Supreme Court of Ohio Clerk of Court - Filed May 01, 2015 - Case No. 2014-0273

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	**Case No. 2014-0273**
	:	
Appellee,	:	
	:	***Death Penalty Case***
- vs -	:	
	:	
CURTIS L. CLINTON,	:	
	:	
Appellant.	:	

On Appeal from the Erie County Court of Common Pleas
Erie County, Ohio, Case No. 2012 CR 0383

MERIT BRIEF OF APPELLEE STATE OF OHIO

KEVIN J. BAXTER (#0015782)
Erie County Prosecutor

MARY ANN BARYLSKI (0038856)
Chief Assistant Criminal Division

Erie County Prosecutor's Office
247 Columbus Avenue, Suite 319
Sandusky, Ohio 44870
(419) 627-7697/(419) 627-7567 (facsimile)
prosecutor@eriecounty.ohio.gov

THOMAS MADDEN (#0077069)
***Counsel of Record**
Senior Assistant Attorney General
Thomas.Madden@ohioattorneygeneral.gov

STEPHEN MAHER* (#0032279)
Senior Assistant Attorney General
Stephen.Maher@ohioattorneygeneral.gov

JOCELYN K. LOWE (#0083646)
Associate Assistant Attorney General
Jocelyn.Lowe@ohioattorneygeneral.gov

OHIO ATTORNEY GENERAL
150 E. Gay Street, 16th Floor
Columbus, Ohio 43215
(614) 995-3234/(866)239-5489 (facsimile)

Counsel for Appellee, State of Ohio

KIMBERLY S. RIGBY (#0078245)
***Counsel of Record**
Supervisor Attorney, Death Penalty Div.
Kim.Rigby@opd.ohio.gov

ELIZABETH ARRICK (#0085151)
Assistant State Public Defender
Elizabeth.arrick@opd.ohio.gov

JESSICA CARRICO (#0087813)
Assistant State Public Defender
Jessicca.carrico@opd.ohio.gov

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

Counsel for Appellant, Curtis L. Clinton

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INTRODUCTION

Heather Jackson, along with her toddler daughter Celina and infant son Wayne Jr., had just moved into their new home in Sandusky, Ohio, and she decided to have friends over on the Friday night after Labor Day. Throughout the night, friends came and went. Well after midnight, everything began to settle down, and friends started leaving. Because Heather lived directly across the street from a hospital, video surveillance taped all the traffic. Around 3 AM, a white Cadillac approached the house, and Curtis Clinton went into the home. An hour later, Clinton left and drove away. Shortly thereafter, Clinton pulled back up and then left a minute later. Per the surveillance video, nobody else pulled up and entered Heather's home. The next afternoon, Heather's friends discovered her naked body wedged between a mattress and box springs. Her children were later discovered discarded in a utility closet. All three died from ligature strangulation. Due to surveillance footage showing Clinton's white Cadillac, cell phone directories calls between Clinton and Heather, and the concurrent investigation of a rape where Clinton strangled a teenage victim E.S., Sandusky police were able to focus the investigation on Clinton. During a police interview, where Clinton denied any involvement in the murders and denied any contact with the children, Clinton did allow a DNA sample to be taken. The DNA evidence, coupled with the testimony at trial, overwhelmingly showed that Clinton strangled Heather and her helpless children. The evidence also showed that Clinton raped E.S. the weekend before. For these callous and depraved murders, the jury recommended that Clinton receive the death penalty, which the trial judge imposed.

Because Clinton received a fair trial and appropriate sentence, the State of Ohio asks this Court to affirm the judgment below.

STATEMENT OF THE CASE

Following the triple homicide that took place on Saturday, September 8, 2012, this case was commenced by an indictment filed on September 19, 2012. R. 1, Indictment. The case was tried in November, 2013, where guilty verdicts were returned as to every charge presented to the jury. The following chart summarizes the charges, the verdicts, as well as the sentences pertinent to the various counts.

Count One Rape (E.S.) O.R.C. 2907.02(A)(2) F-1 (sexually violent predator; O.R.C. 2941.148; dismissed before jury submission by prosecutor's motion, R. 158, trial court order, R.165, Clinton consent, R. 175) (repeat violent offender; O.R.C. 2941.149; dismissed at sentencing, see R. 262, Sentencing Entry, R. 266, Sentencing Opinion) R. 1, Indictment	Guilty. Tr. 1306 – 1315.	Ten years: concurrent with Count Two; concurrent with life without parole on Count Six, forcible rape under ten; consecutive with the death sentences in Count Three, Count Five and Count Eight; concurrent with the ten year sentence in Count Nine for aggravated burglary. R. 262, Sentencing Entry. R. 266, Sentencing Opinion.
Count Two Rape (E.S.) O.R.C. 2907.02(A)(2) F-1 (sexually violent predator; O.R.C. 2941.148; dismissed before jury submission by prosecutor's motion, R. 158,	Guilty. Tr. 1306 – 1315.	Ten years: concurrent with Count One; concurrent with life without parole on Count Six, forcible rape under ten; consecutive with the death sentences in Count Three, Count Five and Count Eight; concurrent with the ten year sentence in Count Nine for aggravated burglary. R. 262, Sentencing Entry.

trial court order, R.165, Clinton consent, R. 175) (repeat violent offender; O.R.C. 2941.149; dismissed at sentencing, see R. 262, Sentencing Entry, R. 266, Sentencing Opinion) R. 1, Indictment		R. 266, Sentencing Opinion.
Count Three Agg. Murder (Heather Jackson) (rape and/or agg. burglary) O.R.C. 2903.01(B) (sexually violent predator; O.R.C. 2941.148; dismissed before jury submission by prosecutor's motion, R. 158, trial court order, R.165, Clinton consent, R. 175) (repeat violent offender; O.R.C. 2941.149; dismissed at sentencing, see R. 262, Sentencing Entry, R. 266, Sentencing Opinion) (sexual motivation; O.R.C. 2941.147; dismissed at sentencing, see R. 262, Sentencing Entry, R. 266, Sentencing Opinion) (felony-murder capital specification, O.R. C. 2929.07(A)(7)) (prior murder/course of conduct capital specification; O.R.C. 2929.04(A)(5); amended before jury submission to remove "prior	Guilty on all charges and specifications, Tr. 1306 – 1315. Jury recommendation of death, Mit. Tr. 130 – 134. Entry Memorializing Capital Verdict, R. 250.	Death sentence: consecutive to the death sentences in Count Five and Count Eight; consecutive to the ten year concurrent sentences in Count One and Count Two; concurrent with the life without parole sentence in Count Six; concurrent with the ten year sentence in Count Nine. R. 262, Sentencing Entry. R. 266, Sentencing Opinion.

murder" designation by prosecutor's motion, R. 171, Clinton consent, R. 175, and trial court order, R. 164) R. 1, Indictment		
Count Four Agg. Murder (Celina Jackson) (rape) O.R.C. 2903.01(B) (sexually violent predator; O.R.C. 2941.148; dismissed before jury submission by prosecutor's motion, R. 158, trial court order, R.165, Clinton consent, R. 175) (repeat violent offender; O.R.C. 2941.149; dismissed at sentencing, see R. 262, Sentencing Entry, R. 266, Sentencing Opinion) (sexual motivation; O.R.C. 2941.147; dismissed at sentencing, see R. 262, Sentencing Entry, R. 266, Sentencing Opinion) (felony-murder capital specification, O.R. C. 2929.07(A)(7)) (prior murder/course of conduct capital specification; O.R.C. 2929.04(A)(5); amended before jury submission to remove "prior murder" designation by prosecutor's motion, R. 171, Clinton consent, R. 175, and trial court order, R. 164) (purposeful death under 13	Guilty on all charges and specifications, Tr. 1306 – 1315. Merged into Count Five. See R. 250, Entry Memorializing Verdict.	

capital specification; O.R.C. 2929.04(A)(9); amended before jury submission to remove "prior calculation and design" designation by prosecutor's motion, R. 171, Clinton consent, R. 175, and trial court order, R. 164) R. 1, Indictment		
Count Five Agg. Murder (Celina Jackson) (under 13) O.R.C. 2903.01© (sexually violent predator; O.R.C. 2941.148; dismissed before jury submission by prosecutor's motion, R. 158, trial court order, R.165, Clinton consent, R. 175) (repeat violent offender; O.R.C. 2941.149; dismissed at sentencing, see R. 262, Sentencing Entry, R. 266, Sentencing Opinion) (sexual motivation; O.R.C. 2941.147; dismissed at sentencing, see R. 262, Sentencing Entry, R. 266, Sentencing Opinion) (felony-murder capital specification, O.R. C. 2929.07(A)(7)) (prior murder/course of conduct capital specification; O.R.C. 2929.04(A)(5); amended before jury submission to remove "prior murder" designation by	Guilty on all charges and specifications, Tr. 1306 – 1315. Jury recommendation of death, Mit. Tr. 130 – 134. Entry Memorializing Capital Verdict, R. 250.	Death sentence: consecutive to the death sentences in Count Three and Count Eight; consecutive to the ten year concurrent sentences in Count One and Count Two; concurrent with the life without parole sentence in Count Six; concurrent with the ten year sentence in Count Nine. Sentencing Entry, R. 262. R. 266, Sentencing Opinion.

prosecutor's motion, R. 171, Clinton consent, R. 175, and trial court order, R. 164) (purposeful death under 13 capital specification; O.R.C. 2929.04(A)(9) ; amended before jury submission to remove "prior murder" designation by prosecutor's motion, R. 171, Clinton consent, R. 175, and trial court order, R. 164) R.1, Indictment		
Count Six Rape (Celina Jackson) (under 10; force) O.R.C. 2907.02(A)(1)(b) F-1 (sexually violent predator; O.R.C. 2941.148; dismissed before jury submission by prosecutor's motion, R. 158, trial court order, R.165, Clinton consent, R. 175) (repeat violent offender; O.R.C. 2941.149; dismissed at sentencing, see R. 262, Sentencing Entry, R. 266, Sentencing Opinion) R. 1, Indictment	Guilty on all charges and specifications, Tr. 1306 – 1315.	Life without parole: concurrent with Count Nine, aggravated burglary; concurrent to the ten year concurrent sentences in Count One and Count Two (rape of E.S.); concurrent with the death sentences in Count Three, Count Five, and Count Eight. R. 262, Sentencing Entry. R. 266, Sentencing Opinion.
Count Seven Agg. Murder (Wayne Jackson, Jr.) (rape and/or burglary) O.R.C. 2903.01(B)	Guilty on all charges and specifications, Tr. 1306 – 1315. Merged into Count Eight. See R. 250, Entry Memorializing Verdict.	

(sexually violent predator; O.R.C. 2941.148; dismissed before jury submission by prosecutor's motion, R. 158, trial court order, R.165, Clinton consent, R. 175) (repeat violent offender; O.R.C. 2941.149; dismissed at sentencing, see R. 262, Sentencing Entry, R. 266, Sentencing Opinion) (sexual motivation; O.R.C. 2941.147; dismissed at sentencing, see R. 262, Sentencing Entry, R. 266, Sentencing Opinion) (felony-murder capital specification, O.R. C. 2929.07(A)(7)) (prior murder/course of conduct capital specification; O.R.C. 2929.04(A)(5); amended before jury submission to remove "prior murder" designation by prosecutor's motion, R. 171, Clinton consent, R. 175, and trial court order, R. 164) (purposeful death under 13 capital specification; O.R.C. 2929.04(A)(9) ; amended before jury submission to remove "prior murder" designation by prosecutor's motion, R. 171, Clinton consent, R. 175, and trial court order, R. 164) (purposeful death under 13 capital specification; O.R.C. 2929.04(A)(9); amended before jury submission to		

remove "prior calculation and design" designation by prosecutor's motion, R. 171, Clinton consent, R. 175, and trial court order, R. 164) R.1, Indictment		
Count Eight Agg. Murder (Wayne Jackson, Jr.) (under 13) O.R.C. 2903.01(C) (sexually violent predator; O.R.C. 2941.148; dismissed before jury submission by prosecutor's motion, R. 158, trial court order, R.165, Clinton consent, R. 175) (repeat violent offender; O.R.C. 2941.149; dismissed at sentencing, see R. 262, Sentencing Entry, R. 266, Sentencing Opinion) (sexual motivation; O.R.C. 2941.147; dismissed at sentencing, see R. 262, Sentencing Entry, R. 266, Sentencing Opinion) (felony-murder capital specification, O.R. C. 2929.07(A)(7)) (prior murder/course of conduct capital specification; O.R.C. 2929.04(A)(5); amended before jury submission to remove "prior murder" designation by prosecutor's motion, R. 171, Clinton consent, R. 175, and	Guilty on all charges and specifications, Tr. 1306 – 1315. Jury recommendation of death, Mit. Tr. 130 – 134. Entry Memorializing Capital Verdict, R. 250.	Death sentence: consecutive to the death sentences in Count Three and Count Five; consecutive to the ten year concurrent sentences in Count One and Count Two; concurrent with the life without parole sentence in Count Six; concurrent with the ten year sentence in Count Nine. Sentencing Entry, R. 262. R. 266, Sentencing Opinion.

trial court order, R. 164) (purposeful death under 13 capital specification; O.R.C. 2929.04(A)(9); amended before jury submission to remove "prior murder" designation by prosecutor's motion, R. 171, Clinton consent, R. 175, and trial court order, R. 164) (purposeful death under 13 capital specification; O.R.C. 2929.04(A)(9); amended before jury submission to remove "prior calculation and design" designation by prosecutor's motion, R. 171, Clinton consent, R. 175, and trial court order, R. 164) R. 1, Indictment		
Count Nine Agg. Burglary (723 John St.; Heather Jackson; physical harm) O.R.C. 29.11(A)(1) F-1 (repeat violent offender; O.R.C. 2941.149; dismissed at sentencing, see R. 262, Sentencing Entry, R. 266, Sentencing Opinion) R. 1, Indictment	Guilty. Tr. 1306 – 1315.	Ten years: concurrent with life without parole on Count Six, forcible rape under ten; concurrent with the ten years concurrent sentences in Count One and Count Two (rape of E.S.); concurrent with the death sentences in Count Three, Count Five and Count Eight. R. 262, Sentencing Entry. R. 266, Sentencing Opinion.

Trial Phase Procedural Events

Relative to jury selection, Clinton filed a motion for change of venue based on pre-trial publicity. R. 130, Clinton Motion for Change of Venue. After the jury selection process was well under way, the trial court by written order overruled the motion for change of venue. R. 180, Order Denying Change of Venue.

Relative to Clinton's statement to police, all of which was videotaped, Clinton filed a motion to suppress that portion of the statement made after Clinton invoked his right to counsel. R. 92, Clinton Motion to Suppress. The trial court conducted a suppression hearing, where the sole witness was Sandusky Police Department detective Gary Wichman, the officer who conducted the interrogation. Suppression Hearing Transcript, p. 1 – 70. Thereafter, the trial court issued a written opinion finding that, around 45 minutes into the interrogation, Clinton did invoke his right to counsel and that interrogation should have ceased. Given these findings, the trial court suppressed that part of Clinton's statement from the invocation to the end, where the first part of the interrogation prior to invocation was admitted. R. 97, Order Granting Partial Suppression.

Relative to DNA evidence, the trial court granted a defense motion for comprehensive discovery. R. 80, Order Granting DNA Discovery. Thereafter, at the request of the defense, the trial court convened a *Daubert* hearing, where the sole witness was BCI forensic scientist Hallie Garofalo. Tr. 27 – 104. Following argument where the defense emphasized their attack was directed to the determination of statistical probabilities, the trial court ruled that Garofalo was a qualified expert, and that DNA evidence sufficiently reliable to be admissible. Daubert Hearing Tr. 100 – 103. R. 163, Order Finding DNA Evidence Admissible.

Relative to other acts evidence pursuant to Evid. R. 404(b), the State filed a notice of intent in respect to Clinton's prior conviction of the ligature strangulation of Misty Keckler, for which he was convicted of involuntary manslaughter in Wood County, Ohio on August 3, 1999. Included with the State's motion were other acts as to other victims distinct and apart from the Keckler involuntary manslaughter. R. 99, State's Notice re Other Acts Evidence. Clinton filed a written opposition. R. 122, Clinton Opposition to Other Acts Evidence. The trial court granted the State's motion to admit other acts evidence as the Keckler involuntary manslaughter, reasoning, *inter alia*, that Keckler's death by ligature strangulation fit within the parameters of Evid. R. 404(b). R. 129, Order Granting, In Part, Other Acts Evidence. By amended order, the trial court permitted other acts evidence as to Carrie Bello and Tonya Valero aka Antonia Sabo. R. 201, Amended Order Regarding Other Acts Evidence. However, the State did not present any other acts evidence as to Bello and Valero/Sabo. Instead, the other acts evidence before the jury was limited to the Keckler involuntary manslaughter.

At the conclusion of the presentation of the Keckler other acts evidence, Clinton moved for a mistrial, for the reasons expressed in his prior written brief on the matter. The trial court overruled the motion for mistrial. Tr. 962 – 969. Clinton renewed this same motion for mistrial at the conclusion of the State's case, which was overruled by the trial court. Tr. 1152 – 1153.

Relative to Clinton's motion to sever the two rape charges against E.S. from the charges associated with the triple homicide, the trial court overruled the motion. R. 87, Clinton Motion to Sever, R. 90, Order Denying Severance.

Mitigation Phase Procedural Events

Clinton asked for, and was granted, a procedure whereby his expert assistance matters would proceed *ex parte*. R. 24, Clinton Motion For *Ex Parte* Expert Requests; R. 37, Order

Granting *Ex Parte* Expert Requests. Clinton's motion was granted to have serve on his case Mark Rooks, the mitigation investigator from the Ohio Public Defender's office. R. 25, Clinton Motion for OPD Mitigation Investigator; R. 31, Order Granting OPD Mitigation Investigator. R. 31.

Clinton asked for, and was granted, copies of all records relative to his incarceration in the Erie County jail, including audio recordings of telephone calls. R. 42, Clinton Motion for Erie County Jail Records; R. 67, Order Granting Erie Jail Records.

Eight months before the trial, Clinton moved for an *in camera* inspection as to records from the Erie County Children's Services department involving him as a child, as well as records pertaining to six additional members of his family. R. 84 Clinton Motion for Children's Services Records. The trial court granted the motion, and ordered Erie County Children's Services to produce, for *in camera* inspection, records pertaining to Clinton, as well as six of Clinton's family members. R. 88, Order For *In Camera* Inspection.

A month and a half before the start of the trial, Clinton moved to compel production of Children's Services records regarding his six family members. R. 120, Clinton Motion to Compel. Three weeks before the trial, a show cause hearing was convened, where the trial court learned that Children's Services personnel had, just that morning, uncovered pertinent records in microfilm storage, having previously believed records of the six family members had not been preserved. Daubert/Show Cause Hearing Transcript, pgs. 107 – 123. The trial court immediately issued an order directing Children's Services to produce the pertinent records within 24 hours. R. 159, Order Regarding Children's Services Records.

The following week, Clinton moved for appointment of a special master to review and report to the trial court on the matter. R. 205, Clinton Motion for Appointment of a Special

Master. The trial court granted the motion and appointed a special master to review and report on the matter, as well as to determine the accuracy of an affidavit of the agency director, dated the preceding week, that all records of the six family members had been produced. R. 220, Order Appointing Special Master. The trial court thereafter filed for record the report of the special master, who reported that following the show cause hearing "the department appears to have been diligent in their production [of the microfilm records] once that it had been discovered they existed." R. 264, Entry re Special Master Report.

Limited Mitigation Presentation

Following announcement of the guilty verdicts, the defense noted for the record it was not requesting a pre-sentence investigation. Tr. 1320. Relative to any referral to Court Diagnostic and Treatment, it was agreed the defense will notify the trial court the following morning. Tr. 1320 – 1321. Upon reconvening, defense counsel Doughten noted that Clinton does not want counsel to make any arguments or statements, but that Clinton does want to make an unsworn statement.

Defense counsel Doughten said "I specifically cite *State v. Roberts*. That's not a waiver of mitigation, the fact that he is going to get up and make a statement." Mit. Tr. 11-07-13, pg. 3 – 4, quotation on Mit. Tr. 11-07-13, pg. 4. Defense counsel Doughten noted they had the services of a neuropsychologist, Dr. Galit Askenazi. Mit. Tr. 11-07-13 pg.4.

In addition, defense counsel Doughten noted that Clinton "did cooperate with the testing, and he was totally cooperative with our meeting yesterday." Mit. Tr. 5 Defense counsel Doughten noted that Clinton "believes he will be much safer on death row than general population." Defense counsel Doughten said Clinton reported "the basis for this is due to the conviction of the offenses against the children." Mit. Tr. 11-07-13, pg. 5 – 6.

Expanding on Clinton's reasons for a limited mitigation presentation, Doughten said:

> "I'm sure he would want me to say for the record, he's not afraid and he's not intimidated, but he would find himself fighting every single day and looking over his shoulder every single day in general population. That's, generally, his basis. Based on that, we had Dr. Askenazi to ensure he was competent and that he was sure of the effect of the waiver. And she's very clear, he is very competent, and all three of us believe he is competent. Also, after discussing with – we've gone over with him every aspect of it, and I think his knowledge of the penalty phase is probably better than a lot of lawyers in the state at this time. So we're very comfortable with his knowledge. We tried to get him to go forward and let us attempt to ask for a sentence of less than death, but he's made it very clear and instructed us on, we aren't to do that. And I believe, under Ohio law, we're required to let him do that, as long as he has all the knowledge, but we're also very satisfied that he gave a voluntary waiver. He did not want to come over. He doesn't want to participate in, basically, going over the jury instructions and, frankly, that's consistent with his other actions." Mit. Tr. 11-07-13, pg. 6 - 7.

Moments before commencement of the defense mitigation case, when the defense was asked if there was anything further before the jury was brought out, defense counsel Dixon responded "Your Honor, just what we discussed on Thursday. Nothing has changed. It's what we represented to the Court was going to happen today is going to happen." Mit. Tr. 11-12-13, pg. 9. The defense additionally noted it would file under seal evidence it would present during a mitigation case, if Clinton would authorize it. Mit. Tr. 11-07-13, pg. 16 – 17.

The defense waived opening and closing statements, with defense counsel Doughten stating before the jury "Your Honor, Mr. Clinton elects to waive his opening statement." (Mit. Tr. 11-12-13, pg. 27), and "Your Honor, it's Mr. Clinton's election to waive his closing argument." Mit. Tr. 11-12-13, pg. 99.

While the jury was deliberating, the defense offered mitigation exhibits under seal, designated as A through N, itemizing for the record the general subject matter of each exhibit.

Mit. Tr. 11-12-13, pg. 123 – 125. Prior to doing so, defense counsel Doughten said "A little bit before the jury summation, that we had discussed with Mr. Clinton – in fact, we went in with his mother on Sunday, just to go over everything, just to make sure his decision not to put on mitigation, other than a statement, was – was made." Mit. Tr. 11-12-13, pg. 123.

Immediately after the sealed proffer, defense counsel Doughten said "So that – so we had considerable mitigation to put on. We did try to discuss with him and allow us to put this into evidence and allow the jury and the Court to hear it. It was clearly his decision not to. I'm – even though I disagree with the decision, and Ms. Kendall [defense paralegal] and Mr. Dixon [defense co-counsel] disagree, also, it was his decision. I think we are obligated to follow that decision. So we would like to present this and, frankly, put it under seal, because much of the information is really not for public consumption. One of the bases for him – excuse me – for Curtis not to present it is he didn't want the family dysfunction to be put out for the public record. So we're going to ask that these be placed under seal." Mit. Tr. 11-12-13, pg. 125 - 126.

STATEMENT OF FACTS

Single Mom, Heather Jackson, and Two Toddler Kids, Move to New Residence

Heather Jackson's friend Danielle Sorrell testified that about two and one half weeks before the crimes, she helped Heather and the kids move into a house at 723 John Street. At Heather's new home, Sorrell would visit Heather and the kids about every other day. The last visit was on Thursday, when Sorrell left Heather's house around 5:00 PM. Tr. 395 – 399.

Sorrell was age 26 and had been friends with Heather for 13 years. As Heather's best friend, Sorrell knew that Heather's daughter, Celina, was age three, and Heather's son, Wayne, Jr., nicknamed "Fatman," was age 1. Sorrell knew that Heather was had been separated one year from her husband, the father of the children, Wayne Jackson. Tr. 393 – 395.

The coroner, Dr. Elizabeth Scala-Barnett, would later testify that Wayne Jackson, Jr. was 18 months old and weighed 34 pounds, (Tr. 1103) and that Celina Jackson was 3 years old and weighed 34 pounds. Tr. 1123.

Despite her friendship with Heather, Sorrell did not know anything about Curtis Clinton. The only event Sorrell testified to occurred one night around 2:00 AM in May or June of 2012, when Heather and her children were living with Sorrell. Heather left Sorrell's home with an African-American male who was driving a white Cadillac. Heather had told Sorrell that she was going out to get something to eat. Tr. 403 – 404.

None of Heather's other friends knew of, or had any contact with, Curtis Clinton.

Justin Kromer was a friend of Heather. Through his relationship with Heather's sister Mandy, Kromer had known Heather Jackson, maiden name Lynch, for 15 years. Kromer had a six year old child with Heather's sister Mandy, but he and Mandy had been apart for three years. Kromer was good friends with Heather, helping her out financially, and providing her with a cell

phone on his plan with Sprint. Tr. 498 – 507. Kromer testified that he knew Heather took Percocet pain pills without a prescription. Tr. 510 – 511.

The lead investigator, Sandusky Police detective Gary Wichman, testified he learned that while Heather Jackson had her own personal cell phone, the responsible party on the cell phone account was Justin Kromer. Detective Wichman would later identify St. Ex. 9, which was Sprint cell phone records for Heather's cell phone, 419-370-6611. That Sprint document showed the subscriber was Justin Kromer. Tr. 786 – 787.

Joshua Case was another friend of Heather. Case testified that he had been friends with Heather for the previous two years, having met her through his cousin, Jeremy Griggs. Tr. 518 – 524.

Another one of Heather's friends was Tom Hanson. Hanson testified that about two weeks before the crime, when she was selling her Pontiac Grand Am at her parent's house, he became friends with Heather. Hanson was friends with several of Heather's friends, and for that two week period, Hanson testified he and Heather were communicating every day. Hanson testified that he helped Heather move into her new John Street residence. Tr. 562 – 567.

Investigation of Rape of E.S.
Would Later Lead Police To Clinton in the Triple Homicide

About a week before the triple homicide, Curtis Clinton had raped E.S. E.S. had just graduated from high school in June 2012, at the age of 17. Her 18th birthday was to be September 17, 2012. Tr. 971 – 975. During Labor Day weekend of 2012, E.S. was with her friend, Mercedes Charlton, through whom E.S. met Curtis Clinton. Clinton was the boyfriend of Mercedes. Tr. 975 – 983. E.S. testified that she, Mercedes and Clinton were at Clinton's house watching movies, when she and Clinton went to a bar, with Mercedes staying behind. Clinton was driving a white Cadillac. Tr. 983 – 989. E.S. testified that when they returned to Clinton's

home, Mercedes left. E.S. was alone with Clinton. Tr. 989 – 1003. E.S. testified that while she was lying on the couch watching a movie, Clinton sat on the couch next to her. Feeling uncomfortable, she got up. At that point, Clinton put his hands around her neck, choking her. E.S. testified that as she struggled to her feet, Clinton put her in a headlock. Tr. 1003 – 1004.

E.S. testified that during this struggle, she said "please don't hurt me.," Clinton responded by saying "Don't say a word." Maintaining a headlock on her, Clinton took her to his bedroom. E.S. testified after an extended period of time during which Clinton had sexual contact with her, Clinton started choking her until she passed out. When she awoke, Clinton was taking pictures of her. After that, Clinton resumed sexual contact with her. Later, Clinton said "Are you ready to go," and said he would take her home. On the ride home, driving his white Cadillac, Clinton said he was sorry and that he didn't know why he did that, and ES testified she promised Clinton she would not tell. Tr. 1004 – 1010.

E.S. arrived at her own home around 7 AM, on Saturday of Labor Day weekend, 2012. Shortly thereafter, E.S. was taken to the local hospital by her mother and stepfather to be examined as the victim of a rape. Tr. 1010 – 1013.

E.S. was initially examined at Bellevue Hospital, and she identified St. Ex. 131 as the records from Bellevue Hospital for that examination. Tr. 1013 – 1016. Because Bellevue personnel told E. S. they did not process rape kits, at the request of Bellevue hospital, she went to Toledo St. Vincent Hospital. E.S. identified St. Ex. 132 as the records from Toledo St. Vincent Hospital for that examination. Tr. 1016 – 1017. E.S. testified about an error in the Toledo St. Vincent Hospital record, in that the notation should have said Clinton performed oral sex on her, and not that she performed oral sex on him. Tr. 1017 – 1020. E.S. also identified St. Ex. 133, which were photos of her taken by St. Vincent Hospital personnel during the sexual assault

examination. Tr. 1020. E.S. testified that the primary examiner at St. Vincent Hospital was Nurse Lisa Dettling. Tr. 1021.

The following Thursday, September 6, 2012, E.S. was interviewed by a detective from the Sandusky police department. Tr. 1025 – 1027. E.S. testified that several days later, after the bodies of Heather and the children were found, she made contact with the Sandusky police department a second time. During this second encounter with the Sandusky police department, she gave a videotaped statement and identified Clinton as the person who assaulted her the previous Labor Day weekend. Tr. 1027 – 1029, 1034.

Additional evidence regarding the rape of E.S. was provided by registered nurse, Lisa Dettling. Dettling testified she was employed as a register nurse at Toledo St. Vincent Hospital and that she was a certified Sexual Assault Nurse Examiner. Tr. 1057 - 1060. Dettling identified St. Ex. 132 as the records of the examination of E.S. for sexual assault that took place on Monday, September 3, 2012. Tr. 1062.

Dettling testified that in taking a patient history, she recorded in the medical records that E.S. said she had been raped. Tr. 1070 – 1071. E.S. also told Dettling her injuries were, in part, due to being choked by Clinton. Tr. 1072 – 1073. Dettling identified St. Ex. 133 as the photos of E.S. she took to document E.S.'s injuries. Tr. 1074 – 1076. Dettling also identified an error in the medical records that suggested E.S. performed oral sex on Clinton, when it was actually the other way around. Tr. 1076 – 1077. Dettling also identified St. Ex. 110, 110A and 110B, as the rape kit from the E.S. examination. Tr. 1080 – 1081

That same day, being Monday September 3, 2012, Sandusky Police detective Ken Nixon, assigned to the sexual assault unit, began to investigate an alleged sexual assault against a 17 year old female. Tr. 727 – 736. Detective Nixon identified St.'s Ex. 110, 110A and 110B as the

rape kit from the E.S. investigation he retrieved from local St. Vincent's hospital and then turned over to BCI for testing. Tr. 739 – 741.

As part of the investigation process, Detective Nixon testified E.S. was scheduled for an interview with a Children's Services caseworker. At 10:00 AM on September 6, 2012, Detective Nixon watched, from a monitor in an adjacent room, the interview of E.S. by a caseworker from Sandusky County Children's Services. The interview with the social worker lasted 45 minutes. After the social worker interview, Detective Nixon interviewed E.S. and gave her information about the grand jury process. Tr. 741 – 743.

Detective Nixon testified that as a result of the interview process with E.S., he identified Curtis Clinton as the suspect in the sexual assault of E.S. that took place on Labor Day weekend, 2012. Tr. 744.

Heather's Friends Visit Her New House on Friday Night

On Friday September 7, 2012, a number of Heather's friends visited her. Justin Kromer, the young man in whose name Heather had her cellphone, arrived for a visit at Heather's house around 6:00 PM. Kromer testified that he and Heather made plans to later that evening go together to Jimmy's Bar. Around 7:45 PM that Friday evening, while he was still at Heather's house, Kromer went out to a nearby Little Caesar's restaurant, and picked up a pizza for Heather and the children. Kromer came back to Heather's house, dropped the pizza off, and left for his own home. Tr. 498 – 507.

Heather's friend Josh Case testified that earlier in the day on Friday September 7 2012, he made plans with Heather to visit at her house that evening. Case testified that he arrived at Heather's house around 9:30 PM, having been dropped off there by his cousin, Jeremy Griggs.

Griggs visited with them at Heather's house about 20 minutes before leaving. When Griggs left, Case testified that he was alone with Heather and the two children. Tr. 524 – 528.

Case testified that he had brought with him a fifth of vodka. Case was drinking the vodka by himself, and Heather was not drinking any alcohol. During the evening, Case testified that he drank almost the whole fifth. Case also testified that both he and Heather took Percocet pain pills. Tr. 518 – 524.

Heather's friend Tom Hanson also stopped by. Hanson testified he got to Heather's residence around 9:30 PM on Friday, September 7, 2012. Hanson testified that when he arrived, Heather was there with two other young men. Hanson knew one of the two, Josh Case, who was casual acquaintance. Hanson testified that at Heather's request, he went to a nearby BP gas station and purchased a half gallon of milk and some Mountain Dew. Hanson brought the items back to Heather's house. Tr. 567 – 571, 584 – 588, 594 – 595.

Around this time of the trip to the BP gas station, Hanson testified that he and Heather had a conversation in his car. Hanson said the conversation was about his concern for Heather's general health. Soon after, Hanson testified that he left, with Heather and the two other young men, one of whom was Josh Case, remaining at Heather's residence. Tr. 567 – 571, 584 – 588, 594 – 595. When he testified, Hanson acknowledged that he and Heather were sitting in his car for about ten minutes. Hanson testified that he did not exchange any drugs with her. As to whether Heather was involved with drugs, Hanson testified that heard from other people that Heather was taking illegal drugs. Hanson himself denied ever selling pills. Tr. 588 – 593.

As to the conversation between Heather and Hanson in Hanson's car, Josh Case testified that Heather went outside and sat in Hanson's car. He saw hand motions that looked to him like Heather and Hanson were arguing. Case testified that after being in Hanson's car for about ten

minutes, Heather came back inside the house. When she came back in the house, she had an Adderall pill and a Soma pill that she hadn't had before she got into Hanson's car. Tr. 534 – 544. Heather and Hanson went back inside Heather's house. While Case watched a movie, Heather and Hanson talked in the kitchen for about ten minutes. Case testified that Hanson left. Tr. 534 – 544.

Detective Wichman also testified that Tom Hanson was questioned about providing prescription medication to Heather. Detective Wichman testified that Hanson denied doing so. Tr. 783 – 784.

After Hanson left Heather's house, Case testified that he went to a nearby 7-11 carry out and bought donuts and milk for Heather and the children. Although he was fuzzy on the exact times, Case thought this trip to the 7-11 took place around 11:30 PM. Tr. 534 – 544.

