravated murder, not toward the accompanying specification(s).

Defendant might try to rely on another part of Criminal Rule 11(C)(3), which provides that the panel shall, “if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.” But notably absent from this provision is any requirement that independent proof be provided in support of the specifications. In contrast to R.C. 2945.06, which directs an examination of witnesses for the purpose of determining whether the offense was aggravated murder or some other offense, this provision has no “examine witnesses” requirement, thereby supporting the conclusion that there is no such requirement regarding the specifications. The requirement that the panel “proceed as provided by law to determine the presence or absence of the specified aggravating circumstances” is consistent with the long-standing and well-accepted principle that a court can find a defendant guilty based solely on a guilty plea without additional evidence.

Even if Crim.R. 11(C)(3) were somehow interpreted to require an examination of witnesses as to a capital specification, it would be unconstitutional. When read to be a procedural companion to R.C. 2945.06, Crim.R. 11(C)(3) would be properly “procedural” and therefore valid as a procedural rule adopted by this Court under Article IV, Section 5(B), of the Ohio Constitution. But requiring proof above and beyond what R.C. 2945.06 requires would be an improper substantive expansion of the law beyond

what the statutory law provides. Section 5(B) forbids this Court's procedural rules from being given any substantive effect. Giving the defendant a right to insist on additional proof of his guilt on a capital specification would be the creation of a substantive right.

In the final analysis, R.C. 2945.06 represents a narrow exception to the general rule that a guilty plea is enough to determine guilt. Since the statute does not apply to the specifications, defendant's guilty plea was enough to support a finding of guilt as to the escaping-detection specification.

C.

In *Carpenter v. Mohr*, 163 F.3d 938 (6th Cir. 1998), reversed on other grounds, *Edwards v. Carpenter*, 529 U.S. 446, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000), the notion that a sufficiency standard applied after a guilty plea to aggravated murder went largely unexamined. The Sixth Circuit had no reason to differentiate between proving the underlying offense and proving an accompanying specification, since the claimed insufficiency involved the failure of the prosecution to provide any evidence at all (a claim ultimately rejected in later proceedings after the United States Supreme Court reversed).

The Sixth Circuit did contend (wrongly) that the state-law examine-witnesses requirement had constitutional implications. In fact, as noted above, for constitutional purposes, plea-based convictions do not require any supporting factual basis. At that point, the analysis of the Sixth Circuit, sitting as a federal habeas court, should have ended, as the Sixth Circuit could not award federal habeas relief based on the claimed violation of a state statute. The Sixth Circuit later conceded that the examine-witnesses

issue was only a question of state law, not a question of constitutional law. *Post*, 621 F.3d at 427. “There is nothing fundamentally unfair about not requiring the State to prove a case that a defendant, represented by counsel, knowingly, voluntarily, and intelligently says he does not contest.” *Id.* at 427.

In *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, the defendant challenged the sufficiency of the evidence on the escaping-detection specification. This Court entertained the challenge and concluded that the evidence was sufficient on the specification. In the process, this Court favorably cited *Green*, *Carpenter*, and *State v. Taylor*, 30 Ohio App.2d 252, 285 N.E.2d 89 (8th Dist. 1972), as supporting a requirement that the State must satisfy a sufficiency-of-evidence standard on appeal. But, as stated earlier, *Green* only addressed the need under the statute to examine witnesses regarding whether the offense was aggravated murder or some lesser offense. *Carpenter* did not need to address the exact reach of the state-law examine-witness requirement. *Taylor* involved a challenge to the sufficiency of the evidence for first-degree murder, not a specification. *Taylor*, 30 Ohio App.2d at 256 (“determine the degree of crime”). None of the cases cited in *Ketterer* actually supported the contention that the examine-witness requirement applied to a capital specification.

Now, with this Court having made clear in *Ford* that an offense is different than an accompanying specification, the *Ketterer* Court’s unexamined extension of *Green* to capital specifications should be questioned and now overruled. The statute and rule simply do not require an examination of witnesses regarding the capital specification, but, rather, only an examination of witnesses as to the offense. The provision is

designed to assure that the defendant is guilty of aggravated murder, rather than some lesser offense. Since there was no statutory or rule requirement that the State provide proof of the escaping-detection capital specification, and since the guilty plea itself was sufficient to completely admit guilt for that specification, defendant's challenge to the sufficiency of the evidence on the specification is a non-sequitur.

D.

In any event, defendant proceeds from two false premises in challenging the evidence regarding the escaping-detection specification. First, the specification only alleged that defendant had the purpose of escaping detection, apprehension, trial, or punishment for "murder." It did not limit the specification to the murder of Tia; the murder of Tyron would have satisfied the "another offense" requirement.

More importantly, nothing in the specification required that the State prove that Tia's (or Tyron's) murder preceded the killing of Tahlia. To be sure, the concept of "escaping detection, apprehension, trial, or punishment" often involves the defendant killing the decedent after another crime has already occurred. But the language does not require that the other crime already be completed. It only requires that the killing take place with the "purpose" of escaping detection, apprehension, trial or punishment. That purpose can easily arise before the other crime has occurred. Under this language, the killer can be guilty of the specification if he preemptively kills the would-be witness first. Killing the would-be witness furthers the offender's purpose of seeking to escape detection, apprehension, trial, or punishment for the crime he is about to commit.

In *State v. Jester*, 32 Ohio St.3d 147, 512 N.E.2d 962 (1987), the defendant

preemptively killed the bank guard before jumping the counter to commit the bank robbery. This Court concluded that the killing clearly would have satisfied the requirement of having a purpose to escape “apprehension, trial, or punishment.” *Id.* at 148. However, those parts of the provision were not alleged in the specification; only “detection” was alleged, and this Court found that a purpose to avoid detection was not shown. This Court concluded that “detection” “anticipates a situation where the witness or witnesses are killed in an attempt to hide the commission of the crime.” *Id.* at 148.

This Court later explained that a purpose to avoid detection was not shown in *Jester* because “no inference arises that a criminal defendant seeks to escape detection under circumstances where one of many potential witnesses is slain.” *State v. Wiles*, 59 Ohio St.3d 71, 85, 571 N.E.2d 97 (1991). “However, where the accused attempts to kill the only witness to his commission of a crime, there exists sufficient circumstantial evidence that the act was undertaken for the purpose of avoiding detection.” *Id.* at 85.

This Court later indicated in *State v. Smith*, 80 Ohio St.3d 89, 684 N.E.2d 668 (1997), that the order of events was not critical. The defendant had admitted that he and his brother killed the two victims in order to prevent them from identifying them. This Court concluded that it did not matter whether the robbery occurred before or after the killings. “R.C. 2929.04(A)(3), the specification of purpose to escape detection, does not require the aggravated robbery of the [decedents] to have preceded their murders.” *Id.* at 114.

Whether the killing of Tahlia occurred before, during, or after the killings of Tia or Tyron, defendant was eliminating a witness to his crimes. He was killing everyone;

none of them would be able to provide information toward his detection, apprehension, trial, or punishment. This was not a crowded bank, where the elimination of a single witness could not create an inference of trying to escape detection. It was an apartment where he eliminated everyone, thereby seeking to escape detection, apprehension, trial, or punishment. In this situation, a pre-emptive killing “hides” detection for the about-to-be-committed crime at least as much as an after-the-fact killing. Indeed, it hides the crime even more, preventing the would-be witness from perceiving the crime at all.

In any event, eliminating all of the witnesses shows a purpose to escape detection, apprehension, trial, or punishment. Even if defendant killed Tahlia first, it was for the purpose of eliminating Tahlia as a witness to his crimes of murdering Tia or Tyron. The particular order of the killings was unimportant. *Smith, supra.*

E.

Even if the order were important, the evidence still circumstantially supported the view that defendant killed Tyron or Tia before killing Tahlia. Insofar as Tyron was concerned, the photographs showed that Tyron had no defensive wounds. Also, given the large amounts of blood in Tyron’s bed, he was plainly killed in bed before he had a chance to resist. The killing of Tyron was executed with ruthless efficiency, with knife wounds that cut so deep that the esophagus and trachea were cut as well.

In contrast, there was a very limited amount of blood in Tahlia’s bedroom on the space heater, and that blood was only defendant’s, a sign that he had already attacked one or both of the others before he reached Tahlia. The absence of Tahlia’s blood in her bedroom also supported the view that she came upon the killing(s) in progress.

Moreover, she had defensive wounds, showing she put up a fight, and her fatal throat injuries were more haphazard, therefore indicating that defendant had not been able to surprise her like Tyron. All of the evidence supports the view that Tahlia knew she was fighting for her life, and she would not have known to do this unless she was already aware of what defendant was doing, trying to do, or had done to Tia and/or Tyron. Tia's yelling during the 911 call very likely alerted Tahlia to the need to defend herself.

Also, in a poignant indicator of the order of events, Tahlia's body ended up laying next to Tyron's body, with one of her legs laying *over the top* of Tyron. This, too, supports the view that defendant attacked Tyron first and was seeking to avoid detection, apprehension, trial, and punishment by killing witness Tahlia.

Nevertheless, the person most likely attacked first was Tia, who, as the adult, would have been most cognizant of the danger and who put up a valiant effort to repel defendant's attacks. She had 46 total injuries that attested to her efforts to protect herself and/or her kids, many of them defensive. Her large number of wounds showed that defendant would have needed to eliminate Tia and most likely would have chosen her as his first victim so as to enable the carrying out of the killings of the Tahlia and Tyron, who were less able to defend themselves.

Defendant's first proposition of law does not warrant relief.

RESPONSE TO SECOND PROPOSITION OF LAW

IN THE ABSENCE OF ANY INDICATION THAT THE USE OF MEDICATION IS AFFECTING THE DEFENDANT'S ABILITY TO COMPREHEND THE PROCEEDINGS, THE MERE MENTION OF ONGOING USE OF A MEDICATION FOR DEPRESSION DOES NOT INVALIDATE A JURY WAIVER OR GUILTY PLEA.

Defendant contends that his jury waiver and his guilty plea were both invalid because the court failed to inquire further into defendant's use of two medications for depression. He also contends that he was not fully informed of all of the implications of his waiver of jury. For the following reasons, defendant's arguments lack merit.

A.