Case's testimony is corroborated by the testimony of his friend, Billy Crawford. Crawford testified that the evening of Friday, September 7, 2012, he was at his own home. His friend, Jeremy Griggs, who was a cousin to Josh Case, was visiting. Crawford was working on Griggs' car. Around 10 or 11 PM, Josh Case texted Crawford, asking Crawford to deliver a pack of cigarettes to him at Heather's house. Crawford did so, and drove Jeremy Griggs' car by himself for this trip to Heather's house. Crawford testified that when he arrived at Heather's house, he took Case to a nearby 7-11 carry out. Case bought milk and donuts. Crawford testified he drove Case back to Heather's house, and Crawford and Case went inside. Once inside Heather's house, Crawford saw Tom Hanson, who Crawford had known for a couple of years. Crawford stayed for a few minutes and left. Crawford testified that when he left, Case, Hanson and Heather were at Heather's house. Tr. 546 – 552.

Around midnight that night, Heather's friend Justin Kromer called and spoke to Heather on the telephone, while he was at Jimmy's Bar. Heather told Kromer that her daughter Celina was still awake and that she, Heather, would call Kromer when Celina was asleep. Tr. 498 – 507. Kromer also learned that when he spoke to Heather by telephone around midnight, Heather's friend Josh Case was at Heather's house. Tr. 513.

Around this same time frame, according to Case, he and Heather had consensual regular sex. Later, at around 1:00 AM, Case left. Case testified that he was picked up at Heather's house by his friend, Billy Crawford. After leaving Heather's residence, Case testified that Billy Crawford dropped him off at the home of Jeremy Griggs. Tr. 524 – 528.

Billy Crawford testified that around 12:30 AM or 1:00 AM, Case had contacted Crawford for a ride. Crawford came back to Heather's house to pick up Case. At that time, Crawford was driving his own 1987 Ford Ranger pick-up truck, and Crawford's girlfriend was with him. After waiting about 20 minutes for Case, Crawford's girlfriend got mad, so Crawford took her home. Shortly thereafter, Case contacted Crawford again and said he had been in the bathroom puking and asked if Crawford could come back and pick him up. Crawford did so. Crawford and Case stopped at Crawford's house for a while, and then Crawford took Case over to the home of Jeremy Griggs. Tr. 552 – 560.

Case's and Crawford's testimonies were corroborated. Sandusky police detective Wichman explained that phone records, as well as surveillance videos from Firelands Hospital, which was immediately adjacent to the victim's residence, was used to corroborate the accounts of Josh Case and Billy Crawford that they left the victim's residence at 1:00 AM on Saturday, September 8, 2012. Tr. 780 – 783.

This surveillance video from Firelands Hospital, Detective Wichman, came from24 hours of video from each of three cameras that provided a view of the area immediately adjacent to Heather's house. In addition, using the videotape surveillance, Detective Wichman confirmed that Tom Hanson's car left the victim's residence at 9 PM on Friday September 7, 2012, and did not return. Tr. 780 – 783. The particular 24-hour period for the three Firelands Hospital surveillance video cameras started at 8 PM on Friday, September 7, 2012, and ended at 8 PM on Saturday September 8, 2012. Detective Wichman testified that he watched all the video. Tr. 785 – 786.

After Case left Heather's house, at around 3:00 AM on Saturday September 8, 2012, Kromer left Jimmy's Bar and went to a friend's house. Kromer testified he texted Heather and asked if she was home. Kromer received a reply text that said, "Yeah, why?" Kromer texted Heather back, saying he wanted to come over to her house. Kromer testified he did not get a reply text. Tr. 498 – 507.

Discovery of the Triple Homicide

The following afternoon, Saturday, September 8, 2012, Heather's friend Danielle Sorrell stopped by at Heather's house around 2:30 PM. Sorrell was on her way to home from work. At that time, Sorrell went to the side screen door and found it to be locked, where Sorrell knew that Heather locked that door only if she was at home. After knocking a few times, there was no answer at the door. Sorrell left. Tr. 395 – 399.

Around 5:00 PM on that same day, Sorrell spoke on the telephone to Heather's mother. Sorrell testified that Heather's mother told her that nobody had been able to reach Heather. Learning this, Sorrell went back to Heather's house, arriving around 5:30 PM. Sorrell "went to every door and they were all locked." Sorrell testified "So then, I went to Celina's bedroom

window and opened it." Tr. 399 – 400. Sorrell did not go inside Heather's house Tr. 404 – 405. Sorrell testified she saw that "The TV was on, and Fatman's [Wayne, Jr.] bottle was laying on Celina's bed, right in front of the window. And there's a toddler bed in the living room with baby's blankies on it." That sight was concerning to Sorrell, "Because you don't leave without baby's blankies or Fatman's bottle." Sorrell left Heather's house and called Heather's mother. Sorrell testified that she and Heather's mother both went Heather's house. When they arrived, police were already on the scene. Sorrell testified that she knew Heather's cell phone number to be 419-370-6610. Tr. 400 – 403.

Sandusky police officer Rob Bess testified that around 6:30 PM on Saturday, September 8, 2012, he was dispatched on a well-being check to the home of Heather Jackson. Officer Bess checked the doors and windows and found them to be locked. Officer Bess left the scene and returned to the main police station. While at the main police station, officer Bess spoke by telephone with the landlord of the premises and requested that a key to the premises be delivered. Officer Bess also spoke by telephone with Heather's mother. Tr. 422 – 428.

Just before Sorrell and Heather's mother got to Heather's house, Tom Hanson, along with his friend, Dan Risner, went to Heather's house. Hanson testified that around 7:30 PM Saturday evening, because everybody was looking for Heather, he and his friend, Dan Risner, came to Heather's house. Hanson testified that he knocked on the front door and called out for Heather, with no response. Hanson could hear that the television set was on. Hanson testified that his friend Dan Risner called out from the back door area, saying that the door was open. Hanson testified that he and Risner went inside and looked around until they saw what looked like a body by a mattress. They both left. About ten or twenty minutes later, Hanson testified that Risner called 911. The police arrived in a few minutes. Tr. 571 – 577, 595 – 605.

Hanson's friend, Dan Risner, also testified. Risner testified that at Hanson's request, he went to Heather's house to look around, since Hanson said he had been unable to speak with Heather. Risner testified he forced open the back door. Tr. 459 – 460. Risner called Hanson over, and they went into the house together. Within seconds, they saw a body underneath a mattress and quickly left the residence. Tr. 443 – 447. Risner called his wife, who told him to call 911. Risner did so. Risner testified that he lied to the operator, saying the door had been unlocked, because he was afraid to "implicate myself into something." Tr. 447 – 451, 463 - 464. Risner also testified that on his way out of Heather's house, he wiped off the bathroom door handle and "maybe the light switch." Tr. 464 – 465, 472 - 473.

About a week later, after being interviewed by Sandusky police Detective Wichman, Risner admitted he had forcefully entered the residence. Tr. 451 – 453.

At around 7:30 PM, while Officer Bess While he was checking with the landlord about getting a key, he was dispatched back to Heather's house on a 911 call. The dispatcher reported that two subjects had entered the premises and found a body. Tr. 422 – 428. At the scene, Officer Bess determined that Dan Risner and Thomas Hanson were the two individuals who had discovered the body. Officer Bess did not enter the residence. Tr. 428 – 433.

Investigators Process the Crime Scene

The first law enforcement person inside Heather's house was Sandusky police sergeant Eric Graybill. Sgt. Graybill testified that he was the officer in charge of the second shift patrol on Saturday, September 8, 2012, when Officer Bess made him aware of the welfare check matter at Heather's house. While both he and Officer Bess were at the main police station, they responded to a 911 call at the Heather's house regarding a possible body in the residence. Sgt. Graybill testified that he and other officers responded to the scene. Sgt. Graybill entered the

residence and discovered under a mattress in a bedroom a body that, he and two firefighters determined was deceased. Tr. 476 – 483.

After clearing the house and learning there may be children in the house, Sgt. Graybill reentered the residence. At a utility closet in the living room, Sgt. Graybill unlocked a slide-bolt mechanism on the door, peered over some boxes, and saw what appeared to be two children on the floor. The female child was up-side down, with her head down and her feet up. Underneath the female child, there appeared to be the top of another child's head. Sgt. Graybill testified that firefighters determined the children were deceased, and the residence was vacated. The scene was secured and detectives were summoned. Tr. 483 – 487.

Sgt. Graybill identified State's Ex. 2, 3, and 4, which were photographs of the exterior of Heather's house. Tr. 487. Sgt. Graybill also identified State's Ex. 5, which was a photograph of the location of Heather's body, State's Ex. 6, which was a photograph of the inside of the utility closet, and State's Ex. 7, which was a photograph of the children's bodies behind boxes in the utility closet. Tr. 487 – 489.

The Sandusky police department requested that the Ohio BCI process the crime scene. BCI Special Agent David Hammond was dispatched at 9:00 PM, and arrived at Heather's house at 11:00 PM on Saturday September 8, 2012. Hammond took photographs and collected evidence. Tr. 616 – 617.

Hammond conducted an examination of the exterior of the residence to determine whether doors and windows were locked. A window on the west side of the residence leading into a child's room had no window screen and the window, although in a closed position upon examination, was raised by Hammond and determined not to be locked. Tr. 625 None of the windows showed signs of forced entry. Tr. 644.

As to processing the bodies of the children, Hammond explained that the wrists and ankles were swabbed for DNA, since a suspect could have grabbed the children by the ankles or the wrists to control or carry them. Tr. 662 – 663, 673 – 674.

Hammond identified Defense Exhibit A as an inventory of items he seized during the search of Heather's house. Tr. 696 – 697, 700.

Hammond identified Defense Exhibit B as the lab submission sheet that was a request to forensically test 26 items. Tr. 703 – 706.

Sandusky Police Identify Curtis Clinton as a Suspect

Sandusky police detective Ken Nixon, who just days before had investigated the sexual assault of E.S, was dispatched on Saturday, September 8, 2012, to Heather's house relative to the triple homicides. Tr. 749 – 751.

After the crime was discovered, Detective Wichman testified that he obtained and reviewed cell phone records. In reviewing Heather's cell phone records, Detective Wichman determined that Heather received a call from telephone number 419-202-0131 at 2:59 AM on Saturday, September 8, 2012, which lasted for 182 seconds. At 3:12 AM on Saturday, September 8, 2012, Heather received a call from the same number, 419-202-0131, which lasted for 36 seconds. Tr. 787 – 791.

Detective Wichman testified that Detective Nixon was assigned to determine to whom the 419-202-0131 number belonged. At 3:05 AM on Saturday September 8, 2012, Heather's cell phone placed a call to the cell phone of Josh Case, which lasted approximately 5 minutes. In following up with Josh Case, Detective Wichman testified that that Case said, due to his high level of intoxication, he had no recollection of any conversation with Heather during that time frame. Tr. 787 – 791.

Detective Wichman testified that after the 36-second phone call from 419-202-0131 at 3:12 AM, the rest of Heather's calls were all incoming and were designated as "routed" calls, which meant the incoming calls either went to voicemail, or the caller hung up. Tr. 787 – 791.

After securing Heather's phone records, Detective Nixon determined the last communication Heather had was with phone number 419-202-0131. Detective Nixon determined this phone number was assigned to Curtis Clinton. Detective Nixon identified St. Ex. 109 as the records from Neustar, for the phone number 419-202-0131, that showed Curtis Clinton to be the subscriber. Tr. 753 - 756.

Detective Nixon also testified that because Heather's home was next to Firelands Hospital, surveillance video of the hospital parking lot was obtained. Watching the video, Detective Nixon saw a white Cadillac, which Detective Nixon knew from the E.S. sexual assault investigation, to be associated with Curtis Clinton. Tr. 756 – 758.

On the morning of Monday, September 10, 2012, after conversation with the caseworker who had interviewed E.S., detective Nixon determined that Curtis Clinton was in Bellevue Hospital following a suspected suicide attempt. Detective Nixon, along with Sandusky police Sgt. Newell and two Erie County deputy sheriffs, went to Bellevue Hospital to speak with Clinton. Tr. 757 – 759.

Detective Nixon testified that he and Sgt. Newell entered Clinton's room. Clinton's girlfriend, Mercedes Charlton, was sitting on the bed next to Clinton. Detective Nixon secured the cellphone that was in Clinton's hand as they entered the room. After conversation, Clinton agreed to go to the Sandusky Police Department. Detective Nixon identified St. Ex. 108 as the cell phone he secured from Curtis Clinton. Detective Nixon identified Curtis Clinton, and the defense stipulated to the identification. Tr. 759 – 765.

Sandusky police detective Gary Wichman was the lead investigator on the case. Detective Wichman testified that he learned from detective Nixon that the number 419-202-0131 came back to Curtis Clinton, whom detective Wichman knew to be a suspect in a rape being investigated by detective Nixon. Detective Wichman saw from the Firelands Hospital surveillance videos that a white Cadillac car arrived at Heather's residence around 3:10 AM on Saturday September, 8, 2012, and left at 4:16 AM. The Firelands Hospital surveillance videos also showed the same white Cadillac returning at 4:20 AM and leaving for the last time at 4:21:30 AM. Detective Wichman learned this car was associated with Curtis Clinton, where that association had been made through detective Nixon's investigation of the rape from the previous weekend where Clinton was the suspect. Tr. 791 – 793.

Detective Wichman identified St. Ex. 108 as Clinton's cell phone. Detective Wichman testified that the Toledo Police Department performed a "complete dump" of Clinton's cell phone, by which the data stored on the phone was placed on a CD. Tr. 822 – 823. In connection with the data from Clinton's cell phone, detective Wichman reviewed the Heather's cell phone records, previously identified as St. Ex. 9, and determined that Heather's cell phone number, along with record of the calls to Heather's cell phone had been deleted from Clinton's phone. Tr. 822 – 825.

Detective Wichman also testified that Heather's cell phone was never recovered. Tr. 813 – 814.

Detective Wichman further identified St. Ex. 111, which was a satellite photo centered on the Heather's house. That overhead photo also showed the adjacent parking lot of Firelands Hospital and the location of the three surveillance video cameras. Detective Wichman testified that he correlated the time record on the surveillance videos with Heather's cell phone records.

Doing so, Detective Wichman determined that the white Cadillac arrived at the Heather's house at the same time the 36-second call, made at 3:12 AM, was in progress. The Firelands Hospital surveillance tape showed the white Cadillac left at 4:16 AM and returned at 4:20 AM, leaving for the last time at 4:21 AM, where detective Wichman used the aerial photo to show the path taken by the white Cadillac at the designated times. Tr. 793 – 798.

Detective Wichman showed excerpts of St. Ex. 113, which was the "channel 6" surveillance video from Firelands Hospital, showing the white Cadillac arriving at and leaving from Heather's house and returning again. Detective Wichman also showed excerpts of St. Ex. 114, which were the "channel 2" and "channel 1" surveillance videos from Firelands Hospital, showing the same scenes from different angles. Tr. 802 – 812.

Clinton Makes a Videotaped Statement to Police

Detective Wichman went on to testify about statements made by Curtis Clinton, where the non-suppressed portion of Clinton's videotaped statement was played for the jury. Detective Wichman testified that in the interrogation of Clinton, he utilized a standard interview technique where the examiner would minimize the suspect's conduct in a way that may facilitate admissions from the suspect. In this regard, Detective Wichman explained that his own statements to Clinton saying the deaths must have been accidental, and that Clinton was not a violent person, were interview techniques to aid a suspect in admitting responsibility, and not actual beliefs he held. Tr. 825 – 827

Detective Wichman identified and played for the jury St. Ex. 118, which was the 911 call made by Clinton's girlfriend Mercedes relative to Clinton's suicide attempt at 5 AM on Sunday, September 9, 2012. The videotaped interview with Clinton, which was identified as St. Ex. 117, followed that suicide attempt. Tr. 827 – 829. The video contained a written superscript of what

was being said, and by agreement of the parties the trial court gave an instruction to the jury to "rely on what you hear over what you read." Tr. 829 – 839.

The interview began with detective Wichman reading the rights form and rights waiver, with Clinton signing the rights waiver and detective Wichman signing as a witness. Clinton Statement Transcript, pg. 3 – 4.

Detective Wichman told Clinton that "a lady had – was found in her residence and her two kids were passed away." Clinton said he heard about it, that somebody said "she got shot," and that he was referring to "Heather." Clinton said "everybody was texting me telling me about it, but nobody was specific. Clinton Statement Transcript, pg. 5. Clinton said "It's not girlfriend/boyfriend…" but that "I have been seeing her for like five months." Clinton Statement Transcript, pg. 7. When asked "Did you guys have a sexual relation at all?" Clinton said "Yes, of course." When asked "Who would do something like this to her?" Clinton said, "I don't have a clue because I heard so many things …." Clinton Statement Transcript, pg. 8 - 9.

When asked "When was the last time you had seen Heather?" Clinton said, "Thursday." Clinton said, "I just seen her, we talked, I gave her like $328 that she needed for her car or something. And of course we had sex, but that was it." Clinton Statement Transcript, pg. 12.

When asked what he did Friday night, Clinton said he thinks he went to Dave and Buster's with his teenage step-daughter Tirecia and her friend, Lacy. After that, Clinton said he thinks he dropped off Tirecia and Lacy and then went to Clyde, Ohio to see his girlfriend, Mercedes. At that time, according to Clinton, Mercedes was staying with her cousin, Susie. Clinton Statement Transcript, pg. 14 - 20.

When asked about Heather's kids, Clinton said I really didn't know them that much. They were kids, I didn't know them." Clinton Statement Transcript, pg. 20.

When asked if he knew Heather to be involved in drugs, Clinton said "She did a lot of drugs. That's basically why I would pay her debts." Clinton Statement Transcript, pg. 22.

Clinton gave DNA swabs when asked to do so by detective Wichman. Clinton Statement Transcript, pg. 25 – 26.

Detective Wichman told Clinton he had phone records showing that Clinton "Friday night into Saturday morning you had a conversation with her." Clinton said "It may have been Friday because I thought I went out, so I called her when I was out." Clinton said Friday night he was at bars called "Daly's" and "DJ's," "So it had to have been Friday." Clinton Statement Transcript, pg. 30 - 31. Clinton said "… I wasn't at Heather's long, I wasn't there long." "Because whenever I dropped the money off and gave her a kiss, and we did have sex, but, you know, it was like…" " … The kids was asleep. I think the one daughter was in the living room, it was like on a mattress or something, she was out there asleep. I don't know where the other kid was." "I just remember her being out there because we was – I forget what we did. That was about it. And then I left, came home, and that was it." Clinton Statement Transcript, pg. 36.

When pressed about the matter, Clinton said "Okay. Oh, Okay, I'll tell you, no, I didn't do nothing to her, and no, I didn't do nothing to her kids, so that's my statement." Clinton Statement Transcript, pg. 42.

Clinton Makes a Call from Jail to His Mother

Detective Wichman testified that that the county jail has a phone system where inmate phone calls are monitored and recorded, with an automated recording making that statement while the call is in progress. Detective Wichman identified St. Ex. 119, which was an audio-only CD of a recorded telephone conversation between Curtis Clinton and his mother, which was played for the jury. Tr. 843 – 844.

In that telephone call with his mother, Clinton made the following statements:

- "How do I ever get help? I didn't even notice it …."
- "You should know that it would happen again, though."
- "Now it's even worse than before."
- "It's something in me. I don't know what it is though. I swear I just don't know. I don't know what the fuck it is. It's just, I just lose it, and then I just don't even – I don't know what it is."

Clinton Jail Call Transcript, pg. 5 – 6.

- "I just didn't think that, you know, nothing would happen like that again because I was doing good."
- "I just thought I was over it, I don't know. I thought after 13 years I would be over that, and I just wouldn't believe that shit would happen no more."
- "I hurt someone."
- "Look at all the people I hurt. I can't even explain it."

Clinton Jail Call Transcript, pg. 7 – 8.

- "I'm going to go in there and plead guilty or whatever, and just let them do whatever, just fucking, just …."
- "I apologize."

Clinton Jail Call Transcript, pg. 11 - 12.

Clinton Killed Misty Keckler by Ligature Strangulation

Curtis Clinton had killed another woman 15 years earlier according to retired Fostoria, Ohio police detective Michael Clark. Detective Clark testified that in April 1997, he was the lead detective with the Fostoria, Ohio police department investigating the homicide of an 18-year-old female, Misty Keckler. Keckler was found deceased, face down in a bathtub with water in it, with a ligature around her neck and her hands and feet tied behind her back. Clark identified St. Ex. 125, 126 and 127, which were photos showing Keckler's body at the crime

scene. Clark also identified St. Ex. 128, 129, and 130 were autopsy photos. Clark testified that Curtis Clinton was a suspect, that "Curtis Clinton advised there was sexual contact" between he and the victim, and that Curtis Clinton was found guilty in the homicide of Misty Keckler. Clark identified Clinton as the same person from the Keckler case. Tr. 951 – 960.

When asked on cross-examination "Do you know exactly what it was that he pled guilty to?" Clark said, "I believe he pled guilty to involuntary manslaughter." Tr. 960 – 961.

Clinton's DNA on Each Ligature Used to Kill the Children

Clinton's DNA was found on the ligatures used to kill the children according to the State BCI Technician Julie Cox. Cox testified that as a forensic biologist, her job is to identify and characterize biological fluid stains such as blood, semen, and saliva. Tr. 867. Cox identified St. Ex. 120 as the forensic biology report, dated September 13, 2012, she authored in connection with her initial activities in this case. Tr. 872 – 873. Cox identified St. Ex. 124 as the DNA blood card collected from victim Celina Jackson. Tr. 873. Celina's blood card, along with similar known DNA standards from victims Wayne and Heather, as well as Clinton, were forwarded by Cox to the DNA testing section. Tr. 875.

As to the rape kit for Heather and the child Wayne, Jr., Cox determined there was no semen present, and under those circumstances samples from the rape kit were not forwarded to the DNA testing section. Tr. 877 – 879. As to the rape kit for the child Celina, Cox determined semen was not present on the vaginal swabs, but that semen was present on the anal swabs. Samples from the anal swabs from the child Celina were prepared and forwarded to the DNA testing section. Tr. 879 – 881.

Cox identified St. Ex. 121 as the forensic biology report, dated September 24, 2012, that she authored as part of the case after her initial report. That report addressed the analysis of the

underwear of the child Celina, which Cox identified as St. Ex. 93. Cox testified that she identified a single sperm cell on the crotch area of those panties of the child Celina. Cox cut out a portion of the area where she had located the single sperm cell from the panties of the child Celina and forwarded that to the DNA testing section. Tr. 882 – 887.

The State presented evidence from BCI forensic scientist Hallie Garofalo. Garofalo conducted DNA testing on the items forwarded by forensic biologist Cox. Garofalo identified St. Ex. 122 as the DNA testing report, dated October 12, 2012, that she authored Tr. 872 – 873.

As to the anal swabs from the child Celina, Garofalo determined that Clinton could not be excluded as a source of the semen, and that the chances of a coincidental match were one in 27,140 unrelated individuals. Tr. 907 – 909. Garofalo identified St. Ex. 123 the DNA testing report, dated November 20, 2012, that she authored in her analysis of the likelihood of the conventional DNA profile and the Y profile happening in conjunction with one another, as it relates to the anal swabs from the child Celina. "The combined expected frequency of occurrence of these DNA profiles on the anal swab is one in 120,094,500 unrelated individuals." Tr. 920 – 923, quotation at Tr. 921.

As to touch DNA from the right wrist of Heather, Garofalo determined that Clinton cannot be excluded as source of the DNA, and that the chances of a coincidental match were one in 2,083,000 individuals. Tr. 909 – 910.

As to touch DNA from the left wrist of the child Celina, Garofalo determined that Clinton cannot be excluded as a source of the DNA and that the chances of a coincidental match were one in 3,643 unrelated individuals. Tr. 911. As to this same touch DNA sample from the left wrist of the child Celina, Garofalo determined through Y-STR testing, where male-specific DNA is isolated, that Clinton nor any of his paternal male relatives could be eliminated as a source of

the DNA, and that the chances of a coincidental match was one in 4,425 male individuals. Tr. 911 – 912.

As to touch DNA from the right ankle of the child Celina, Garofalo determined that Clinton cannot be excluded as a source of the DNA and that the chances of a coincidental match were one in 1,871 unrelated individuals. As to this same touch DNA sample from the right ankle of the child Celina, Garofalo determined through Y-STR testing, where male-specific DNA is isolated, that neither Clinton nor any of his paternal male relatives can be eliminated as a source of the DNA, and that the chances of a coincidental match was one in 4,425 male individuals. Tr. 914 – 915.

Relative to touch DNA from the left ankle of the child Celina, Garofalo determined that Clinton cannot be excluded as a source of the DNA, and that the chances of a coincidental match were one in 5 quintillion 74 quadrillion unrelated individuals. Tr. 915 - 916.

Relative to touch DNA from the ligature of the child Celina, Garofalo determined that Clinton cannot be excluded as a source of the DNA and that the chances of a coincidental match is one in 74,960,000 unrelated individuals. As to this same touch DNA sample from the ligature of Celina, Garofalo determined through Y-STR testing, where male-specific DNA is isolated, that neither Clinton nor any of his paternal male relatives can be eliminated as a source of the DNA, and that the chances of a coincidental match was one in 4,425 male individuals. Tr. 916.

As to touch DNA from the ligature of the child Wayne, Jr., Garofalo determined that Clinton cannot be excluded as a source of the DNA, and that the chances of a coincidental match is one in 55,930 unrelated individuals. Tr. 916 – 917.

Garofalo identified St. Ex. 123 the DNA testing report, dated November 20, 2012, she authored in connection with her analysis of the sperm cell from the child Celina's underwear.

Garofalo determined that Clinton cannot be excluded as a source of the DNA, and that the chances of a coincidental match are one in 490 unrelated individuals. As to this same touch DNA sample from the sperm cell from the underwear of the child Celina, Garofalo determined through Y-STR testing, where male-specific DNA is isolated, that neither Clinton nor any of his paternal male relatives could be eliminated as a source of the DNA, and that the chances of a coincidental match was one in 4,425 male individuals. Tr. 918 – 920.

Heather, Celina, and Wayne, Jr. Were Killed By Ligature Strangulation

The autopsy of each of the three victims was conducted by Dr. Diane Scala-Barnett. Dr. Scala-Barnett identified St. Ex. 134 as the autopsy report regarding Wayne Jackson, Jr. and St. Ex. 135 through 141 as photos from the autopsy. Tr. 1099 – 1110. Dr. Scala-Barnett identified St. Ex. 99 as the ligature she removed from the child Wayne Jr.'s neck. Tr. 1110 – 1112. The cause of death of the child Wayne, Jr. was ligature strangulation. Tr. 1112.

Dr. Scala-Barnett identified St. Ex. 142 as the autopsy report regarding Heather Jackson, and St. Ex. 143 through 149 as photos from the autopsy. Tr. 1112 – 1121. The cause of death of Heather was ligature strangulation. Tr. 1121.

Dr. Scala-Barnett identified St. Ex. 150 as the autopsy report regarding Celina Jackson, and St. Ex. 151 through 159 as photos from the autopsy. Tr. 1121 – 1130. Dr. Scala-Barnett identified St. Ex. 90 as the ligature she removed from the child Celina's neck. Tr.1127.The cause of death of the child Celina was ligature strangulation. Tr. 1131.

Clinton's Mitigation Presentation was Limited to His Unsworn Statement

Following on-the-record discussions and disclosure spelled out in the Statement of the Case section of the State's Merit Brief, what the jury heard in mitigation was limited to Clinton's unsworn statement.

Immediately following the State resting, defense counsel Doughten said "Your Honor, for the defense, Mr. Clinton does elect to make an unsworn statement." Mit. Tr. 11-12-13, pg. 28.

Clinton proceeded to make an uninterrupted, unsworn statement. Mit. Tr. 11-12-13, pg. 28 – 91. Clinton spoke at length regarding the DNA testing, where he repeated his view that the conclusion that "Clinton cannot be excluded as a source" of the DNA meant that the DNA was not his. Mit. Tr. 11-12-13, pg. 28 – 36, 53 – 54, 57 - 58. As to the events of the evening, Clinton said "I was over there that night, I had sex with Heather that night, and I left that night." Mit. Tr. 11-12-13, pg. 28 – 36. Clinton said he had never been to her new house, so the 36 second cell phone call was made as he arrived, with him asking Heather in which of two houses she lived. Mit. Tr. 11-12-13, pg. 36. Clinton said he left the first time, he came back briefly to get his "Black and Mild" cigars he had left there, and that Heather handed him his cigars and he left. Mit. Tr. 11-12-13, pg. 37 – 40.

Clinton denied the crime, saying "I'm very sorry for this family's loss, but I'm – I didn't do this." Mit. Tr. 11-12-13, pg. 67. As to the sentencing decision, Clinton said "when you go back there, I'm not even going to ask you to – you know, to – do what you need to do. I'm – that's the honest truth. Do what you need to do. I'm not going to try to sway you to do anything." Mit. Tr. 11-12-13, pg. 84.

At numerous times, Clinton made reference to having been in prison. Mit. Tr. 11-12-13, pg. 36, 41, 43, 44, 45, 47, 58, 68, 70 – 71, 80, 88.

After Clinton's Allocution and Imposition of the Death Sentences
A Courtroom Disruption Occurred

The procedural components of the jury verdicts and related matters are spelled out in the Statement of the Case section of the State's Merit Brief.

At the sentencing hearing, when asked if there would be an allocution, defense counsel Doughten said "Your Honor, Mr. Clinton is requesting that he be able to allocute." Sent. Tr. pg. 7 – 8.

Clinton did so, generally stating his displeasure with the proceedings. Sent. Tr. pg. 7 – 8.

The trial court proceeded to sentencing, found that the aggravating circumstances outweighed the mitigating facts, and imposed a death sentence as to each victim. Sent. Tr. pg. 25 – 27.

Following the imposition of the death sentences, and before sentencing on the non-capital counts, the trial court entertained victim statements. One of the statements was from Heather's brother Nick Fee, who berated Clinton. Sent. Tr. pg. 28 – 35. After completion of the victim statements, and before sentencing on the non-capital counts, the trial court asked Clinton whether "there is anything further you'd like to say." Clinton said "No. Nick can kiss my ass," being a reference to Nick Fee. A disruption of the courtroom ensued. When order was restored, the trial court concluded the sentencing proceedings. Sent. Tr. pg. 36 – 41.

Response to Proposition of Law 1: By giving an unsworn statement, Clinton did not completely waive mitigation and therefore the trial court was not obligated to conduct an Ashworth colloquy.

Clinton alleges the failure to strictly conduct a colloquy in accordance with *State v. Ashworth* is a violation rooted in the federal and state constitutions, is structural error, and is not subject to harmless error review. (Clinton Brief, p. 27.) This Court has repeatedly held that a defendant's decision to only give an unsworn statement (as Clinton did) is not a waiver of mitigation. Therefore, no *Ashworth* colloquy was necessary.

***Factual History*:**

After Clinton was convicted, at status conference before the trial court, David Doughten (lead counsel) informed the trial judge, "Mr. Clinton has instructed us not to put on any mitigation whatsoever." (11/7/2013 Hrg; Tr. p. 4.) Doughten then noted that Clinton "has indicated to us that he wants to make an unsworn statement, which is his right under Ohio law." (*Id*.) Doughten explained:

> So the record is clear, what is happening is, Mr. Clinton has instructed us not to put on any mitigation whatsoever. He also has instructed us he doesn't want he doesn't want us to say anything in opening or close in the penalty phase to argue for his life. However, he has indicated to us that he wants to make an unsworn statement, which is his right under Ohio law, and I specifically cite State versus Roberts. <u>That's not a waiver of mitigation</u>, the fact that he is going to get up and make a statement. I'm not clear what he's going to say. <u>It's not a waiver</u>.

(*Id*.) (emphasis added.) As a precaution and to ensure compliance with the law, Doughten insisted that their mental health expert Dr. Galit Askenazi "come in to conduct a competency evaluation…" (*Id*.) In regards to the competency report done by his expert, Doughten explained, "I don't think it's necessary under Ohio law, but we want to make sure it's part of the record, so we're clear that he was competent and, also, so the record's clear." (11/7/2013 Hrg; Tr. p. 5.) In the report, Dr. Askenazi reviewed the work she conducted in preparation for the mitigation phase, described Clinton's history, relayed the information she relied upon, and provided her diagnosis. (Askenazi Rpt. p. 1-7.)

Starting on page eight of the report, Dr. Askenazi reviewed Clinton's decision to waive a traditional presentation of mitigation evidence and his reasoned decision to, instead, rely solely upon his unsworn statement. (Askenazi Rpt. p. 8-10.) Clinton told Dr. Askenazi that "he knew that if he chose not to proceed with mitigation, the death penalty would likely be imposed given the nature of his convictions." (Askenazi, p. 8.) According to Dr. Askenazi, Clinton chose not to offer mitigation because he believed "there was [sic] no legitimate reasons for him to beg for his

life for crimes he did not commit." (Askenazi Rpt. p. 8.) In other words, Clinton did "not want to present 'reasons why I did this?' when he did not in fact do what he was convicted of." (Askenazi Rpt. p. 8.) Moreover, Clinton did "not want mitigation to bring to light the history of his family, which he prefer[red] to keep private." (Askenazi Rpt. p. 9.) Clinton acknowledged "he is allowed to give an unsworn statement of any length to say things he chooses to, without being cross-examined." (Askenazi Rpt. p. 9.) Clinton told Dr. Askenazi that "he wants to fight his case, just not via mitigation." (Askenazi Rpt. p. 9.) In her report, Dr. Askenazi opined "with reasonable psychological certainty, [* * *] Mr. Clinton is able to understand the nature and objectives of the mitigation phase and [is] knowingly choos[ing] to waive mitigation at the present time." (Askenazi Rpt. p. 9.) According to Dr. Askenazi, Clinton was competent to forego a traditional mitigation case because:

1. Clinton has a good understanding of the legal system and the options available to him.

2. Clinton understands the pros and cons of information that may be elicited during the mitigation phase.

3. Clinton appreciates his right to speak in the alternative method, namely an unsworn statement.

4. Clinton's reasoning skills are intact and he provides rational and logical reasons for his decision.

5. Clinton has a very positive relationship with his attorneys and attends to their advice and recommendations.

6. Clinton does not suffer from any delusional beliefs regarding his situation or his legal proceedings.

7. Clinton has no self-defeating or suicidal notions.

(Askenazi Rpt. p. 10.)

On the record, Doughten emphasized "[Dr. Askenazi's] very clear, [Clinton] is very competent…" (11/7/2013 Hrg; Tr. p. 6.) Doughten summarized "all three of us believe he is competent," referring to himself, co-counsel (Dixon), and their expert (Askenazi). (11/7/2013 Hrg; Tr. p. 6.) Doughten reported to the trial judge that "we've gone over with [Clinton] every aspect of [the mitigation phase], and I think his knowledge of the penalty phase is probably better than a lot of lawyers in the state at this time." (*Id*.) Doughten insisted "we're very comfortable with [Clinton's] knowledge." (*Id*.) According to Doughten, Clinton "made it very clear and instructed" his attorneys not to "ask for a sentence less than death." (*Id*.)

Later, defense counsel proffered "all the mitigation" uncovered by their investigations "in case [Clinton] changes his mind." (11/12/2013 Hrg; Tr. p. 16.) On the record, Doughten informed the trial court that they spoke with Clinton and his mother "just to make sure his decision not to put on mitigation, other than a statement, was made." (11/12/2013 Hrg. Tr. p. 123.) In Clinton's presence, Doughten proffered the evidence they had gathered for mitigation and stated that they tried to discuss presenting it with him and, "[i]t was clearly his decision not to." (11/12/2013 Hrg. Tr. p. 126.) Doughten also noted that he disagreed with Clinton's decision but was "obligated to follow" it. (11/12/2013 Hrg. Tr. p. 126.) Doughten informed the trial court that one of the reasons Clinton chose not to present mitigation "is he didn't want the family dysfunction to be put out for the public record." (11/12/2013 Hrg. Tr. p. 126.) To ensure confidentiality, Doughten proffered the mitigation information under seal. The trial judge allowed Doughten to file the information under seal. (11/12/2013 Hrg; Tr. p. 127-29.)

Clinton went before the jury and gave a lengthy mitigation presentation: the theme being he was a genuinely good person who had nothing to do with these murders. (11/12/2013 Hrg; Tr. 28-91.) In other words, Clinton deliberately chose to pursue a "good guy / not guilty" theme.

There is no question that Clinton spent a large amount of time attempting to refute the evidence of guilt, which makes sense given the horrific nature of the murders. Clinton likely recognized that his "good guy" theme would fall on deaf ears if he took responsibility for the heinous murder of a mother, an infant, and a toddler. Instead, Clinton spent time portraying himself as a responsible citizen who was employed, paid child support, and spent time with children and family. (Mit. Hrg. Tr. 41-48, 88.) He also told the jury about suffering from depression. Clinton denied any drug usage, much less dependency. (Mit. Hrg. Tr. p. 68.) Although his "good guy / not guilty" theme was rejected by the jury, it was an intelligent and reasonable decision to make that presentation given the circumstances of this case.

Argument:

Clinton did not call for, or object to, the trial court's decision not to conduct an *Ashworth* colloquy before Clinton chose to give only an unsworn statement at the penalty phase. In fact, his attorney, citing *State v. Roberts*, told the trial court explicitly that Clinton decision to only make an unsworn statement was not a waiver of mitigation – and the trial court reasonably relied upon that correct statement of law. Based on this Court's case law, Clinton's decision to only pursue an unsworn statement is not waiver of mitigation which triggers an *Ashworth* colloquy. R.C. 2929.03(D)(1) gives a defendant the right to make an unsworn statement during which he can present the jury with any mitigation that he deems relevant and appropriate without fear of cross-examination. Defendants who choose to take advantage of this unique opportunity have not waived mitigation. *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶144 (*Ashworth* inquiry not required where defendant presented mitigation through unsworn statement). This is true regardless of the content or potential effectiveness of the unsworn statement.

Trial courts know that if the defendant chooses to give an unsworn statement, regardless of what topics he pursues, no *Ashworth* colloquy is necessary. This is an easily applied rule that cannot be manipulated by defendants, facing insurmountable aggravating factors, who do not have anything lose. The rule does not require an evaluation of content or the effectiveness of the unsworn statement. Requiring what Clinton appears to ask for would put the trial courts in an impossible and illogical situation: the trial court would have to limit unsworn statements to only statutorily-based mitigating factors. An unsworn statement is the defendant's nearly unfettered opportunity to talk to the jury without restriction and without fear of cross-examination. Clinton's decision to humanize himself and argue doubt was reasonable mitigation even if not statutorily based. It is also arguably a better strategy than some of the mitigation presented by the cases Clinton relies on. *See Roberts*, 2006-Ohio-3665, ¶137 (defendant told jury to impose death because it was the right thing to do.) The rule proposed by Clinton would give defendants, facing insurmountable aggravating factors, an opportunity to manipulate the trial.

The lack of an *Ashworth* colloquy also does not implicate structural error because any such right to colloquy before a waiver of mitigation has questionable footing under the United States Constitution, especially where the defendant affirmatively made an unsworn statement. Assuming an *Ashworth* colloquy was necessary in this case, any failure to provide it was harmless and invited error given Clinton was actually assessed for waiver by a psychologist before the penalty phased began, trial counsel affirmatively stated there was no waiver, and the results of the mitigation investigation were filed under seal.

A. Because Clinton gave an unsworn statement, and offered mitigation, the trial court was under no obligation to conduct a colloquy under *Ashworth*.

"[T]he right to present mitigation evidence is not a fundamental right that must be personally waived by the defendant." *State v. Keith*, 79 Ohio St.3d 514, 530, 684 N.E.2d 47

(1997). Moreover, "the trial court has no constitutional duty to secure from the defendant an on-the-record waiver of the right to present mitigation evidence." *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶59. In fact, the United States Supreme Court has recognized these legal verities by noting, "we have never required a specific colloquy to ensure that a defendant knowingly and intelligently refused to present mitigation evidence." *Schriro v. Landrigan*, 550 U.S. 465, 479, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007); *See also*, *Cowans v. Bagley*, 639 F.3d 241, 246 (6th Cir. 2011) (J. Sutton) ("The Supreme Court has never held that the Eighth Amendment or any other constitutional provision requires a defendant to present mitigating evidence at the sentencing phase of a capital trial. The Court, in point of fact, has suggested otherwise.").

In *State v. Ashworth*, this Court added a procedural safeguard: "[i]n a capital case, when a defendant wishes to waive the presentation of *all* mitigation evidence, a trial court must conduct an inquiry of the defendant on the record to determine whether the waiver is knowing and voluntary." 85 Ohio St.3d 56, 61, 706 N.E.2d 1231 (1999). Since *Ashworth*, this Court, on several occasions, has held "the requirement of an *Ashworth* inquiry is triggered only 'when a defendant wishes to waive the presentation of *all* mitigation evidence.'" *Short*, 2011-Ohio-3641, ¶62 (emphasis added). And this Court clarified that "[p]resentation of *any* mitigating evidence during either the guilt phase or the penalty phase of a capital-murder trial relieves the trial court of the duty to conduct an *Ashworth* inquiry." *State v. Barton*, 108 Ohio St.3d 402, 2006-Ohio-1324, 844 N.E.2d 307, ¶52 (emphasis added). In *Roberts*, this Court further clarified that an *Ashworth* inquiry is specifically limited to situations where "the defendant chooses to present no mitigating evidence whatsoever[.]" *Roberts*, 2006-Ohio-3665 at ¶143. This Court reasoned that because the presentation of "[a]n unsworn statement *can* constitute critical mitigation evidence,"

an *Ashworth* colloquy was unwarranted before limiting mitigation to that presentation. *Id*. (emphasis added). By utilizing the word "can," this Court created a bright-line rule: if a defendant refuses to allow his attorneys to present a mitigation case, and refuses to make an unsworn statement, an *Ashworth* colloquy is required. But if a defendant chooses to offer only an unsworn statement, the defendant retains a final opportunity to offer "critical mitigation evidence" and no *Ashworth* colloquy is required. "[T]he requirements of *Ashworth* do not apply when a defendant makes an unsworn statement and presents minimal evidence in mitigation." *Id*. In fact, this Court has "upheld the death sentences in several cases in which the defendant chose to present only an unsworn statement" without the benefit of an *Ashworth* colloquy. *Id*. at ¶144, *citing*, *State v. Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, 805 N.E.2d 1064, ¶113-114 ; *State v. Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193, 790 N.E.2d 303, ¶22; *and Barton*, 2006-Ohio-1324,¶47. This rule prevents capital defendants, from manipulating the record with equivocal or partial waivers.

A defendant "is entitled to 'great latitude' and may decide what mitigating evidence he wishes to present… (if) only through an unsworn statement asking for the death penalty." *Id.* at ¶47, *citing Mink*, 2004-Ohio-1580,¶113-14; *State v. Vrabel*, 2003-Ohio-3193, ¶22. If the trial court is not required to conduct an *Ashworth* inquiry of a defendant who presents nothing more than an unsworn statement asking for death, it would be illogical to require the trial court to conduct an *Ashworth* inquiry of a defendant who presents an unsworn statement insisting he is innocent while periodically highlighting his better qualities.

In this case, Clinton did not waive the presentation of mitigation in its entirety, but instead chose to limit his presentation to an unsworn statement. By utilizing his statutory right to an unsworn statement, Clinton was provided a final opportunity to proffer whatever mitigation

he believed was personally relevant. That decision was well within his discretion. The trial court's acceptance of Clinton's decision, without an *Ashworth* colloquy, was not a violation of his statutory or constitutional rights.

B. Clinton's request that this Court to require an *Ashworth* colloquy for defendants, like himself, who maintain their innocence during their unsworn statement, is unsound.

Clinton is not asking that this Court reconsider previous decisions that an *Ashworth* colloquy is only required when a defendant chooses not to present *any* mitigation whatsoever. Instead, Clinton is seeking an exception by arguing that the *Ashworth* colloquy is constitutionally required when a defendant uses his unsworn statement as an opportunity to maintain his innocence. (Clinton brief, p. 30.) Clinton insists that because *State v. McGuire* precludes his attorneys from proffering witnesses to support his claims of actual innocence during the penalty phase, and the jury cannot be instructed to consider residual doubt as a mitigating factor, he should have been given an *Ashworth* colloquy before talking about actual innocence during his unsworn statement. Clinton then suggests because he primarily used his statutory unsworn statement to proclaim his innocence, which was essentially no mitigation whatsoever, the trial court should have known to afford him an *Ashworth* colloquy at some point. Clinton's unprecedented argument would require a trial court to make a content-based analysis at some point, although Clinton is not exactly clear whether the trial judge should have given him the *Ashworth* colloquy before or after his unsworn statement, or required him to preview his unsworn statement for the judge. Any such a holding would be unsound.

Like a mitigation waiver, there is also no constitutional right to an unsworn statement. *Bedford v. Collins*, 567 F.3d 225, 237 (6th Cir. 2009). Capital defendants only have a statutory right to make an unsworn statement. R.C. 2929.03(D)(1). The plain statutory language only

contemplates a "statement," and places no restrictions on his topics for discussion. *State v. Lynch*, 98 Ohio St.3d 514, ¶107 (2003) ("trial court acted within its discretion by following R.C. 2929.03(D)(1) language and limiting defendant's presentation to a statement.") This Court has emphasized "a defendant is entitled to decide what (he or she) wants to *argue and present* at mitigation in the penalty phase." *Roberts*, 2006-Ohio-3665at ¶140 (emphasis added.) This is especially true for unsworn statements, where, practically speaking, a defendant is given a *carte blanche* opportunity to talk to the jury about any topic he deems appropriate, truthfully or not, and has no fear of being confronted by means of cross-examination. Unlike similar provisions in other states, R.C. 2929.03(D)(1) places no statutory limitation on "the scope and content of a capital defendant's right to present an unsworn statement before the jury." *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185, ¶102 *citing State v. Zola*, 112 N.J. 384, 430 (1988)(defendant forbidden from rebutting facts or deny guilt); *State v. Rogers*, 330 Ore. 282, 304 (2000) (defendant must submit prepared statement for trial court approval); *State v. Lord*, 117 Wash.2d 829, 898 (1991) (if defendant attempted to offer his version of events, instead of allocution, he was subject to cross-examination.)

Furthermore, this Court has explained that trial courts are under no obligation "to inform a capital defendant of his right to make an unsworn, penalty phase statement[.]" *State v. Campbell*, 90 Ohio St.3d 320, 326 (2000). As such, trial courts have no similar obligation to explain that, if defendant wishes to make an unsworn statement, he cannot talk about actual innocence, let alone halt the statement for an *Ashworth* colloquy if the defendant primarily talks about actual innocence. Because this unsworn statement is the last opportunity for a defendant to ask the jury to spare his life, courts should be encouraged not to sua sponte interrupt or admonish the defendant. Clinton's proposed rule seeks to limit the scope of a defendant's unsworn

statement in contravention of the statutory language and this Court's previous decisions. The trial court is not, and should not be, obligated to ensure that the defendant's unsworn statement is limited to the mitigating factors set forth in the statute.

Just as the trial court and State's attorneys are not privy to the defendant's closing argument before it is presented, they are not privy to the defendant's unsworn statement. Even the defendant and the defense team, who may work with the defendant to prepare his statement, cannot predict what topics a defendant will talk about when he actually stands up to speak, particularly when he is asking the jury to spare his life. In other words, it is highly likely that a defendant – caught up with emotion – may *ad lib* from script.

Trial courts should not be required to guess that a defendant may cover residual doubt, and fail to sufficiently mention other evidence that relates to statutory mitigating factors, and then give the *Ashworth* colloquy as some sort of precautionary measure. Likewise, trial judges should not be placed in the untenable predicament of trying to guess whether the defendant talked too much about residual doubt or failed to talk enough about topics that bear some relation to statutory mitigating factors after listening to a defendant's lengthy, and potentially unscripted, unsworn statement. Nor should the trial court engage in some unspecified weighing process to decide whether the *Ashworth* colloquy is required after analyzing the content of a defendant's statement

In this case, there is no question that Clinton presented the unsworn statement that he personally wanted. In fact, Clinton deliberately chose not to offer a traditional mitigation case because he believed "there was [sic] no legitimate reasons for him to beg for his life for crimes he did not commit." (Askenazi Rpt. p. 8.) The Supreme Court has made it clear that mitigation involves "the principle that punishment should be directly related to the personal culpability of

the criminal defendant." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). "Viewed as a whole, therefore, mitigation evidence encompasses both culpability and character, all to the extent relevant to the defendant's 'personal responsibility and moral guilt.'" *U.S. v. Gabrion*, 719 F.3d 511, 521 (6th Cir. 2013) (*en banc*) (quoting *Enmund v. Florida*, 458 U.S. 782. 801 (1982)). Clinton refused to accept any responsibility for the crimes at all, and chose to proffer a "good guy / not guilty" mitigation case to accommodate this stance. Although this is not a traditional mitigation case that might cause a jury to find that a defendant's culpability is lessened, or one that his attorneys would be able to present, it is still a viable unsworn statement that does not trigger an *Ashworth* colloquy.

There is no dispute that Ohio capital juries are not to be instructed that residual doubt is a statutory mitigating factor. *State v. McGuire*, 80 Ohio St.3d 390, 403 (1997). Likewise, defendants are not constitutionally entitled to proffer evidence of innocence during the penalty phase. *Oregon v. Guzek*, 546 U.S. 517, 524 (2006) ("sentencing traditionally concerns *how*, not *whether*, a defendant committed the crime.) That is not to say that trial courts should try to affirmatively prevent defendants from talking about actual innocence during an unsworn statement, or determine that an unsworn statement about actual innocence amounts to no unsworn statement was given and conduct an *Ashworth* colloquy. Under current practices, capital defendants are given nearly unlimited discretion regarding the content of their unsworn statement. This practice is sound and should remain the standard. Because capital defendants are given every opportunity to talk about whatever mitigation they deem appropriate, if they choose to make such a statement, an *Ashworth* colloquy is unnecessary. That is an easy to follow, black-and-white rule, which cannot be easily manipulated.

C. Because Dr. Askenazi's report was even more thorough than an *Ashworth* colloquy, any alleged error was harmless.

Only a few classes of constitutional error require structural error analysis – errors "so intrinsically harmful so as to require automatic reversal." *Neder v. U.S.*, 527 U.S. 1, 7 (1999). "[M]ost constitutional errors can be harmless." *Arizona v. Fuliminante*, 499 U.S. 279, 306 (1991). The Supreme Court has only found "error to be 'structural,' and thus subject to automatic reversal, only in a 'very limited class of cases.'" *Johnson v. United States*, 520 U.S. 461, 468 (1997).[1]

"Although all structural errors are by nature constitutional errors, not all constitutional errors are structural." *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, ¶79 (2008) (Lanzinger, J., dissenting) overruled by *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26. As the United Supreme Court has strongly suggested, the footing for an alleged constitutional right to a colloquy before waiver of mitigation is shaky at best. *Landrigan*, 550 U.S. at 479. Thus, any failure to perform a colloquy before waiver of mitigation – even assuming that happened in this case –is not one of the "limited class of cases" that obviously calls for automatic reversal. In this case, Clinton's attorneys went beyond the requirements of an *Ashworth* colloquy by having Clinton evaluated to determine his competency and understanding of the consequences of limiting the mitigation presentation before the penalty phase began. Clinton's counsel then went one-step further and submitted their mitigation investigation, and the presentation they had planned, under seal for appellate review. "[A] capital defendant's decision to forego mitigation 'does not by itself call his competence into question.'" *Cowans*, 87 Ohio

[1] The Supreme Court has only found structural error in the following types of cases. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (complete denial of counsel); *Tumey v. Ohio*, 273 U.S. 510 (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 391 (1984) (denial of public trial); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (defective reasonable-doubt instruction).

St.3d at 82, *citing*, *Tyler*, 50 Ohio St.3d at 29. Even so, by having Clinton evaluated by an expert, the parties took the extra step of ensuring that Clinton's decision to pursue only an unsworn statement was the product of reason and choice. In other words, an *Ashworth* colloquy would have merely confirmed that which Dr. Askenazi's report covered in more professional detail. Even assuming error occurred, it was harmless.

Response to Proposition of Law 2: With Clinton's consent, defense counsel properly engaged in status conferences and non-critical stages at trial, and Clinton did not have to personally waive those appearances.

Clinton insists that he was denied his rights under both the Confrontation Clause and Due Process Clause because his attorneys waived his presence at a conference where his exhibits were admitted, at a conference where jury instructions and verdict forms were discussed, and a status conference that occurred days before his penalty phase hearing started. (Clinton Merit Brief, p. 33-34.) These status conferences, which Clinton deliberately chose not to attend, were not critical moments of the trial or penalty phase, and so did not require either his personal appearance or personal waiver of appearance. In other words, trial counsel was sufficiently qualified to relay his personal decision not to attend either status conference.

Factual History:

After the State rested, the trial court had a status conference with the attorneys on November 1, 2013. (Tr. 1139.) At this status conference, the following dialogue took place:

THE COURT:	Let's go on the record in the matter of State of Ohio versus Curtis Clinton. The Defendant is not present currently. Counsel?
MR. DIXON:	Correct.
MR. DOUGHTEN:	Well --
THE COURT:	Is he coming over? Do we want to --
MR. DOUGHTEN:	We met with him yesterday. He had specifically requested not to come over. We explained to him what we were doing; we're going through the evidence and the jury instructions. He said he absolutely did not want to be here.

So that we indicated he could be here for, actually, the Rule 29 arguments, for this, he requested not to.
And both Mr. Dixon and myself, and I should add, Ms. Kendall, are satisfied that we've explained it thoroughly and there was no need for him to be here. We discussed this with him before we came in.
So we would waive his presence, Your Honor.

THE COURT: Okay. Very good, counselor.

(Tr. 1139-40.) After Clinton was convicted, but before the penalty phase began, the trial court conducted a status conference on November 7, 2013. At this conference, the following dialogue took place:

THE COURT: We are in between the trial phase and the penalty phase, and I'm meeting with counsel outside the hearing of any jury, jurors, to cover some pre-phase two or penalty phase issues, such as a series of defense motions and, also, the jury instructions for the penalty phase.
The Court would note for the record that Mr. Clinton is not present. Mr. Doughten or Mr. Dixon.

MR. DOUGHTEN: Yes, Your Honor. We'll address that.
So the record is clear, what is happening is, Mr. Clinton has instructed us not to put on any mitigation whatsoever.

* * * * *

He did not want to come over. He doesn't want to participate in, basically, going over the jury instructions and, frankly, that's consistent with his other actions.

Thank you.

THE COURT: Thank you very much for covering that in such detail on the record.

(11/7/2013 Status Conf. p. 3, 7.) Nearly a week later, on November 12, the penalty phase began, wherein Clinton was present for the entire hearing. (Mit. Hrg. p. 1-130.)

Analysis:

"An accused has a fundamental right to be present at all critical stages of his criminal trial." *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶117 (2005). However, "[a]n accused's absence… does not necessarily result in prejudicial or constitutional

error." *Id*. In fact, "under certain circumstances, a defendant's absence from a hearing at which his counsel are present does not offend due process." *Id.* at ¶118. A defendant can voluntarily waive his right to be present and that decision can be conveyed to the court by his attorney. Ohio Crim.R. 43; *State v. Carr*, 104 Ohio App.3d 699, 703, 663 N.E.2d 341 (2nd Dist. 1995). "Counsel is presumed to be authorized to act for his or her client." *Id*. at 703; *see also United States v. Riddle*, 249 F.3d 529, 534 (6th Cir. 2001) ("the Constitution does not require a colloquy on the record to establish a knowing waiver of the right to be present.") This Court has further explained that a defendant does not have to be personally present at "a conference or hearing on a question of law." *State v. Roe*, 41 Ohio St.3d 18, 27, 535 N.E.2d 1351 (1989). To obtain relief, "the record must affirmatively indicate the absence of a defendant or counsel during a particular stage of the trial." *State v. Clark*, 38 Ohio St.3d 252, 258, 527 N.E.2d 844 (1988).

The Confrontation Clause is not implicated in this claim because this case does not involve a situation where "cross-examination has been restricted by law or by trial court ruling." *Kentucky v. Stincer*, 482 U.S. 730, 738, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987). Neither the admission of exhibits, jury instructions and verdict forms, nor the pre-mitigation phase status conference, involved any type of restriction on Clinton's ability to cross-examine witnesses. The Supreme Court has recognized, "the Confrontation Clause's functional purpose [is] ensuring a defendant an opportunity for cross-examination." *Id.* Nothing in Clinton's Brief, nor the record, reflects any sort of restrictions were placed upon Clinton that "interfere(d) with his opportunity for effective cross-examination." *Id*. Moreover, Clinton does not argue that the introduction of any evidence violated the Confrontation Clause principles set forth by *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2001) and its progeny. Simply stated, the Confrontation Clause is not implicated in this claim.

As to the Due Process component of this claim, the Supreme Court has recognized "even in situations where the defendant is not actually confronting witnesses or evidence against him, he has a due process right 'to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" *Stincer*, 482 U.S. at 745, *citing*, *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.Ed. 674 (1934). The Supreme Court "emphasized that this privilege of presence is not guaranteed 'when presence would be useless, or the benefit but a shadow.'" *Id*. As such, a defendant has only the right to be physically present "at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Id*. In *Stincer*, the Supreme Court held that a defendant did *not* have a due process right to be present at a pre-trial hearing regarding the competency of witnesses. 482 U.S. at 738. The defendant's presence at a proceeding is "a condition of due process to extant that a fair and just hearing would be thwarted by his absence, and to that extent only." *United States v. Gagnon*, 470 U.S. 522, 526, 470 U.S. 522, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985). In *Gagnon*, the Supreme Court made it clear that a trial court "need not get an express record waiver from the defendant for every trial conference which a defendant may have a right to attend." *Id*. at 528.

Accordingly, for most rights "waiver may be affected by the action of counsel." *New York v. Hill*, 528 U.S. 110, 114, 120 U.S. 110, 145 L.Ed.2d 560 (2000). In *Hill*, the Supreme Court instructed "[w]hether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *Id*. The Court further opined "for certain fundamental rights, the defendant must personally make an informed waiver." *Id*. As an illustration of fundamental rights, the Court noted "right to counsel" and

'right to plead not guilty." *Id*. As to all remaining rights, the Court explained "the defendant is 'deemed bound by the acts of his lawyer-agent[.]" *Id.* at 115. According to the Supreme Court, for all non-fundamental issues "counsel's word on such matters is the last." *Id*.

November 1, 2013 – Conference

At the November 1 hearing, the attorneys went through exhibits and jury instructions. It is well settled that a defendant's absence from a hearing on proposed jury instructions does not violate due process. *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, 873 N.E.2d 1263, ¶147; *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶51 (2006); *State v. White*, 82 Ohio St.3d 16, 26, 693 N.E.2d 772 (1998). Moreover, the Supreme Court has noted that agreements regarding the admission of evidence do not implicate fundamental rights , and do not require a defendant's personal waiver. *Hill*, 528 U.S. at 115, *citing*, *United States v. McGill*, 11 F.3d 223, 226-227 (1st Cir. 1993).

November 7, 2013 – Status Conference

Clinton was absent from the November 7 status conference because he told his attorneys that he did not want to come to court "for any reason, except for to give his statement, and he asked us to convey to the Court that he doesn't want to be moved." (11/7/2013 Status Conf. p. 5.) During the hearing, the Defendant's counsel informed the Court that the Defendant did not want to present anything on in mitigation and did not want his lawyers to make any argument, but would be presenting an unsworn statement. (11/7/2013 Status Conf. p. 4.) It is clear from Dr. Askenazi's report that trial counsel accurately recited the Defendant's decisions. (Askenazi Rpt. p. 9.) And, although Clinton gave a lengthy unsworn statement, as he indicated to both his attorneys and the psychologist a week before, he withheld any mention of his childhood.

And the record is clear that he was physically present during the entire penalty phase, which started on November 12, and was undoubtedly the "critical stage" that required his presence. On November 12, moments before the penalty phase began, the trial court noted "[p]resent with Mr. Clinton is his counsel…" (Mit. Hrg. p. 4.) Nothing in the record even suggests that Clinton abruptly left the courtroom at any time during the penalty phase. Because Clinton was present during the entire penalty phase hearing, that alone is sufficient basis for denial of this claim.

Clinton's contends due process required the trial court to conduct some sort of colloquy before the penalty phase to make up for his absence at the previous status conference. (Clinton Brief, p. 36.) "Waiver can be either express or implied from the defendant's conduct." *United States v. Nichols*, 56 F.3d 403, 416 (2nd Cir. 1995). Moreover, as discussed in Response to Proposition of Law I, because Clinton gave an unsworn statement, no *Ashworth* colloquy was required. The trial court does not have to secure an on-the-record waiver of presenting mitigation evidence because "the right to present mitigating evidence is not a fundamental right that must be personally waived by the defendant." *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶59; *State v. Keith*, 79 Ohio St.3d 514, 530, 684 N.E.2d 47 (1997). The United States Supreme Court has "never imposed an 'informed and knowing' requirement upon a defendant's decision not to introduce evidence. * * * [W]e have never required a specific colloquy to ensure that a defendant knowingly and intentionally refused to present mitigating evidence." *Schriro v. Landrigan*, 550 U.S. 465, 479, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007). Clinton's right to a fair and just hearing was not thwarted by his absence at the pre-trial hearing.

Clinton's insistence that a colloquy was required before the penalty phase began, due to his absence from a status conference a week before, is baseless. In *Taylor v. United States*, 414

U.S. 17, 94 S.Ct. 194, 38 L.Ed.2d 174 (1973), half-way through trial, the defendant did not return to court proceedings after a lunch break. The trial court continued the trial where in his absence and the defendant was convicted. On appeal, the defendant argued that his voluntary absence was not an informed waiver of his right to be present. In denying his claim, the Supreme Court concluded "a defendant need not be expressly warned of rights* * * [and did not] require any type of waiver to exist on the record." *Id*. at 196. Instead, the Supreme Court found "a defendant's failure to assert his right was an adequate waiver." *Id*. In fact, the Supreme Court has explained the "failure by a criminal defendant to invoke his right to be present … at a conference he knows is taking place … constitutes a valid waiver of that right." *Gagnon*, 470 U.S. at 529. As stated previously, because Clinton was physically present during the entire penalty phase, this argument has no footing.

Undeterred by his physical presence during the entire penalty phase, Clinton suggests "had the trial court conducted a proper inquiry" the trial court "may very well have found" that he "did not want to waive mitigation at all." (Clinton Merit Brief, p. 36.) This allegation is speculative and belied by the record. Even at this late a date, Clinton is completely equivocal about whether he would have proffered evidence regarding his childhood – stating "he may, or may not have" presented this evidence in mitigation. (Clinton Merit Brief, p. 36.) The record is unequivocal – Clinton made a competent, knowing, and voluntary decision not to present mitigation evidence. Per Dr. Askenzi's report, Clinton did "not want mitigation to bring to light the history of his family, which he prefer(ed) to keep private." (Askenazi Rpt. p. 9.) Thus, before the penalty phase began, Clinton instructed his attorneys not to present any evidence of bad childhood. (Askenazi Rpt. p. 9.) Clinton sat silent when his attorneys informed the court that

they were not presenting any mitigation evidence other than Clinton's unsworn statement. (Mit. Hrg. p. 123-26.)

Clinton did not waive mitigation. In fact, Clinton gave a lengthy unsworn statement where he talked about a whole range of topics and chose not to mention anything regarding his childhood. *See State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168 ¶143 (2006) (presenting an unsworn statement is not waiving mitigation). Nothing prevented him from talking about "his life, character, and history" in his unsworn statement, except his own personal reservations. Before the penalty phase, Clinton acknowledged that he was aware "he is allowed to give an unsworn statement of any length to say things he chooses to, without being cross-examined." (Askenazi Rpt. p. 9.) Thus, Clinton knew the parameter of topics he could discuss during his unsworn statement was limitless, yet he evaded any facts supporting his childhood. Clinton's decision not to present any allegations of his childhood was not a result of any actions or inactions of the trial court or attorneys for either side. It was his decision.

This proposition of law is without merit and should be denied.

Response to Proposition of Law 3: The introduction and admission of Clinton's homicide of Misty Keckler to prove identity of perpetrator, given the striking similarity between deaths of Misty Keckler and Jacksons by ligature strangulation, did not deprive Clinton of his rights to a fair trial, due process, and a reliable determination of his guilt and sentence.

This Court should overrule Clinton's third proposition of law. The limited other acts testimony in this case was admissible pursuant to Ohio Evid. R. 404(B) as it went directly to the contested issue of identity. The evidence was narrow in scope and the jury was properly instructed on how to treat it. Clinton's argument lacks merit and must be denied.

A. Standard of Review

"The admission of [other-acts] evidence lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of

discretion that created material prejudice." *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, par. 14 citing *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 66. "Abuse of discretion" has been described as including a ruling that lacks a "sound reasoning process." *Id*. citing *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). "A review under the abuse-of-discretion standard is a deferential review. It is not sufficient for an appellate court to determine that a trial court abused its discretion simply because the appellate court might not have reached the same conclusion or is, itself, less persuaded by the trial court's reasoning process than by the countervailing arguments." *Id.* A trial court only abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

B. Law and Analysis

Ohio has long held that evidence of other acts is admissible if "(1) there is substantial proof that the alleged other acts were committed by the defendant, and (2) the evidence tends to prove motive, opportunity intent, preparation, plan, knowledge identity, or absence of mistake or accident." *State v. Lowe*, 69 Ohio St.3d 527, 634 N.E.2d 616 (1994) citing *State v. Broom*, 40 Ohio St.3d 277, 282-83, 533 N.E.2d 682; Evid. R. 404(B); R.C. 2945.59. The State clearly satisfied the first prong as Clinton entered a guilty plea to the homicide of Misty Keckler. And, as the trial court found, the State satisfied the second prong because the evidence tends to "prove the identity of the killer of the three victims, to prove the identity and modus operandi of [Clinton] when committing a sexual assault on victim E.S., and to prov[e] [sic] the sexual motivation specification." Docket, Amended Op. & Judgment Entry, 10/23/13.

Clinton was indicted with murdering Heather Jackson and her minor children, Celina and Wayne Jr. The indictment further charged that Clinton raped Celina and another minor, E.S. Heather, Celina, and Wayne Jr. each died as a result of strangulation by ligature. While E.S. survived Clinton's assault, her testimony established that he had repeatedly strangled her as well. Prior to trial, the State notified Clinton of its intent to use the following other acts evidence:

- Clinton's 1999 involuntary manslaughter conviction for the strangulation homicide of Misty Keckler
- Clinton's prior conviction for corruption of a minor which included evidence that Clinton choked victim Tonya Valero when she refused his sexual advances
- Evidence that Clinton would choke his partners during consensual sex
- Clinton's attack against Carrie Below, whom Clinton choked during a sexual assault
- Clinton's attack against Jennifer Reiter, whom Clinton also choked during a sexual assault

The Sate argued, and the trial court agreed, that the evidence was admissible to prove Clinton's identity for the charged murders and sexual assaults. In a pretrial ruling, the trial court allowed the state to admit evidence of the Keckler homicide and the sexual strangulation assaults of Tonya Valero and Carrie Bello. Docket, Amended Op. & Judgment Entry, 10/23/13. During trial, the state limited the other acts evidence only to the Keckler homicide. The trial court gave an appropriate limiting instruction to the jury about the use of other acts evidence. (Tr. 1250-51.)

In *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, this Court outlined a three-step analysis for the admissibility of other acts evidence: (1) whether the evidence is "relevant to making any fact that is of consequence to the determination of the action more or less probable that it would be without the evidence"; (2) whether there is a legitimate purpose for the evidence, such as those stated in Evid. R. 404(B); and (3) whether the probative

value of the other acts evidence is substantially outweighed by the danger of unfair prejudice." *Id*. at ¶20.

1. The prior homicide was relevant evidence to prove that Clinton killed Heather, Celina, and Wayne Jr.

Clinton's prior conviction for killing Misty Keckler was relevant to the charges in the instant matter. Evid.R. 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." During trial Clinton argued that he did not kill Heather, Celina, and Wayne Jr. Therefore, the evidence was relevant because the "identity of the perpetrator of [the] murder[s] was directly at issue." *State v. Ross*, 9th Dist., 2014-Ohio-2867, ¶61.

On appeal, Clinton argues that the trial court erred in admitting this testimony because "the State was relying on DNA, and not the prior conviction, to prove [Clinton's] identity." Appellant Brief, pg. 43. While the evidence against Clinton certainly included inculpatory DNA results, the record reflects that Clinton argued that he was not the killer. Identity was the primary issue of the case. Even if it were not, this Court has held "[p]ursuant to Evid. R. 404(B)…evidence of other crimes, wrongs, or acts of an accused may be admissible to prove intent or plan, ***even if the identity of an accused or the immediate background of a crime is not at issue***." *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶2 (emphasis added.) *See also State v. McNeill*, 83 Ohio St.3d 438, 442, 700 N.E.2d 596 (1998) ("need is irrelevant to an Evid. R. 404(B) objection.")

The evidence of Clinton's prior homicide was also relevant because there was no question that he was the one who committed the offense. "Evidence of 'other acts' is admissible if there is substantial proof that the alleged similar act was committed by the defendant." *State v.*

Broom, 40 Ohio St.3d 277, 282, 533 N.E.2d 682 (1988.) Clinton entered a guilty plea to involuntary manslaughter for killing Misty Keckler. During the pretrial admissibility briefing, the state presented the trial court with Keckler's autopsy report and certified judgment entries of Clinton's plea and sentence to involuntary manslaughter. Docket, Amended Op. & Judgment Entry, 10/23/13. Clinton's trial counsel agreed that Clinton's conviction was substantial proof that he committed the crime. *Id*.

Because there is no question of Clinton's guilt for the prior homicide and because identity was a primary issue in this case, the trial court did not err in finding the other act evidence relevant.

2. The other act evidence was admitted for the legitimate purpose of proving identity/modus operandi and sexual motivation. The offenses were sufficiently similar to show Clinton's distinctive behavior.

This Court next directs trial courts to determine if a legitimate purpose exists to satisfy Evid. R. 404(B). The trial court found that there was a legitimate purpose to the admission of the other act evidence: identity. Docket, Amended Op. & Judgment Entry, 10/23/13. The trial court found the facts of the Keckler homicide to be "strikingly similar" to the deaths of Heather, Celina, and Wayne Jr., as well as to the forcible rape of E.S. *Id*. The Keckler homicide was admissible because it tended to show that Clinton committed the charged crimes, not that he was the type of person who might commit a particular crime. *State v. Lowe*, 69 Ohio St.3d 527, 530, 634 N.E.2d 616.