As early as October 28, 2011, the defense was indicating that the defense had the intention of defendant pleading guilty and addressing the mitigation phase. (IV, 3) The prosecutor stated on the record on February 6, 2012, that "[i]t's been purely a mitigation case from day one." (V, 3)

On May 7, 2012, the court indicated that it had been previously advised that the intent was to waive trial by jury and proceed before a three-judge panel. (VI, 2) Defendant executed a jury waiver. (Id. 2-3) Counsel indicated that she had explained to defendant his constitutional right to jury trial. (Id. 3) She acknowledged on the record that she had advised defendant that the jury waiver meant that the matter would be heard by a three-judge panel with a possible sentence of the death penalty. (Id. 3) Counsel believed that defendant was mentally competent and that he understood and knew what he was doing. (Id. 3-4)

Defendant said that he was taking thorazine and risperdal for depression. (Id. 4-5) Defendant said he had no other mental issues. (Id. 5)

Defendant said “yes” when asked whether he understood he had a right to a jury trial on both the issues of guilt and punishment. (Id. 5) He said “yes” when asked whether he had signed the waiver of the right to jury trial and was electing to have the matter heard by a three-judge panel. (Id. 5)

Defendant said “yes” when asked whether his attorneys had gone over the waiver in detail. (Id. 5-6) He said “yes” when asked whether they explained to him that the waiver meant that a three-judge panel would decide the case instead of a jury of 12. (Id. 6)

Defendant said “yes” when asked whether he understood that the right he was giving up is a constitutional right. (Id. 6) He said “no” when asked whether anyone promised him anything or threatened him in order to cause him to waive jury. (Id. 6)

Defendant said “yes” when asked whether he was waiving his right to jury trial and electing to have this matter heard by a three-judge panel. (Id. 6)

The court found that defendant had voluntarily, knowingly, and intelligently waived his right to a jury trial. (Id. 6-7) The written jury waiver was filed. (R. 116)

Later on the same day, defendant entered a guilty plea to the indictment as charged. (R. 130) His counsel informed the court that they had gone over the plea with defendant. (VII, 11) Counsel said “yes” when asked whether she believed defendant was mentally competent and understood what he was doing. (Id. 11-12)

In defendant’s colloquy with the court, defendant informed the court that he was

able to read and write English, having completed the 11th grade. (Id. 12) He had never been found mentally ill or incompetent. (Id. 12) He was currently taking risperdal and thorazine prescribed by a doctor for depression. (Id. 12-13)

Defendant said he understood that he had the right to have a trial. (Id. 13) He understood that he was giving up certain rights, including the right to cross-examine witnesses, the right to compel the testimony of witnesses, and the right against being compelled to testify. (Id. 13-14, 18)

Defendant had signed the Entry of Guilty Plea after going over the entry with his attorneys. (Id. 16) Defendant understood that the maximum penalty on counts two through five was the death penalty. (Id. 16-17)

Defendant's trial counsel indicated that "at this point in time, we have no question whether this is the appropriate way to approach this case and carry on." (Id. 19)

Defendant said he felt confident in their representation of him and that he thought they were being diligent and effective in such representation. (Id. 19)

JUDGE REECE: Did they in fact explain to you your options with respect to trial in this matter?

THE DEFENDANT: Yes, Your Honor.

JUDGE REECE: With respect to not only just you've waive your right to a jury trial and elected to proceed with the trial before the Court, did they explain all of that to you thoroughly?

THE DEFENDANT: Yes, sir.

JUDGE REECE: Did they give you the option to make the

decisions in this matter?

THE DEFENDANT: Yes, Your Honor.

JUDGE REECE: And did you in fact make that decision?

THE DEFENDANT: Yes, sir.

JUDGE REECE: With respect to your plea of guilty to the charges in the indictment here, did your attorneys explain to you your options with respect to going to trial or pleading guilty in this case?

THE DEFENDANT: Yes, Your Honor.

JUDGE REECE: And your decision – was it your decision to enter the plea in this case?

THE DEFENDANT: Yes, it was.

JUDGE REECE: And they explained to you fully your options as to whether to go to trial or not go to trial?

THE DEFENDANT: Yes, sir.

JUDGE REECE: And what is your desire here today?

THE DEFENDANT: To enter guilty – .

JUDGE REECE: Beg pardon?

THE DEFENDANT: To enter a guilty plea.

(Id. 19-21)

Defendant understood their advice and was able to ask questions and get thorough answers from his counsel to his satisfaction:

JUDGE SHEERAN: Do you have any reason to believe that either of your attorneys did not understand the laws

which governed your case? In other words, do you believe that they understand the law?

THE DEFENDANT: Yes, sir.

JUDGE SHEERAN: I'm actually supposed to ask counsel this as well. Counsel, is that correct?

MS. DIXON: Yes, Your Honor.

MR. WEISMAN: Yes, sir.

JUDGE SHEERAN: Okay. Thank you. Do you have any reason to believe that your attorneys did not in fact fully investigate the facts of your case. Do you have any reason to believe that?

THE DEFENDANT: No, Your Honor.

JUDGE SHEERAN: Counsel, did you in fact fully investigate the facts of this case?

MS. DIXON: Yes, Your Honor.

MR. WEISMAN: We did, Your Honor.

JUDGE SHEERAN: All right. Mr. Montgomery, do you understand the advice that counsel have given you throughout this case?

THE DEFENDANT: Yes, sir.

JUDGE SHEERAN: All right. Were you allowed to ask questions about this case?

THE DEFENDANT: Yes, sir.

JUDGE SHEERAN: Did they answer the questions to your satisfaction?

THE DEFENDANT: Yes, sir.

JUDGE SHEERAN: Did they go over the discovery information with you?

THE DEFENDANT: Yes, sir.

JUDGE SHEERAN: Did they go over -- okay. Do you have now any questions about the evidence the State has to present against you?

THE DEFENDANT: No, sir.

JUDGE SHEERAN: Was there any advice counsel gave you that you do not understand?

THE DEFENDANT: No, sir.

(Id. 22-24)

Defendant understood the concept of “mitigating factors” and discussed the matter with counsel:

MR. WEISMAN: Judge, in response to any issue about a mitigation expert, we were provided sufficient funding by the Court.

Kelly Heiby has been on this case from the very beginning, has met with Caron numerous times, met with the team numerous times.

All the steps have been taken to sufficiently investigate mitigation and to obtain witnesses and information that was necessary.

JUDGE SHEERAN: So without stating exactly what they are, Mr. Montgomery, you did discuss with counsel what mitigating factors you might present and, counsel, you discussed that with him; is that correct?

MR. WEISMAN: That's correct, Your Honor.

JUDGE SHEERAN: Mr. Montgomery?

THE DEFENDANT: Yes, sir.

JUDGE SHEERAN: And Ms. Dixon?

MS. DIXON: Yes, Your Honor.

(Id. 24-25)

As can be seen, with defendant having the assistance of counsel and having several months to ponder the decision, there can be no doubt that defendant's jury waiver was knowing, voluntary, and intelligent.

B.

Defendant mostly complains that, for purposes of his jury waiver and guilty pleas, the trial court failed to sufficiently inquire into defendant's use of prescription medications for depression. The State will discuss that claim below.

Defendant also complains in passing that, for purposes of the jury waiver, the waiver was invalid because the court did not explain to him that "it would only take one of the twelve jurors voting against conviction for him to be found not guilty."

Defendant's Brief, at 17. Of course, such an explanation would have been erroneous. A single juror cannot acquit a defendant; jury unanimity is needed to acquit.

Defendant also complains that the jury waiver was invalid because the court did not explain to him that a single juror voting against the death penalty could prevent the death penalty from being imposed. The defense is drawing here from *State v. Brooks*, 75 Ohio St.3d 148, 661 N.E.2d 1030 (1996). But even if *Brooks* sets forth a correct rule of

law, there was no requirement that an advisement to that effect be included in a colloquy over a jury waiver.

There is no need for a detailed oral colloquy with a defendant who wishes to waive the jury-trial right. “[A] defendant need not have a complete or technical understanding of the jury trial right in order to knowingly and intelligently waive it.” *State v. Bays*, 87 Ohio St.3d 15, 20, 716 N.E.2d 1126 (1999). In addition, “a written waiver is presumptively voluntary, knowing, and intelligent.” *Id.* at 19. “[I]f the record shows a jury waiver, the verdict will not be set aside except on a plain showing that the waiver was not freely and intelligently made.” *Id.* at 19.

“There is no constitutional requirement that a court conduct an on the record colloquy with the defendant prior to the jury trial waiver.” *United States v. Martin*, 704 F.2d 267, 274 (6th Cir. 1983). Nor is there any such requirement under Ohio law, as this Court discussed in *State v. Thomas*, 97 Ohio St.3d 309, 2002-Ohio-6624, 779 N.E.2d 1017, ¶¶ 26-27:

¶26 In *State v. Jells* (1990), 53 Ohio St.3d 22, 559 N.E.2d 464, paragraph one of the syllabus, we held, “There is no requirement for a trial court to interrogate a defendant in order to determine whether he or she is fully apprised of the right to a jury trial.” “The Criminal Rules and the Revised Code are satisfied by a written waiver, signed by the defendant, filed with the court, and made in open court, after arraignment and opportunity to consult with counsel. While it may be better practice for the trial judge to enumerate all the possible implications of a waiver of a jury, there is no error in failing to do so.” (Citation omitted.) *Id.* at 26, 559 N.E.2d 464; see, also, *State v. Filiaggi* (1999), 86 Ohio St.3d 230, 238, 1999 Ohio 99, 714 N.E.2d 867; *State v. Baston* (1999), 85 Ohio St.3d 418, 421, 1999 Ohio 280, 709 N.E.2d 128.

¶27 * * * *Jells* holds that the statute and rules require

no inquiry, and we now hold that nor does the Constitution. Therefore, the trial court's failure to advise defendant about the legal consequences of his jury waiver was not error.

In line with *Jells*, this Court has rejected defendant's contention that a jury waiver is invalid in the absence of an advisement that a single juror could prevent the death penalty.

Bays also contends that his waiver was not knowing and intelligent because the trial court did not explain that a single juror can block a death recommendation, see *State v. Springer* (1992), 63 Ohio St. 3d 167, 586 N.E.2d 96, and that a death sentence recommended by a jury could not be reimposed if reversed on appeal (as was then the case; see *State v. Penix* [1988], 32 Ohio St. 3d 369, 513 N.E.2d 744, and R.C. 2929.06[B]). Again, however, these are not aspects of the jury trial right that a defendant must know about before he can knowingly and intelligently waive a jury trial. *Martin, supra*. The trial court is not required to inform the defendant of all the possible implications of waiver. See *State v. Jells* (1990), 53 Ohio St. 3d 22, 559 N.E.2d 464, paragraph one of the syllabus.

Bays, 87 Ohio St.3d at 20. "[T]he trial court was not required to specifically advise [defendant] on the need for juror unanimity." *Ketterer*, ¶ 68.

In the present case, the written jury waiver was filed, and it is presumed that defendant signed that waiver in a knowing, voluntary, intelligent way. The trial court did discuss the waiver with defendant on the record and confirmed defendant's desire to waive jury. Defendant had extensively consulted with his counsel. Under these circumstances, defendant has not made a plain showing that the waiver was not voluntarily and intelligently made.

The same conclusion applies to defendant's contention that the jury waiver was

invalid because the court did not advise defendant on the “voir dire and instructional issues” that would become unavailable because of the jury waiver. No such advisement is required. *Thomas*, ¶¶ 25-27.

C.

Defendant mainly contends that the use of prescription medications may have interfered with his ability to knowingly, voluntarily, and intelligently waive jury and plead guilty. This contention lacks merit for several reasons.

First, given the court’s inquiries with counsel and defendant, the court itself could arrive at the conclusion that defendant had no deficit in competency that was interfering with his ability to understand what he was doing. The court was in the best position to see whether there were any apparent signs of incompetency. Defendant repeatedly answered the court’s questions without any difficulty, thereby reflecting an understanding of what the court was saying. “Defendant showed that he understood the proceedings by meaningfully responding to each of the trial court’s questions.” *Thomas*, ¶ 38.

“Moreover, the defense counsel affirmatively indicated throughout the trial that defendant understood the proceedings.” *Id.* ¶ 38. “[T]he defense counsel never suggested that defendant was incompetent. Counsel had ample time to become familiar with defendant’s competency * * *. If counsel had some reason to question defendant’s competency, they surely would have done so.” *Id.* ¶ 39. When the court directly inquired of defendant’s counsel, who would have been in a position to alert the court to any signs of incompetency after their many consultations with him, counsel said they

saw no indications of incompetency. Defendant and his counsel both acknowledged their consultations over the Entry of Guilty Plea and their discussions of trial and plea options, with defendant saying he understood their advice. The defense attorney is often in the best position to alert the court to any signs of incompetency that warrant further inquiry, and here the attorneys raised no signs. “Counsel knew their client and could best determine whether he was able to assist them in his defense or whether a competency hearing or psychiatric examination was needed.” *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, 793 N.E.2d 446, ¶ 65.