Clinton argues that the Keckler homicide should not have been admitted because it was different than the current charges. "[I]n order 'to be admissible to prove identity through a certain modus operandi, other acts evidence must be related to and share common features with the crime in question." *State v. Bey*, 85 Ohio St.3d 487, 491, 709 N.E.2d 484 (1999) citing *Lowe*,

supra. However, "***admissibility is not adversely affected because the other [crimes] differed in some details***." *Id*. citing *Jamison*, 49 Ohio St.3d at 187. (Emphasis added.) "While the other act must be similar to the crime in question, it need not be identical. Differences between the other acts evidence and evidence relating to the charged offense 'go to the weight of the evidence, not its admissibility.'" *State v. Roberts*, 1st Dist., 2007-Ohio-856, par. 6 citing *State v. Knight*, 131 Ohio App.3d 349, 353, 722 N.E.2d 568 (1998.)

The facts in this case are "strikingly similar" to the prior homicide. Misty Keckler was found face down in the bathtub of a house trailer in Fostoria, Ohio. Like the charged offenses, the Keckler homicide appeared to occur in the early morning hours. Tr. 953-54. Her hands and legs were tied behind her back. Tr. 955; Ex. 125-27. The bathtub was full of hot water which scalded her fact. Tr. 955-56. Ms. Keckler also had ligature marks around her neck. Tr. 957. Clinton admitted to having sex with Keckler. Tr. 959. Clinton also admitted to having sex with Heather. Clinton Statement Transcript, pg. 36. Heather and Ms. Keckler were also both blonde. See Ex. 133.

Clinton primarily relies on *Lowe, supra*, to support his argument. However, "*Lowe* was a state's appeal from the trial court's decision to exclude other the other acts evidence. The *Lowe* Court affirmed the trial court's exclusion, emphasizing that the trial court has broad discretion in the admission of evidence and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, the reviewing court should be slow to interfere." *State v. Charley*, 7th Dist. Belmont No. 05 BE 34, 2007-Ohio-1108, ¶42. Nor was the Keckler homicide too remote to be admissible. "Where, as here, other acts evidence 'establishes an idiosyncratic pattern of criminal conduct, it is not necessary for the offense at issue to be near in time and place to the other acts introduced into evidence; the probative value of such conduct lies in its

peculiar character rather than its proximity to the event at issue.'" *State v. Zich*, 6th Dist. Lucas App. No. L-09-1184, 2011-Ohio-6505, ¶101 citing *State v. Brooks*, 7th Dist. No. 07-MA-79, 2008-Ohio-6600, ¶36.

The facts of this case and the Keckler homicide share more similarities than the facts in *Lowe*. Both cases involved ligatures/strangulation, an attempt to degrade or hide the bodies of the victim(s), involved sexual conduct, and occurred in the early morning hours. Multiple Ohio courts have upheld the admission of a defendant's history of choking women when the defendant is charged with the strangulation murder of a woman. See *Zich*, 2011-Ohio-6505, ¶99 citing *State v. Hood*, 8th Dist. Cuyahoga App. No. 75210, 1999 WL 1204862 (Dec. 16, 1999); *State v. Collymore*, 8th Dist. Cuyahoga No. 81594, 2003-Ohio-3328; *State v. Robinson*, 3rd Dist. No. 3-95-13 (Dec. 21, 1995).

In addition to the similarities between Heather and Misty, the other act evidence also dispels Clinton's argument that he (1) lacked motive to kill Celina and Wayne Jr. and (2) had consensual sex with E.S. See Evid. R. 404(B). The other act evidence proves that Clinton strangles his victims during or close in time to sex. The evidence at trial proved that there was sexual activity between Clinton and his female victims. While E.S. survived, her attack, the similarities are evident: Clinton strangled her until she passed out during the sexual assault. Further, given the very young age of the children and the time the homicides occurred, the Keckler homicide helps to explain why Clinton attacked Celina and Wayne Jr. – Clinton has a pattern of doing this.

The other act evidence also helped place some of the new evidence into context. In a recorded jail call after the triple homicide, Clinton told his mother to "look at all the people I hurt." He tells her that she "should know that it would happen again…now it's even worse than

before," and that "something in [him]" causes him to "just lose it." Clinton also specifically referred to the Keckler homicide, saying that he "…thought it was over…I thought after 13 years I would be over that, and I just wouldn't believe that shit would happen no more." Clinton Jail Call Transcript, pg. 5-8. The Keckler homicide helped the jury understand what Clinton said in his call and shows motive and absence of mistake.

The trial court did not abuse its discretion in admitting the other act testimony. The Keckler homicide helped to prove Clinton's identity as the killer.

3. The risk of unfair prejudice did not outweigh the probative value of the other act evidence. The risk was also diminished by the trial court's limiting instruction.

The final prong in Williams directs courts to determine if the probative value of the other act evidence is substantially outweighed by the risk of unfair prejudice. *Williams* at ¶20. Unfair prejudice is "that quality of evidence which might result in an improper basis for a jury decision." *State v. Crotts*, 104 Ohio St.3d 432, 2004-Ohio-6550, 820 N.E.2d 302, par. 24. The evidence of Clinton's guilt is overwhelming and consists of telephone records, video footage, and DNA. Additionally, the trial court gave an appropriate limiting instruction to the jury about the use of other acts evidence. (Tr. 1250-51.) The trial court's instruction "minimized the likelihood of any undue prejudice regarding the jury's consideration of [Det. Clark's] testimony." *State v. Ross*, 9th Dist., 2014-Ohio-2867, ¶64 citing *State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, ¶194. The prosecutor also told the jury in closing argument that the other act evidence was for the purpose of proving identity, modus operandi, and motive. Tr. 1204.

Because the risk of prejudice did not outweigh the admission of Clinton's prior homicide, the trial court did not abuse its discretion in admitting this limited evidence.

4. Even if this Court were to find that the other act evidence should not have been admitted, any error was harmless. The evidence against Clinton was overwhelming.

Should this Court find error in the admission of the Keckler homicide, the error is harmless and does not warrant reversal. Crim R. 52(A) says harmless error is "any error, defect, irregularity, or variance which does not affect substantial rights" and that such error "shall be disregarded." The "term 'substantial rights' has been interpreted to require that 'the error must have been prejudicial.'" *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1152, ¶23. R.C. 2945.83 also prohibits granting a new trial as a result of the erroneous admission of evidence unless the record demonstrates prejudice. Clinton cannot show any prejudice by the admission of the other act evidence.

It is appropriate to find harmless error where, as here, there is overwhelming evidence of the defendant's guilt. See *Morris* at ¶29 *citing State v. Rahman*, 23 Ohio St.3d 146, 151, 492 N.E.2d 401 (1986.) Clinton's conviction is supported by DNA as well as additional uncontradicted evidence. See *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶123 (finding no plain error due to overwhelming evidence of guilt including DNA evidence and testimony that defendant had contact with the victim.) Therefore, even if there were error, Clinton is not entitled to relief.

Clinton also argues that the trial court erred in admitting photographs of the Keckler homicide. Because the other act itself was admissible, the trial court could also properly admit photographs depicting the other act. See *State v. Travers*, 8th Dist. Cuyahoga App. No. 71612, 1997 WL 661881 (Oct. 23 1997.)

C. Conclusion

The State respectfully requests this Court overrule Clinton's third proposition of law. The other act evidence was admissible to prove identity and its admission did not prejudice the defendant. The trial court did not abuse its discretion when it properly admitted this evidence.

Response to Proposition of Law 4: The trial court correctly denied Clinton's motion to sever rape charges from charges of aggravated murder because the cases were inextricably interrelated during the investigation and identified Clinton as the perpetrator.

This Court should overrule Clinton's fourth proposition of law. The rape of E.S. and the murders of Heather, Celina, and Wayne Jr. were inextricably related. Joinder was appropriate both as other acts and because the evidence was simple and direct. Clinton's meritless argument must be denied.

A. Standard of Review

An appellate court reviews a trial court's decision on joinder for an abuse of discretion. *State v. Scott*, 7th Dist. Mahoning App. No. 05-MA-215, 2007-Ohio-6258, ¶82. A trial court only abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

B. Law and Argument

If it appears that a defendant would be prejudiced by the joinder, a trial court may grant severance. Crim. R. 14; *State v. Diar*, 120 Ohio St. 3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶95. The defendant bears the burden of proving prejudice. *Brinkley*, *supra*. The State may rebut a defendant's claim of prejudicial joinder in two ways: (1) by showing that, if in separate trials, the state could introduce evidence of the joined offenses as "other acts" under Evid. R. 404(B); or (2) by showing that the evidence of each crime joined at trial is simple and direct, also known as the "joinder test." *State v. Lott*, 51 Ohio St.3d 160, 163, 555 N.E.2d 293 (1990).

The options are disjunctive; if the state can meet the requirements of the 'joinder test,' it need not meet the requirements of the 'other acts' test. See *State v. Mills*, 62 Ohio St.3d 357, 362, 582 N.E.2d 972 (1992); *State v. Franklin*, 62 Ohio St.3d 118, 122, 580 N.E.2d 1 (1991). "A trier of fact is believed capable of segregating the proof on multiple charges when the evidence as to each of the charges is uncomplicated. [citations omitted]. Joinder is therefore not prejudicial when the evidence is direct and uncomplicated and can reasonably be separated as to each offense. *State v. Peterson*, 8th Dist. Cuyahoga App. Nos. 100897, 100899, 2015-Ohio-1013, ¶65.

The trial court properly denied Clinton's motion to sever because the state satisfied both the "other acts" test and the "joinder test."

1. Other acts test

E.S.'s rape and the triple homicides satisfied the other acts test because they were inextricably related and because the crimes establish identity.

Other acts which form part of the immediate background of the charged crime are admissible. *State v. Curry*, 43 Ohio St.2d 66, 330 N.E.2d 720 (1975). "In such cases, it would be virtually impossible to prove that the accused committed the crime charged without also introducing evidence of the other acts." *Id*. The rape of E.S. is inextricably related because the investigation of that crime led to identifying Clinton as a suspect in the homicides.

E.S. was raped by Curtis Clinton less than a week before Clinton murdered Heather, Celina, and Wayne Jr. E.S. knew Clinton through a friend and was able to identify him as her assailant. Tr. 975-83, 1027-29, 1034. E.S. informed police that Clinton was driving a white Cadillac the night she was raped. Tr. 983-89. When E.S. tried to leave, Clinton put her in a headlock and began choking her. Tr. 1003-04. Clinton then raped E.S. and continued to choke her until she passed out. Tr. 1004-10. Det. Nixon was assigned to investigate the sexual assault.

While also assisting with the homicide investigation, Det. Nixon discovered that 419-202-0131 was Clinton's phone number; this was the last number that Heather answered before her death. He informed Det. Wichman of this development and the fact that Clinton was known to drive a white Cadillac, which was observed on the surveillance video at Heather's home at the time of the offense. Tr. 791-93.

The rape case was also admissible as another act to prove Clinton's identity as the killer. Clinton did not contest sexual conduct with E.S.-he alleged that it was consensual-so there was substantial proof that Clinton committed the act. See *State v. Broom*, 40 Ohio St.3d 277, 282, 533 N.E.2d 682 (1988.) The crimes are also significantly similar as they both involved strangulation and sexual assault. See *State v. Zich*, 6th Dist. Lucas App. No. L-09-1184, 2011-Ohio-6505, ¶99. Clinton's idiosyncratic pattern of criminal conduct was discussed at greater length in response to Proposition III, *supra*, but the same analysis applies here. The E.S. rape would have been relevant evidence to prove Clinton's identity as the killer because it demonstrated his pattern of strangling and sexually assaulting his victims.

Clinton's attack on E.S. also dispels any claim that he lacked a motive to kill Celina and Wayne Jr. In a recorded jail call after the triple homicide, Clinton told his mother to "look at all the people I hurt." He tells her that she "should know that it would happen again…now it's even worse than before," and that "something in [him]" causes him to "just lose it." Clinton Jail Call Transcript, pg. 5-8. While part of the jail call references the other act discussed in Proposition III, E.S. was also another victim of Clinton's depravity. E.S.'s rape helped the jury understand what Clinton said in his call and shows motive and absence of mistake. The other act evidence proves Clinton has a pattern of this behavior, a sexual motive for his actions, and a knowledge that he has and will continue to harm people.

Clinton argues that the rape of E.S. would only be admissible if it satisfies both Evid. R. 404(B) and the rape shield statute, R.C. 2907.02(D). As Clinton acknowledges, R.C. 2907.02(D) provides an exception which allows the admission of a defendant's sexual activity in a criminal case under various circumstances. R.C. 2945.59. As previously explained, the evidence of E.S.'s rape satisfies the requirements of that statute. The rape was admissible as scheme/plan/system evidence because it was inextricably related to the homicide investigation. See *State v. Curry*, 43 Ohio St.2d 66, 330 N.E.2d 720 (1975). It would also have been admissible to establish identity, intent, and absence of mistake because of Clinton's repeated use of strangulation.

Because of the investigatory overlap between the offenses, it was necessary that the crimes be tried together. The rape of E.S. was also properly joined because that case could have been admissible as other act evidence. Therefore, the trial court did not err in denying Clinton's motion to sever.

2. Joinder test

In addition to satisfying the "other act test," the crimes also satisfy the "joinder test." When "simple and direct evidence exists, an accused is not prejudiced by the joinder of multiple offenses in a single trial, regardless of whether the evidence is admissible as other-act evidence." *State v. Coley*, 93 Ohio St.3d 253, 260, 754 N.E.2d 1129 (2001) citing *Lott, supra*. Clinton raped E.S. days before he killed Heather, Celina, and Wayne Jr. The evidence for each offense was separate and distinct. E.S., Det. Nixon, and nurse Dettling testified about the sexual assault. There was separate testimony about the homicides. Clinton also argues that the trial court erred in admitting photographs of the Keckler homicide. Because the other act itself was admissible, the trial court could also properly admit photographs depicting the act. *See, State v. Travers*, 8th Dist. Cuyahoga App. No. 71612, 1997 WL 661881 (October 23, 1997.)

There is no evidence that the jury confused the rape and the homicide charges. Although extensive, the testimony regarding each offense was uncomplicated and easily dissected by the jury. Therefore, Clinton is unable to show prejudice from joining the offenses.

C. Conclusion

The trial court properly denied Clinton's motion to sever. The offenses were inextricably related and satisfied both the "other acts" and "joinder" tests. This Court should overrule Clinton's fourth proposition of law.

Response to Proposition of Law 5: The State is not required to contact the Defendant before permitting the consumption of evidence because the consumption of evidence amounts to a due process violation only where it is apparent, before testing, that the evidence will be materially exculpatory.

Determining if the failure to preserve evidence constitutes a due process violation "depends on whether the lost or destroyed evidence involves 'materially exculpatory evidence' or 'potentially useful evidence.'" *State v. Powell*, 132 Ohio St.3d 233, ¶73 (2012). Evidence is materially exculpatory if it has "an exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at ¶74, quoting *California v. Trombetta*, 467 U.S. 479, 489 (1984). It is the defendant's burden to prove that the evidence was materially exculpatory. *Id.* Evidence is "potentially useful" if "no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988). When materially exculpatory evidence is destroyed, a due process violation occurs regardless of the State's good or bad faith. *Id.* If evidence is only potentially useful, the defendant must show that the State destroyed the evidence in bad faith to demonstrate a denial of due process of law. *Id.* at 58; *State v. Geeslin*, 116 Ohio St.3d 252, ¶10 (2007). Bad faith is "something more than bad judgment or negligence," it requires a showing of

"dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another." *Powell* at ¶81 (citations and internal quotations omitted).

The Defendant has not shown that the evidence was materially exculpatory or that it was destroyed in bad faith. Before testing, it was not apparent whether the DNA swabs would inculpate or exculpate anyone. No more can be said of the DNA swab evidence than that it could have been subjected to a different test if it had been preserved. This evidence was potentially useful, not materially exculpatory, so a due process violation occurred only if the Defendant can show that the State destroyed the evidence in bad faith. There was no bad faith in this case. Following BCI's protocols and procedures, BCI Forensic Scientist Julie Cox informed the prosecutor that DNA testing would consume the entire sample on September 13, 2012. Tr. 889. Ms. Cox explained that with limited samples, like "seminal fluid on the anal swabs, or touch DNA where you - - the potential to deposit DNA is variable," there may not be enough DNA for testing, so permission to consume the entire sample is sought. Tr. 893. The prosecutor provided that permission on the same day.

The State was under no obligation to seek the permission or consent of the Defendant or his counsel in order to conduct that testing. The Defendant has not cited any controlling case law that directs an Ohio prosecutor to contact defense counsel before permitting DNA evidence to be consumed. The ABA Guidelines are not controlling authority and do not impose a duty, "they are only guides." *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984); *Bobby v. Van Hook*, 130 S.Ct. 13, 17 (2009). The results of the State's DNA analysis were available to the Defendant to examine or to have examined by the DNA expert he retained if he wished to challenge how any of the testing was completed. This proposition of law lacks merit and should be denied.

Response to Proposition of Law 6: Clinton's claim of biased jury due to pretrial publicity, where bias is to be presumed, fails for a complete lack of evidence before the trial court, and any claim of actual bias of a seated juror as grounds to change venue has been waived, where Clinton did not move for change of venue during the voir dire process.

The record reveals that of more than one hundred jurors who participated in the question-and-answer process for jury selection, twelve expressed a bias due to pretrial publicity or other personal knowledge, and they were excused for cause by the trial court. Accordingly, the record below reveals only a slight impact on the jury pool due to pretrial publicity, thus taking Clinton's case out of the "rare" and "extreme" cases that would require a change of venue even before any effort to seat a jury through the voir dire process.

Moreover, Clinton failed to present before the trial court any evidence at all about the volume and content of pretrial publicity. Under these circumstances, because there is no evidence at all about the volume or content of pretrial publicity, any discussion about the law pertinent to a "presumed bias" claim would be a pure academic exercise, not grounded in real events in Clinton's case.

Clinton did not move for change of venue during the actual questioning process of voir dire. Instead, before commencement of the voir dire questioning process, Clinton moved for change of venue under a "presumed bias" theory. The point is that Clinton never claimed below an entitlement to a change of venue based on real events during the jury selection process itself. Instead, Clinton's claim below was limited to the erroneous contention that adverse publicity had so tainted the jury pool that venue should be changed even before the commencement of the actual voir dire questioning process. Consequently, while the "presumed bias" claim is eligible for adjudication by this Court, any claim - readily seen to be invalid - that real events during the voir dire process itself warranted a change of venue is, at best, subject only to plain error review.

As explained below, the pertinent facts and the law readily show the trial court was well within bounds to deny Clinton's "presumed bias" jury claim.

A. Factual and Procedural Background

Clinton filed "Defendant's Motion For Change of Venue, " which was numbered "Defendant's Motion No. 28." See R. 130. In reliance on *Irwin v. Dowd*, 366 U.S. 171 (1961), *Sheppard v. Maxwell*, 384 U.S. 333 (1966), and *Rideau v. Louisiana*, 373 U.S. 723 (1963), Clinton alleged "The media accounts have left little room for fact-finding at trial and have created a presumption of the Defendant's guilt that is widespread in this community." R. 130, Defendant's Motion for Change of Venue, pg. 2.

Because Clinton's only challenge below was limited to this "presumed bias" jury claim, relief on his grievance about seated jurors 26, 70, 96, 143, 210, and 397 is precluded by lack of contemporaneous trial objection, where Clinton did not move for change of venue due to pretrial publicity by reason of anything said by these jurors. *State v. Allen*, 73 Ohio St. 3d 626, 634 (1995) ("However, Allen never made this objection at trial, and thus waived this issue absent plain error.")

Clinton's motion for change of venue - the "presumed bias" claim - did not contain any records, documents, or evidence of pretrial publicity. Clinton did not thereafter supplement the record with evidence of pretrial publicity. In other words, there were no newspaper stories, no audio or video recordings, no media studies, nor any evidence whatsoever before the trial court in support of defense motion 28. Consequently, Clinton did not present any evidence as to pretrial publicity, and the sole support for his motion was uncorroborated and unsubstantiated allegations contained entirely within defendant's motion 28 for change of venue. This absence of evidence to support a "presumed bias" jury claim should be considered a fatal defect, and should warrant rejection of Proposition 6 for failure to present in its support any evidence at all.

During the voir dire process, Clinton did not move for a change of venue. Moreover, Clinton successfully challenged for cause on grounds of predisposition to guilt, generally due either to pretrial publicity or connection to the victims, the following prospective jurors: Juror Number 108 (Voir Dire Tr. 155), Juror Number 69 (Voir Dire Tr. 380), Juror 60 (Voir Dire Tr. 721), Juror Number 49 (Voir Dire Tr. 845), Juror Number 180 (Voir Dire Tr. 879), Juror Number 348 (Voir Dire Tr. 1212), Juror Number 310 (Voir Dire Tr. 1404), Juror 100 (Voir Dire Tr. 1523), Juror Number 38 (Voir Dire Tr. 1610), Juror Number 393 (Voir Dire Tr. 1783), Juror Number 104 (Voir Dire Tr. 1825), and Juror Number 363 (Tr. 209).

What this shows was that Clinton was largely successful in excising from the jury pool of those individuals whose prior knowledge of the case conjoined with their express or implied unwillingness to be fair. Moreover, Clinton's measure of success in this regard is likely the reason why there was no motion for change of venue during the voir dire process itself.

Once the voir dire process was well under way, the trial court issued a written denial of Clinton's "presumed bias" jury claim. R. 180, Order Denying Defendant's Motion Number 32 for Change of Venue.

B. Presumed Bias In Contrast With Actual Bias

As explained by this Court in *State v. Mammone*, 139 Ohio St. 3d 467, P47 to P75 (2014), there are two types of claims of lack of an impartial jury due to pretrial publicity. The first type involves the "rare" and "extreme" case where pretrial publicity "was so pervasive and prejudicial that an attempt to seat a jury would be a vain act." *Id.*, P 56, P 58. The second type involves the case where one or more identified jurors have been seated who displayed an "actual bias" against the defendant due to an individual opinion formed by their particular exposure to pretrial publicity. *Id.*, P57, P69.

The rare and extreme first type of claim that an unbiased jury could not be seated due to pretrial publicity "is the product of three [United States] Supreme Court decisions from the 1960's," being *Sheppard v. Maxwell*, 384 U.S. 333, (1966), *Estes v. Texas*, 381 U.S. 532, (1965), and *Rideau v. Louisiana*, 373 U.S. 723, (1963). *Mammone*, P 56. Commonly referred to as a "presumed bias" claim, the standard of proof is a "clear and manifest" showing that "pretrial publicity is so damaging that bias must be conclusively presumed even without a showing of actual bias." *Id.*, P56. The *Mammone* Court to cited *Skilling v. United States*, 561 U.S. 358 (2010) for a four factor test to evaluate a presumed bias claim. *Id*., P59.

The other claim that a jury was tainted due to pretrial publicity requires the defendant to show that one or more jurors had an "actual bias" due to pretrial publicity. *State v. Gross*, 97 Ohio St. 3d 121, P29 (2002). ("A defendant claiming that pretrial publicity has denied him a fair trial must show that one or more seated jurors were actually biased.") This showing requires more than "pointing out some degree of media exposure." *Mammone*, P71. Moreover, "even pervasive, adverse publicity" is not dispositive of a claim the jury was tainted due to actual bias of a seated juror. *State v. Trimble*, 122 Ohio St. 3d 297, P58 (2009). Instead, "a juror will be considered unbiased if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Mammone*, P71, citing to *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). The question whether a prospective juror could lay aside his impression or opinion "rests in the sound discretion of the trial court." *Trimble*, P59. The *Mammone* Court explained that "The trial judge is in the best position to judge each juror's demeanor and fairness and thus decide whether to credit a potential juror's assurance that he or she will set aside any prior knowledge and preconceived notions of guilt." *Mammone*, P73.

C. Presumed Bias Claim Fails For Lack Of Evidence

Where there is a complete lack of evidence to support a presumed bias claim, Clinton has fallen far short of a "clear and manifest" showing needed to prevail. To begin with, Clinton did not present any evidence at all to support the bare assertions of pervasive publicity contained in defendant's motion number 28 for change of venue. Moreover, in a vague and conclusory fashion, defendant's motion number 28 referred to the volume, not the content, of the pretrial publicity, yet even then failed to provide hard data or concrete and specific measurements of the volume of pretrial publicity. In this respect, even the few unsubstantiated allegations in defendant's motion number 28 lacked the particular types of information necessary to evaluate the merit of a presumed bias claim.

Under these circumstances, the trial court was well within bounds to defer determination on defendant's motion number 28 until the effort to seat a jury was underway. Given the lack of evidence to support the vague and conclusory allegations in defendant's motion number 28, the abeyance determination was a fair outcome as well, since Clinton had ample time to produce evidence as to the volume and content of pretrial publicity if he intended to pursue that relief. Where Clinton chose not to present any evidence to support his presumed bias claim, the trial court's denial of the change of venue motion was necessarily prudent and proper. The denial was proper due to lack of any proof at all, let alone the failure to present a "clear and manifest" showing that "pretrial publicity is so damaging that bias must be conclusively presumed even without a showing of actual bias." *Mammone*, P 56. See R. 180, Order Denying Defendant's Motion Number 28 for Change of Venue.

Beyond the obvious propriety of denying relief where no evidence was presented as to the content or volume of pretrial publicity, this Court has determined that in reference to a

presumed bias claim, the volume of pretrial publicity, standing alone, does not require a change of venue. See *State v. Gross*, 97 Ohio St. 3d 121, P29 (2002). ("We have recently reiterated that the rule does not require a change of venue merely because of extensive pretrial publicity.") Furthermore, where the content of pretrial publicity was "factual, not sensational," this Court has declined to give significance to the volume of pretrial publicity, standing alone, even where "extensive" publicity involved the trial of a co-defendant. *State v. Landrum*, 53 Ohio St. 3d 107, 116 (1990). However, these guidelines have no pertinence to this case, where Clinton failed to present any evidence as to the volume or content of the pretrial publicity. In other words, because there is no evidence at all about the volume or content of pretrial publicity, any discussion about the law pertinent to a presumed bias claim would be a pure academic exercise, not grounded in real events in Clinton's case.

In view of the complete lack of evidence as to the volume or content of the pretrial publicity, the trial court correctly overruled Clinton's motion for change of venue under a presumed bias theory. *Mammone*, P55 ("As a general rule, a trial court should therefore make " 'a good faith effort * * * to impanel a jury before * * * grant[ing] a motion for change of venue.' " *[citations omitted*.])

In his brief to this Court, to determine the extent of pretrial publicity Clinton suggests this Court should conduct its own internet search. Clinton's Merit Brief, p. 66, footnote 10. No such evidence was presented below, and this Court should not permit a presumptuous invitation made for the first time Clinton's Merit Brief to absolve him from a wholesale failure of proof in respect to the presumed bias claim that he presented below. Moreover, Clinton's unsubstantiated assertions to this Court still do not address the volume and content of pretrial publicity. In other words, a mere allegation that pretrial publicity was supposedly pervasive lacks legal significance,

where it is the particular volume and the specific content of pretrial publicity that are the factors that must be assessed in a presumed bias claim. *Mammone*, P59.

The case of *Skilling v. United States*, 561 U.S. 358 (2010) illustrates the propriety of the denial of a presumed bias claim that lacks any evidentiary support. In support of a claim that pretrial publicity was so pervasive and adverse that venue should be changed before undertaking an effort to seat a jury, Skilling presented "hundreds of news reports detailing Enron's downfall, as well as affidavits from experts he engaged portraying community attitudes in Houston in comparison to other potential venues." *Id.*, at 370. The *Skilling* Court articulated and applied a four part test that assessed the evidence in view of community demographics, specific content of the pretrial publicity, specific time frames for the commencement and duration of the pretrial publicity, and finally assessed the pretrial publicity in light of actual trial events that might be consistent or inconsistent with a biased jury. *Id*, at 382 – 384. *Cf. Mammone*, P59 (enumerating the four part test in *Skilling*.) Had the *Skilling* defendant failed to present any evidence to support a presumed bias claim, the *Skilling* Court would have had no occasion to articulate and apply a four part test.

In this case, Clinton failed to offer any evidence against which the *Skilling* test could be applied, and the few words of unsubstantiated allegations in his brief to this Court does not cure the failure of proof below. Under these circumstances, the trial court properly denied Clinton's motion number 28 for change of venue, and this Court should so conclude.

D. Clinton's contention that certain seated jurors "had been exposed to pretrial publicity" lacks legal import.

It has been long settled that "a juror will be considered unbiased if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Mammone*, P71, citing to *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). Clinton ignores this well

settled law in his enumeration of the seated jurors who expressed some measure of foreknowledge due to pretrial publicity. Clinton Merit Brief, p. 65.

The record shows these particular seated jurors had minimal foreknowledge and, at best, lukewarm feelings about that foreknowledge. Juror 26, Tr. 1066 – 67, 1075 – 1081, 1085; Juror 70, Voir Dire Tr. 666, Tr. 279; Juror 96, 63 – 64, 76 – 82, 86; Juror 143, Tr. 537 – 538, 553; Juror 210, Tr. 775 – 777, 784 – 787, 794; Juror 397, Tr. 1132 – 1133, 1143. Moreover, each of these jurors was passed for cause by the defense.

Where the defense successfully challenged twelve prospective jurors for cause, on grounds of foreknowledge, conjoined with and expressed or implied unwillingness to be fair, it should be significant that these same defense attorneys passed for cause as to Jurors 26, 70, 96, 143, 210, and 397. The significance arises where the record shows Clinton's defense counsel were aggressive on the pretrial publicity issue and were, to a high percentage, successful when asserting a challenge for cause on pretrial publicity. Under these circumstances, this Court should view the seating of Jurors 26, 70, 96, 143, 210, and 397 to be eminently correct, corroborated by the fact that the defense counsel passed for cause.

Clinton argues that prejudiced should be presumed, despite jurors' assurances that they could be fair and impartial, because there was voluminous coverage of the murders in the local news. Petition, 160. Prejudice is presumed "in certain rare cases" where Clinton makes "a clear and manifest showing * * * that pretrial publicity was so pervasive and prejudicial that an attempt to seat a jury would be a vain act." *State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶56 (internal quotations omitted); *see also Skilling v. United States*, 561 U.S. 358, 381, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010) (the presumption of prejudice "attends only the extreme case"). There is no allegation or evidence in this case that the media's presence

during the trial caused a disruption, only that pretrial publicity created the problem. *See Mammone* at ¶60; *Sheppard v. Maxwell*, 384 U.S. 333, 355, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). In *Rideau v. Louisiana*, prejudice was presumed where "[a] 20-minute recording of the [defendant's] confession was broadcast three times on television within weeks of Rideau's trial" and viewed by "tens of thousands of people." 373 U.S. 723, 724-26, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963).

The trial court fully considered the same claim when it was made before trial. Judgment Entry, Oct. 21, 2013. In its entry, the trial court noted that it had considered that the pretrial publicity had been "extensive and adverse to Clinton," but found it was not enough to rise to the level of prejudice in *Rideau*. It is clear from the record that this judgment was reached after the first phase of voir dire, during which jurors were questioned about their exposure to pre-trial publicity and any effect it may have on their ability to be fair and impartial juror. The trial court noted that the pretrial publicity was "not sufficiently prejudicial that readers and viewers could not realistically shut it from sight" and that it was "unable to determine how many residents from only Erie County" had accessed the various online sources that covered the case. Judgment Entry, Oct. 21, 2013. The trial court took steps to ensure that media presence would not disrupt any of the courtroom proceedings, as it stated in the judgment. The record demonstrates that trial court correctly found that prejudice should not be presumed.

Clinton also argues - incorrectly - that some jurors had an actual bias as a result of the pretrial publicity. To demonstrate that a juror was actually biased, Clinton must do more than just point out "some degree of media exposure," he must demonstrate that a juror cannot "lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Mammone* at ¶71. A trial judge exercises his discretion in "judg[ing] each juror's

demeanor and fairness and thus decid[ing] whether to credit a potential juror's assurance that he or she will set aside any prior knowledge and preconceived notions of guilt." *Id.* at ¶73.

As previously noted, the trial court considered Clinton's motion for change of venue after individual voir dire had been completed. The trial court qualified 72 prospective jurors at the end of that process. From those jurors who ended up seated on the jury – either as jurors or alternates – Clinton objects that seven of them had some familiarity with the case due to pretrial publicity. But he cannot show more than simply that these jurors were exposed to some media. Each juror was heard by this Court, which determined that the jurors were able to set aside any prior knowledge of the case and determine the case on its merits. There was no showing of actual prejudice.

For the reasons expressed, this Court should find Clinton's Proposition 6 to be not well taken.

Response to Proposition of Law 7: The claim has a faulty premise given that merely being acquainted with law enforcement officers, witnesses, each other, and a prosecutor not assigned to the case does not render a juror biased by implication.

Clinton's numerous claims of juror bias fail on the facts and the law. Clinton attacks Juror 70, 96, and 225 because they admitted being acquaintances with members of law enforcement. (Clinton Brief, p. 68-70.) Clinton attacks Jurors 143 and 371 because they were "neighbors." (Clinton Brief, p. 71.) Clinton attacks Jurors 63 and 341 because they were "friends." (Clinton Brief, p. 72.) And Clinton attacks Juror 344 because he knew a witness and an assistant prosecutor. (Clinton Brief, p. 73.) Bias cannot be established for any of these jurors.

A. Because Clinton failed to move to have any of the aforementioned jurors removed for cause, he has waived all but plain-error review.

"[A] defendant who does not present a challenge for cause 'waive[s] any alleged error in regard to [that] prospective juror.' [citations omitted]. Under those circumstances, plain-error

review applies.*" State v. Mammone*, 139 Ohio St. 3d 467, 13 N.E.3d 1051, ¶78 (2014). The record demonstrates that Clinton failed to move for cause to remove Jurors 63, 70, 96, 143, 225, 341, 344, and 371. Therefore, Clinton has waived all but plain-error review.

B. To obtain relief, Clinton must show that one of the jurors who served was actually biased.

"[P]resumed or implied, as opposed to actual, bias provides that, in certain 'extreme' or 'exceptional' cases, courts should employ a conclusive presumption that a juror is biased." *Treesh v. Bagley*, 612 F.3d 424, 437 (6th Cir. 2010). Examples given are "that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J. concurring.) The doctrine of implied bias has been described as "those extreme situations where the relationship between the prospective juror and aspect of the litigation in such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances." *Person v. Miller*, 854 F.2nd 656, 664 (4th Cir. 1988). In fact, "[u]se of implied bias doctrine is the certainly the rare exception." *Hunley v. Godinez*, 975 F.2d 316, 318 (7th Cir. 1992). However, "[t]he Supreme Court has never held explicitly that courts may infer or presume bias." *U.S. v. Frost*, 125 F.3d 346, 380 (6th Cir. 1997). In fact, *"Courts that reviewed [Smith v. Phillips, 455 U.S. 209 (1982)]… have suggested that the majority's treatment of the issue of implied juror bias calls into question the continued vitality of the doctrine." Johnson v. Luoma, 425 F.3d 318, 326 (6th Cir. 2005).*

"There is no constitutional prohibition against jurors simply knowing the parties involved or having knowledge of the case." *State v. Hale, 119 Ohio St.3d 118, 150, 2008-Ohio-3426, 892 N.E.2d 864, ¶208.* "Merely being acquainted with someone involved in the case does

not necessarily undermine a juror's assurance of impartiality." *McQueen v. Scroggy*, 99 F.3d 1302, 1320 (6th Cir. 1996) ("[t]he Constitution does not require ignorant or uninformed jurors; it requires impartial jurors."); *State v. Sharrow*, 949 A.2d 428, 432 (Vt. S.Ct. 2008) ("[k]nowing a witness does not automatically require removal.") The burden lies with Clinton to demonstrate that a juror was actually biased. *State v. Mundt*, 115 Ohio St.3d 22, 31, 2007-Ohio-4836, 873 N.E.2d 828. "Actual bias is 'bias in fact' and focuses on the record at voir dire." *Luoma*, 425 F.3d at 326. In *State v. Treesh*, this Court refused to find implied bias, based solely on the nature of a prior relationship between the prosecutor and a juror, where the former taught the latter in a paralegal course. 90 Ohio St.3d 460, 490 (2001). Even if this Court were to officially recognize the doctrine implied bias, Clinton has failed to demonstrate a sufficiently "close and ongoing" relationship – as described by Justice O'Conner in her concurring opinion in *Smith v. Phillips* – between listed jurors and others / themselves (law enforcement, each other, a witness, or an assistant prosecutor) so as to render his trial unfair. *Hale*, 119 Ohio St.3d at ¶208.

Clinton's claim that because Jurors 70, 96 and 225 knew law enforcement officers and therefore should have been questioned in depth to ensure no bias, fails. The Tenth District Court of Appeals has correctly held "the relationship of two prospective jurors to law enforcement officers involved in the case is not the extreme or extraordinary case in which we can assume bias by the presence of a law enforcement officer on the jury, or a relationship with a law enforcement officer." *State v. Vasquez*, 10th Dist. Franklin App. No. 03AP-460, 2004-Ohio-3880, ¶14. Most jurisdictions, if not all, refuse to extend implied bias based on a juror's mere knowledge of a law enforcement officer. *See, Sharrow*, 949 A.2d 428 at ¶17 (Ct. refused to find implied bias where juror was a police instructor who was acquaintances with several police officer witnesses."); *See also, State v. Louis*, 156 Wisc.2d 470, 478 (Wisc. S. Ct 1990) (Ct held

law enforcement officials of the jurisdiction where the crime was committed are not per se ineligible to serve as jurors.); *U.S. v. Caldwell*, 543 F.2d 1333, 1347 (D.C. Dist. Ct. 1974) ("a defendant accused of murdering a police officer is not entitled to a jury free of policemen's relatives."); *Penman v. Commonwealth*, 194 S.W.3d 237 (Ky. S. Ct. 2006) (Ct. held a close relationship to police officer did not rise to a presumption of bias.)

During *voir dire*, it was never established that any of the law enforcement officers known by Jurors 70, 96 and 225 were actually involved in Clinton's case. Even if they were involved in the actual case, jurors are not precluded from sitting on a jury for the mere fact they know police officers involved in the case. If the state of the law were otherwise, trials in small tight knit communities would be nearly impossible. Moreover, jurors 70, 96, and 225 were all asked during *voir dire* whether they could be impartial, to which they replied they could. Tr. 67, 668-669, 923. Therefore, the court inferred no bias and properly allowed them to serve on the jury.

Clinton asserts that because Jurors 143 and 371 were neighbors and Jurors 341 and 63 knew each other from high school they should not have been allowed to serve on the jury together. In *State v. Lundgren*, where two jurors knew each other from Church, this Court held that no basis existed to exclude the jurors when the relationship caused no difficulties and each juror could think for themselves. *State v. Lundgren*, 73 Ohio St.3d 474, 653 N.E.2d 304 (1995). Juror 143 and Juror 371 each stated they could decide the case on their own despite knowing one another. Tr. 187. Juror 341 was directly asked by the court whether knowing Juror 63 would affect his decision making, to which he stated no. Tr. 174-175. Juror 63 was not directly asked about his relationship with 341, however he was extensively questioned during *voir dire* in which he stated he would follow court instructions and remain impartial. Tr. 385. Accordingly,

there was no basis to exclude these jurors and the court properly allowed them to serve on the jury.

Clinton's claim that Juror 344 should not have sat on the jury because of his connection to a prosecution witness fails. Clinton claims that because Juror 344 was a co-worker of Josh Case, a witness for the prosecution, he should not have sat on the jury. The Fifth District has held that a juror merely being acquainted with witnesses for the State did not render him implicitly biased. *State v. Stein*, 5th Dist. Richland App. No. 05 CA 103, 2007-Ohio-1153, ¶15. In fact, several courts have refused to extend implied bias to cases where a juror was acquainted with a witness. *United States v. Bradshaw*, 787 F.2d 1385, 1390 (10th Cir. 1986) (no bias even though juror had prior business relationship with government witness*); United States v. Alfred*, 867 F.2d 856, 870 (5th Cir. 1989) (no bias even though juror had social contact with testifying police officer); *United States v. O'Neill*, 767 F.2d 780, 784-85 (11th Cir. 1985) (juror friends with narcotics officer who testified.); *Vasey v. Martin Marietta Corp*., 29 F.3d 1460, 1468 (10th Cir. 1994) (no bias even though juror was an employee of a company that performed consulting work for Defendant corporation.)

Juror 344 told the court he had never discussed the case with the witness and that he could be an impartial juror. Tr. 289, Tr. 292-293. Juror 344 said they never talked about the case. Tr. 288-89. Juror 344 said he has only known Case for four months and that he would not give Case anymore credibility than any other testifying witness. Tr. 289-90. Juror 344 acknowledged that he had little contact with Case at work because "he reports to a supervisor that reports to me." Tr. 291. When asked by defense counsel whether he would "automatically believe" Case due to prior knowledge of each other, Juror 344 responded "I think I'd view them all equally." Tr. 293-294. Defense counsel did not move for cause. The court was justified in allowing Juror

344 to sit on the jury because his work relationship with a prosecution witness did not serve as a basis for implied bias and Juror 344 stated he could remain an impartial juror throughout the trial.

Clinton wrongly contends that Juror 344 should not have been permitted on the jury because he was friends with an assistant prosecutor. This assertion is ungrounded. The courts have held that "a juror's remote relationship to an Assistant District Attorney who was not a party to the particular action" does not create an implication of bias. *People v. Rodriguez*, 705 N.W.S.2d 485, 487 (N.Y Sup. Ct. 1999), *aff'd by, People v. Rodriguez*, 100 N.Y.2d 74, 790 N.E.2d 247 (Ct. App. of New York, 2003). Juror 344's friend, assistant prosecutor Jason Hinners, did not handle Clinton's case and served in an entirely different unit of the prosecutor's office. Furthermore, Juror 344 stated to the court he could remain an impartial juror and follow the instructions of the court.

"[T]he doctrine of implied bias is reserved for exceptional situations in which objective circumstances cast concrete doubt on the impartiality of a juror." *U.S. v. Torres*, 128 F.3d 38, 46 (2nd Cir. 1997). The innocuous relationships that Clinton complains about in his brief are not the type of "exceptional situations" that relieve him of a duty to prove actual bias. *See*, *Urganga v. State*, 330 S.W.3d 301, 306 (Texas Crim. App. 2010) (Texas Court of Criminal Appeals refused to apply doctrine of implied bias to a juror whose yard had previously been damaged by the defendant.); *U.S. v. Mitchell*, 690 F.3d 137, 140 (3rd Cir. 2012) (Ct. held "[a] distant relative, on average, is unlikely to harbor the sort of prejudice that interferes with the impartial discharge of juror service.)

Thus, Clinton fails to establish any bias as to Jurors 63, 70, 96 225, 143, 371, 341 and 344, and this court should find their service on the jury did not violate Clinton's constitutional rights.

Response to Proposition of Law 8: Clinton's use of preemptory challenges on Juror 73 and Juror 22 and the delay in the removal of Juror 363 for cause does not constitute a violation of his constitutional rights where the jury ultimately seated was impartial.

The Due Process Clauses requires that each juror be fair and impartial "to the extent commanded by the sixth amendment." *Morgan v. Illinois*, 504 U.S. 719, 727 (1992). "So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." *Ross v. Oklahoma*, 487 U.S. 81, 88, 108 S.Ct. 2273 (1988). Recently, Justice Alito explained that the Sixth Amendment is satisfied if "no biased juror is actually seated at trial." *United States v. Skilling*, 561 U.S. 358, 425 (2010) (J. Alito concurring). In other words, "if no biased jury is actually seated, there is no violation of the defendant's right to an impartial jury." *Id*. "If the jury that sits and returns a verdict is impartial, a defendant has received what the Sixth Amendment requires." *Id.* This reasoning is congruent with *United State v. Martinez-Salazar*, where the Supreme Court opined the "principle reason for peremptories" is to "help secure the constitutional guarantee of trial by an impartial jury." 528 U.S. 304, 315-16, 120 S.Ct. 774 (2006). The Supreme Court was emphatic when it held "a defendant's exercise of a preemptory challenge… is not denied or impaired when the defendant chooses to use a preemptory to remove a juror who should have been excused for cause." *Id*. at 317. Thus, "a defendant's exercise of a preemptory challenge to a cure a trial court's error in denying a challenge for cause, without more, does not violate the constitutional right to an impartial jury." *State v. Hickman*, 205 Ariz. 192, 195, 68 P.3d 418, 421

(Ariz. S. Ct. 2003). Accordingly, Clinton's claim that he was forced to exhaust his preemptory challenges fails to state grounds for relief.

Because in Proposition of law VII, Clinton failed to show any of the seated jurors were biased, he cannot argue the preemptory challenges used on Jurors 73 and 22 *forced* him to allow biased jurors to remain on the jury. See, *State v. Broom*, 40 Ohio St.3d 277, 287-88, 533 N.E.2d 682 (1998) ("in order to state a constitutional violation in this situation, the defendant must use all of his peremptory challenges and demonstrate that one of the jurors seated was not impartial.") Thus, the court's failure to remove Jurors 73 and 22 for cause and their ultimate removal through preemptory challenges did not violate Clinton's constitutional rights.

Furthermore, the court was justified in denying removal of Jurors 73 for cause. During *voir dire*, Juror 73 candidly said she knew the victim's family and she knew of the defendant, but neither relationship was close or substantial. Tr. 641, 645. She said that Clinton "used to work with my friend… [but she] never really spoke to him." Tr. 645. Juror 73 explained that she had never spoken to Clinton, and had only "seen him in passing." Tr. 654. As to Heather's brother's online postings, Juror 73 said "her brother had something on there," but she did not really pay it much attention. Tr. 646. As to her previous dealings with Heather Jackson, and her friend Danielle Arwood (not Sorrell), she explained "I don't hang out with them." Tr. 646, 654. Although she said she found Clinton "creepy," she explained this was because Clinton often "hit on" her friend that worked with him. Tr. 654-56.

None of this rises to the level warranting excusal for cause, especially where Juror 73 stated she would be able to put aside her knowledge of these relationships, listen to court instructions and be a fair and impartial juror. Tr. 645-647, 651.

For example, in this exchange with the Court, in three responses Juror 73 expressed a view to decide the case "solely on the evidence presented in the courtroom".

> THE COURT: Okay. If you're picked as a juror to sit on this case, can you block out what you've -- because the law is -- the instruction that I'll give you is, you need to block out anything you know before you came to court and became a juror in this case and decide the case solely on the evidence presented in the courtroom.
>
> And evidence comes from witnesses that testify and exhibits that you'll see and that are admitted into evidence.
>
> So the evidence is in the courtroom.
>
> Can you decide this case solely on the evidence that you hear in the courtroom?
>
> JUROR NUMBER 73: Yes, I could.
>
> THE COURT: Okay. It's kind of like -- my wife, especially, will come unglued. There was the gal in Florida who was on trial for allegedly killing her child, and she comes unglued when she's found not guilty.
>
> "Well, did you hear the whole trial?" She said, "Well I've watched some of it on the news." Well, that's not the whole trial. Okay? And evidence comes from the whole trial, the whole case, when you sit through the whole trial.
>
> Do you think you could do that?
>
> JUROR NUMBER 73: I think I could.
>
> THE COURT: Before you formulated an opinion as to guilt or innocence?
>
> JUROR NUMBER 73: I could be open-minded and do that, yes.

Tr. 642 – 643.

When questioned by the prosecutor, in six responses Juror 73 expressed a view that she could be fair.

Q	And do you think it's important that jurors be able to put aside anything that they may know before they are able to sit on a jury and make a decision?
A	Yes, I do.
Q	Why do you think that's important?
A	I do believe everyone should have a fair trial.
Q	Okay. And the things that you know, you'd be able to follow the Judge's instructions and base your decisions only on what you hear in this courtroom?
A	Yes.

Tr. 645 – 646.

* * *

Q	Okay. And you'd be able to set aside any of those relationships and things that you heard, and if you heard something in the courtroom during the course of the trial that was different or conflicted with that you had heard before, where would you -- what would you rely on the most? Would it be what you heard outside or what you heard in the courtroom?
A	Probably what I heard in the court.
Q	Okay. Makes more sense that way?
A	Yes.
Q	Okay. And you'd be able to follow the Judge's instructions with respect to that?
A	Yes.

Tr. 647

Although defense counsel continued to question Juror 73 regarding her knowledge of Clinton, as well as her knowledge of the people associated with the victim, Juror 73 never varied from her prior statement that "I do believe everyone should have a fair trial." Tr. 653 – 657.

Where Juror 73 repeatedly said she could be fair, the trial court was well with its discretion in denying the defense challenge for cause. The law is well settled that this Court justifiably relies on the decisions by the trial court in these matters, since the trial judge was in a position to see and hear the questioning process. "The trial judge was in the best position to observe [a juror's] demeanor and body language to determine" whether to remove a juror for cause. *State v. Fears*, 86 Ohio St.3d 329, 338, 715 N.E.2d 136 (1999). "A trial court's ruling on a challenge for cause will not be overturned on appeal 'unless it is manifestly arbitrary and unsupported by substantial testimony, so as to constitute an abuse of discretion.'" *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶53.

The fair and evenhanded exercise of discretion in the denial of the challenge for cause is readily seen in the extended explanation given by the trial court.

> THE COURT: Okay. Well, for the record, I think that she was not automatic death, not automatic life, very honest and forthright. She does know a friend of the alleged victim.
>
> The "creepy" word -- I have a daughter that's in her almost mid-20s. That's a word that girls use when -- it's no offense, I don't think, to Mr. Clinton as a man. I mean, you know, it's just maybe they don't like the guy and they go, "Oh, he's creepy. I don't want anything to do with that guy."
>
> So I don't know that that's a basis for a challenge for cause. I'm going to deny your challenge for cause as to Juror Number 73. I think she's honest and doesn't fit into any of what the Court would feel would be criteria for challenge for cause under Witherspoon, Wainwright, or Morgan, or that progeny.

All right. Thank you.

Tr. 664.

Under these circumstances, the trial court properly denied the removal of this juror for cause, and Clinton's contention to the contrary is wrong.

Clinton's claims that Juror 22 disagreed with the fundamental principle that a defendant is innocent until proven guilty and, therefore, should have been removed by the court is not supported by the record. In the end, Juror 22 affirmed the concept that a defendant is innocent until proven guilty. Tr. 303-304. Furthermore, during individual *voir dire*, Juror 22 stated he understood that a defendant is innocent until proven guilty, that this concept made sense to him and that he felt it was important. Tr. 883-884. In fact, defense counsel twice passed Juror 22 for cause. Tr. 895, 304.

As to Juror 363, no basis for a challenge for cause was present until the juror admitted to knowing the victim, upon which the court granted his removal for cause. Key words being Juror 363 was removed for cause. Clinton speculates that because Juror 363 was not removed immediately, he somehow contaminated the jury pool. This is rank speculation. In fact, the jury who were actually present during Clinton's trial, were instructed to "decide the case solely on the evidence that is submitted in this case" and the "law requires that you consider only the testimony and evidence that you hear and see in this courtroom." (Tr. 360.) Juries are presumed to follow instructions.

As a final matter, it should be noteworthy that none of the grieved jurors sat on Clinton's jury. Jurors 22, 73, and 363 did not sit and decide the facts of this case, and thus they had no bearing on Clinton's guilty verdict or death sentence. Under this common sense notion that an allegation of bias as to a prospective juror who did not serve could not amount to reversible

error, several courts have decided that any alleged error was necessarily harmless. *Green v. Maynard*, 349 S.C. 535 (S.C. S.Ct. 2002); *State v. Verhoef*, 627 N.W.2d 437, 441-42 (S.D.2001); *State v. Fire*, 34 P.3d 1218, 1225 (2001); *State v. Lindell*, 629 N.W.2d 223, 250 (Wis. S. Ct. 2001); *Fortson v. State*, 277 Ga. 164, 169-72, (Ga. S.Ct. 2003); *Klahn v. State*, 2004 WY 94, P19, (Wy. S. Ct. 2004). When the impartial jury selected was hearing and deliberating the facts of this case, prospective Jurors 22, 73, and 363, were out living their lives and presumably nowhere near the courthouse. Essentially, they could not have denied Clinton a fair trial given they were not even there.

Ultimately, none of the jurors in proposition of law VIII served on the jury, and the jury seated by the court was impartial. Thus, Clinton was afforded his right to a fair and impartial jury. Proposition of law VIII should therefore be rejected.

Response to Proposition of Law 9: The photographs presented into evidence at both phases of the trial were admitted without error because the probative value of the photographs outweighed the danger of the prejudice to the defendant and no plain error occurred.

During the trial phase, Clinton did not object to the admission of any of the photographs introduced during the testimony of Agent Hammond or Dr. Scala-Barnett. Tr. 612-726, 1096-1136. An alleged error must be brought to the attention of the trial court, during the course of the trial, to be considered on appeal. In *State v. Williams*, 51 Ohio St. 2d 112, 117-18 (1977) this Court explained that:

> "Any other rule would relieve counsel from any duty or responsibility to the court * * * disregarding entirely the true relation of court and counsel which enjoins upon counsel the duty to exercise diligence and to aid the court rather than by silence mislead the court into commission of error."

State v. Driscoll, 106 Ohio St. 33, 39 (1922). Litigants have a duty of vigilance and must bring the trial court's attention to errors "then and there" to allow the court to correct the error or note the objections. *Lester v. Leuck*, 142 Ohio St. 91, 92 (1943).

Plain error is not present in this case because the photographs would have been admissible even upon objection. In a capital case, once a Rule 403 objection is made to photographs, the trial judge must determine: (1) whether the probative value of each photograph outweighs the danger of prejudice; and (2) whether the photographs are "needlessly repetitive or cumulative in nature." *Id.* The probative value must "in a simple balancing of the relative values, outweigh the danger of prejudice to the defendant" or the evidence must be excluded. *Id.* The trial judge retains his discretion in determining the weight. *Id.*

A. Response to Claim 9A: The Photographs Offered During Agent Hammond's Testimony Were Admissible

During Agent Hammond's testimony, the State offered numerous photographs into evidence without objection. Tr. 612-726. Even if objections had been raised, they would have been overruled because, although some of the photographs may have been gruesome, each of the photographs was highly probative and the photographs were not cumulative or repetitive.

Agent Hammond identified and explained multiple photographs depicting the crime scene. Tr. 612- 645, Ex. 2-4, 10-12, 15-20, 22-54. These photographs allowed Agent Hammond to explain his investigative steps and placed the crime in context for the jury. The photographs depicted the different rooms of the Jackson residence and what was observed in each room by crime scene investigators. None of these photographs were inflammatory or gruesome and there was no danger that their probative effect would be outweighed by potential prejudice.

Agent Hammond also authenticated a number of photographs depicting the bodies of Heather, Celina, and Wayne Jr. as they were found. Tr. 645-664. Ex. 5-7, 55-77. While these photographs may have been upsetting and gruesome, "the mere fact that a photograph is gruesome or horrendous is not sufficient to render it *per se* inadmissible." *Maurer*, 15 Ohio

St.3d at 265. These photographs illustrated Agent Hammond's testimony about the crime scene, the condition of the bodies, and his subsequent investigation. "Such illustrative photographs are generally admissible." *Id.* The state in which the bodies were found was also probative of the intent and modus operandi of Clinton.

1. Factual and Procedural History

This matter first arose during BCI agent David Hammond's testimony concerning the evidence he collected and photographed at the Jackson residence. Exhibit 13 was admitted to show an area of the outside of the house which contained a child's pacifier. Tr. 622. Exhibit 14 was then admitted to show the same area but this photograph also captured victim Wayne Jackson's baby bottle. Tr. 622-623. The State later introduced Exhibit 19 which showed an up-close view of the intact locking mechanism of the backdoor with Exhibit 20 showing the full view of the intact backdoor. Tr. 624.

Hammond later testified to State's Exhibits 35-38. These pictures showed different angles of the children's room. Exhibit 35 specifically showed the window which was opened to gain access to the house. Exhibits 37 and 38 showed different corners of the room. Hammond stated the photos were presented to show the room where initial access was given to house and where fingerprints were taken. Tr. 634-635.

Hammond later testified to the exhibits of the master bedroom, where Heather Jackson's body was found. Hammond described the master bedroom as a location within the house where there was a "concentration of evidence." Tr. 644. Exhibit 5 and Exhibits 55-62 showed different angles of the master bedroom. Exhibits 5 and 55 gave two different views of the master bedroom from the doorway looking in. Tr. 646. Exhibit 56 was introduced to show a different angle, which displayed the bedding that was placed on top of the mattress. Tr 647. Exhibit 58 then showed the top of the mattress. Tr. 647-648. Exhibit 59 was introduced to show the view

looking into Heather's closet. Tr. 648. Hammond testified that Exhibit 60 showed the bed from the west wall looking east and exhibit 61 showed a closer look at the pile of blankets on the bed. Tr. 648-649. According to Hammond, the bedding was an important part of the evidence gathering as it was pertinent in showing an assault had taken place. Tr 648. Exhibit 62 showed an up-close view of the blood stain found on the blankets which later tested positive for blood. Tr. 649-650.

Hammond's testimony continued to the photographs of Heather's body. Exhibit 63 was introduced to show Heather as she was found between the box spring and mattress. Tr. 650-651. Exhibit 64 showed the underside of the mattress. *Id.* Exhibit 65 was introduced to show her positioning when the mattress was lifted. *Id.* Exhibit 66 showed her neck and back areas with Exhibit 67 showing a closer look at the ligature around her neck. Tr. 652. Exhibit 68 was shown to illustrate the left side of her face, not seen in previous exhibits. Tr. 654. Exhibit 69 showed a close up view of her tattoos which was demonstrative evidence in identifying Heather Jackson. Tr. 655. After the presentation of the photographs, the defense requested a sidebar which was granted. The Defense asked the Judge to warn the court about upcoming photographs of the children, as to prevent people walking out emotionally in front of the jury. The judge did so. Tr. 657.

Later in the trial, Lucas County Deputy Coroner, Dr. Diane Scalia-Barnett, testified in regards to the autopsies of all the victims. Tr. 1102. When asked about Heather's injuries other than the ligature strangulation, Barnett testified that Heather's rectum was dilated beyond normal postmortem standard. Barnett concluded that this happened on or around the time of death and was likely the result from the introduction of an object into the rectum. Tr. 1118-1119. Barnett concluded testifying about Heather's injuries and began to answer questions regarding Celina.

Celina's strangulation by ligature was discussed first and then the State asked Barnett to testify as to any other injuries. Exhibit 159 was introduced to show that no visible injuries to her vagina were discovered. Tr. 1129-1130. No photograph of Celina's rectum was introduced, but Barnett testified that it was dilated, similar to that of Heather Jackson's. Tr. 1130. Heather's rectum photograph was not reintroduced, but exhibit 160 was introduced to show a picture of what a normal five year old's rectum should look like postmortem. Tr. 1130. No objections were made by the Defense.

At the mitigation phase, State's Exhibits 135 and 152 were readmitted. Exhibit 135 was admitted to show demonstrative evidence that Wayne Jackson was under the age of 13, one of the aggravating specifications the Jury was to consider in the mitigation phase. Mit. Tr. 7-9. Exhibit 152 of Celina Jackson was admitted for the age specification and the rape specification of the victim. *Id.* The exhibit showed demonstrative evidence of her age and depicted her rolled up underwear, which the Coroner stated is indicative of the body being redressed, a common occurrence in sexual assaults. Tr. 1124-1125. The Defense objected to the re-admission of these photos. The state soon after rested its case. Mit.Tr. 27.

2. The admission of the photographs at the trial phase does not constitute plain error because the photographs were not unduly prejudicial.

Exhibit 13 and 14 showed the outside back area which showed possessions of the victims, demonstrative of testimonies given by witnesses. Exhibit 19 and 20 were admitted to show that the door and the door's locking mechanism were intact, demonstrating there was no breaking and entering from the back door. Exhibits 5, 55-62 depicted the crime scene in which Heather Jackson's body was found. The court was justified in their discretion to admit such photos, given the concentration of evidence within the room.

Exhibits 63-67 were produced to show Heather's body and the surrounding area, as she was found between the box spring and the mattress. The photos were distinctive and served to identify the body and to take a detailed look at her positioning and the injuries to her neck, specifically the ligature strangulation. The exhibits supported Barnett's testimony that Heather was murdered by strangulation. None of the exhibits were repetitive or overly gruesome given the inherent nature of the crimes committed. The state was reserved in their admission of these photos and only admitted the minimum amount of photographs needed to show an appropriate and thorough depiction of Heather Jackson's body and the injuries she sustained.

Exhibit 159 was introduced to show Celina's vagina which had no visible injuries. Barnett did not take a photograph of Celina's rectum, but testified as to its condition. As a reference, exhibit 160 was introduced to show a normal post mortem 5 year old's rectum. This photograph aided in Barnett's conclusion that Celina's postmortem rectum was abnormal similar to Heather's rectum and supported Barnett's testimony that Celina was likely assaulted.

Thus, given the probative nature of the photographs listed above, all of the photographs were properly admitted by the trial court and no error can be established for plain error review. The photographs were limited in number, noncumulative, substantially probative and supported both Barnett and Scalia's testimonies. Because they were all properly admitted by the trial court, the Defense cannot successfully show any plain error occurred.

3. The photographs objected to at the mitigation phase were properly admitted and no plain error exists.

In capital cases, "Properly authenticated photographs, even if gruesome, are admissible in a capital prosecution if relevant and of probative value in assisting the trier of fact to determine the issues or are illustrative of testimony and other evidence, as long as the danger of material

prejudice to a defendant is outweighed by their probative value and the photographs are not repetitive or cumulative in number." *State v. Maurer,* 15 Ohio St.3d 239 (1984). At the mitigation phase, the state reintroduced Exhibits 135 and 152. Exhibit 135 showed the autopsy photo of Wayne Jackson to support the aggravating specification that the victim was under the age of 13. (Mit. Tr. 7-8.) Exhibit 152 was reintroduced to support the aggravating specifications that Celina was under the age of 13 and to also support the rape specification.

The probative value of these two autopsy photographs outweighed any possible danger of prejudice to the defendant. The exhibits were not admitted to appeal to the juror's emotions, but to demonstrate the aggravating specifications of the crime. The state re-admitted only two photographs during the mitigation phase to prove their aggravating specifications. This shows an immensely reserved effort by the State given the gruesome triple homicide at hand. The two photographs proved that the two victims were under the age of 13. Additionally, the State was justified in admitting Exhibit 152 for the rape specification of Celina. The photograph displayed her rolled up underwear, which the Dr. Scala-Barnett testified was indicative of a sexual assault. The Defendant's objection to these photographs was properly overruled by the court at mitigation phase.

The photographs were all properly admitted and no plain error occurred in either the trial or mitigation phase . Proposition of Law No. IX lacks merit and should be denied.

Response to Proposition of Law 10: Where Clinton failed to raise below a claim of coerced confession, relief is precluded under the doctrine of waiver. Moreover, plain error is not present because there is no evidence of police coercion, much less, police coercion causing an actual confession of guilt, Clinton cannot obtain relief on his claim.

On September 10, 2012, Clinton was questioned by Det. Wichman after being released from the hospital due to a failed suicide attempt. (Supp. Hrg. p. 6, 10-12.) Before the interview started, Clinton was provided a beverage. (Supp. Ex. 2 – 11:07:30.) Det. Wichman then read

Clinton his Miranda rights, which Clinton waived both orally and in writing. (Supp. Hrg. p. 7, 12; Supp. Hrg. Ex. 1; Supp. Hrg. Ex. 2 - 11:09:10 to 11:11:19.) Det. Wichman even provided Clinton with a phone number to the Public Defender's Office. (Supp. Hrg. p. 11.) Det. Wichman and Clinton then proceeded to have a lengthy dialogue about Clinton's relationship with Heather Jackson. (Supp. Hrg. p. 15-21, 27-29.) Det. Wichman inquired as to the last time Clinton had seen Heather, which he replied "Thursday." (Supp. Hrg. p. 18.) At that point, Clinton started to feign confusion about not knowing the precise day. Clinton then voluntarily agreed to give a DNA swab. (Supp. Hrg. p. 29.) At some point, Det. Wichman confronted Clinton for both making a phone call to Heather and being physically present at home on the night of the murder – "Friday night / Saturday morning." (Supp. Hrg. p. 33-39.) This was confirmed by Firelands Hospital surveillance video. (Supp. Hrg. p. 46, 51.) Later in the interview, Det. Wichman attempted to get Clinton to accept responsibility for the murders by suggesting that Clinton may have "snapped" as opposed to the murders being preplanned. (Supp. Hrg. p. 45-47.) Clinton refused to admit to any involvement with the murders. (*Id.*) An hour into the interview, Clinton requested a lawyer. (Supp. Hrg. p. 58; State's Ex. 2 - 12:13:15.) Before trial, defense counsel moved to suppress all of Clinton's statements arguing that he invoked his right to counsel. (R. 92.) Finding that Clinton unequivocally requested counsel, the trial court suppressed all of Clinton's statements following the invocation. (R. 97.) Because Clinton's statement was not necessary to their case, the State of Ohio did not seek an interlocutory appeal. *See* Ohio Crim. R. 12(K). At trial, the jury only heard Clinton's statements up to the invocation. (Tr. p. 829-839.)

On appeal to this Court, Clinton argues for the first time that his confession was involuntary because his will was allegedly overborne by police questioning due to health issues brought about by his suicide attempt. (Clinton Brief, p. 94-95.) Because the claim was not raised

below, it is waived. *State v. Mammone*, 139 Ohio St.3d 467, 13 N.E.3d 1051, ¶111 (2014); Crim.R. 52(B).

Where a defendant challenges the voluntariness of his statement there must be a showing of coercive police action before the statement can be suppressed. *Colorado v. Connelly*, 479 U.S. 157, 164, 107 S.Ct. 515 (1986); *State v. Otte*, 74 Ohio St.3d 555, 562, 660 N.E.2d 711 (1996). In examining the voluntariness of a statement, the reviewing court looks at "the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment, and the existence of threat or inducement." *State v. Edwards*, 49 Ohio St.2d 31, 358 N.E.2d 1051 (1976), paragraph two of the syllabus, vacated as to death penalty, *Edwards v. Ohio*, 438 U.S. 911, 98 S.Ct. 3147 (1978). Clinton's physical condition "is but one factor in the totality of the circumstances to be considered in determining voluntariness." *State v. Hughbanks*, 99 Ohio St.3d 365, 792 N.E.2d 1081 ¶ 61(2003). This Court has explained that a defendant's condition "by itself and apart from its relation to official coercion, should (never) dispose of the inquiry into constitutional voluntariness." *Id.*; *State v. Frazier*, 115 Ohio St.3d 139, 873 N.E.2d 1263, ¶113 (2007) (low intelligence alone, without police misconduct, not enough to suppress statement); *State v. Wesson*, 137 Ohio St.3d 309, 999 N.E.2d 557, ¶ 41 (2013) (intoxication and low intelligence, without police misconduct, not enough to suppress statements); *State v. Bullock*, 353 Wis.3d 202, 215-16, 844 N.W.2d 429 (Wis. App. Ct. 2014) (suspect hospitalized with lacerations to his stomach, left wrist, and neck – without police coercion - not enough to suppress statements.)

To support his claim, Clinton relies heavily on *Mincey v. Arizona*, 437 U.S. 385, 401, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). But the defendant's medical condition in *Mincey* was far

worse than Clinton's was in this case. In that case, the defendant was "seriously and painfully wounded * * * on the edge of consciousness." *Id* at 401. In fact, when he was questioned, Mincey was hospitalized in the intensive care unit, with a breathing apparatus in his mouth that prevented him from communicating without the assistance of pen and paper. *Id*. at 396. The detective questioned Mincey for four hours despite his relapses in and out of consciousness and his repeated requests for a lawyer. *Id.* In this case, Clinton was not interviewed until after the hospital released him. Although he was soft spoken, Clinton was never agitated, was coherent throughout the interview, provided logical responses to questions, and remained seated during the interview. (State's Ex. 117 – taped interview.) Distinguishing *Mincey v. Arizona*, in *State v. Jenkins*, 15 Ohio St.3d 164, 232-33, 473 N.E.2d 264 (1984), this Court held that a defendant's statement was voluntary even though it was given in a hospital room while the defendant was recovering from a gunshot wound because the *Jenkins* defendant was able to converse in a normal voice, had "more or less stable" blood pressure, and questioning lasted only forty-five minutes. As this Court cautioned, determining voluntariness "requires more than a mere color-matching of cases." *Id.* at 232. Moreover, "[a] suspects will not always overborne simply because he is questioned while in pain or under the effect of medication." *State v. Winchester*, 183 Wash.App. 1024, *7 (Wash. App. Ct. 2014), *citing*, *United States v. George*, 987 F.2d 1428, 1430 (9th Cir. 1993).

The interview tactics used by Det. Wichman did not affect the voluntariness of Clinton's statement. "It is well settled… that police may elicit a confession through psychological ploys, such as playing on a suspect sympathies, as long as the confession is a product of the suspects own balancing competing considerations." *Winchester*, 183 Wash.App. at 7. "These ploys may play a part in the suspect's decision to confess, but, so long as that decision is a product of the

suspect's own balancing of competing considerations, the confession is voluntary." *State v. Dickey*, 459 N.W.445, 448 (S.D. S. Ct. 1990). In fact, the Supreme Court has held that police misrepresentation of their investigation, to obtain a confession, does not render that confession involuntary. *Frazier v. Cupp*, 394 U.S. 731 (1969). Simply watching the video – State's Ex. 117 – shows that Det. Wichman's conduct during the interview does not even come remotely close to the level of coercion necessary to have rendered Clinton's statement involuntary. Det. Wichman never made threats or inducements while speaking to Clinton. Clinton was not physically deprived or mistreated. There was only one interview and it was relatively short – less than three hours. In fact, the jury only heard the hour interview preceding the invocation. Throughout most of the interview, Det. Wichman maintained a conversational tone. Clinton was a forty-one year old adult with prior criminal experience and an involuntary manslaughter conviction for which he had served time in prison. The circumstances show that Clinton's statement was voluntary.