Defendant’s “counsel never challenged their client’s ability to understand the jury-waiver or guilty-plea process.” *Ketterer*, ¶ 72. As stated in *Ketterer*:

{¶ 73} The fact is that “*nobody* on the spot thought [defendant’s] behavior raised any question as to his competence.” (Emphasis sic.) *State v. Cowans* (1999), 87 Ohio St.3d 68, 84, 717 N.E.2d 298. Cf. *State v. Thomas*, 97 Ohio St.3d 309, 2002-Ohio-6624, 779 N.E.2d 1017, ¶ 39; *State v. Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193, 790 N.E.2d 303, ¶ 27–34. “[F]actual determinations are best left to those who see and hear what goes on in the courtroom.” *Cowans*, 87 Ohio St.3d at 84, 717 N.E.2d 298.

“R.C. 2945.37(G) creates a rebuttable presumption that a defendant is competent to stand trial.” *State v. Barton*, 108 Ohio St.3d 402, 2006-Ohio-1324, 844 N.E.2d 307, ¶ 56. “[T]he trial court has no duty to question the accused’s competence when nobody on the spot thought the defendant’s behavior raised any question as to his competence and no evidence of outrageous, irrational behavior during trial or complaints about the accused’s lack of cooperation in his defense exists.” *Id.* ¶ 57 (quotation marks and brackets omitted). “Factual determinations are best left to those who see and hear what

goes on in the courtroom.” Id. ¶ 57 (quotation marks omitted).

“The fact that a defendant is taking antidepressant medication or prescribed psychotropic drugs does not negate his competence to stand trial.” *Ketterer*, ¶ 71. A “defendant cannot be found incompetent solely because he is receiving medication to treat depression”. *State v. Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, 805 N.E.2d 1064, ¶ 38; R.C. 2945.37(F). Incompetence is shown only if the evidence shows by a preponderance that “the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant’s defense * * *.” Id. There was no reason to think defendant was incompetent here given the lengthy colloquies with the court, defendant, and counsel, which all pointed toward the conclusion that defendant was in possession of sufficient mental ability to be competent to waive jury and plead guilty.

The constitutional test for competency is whether the defendant has a sufficient present ability to consult with a lawyer with a reasonable degree of rational understanding and whether he has a rational and factual understanding of the proceedings against him. *Godinez v. Moran*, 509 U.S. 389, 396, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993). “Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel.” Id. at 402. “Incompetency must not be equated with mere mental or emotional instability or even with outright insanity. A defendant may be emotionally disturbed or even psychotic and still be capable of understanding the charges against him and of assisting his counsel.” *State v. Bock*, 28 Ohio St.3d 108, 110, 502 N.E.2d 1016

(1986). A defendant need not have a lawyer-like acumen in order to be competent to stand trial. The test is whether defendant had sufficient capability to consult with a lawyer, not whether he would be a good lawyer herself. *Godinez*, 509 U.S. at 399-400.

The standard of competency to waive rights or plead guilty is the same as the standard of competency to stand trial. *Mink*, ¶ 57 (citing *Godinez*).

Defendant errs in contending that *Mink* required the court to do more than it did. While *Mink* indicates that “additional inquiry” is necessary in some circumstances, here the court did engage in such inquiry by inquiring of counsel and by engaging in specific inquiry into defendant’s understanding of various matters. These inquiries confirmed that there were no ongoing problems with competency. In addition, the circumstances in *Mink* were far different than those present here. In *Mink*, a competency evaluation had been performed; here, no evaluation was even sought. And given the colloquies as a whole, there was simply no indication that the medications were having any adverse effect on competence to waive jury or plead guilty.

Given the entire record, the court had no reason to presume incompetency or to order a competency evaluation vis-à-vis medications he was taking. By all indications, defendant was competent. The court did not abuse its discretion in failing to fashion its inquiry differently or in failing to sua sponte have a hearing on competency. “The record in this case does not reflect ‘sufficient indicia of incompetence’ to have required the trial court to conduct a competency hearing.” *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶ 157.

Defendant’s second proposition of law does not warrant relief.

RESPONSE TO THIRD PROPOSITION OF LAW

A DEFENDANT BEARS THE BURDEN OF PROVING TRIAL COUNSEL INEFFECTIVENESS.

Defendant complains that his trial counsel were ineffective in various respects.

For the following reasons, these claims lack merit.

A.

To succeed on a claim of ineffective assistance, a defendant must satisfy a two-prong test. Initially, a defendant must show that his trial counsel acted incompetently. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In assessing such claims of incompetence, “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Id.* at 689, quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955).

“There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” *Strickland*, 466 U.S. at 689. The question is whether counsel acted “outside the wide range of professionally competent assistance.” *Id.* at 690. In assessing competence, every effort must be made to avoid the distorting effects of hindsight. *Id.* at 689.

The test for ineffectiveness is an objective one, *i.e.*, whether the trial counsel acted within the wide range of *reasonable* professional assistance. *Strickland*, 466 U.S.

at 688-90. The defendant “must establish that no competent counsel would have taken the action that his counsel did take.” *Chandler v. United States*, 218 F.3d 1305, 1314 (11th Cir. 2000); see also, *Bullock v. Carver*, 297 F.3d 1036, 1048-49 (10th Cir. 2002). “*Strickland* * * * calls for an inquiry into the objective reasonableness of counsel’s performance, not counsel’s subjective state of mind.” *Harrington v. Richter*, ___ U.S. ___, 131 S.Ct. 770, 790, 178 L.Ed.2d 624 (2011).

“Surmounting *Strickland*’s high bar is never an easy task.” *Harrington*, 131 S.Ct. at 788 (quoting another case). “An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest ‘intrusive post-trial inquiry’ threaten the integrity of the very adversary process the right to counsel is meant to serve.” *Id.* at 788. “[T]he standard for judging counsel’s representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge.” *Id.* at 788. “The question is whether an attorney’s representation amounted to incompetence under ‘prevailing professional norms,’ not whether it deviated from best practices or most common custom.” *Id.* at 788. “Rare are the situations in which the ‘wide latitude counsel must have in making tactical decisions’ will be limited to any one technique or approach.” *Id.* at 789. “[T]here is no expectation that competent counsel will be a flawless strategist or tactician * * *.” *Id.* at 791.

Even if a defendant shows that his counsel was incompetent, the defendant must

then satisfy the second, “actual prejudice” prong of the *Strickland* test, showing that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “*Strickland* asks whether it is ‘reasonably likely’ the result would have been different.” *Harrington*, 131 S.Ct. at 792. “This does not require a showing that counsel’s actions ‘more likely than not altered the outcome,’ but the difference between *Strickland*’s prejudice standard and a more-probable-than-not standard is slight and matters ‘only in the rarest case.’” *Id.* at 792. “The likelihood of a different result must be substantial, not just conceivable.” *Id.* at 792.

When counsel’s alleged ineffectiveness involves the failure to pursue a motion, objection, or legal defense, this actual prejudice prong of *Strickland* breaks down into two components. First, the defendant must show that the motion, objection, or defense “is meritorious,” and, second, the defendant must show that there is a reasonable probability that the result would have been different if the motion had been granted, the objection sustained, or the defense pursued. *Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); *State v. Santana*, 90 Ohio St.3d 513, 739 N.E.2d 798 (2001), citing *State v. Lott*, 51 Ohio St.3d 160, 175, 555 N.E.2d 293 (1990).

In addition, “[i]n ineffective-assistance claims in guilty-plea cases, ‘the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.’” *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 89, quoting *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

The actual prejudice prong presumes that the judge or jury will act according to law. *Strickland*, 466 U.S. at 694. “To hold otherwise would grant criminal defendants a windfall to which they are not entitled.” *Lockhart v. Fretwell*, 506 U.S. 364, 366, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The right to effective counsel does not entitle a defendant to the luck of a lawless decisionmaker. *Strickland*, 466 U.S. at 695.

A claim of trial counsel ineffectiveness usually will be unreviewable on appeal because the appellate record is inadequate to determine whether the omitted objection, motion, or defense really had merit and/or because the possible reasons for counsel’s actions appear outside the appellate record. *United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995) (en banc) (“Such claims brought on direct appeal are presumptively dismissible, and virtually all will be dismissed.”; “A factual record must be developed in and addressed by the district court in the first instance for effective review.”). No interlocutory remand will be allowed to develop the record. *Id.*

Ohio law similarly recognizes that error cannot be recognized on appeal unless the appellate record actually supports a finding of error. A defendant claiming error has the burden of proving that error by reference to matters in the appellate record. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980). “[T]here must be sufficient basis *in the record* * * * upon which the court can *decide* that error.” *Hungler v. Cincinnati*, 25 Ohio St.3d 338, 342, 496 N.E.2d 912 (1986) (emphasis *sic*).

In *Massaro v. United States*, 538 U.S. 500, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003), the Court emphasized the general unreviewability of trial counsel ineffectiveness claims on direct appeal.

- “When an ineffective-assistance claim is brought on direct appeal, appellate

counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose.”

- “The evidence introduced at trial * * * will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis.”
- “If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel’s alternatives were even worse. * * * The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them.”

Although there are rare cases where claims of trial counsel ineffectiveness can be legitimately argued on appeal, see *id.*, the present case is not one of those cases.

B.

The defense contends that the defense should have objected to Detective Croom testifying to numerous matters that were objectionable on hearsay and Confrontation grounds. Initially, it should be noted that defendant had no constitutional objection. As explained in the response to the first proposition of law, defendant had already pleaded guilty, and there was no constitutional right to this hearing to confirm his guilt through the admission of evidence. A guilty plea waives the constitutional right to confront witnesses. Even if there were a constitutional “factual basis” requirement, such a requirement would have been satisfied by a recitation by the prosecution; there would have been no constitutional requirement to have live witnesses.

Although the defense could have raised a state-law hearsay objection, the record does not show that trial counsel was ineffective in failing to do so. The record supports the view that counsel was engaged in strategic decisionmaking here, seeking to

minimize the prosecution's presentation as much as possible. The defense made the repeated point that defendant was admitting his guilt. A further indication of this strategy was the defense decision not to cross-examine Croom.

From a defense perspective, this approach made sense. Defendant was attempting to show his acceptance of responsibility for the crimes. By not insisting on the testimony of other witnesses, and by allowing the detective's testimony to proceed without hearsay objection, the defense was showing that he in fact was giving up any possible dispute of his guilt. It would have lessened the value of the acceptance of responsibility if defendant had pleaded guilty but then insisted on hearsay objections that made it look like he was disputing matters. Defendant was pleading guilty and throwing himself on the mercy of the court, and allowing hearsay without objection reinforced what defendant was doing.

More importantly, insisting on the testimony of the percipient witnesses merely would have served to expand the evidentiary record of what defendant did. Hearsay objections would have forced the prosecution to call the percipient witnesses, and they very likely would have been able to provide greater evidentiary detail and, thus, more evidence of defendant's guilt. By not objecting here, the defense ensured that the record was less complete than it would have been if the defense had insisted on the testimony of percipient witnesses. "[C]ounsel could have reasonably concluded that [defendant] had nothing to gain from having [the witness'] testimony presented by several witnesses rather than one." *Skatzes*, ¶ 196. Even with numerous instances of hearsay, "counsel were not ineffective in allowing [the witness] to testify as a summary witness." *Id.* ¶

215. In fact, making a hearsay objection would have been counterproductive given all of the tactical considerations involved. *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, ¶ 83 (“counsel’s failure to object to Heinig’s testimony as hearsay was a tactical decision.”; “counsel avoided forcing the prosecution to call the other DNA analyst as a witness,” who likely would have elaborated upon Heinig’s findings and bolstered the prosecution’s case.).

In any event, defendant cannot show a reasonable probability of a different outcome if the defense had made an evidentiary objection. Even if sustained, the State merely could have called the percipient witnesses. The hearing would have been longer as a result, but defendant cannot show a reasonable probability that the outcome would have been different.