For a confession to be truly involuntary, there must be an "essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other." *Connelly*, 479 U.S. at 165. In the present case, Clinton lacks both elements – police coercion and resulting confession. Clinton never confessed. At best, after attempting to deny seeing Heather on the night she was murdered, Clinton backtracked during the interview and admitted that he was present at her house around the time she was murdered. (Supp. Hrg. p. 18, 33-39.) However, Clinton had no alternative but to make this incriminating admission given that hospital surveillance proved it. (Tr. p. 802-812; State's Ex. 113, 114 - Hospital surveillance footage.) In sum, Clinton never actually confessed to the murders and his incriminating admissions were the product of a solid, old-fashioned police investigation – not coercive tactics.

There was no error, let alone plain error, in the trial court's decision to admit the statement into evidence. This proposition of law lacks merit and should be denied.

Response to Proposition of Law 11: Detective Clark's testimony was properly admitted as it was rationally based on his perception and helpful to a clear understanding of the determination of a fact in issue.

The trial court did not err in permitting Detective Michael Clark to testify regarding the circumstances of Misty Keckler's death. Det. Clark's testimony was based on his personal observations and his experience as a homicide investigator. Tr. 952-53, 957-58. His testimony was helpful to determining Clinton's identity in the crimes at issue by establishing his modus operandi. Clinton's attorneys declined to object to his testimony and, instead, used the testimony regarding the placement of the ligatures and bindings after Ms. Keckler's death to argue for a mistrial because of the lack of post-death bindings in the Jackson murders. Tr. 963.

When an objection is made, the trial court has broad discretion to determine the admission and exclusion of evidence. Before disturbing the decision to admit or exclude evidence, the appellate court must find that the trial court abused its discretion and that the defendant was materially prejudiced by that abuse. *State v. Hymore*, 9 Ohio St.2d 122, 128, 224 N.E.2d 126 (1967); *see also State v. Thomas*, 97 Ohio St.3d 309, 2002-Ohio-624, 779 N.E.2d 1017, ¶46; *and State v. Robb*, 88 Ohio St.3d 59, 68, 723 N.E.2d 1019 (2000). Evidence Rule 701 provides: "If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue." Evid.R. 701.

Clinton did not object to Det. Clark's testimony as being "beyond his limited realm of expertise," the objection he now raises, so he has waived review of this alleged error. Tr. 954,

957-58, 962-63, 967; *and see* Evid.R. 103 (party must state ground for objection with specificity); *and State v. Tibbets*, 92 Ohio St.3d 146, 160-61, 749 N.E.2d 226 ("Because he failed to object at trial on the specific ground raised here, Tibbetts has forfeited the issue, limiting us to a plain-error analysis"). An alleged error must be brought to the attention of the trial court, during the course of the trial, to be considered on appeal. *State v. Williams*, 51 Ohio St. 2d 112, 117-18, 364 N.E.2d 1364 (1977) *vacated in part on other grounds*, 438 U.S. 911, 98 S. Ct. 3137, 57 L. Ed. 2d 1156 (1978). A defendant waives review of all but plain error on appeal when he fails to bring an error to the court's attention at a time when it could have been corrected. *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, ¶31; See also Crim.R. 52(B). Plain error can be found when the error is "obvious", *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002), and it is clear that "but for the error" the trial's outcome would have been different, *see State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), at paragraph two of the syllabus. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id.* at paragraph three of the syllabus.

No plain error occurred in this case. When Det. Clark testified, he was a retired police detective from Fostoria, Ohio who had been a law enforcement officer for approximately 25 years, and spent at least 12 years working as a detective. Tr. 952-53. He investigated between 25 and 30 homicide cases during his career, including the death of Misty Keckler. Tr. 953. Ms. Keckler was an eighteen year old woman found dead in a trailer in a bathtub full of water. (Tr. 954.) Det. Clark testified that he went to the scene of Ms. Keckler's death in the early morning hours of April 3, 1997. (Tr. 954.) He found her face down in a bathtub filled with water, with her hands and legs tied behind her back. (Tr. 955-56; State's Ex. 26.) Det. Clark identified

photographs of the ligature and ligature marks found on Keckler's neck. (Tr. 956- 957; State's Ex. 127.) Det. Clark was present during the autopsy and remembered that there was no bruising in the area of Ms. Keckler's hands and feet, which indicated that she had been bound after she was killed. (Tr. 957-958; State's Ex. 128.) Det. Clark interviewed Clinton, who admitted that he had "sexual contact" with Ms. Keckler. (Tr. 959.) Clinton pleaded guilty to involuntary manslaughter for causing Ms. Keckler's death. (Tr. 961.)

This testimony was based on Det. Clark's experience with homicides and his personal knowledge of the investigation, including his observations at the crime scene and during the autopsy. Appellate courts have upheld the admission of police officers' testimony regarding the cause of certain wounds on a victim. *State v. Coit*, 10th Dist. No. 02AP-475, 2002-Ohio-7356, ¶40 (permitting officer's testimony that wounds were consistent with a brick); *State v. Parker*, 2nd Dist. No. 18926, 2002-Ohio-3920, ¶52-53 (permitting officer's testimony that wounds were consistent with gunshots); *State v. Wittsette*, 8th Dist. No. 70091, 1997 WL 67764, *4 (Feb. 13, 1997) (permitting officer's testimony that wounds were not caused by a .22 caliber gun); *and see State v. Norman*, 7 Ohio App.3d 17, 453 N.E.2d 1257 (5th Dist. 1982) (permitting officer's testimony that shot pattern was made by a 12-gauge shotgun). In this case, as in cases regarding wounds, Det. Clark's testimony was rationally based on his perception and his experience, and was relevant to the issues in the case.

Det. Clark's testimony was helpful to a determination of multiple matters at issue, including the identity of the killer of the Jackson family, the identity of the perpetrator of the sexual assault of E.S, the sexual motivation specification, and a sexual predator specification, as the trial court recognized. (Judgment Entry, Oct. 3, 2013, p. 6.) Even if this testimony were objectionable, the record indicates that Clinton's counsel likely made a tactical decision not to

object in order to use that evidence in arguing for a mistrial on the grounds that that Ms. Keckler's homicide did not establish a "signature." Tr. 963. And, had Clinton's counsel objected, they ran the risk that the State would respond by calling in a coroner to testify regarding those matters, which would increase the amount of time and testimony devoted to Ms. Keckler's homicide. Clinton's defense counsel had received a copy of Ms. Keckler's autopsy report and may have strategically decided to avoid further testimony regarding that topic. *See* Judgment Entry, June 14, 2013 and exhibits (under seal).

The trial court did not commit plain error in admitting Det. Clark's testimony regarding Ms. Keckler's death. The testimony was relevant and admissible.

This proposition of law lacks merit and should be overruled.

Response to Proposition of Law 12: Where neither of the disruptive events complained of by Clinton occurred during the trial, and in the absence of any evidence that either event had any influence on any aspect of the trial itself, Clinton's claim of unfair trial has no factual basis.

Clinton's claim of unfair trial fails at the starting gate since neither of the two aggrieved events took place during the trial, and there is no evidence at all that either event had any impact, adverse or otherwise, on the trial itself.

The first event, being aggressive staring at Clinton by Heather's brother, apparently in conjunction with family members wearing shirts with a photograph of Heather and the children, took place during individual voir dire. The matter was addressed and resolved on the record, and put to a close well before the jury was empaneled. Voir Dire Tr. 726, 810 – 815.

The second event, being aggressive statements by Heather's brother to Clinton, and a courtroom brawl immediately triggered by those aggressive statements, took place at the very end of the sentencing hearing, after Clinton was sentenced to death but before he was sentenced

on the non-capital counts. (Sent. Tr. 35 - 36.) The trial judge restored order and proceeded to complete the non-capital sentencing. (Sent. Tr. 37 – 41.)

Clinton unsuccessfully makes an effort to link these two events to the trial itself, where neither event took place during the trial. As to the staring/shirt event, the best Clinton can say is that the event took place during the individual voir dire of Juror 70, who was eventually seated on the case. As to the aggressive statements/courtroom brawl event, Clinton implies a connection to his expressed desire to be housed on death row and away from inmates in general population who routinely attack inmates who prey on children. Neither of these tenuous linkages shows any manifestation in the trial itself, and that means Clinton's claim of unfair trial has no basis in fact.

A different circumstance would arguably be present if Juror 70 expressed consternation about the staring/shirt event. But nothing of the sort took place, and given the silent record, the only fair assumption is that the event had no impact whatsoever on Juror 70. Any alternative view would require a string of adverse inferences arising from facts that simply don't exist.

In similar fashion, a silent record below strongly suggests that Clinton's new assertion, that intimidation from Heather's brother led to his decision to want to be housed on death row instead of general population, is simply false. If that was remotely true, Clinton and his defense counsel would have had every reason to place that on the record, so as to gain a tactical advantage. Instead, the record shows the exact opposite, where out of the hearing of the jury, defense counsel Doughten disclosed, *inter alia*, that Clinton was "not afraid and not intimidated." Defense counsel Doughten noted that Clinton "believes he will be much safer on death row than general population" and that Doughten believes "the basis for this is due to the conviction of the offenses against the children." Mit. Tr. 11-07-13, pg. 5 – 6. Doughten continued:

> I'm sure he would want me to say for the record, he's not afraid and he's not intimidated, but he would find himself fighting every single day and looking over his shoulder every single day in general population. That's, generally, his basis. Based on that, we had Dr. Askenazi to ensure he was competent and that he was sure of the effect of the waiver. And she's very clear, he is very competent, and all three of us believe he is competent. Also, after discussing with – we've gone over with him every aspect of it, and I think his knowledge of the penalty phase is probably better than a lot of lawyers in the state at this time. So we're very comfortable with his knowledge. We tried to get him to go forward and let us attempt to ask for a sentence of less than death, but he's made it very clear and instructed us on, we aren't to do that. And I believe, under Ohio law, we're required to let him do that, as long as he has all the knowledge, but we're also very satisfied that he gave a voluntary waiver. He did not want to come over. He doesn't want to participate in, basically, going over the jury instructions and, frankly, that's consistent with his other actions." Mit. Tr. 11-07-13, pg. 6 - 7.

This on-the-record disclosure directly contradicts Clinton's new assertion that intimidation by Heather's brother contributed to his decision to prefer death row housing over incarceration in general population.

The balance of Clinton's argument in support of Proposition 12 consists of boilerplate citations to law and assertions of fact that have no connection with the record below.

Because Clinton's Proposition 12 lacks a factual basis, this Court should determine that that Proposition 12 is not well taken.

Response to Proposition of Law 13: A defective closed-circuit video feed during voir dire did not violate Clinton's right to due process, where the matter was immediately addressed and rectified by the trial court and there is no evidence any confidential communication between Clinton and his attorneys had been inadvertently transmitted.

A. Factual and Procedural History

During the initial stages of voir dire, an empty courtroom was made available to consist of public spectators. Because of the large number of potential jurors, the trial courtroom could not additionally hold public spectators. A live closed circuit feed was set up between the trial courtroom and the spectator courtroom. During voir dire, it was brought to the court's attention

that the feed was faulty and the monitor near the defense table was picking up sound from the Defense counsel table. Tr. 178. Because the proceedings were reaching the stage where preemptory challenges would be utilized, the court terminated the feed. Tr. 178-179. It was confirmed that no public spectators heard anything from the live feed. Upon hearing this news, the Defense counsel stated "That's good" and confirmed he had heard the same report. Tr. 179-180. At no time was the trial court advised specifically what, if anything, had been overheard by persons observing the voir dire by monitor. Moreover, defense counsel never lodged any objection regarding the entire scenario. Thus, this claim is subject to plain-error review.

B. Plain error did not occur because Clinton's right to due process was not violated.

The faulty live circuit between the trial courtroom and the spectator courtroom did not violate Clinton's right to due process. The record is clear in support of this assertion. The court was made aware that sound from the defense table could be heard in the spectator courtroom. Tr. 178. However, no comments from Defense counsel were deciphered. This was confirmed by the prosecution from sources within the spectator courtroom. Tr. 179-180. Upon hearing this report, the Defense counsel did not suggest otherwise, stating "That's good" and further informed the court he had heard the same news. *Id.* Erring on the side of caution, the court terminated the live feed. Tr. 180.

The faulty live circuit did not affect Clinton's substantial rights in this trial. The faulty live circuit audio and video feed was a minor technical error, which was resolved almost immediately. Because this does not rise to the level of constitutional error, Clinton cannot argue plain error. Ohio Crim. Proc., R. 52(B). The standard for plain error is extremely stringent. Notice of plain error is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Long,* 53 Ohio St.2d 91(1978). In order to establish plain error, the defense must establish there was error, that the error is clear or

obvious and that it affects substantial rights. *United States v. Olano*, 113. S. Ct. 1770 (1993). Because no comments from Defense counsel were heard within the spectator courtroom, the attorney-client privilege between Clinton and his counsel remained intact. The fact that the faulty live circuit *could have* facilitated a breach in this privilege, but did not, does not rise to a violation of Clinton's attorney-client privilege or right to due process. In other words, the scenario was quickly resolved by the court to the satisfaction of Clinton and his counsel. Thus, Clinton's right to due process was not violated and plain error cannot be established.

C. Even assuming error, it was harmless.

In his Brief, Clinton points to no specific comment made by either Clinton or his attorneys allegedly overheard by third parties due to the live feed, much less, that the release of a specific comment resulted in his unfair conviction. "Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise." *State v. Davis*, 127 Ohio St. 3d 268 (2010). In context of the complete absence of any evidence that any communication involving Clinton and his counsel was inadvertently overheard by courtroom spectators, it is simply not possible that the outcome of the trial would have been different. The overwhelming evidence against Clinton in this case is well established. Moreover, the evidence of Clinton's guilt was uncovered by old-fashioned police work – not the product of a live-feed as relayed to police by third-party listeners. This claim does not have any arguable validity at all where there is simply no evidence that any confidential communication was overheard, and deciphered, by spectators. Even in the unlikely event any comments by Defense counsel were overhead, and deciphered, *during voir dire*, Clinton has failed to show that his was conviction was the direct result of released confidential communication overheard by third-party spectators.

Accordingly, this court should conclude Clinton's Proposition of Law No. 13 lacks merit and conclude that the Clinton's right to due process was not violated and no plain error occurred.

Response to Proposition of Law 14: Because Clinton failed to make a Batson challenge to the prosecutor's use of a preemptory challenge to remove Juror 255, and actually acquiesced to the removal, thus never triggering Batson's burden shifting analysis, Clinton cannot show plain error.

Clinton argues that the prosecutor violated *Batson v. Kentucky* when he utilized a preemptory challenge to remove Juror 255, an African American juror, without providing a satisfactory race-neutral reason. (Clinton Brief, p. 111-113.) Clinton never objected to the removal of Juror 255, thus never actually triggering *Batson*'s burden shifting analysis, and waiving all but plain-error review.

Factual History:

During individual voir dire, when asked by the Judge whether she was "religiously, morally, or otherwise against the death penalty," Juror 255 replied "I would say yes." (Tr. 584.) When questioned by the prosecutor about the juror questionnaire stating "that you didn't have an opinion as to the death penalty," Juror 255 replied "Right. I probably did. I thought about it out there." (Tr. 587.) After the prosecutor explained Ohio's capital bifurcated process and asked whether the system sounded fair, Juror 255 replied "doesn't seem fair, I don't think so. No." (Tr. 589.) Because Juror 255 said she was impartial, and could impose a death sentence, she was passed for cause. (Tr. 592-93.)

During general voir dire, the prosecutor questioned Juror 255 about her questionnaire where "you indicated that your brother has been involved with the system." (Tr. 222.) Juror 255 replied affirmatively. When questioned whether "Alonzo" was her brother, Juror 255 replied that Alonzo was "[a] cousin." (Tr. 222.) Juror 255 responded that "Marcus" was her brother. (Tr. 222.) Juror 255 said her brother Marcus was under indictment, and her cousin Alonzo was presently in prison. (Tr. 223-224.) Although Juror 255 said she never saw Alonzo at all, she admitted that she dealt with Marcus on occasion. (Tr. 224.)

After general voir dire, the prosecution moved to remove Juror 255 for cause. The prosecutor argued "[w]e have her brother * * * and it's my case in Judge Binette's court, and I'm prosecuting her cousin, Marcus Bonner." Because of those prosecutions, the State argued "[w]e personally don't feel that she can be fair and impartial juror to the State of Ohio based on all the State's involvement in her family." (Tr. 229.) The defense responded "all of her answers under oath have been that she could be [impartial]. It's fair game for preemptory challenge, but for cause* * * there's not been a single answer that she stated wasn't indicative that she could follow the Court's instructions." (Tr. 230.) The trial judge denied the State's challenge for cause. (Tr. 231.)

Later, the prosecutor utilized his second preemptory challenge to remove Juror 255. At a side bar, for the record, the prosecutor noted that Juror 255 was African American, but that "there's another prospective juror on the jury that's an African American female." (Tr. 267.) The prosecutor explained that his office had prosecuted Juror 255's uncle, Alonzo, another uncle, Dennis, and that both were "presently serving a lengthy prison term." (Tr. 267.) The prosecutor then noted "we have a pending case against her brother, Marcus Bonner. He is under indictment." (Tr. 268.) In response, defense counsel admitted "[w]e would agree that's a race neutral reason for it. We didn't think it was reason for cause, but we believe it's a proper use of a preemptory challenge because of that background." (Tr. 268.) The trial court agreed that prosecutor's explanation "definitely * * * passes the Batson test. Thank you." (Tr. 268.)

1. Because Clinton failed to make a Batson challenge to the prosecutor's use of a preemptory challenge to remove Juror 255, and actually acquiesced to the removal, this Court must review the claim for plain error.

In *Batson v. Kentucky*, the Supreme Court held that a defendant who shows that he has been denied equal protection through the prosecution's use of a preemptory challenge to

purposefully exclude a suspect class from jury participation is entitled to relief. 476 U.S 79, 96-97, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1984). However, in *Batson*, the Supreme Court "declined to establish 'particular procedures' to be followed by courts applying *Batson*… (and determined) it was up state courts, with their 'variety of jury selection processes,' to establish procedural guidelines." *State v. Valdez*, 556 Utah Adv. Rep. 36, 140 P.3d 1219, 1225 (Utah S. Ct. 2006), *citing*, *Batson*, *supra*. n. 24. In Ohio, it is well settled that if a defendant fails to make a *Batson* challenge at trial, he has waived all but plain-error review. *State v. Ballew*, 76 Ohio St.3d 244, 253, 667 N.E.2d 369 (1996); *See also*, *State v. Robertson*, 90 Ohio App.3d 715, 719, 630 N.E.2d 422 (2nd Dist. 1993); *State v. Vaughn*, 7th Dist. No. 03-MA-49, 2004-Ohio-5122, ¶93; *State v. Lowery*, 160 Ohio App.3d 138, 2005-Ohio-1181, 826 N.E.2d 340, ¶28 (1st Dist.). "Even constitutional rights 'may be lost as finally as any others by a failure to assert them at the proper time.'" *State v. Murphy*, 91 Ohio St.3d 516, 532, 747 N.E.2d 765 (2001), quoting *State v. Childs*, 14 Ohio St.2d 56, 62, 236 N.E.2d 545 (1968).

It is well settled that in order to preserve a *Batson* challenge, counsel must raise a timely objection during the *voir dire* process. *United States v. Reid*, 764 F.3d 528, 533 (6th Cir. 2014); *United States v. Contreras-Contreras*, 83 F.3d 1103, 1104 (9th Cir. 1996); *United States v. Maseratti*, 1 F.3d 330, 335 (5th Cir. 1993); *United States v. Cashwell*, 950 F.2d 699, 704 (11th Cir. 1992); *United States v. Humphrey*, 287 F.3d 422, 438-39 (6th Cir. 2002). When a defendant fails to raise a timely *Batson* challenge "he is denied any remedy on this claim because he expressly relinquished his right to a remedy at trial by, in effect, consenting to be tried by the jury as constituted." *Allen v. Lee*, 366 F.3d 319, 328 (4th Cir. 2004) (en banc). Clinton's failure challenge the prosecution's utilization of a preemptory challenge to remove Juror 255 is fatal to his claim.

2. Clinton cannot show plain-error.

The Equal Protection Clause prevents the use of a peremptory challenge to exclude prospective jurors on account of race. *Batson*, 476 U.S. at 89. However, "[a]bsent intentional discrimination violative of the Equal Protection Clause, parties should be free to exercise their peremptory strikes for any reason**,** or no reason at all**.** The peremptory challenge is 'as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose.'" *Hernandez v. New York*, 500 U.S. 352, 374, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (O'Connor, J., concurring.) "The very purpose of peremptory strikes is to allow parties to remove potential jurors whom they suspect, but cannot prove, may exhibit a particular bias." *Ford v. State*, 132 P.3d 574, 581 (Nev. S. Ct. 2006).

When properly invoked, "*Batson* involves a tripartite burden-shifting inquiry." *Braxton v. Gansheimer*, 561 F.3d 453, 458 (6th Cir. 2009). This Court has explained the burden-shifting analysis that unfolds when a defendant affirmatively raises a timely *Batson* challenge at trial.

> "A court adjudicates a *Batson* claim in three steps." *State v. Murphy* (2001), 91 Ohio St.3d 516, 528, 747 N.E.2d 765. First, the opponent of the peremptory challenge must make a prima facie case of racial discrimination. Second, if the trial court finds this requirement fulfilled, the proponent of the challenge must provide a racially neutral explanation for the challenge. *Batson*, 476 U.S. at 96–98, 106 S.Ct. 1712, 90 L.Ed.2d 69. However, the "explanation need not rise to the level justifying exercise of a challenge for cause." Id. at 97, 106 S.Ct. 1712, 90 L.Ed.2d 69. Finally, the trial court must decide based on all the circumstances, whether the opponent has proved purposeful racial discrimination. Id. at 98, 106 S.Ct. 1712, 90 L.Ed.2d 69. See, also, *Purkett v. Elem* (1995), 514 U.S. 765, 767–768, 115 S.Ct. 1769, 131 L.Ed.2d 834. A trial court's findings of no discriminatory intent will not be reversed on appeal unless clearly erroneous.

State v. Bryan, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶106. The burden for establishing *prima facia* case under *Batson* rests with the defendant. *Batson, supra.* at 96; *Murphy*, 91 Ohio St.3d at 530. "The burden of proving intentional discrimination was [the defendant's]." *Bryan* at ¶110. Clinton made no attempt to demonstrate an inference of

purposeful discrimination for the removal of Juror 255 because he agreed that use of the peremptory was proper. "*Only after the defendant* makes a showing sufficient to raise an 'inference of purposeful discrimination' is the State required 'to come forward with a neutral explanation for challenging black jurors." *Allen*, 366 F.3d at 329 (emphasis added.)

Although Clinton had not raised an inference of purposeful discrimination, the prosecution provided an ample justification for removing Juror 255 with a preemptory – the State's trial attorneys had prosecuted three closely-related family members. "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez*, 500 U.S. at 360. "[T]he reason offered by the prosecutor for a preemptory strike need not rise to the level of a challenge for cause[.]" *Id*.. at 362-63. Moreover, "[t]his non-racial explanation need not be particularly persuasive, or even plausible, so long as it is neutral.'" *Braxton*, 561 F.3d at 458-59. In other words, "[a]lthough the prosecutor must present a comprehensible reason, the second step of this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices." *Rice v. Collins*, 546 U.S. 333, 338, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006). Juror 255 had several cousins who had been prosecuted by the Erie County prosecutor's office and a brother who was awaiting trial. Based on this family dynamic, the prosecutor had a non-discriminatory basis for utilizing a preemptory challenge. The prosecution removed Juror 255 because they suspected, but could not necessarily prove, that she harbored a particular bias against the State. *Ford*, 132 P.3d at 581. This alone is a sufficient basis for refuting an actual, timely raised, *Batson* challenge – let alone one never sought.

"[T][he question presented at the third stage of the *Batson* inquiry is 'whether the defendant has shown purposeful discrimination.'" *Snyder v. Louisiana*, 552 U.S. 472, 485, 128

S.Ct. 1203, 170 L.Ed.2d 175 (2008). "Once the defending party proffers a race-neutral reason, the challenging party… must show that the explanation is merely a pretext for a racial motivation." *Braxton*, *supra*, at 459. "This final step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'" *Rice*, 546 U.S. at 338. The trial judge is tasked with evaluating the prosecutor's motives for striking a juror and his assessment is "a credibility judgment, which lies 'peculiarly within a trial judge's province.'" *Hernandez*, 500 U.S. at 365. In the absence of "exceptional circumstances," a reviewing court should defer to trial court's factual findings. *Id*. at 366. In the present case, Clinton made no attempt to show that the justification given by the prosecution was pretextual. In fact, the record shows that defense counsel affirmatively believed in the stated reasons offered by the prosecutor for utilizing a preemptory challenge.

The trial court also affirmatively believed in the reasons offered by the prosecutor, and stated so for the record. The trial court concluded that prosecutor's explanation "definitely * * * passes the Batson test." (Tr. 268.) Given that defense counsel never raised a *Batson* challenge to begin with, the trial court's affirmative finding of no racial discrimination was certainly not clearly erroneous or plain error. Clinton insists that because the trial court "failed to engage" in more specific factual findings regarding prosecution's proffered basis, he should receive a new trial. (Clinton brief, p. 114.) However, per the Supreme Court, "we have never suggested that a reviewing court should defer to a trial court's resolution of a *Batson* challenge only if the trial court made specific findings with respect to each of the prosecutor's proffered race-neutral reasons." *Snyder*, 552 U.S. at 487. In fact, the United States Supreme Court has disagreed, finding that "when the grounds for a trial court's decision are ambiguous, an appellate court

should not presume that the lower court based its decision on an improper ground," *Id*. Neither the Supreme Court, nor this Court, has ever suggested that a trial court has an affirmative to duty to make factual findings refuting a *Batson* challenge never raised. This proposition of law lacks merit and should be denied.

Response to Proposition of Law 15: The Defendant was not deprived due process of law by the trial court's lawful and appropriate rulings from the bench.

Clinton contends that his due process right to a fair trial was violated due to a myriad of rulings made by the trial court. Specifically, Clinton alleges (1) Dr. Scala-Barnett, the Lucas County Deputy Coroner, was allegedly allowed to testify in an inappropriate manner, (2) the trial court allowed victim-impact testimony during the guilt phase, (3) the trial court erroneously overruled numerous objections raised by defense counsel, (4) the trial court erred by allowing the prosecution to introduce a recorded jail phone conversation between Clinton and his mother, (5) the trial court erred in the manner Clinton's police interview was introduced, (6) the trial court erred in denying a host of defense counsel's pre-trial motions, (7) the trial court erred in denying Clinton's *Daubert* challenge to DNA evidence, (8) the trial erred in denying Clinton's motion for a mistrial, (9) the trial court erred in denying his Crim. Rule 29 motion as to the rape of Celina Jackson, (10) trial court erred by failing to give a curative instruction after several people walked out of the courtroom while photos of the victims were displayed, (11) the trial court erred by failing to give a curative instruction after Juror 363 made certain comments during *voir dire*, (12) trial court erred by not conducting additional *voir dire* of other jurors following Juror 363's comments, (13) and the trial court erred by not voir diring prospective jurors about race.

"As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice" *Lisenba v. California*, 314 U.S. 219, 236 (1941). "In the field of criminal law, [the Supreme Court] defined the category of

infractions that violate 'fundamental fairness' very narrowly based on the recognition that, beyond the specific guarantees enumerated by the Bill of Rights, the Due Process Clause has limited operation." *Medina v. California*, 505 U.S. 437, 443 (1992). In other words, trial judge's evidentiary rulings are "not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Patterson v. New York*, 432 U.S. 197, 201-02 (1977).

A. Sub-claims A2 (bullet points), A3 (bullet points), A5, B (bullet points), B1, and B2 are waived.

Most of Clinton arguments are made in a perfunctory manner in that he makes no attempt to give any analysis as to how these alleged errors violate the law, and how these alleged errors affected his trial. Thus, arguments A2 (bullet points), A3 (bullet points), A5, B (bullet points), B1 and B2 are waived. (Clinton Brief, p. 117, 118-121, 126-127, 128-129.) The burden lies with the appellant to demonstrate error on appeal. *State ex. rel. Fulton v. Halliday*, 142 Ohio St. 548, 53 N.E.2d 521 (1944). "[I]t is a 'settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.'" *United States v. Elder*, 90 F.3d 1110, 1118 (6th Cir.1996). "As we have repeatedly held, '[i]f an argument exists that can support [an] assignment of error, it is not this [c]ourt's duty to root it out.'" *State v. Raber*, 189 Ohio App.3d 396, 412, 938 N.E.2d 1060, ¶ 30 (9th Dist. 2010); *TJX Cos., Inc. v. Hall*, 183 Ohio App.3d 236, ¶6, 916 N.E.2d 862 (11th Dist. 2009); *State ex. rel. Petro v. Gold*, 166 Ohio App.3d 371, ¶95 (10th Dist. 2006). This Court is "not required to review issues that have been improperly presented to this court through an inadequate brief.... Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failing to brief the issue properly." *In re Sarah S.* 110 Conn. App. 576, 589 (2008).

(a.1) Dr. Scala Barnett's testimony was neither inappropriate nor denied Clinton a fair trial.

Clinton raises several arguments regarding the alleged inappropriate testimony of Dr. Scala-Burnett from the Lucas County Coroner's Office. No objection was raised at trial regarding the complained of testimony, thus plain-error review is required.

Defense counsel joined in the State's motion to have Dr. Scala-Barnett recognized as an expert. (Tr. 1099.) In response to how Wayne Jackson Jr. first appeared to her, Dr. Scala-Barnett responded "Wayne Jackson Jr., was an 18 months old, toddler, 34 pounds. He was dressed in his jammies. He had footed pajamas with a monkey logo." (Tr. 1103.) Clinton insists that because Dr. Scala-Barnett referred to Wayne Jr.'s "jammies," a common term for clothing worn by toddlers, he was somehow denied a fair trial. This assertion is absurd. Dr. Scala-Barnett was a witness for the State, not the defense, and was under no constitutional obligation refer to clothing in any one specific manner. Dr. Scala-Barnett was only describing Wayne Jr., as presented to her, just before the autopsy.

Later, while describing a photograph, Dr. Scala-Barnett was describing Wayne Jr.'s injuries by testifying "You kind of see the furrows here (indicating). That's just where the little blanket was folded on itself, and it causes furrows in the skin." (Tr. 1110.) When asked to identify State Ex. 91, Dr. Scala-Barnett testified "This is the froggy blanket that removed from Wayne's neck." (Tr. 1110.) Ruling out other causes of death, Dr. Scala-Barnett determined that Wayne Jr. died from "ligature strangulation." (Tr. 1112.) In other words, this testimony demonstrates that Wayne Jr. was murdered with his own blanket. Dr. Scala-Barnett's description of the murder weapon as a "froggy blanket" was not inaccurate, and certainly did not deprive Clinton of a fair trial.

As to Celina Jackson being "redressed," Dr. Scala Barnett testified that the victim's underwear "caught my attention because that is not how people put their underwear on, even

kids." According to Dr. Scala-Barnett, "[y]ou pull your underwear up by the waistband, and this is rolled." Stating that she has witnessed this exact situation "many times," and it is a red flag in her occupation. Dr. Scala-Barnett testified that "[o]ften times, in a sexual assault, the body will be redressed or the clothes will be put back on." (Tr. 1125.) Given that Dr. Scala-Barnett is a coroner who has conducted "8,300" autopsies since 1985, this testimony was not beyond the scope of her knowledge and expertise. (Tr. 1098.) *See*, *People v. Prince*, 156 P.3d 1015, 1048 (Cal. S. Ct. 2007) ("an expert may… offer the opinion that evidence seized by authorities is of a sort typically used in committing the type of crime charged.) Furthermore, Clinton's DNA was found in the anal swab collected from Celina Jackson, and his sperm cell was collected from her underwear. (Tr. 907 -909, 918 – 923; St. Ex. 122, St. Ex. 123..)

Clinton next complains about the non-sexual autopsy photograph used by Dr. Scala-Barnett "as a point of reference." Dr. Scala-Barnett testified that Heather Jackson's "rectum is dilated… it is more open than it normally is after death." (Tr. 1118.) As such, the dilation shows "that something was most likely introduced in there to keep it open like that." (Tr. 1119.) According to Dr. Scala-Barnett, this occurred "perimortem… on or about the time of death." (Tr. 1119.) She further testified that dilation of the rectum indicated to her that a rape kit was necessary, which she ordered for all three victims. (Tr. 1120.) Later, Dr. Scala-Barnett identified Exhibits 151 through 159 as photographs she took during Celina Jackson's autopsy. (Tr. 1123.) As to Exhibit 160, Dr. Barnett identified a photograph taken from another autopsy she performed. (Id.) Dr. Scala-Barnett told the jury that this photograph was only being used as "a point of reference." (Tr. 1123.) According to Dr. Scala-Barnett, Celina also had rectal dilation, similar to her mother. (Tr. 1129-30.) Using the point of reference photo (State's Ex. 160), Dr. Scala-Barnett began by noting that this was a photograph of a rectum, from a five year old

victim, where there was no sexual assault, which was taken at an autopsy conducted back in 2001. In other words, State's Ex. 160 depicted a child's rectum were no sexual assault occurred. She further explained "this is how a rectum looks after death in a child. It's kind of puckered. All of those out there of you who have changed diapers knows what a rectum looks like in a live baby…. It may be a little bit dilated after death, but it still puckers and it closes." According to Dr. Scala-Barnett, Celina's rectum did not look like this and was "more consistent with how her mother's looked." (Tr. 1131.) It was clearly explained to the jury that State's Ex. 160 was not any of the victims, and was only being used to show a child's rectum in a case where no sexual assault had occurred. Moreover, the comparisons were relevant to prove that Clinton raped Celina because Clinton challenged (and continues to challenge) the rape charge by arguing that the state could not establish whether sexual conduct occurred before or after Celina's death.

(a.2) Clinton was not denied a fair trial due to allegations of victim-impact testimony.

In his next claim, Clinton argues that the trial court allowed victim impact testimony to be introduced during the guilt phase. Although victim-impact is generally inadmissible during the guilt phase of a trial, it is admissible if it relates to the facts of a case. *State v. McKnight*, 107 Ohio St.3d 101, ¶98 (2005). Clinton's arguments are made in a perfunctory manner in that he makes no attempt to give any analysis as to how these statements are victim-impact, and how these statements affected his trial. Thus, the arguments are waived. " *Raber*, 189 Ohio App.3d at 412; *Hall*, 183 Ohio App.3d at ¶6; *Gold*, 166 Ohio App.3d at ¶95.

In a bullet point, Clinton merely notes "Thomas Hanson referred to the perpetrator of the crime as 'some sick individual.'" At trial, defense counsel objected that this statement was hearsay. (Tr. 579.) This statement, adopted by Thomas Hanson as his own, was previously given

when he was questioned by police, and is non-hearsay as a prior consistent statement under Evid. R. 801(D)(1)(b). Clinton characterizes this statement as "victim impact," but makes no attempt to argue how.

In the next bullet point, Clinton notes that Det. Wichman stated that his police interview with Clinton was "an extremely difficult interview. Probably the worst interview I ever did, situation-wise." Again, Clinton makes no attempt to argue how this statement is "victim-impact," and how it affected his trial. At trial, Det. Wichman was merely explaining how he attempted to "minimize what (Clinton) did wrong" in order to get him to "admit what he did." (Tr. 826.) Again, this statement has nothing to do with any victims.

In the next two bullet points, Clinton notes that Det. Nixon testified that "[v]ictims are afraid. They don't want to go forward. They're afraid of what's going to happen if they do, if they tell on the person." There was no objection to this testimony, thus Clinton has waived all but plain error review. Again, Clinton makes no attempt to argue how this statement is "victim-impact," and how it affected his trial. Det. Nixon, based on his experience, attempted to explain why E.S. did not immediately file charges. This goes to support E.S.'s credibility, not how the crime has impacted her life. *People v. Brown*, 883 P.2d 949, 956 (S.Ct. Cal. 1994) ("The overwhelming body of current empirical studies, data, and other information establishes that it is *not* inherently "natural" for the victim to confide in someone or to disclose, immediately following commission of the offense, that he or she was sexually assaulted.")

In the next bullet point, Clinton quotes a statement where Det. Nixon stated E.S. was afraid because Clinton might get out of jail. Again, this testimony was offered to explain E.S.'s reluctance to press charges.

Finally, in the last bullet point, Clinton notes that E.S. was allowed to testify that "she was involved in counseling." This evidence was offered to show seeking counseling was an action taken by person consistent with actually being raped, as opposed to actions taken by a person fabricating an accusation of rape against Clinton. (Tr. 1030-31.) Moreover, the trial court only allowed the fact that counseling was sought, not what transpired during those sessions, and what affect those sessions had on E.S. in relation to her rape. (Tr. 1031.)

(a.3) The trial court's rulings on evidentiary issues did not deprive Clinton a fair trial.

In his next sub-claim, Clinton argues that the trial court allowed irrelevant and prejudicial evidence to be submitted. In bullet points, Clinton points to several instances at trial where he claims the trial court allowed allegedly irrelevant and prejudicial testimony. Clinton's arguments are made in a perfunctory manner in that he makes no attempt to give any analysis as to how these ruling were wrong or how these rulings affected his trial. Thus, the arguments are waived. *Raber*, 189 Ohio App.3d at 412; *Hall*, 183 Ohio App.3d at ¶6; *Gold*, 166 Ohio App.3d at ¶95.

Clinton argues the prosecutor made allegedly prejudicial statements when he told the jury about victims sometimes reporting, or not reporting, crimes. During general *voir dire*, the prosecution was appropriately inquiring as to how jurors would react to hearing that a victim of rape did not immediately contact authorities. Defense counsel immediately objected, which the trial court initially overruled. Undeterred, defense counsel objected again, and after a short conference before the bench, the trial court sustained his objection. (Tr. 116-117.) Also, the trial court instructed the jury that "comments by counsel during voir dire" was not evidence that could be considered as guilt. (Tr. 1247.) Even assuming error, there was no prejudice.

Next, Clinton claims that the prosecution elicited prejudicial testimony from Thomas Hanson when he questioned him about his second interview with police. Clinton also argues that

Hanson's testimony about his own statements to police was hearsay. (Clinton Brief, p. 118, 121.) At trial, defense counsel objected that this statement was hearsay. (Tr. 579.) This statement, adopted by Thomas Hanson as his own, was previously given when he was questioned by police, and is non-hearsay as a prior consistent statement under Evid. R. 801(D)(1)(b). Tom Hanson was the alternative suspect that Clinton focused on at trial. Hanson had been at Jackson's house on the night of her death. He, along with a friend, discovered Jackson's body the next day. The police had investigated Hanson and interviewed him twice. The prosecution was just beginning to go through his two interviews with police when the defense objected. There was a lengthy conference before the judge, outside the hearing of the jury, where the parties argued whether Hanson, who was present for cross-examination, was able to testify about his own prior statements to police. At the conclusion of this lengthy argument, the prosecution made the decision to move on. (Tr. 577-582.) Because Hanson was Clinton's alternative suspect, the prosecution attempted to show the jury that Hanson was initially investigated by police but eventually ruled out as a suspect. This was a highly relevant line of questioning.

Clinton argues that he was denied a fair trial because the prosecution asked Hanson how long it took him to retain his composure after finding the bodies. However, this was an important part of Hanson's testimony. After finding the bodies, Hanson and Daniel Risner did not immediately call police. Defense counsel had interrogated Hanson quite a bit on this topic during cross-examination. (Tr. 604-606.) On redirect, the prosecution was merely trying to establish that Hanson was in shock after finding the bodies to explain why he did not immediately call police. This is relevant evidence and not prejudicial.

In the next bullet point, Clinton complains that the trial court erred when it overruled his objection when Det. Nixon was asked "who the suspect was that he had in mind after his

interview and conversation with E.S." Det. Nixon responded "Curtis Clinton." (Tr. 744.) Clinton makes no attempt to show how this question and answer denied him a fair trial. This question, and answer are highly relevant. The weekend before the murders – Labor day weekend - E.S. was raped by Clinton. (Tr. 1003-1007.) On September 3, 2012, E.S. was given a rape kit at Toledo St. Vincent's hospital. (Tr. 1062.) Detective Nixon interviewed E.S. on September 6, 2012. (Tr. 738-40.) After the Jackson's were murdered on September 8th, Det. Nixon was able to ascertain that Curtis Clinton, the primary suspect in the E.S. rape, had called Heather Jackson on the night she was murdered. (Tr. 755.) After watching the hospital surveillance video, Det. Nixon (and Sandusky P.D.) was able to decipher that Clinton's white Cadillac (as seen in hospital surveillance) was related to the rape investigation of E.S. (Tr. 756, 792, 806, 988-89, 1010.) Clinton was driving E.S. around in the same white Cadillac before and after he raped her. (Tr. 989, 1010.) Detective Nixon, who had just interviewed E.S. about the rape, was able to ascertain that Clinton was the person driving the white Cadillac that was parked at Jackson's house in the early morning hours when the Jackson's were murdered.

In his next bullet, Clinton complains that Det. Nixon testified that E.S. was reluctant to file charges because she "felt that he would not be in jail forever, and he would get out." Det. Nixon, based on his experience, attempted to explain why E.S. did not immediately file charges. This goes to support E.S.'s credibility, and refute attack's on E.S.'s credibility. E.S. also testified that she was reluctant press charges due to her fear of Clinton. (Tr. 1027.) *See*, *People v. Brown*, 883 P.2d 949, 956 (Cal. S.Ct. 1994) ("The overwhelming body of current empirical studies, data, and other information establishes that it is *not* inherently "natural" for the victim to confide in someone or to disclose, immediately following commission of the offense, that he or she was sexually assaulted.") This was relevant testimony and not prejudicial.

In the next bullet point, Clinton notes that Det. Wichman stated that his police interview with Clinton was "an extremely difficult interview. Probably the worst interview I ever did, situation-wise." Again, Clinton makes no attempt to argue how this statement affected his trial. At trial, Det. Wichman was merely explaining how he attempted to "minimize what (Clinton) did wrong" in order to get him to "admit what he did." (Tr. 826.) This statement did not deprive Clinton of a fair trial.

In the next bullet point, Clinton argues that the trial court erred when it overruled his renewed motion on *Daubert* issues. Clinton makes no attempt to show how this ruling denied him a fair trial. Given that the trial court was not even obligated to hold an evidentiary hearing on DNA issues, and even so, conducted a competent hearing and made sufficient findings under *Daubert*, Clinton cannot show error. *State v. Adams*, 103 Ohio St.3d 508, ¶80 (2004).

In the next bullet point, Clinton simply re-raises the same arguments he makes in Proposition of Law XI. The State will rely on its response to Proposition of Law XI as a basis for refuting this claim.

In the next bullet point, Clinton notes that E.S. was allowed to testify that "she was involved in counseling." This evidence was offered to show seeking counseling was an action taken by person consistent with actually being raped, as opposed to actions taken by a person fabricating an accusation of rape against Clinton. (Tr. 1030-31.) Moreover, the trial court only allowed the fact that counseling was sought, not what transpired during those sessions, and what affect those sessions had on E.S. in relation to her rape. (Tr. 1031.) Even assuming error, it was harmless given that E.S. merely acknowledged she was going to counseling, and did not divulge any evidence regarding the repercussions she has suffered as result of such a brutal rape.

In the next bullet point, Clinton complains trial court erred by allowing SANE Nurse Dettling testify about what E.S. told her while the rape kit was performed. In overruling the objection, the trial court overruled the objection but asked the prosecution "to not go over, you know, verbatim" what E.S. told Nurse Dettling. (Tr. 1070.) This Court found this sort of evidence relevant in *State v. Stahl*, 111 Ohio St.3d 186, ¶43, 855 N.E.2d 834 (2006); *See, also*, Evid. R. 803(4) (provides that hearsay statements are admissible if they are made for purposes of medical diagnosis or treatment and describe medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof as reasonably pertinent to diagnosis or treatment.) Nurse Dettling kept her testimony to what she observed during the examination, what E.S. told her regarding the injuries she suffered, and what actions she took to document and photograph those injuries. (Tr. 1070-1081.) In fact, defense counsel never objected that Nurse Dettling's testimony went beyond the scope of the hearsay exception. Furthermore, given that E.S. testified, it does not appear from the brief that Clinton is bringing a hearsay claim or a confrontation clause claim. Rather, he simply arguing the evidence is prejudicial without explaining how.

In the next bullet point, Clinton criticizes the trial court for allowing Nurse Dettling to read the statement on redirect. However, defense counsel opened the door when they questioned Nurse Dettling extensively about the statement and the information it allegedly lacked about E.S. drinking that night. (Tr. 1083-1087.)

In a the final bullet point, in a conclusory fashion, Clinton complains about the trial court admitting exhibits introduced during testimony by Det. Clark regarding the Misty Keckler homicide. Given that details surrounding Misty Keckler's death was admissible under Evid. 404(b), the photographs of that crime were not prejudicial.

(a.4) Clinton's incriminating conversation with his mother was not privileged, highly relevant, and not prejudicial.

Clinton contends that the trial court denied him due process when it allowed a recorded taped phone call between him and his mother to be played for the jury. (State's Ex. 119.) Clinton does not contend that this conversation was privileged, rather irrelevant and prejudicial. It was neither. In the taped conversation, Clinton made multiple incriminating statements:

- "You should know that it would happen again though."
- "Now it's even worse than before."
- "I just didn't think that, you know, nothing would happen like that again because I was doing good[…]"
- It's something in me. I don't know what it is though… I just, I just lose it, and then I don't even – I don't know what it is."
- "I thought I was just over it, I don't know. I thought after 13 years I would be over that, and I just wouldn't believe that shit would happen no more."

(State's Ex. 119.) A reasonable juror could conclude that Clinton is telling his mother that he has managed to strangle yet another victim. (State's Ex. 119.) Clinton's lack-luster attempt to speak in vagaries does not somehow make his highly incriminating statements prejudicial. *People v. Guerra*, 37 Cal.4th 1067, 1123, 129 P.3d 321, 364 (Cal. S. Ct. 2006) (Ct. held incriminating statement admissible "because '[the statement] concerns only the weight of the evidence, not its admissibility, which does not require complete unambiguity.") After listening to that tape, a juror could give that taped conversation whatever weight he or she deems appropriate. Clinton's arguments go to the weight of the evidence, which a reasonable jury would be allowed to infer against him, not its admissibility.

(a.5) Because Clinton makes no attempt to demonstrate how the subtitles differ from Clinton's statement to police, he has failed to demonstrate exactly how he was denied a fair trial.

Clinton complains that the trial court erred by allowing Clinton's taped confession to be played, without subtitles, because the latter were inaccurate. Watching the video reveal, at certain points, it is difficult to hear Clinton. Clinton complains that the trial court "did nothing to further inquire as what substantive inaccuracies existed[.]" (Clinton Brief, p. 125.) However, in his brief, Clinton makes no attempt to describe the alleged inaccuracies, or how they affected his trial. Arguments raised in a perfunctory manner are waived. Moreover, Clinton maintained his innocence throughout his statement to police, and only admitted that he was at Heather Jackson's house in the early morning hours, on the night of the murder. (State's Ex. 117.) A concession he could not conceal given the security video surveillance from the hospital across the street. As such, any error was harmless.

(b) Clinton makes absolutely no attempt to show how trial court's denial of the referenced pre-trial motions denied him a fair trial.

Without any attempt to elucidate his arguments, Clinton cites a dozen pretrial motions he filed and then simply complains without analysis that the trial court overruled them. (Clinton Brief, p. 126-27.) The record reveals that defense counsel, which is routine in capital cases, filed a plethora of pre-trial motions. Most were denied by the trial court. Without any explanation as to why these motions were wrongly denied, and how those denials denied him a fair trial, using bullet points, Clinton alleges the trial court erred by denying the following motions: (D-10) Motion to preclude death specification, (D-11) Motion to transcribe Grand jury proceedings, (D-13) Motion to release prior to trial Grand Jury transcripts, (D-15) Motion to dismiss capital specifications, (D-15) Motion to Dismiss case due to constitutional and international law, (D-17) Motion to order complete Prosecutor file be sealed, (D-18) Motion to preserve investigatory agency files, (D-20) Motion in limine to prohibit victim-impact evidence, (D-23) Motion to sever counts, Motion for change of venue, Motion to dismiss capital specifications, Motion to

recognize mercy as mitigating factor, and Motion to consider residual doubt as mitigating factor. (Clinton Brief, p. 126-27.) Clinton admits that several of these motion correlate with other Propositions of Law in his Brief. (Prop. of Law 4, 6, 17.) Other than random record citations, and conclusory allegations, Clinton makes absolutely no attempt to make a coherent argument which the State could intelligently respond to. The State should not be required to guess arguments not raised, and then attempt to tear them down.

(b.1) The trial court was not even obligated to hold a *Daubert* hearing on State's DNA evidence. Even so, the trial court put on a competent *Daubert* hearing and made the appropriate findings based on the evidence elicited during a lengthy hearing.

Without bothering to cite to *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993) or *State v. Pierce*, 64 Ohio St.3d 490, 497 (1992), Clinton makes a perfunctory argument that the trial court acted unreasonably when it, after a *Daubert* hearing, allowed State to proffer evidence in the form of DNA testimony. Without citing to *Daubert* or progeny, Clinton argues that the trial court failed to understand "the meaning of the motion in the first place." (Clinton Brief, p. 128.) Clinton makes no attempt to explain exactly how the trial court misapplied *Daubert* and progeny, or how it misunderstood the motion filed below, or what aspect of that case law that trial court failed to grasp. Instead, Clinton makes perfunctory allegations. Clinton's allegations are wrong both factually and legally.

On September 18, 2013, Clinton filed a Motion to Conduct a *Daubert* Hearing challenging BCI's "interpretation and calculation of the data from the DNA test." (R. 119.) In October of 2013, based on Clinton's motion, the trial court conducted *Daubert* hearing. The State called Hallie Garofalo. Garofalo testified that she has worked for BCI since January of 2012. (Tr. p. 28.) She said she was a forensic scientist in the DNA unit. (Tr. p. 28.) Garofalo testified that she had a bachelors in biology from John Carroll University and a master's degree

in forensic science from Virginia Commonwealth University. (Tr. p. 28.) At BCI, Garofalo explained that she "underwent vigorous training program to qualify, pass competency exams, pass proficiency tests." (Tr. p. 28.) Before BCI, Garofalo testified that she had previously "been employed in the forensic DNA field" at Bode Technology Group in Lorton, Virginia. (Tr. p. 29.) Describing her continuous training at BCI, Garofalo explained that a her training program adheres to the Scientific Working Group on DNA Analysis Methods (SWGDAM) which involves the testing of samples on known standards and generate a profile following laboratory standards. (Tr. 29.) Describing the laboratory protocols for DNA, Garofalo testified the protocols for extraction, carrying out lab procedures, amplification, how to interpret the DNA profile, and training on how to provide testimony at court. (Tr. 30.) According to Garofalo, if you don't complete the training in a satisfactory manner, you cannot work at BCI as a lab analyst. (Tr. p. 30.) Garofalo testified that she has passed all the required training to "remain competent in the field of DNA analysis."

Garofalo explained to the trial court, when evidence first arrives, it is examined by a forensic biologist who is trained to "screen items… for the presence of biological material." (Tr. 31.) If biological evidence is found, those samples will be initiated into the DNA process. (Id.) At that point, the DNA is extracted, put into liquid form, and purified. (Id.) At that juncture, the DNA sample is amplified to essentially generate a DNA profile. (Id.)

With rape kits, Garofalo explained that they take a small portion of the swab and test to determine if there is any biological material – sperm cells or anything foreign. (Tr. p. 32.) She insisted that only a very small fraction is taken because of the need to preserve for additional testing. (Tr. 32-33.) Garofalo insisted that it was not necessary to test the entire swab and it was not uncommon for just one cell to recovered during the examination. (Tr. 33.) For extraction,

Garofalo explained that that they "add a series of reagents to the sample" to "optimize and break open the cells that are present[.]" (Tr. 34.) This allows them to discard unwanted material and garner "purified DNA." (Id.) Garofalo explained that BCI utilizes "an extraction procedure that is standardized throughout the nation." She insisted that BCI "make our own reagents and test those reagents to maintain quality control." (Id.) According to Garofalo, "it is a standardized procedure." (Id.) Garofalo explained that BCI's protocol is both "generally accepted scientifically" and "an appropriate way to do it." (Tr. p. 34-35.)

As to the amplification process, Garofalo testified that BCI initially conducts a quantification process. (Tr. p. 35.) This determines "how much total human DNA and how much total male DNA is present." (Id.) Explaining the standards for amplification, Garofalo testified that BCI's "ideal amount" is ".75 nanograms of DNA." (Tr. 35.) According to Garofalo, the .75 nanograms is "the manufacturer's recommendation." (Id.) She further testified that this standard also came from BCI"s "internal validation when we tested these kits[.]" (Tr. p. 36.) Garofalo confirmed that the "kits" are "used in other labs around the nation" and are "generally accepted as scientifically sound." (Tr. p. 36.) Even with low amounts of DNA, Garofalo testified that BCI has instruments that are "calibrated and designed to work specifically with these amounts." (Tr. p. 36.)

Circling back to the amplification process, Garofalo explained that amplification targets sixteen (16) regions along the DNA. (Tr. p. 37.) Thus, amplification targets regions of DNA and amplifies them. (Id.) Garofalo called it "chemical Xeroxing or making millions, and billions, and trillions of copies of the DNA that already present in order … to conduct downstream testing and get that portrait or snapshot of the DNA profile." (Id.) Per Garofalo, they focus on sixteen different spots on the entire DNA genome. (Id.) Garofalo instructed that they look at "noncoding

regions that contain a great deal of variability… [and] regions that highly variable among different individuals." (Id.) According to Garofalo, "no two people have the same combination of a genetic profile at all 16 of these locations." (Tr. p. 38.) Garofalo explained to the trial court that these sixteen locations are "established by SWGDAM, the Scientific Working Group for DNA Analysis Methods, as well as the FBI[.]" (Id.) Garofalo explained the sixteen sites as "locations," and the "allele" as the "variable part we measure." (Id.) In other words, BCI "look(s) at the specific allele at a specific location." (Id.)

At that point, per Garofalo, "we run it on an instrument that takes a snapshot of what the DNA profile is… at the specific alleles or combination of alleles that are present in each location." (Tr. p. 39.) Garofalo explained that each instrument is standardized and calibrated "to make sure they're performing optimally." (Tr. 40.) Garofalo explained that BCI run a set of known standards or proficiency tests. (Id.) She testified that the positive control test is a "nationally standardized DNA profile." (Tr. p. 41.) In other words, when running a DNA sample, BCI also runs "three positive and negative controls" to "help alleviate any problems with the machine being miscalculated[.]" (Id.) Per Garofalo, if any problems arise from those controls, BCI requires a "repeat [of that] analysis." (Tr. p. 42.)

Once the snapshot is obtained, Garofalo explained that the analyst must review the quality of the profile. (Id.) In other words, BCI has "established thresholds that the DNA profile has to meet" in order to proceed further. Garofalo said that she looks at each allele. (Tr. p. 43.) However, there are threshold DNA standards established by internal validation, required by SWGDAM and the DNA advisory board. (Tr. 44.) BCI must carry out an internal validation to determine the ideal quality a sample and establish minimal thresholds that must be met. (Id.) For example, Garofalo explained that if an allele is only present in one of sixteen locations, there is

not enough DNA to make a comparison. (Id.) Garofalo explained that BCI's threshold standard depends upon the quality of the profile. (Tr. p. 45.) However, Garofalo told the trial court that every profile must be "peer reviewed" by a competent analyst and administrative review by a trained supervisor. (Id.)

As to comparison, BCI looks "at known reference standard that have been processed… and we compare that profile to the same locations on the evidence sample." (Tr. p. 46.) If a particular profile cannot be excluded, then a statistical significance must be assessed. (Id.) In other words, a "measure of what are the odds that this is a coincidental match versus what the odds that this is from the contributor[.]" (Id.) Comparing the statistic to the lottery, Garofalo provided an example of 6 buckets with ten balls – labeled 1 thru 10 –in each. The likelihood of pulling a certain number from the first bucket is 1 in 10. However, what number is pulled out of the second bucket is independent from what number is pulled out the other buckets. Thus, the analysis must multiply the frequency "one in ten times, one in ten." (Id.) Considering all six buckets, and the likelihood of pulling a specific number from each bucket, the likelihood is one in a million. With DNA, Garofalo explained that BCI is "looking at a particular combination of alleles at 16 different locations." (Tr. 48.) Garofalo instructed "the allele combination that is at that location, has a specific frequency based on when it was observed in our population, and we multiply those frequencies by each other to the determine the likelihood." (Tr. 48.)

Garofalo then explained the Y-STR test, which is male specific. (Tr. 49.) Garofalo insisted that BCI uses the same chemistry, same instruments, and lab procedures. (Id.) The difference, according to Garofalo, instead of targeting the entire genome, they target sequencing specific to the Y chromosome (unique to males). (Id.) Garofalo explained that the FBI has a database, which is recognized nationally, which is used for Y-STR analysis. (Tr. p. 49-50.)

As to BCI's laboratory, Garofalo explained that the American Society for Crime Lab Directors must accredit them every five years. (Tr. p. 72.) To attain accreditation, BCI's lab's protocols, procedures, and instruments must meet national standards. (Tr. p. 73.) As such, the procedures used by BCI are "scientifically acceptable." (Id.) Garofalo testified that she has been qualified as an expert, and testified about DNA, fourteen different times. (Id.) Garofalo testified that she has conducted DNA testing in 800 cases. (Tr. p. 78.)

After lengthy cross-examination by the defense attorney, and oral arguments, the trial court made the following relevant findings:

- He qualified Garofalo as an expert based on training and experience – testified fourteen different times and conducted 800 different DNA tests.
- The evidence complies with Ohio Evid. R. 402, 403, and 702, as well as the factor listed in *Daubert v. Merrell Dow*, 509 U.S. 579.
- The DNA technology has been tested.
- DNA has been subjected to peer review.
- DNA has a known potential rate of error.
- DNA methodology has gained general acceptance.
- Evidence is relevant in that it has a tendency to make the existence of a fact in consequence to the determination of the matter more probable than it would without the evidence.
- DNA evidence is relevant, competent, material, and reliable.
- Citing *State v. Pierce*, the trial court held "questions regarding the reliability of DNA evidence in a given case go to the weight of the evidence, rather than its admissibility."

(Tr. 100-102; R. 163.)

In *State v. Pierce*, this Court recognized that "the theory and procedures used in DNA typing are generally accepted in the DNA community." 64 Ohio St.3d 490, 497 (1992). This Court has emphasized that "the state trial court is not required to conduct a preliminary hearing under Evid. R. 104 to accept the scientific reliability of DNA evidence." *State v. Adams*, 103

Ohio St.3d 508, ¶80 (2004). This Court instructed that "questions regarding the reliability of DNA in given case go to the weight of the evidence rather than its admissibility." *Id* at 597. In *State v. Nicholas*, 66 Ohio St.3d 431, 437 (1993), this Court opined that "DNA results constitute reliable evidence."

Clinton's averment that statements by the trial court "raise significant questions as to whether the court understood what a *Daubert* hearing entailed[…]" is completely absurd, misleading, and refuted by the record. (Clinton Brief, p. 128.) The trial court conducted a competent *Daubert* hearing and made appropriate findings based on this Court's precedents. *Pierce*, 64 Ohio St.3d at 497. In fact, under this Court's precedent, the trial court wasn't even obligated to conduct pre-trial hearing – much less the extensive one it did preside over.

Clinton argues, when defense counsel renewed their *Daubert* objection to preserve the argument, the trial court allegedly prevented defense counsel from proffering additional evidence. The trial court did no such thing. Just before Julie Cox's testimony (a BCI analyst) defense counsel renewed their *Daubert* objections. (Tr. 864.) Nothing in the record even suggests that an attempt was made to proffer more evidence. Also, when the State moved to have Garofalo recognized as an expert, defense counsel conceded and raised no objection. (Tr. 897.) This allegation is baseless.

(b2) The trial court correctly denied Clinton's motion for a mistrial.

In his next sub-claim, Clinton argues that his right to due process was violated when the trial court denied his motion for a mistrial after Det. Mike Clark testified about Clinton's involvement in the death of Misty Keckler. This claim offers nothing that has not been covered by Propositions of Law III and XI. Therefore, the State of Ohio rests upon its arguments in response to Propositions of Law III and XI in opposition to this sub-claim.

(b3) The evidence established that Clinton raped Celina Jackson.

In the next sub-claim, Clinton argues there was insufficient evidence of rape of Celina Jackson, and the trial court erred by denying his Crim. R. 29 motion for directed verdict. First, due to her age, Celina Jackson could not consent to sexual activity. *In re. D.B.*, 129 Ohio St.3d 104, ¶26, 950 N.E.2d 528 (2011). Furthermore, Clinton's DNA was found in the anal swab collected from Celina Jackson, and his sperm cell was collected from her underwear. (Tr. 907-909, 918-923; State Ex. 122, State Ex. 123.) After the prosecution rested, defense counsel raised a Crim. R. 29 "general motion for the counts, but the specific count is the … rape against Celina." (Tr. 1147.) Defense counsel argued "the coroner did not testify to a medical certainty that the intrusion into her anal cavity occurred premortem… [o]bviously, if its postmortem, it's not rape. It's abuse of a corpse." (Tr. 1148.) The trial court denied the motion. (Tr. 1149.)

During the trial, Dr. Scala-Barnett testified that Heather Jackson's "rectum is dilated… it is more open than it normally is after death." (Tr. 1118.) As such, the dilation shows "that something was most likely introduced in there to keep it open like that." (Tr. 1119.) According to Dr. Scala-Barnett, this occurred "perimortem… on or about the time of death." Dr. Scala-Barnett then testified that Celina Jackson's rectum was "consistent with how her mother's looked." (Tr. 1131.) She also testified that rectal dilation was perimortem. (Tr. 1133.) In other words, "[o]n or about the time of death." (Id.)

In *State v. Rojas*, 64 Ohio St.3d 131, 138-39 (1992), this Court rejected a similar argument. In *Rojas*, the defendant was convicted of aggravated murder predicated on an aggravated robbery. The evidence showed that Rojas killed the victims and then stole their money. *Id.* at 139. Rojas argued that he could not be convicted of aggravated robbery during a murder because the murder occurred hours earlier. This Court held that a robber cannot avoid

the felony-murder rule by initially killing the victim, wait for the victim to die, and then steal the victim's property thereafter. Id. The same logic applies in this case.

Ohio's rape statute "does not explicitly require a living victim." *State v. Dieterle*, 2009-Ohio-1888, *4 (1st Dist. 2009) (defendant convicted of rape even though he and his companions had viciously beaten, choked, and raped the victim, who died at some point during the assault.); *State v. Collins*, 66 Ohio App.3d 438, 443 (10th Dist. 1990) (R.C. 2907.02 does not require "a living victim.") Moreover, Ohio's "abuse of corpse" statute was intended to prevent indecent behavior to an obvious corpse, not to split hairs as to whether insertion occurred "on or about the time of death." *Collins*, at 442. Rejecting a similar argument, the Missouri Supreme Court said it best,

> We are likewise unable to embrace the notion that the fortuitous circumstance, for the rapist, that death may have preceded penetration by an instant, negates commission of the crime of aggravated rape and reduces it to a relatively minor offense associated with erotic attraction to dead bodies. Reading the 'live only' requirement into the statute encourages rapists to kill their victims, in our opinion.

State v. McLaughlin, 265 S.W.3d 257, 269 (Mo. S. Ct. 2008); *See also*, *State v. Honie*, 2002 UT 4, ¶ 49, 57 P.3d 977 (Utah S. Ct. 2002); *Commonwealth v. Waters*, 420 Mass. 276, 279–80, 649 N.E.2d 724 (1995); *State v. Gallegos*, 178 Ariz. 1, 9, 870 P.2d 1097 (Ariz. S. Ct. 1994); State v. *Brobeck*, 751 S.W.2d 828, 832 (Tenn S. Ct. 1988); *Lipham v. State*, 257 Ga. 808, 809–10, 364 S.E.2d 840 (Ga. S. Ct. 1988); *Smith v. Commonwealth*, 722 S.W.2d 892, 894 (Ky. S. Ct. 1987); *State v. Usry*, 205 Conn. 298, 317–18, 533 A.2d 212 (Conn. S. Ct. 1987); *Lewis v. State*, 889 So.2d 623, 683 (Ala.Crim.App.2003); *State v. Jones*, 308 N.J.Super. 174, 189, 705 A.2d 805 (N.J. App. Ct. 1998); *People v. Guiterrez*, 402 Ill. App.3d 248, 268, 932 N.E.2d 139 (Ill. App. Ct. 2010).

(c) The trial court acted appropriately when defense counsel objected to spectators leaving the courtroom during testimony.

In his next sub-claim, Clinton argues that the trial court denied him a fair trial by not adequately handling the public audience because "several people walked out of the courtroom in tears" when photographs were displayed. (Clinton Brief, p. 130.) In response to defense counsel objection, the trial court instructed the prosecution to advise the victim-witness advocates that "this is going to be probably the most demonstrative evidence of the children and if they're going to leave the room, they should leave the room before we proceed." (Tr. 657.) At that point, defense counsel thanked the trial court and did not request any sort of jury instruction. *State v. Morales*, 32 Ohio St.3d 252, 255, 513 N.E.2d 267 (1987) (the trial court handling of an emotional disturbance at trial will rarely be disturbed on appeal.) Obviously, defense counsel believed the trial court appropriately handled the situation – and a jury instruction was not required.

(d1 & d2) Juror 363 did not deprive Clinton of a fair trial.

Clinton complains that the trial court was obligated to give a cautionary instruction after Juror 363 made comments that he thought Clinton "admitted guilty." Clinton acknowledges that Juror 636 was not seated on the jury that convicted him and sentenced him to death, but he still alleges Juror 636's comments somehow denied him a fair trial. However, Clinton must acknowledge that the trial court removed Juror 363 for cause. (Tr. 208.) A jury is presumed "impartial… so long as no biased juror is actually seated at trial." *Skilling v. United States*, 561 U.S. 358, 425, 120 S.Ct. 2896 (2010) (J. Alito, concurring.) Clinton must show that the jurors, who actually sat, and allegedly overheard Juror 363's comments, were somehow biased by his comments. Clinton cannot do so. Clinton's jury was instructed to base their conviction solely on the evidence proffered a trial. (Tr. 1245-48. 1291.) There is a strong presumption that jury

followed the instructions that were given by the trial judge. *State v. Garner*, 74 Ohio St.3d 49, 59, 656 N.E.2d 623 (1995).

(d3) The trial judge was under no constitutional obligation to sua sponte voir dire prospective jurors about race.

"[T]he Constitution . . . does not dictate a catechism for *voir dire*, but only that the defendant be afforded an impartial jury." *Morgan*, 504 U.S. at 729. "Voir dire 'serves the dual purpose' of (1) identifying those individuals in the venire who are incapable of following the court's instructions and evaluating the evidence, and (2) assisting lawyers in the exercise of peremptory strikes." *Goins v. Angelone*, 226 F.3d 312, 321 (4th Cir. 2000). "Neither due process nor the *Sixth Amendment* entitles a defendant to ask prospective jurors every question that might prove helpful." *Bedford v. Collins*, 567 F.3d 225, 232 (6th Cir. 2009). "What matters is whether the defendant's inability to ask a question renders the proceeding 'fundamentally unfair' by making it impossible to identify an unqualified juror." *Id.* To merit relief, the inquiry foreclosed by the trial court must be "constitutionally compelled." *Id.* To date, the only "constitutionally compelled" questions recognized by the United States Supreme Court have involved issues of race. *Turner v. Murray*, 476 U.S. 28 (1986); *Ham v. South Carolina*, 409 U.S. 524 (1973); *Ristaino v. Ross*, 424 U.S. 589 (1976); *Mu'Min v. Virginia*, 500 U.S. 415 (1991).

In *Turner*, the Supreme Court held that when a victim and defendant are of different races, defense counsel are *entitled* – but not *obligated* – to question jurors about racial bias. 476 U.S. at 34. The Supreme Court vacated the death sentence of a black man, who killed a white store proprietor, because the trial court refused to allow the defendant's attorneys to question prospective jurors about racial prejudices during *voir dire*. *Id.* In *Turner*, the U.S. Supreme Court held that, in a capital case, where the race of the victim and defendant are different, the defendant must be allowed an opportunity to questions jurors about race, if he / she so chooses.

Id. at 36. In other words, defense attorneys must be given an opportunity to question jurors about race if they elect to do so. However, the point that Clinton overlooks, is that nothing in in *Turner* obligates a trial judge to question jurors about race if he or she decides that there is no reason for pursuing that particular inquiry. He just cannot prevent a defense attorney from doing so.

In the present case, defense counsel never asked the trial court to pursue this line of *voir dire*, and the trial court was under no constitutional obligation to purse it. In *Turner*, the Supreme Court noted that trial courts have no obligation to pursue the topic of race *sua sponte*. *See*, *Turner*, 476 U.S. at fn. 10 ("Should defendant's counsel decline to request voir dire on the subject of racial prejudice, we in no way require or suggest that the judge broach the topic *sua sponte*."); *See also*, *Spencer v. Murray*, 18 F.3d 229, fn. 6 (4th Cir. 1994) ("*Turner* specifically states that a court does not have to raise the question [of race] sua sponte and that the issue of whether such questioning is appropriate is best left to the discretion of counsel.")

Response to Proposition of Law 16: Counsel was not constitutionally deficient during voir dire, the trial, or the penalty phase; and Clinton cannot demonstrate prejudice.