C.

Defendant next contends that his counsel was ineffective in letting the defendant plead guilty without an agreement in place that the defendant would not face the death penalty or would be able to withdraw the plea if the panel returned a death sentence. But there is no claim that the prosecution was ever willing to make such an agreement.

Defendant cannot claim trial counsel ineffectiveness merely because the law did not give him an option or power he wished he had. When the law precludes a certain defense strategy, the failure to pursue such a strategy is the result of the law, not the result of any incompetence of counsel. See *Mabry v. Johnson*, 467 U.S. 504, 510 n. 10, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984). A prosecutor’s decision not to agree to a life sentence would not be attributable to counsel. *Id.* The right to counsel “has never been

understood to confer upon defense counsel the power to veto the wholly permissible actions of the trial judge.” *Lakeside v. Oregon*, 435 U.S. 333, 341, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978). The right to counsel does not exist for its own sake; it exists only to protect the defendant’s right to a fair trial, *i.e.*, a trial whose result is reliable. *Fretwell*, 506 U.S. at 369. “Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him.” *Id.* at 372.

To be sure, when the prosecution and defense have reached a *plea agreement* and have *agreed* on a sentence less than death, the prosecution and defense have been allowed in some cases to include a “withdrawal” provision in the agreement thereby allowing the defendant to withdraw the jury waiver and/or plea if the three-judge panel ends up desiring to impose the death penalty. In other words, the parties can create an “escape hatch” if they agree and if the three-judge panel which accepts the guilty plea agrees to that “escape hatch.” Once accepted by the court, such a plea bargain becomes enforceable as a matter of due process. *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).

But the availability of such an “escape hatch” provision would depend entirely on the plea agreement adopted by the parties and approved by the court, since Ohio law does not otherwise provide for a defendant to change his mind merely because he does not like the outcome of the proceeding. A jury waiver cannot be withdrawn after the trial begins. R.C. 2945.05; *State v. Frohner*, 150 Ohio St. 53, 80 N.E.2d 868 (1948), paragraph five of the syllabus. Moreover, a post-sentence motion to withdraw plea will

not be allowed merely because the defendant has tested the weight of punishment in sentencing and found it not to his liking. *State v. Smith*, 49 Ohio St.2d 261, 264, 361 N.E.2d 1324 (1977).

A defendant cannot simply “reserve” the right to change his mind if he is unhappy with the result of the sentencing proceeding. *State v. Davis*, 12th Dist. No. CA95-07-124 (1996).

In the present case, the prosecution did not reach any plea agreement with the defense, and certainly there was no agreement creating an “escape hatch.” Counsel very well may have attempted to negotiate an “escape hatch” but was rebuffed by the prosecution. *Ketterer*, ¶ 82 (“the record does not reflect whether Ketterer, through counsel, attempted to exchange a guilty plea for a life sentence.”). Without the agreement of the prosecution, and without the approval of the court, defendant could not simply “reserve” the right to change his mind if he was unhappy with the three-judge panel’s sentencing decision.

Defendant’s trial counsel cannot be deemed ineffective in failing to reserve the power to employ an “escape hatch.” There was no escape hatch under Ohio law generally, and the prosecution did not agree to any escape hatch.

Defendant contends that, absent such an escape hatch, defendant’s trial counsel should not have advised defendant to plead guilty and should have advised defendant to proceed to a jury trial instead of having a three-judge panel. But several problems attend this part of defendant’s ineffectiveness claim.

First, the appellate record does not establish exactly what advice defendant’s

counsel actually gave to defendant. *Ketterer*, ¶ 82. The decision was defendant's, not counsel's, and counsel very well could have given defendant full and accurate advice regarding the upsides and downsides of the competing "jury" and "plead-and-panel" strategies here. Since the record does not indicate what consultations occurred in this regard, it could very well be the case that counsel actually did not support either strategy. And, even if counsel did advocate a plead-and-panel strategy, counsel again very well could have presented defendant with full advice regarding the upsides and downsides of each approach. Such consultations would be constitutionally effective, even if it is judged in perfect hindsight that defendant perhaps should have chosen the "jury" approach.

For various reasons, it would have been reasonable for trial counsel to advocate pleading guilty and having the sentence determined by a three-judge panel. As stated by this Court in *Ketterer*:

{¶ 86} Counsel may have reasonably believed that a guilty plea could minimize the effect of gruesome facts and a brutal murder, especially before a three-judge panel. By pleading guilty before a three-judge panel, counsel obtained the benefit of substantial mitigation evidence, namely remorse and a plea of guilty. See, e.g., *State v. Ashworth* (1999), 85 Ohio St.3d 56, 72, 706 N.E.2d 1231 ("guilty pleas are traditionally accorded substantial weight in imposing a sentence"). Further, there was overwhelming evidence of Ketterer's guilt. * * *

{¶ 87} Counsel's advice therefore reflects reasonable representation under *Strickland*. In *Shaw v. Martin* (C.A.4, 1984), 733 F.2d 304, 316, the Fourth Circuit Court of Appeals held that counsel's recommendation of a guilty plea in a capital case "was the product of their sound deliberation and judgment that [the defendant's] prospects were better with the sentencing judge than with a jury, especially considering the brutal and utterly sadistic facts

of the case.” See, also, *Reid v. True* (C.A.4, 2003), 349 F.3d 788 (counsel’s deficient performance not shown in guilty plea to capital offense); *Carpenter v. State* (Okla.Crim.1996), 929 P.2d 988, 999 (counsel not ineffective when accused pleaded no contest in capital case).

{¶ 88} In *Wilson v. State* (1983), 99 Nev. 362, 372, 664 P.2d 328, the Nevada Supreme Court noted that counsel “encouraged [their clients] to plead guilty [to capital murder] so that they would be sentenced by a three judge panel rather than be exposed to a jury.” The Nevada court held that such “advice and recommendation * * * are largely tactical decisions. We * * * will not second guess such matters when they relate to trial strategy.”

By pleading guilty, defendant could actually demonstrate his acceptance of responsibility and remorse (rather than merely mouthing words of remorse in an unsworn statement at sentencing). Counsel could reasonably believe that a guilty plea was more likely to be given weight as “remorse” and “acceptance of responsibility.” Nothing in the appellate record overcomes the strong presumption that trial counsel would have been acting within the wide range of reasonable professional assistance in giving this kind of advice. Nothing shows that all reasonable counsel would have advocated the “jury” option only.

Also, trial counsel could be concerned about how a jury would react to the evidence of defendant’s slitting of the throats of these two young children. The photographic evidence would have been admissible in both the guilt phase and penalty phases of a jury trial to show defendant’s purpose in the killings and to allow the jury to weigh such purpose to kill and his status as principal offender in the killing of these children as part of the under-13 aggravating circumstances in the respective counts.

Counsel could believe that a three-judge panel would be a better decisionmaker to consider and address this evidence in relation to defendant's sentences for these horrendous acts. *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 55 (“[T]rial counsel may have concluded that Hunter should proceed with a three-judge panel instead of a jury because of the horrific nature of the charges involving the death of a two-year-old child.”). Again, nothing in the appellate record overcomes the strong presumption that trial counsel would have been acting within the wide range of reasonable professional assistance in advocating a three-judge-panel sentencing under these circumstances. Nothing shows that all reasonable counsel would have advocated the “jury” option only.

Also, given the probable familiarity of counsel with the judges and their past sentencing practices in death-penalty cases and other cases, counsel very well could have had a substantial reason to think that one or more of the panel members would be less likely to impose death than would a jury.

In any event, defendant cannot show any prejudice under the *Strickland* standard. To the extent defendant is contending that his counsel was ineffective vis-à-vis his waiver of jury trial, there is no actual prejudice from proceeding before a three-judge panel instead of a jury. Under the prejudice prong, the *Strickland* standard specifically eschews drawing distinctions based on the idiosyncrasies of particular decisionmakers. “The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decisionmaker,

such as unusual propensities toward harshness or leniency.” *Strickland*, 466 U.S. at 695.

Defendant cannot show a reasonable probability of a different outcome in his convictions or sentencing when the two decisionmakers, jury or panel, are considered fungible under the second prong of *Strickland*.

In addition, to the extent defendant is challenging his plea here, he must show that any “erroneous” advocacy for a plead-and-panel sentencing was outcome-determinative vis-à-vis his decision to plead guilty. “In ineffective-assistance claims in guilty-plea cases, ‘the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.’” *Ketterer*, ¶ 89, quoting *Hill*, 474 U.S. at 59. The appellate record does not show that any erroneous advice was given. Nor is there any indication in the record that, but for such advice, defendant would have insisted on a jury trial. Even if counsel had not advocated for a panel sentencing, counsel still would have needed to advise defendant of that option, and defendant in weighing the two options very well still could have chosen to have a panel sentencing.

In addition, “[i]n view of the compelling evidence of [defendant’s] guilt, any rational jury or panel of three judges would have convicted him whatever his plea. Thus, [defendant] has failed to establish ‘a reasonable probability that, were it not for counsel’s errors, the result of the trial would have been different.’” *Ketterer*, ¶ 90.

D.

Defendant next contends that his trial counsel was ineffective in failing to forcefully litigate the question of whether one of the panel members had been sleeping

on the bench. Trial counsel raised the issue based on information that there was video footage showing that the judge's eyes had been closed. (VIII, 308) Counsel asked the presiding judge to inquire as to whether the other judge had been sleeping. (Id.) The presiding judge did so, and the judge said he had not been sleeping. (Id. 309) The judge said he sometimes closes his eyes while he is listening to the testimony, concentrating on what is being said. (Id. 309) "But I can only assure you that I heard every word that was said." (Id. 309) "[B]y no means was I asleep." (Id. 309)

Counsel indicated that he was satisfied by the answer. (Id. 309) Counsel was aware that this particular judge will sometimes listen to testimony with his eyes closed. (Id. 308, 310-11)

Defendant now contends that trial counsel should have asked for a fuller hearing and called as witnesses the member(s) of the media who took the video footage. But the record only indicates that the video footage showed that the judge's eyes were closed. There is no indication that the video would have shown whether the judge was sleeping. In order to determine that issue, it was necessary to ask the judge, and counsel specifically brought up the matter, and the judge denied sleeping. At that point, there was nothing left to do. A reasonable counsel – especially one knowing this particular judge's habits – could decide not to ask for a fuller hearing on the issue in order to waste the panel's time by introducing inconclusive video footage.

Defendant does not demonstrate that his counsel was ineffective. Counsel sufficiently raised the matter, and it went nowhere. A reasonable counsel could decide not to pursue it further. In addition, defendant does not explain how counsel's failure to

object more forcefully, if indeed the judge was sleeping, prejudiced his case. *Hummel v. State*, 617 N.W.2d 561, 564 (Minn. 2000). As a result, defendant does not demonstrate a reasonable probability of a different outcome.

Defendant errs in assuming that sleeping by the judge would have required the judge's removal. An acceptable response in such a situation would have been to repeat what was missed while the judge was sleeping or to have the court reporter do a read-back, especially if the judge had only missed a matter that was undisputed. The panel would have had considerable discretion on how to proceed. See *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 186 (discussing discretion of court in handling sleeping-juror issue).

There is no indication that the judge missed "large or critical portions of the trial." *State v. Sanders*, 92 Ohio St.3d 245, 253, 750 N.E.2d 90 (2001) (sleeping-juror issue). Defendant "has provided no evidence of prejudice. Nothing in the record shows what part of the testimony, if any," was missed. *McKnight*, ¶ 187 (sleeping-juror issue).

Defendant does not specify any trial error that occurred as a result of the judge's alleged sleeping during parts of the trial and therefore defendant cannot show how he was prejudiced under the *Strickland* standard. *Hummel*, 617 N.W.2d at 564. The absence of prejudice is also confirmed by the fact that there were two other judges listening to the testimony who would have been able to make legal rulings if necessary.

E.

Defendant contends that trial counsel "failed to present expert testimony that would have been critical for the panel to consider and weigh when determining the

sentence.” Defendant’s Brief, at 34. While the record establishes that no expert testified at the penalty phase for defendant, the record does not establish that counsel was ineffective in that respect.

The record shows that funding was received for two experts, i.e., a psychologist and sex-abuse expert. But the record does not reveal how they would have testified if called. For that reason alone, defendant cannot establish on direct appeal that trial counsel was acting unreasonably in failing to call these experts or whether these experts would have created a reasonable probability of a different outcome. “Establishing that would require proof outside the record, such as affidavits demonstrating the probable testimony. Such a claim is not appropriately considered on a direct appeal.” *State v. Madrigal*, 87 Ohio St.3d 378, 390-91, 721 N.E.2d 52 (2000).

Defendant details information that is in the appellate record regarding defendant’s history and other matters. The record does not show whether any expert testimony would have added so much that all reasonable counsel would have called the expert(s) and that the testimony of such expert(s) would have been so significant as to create a reasonable probability of a different outcome.

Defendant is just speculating in contending that the expert(s) would have been a key component in helping him avoid the death penalty. There is a strong presumption that counsel would have called one or both of the experts if they would have been helpful in the way imagined. The *failure* to call these experts supports the view that these experts were not as helpful as defendant now speculates and/or that their testimony would have one or more significant downsides that would be counterproductive.

Indeed, one of the reasons not to introduce “mitigating” evidence is that such evidence could open the door to damaging evidence about the defendant. Putting an expert on the witness stand to testify about various current-day psychological considerations very well could have opened the door to a panoply of negative psychological traits that would undercut whatever might be considered otherwise “favorable” in the presentation. Defendant’s speculation about favorable mitigation from experts merely encourages further speculation that counsel must have had a good reason or reasons for not calling these experts. Maybe they did not add much to what was otherwise being presented. Maybe there were substantial downsides to presenting evidence of a full or partial psychological evaluation.

Defendant’s trial counsel could not cherry-pick supposedly-favorable details from expert evaluations and present only those details. Defendant’s trial counsel needed to be concerned about the entire universe of information available from those would-be experts, and whether, under cross-examination, those witnesses would reveal unfavorable information or information that would undercut other “favorable” details. Without knowing what information was known to counsel, it simply cannot be said that counsel was being unreasonable in deciding not to introduce expert testimony.

Defendant’s speculation on direct appeal does not show that the omitted expert(s) would have created a reasonable probability of a different outcome in the sentencing phase. Defendant faced overwhelming aggravating circumstances. Applicable to each aggravated-murder count was the course-of-conduct aggravating circumstance, under which defendant was convicted of having purposely killed or

attempted to kill two or more persons. On this aggravator, actually three murders were to be weighed, as defendant's killing of Tia was part of the course of conduct, as was the killing of Tahlia and Tyron. It is a triple homicide, and the three killings in the course of conduct all weigh in favor of the death penalty on the killings of Tahlia and Tyron. Also weighing in favor of the death penalty under this aggravator is the purpose to kill, and, of course, defendant's purpose to kill was extreme here, slitting the throat of each victim, including the young children (including Tyron all the way down to his trachea and esophagus).

Of course, another extremely strong aggravator is the victim-under-13 aggravating circumstance that is applicable to the killings of Tahlia and Tyron. Under this aggravating circumstance, the youth of the victim is considered and weighed. Their respective ages, ten and two, weigh heavily in favor of the death penalty. As the panel stated, "[t]he murder of innocent children, especially a two-year-old, is one of the most extreme of any aggravating factors." Sentencing Opinion, at 6. Weighing in favor of death under this aggravating circumstance is the fact that defendant "purposely caused the death of another who was under 13 years of age * * *" and that he did so as the principal offender. Defendant's purpose to kill very young children weighs heavily here, especially when it is considered that he had to overcome Tahlia's resistance (as shown by her defensive wounds). In addition, the fact that he as the principal offender personally performed these execution-style throat slittings weighs heavily.

Also weighing in favor of death under the counts involving Tahlia is the aggravating circumstance for having the purpose to escape detection, apprehension, trial

or punishment.

Against these strong, overwhelming aggravated circumstances (3 as to each count involving Tahlia, 2 as to the each count involving Tyron), defendant's speculation about additional expert "mitigation" evidence falls far short of showing a reasonable probability of a different outcome.

F.

Defendant next posits that his trial counsel were ineffective in failing to object to the cross-examination of defense witnesses Thomas and Brown about defendant's time while he was in custody of Children Services. According to defendant, counsel should have objected when these witnesses were cross-examined with information from Children Services records. In addition, defendant contends that his counsel were ineffective in failing to prepare these witnesses for such cross-examination.

Several responses come to mind. First, the defense even now sees some benefit from introducing information relating to defendant's time with Children Services. The defense is currently citing Joint Exhibit 1 (the Children Services records) and Joint Exhibit 2 (counseling records) and citing the testimony of Thomas and Brown. See Defendant's Brief, at 34-36. Indeed, the defense contends that even more information relating to that time should have been introduced via expert testimony. So the decision to have Thomas and Brown testify is not being challenged.

Instead, the defense asserts that the witnesses should have been allowed to testify without contradiction from the records, which were eventually admitted by stipulation. (VIII, 315) But counsel could not legitimately object on that basis.

Thomas testified that “nobody really wanted to deal with” defendant, contending that Children Services placed him with older boys not because of his large size but because Children Services wanted the older boys to “get him in shape * * *.” (VIII, 246, 246-47) She contended that defendant would “act out” but was not “overaggressive” in doing so. (Id. 252) She argued that he behaved better during the week because there was “structure” in the cottage where he was being housed as opposed to the lack of “structure” in his home environment. (Id. 252) She argued that Children Services “definitely” “failed” defendant. (Id. 255)

But, under cross-examination, Thomas conceded that she had only worked with defendant at the cottage for six to eight months and that she was not privy to the records regarding what had happened to defendant before he came to that cottage. (Id. 257, 264) Thomas also contended that defendant had been bullied at the cottage, (Id. 258), but then claimed that it “wouldn’t surprise” her if the records showed the opposite. (Id. 258) She could not say whether defendant was aggressive with the other boys or whether he was disrespectful to staff. (Id. 259) She did not remember that defendant had gone AWOL at one point. (Id. 260)

Brown testified that defendant “was a good kid in comparison to a lot of the kids that we had in and out of the system there.” (VIII, 272) Defendant was just “a big old baby,” a “big kid” who liked watching cartoons unbothered by other things going on. (Id. 272) “He was not a problem child for me.” (Id. 272) Brown could not remember needing to discipline defendant, who was “respectful” and “responsive” to things he was told to do and “was not a discipline problem that I saw.” (Id. 272-73, 275) Brown

portrayed defendant as earning credits to obtain weekend passes to go home but his mother not picking him up sometimes. (Id. 273-74) Brown contended that defendant's mother was the kind of parent who "warehouse[d]" her child at the facility when there was not necessarily a need because of problems. (Id. 276) Brown contended that Children Services should have done more for defendant and that defendant "was discarded" by Children Services. (Id. 282, 285)

Under cross-examination, when asked whether he knew about defendant's discipline problems, Brown said he knew of the discipline problems but did not personally have those problems with defendant. (Id. 287, 288) Brown recalled a report of defendant sexually acting out. (Id. 288) Brown was unaware of other problems like disrespect, agitation, going AWOL, and lack of cooperation. (Id. 288-89)

The Children Services records gave a full picture of these matters, showing that serious problems caused defendant's mother to bring him to Children Services. The mother was not merely "warehousing" defendant. Defendant also had several discipline problems while in the custody of Children Services, including one incident documented by "Mr. Brown." And Children Services had not "discarded" defendant but instead had made repeated efforts to have defendant receive psychological counseling.

The problems causing defendant's initial placement with Children Services included defendant being regularly suspended from school once or twice a week. (Jt. Ex. 1, 4-15-86 Social Summary, at 1) When an aunt temporarily cared for defendant, defendant was a behavioral problem in her home, stealing food and beating up her younger children. (Id. at 1) Defendant's behavioral problems were so serious that his

mother's family would not want to be around them because of his behavior. (Id. at 1-2) Defendant exposed himself in school and masturbated in the school hallways. (Id. at 3) He was overly aggressive with females and was physically aggressive with younger children. (Id. at 3) Defendant was "beyond the reasonable control of his mother," who appeared to be experiencing a certain degree of "burn out" from having to deal with him. (Id. at 4) Children Services indicated that defendant would need 12-18 months of long-term residential treatment. (Id. at 6)

Upon entering FCCS custody, defendant assumed a false identity at a camp, causing much concern because the staff there thought the child with that identity had gone missing. (Jt. Ex. 1, 10-15-86 Periodic Evaluation, at 1)

At a pre-placement visit at Boys' Village, defendant deliberately sabotaged his placement by starting a food fight and spitting on and wiping mucous on other residents. (Id. at 1) Boys' Village indicated that they could not accept him into their program because his behavior was beyond their control. (Id. at 1)

Upon entering Franklin Village Cottage # 5 (where Thomas and Brown had supervised him), the records indicated that he caused several problems. Defendant was accused of approaching other boys there for sexual favors. (Id. at 1) He accumulated so many demerit points as to be in the negative at certain times. (Id. at 1) Defendant did not obey the rules of the cottage and went AWOL on one occasion. (Id. at 2) "Caron's mother has tried to participate with the program and encourage Caron by visiting him on visitation day and having phone calls with him as permitted." (Id. at 1, 2)

Defendant was referred for counseling at the Diocesan Child Guidance Center.

(Id. at 1)

Defendant's misbehaviors included sexual remarks, fighting, going AWOL, and refusing to follow instructions, including turning over furniture. (Jt. Ex. 1, 10-27-86 Placement Treatment Plan Evaluation, at 1) Defendant "lost points for infringement, disrespect, and trespassing." (Id. at 3) Other problems included excessive talking, "constant agitation," generally being uncooperative, and being "sneaky." (Id. at 4) Defendant would argue with staff and would not accept consequences well, usually claiming the problem was someone else's fault. (Id. at 3) "He has had difficulty with staff in the cottage * * *." (Id. at 5)

In the next evaluation, it was noted that defendant had made obscene hand gestures in close proximity to a teacher at Kingston School and was suspended for three days as a result. (Jt. Ex. 1, 4-23-87 Placement Treatment Plan Evaluation, at 1, 4) School staff was having "ongoing difficulty with Caron making inappropriate sexual gestures or comments and touching himself." (Id. at 4) He lost points at Kingston "for disrespect, agitation, infringement, fighting and being uncooperative." (id. at 4)

According to an incident report "by Mr. Brown," defendant exposed himself to other residents at the cottage by pulling his pants down. (Id. at 1) "When confronted by staff about this behavior, Caron lost control and charged Mr. Brown." (Id. at 1) Defendant "lies when caught, even when caught red-handed." (Id. at 3) "He continues to have difficulty accepting responsibility for his behavior." (Id. at 3)

Defendant underwent a psychological evaluation and was accepted into the Adolescent Sexual Offender's Group at the Willson Clinic. (Id. at 1)

As a result of psychological counseling, the psychologist indicated in a conference on May 5, 1987 that defendant was considered very capable of forced sexual activity that would victimize another child. (Jt. Ex. 1, 5-6-87 Interoffice Communication, at 1) The psychologist was adamant that defendant should not be released from Franklin Village before August 1987. (Id. at 1)

In a subsequent motion contained in the Children Services file, Children Services noted the repeated attempts at counseling that had occurred while defendant was at Franklin Village. Defendant received six months of individual counseling at Diocesan Child Guidance Center, but the progress was minimal because defendant was resistant. (Jt. Ex. 1, "Motion Regarding Caron Montgomery," at 2) He participated for over a year in the Willson Clinic program, but the prognosis was poor. (Id. at 3) He also received additional counseling for four months from a FCCS psychologist, but defendant was evasive and had only minimal progress. (Id. at 3)

Defendant had been in the placement at Franklin Village from July 1986 to August 1987. (Id. at 2) "[L]ate in his placement he was involved in an attempted rape of another resident in another cottage while that youth was there on a pre-placement visit." (Id. at 2)

Given what the Children Services records revealed, the prosecutor had a good-faith basis to challenge the veracity and memories of Thomas and Brown. Their pollyannaish portrayal of defendant as a "good kid" without disciplinary problems was just wrong, including an incident that Brown was personally involved in (contrary to his testimony). Their effort to claim that Children Services "discarded" and "failed"

defendant was belied by the length of time of their efforts and the repeated efforts at counseling that were made. And although the records tend to show a drop-off in the participation by defendant's mother as time went along, the fact remains that she was not "warehousing" defendant at Children Services as claimed by Brown. Defendant had serious behavioral problems that were far more than she could control, and the records help show she was "burn[ing] out" from trying.

The prosecutor could cross-examine on the information contained in the records. "A cross-examiner may ask a question if the examiner has a good-faith belief that a factual predicate for the question exists." *State v. Gillard*, 40 Ohio St.3d 226, 533 N.E.2d 272 (1988), paragraph two of the syllabus. The records provided a good-faith basis for the prosecutor to question the veracity and memories of these witnesses. And the cross-examination easily satisfied the standard of relevance under Evid.R. 401 and 402 after the defense opened up these areas of inquiry. Once the defense introduced these topics into the penalty phase, it "could not limit the subject to just those points of evidence which were in its favor. Rather, the topic[s] became open to all relevant inquiry in the discretion of the trial court." *State v. Kamel*, 12 Ohio St.3d 306, 312, 466 N.E.2d 860 (1984).

There was no basis for counsel to object, and such an objection would have been properly overruled. An overruled objection would not have created a reasonable probability of a different outcome, and, even if sustained, the exclusion of the cross-examination still would not have created any reasonable probability of a different outcome given the eventual defense *stipulation to the records* and given the

overwhelming nature of the aggravating circumstances.

As for counsel's failure to "prepare" the witnesses for the cross-examination, the record is unclear what amount of preparation took place. As a result, the record is insufficient to allow a ruling on such a claim.

In any event, there is no indication that the witnesses would have performed any better than they did even if "prepared." They presumably gave truthful answers when they said they did not recall the information in the records. "Preparing" them still would have left them to concede that they did not recall or know the significant details in the records. Of course, to the extent they recalled the negative details about defendant reflected in the records, there was no amount of "preparation" that would have allowed them to avoid effective cross-examination on whether defendant was a "good kid," whether he was a discipline problem, and whether Children Services "discarded" or "failed" him, all of which were topics opened up by the direct examination of these witnesses.

G.

An aunt of defendant called one of defendant's trial counsel complaining about efforts by defense counsel to "slander" defendant's mother. The aunt was demanding that the attorneys seek to clear the mother's name and get off the case. (VIII, 349-50) The counsel viewed the messages as "forcefully threatening," (Id. 351), and therefore presented the information to the panel, indicating that, despite the calls, defendant still wanted the two trial counsel to remain on the case. (Id. 350) Counsel also said that they could continue the representation uninfluenced by the phone calls. (Id. 352)

Defendant now contends that counsel were being ineffective in presenting the information to the panel. Defendant contends that the phone calls undercut the defense efforts to portray the mother in a negative light.

Counsel's actions did not fall outside the wide range of reasonable professional assistance. A reasonable counsel could decide that the court should be informed of the incident and that the court might wish to assess the situation in terms of whether the incident affected counsel's ability to proceed on with the case and whether defendant had any objection to current counsel continuing on the case. Efforts by third parties to threaten or coerce participants in an on-going trial represent a significant threat to justice that courts are empowered to closely monitor to ensure that the trial is unaffected.

It would be curious and backwards if a trial counsel were deemed ineffective in presenting information to the trial court in order to allow the court to assure itself that counsel in fact could proceed effectively. A criminal defendant's right to the effective assistance of counsel does not extend to having counsel remain silent while threats to trial participants are made (even if the threats are made by the client himself). *Nix v. Whiteside*, 475 U.S. 157, 174, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986). An attorney is "an officer of the court and a key component of a system of justice, dedicated to a search for truth * * *." *Id.* at 174. Counsel cannot be faulted for alerting the court to the issue.

Defendant errs in asserting that, because closing arguments in the penalty phase were already concluded, there was no need to present the information to the panel. There were still substantial proceedings to occur, including the announcement of the penalty verdicts and the eventual sentencing hearing with allocution and imposition of

sentence.

As for the concern that the panel would use the information to undercut the defense strategy of blaming the mother for defendant's development, the panel is presumed to have considered only the evidence admitted before it." *State v. White*, 15 Ohio St.2d 146, 151, 239 N.E.2d 65 (1968).

In any event, the information was not as negative toward the "blame mother" strategy as defendant now portrays. While the aunt's statements indicated that the defense strategy was "slandering" the mother, the information also supported the view that defendant's aunt was a vulgar loud-mouth who did not give a "f***" for defendant, which was a modest barometer of the kind of extended family defendant grew up in. It was unlikely that the panel would credit the aunt's statements under these circumstances. And even if the panel had somehow considered the information, it was at best a "wash" in the context of the entire trial and certainly did not create a reasonable probability of a different outcome in the penalty phase. The aggravating circumstances still would have been overwhelming regardless of the phone-call information.

H.

Defendant finally contends that his individual ineffectiveness claims would cumulatively support reversal. The State disagrees, as none of the claims, either singly or cumulatively, support reversal for the various reasons stated above, including the overwhelming aggravating circumstances faced by defendant.

Defendant's third proposition of law does not warrant relief.

RESPONSE TO FOURTH PROPOSITION OF LAW

AN APPELLANT BEARS THE BURDEN OF DEMONSTRATING PREJUDICIAL ERROR IN A THREE-JUDGE PANEL'S WEIGHING OF AGGRAVATING CIRCUMSTANCES.

The defense is correct in contending that each aggravated murder count must be assessed separately in determining whether the aggravating circumstances on that count outweigh the mitigating factors. “[T]he penalty for each individual count must be assessed separately. Only the aggravating circumstances related to a given count may be considered in assessing the penalty for that count.” *State v. Cooley*, 46 Ohio St.3d 20, 544 N.E.2d 895 (1989), paragraph three of the syllabus. However, defendant fails to address language in the panel’s merger ruling showing that the panel *did* confine the aggravating circumstances to their particular counts.

Before the panel announced its decision on whether to impose death, the panel previewed for the parties how it would merge the offenses, with the presiding judge reading off the proposed ruling on merger. (VIII 353 et seq.) The panel thereby indicated that Counts Two and Three regarding the killing of Tahlia would merge for sentencing and that Counts Four and Five regarding the killing of Tyron would merge for sentencing. (Id. 353-54) The presiding judge then stated that duplicative specifications would be merged as well and announced “that specifications in respective counts that related to a course of conduct involving the purposeful killing of two or more persons that are contained in Counts Two, Three, Four and Five merge for sentencing purposes.” (Id. 354)

The panel indicated that it would be weighing four aggravating circumstances “*as placed in their respective counts*, to weigh against the mitigating factors presented by the defense.” (Id. 354-55; emphasis added) The panel then listed the four aggravating circumstances as: (1) one specification of the purposeful killing of two or more persons as to Counts Two through Five; (2) two specifications as to killing under 13 “each to be separately considered as to Counts Two and Three, merged, and Counts Four and Five, merged * * *”; (3) one specification for the offense being committed for purpose of escaping detection, apprehension, trial, or punishment “as set forth in Counts Two and Three, merged.” (Id. 355)

When one of the panel members queried the parties as to whether there was an objection, the defense raised no objection and even agreed with the panel’s planned approach. (Id. 356)

The prosecutor emphasized that the panel should consider with the respect to Counts Two and Three the aggravated circumstances that were appropriate to Counts Two and Three. (Id. 356) One panel member agreed with the prosecutor; but the presiding panel member said that “[t]hey all merge, though, with respect to killing two or more persons.” (Id. 356) But, in regard to the two-or-more aggravating circumstance, the prosecutor stated that “you would consider that ag circumstances whether you were considering Counts Two and Three or whether you were considering Counts Four and Five.” (Id. 357) Two of the panel members agreed, saying “correct.” (Id. 357) The prosecutor added, “Yeah. I think you had to consider that aggravating circumstance with respect to each of the killings. You don’t have to return the same

verdict with respect to Counts Two and Three as with respect to Counts Four and Five.”

(Id. 357) The third panel member agreed, “That’s right.” (Id. 357) The prosecutor emphasized that “[t]hose decisions are independent of each other.” (Id. 357) The following exchange then occurred:

MR. STEAD [prosecutor]: That’s the specs from Two and Three merge and the specs from Four and Five merge.

JUDGE SHEERAN: And then the purposeful killing, they merge, but they can be considered in each of those, Two and Three, and Four and Five.

MR. STEAD: Fine.

(Id. 357-58)

When the panel later announced its decision, it again noted that the panel “had four aggravating circumstances as placed in their respective counts to weigh against the mitigating factors presented by the defense”, including the under-13 specifications “each to be separately considered as to Counts Two and Three, merged, and Counts Four and Five, merged * * *.” (Id. 361-62) These same statements are contained in the “Preliminary Findings as to Merger” that were filed. (R. 132)

The panel’s verdict imposing death on Counts Two and Three, merged, indicated that the panel had found that “the aggravating circumstances as set forth in Counts Two and Three, merged, outweigh the mitigating factors presented beyond a reasonable doubt.” (VIII 362; R. 132)

The panel’s verdict of death on Counts Four and Five, merged, indicated that the panel had found that “the aggravating circumstances as set forth in Counts Four and Five, merged, outweighed the mitigating factors presented beyond a reasonable doubt.”

(VIII 362-63; R. 132)

In the panel's sentencing opinion, the panel referenced its merger decision. (Opinion, at 2) Although the panel again referred to "four" aggravating circumstances, it did not contradict its contention earlier that it had weighed the aggravating circumstances "*as placed in their respective counts*" and had not double-counted the under-13 specifications because each was "*to be separately considered* as to Counts Two and Three, merged, and Counts Four and Five, merged * * *" Nor did the panel alter its verdicts indicating that the panel had weighed the "aggravating circumstances *as set forth*" in the respective counts. The panel did provide the following comments in conclusion:

This Decision notes, hopefully adequately, how much the Panel considered the evidence presented and the gravity with which it took its responsibility. The particular judges on this case have had a great deal of experience involving death penalty cases, and the decision reached herein was made neither in haste nor in passion, but after careful consideration of all the evidence. It is not an easy thing to sentence another human being to death, and each member of the Panel clearly felt the weight of that responsibility. However, it must be noted that in the unanimous and individual opinion of the Panel's judges, the aggravating circumstances not only outweighed but overwhelmed the mitigating factors, beyond any reasonable doubt.

(Opinion, at 11)

As can be seen, the defense errs in focusing solely on the written sentencing opinion. The court's merger ruling showed that the panel complied with *Cooley* by weighing the aggravating circumstances "as placed in their respective counts" and that the panel had not double-counted the under-13 specifications because "each [was] to be

separately considered as to Counts Two and Three, merged, and Counts Four and Five, merged * * *” The verdicts confirmed that the panel only weighed the aggravated circumstances “as set forth” in the respective counts against the mitigating factors.

The prosecutor himself had emphasized that the court must reach its sentencing verdict as to the counts “independent of each other.” The panel was well aware of the need to assess the aggravating circumstances as to their respective counts.

To be sure, the panel could have been clearer than it was. It had unnecessarily complicated its announcement of its verdicts when it decided to merge the counts *before* announcing the verdicts. There was no requirement that the counts be merged before the verdicts. Counts for the same victim need only be merged at the very end of the sentencing process when imposing sentence. *State v. Waddy*, 63 Ohio St.3d 424, 447, 588 N.E.2d 819 (1992). A defendant is not entitled to merger of those counts before that time. See *State v. Davis*, 76 Ohio St.3d 107, 120, 666 N.E.2d 1099 (1996); *State v. Woodard*, 68 Ohio St.3d 70, 78-79, 623 N.E.2d 75 (1993); *State v. Palmer*, 80 Ohio St.3d 543, 572, 687 N.E.2d 685 (1997); *State v. Twyford*, 94 Ohio St.3d 340, 351 763 N.E.2d 122 (2002) (“we find no error here in the jury’s consideration of two aggravated murder counts for a single victim”). Had the panel avoided discussing merger until after the verdicts, the announcement of the panel’s decision would have been cleaner and clearer.

The panel ultimately imposed the death sentences on Counts Three and Five. Therefore, it is appropriate to refer to the aggravating circumstances pertinent to these respective counts. As to Count Three, aggravated murder (victim under 13) of Tahlia,

the three aggravating circumstances are: (1) killing committed for purpose of escaping detection, apprehension, trial or punishment for another offense; (2) course of conduct involving purposeful killing of two or more people; (3) defendant was principal offender in purposeful killing of victim under 13.

As to Count Five, aggravated murder (victim under 13) of Tyron, the two aggravating circumstances are: (1) course of conduct involving purposeful killing of two or more people; (2) defendant was principal offender in purposeful killing of victim under 13.

Even if the panel had overcounted the number of aggravating circumstances pertinent to the respective counts, defendant cannot show that the error was prejudicial. Even without such supposed overcounting, defendant faced three strong aggravating circumstances as to the killing of Tahlia, and two strong aggravating circumstances as to the killing of Tyron. The course-of-conduct aggravating circumstance was overwhelming unto itself because it included three purposeful killings in the course of conduct. In addition, the under-13 aggravating circumstance as to each respective count was “very significant” as found by the panel. These aggravating circumstances easily overcame the meager mitigation. Any error in “overcounting” the aggravating circumstances was harmless beyond a reasonable doubt.

In any event, this Court’s “independent review of a sentence will cure any flaws in the trial court’s opinion”, including even “serious deficiencies.” *State v. Fox*, 69 Ohio St.3d 183, 190-191, 631 N.E.2d 124 (1994); *State v. Lott*, 51 Ohio St.3d 160, 170, 555 N.E.2d 293 (1990); *Bays*, 87 Ohio St.3d at 30-31 (four errors curable). In particular, a

“failure to separately weigh the aggravating circumstances of each murder count against the mitigating factors can be cured by independent review”. *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637, ¶ 114, citing *Cooley*, 46 Ohio St.3d at 38 (independent review cures double counting). The present case falls far short of the kind of confusion and six errors that prevented curing in *State v. Green*, 90 Ohio St.3d 352, 738 N.E.2d 1208 (2000).

Defendant’s fourth proposition of law does not warrant relief.

RESPONSE TO FIFTH PROPOSITION OF LAW

THE ADMISSION OF GRUESOME PHOTOGRAPHS
BEFORE A THREE-JUDGE PANEL WILL NOT
WARRANT REVERSAL AS SUCH JUDGES ARE
CAPABLE OF CONSIDERING SUCH EVIDENCE
DISPASSIONATELY AND WITHOUT MISUSING
SUCH EVIDENCE.

There is some unintended irony in defendant’s claim that the photographic evidence was “extremely graphic,” “emotional,” “gruesome,” and “shocking.” Defendant was entirely and solely the person responsible for the carnage that resulted in this crime scene and the multiple “gruesome” and “shocking” injuries suffered by the victims. Having massacred the victims in his triple-homicide course of conduct, it is misplaced that defendant appears to demand a sanitized portrayal of what he did. Defendant did monstrous things, and that fact was unavoidable.

In a jury trial, in which the jurors could be unaccustomed to such criminality, the concerns about limiting the presentation in the way contended by defendant would make more sense. But for a seasoned panel of experienced trial judges who have seen these kinds of things before, defendant’s concerns entirely miss the mark. As the panel stated

in its sentencing opinion, “the panel – all of whom have had significant prior death penalty case experience – gave scant consideration to the photographs * * *.” (Sentencing Opinion, at 3) As Judge Sheeran stated, “I’ve seen far worse.” (VII, 101) Judge Reece similarly stated that “I could sit here and view these for, I think, till they are all shown, not a problem with me * * *.” (Id. 101) He also stated that “I do believe that we’re capable of viewing the evidence that we’re required to review and to arrive at the appropriate determination based upon the evidence that we’ve received.” (Id. 101; see, also, VII, 27)

Unlike lay jurors, judges are presumed to be able to review graphic or gruesome evidence in a dispassionate and unemotional way. “We indulge in the usual presumption that in a bench trial in a criminal case the court considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary.” *State v. White*, 15 Ohio St.2d 146, 151, 239 N.E.2d 65 (1968). “[T]his presumption appropriately credits the judiciary with knowledge of the law and the ability to correctly apply it.” *State v. Eley*, 77 Ohio St.3d 174, 181, 672 N.E.2d 640 (1996). In the context of gruesome photographs, this presumption means that, in a case tried to a three-judge panel, “the judges are presumed not to have been improperly influenced by any gruesome photographs.” *State v. Newton*, 108 Ohio St.3d 13, 2006-Ohio-81, 840 N.E.2d 593, ¶ 99; *Ketterer*, ¶¶ 136-38.

The admission of photographs of the decedent is left to the sound discretion of the trial court. *State v. Maurer*, 15 Ohio St.3d 239, 264, 473 N.E.2d 768 (1984). “[T]he mere fact that a photograph is gruesome or horrendous is not sufficient to render it *per*

se inadmissible.” Id. at 265. The trial court should view the photographs in the light most favorable to their proponent, “maximizing [their] probative value and minimizing any prejudicial effect to one opposing admission.” Id.

Even gruesome photographs may be admitted if the court believes the photographs will be useful to the trier of fact. *State v. Woodards*, 6 Ohio St.2d 14, 25, 215 N.E.2d 568 (1966). Since photographs often convey information more accurately than words or diagrams, id., the court can admit photographs even though the defense is willing to stipulate the cause of death. *Maurer*, 15 Ohio St.3d at 265. In capital cases, even gruesome photographs are admissible if their probative value outweighs the danger of unfair prejudice. *State v. Morales*, 32 Ohio St.3d 252, 257-58, 513 N.E.2d 267 (1987).

A trial court’s decision admitting photographs should not be reversed unless the appellate record reveals a clear abuse of discretion. *Maurer*, 15 Ohio St.3d at 265, quoting *State v. Hymore*, 9 Ohio St.2d 122, 128, 224 N.E.2d 126 (1967). An abuse of discretion connotes more than an error of law or judgment; it connotes that the trial court’s attitude was unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). Even if an abuse of discretion has occurred, the conviction will not be reversed unless the defendant has been materially prejudiced. *Maurer*, 15 Ohio St.3d at 265.

Under these standards, defendant has failed to show that the trial panel abused its discretion. There was no danger of unfair prejudice because, as a panel of judges, the panel would be able to assess the evidence dispassionately. There was no danger the

panel would misuse the evidence, and, in fact, the panel said they gave scant consideration to the photographic evidence.

In addition, defendant cannot show material prejudice warranting reversal. Defendant pleaded guilty, and his chief complaint about the photographs was that they were unnecessary because he had pleaded guilty. See *Newton*, ¶ 100 (“because Newton pleaded guilty, he has not demonstrated prejudice * * *”). Insofar as his guilt was concerned, defendant could not have been prejudiced from the admission of the photographs when he was confessing his guilt in open court.

In the penalty phase, defendant cannot show material prejudice either. The panel is presumed not to have misused the photographs or been improperly influenced by the gruesome nature of some of the photographs. The panel actually stated that they gave the photographs scant consideration.

Another aspect of the issue of prejudice arises out of the fact that, even in a best-case scenario for defendant, several of the photographs still would have been admissible. Crime-scene photographs merely showing blood are not “gruesome” because they do not show actual bodies or body parts. *State v. DePew*, 38 Ohio St.3d 275, 281, 528 N.E.2d 542 (1988). And even crime-scene photographs showing the bodies in the background would not qualify as “gruesome” because only the bodies and their location are visible and not the injuries.

To the extent that the photographs include depictions of the injuries, the photographs are gruesome, and a non-repetitive number of those photographs still would have been admissible even in front of a jury. The panel would have seen the gruesome

injuries in some way in this case. Again, defendant could not sanitize his mass murders so that the panel was ignorant of what he did. Given that the panel would have seen at least some of the gruesome photographs, his claim of improper repetition of some photographs of some injuries does not demonstrate any prejudice.

In light of the involvement of a three-judge panel, it would accomplish little to conduct a photo-by-photo review to assess admissibility here. But if such a review would be undertaken, it would be seen that several photographs of the victims are admissible to show the different injuries suffered by the victims. Because defendant inflicted multiple injuries, there would have been multiple photographs. Many would have been admissible to show defendant's purpose, the manner of death, the overall perspective of the various wounds, and the positioning of the bodies at the crime scene.

In all respects, defendant has not demonstrated prejudicial error warranting reversal. Defendant pleaded guilty and was guilty. In the penalty phase, the aggravating circumstances were overwhelming, and the mitigating factors weak. "[E]ven if some of the photographs or slides were improperly admitted, we note that any prejudice was harmless considering the overwhelming evidence of [defendant's] guilt. In addition, any prejudicial impact is minimized by our independent review." *State v. Smith*, 97 Ohio St.3d 367, 2002-Ohio-6659, 780 N.E.2d 221, ¶ 37. "[A]ny prejudicial impact this evidence might have had on the sentencing phase is minimized by [this Court's] independent review of the sentence." *State v. Davie*, 80 Ohio St.3d 311, 318, 686 N.E.2d 245 (1997).

Defendant's fifth proposition of law does not warrant relief.

RESPONSE TO SIXTH PROPOSITION OF LAW

A. IMPOSITION OF THE DEATH PENALTY DOES NOT VIOLATE THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 2, 9, 10, AND 16 OF THE OHIO CONSTITUTION. THE FAILURE TO PROVIDE FOR THE DEATH PENALTY IN THE CASE OF MULTIPLE MURDERS WOULD RESULT IN A SET OF “FREE” MURDERS, ULTIMATELY ENDANGERING HUMAN LIFE.

B. AFTER THIS COURT INDEPENDENTLY REWEIGHS THE AGGRAVATING CIRCUMSTANCES AND MITIGATING FACTORS, AND AFTER THIS COURT CONDUCTS ITS PROPORTIONALITY REVIEW, THE DEATH SENTENCES SHOULD BE AFFIRMED.

In Part A below, the State addresses defendant’s constitutional challenges. In Part B, the State addresses why this Court should find that the aggravating circumstances outweigh the mitigating factors and why the death sentences are appropriate.

A.

Defendant’s constitutional challenges were forfeited by the failure to raise them below. They all lack merit anyway and would not rise to the level of plain error warranting reversal. Defendant cannot show that any error occurred, that the purported error was obvious at the time it was committed, and that the purported error would have been clearly outcome determinative. *State v. Barnes*, 94 Ohio St.3d 21, 27-28, 759 N.E.2d 1240 (2002).

“We have held, time and again, that Ohio’s death penalty statutes are

constitutional.” *State v. Raglin*, 83 Ohio St.3d 253, 261, 699 N.E.2d 482 (1998). The issue of constitutionality is so settled that such claims are now summarily rejected by this Court. See, e.g., *State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, ¶ 208 (summarily rejecting constitutional challenges); *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶¶ 140 (rejecting various challenges); see, also, *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

The present case of mass murder provides a strong reason for why the death penalty is needed. Having no death penalty results in allowing the mass murderer to effectively have a set of free killings with no effective punishment. Knowing that the first killing will often result in a sentence of life without parole, the mass murderer can kill again and again, knowing that there will be no real punishment for such additional killings. The death penalty must be available in such situations to punish the mass murderer.

Defendant’s arguments regarding excessiveness and more severity than necessary were rejected in *State v. Jenkins*, 15 Ohio St.3d 164, 168, 473 N.E.2d 26 (1984), and paragraph one of syllabus.

Defendant’s argument regarding arbitrary and discriminatory imposition was rejected in *Jenkins*, 15 Ohio St.3d at 169; *Short*, ¶ 139. There is no requirement that imposition of the death penalty reach a level of god-like perfection and “consistency” amongst myriad sentencers addressing myriad cases with myriad and nuanced variations of facts and circumstances. This is particularly true in light of the special “mitigation” principle in the death-penalty context that requires individual sentencers to consider

supposed mitigating factors going as far back as the childhood of the killer. When every case devolves into such a wide-ranging list of “mitigators” regarding the killer, and when states like Ohio allow a single outlier juror to veto the death penalty, god-like consistency cannot be expected.

Defendant’s argument that insufficient methods are applied to ensure proper “weighing and consideration” was rejected in *Jenkins*, 15 Ohio St.3d at 172.

Defendant’s argument about unreliable sentencing procedures was rejected in *State v. Ferguson*, 108 Ohio St.3d 451, 844 N.E.2d 806, 2006-Ohio-1502, ¶ 87.

Defendant’s argument that Crim.R. 11(C)(3) imposes an impermissible risk of death on capital defendants who choose to exercise their right to a jury trial was rejected in *State v. Nabozny*, 54 Ohio St.2d 195, 375 N.E.2d 784 (1978), paragraph one of syllabus, and in *State v. Buell*, 22 Ohio St.3d 124, 138, 489 N.E.2d 795 (1986).

Defendant’s argument about mandatory submission of reports and evaluations is inapplicable because defendant declined such reports. *Ferguson*, ¶ 90. This argument was rejected in *Ferguson* and other cases. *State v. Esparza*, 39 Ohio St.3d 8, 10, 529 N.E.2d 192 (1988), and *Buell*, 22 Ohio St.3d at 138.

Defendant’s complaint about the “nature and circumstances” being used in aggravation is wrong, as the nature and circumstances of the aggravated murder are only to be weighed in mitigation under the Ohio scheme. Defendant’s complaint about vagueness in this respect is wrong as well. *Ferguson*, ¶ 92.

Defendant’s argument regarding adequate appellate analysis of excessiveness and disproportionality was rejected in *Jenkins*, 15 Ohio St.3d at 177. “We have

previously reviewed these issues and found them to be without merit.” *State v. Carter*, 89 Ohio St.3d 593, 606-607, 608, 734 N.E.2d 345 (2000). It should be noted that cross-case proportionality review is not constitutionally required anyway, even in capital cases. *McCleskey v. Kemp*, 481 U.S. 279, 307 n. 28, 317, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984).

Defendant’s complaint that the death penalty violates international law in various respects is incorrect and has been rejected. *Short*, ¶¶ 137-38.

Defendant’s sixth proposition of law was forfeited below and does not warrant relief.

B.

Although defendant does not address this Court’s independent sentencing review, the State addresses that review here.

Three aggravating circumstances apply to the aggravated murder of Tahlia Hendricks, and two aggravating circumstances apply to the aggravated murder of Tyron Hendricks. Those aggravating circumstances easily outweigh the mitigating factors beyond a reasonable doubt.

“Courts are certainly entitled to consider the gravity of the aggravating circumstances.” *State v. Jones*, 91 Ohio St.3d 335, 352, 744 N.E.2d 1163 (2001). In addition, “[a]ggravating circumstances in a single count are considered collectively in assessing the penalty for that count * * *.” *State v. Hessler*, 90 Ohio St.3d 108, 126, 734 N.E.2d 1237 (2000).

The aggravating circumstances were overwhelming. Applicable to each

aggravated-murder count was the course-of-conduct aggravating circumstance, under which defendant was convicted of having purposely killed or attempted to kill two or more persons. The course-of-conduct aggravating circumstance is grave. See *State v. Hughbanks*, 99 Ohio St.3d 365, 2003-Ohio-4121, 792 N.E.2d 1081, ¶ 144 (multiple killings during burglary).

On this aggravator, actually three purposeful murders are to be weighed, as defendant's killing of Tia was part of the course of conduct, as was the killing of Tahlia and Tyron. It is a triple homicide, and the three killings in the course of conduct all weigh in favor of the death penalty on the counts of aggravated murder of Tahlia and Tyron.

Also weighing in favor of the death penalty under this aggravator is the purpose to kill, and, of course, defendant's purpose to kill was extreme here, slitting the throat of each of the three victims in the course of conduct, including the young children (including Tyron all the way down to his trachea and esophagus).

Of course, another extremely strong aggravator is the victim-under-13 aggravating circumstance that is applicable to the aggravated murders of Tahlia and Tyron. Under this aggravating circumstance, the youth of the victim is considered and weighed. Their respective ages, ten and two, weigh heavily in favor of the death penalty. As the trial panel stated, the under-13 aggravating circumstance deserves "very significant weight" and is "horrific" given that "[t]he murder of innocent children, especially a two-year-old, is one of the most extreme of any aggravating factors." Sentencing Opinion, at 6, 10. As this Court has stated, "the R.C. 2929.04(A)(9) child-

murder specification is entitled to great weight because it involved the murder of a young and vulnerable victim.” *State v. Powell*, 132 Ohio St.3d 233, 971 N.E.2d 865, 2012 -Ohio- 2577, ¶ 282. “The murder of a child is an especially reprehensible act; hence, the aggravating circumstance here deserves substantial weight.” *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, ¶ 115.

Also weighing in favor of death under this aggravating circumstance is the fact that defendant “purposely caused the death of another who was under 13 years of age * * *” and that he did so as the principal offender. Defendant’s purposeful targeting of very young children weighs heavily here, especially when it is considered that he had to overcome Tahlia’s resistance (as shown by her defensive wounds). In addition, the fact that he as the principal offender personally performed these execution-style killings weighs heavily.

Also weighing in favor of the death penalty for the aggravated murder of Tahlia is the aggravating circumstance for having the purpose to escape detection, apprehension, trial or punishment.

Against these strong, overwhelming aggravated circumstances (3 as to the counts involving Tahlia, 2 as to the counts involving Tyron), defendant’s “mitigation” evidence was scant and weak. It “paled in comparison to the aggravating circumstances.” Sentencing Opinion, at 10.

Regarding defendant’s background, the trial panel noted that, despite efforts by Children Services, defendant’s conduct “was not even remotely cooperative” and defendant became involved in “serious delinquent activity.” Sentencing Opinion, at 7.

Defendant was unconcerned with the legal consequences of his behavior, “thoroughly intimidated” female teachers, and stole his mother’s rental car, hitting a police cruiser. Id. at 7. Defendant also made no effort to eliminate inappropriate sexual behaviors. Id. at 7. Defendant’s mother attempted to reunify with him, but defendant continued to refuse to be cooperative. Id. at 7. Defendant was a repeated liar who would show disrespect and engage in agitation and fighting. Id. at 7-8. Much of the “background” evidence is decades old anyway, as defendant was 36 years old when he slit the throats of Tahlia and Tyron.

The trial panel rightly decided to give little weight to the mitigation offered by the defense. Defendant repeatedly failed to take advantage of opportunities to improve. Instead of improving himself, he became a violent domestic abuser.

One wonders what difference defendant’s “mitigation” could make anyway. Being sexually abused as a child bears no real relationship to the offenses committed against Tahlia and Tyron. Being a victim of child sex abuse does not logically provide some “bank” of mitigation to be used to offset the killing of children. Whatever “mitigation” would be assigned to this mitigator, it pales in comparison to the triple-homicide course-of-conduct and under-13 aggravators applicable to the killings of Tahlia and Tyron. The “mitigation” is weak at best.

As for defendant’s claims of remorse, there were reasons to doubt the sincerity of defendant’s remorse. Defendant actively took steps to hide his involvement by moving Tia’s car from the area (to make it appear Tia was not home) and by later feigning his own stabbing in the apartment in an attempt to avoid responsibility as the police were

attempting to enter the apartment. These efforts to avoid responsibility are far-more accurate indicators of defendant's lack of remorse. Even if the "remorse" is believed, it added little weight in "mitigation" in comparison to the strong aggravators. The panel gave "negligible" weight to his "taking responsibility" and "scant weight" to his "apologies" given that there were doubts about defendant's honesty. *Id.* at 9-10.

Since the defense has not argued its mitigation for purposes of this Court's independent sentencing review, the State will not repeat here all of the mitigation proffered by the defense. The State will note that the three-judge panel thoroughly reviewed the mitigation and properly decided to accord the mitigation little or no weight and ultimately found the mitigation to be minimal. The State incorporates by reference the panel's opinion discussing mitigation. (See Sentencing Opinion, at 5-11)

For these reasons, and for the reasons stated by the three-judge panel, this Court should find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors.

Defendant's death sentence is both appropriate and proportional when compared to similar capital cases decided by this Court. See *State v. Steffen*, 31 Ohio St.3d 111, 509 N.E.2d 383 (1987), paragraph one of the syllabus. The death sentence is proportionate when compared with other course-of-conduct cases. *Powell*, at ¶ 283 (collecting course-of-conduct cases); *Hessler*, *supra*. This Court has also upheld the death sentence in cases involving the under-13 aggravating circumstance, either singly or in combination with other aggravating circumstance(s). *Powell*, ¶ 284 (collecting child-murder cases); *Hunter*, ¶ 206 (collecting child-murder cases). As to the killing of

Tahlia, the death penalty is appropriate for the “escaping” aggravating circumstance in combination with the other circumstances.

The death sentences should be affirmed.

RESPONSE TO SEVENTH PROPOSITION OF LAW

THE CONCEPT OF CUMULATIVE ERROR DOES NOT APPLY WHEN NO ERROR, EITHER SINGLY OR IN COMBINATION WITH OTHER ERROR(S), WARRANTS REVERSAL.

Defendant’s claims of error do not warrant reversal, either singly or combination.

Accordingly, defendant’s seventh proposition of law does not warrant relief.

CONCLUSION

Plaintiff-appellee State of Ohio respectfully requests that this Court affirm the convictions and the sentences of death.³

Respectfully submitted,

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³ If this Court sua sponte contemplates a decision upon an issue not briefed, the State respectfully requests notice of that intention and requests an opportunity to brief the issue before this Court makes its decision. *Miller Chevrolet v. Willoughby Hills*, 38 Ohio St.2d 298, 301 & n. 3, 313 N.E.2d 400 (1974); *State v. 1981 Dodge Ram Van*, 36 Ohio St.3d 168, 170, 522 N.E.2d 524 (1988).

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 12th day of September, 2013, to Kathryn L. Sandford, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, counsel for defendant-appellant.



STEVEN L. TAYLOR 0043876