At every turn in this trial, Clinton was zealously represented by two highly-qualified and seasoned defense attorneys. The record demonstrates that defense counsel took on the prosecution at every turn and persuasively advocated for their client. Based on this record, Clinton cannot demonstrate that his attorneys "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). The verdicts in this case were not due to any deficiencies in counsel's performance, but were the logical conclusion of the overwhelming evidence presented by the State.

A. Standard of Review

These claim are governed by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In *Strickland*, the United States Supreme Court held that, in order to show counsel was ineffective, a defendant must meet a two-prong test. The defendant must demonstrate (1) deficient performance, and (2) prejudice. *Id.* at 697. The Sixth Amendment guarantees that trial counsel will be reasonably competent, not that they will be perfect litigators. *Baze v. Parker*, 371 F.3d 310 (6th Cir. 2004). According to the United States Supreme Court, the "Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." *Bobby v. Van Hook*, 558 U.S. 4, 9, 130 S.Ct. 13 (2009). The Supreme Court recently held "counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,' and that the burden to 'show that counsel's performance was deficient' rests squarely on the defendant." *Burt v. Titlow*, 134 S.Ct. 10, 17, 187 L.Ed.2d 348 (2013). "*Strickland* commands that a court 'must indulge [the] strong presumption' that counsel 'made all significant decisions in the exercise of reasonable professional judgment.'" *Cullen v. Pinholster*, 131 S. Ct. 1388, 1407 (2011). In other words, reviewing courts must not only "give the attorneys the benefit of the doubt… but [must] affirmatively entertain the range of possible reasons [omit] counsel may have had for proceeding as they did." *Id.* "Petitioner bears the burden of overcoming the presumption that the challenged action *might* be considered sound trial strategy." *Carter v. Mitchell*, 443 F.3d 517 (6th Cir. 2006). Even debatable trial tactics do not constitute ineffective assistance of counsel. *State v. Clayton*, 62 Ohio St.2d 45 (1980).

In order to succeed on this claim, Clinton must also demonstrate that his attorney's alleged deficiencies caused him prejudice. It is not enough for Clinton to merely allege that the errors had "some conceivable effect on the outcome of the proceeding." *Strickland*, 466

U.S. at 694. Instead, Clinton must demonstrate a "reasonable probability" that, but for his counsel's deficient errors, the resulting sentence would have been different. *Id*. There is an insufficient showing of "prejudice" where "one is left with pure speculation on whether the outcome of the trial * * * could have been any different." *Baze v. Parker*, 371 F.3d 310 (6th Cir. 2004).

B. Clinton's trial attorneys provided competent, strategically-sound representation

1. Defense counsel cross-examination on the topic of Heather Jackson's traffic stop was effective.

In an effort to take this Court's attention away for overwhelming evidence of guilt, Clinton complains that trial counsel was ineffective for not being persistent enough during the cross-examination of witnesses about Heather Jackson being pulled over shortly before the murders and telling the police that she had information regarding drug activity. "The extent and scope of cross-examination clearly fall within the ambit of trial strategy, and debatable trial tactics do not constitute lack of effective assistance of counsel." *State v. Dixon*, 101 Ohio St.3d 328, ¶54, 805 N.E.2d 1042 (2004). Clinton does not dispute that trial counsel cross-examined Danielle Sorrell, Heather's best friend, about Heather allegedly reporting to police about drug-trafficking after drugs were found in her possession during a traffic stop. (Tr. 419-20.) But he chastises his attorney for not ignoring the trial court after it sustained the prosecution's objection to this line of questioning. A defense attorney cannot be found ineffective for abiding by a trial court's evidentiary ruling. *People v. Petty*, 2012 Il App. (1st) 101611-U (Ill. App. Ct. 2012).

Clinton fails to mention that defense counsel also crossed Detective Wichman (the lead investigator) extensively about this same topic. There is no question that defense counsel focused on Tom Hanson as their alternative suspect. (Tr. 845-846.) Det. Wichman admitted that they investigated Tom Hanson because he reportedly provided Heather with drugs on the night

of the murders, but Hanson denied doing so. (Tr. 847.) Det. Wichman admitted that surveillance video showed Hanson driving away from Heather's house "hastily" on the night of the murders. (Tr. 847-848.) Det. Wichman further admitted that it was reported to him, by Joshua Case, that Hanson and Heather had some sort of argument that same night. (Tr. 850.) During interviews, Hanson denied arguing with Heather. (Tr. 851-52.) Det. Wichman acknowledged that Heather "was stopped in a traffic stop" a few days before her murder. (Tr. 854.) He admitted that that "a very small amount" of narcotics were found in her car. (Tr. 855.) When asked whether Det. Wichman investigated this lead regarding drug traffickers killing her for providing information to police, he explained "there was a lot of finger pointing, which caused us to basically, chase our tails quite a bit, wasting a lot of time and hours[.]" (Tr. 855-56.) On cross-examination, Det. Wichman recalled that "I heard that she was labeled as a snitch at one time. I'm not sure of the extent of that." (Tr. 857.) He further admitted that, in drug culture, "that is not a very good thing." (Tr. 857.) Not only was this a competent cross-examination of a Det. Wichman for purposes of *Strickland*, it was very good cross - period. Clinton's claims that trial counsel failed to cover Heather's traffic stop effectively is refuted by the record.

Even assuming deficient performance, in the end, Clinton cannot demonstrate prejudice because he simply cannot explain away his DNA evidence on the ligatures of the children, his DNA on Celina's underwear, his history of (and apparent fondness for) ligature strangulation, his damning statements to his mother while in jail, the hospital surveillance videos showing his white Cadillac being the last vehicle to visit Heather's house in the early morning hours, and his inculpatory admission to being present at Heather's home at or around the time of murders.

2. Defense counsel was not ineffective for following Clinton's directive to not present a tradition mitigation case and only give an unsworn statement.

As discussed in the State's response to Proposition of Law I, the trial court was under no obligation to conduct an *Ashworth* colloquy because Clinton had given an unsworn statement. The record demonstrates that defense counsel ensured that Clinton's decision to limit the penalty-phase presentation to his unsworn statement was knowing and voluntary. On the record, defense counsel stated that, before the jury summation, they spoke with Clinton and his mother "just to make sure his decision not to put on mitigation, other than a statement, was - - was made." (Mit. Hrg. p. 123.) Because defense counsel was carefully following the plain wording of this Court's decision in *State v. Roberts*, Clinton cannot show deficient performance. (11/7/12 Hrg., p. 4.) As a precautionary measure, at trial counsel's direction, Clinton met with a forensic psychologist, Dr. Galit Askenazi, to ensure that his waiver was competent, despite there being no precedent requiring such precautionary measures. *See Schriro v. Landrigan*, 550 U.S. 465, 479, 127 S.Ct. 1933, 1942-43 (2007). Defense counsel submitted Dr. Askenazi's evaluation to the trial court. (Askenazi Rpt., Def. Ex. A.) In that report, which was placed in the record (as noted in the trial court's November 14, 2013 entry) Dr. Askenazi found that Clinton was fully aware of the meaning and consequences of his decision, and made that decision knowingly and voluntarily. Clinton understood what he had been convicted of, understood the purpose of mitigation and:

> stated that he knew that if he chose not to proceed with mitigation, that the death penalty would likely be imposed given the nature of his convictions, including sexual allegations and children, and the belief that the jury thinks he is a 'callous person' and there is no defense for what he was found guilty.
>
> Mr. Clinton stated that he wanted to waive mitigation because he felt that there was no legitimate reason for him to beg for his life for crimes he did not commit. […] He also does not want mitigation to bring to light the history of his family, which he prefers to keep private.

(Askenazi Rpt., 8-9.) The report also demonstrates that Clinton understood the parameters of the unsworn statement and was aware he could get help from his attorneys. (Askenazi Rpt, 9.) He

"expressed concern regarding being placed in a general prison population versus on death row." (Askenazi Rpt, 9.) Dr. Askenazi noted that Clinton had a good understanding of the proceedings and charges. (Askenazi Rpt, 9.) Dr. Askenazi concluded "with reasonable psychological certainty" that Clinton "is able to understanding [sic] the nature and objectives of the mitigation phase and to knowingly choose to waive mitigation at the present time." According to Dr. Askenazi, Clinton was competent to forego a traditional mitigation. (Askenazi Rpt. p. 10.) In Clinton's presence, defense counsel proffered the evidence they had gathered for mitigation and stated that they tried to discuss presenting it with Clinton and, "[i]t was clearly his decision not to[,]" and although he disagreed, he was "obligated to follow" it. (11/12/2013 Hrg. Tr. p. 135.) .") This Court has repeatedly emphasized "a defendant is entitled to decide what (he or she) wants to *argue and present* at mitigation in the penalty phase." *Roberts*, *supra*, at ¶140 (emphasis added.)

Clinton cannot show prejudice because an *Ashworth* colloquy would have merely confirmed that which Dr. Askenazi's report covered in more professional detail. Its pure speculation to assume that had the trial court conducted an *Ashworth* colloquy, Clinton would have allowed defense counsel to pursue the mitigation case his attorneys so diligently investigated. Clinton told both his attorneys that he simply "didn't want the family dysfunction to be put out for the public record." (11/13/2013 Hrg. Tr. p. 5.) Moreover, Clinton told Dr. Askenazi that he did "not want mitigation to bring to light the history of his family, which he prefer[red] to keep private." (Askenazi Rpt. p. 9.)

Clinton claims that his decision only to present an unsworn statement was somehow related to being intimidated by Nick Fee lacks credibility. There is absolutely no basis in the record to support this pure conjecture. Despite Mr. Fee's presence during the penalty phase,

Clinton spoke at length regarding this case. His unsworn statement takes up 63 pages in the penalty phase transcript. (Mit. Hrg. p. 28-91.) At the sentencing hearing, in Mr. Fee's presence again, Clinton stated that the proceedings were "bullshit" and that the upset people were "all full of shit." (Mit. Hrg. p. 28-91.) When asked if he had anything further to say in sentencing (after hearing the victim impact statements), Clinton replied, "No. Nick can kiss my ass." (Mit. Hrg. p. 28-91.) It is clear from the record that Clinton's claims of intimidation by Nick Fee lack credibility.

Clinton chose to waive the presentment of a traditional mitigation case, and only present an unsworn statement. He cannot show prejudice by pointing to evidence that he precluded his attorneys from presenting. It should be noted that when "assessing whether a defendant's counsel was ineffective at the mitigation hearing for failure to introduce certain evidence, the *focus* must be on whether *the investigation* supporting counsel's decision not to introduce mitigating evidence of the defendant's background was itself reasonable." *Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (emphasis added). Clinton is not questioning counsel's investigation of his background. Instead, Clinton is challenging counsel's decision to abide by his own wishes, and not present a traditional mitigation case. However, Clinton was specific about what he was willing to allow at mitigation – an unsworn statement. Counsel cannot be found ineffective for following their client's specific directives.

Because Clinton prohibited his attorneys from presenting evidence of mitigation, and chose to only given an unsworn statement, he cannot show prejudice. *Schriro*, 550 U.S. at 475; *See also*, *Cummings v. Sec. Dept. of Corr.*, 588 F.3d 1331, 1358 (11th Cir. 2009) ("A competent defendant's clear instruction not to investigate or present mitigation also implicates the prejudice prong[.]") According to the Supreme Court, when a defendant instructs his attorneys not to

present mitigation, "counselor's failure to investigate further could not have been prejudicial[.]" *Id*. In other words, "a defendant who refused to allow the presentation of any mitigation evidence could not establish *Strickland* prejudice based on his counsel's failure to investigate further possible mitigation evidence." *Id*. at 478; *See also*, *Taylor v. Horn*, 504 F.3d 416, 455 (3rd Cir. 2007) (Ct. denied relief because "whatever counsel could have uncovered, [Clinton] would not have permitted any witness to testify, and was therefore not prejudiced by any inadequacy in counsel's investigation or decision not to present mitigation evidence.") Counsel was able and willing to present Clinton's mitigation case. The only obstacle to that presentation was Clinton himself. To consider mitigation evidence that was properly investigated by defense counsel, which they stood ready and willing to present had Clinton permitted it, as evidence of prejudice allegedly caused by their fictitious follies, would be absurd and invite future gamesmanship.

3. Counsel is not ineffective for waiving Clinton presence at the Nov. 7th status conference when that is exactly what he directed them to do.

Without any attempt to explain his arguments, Clinton asserts that his trial counsel were ineffective for waiving his presence from the hearing held after the guilty verdicts were returned but before the mitigation phase began (Clinton Brief, p. 144.) During the November 7th status conference, Clinton's attorneys indicated that Clinton did not want to come to court "for any reason, except for to give his statement, and he asked us to convey to the Court that he doesn't want to be moved." (11/7/13 Hrg. p. 5.) Counsel informed the court that Clinton did not want to his attorneys present anything as mitigation or for his lawyers to make any argument, but would be presenting an unsworn statement. (11/7/13 Hrg. 4.) It is clear from the record that trial counsel accurately recited Clinton's decisions. (Askenazi Rpt, 9.) Clinton chose to present only an unsworn statement. And the record shows that trial counsel took the appropriate and

necessary steps to ensure that Clinton's decision to present only his unsworn statement was competent and intelligent. Trial counsel listened to, and followed, Clinton's wishes. They were not ineffective for waiving his presence at the hearing where they conveyed those wishes, particularly since he told them that he did not want to be moved for any hearings. (11/7/13 Hrg. 5.) Furthermore, Clinton's deficient performance argument fails because he is legally wrong in his assertion that trial counsel cannot waive the defendant's presence on the defendant's behalf at a conference conducted week before the penalty phase began. *State v. Brinkley*, 105 Ohio St. 3d 231, P122 (2005). Furthermore, Clinton cannot demonstrate prejudice because, even had Clinton attended the November 7th hearing, it is pure speculation to assume that, after doing so, he would have given his attorneys the green light to present a traditional mitigation case.

4. Counsel made a strategic decision not to object to Det. Clark's testimony.

The premise of Clinton's claim is incorrect. First, defense counsel fought hard to prevent any testimony regarding Misty Keckler's homicide from being introduced. (R. 122, Motion; Tr. 962-67, 1152-53; R. 129 & 201, Orders.) Moreover, Det. Clark was not offering expert testimony, rather only relaying information he gathered during his investigation of the Keckler murder. His testimony was based on his experience and his personal knowledge of the investigation, including his observations at the crime scene and during the autopsy. Furthermore, Clinton pled guilty to involuntary manslaughter for causing Ms. Keckler's death. (Tr. 961.) Had Clinton's counsel objected, they ran the risk that the State would respond by calling in a coroner to testify regarding those matters, which would increase the amount of time and testimony devoted to Ms. Keckler's homicide. Clinton's defense counsel had received a copy of Ms. Keckler's autopsy report and may have strategically decided to avoid further testimony regarding that topic. *See* Judgment Entry, June 14, 2013 and exhibits (under seal).

5. Since no biased jurors sat on the jury, counsel was not ineffective at voir dire.

In his next sub-claim, Clinton argues that defense counsel was ineffective for allowing certain, allegedly-biased jurors to sit on the panel. Where there was a lack of evidence of any bias, Clinton's trial counsel acted within the bounds of their professional responsibility when they conducted *voir dire* in this case. *State v. Treesh*, 90 Ohio St.3d 460, 490 (2001). "There is no constitutional prohibition against jurors simply knowing the parties involved or having knowledge of the case." *State v. Hale*, 119 Ohio St.3d 118, 150 (2008). Merely being acquainted with someone involved in the case does not necessarily undermine a juror's assurance of impartiality. *McQueen v. Scroggy*, 99 F.3d 1302, 1320 (6th Cir. 1996) ("[t]he Constitution does not require ignorant or uninformed jurors; it requires impartial jurors.") Furthermore, because Clinton cannot show that any of the jurors he complains about were actually biased, he cannot show prejudice. *Treesh*, at 490. (See, Response to Proposition of Law 7.) Simply knowing a random law enforcement officer does not render a juror biased. *State v. Vasquez*, 2004-Ohio-3880, ¶14 (10th Dist. 2004). Nor does simply knowing another juror somehow render them unfit for service. *State v. Lundgren*, 73 Ohio St.3d 474 (1995). Knowing a witness does not automatically render a juror biased. *State v. Stein*, 2007-Ohio-1153, ¶15 (5th Dist. 2007). Knowing a prosecutor, not even assigned to the case, does not cause a juror to be unfit. *State v. Treesh*, 90 Ohio St.3d 460, 490 (2001).

6. Counsel was under no constitutional obligation to voir dire on the issue of race.

Clinton argues that because he is a different race from his victims, his attorneys were constitutionally obligated to question prospective jurors about race during voir dire. (Clinton Brief, p. 148.) While the trial court could not prevent Clinton's attorneys from asking the jurors about racial bias, his attorneys were not required to question the jurors about racial bias. *Turner v. Murray*, a case Clinton relies exclusively upon, is not a Sixth Amendment case and has

nothing to do with ineffective assistance of counsel. Rather, in *Turner*, the Supreme Court held that although a trial court is given much discretion during *voir dire*, it cannot prevent an attorney from questioning jurors about racial bias where the victim and the defendant are of different races. *Turner v. Murray*, 476 U.S. 28, 35, 106 S.Ct. 1683 (1986).

"[T]he Constitution . . . does not dictate a catechism for *voir dire*, but only that the defendant be afforded an impartial jury." *Morgan v. Illinois*, 504 U.S. 719, 729, 112 S.Ct. 2222 (1992). However, the point that Clinton overlooks, is that nothing in in *Turner* obligates an attorney question jurors about race if he or she chooses not to pursue that particular inquiry. The actual decision to question on racial prejudice is best left to the discretion of counsel. *Spencer v. Murray*, 18 F.3d 229, 234 (4th Cir. 1994). Counsel must weigh the risks of interrogating prospective jurors on such a sensitive matter. *Jacobs v. Horn*, 395 F.3d 92, 118 (3rd Cir. 2005); *Lear v. Cowan*, 220 F.3d 825, 829 (7th Cir. 2000). As to prejudice, Clinton offers only speculation by stating "[t]he possibility that racial bias thereby crept into the panel and their deliberations cannot be ignored." (Clinton Brief, p. 149.) In other words, Clinton cannot demonstrate prejudice.

7. Defense counsel were successful in having Juror 363 removed for cause.

In his seventh and eighth subparts of this Proposition, Clinton complains that counsel was ineffective in the manner they handled Juror 363. However, in the end, defense counsel was successful in having him removed for cause. (Tr. 208.) A jury is presumed "impartial… so long as no biased juror is actually seated at trial." *Skilling v. United States*, 561 U.S. 358, 425, 120 S.Ct. 2896 (2010) (J. Alito, concurring.) To show prejudice, Clinton must show that the jurors, who actually sat, and allegedly overheard Juror 363's comments, were somehow biased by his comments. *State v. Mundt*, 115 Ohio St.3d 22, ¶67-68 (2007). Clinton cannot meet this threshold. Clinton's jury was instructed to base their conviction solely on the evidence proffered a trial. (Tr.

1245-48. 1291.) In fact, they were specifically instructed to "decide the case solely on the evidence that is submitted in this case" and the "law requires that you consider only the testimony and evidence that you hear and see in this courtroom." (Tr. 360.) There is a strong presumption that jury followed the instructions that were given by the trial judge. *State v. Garner*, 74 Ohio St.3d 49, 59, 656 N.E.2d 623 (1995). Furthermore, Clinton cannot show prejudice. Even if counsel had Juror 363 removed more quickly, it is pure speculation to assume that this would have resulted in a either an acquittal or a different sentence.

8. Defense counsel competently sought a change of venue.

In a perfunctory manner, Clinton claims counsel was ineffective for not more effectively seeking a change of venue for allegedly pervasive pretrial publicity. However, Clinton fails to cite a single news article, a single instance during individual and general juror voir dire, or anything at all, to support the claim. Moreover, the trial court considered the merits of Clinton's change-of-venue motion and the publicity surrounding the case and correctly denied that motion. Trial counsel's failure to include articles in the trial court record does not rise to the level of ineffective assistance of counsel because (1) the trial court considered online sources, (2) the trial court agreed that the pretrial publicity was extensive, and (3) the trial court found that prejudiced should not be presumed and further found, after voir dire, that prejudice had not been shown. (R. 180 – 10/21/13 Entry.) Even if it would have been prudent to attach copies of the articles, there was no prejudice from the failure to do so since there is no demonstration that the result would have been different since the seated jurors expressed no difficulty in setting aside any pretrial knowledge they had. Since there was no prejudice on the empaneled jury, there was no prejudice in defense counsel's decision not to attach newspaper articles to his motion. *See State v. White*, 82 Ohio St.3d 15, 24-25, 693 N.E.2d 772 (1998). There is no allegation or evidence in this case

that the media's presence during the trial created a disruption. *State v. Mammone*, 139 Ohio St.3d 467, ¶56-60, 13 N.E.3d 1051 (2014). For the following reasons, his claim must fail.

9. Counsel made a strategic decision not to call a DNA expert.

Clinton argues that defense counsel were ineffective for not obtaining a DNA expert. (Clinton Brief, p. 152.) Clinton filed an ex parte motion for experts including a DNA expert. (R. 24 – Motion for ex parte experts.) Counsel was able to persuade the trial court to order the State to grant extensive DNA discovery on Ohio Bureau of Criminal Investigation. (R. 80, Order granting DNA discovery.) Because Clinton received the assistance of a DNA expert, extensive discovery, there is no basis for this claim. The decision not to call an expert does not constitute ineffective assistance of counsel, particularly when it comes to a DNA expert because they may provide more inculpating evidence. *State v. Thompson*, 2014-Ohio-4751, ¶244; *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, ¶97; *State v. Hartman*, 93 Ohio St.3d 274, 299, 754 N.E.2d 1150 (2001). Additionally, the Ohio Supreme Court has held that, "the failure to call an expert and instead rely on cross-examination does not constitute ineffective assistance of counsel." *State v. Nicholas*, 66 Ohio St.3d 431, 436-37, 613 N.E.2d 225 (1993). A defense attorney can make a reasonable "decision to rely on cross-examination… particularly since the results of defense DNA testing might not have turned out to be favorable to the defense." *State v. Foust*, 105 Ohio St.3d 137, ¶ 97, 823 N.E.2d 826 (2004).

10. Counsel was not ineffective for declining to object to relevant, admissible evidence.

Clinton complains that counsel was ineffective for not objecting to "prejudicial, irrelevant, and cumulative" photographs. (Clinton Brief, p. 153.) It is worth noting, this crime was not made especially gruesome by the manner and method police photographed the police scene. Rather, this crime was horrific because a mother and her two children were strangled to

death. The crime scene photos were necessary to give the jury an accurate description of the scene and evidence collected. The photos and evidence were neither irrelevant nor redundant. Thus, Clinton cannot show either deficient performance or prejudice.

11. Clinton was solely responsible for his unsworn statement.

There is also no constitutional right to an unsworn statement. *Bedford v. Collins*, 567 F.3d 225, 237 (6th Cir. 2009). Capital defendants only have a statutory right to make an unsworn statement. R.C. 2929.03(D)(1). The plain statutory language only contemplates a "statement," and places no restrictions on his topics for discussion. *State v. Lynch*, 98 Ohio St.3d 514, ¶107 (2003) ("trial court acted within its discretion by following R.C. 2929.03(D)(1) language and limiting defendant's presentation to a statement.") This Court has emphasized "a defendant is entitled to decide what (he or she) wants to *argue and present* at mitigation in the penalty phase." *Roberts*, at ¶140 (emphasis added.) This is especially true for an unsworn statement, where, practically speaking, a defendant is given a *carte blanche* opportunity to talk to the jury about any topic he deems appropriate, truthfully or not, and has no fear of being confronted by means of cross-examination.

Clinton "not counsel, had the choice whether to testify or give an unsworn statement." *State v. Brooks*, 75 Ohio St.3d 148, 157, 661 N.E.2d 1030 (1996); *Mammone*, 139 Ohio St.3d. at ¶170. Notwithstanding, "the decision to give an unsworn statement is a tactical one, a call best made by those at the trial who can judge the tenor of the trial and the mood of the jury." *Mammone*, at ¶170. Defense counsel may not always be privy to the defendant's plans for his unsworn statement. A defendant may have a long list of topics he wishes to get off his chest, and is uninterested in a defense attorney's advice on organization, manner, and style. Even the defendant and the defense team, who are able to work with a defendant willing to prepare his statement, cannot predict what topics a defendant will talk about when he actually stands up to

speak, particularly when he is asking the jury to spare his life. In other words, it is highly likely that a defendant – caught up with emotion – may *ad lib* from script. Ultimately, it is the defendant, not defense counsel, who stands before the jury and makes an unsworn statement. Trial counsel should not be graded on the defendant's performance. Whether good or bad, Clinton made the unsworn statement he wanted to make, and he was going to make, regardless of the actions, or inactions, of defense counsel.

12. If defense counsel advised Clinton not to testify, that advice was prudent.

The decision whether or not to testify belonged to Clinton, not his attorneys. *Nix v. Whiteside*, 475 U.S. 157, 174 (1986). Due to overwhelming evidence, and Clinton's history, assuming defense counsel advised Clinton not to take the stand, such counsel, was completely prudent. Furthermore, assuming Clinton had testified under oath, and subjected himself to cross-examination, he would have still been convicted, and it is fanciful to suggest otherwise.

13. Because Clinton's statement to police was voluntary, counsel was under no constitutional obligation to file a motion arguing otherwise.

Clinton claims counsel was ineffective for not suppressing his allegedly involuntary statement. First, counsel was effective in filing a motion that convinced the trial court to suppress part of his statement. Second, watching the recorded interview demonstrates that Clinton's statement was voluntary. (See, Response to Proposition of Law X.) From the recording, it is apparent that there were no physical or mental obstacles to Clinton providing a voluntary statement. Clinton's answers to Detective Wichman's questions were logical and cohesive. There was no indication that Clinton was confused about what was happening. He had no trouble recalling memories and clearly indicated that he understood the ramifications of the situation. Clinton's age and previous experience with the criminal justice system indicate that he was familiar with the criminal system and the rights afforded to him under that system.

Detective Wichman never threatened, coerced, or intimidated Clinton during the interview. The interview was relatively brief, approximately three hours long. *See State v. Green*, 90 Ohio St. 3d 352, 366, 738 N.E.2d 1208 (2000) (pretrial statement following 12-hour interview found to be voluntary). Clinton never told Detective Wichman that he did not want to talk, never asked the detective to stop asking questions, and never indicated that he wished to remain silent. *See*, State's Ex. 117. The totality of the circumstances shows that Clinton's statement was voluntary. Counsel was under no constitutional obligation to pursue a baseless motion. Furthermore, prejudice is lacking given that Clinton in his taped statement continually denied committing the murders. Even if trial counsel had successfully convinced the trial court to suppress the entire statement, he still would have been convicted due to overwhelming evidence.

14. Any attempt by counsel to object to the introduction of the recorded jail conversation between Clinton and his mother would have been futile.

Clinton's phone call to his mother was highly relevant, inculpatory, and not more prejudicial than probative, counsel was under no obligation to make a futile objection to its introduction. Clinton told his mother to "look at all the people I hurt." He told her that she "should know that it would happen again…now it's even worse than before," and that "something in [him]" causes him to "just lose it." Clinton also specifically referred to the Keckler homicide, saying that he "…thought it was over…I thought after 13 years I would be over that, and I just wouldn't believe that shit would happen no more." (Clinton Jail Call Transcript, pg. 5-8.) This evidence was highly probative given that it drew an unmistakable link between the Jackson murders and the Keckler murder, and further helped the jury to understand that Clinton had a *modus operandi* – strangling his victims by ligature. In other words, this phone conversation was an important to link to proving the identity of the perpetrator of all of

the crimes charged in the case. Furthermore, it provided Clinton's motive for killing the Jacksons and sexually assaulting E.S.

15. Counsel was not constitutional obligated to voir dire public spectators.

Clinton claims that counsel was ineffective for not conducting a voir dire of public spectators at the trial about attorney-client information that they may, or may not have, overheard. (Clinton Brief, p. 157.) First, there is no evidence that the spectators heard anything. Second, there is nothing in the record suggesting that even if they did overhear comments made between counsel and Clinton – it somehow denied him a fair trial. In other words, Clinton can point to any evidence of guilt, or any tactical advantage, which was brought to bear based on allegedly overheard information elicited from the live-stream video. *See*, *State v. Osie*, 140 Ohio St.3d 131, ¶127-146 (2014). Thus, he cannot show prejudice.

16. Nothing in the record supports Clinton's contention that counsel was constitutionally obligated to request that Nick Fee be removed from the courtroom during the trial.

Clinton asserts that Mr. Fee's presence was disruptive at trial, but points to nothing in the record to support that contention. Before the trial, defense counsel objected to Nick Fee's presence. (Tr. 726, 810-12.) The only other time Fee is referenced in the transcript is when he addresses the court after Clinton is sentenced to death.

17. The trial court would have denied a Rule 29 motion as to the rape of Celina Jackson regardless of the arguments made by counsel.

After the prosecution rested, defense counsel raised a motion for acquittal pursuant to Crim. R. 29 as a "general motion for the counts, but the specific count is the … rape against Celina." (Tr. 1147.) Defense counsel argued "the coroner did not testify to a medical certainty that the intrusion into her anal cavity occurred premortem… [o]bviously, if its postmortem, it's

not rape. It's abuse of a corpse." (Tr. 1148.) The trial court denied the motion. (Tr. 1149.) Clinton argues, without elaboration, that "defense counsel could have, and should have, presented the argument now presented in Proposition of Law No. XX[.]" (Clinton Brief, p. 159.) Dr. Scala Barnett testified that the victim's underwear "caught my attention because that is not how people put their underwear on, even kids." According to Dr. Scala-Barnett, "[y]ou pull your underwear up by the waistband, and this is rolled." Stating that she has witnessed this exact situation "many times," and it is a red flag in her occupation. Dr. Scala-Barnett testified that "[o]ften times, in a sexual assault, the body will be redressed or the clothes will be put back on." (Tr. 1125.) Given that Dr. Scala-Barnett is a coroner who has conducted 8,300 autopsies since 1985, this testimony was not beyond the scope of her knowledge and expertise. (Tr. 1098.) *See*, *People v. Prince*, 156 P.3d 1015, 1048 (Cal. S. Ct. 2007) ("an expert may… offer the opinion that evidence seized by authorities is of a sort typically used in committing the type of crime charged.) Dr. Scala-Barnett testified that Heather Jackson's "rectum is dilated… it is more open than it normally is after death." (Tr. 1118.) As such, the dilation shows "that something was most likely introduced in there to keep it open like that." (Tr. 1119.) According to Dr. Scala-Barnett, this occurred "perimortem… on or about the time of death." (Tr. 1119.) According to Dr. Scala-Barnett, Celina also had rectal dilation, similar to her mother. (Tr. 1129-30.) Furthermore, Clinton's DNA was found in the anal swab collected from Celina Jackson, and his sperm cell was collected from her underwear. (Tr. 907 -909, 918 – 923; St. Ex. 122, St. Ex. 123.) The trial court's denial of a directed verdict was inevitable regardless of which argument was raised by counsel.

18. Given that defense conducted a thorough investigation of Clinton history and background, and Clinton himself ordered them not to present a traditional mitigation case, he is precluded from establishing prejudice.

In this case, Clinton did not waive the presentation of mitigation in its entirety, but instead chose to limit his presentation to an unsworn statement. By utilizing his statutory right to an unsworn statement, Clinton was provided a final opportunity to proffer whatever mitigation he believed was personally relevant. R.C. 2929.03(D)(1). This Court has repeatedly emphasized "a defendant is entitled to decide what (he or she) wants to *argue and present* at mitigation in the penalty phase." *Roberts, supra*, ¶140 (emphasis added.)

Shortly before the penalty phase began, defense counsel proffered "all the mitigation" uncovered by their investigations "in case [Clinton] changes his mind." (11/12/2013 Hrg; Tr. p. 16.) On the record, defense counsel informed the trial court that they spoke with Clinton and his mother "just to make sure his decision not to put on mitigation, other than a statement, was made." (11/12/2013 Hrg. Tr. p. 123.) In Clinton's presence, defense counsel proffered the evidence they had gathered for mitigation and stated that they tried to discuss presenting it with him and, "[i]t was clearly his decision not to." (11/12/2013 Hrg. Tr. p. 123-25.) Defense counsel informed the trial court that one of the reasons Clinton chose not to present mitigation "is he didn't want the family dysfunction to be put out for the public record." (11/12/2013 Hrg. Tr. p. 126.) The trial judge allowed defense counsel to file the information under seal. (11/12/2013 Hrg; Tr. p. 127-29.)

However, Clinton now insists "trial counsel were ineffective when they failed to present the available and compelling evidence that they were apparently ready to present." (Clinton Brief, p. 159.) The record is clear that trial counsel were able and willing to present a traditional mitigation case covering myriad allegations of bad childhood. Clinton does not seem to dispute thoroughness of the investigation. However, with tongue firmly in cheek, Clinton now has the audacity to criticize counsel for following his own instructions – not to present a traditional

mitigation case. "A defendant cannot be permitted to manufacture a winning [ineffective-assistance-of counsel] claim by sabotaging [his] own defense, or else every defendant clever enough to thwart her own attorneys would be able to overturn her sentence on appeal." *State v. Neyland*, 139 Ohio St.3d 353, ¶247, 12 N.E.3d 1112 (2014), *quoting*, *Owens v. Guida*, 549 F.3d 399, 412 (C.A. 6 2008). This claim is pure gamesmanship.

There is no real basis for Clinton's allegations of deficient performance because his attorneys conducted a thorough investigation of his background. It should be noted that when "assessing whether a defendant's counsel was ineffective at the mitigation hearing for failure to introduce certain evidence, the *focus* must be on whether *the investigation* supporting counsel's decision not to introduce mitigating evidence of the defendant's background was itself reasonable." *Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (emphasis added). An inmate's challenge is insurmountable where the attorney has completed a "thorough investigation of law and facts relevant to plausible options." *Strickland*, 466 U.S. at 690. In this situation, the attorney's strategic decisions are "virtually unchallengeable." *Wiggins*, 539 U.S. at 535. At the penalty phase, defense counsel is under no constitutional obligation to pursue a particular trial strategy if the attorney's decision is based upon a thorough investigation. *Clark v. Mitchell*, 425 F.3d 270, 284-286 (6th Cir. 2005). In fact, the decision of what mitigating evidence to present during the penalty phase of a capital trial is a matter of trial strategy. *State v. Bryan*, 101 Ohio St. 3d 272, 300 (2004). In order to grant relief for ineffective counsel during the penalty phase, "it would have to be on the grounds of [defense counsels'] failure to research mitigating evidence, *not their failure to present it*." *Scott v. Mitchell*, 209 F.3d 854, 881 (6th Cir. 2000) (emphasis added). An informed decision is presumed strategic, however questionable in hindsight. *Awkal v. Mitchell*, 613 F.3d 629, 640 (6th Cir. 2010) (*en banc*). Clinton cannot show deficient

performance because he is not questioning counsel's investigation of his background, but their decision to abide by his directive not to present a traditional mitigation case. Counsel should not be found ineffective for following their client's specific directives.

Before trial, Clinton requested funds for a mitigation specialist and independent psychiatrist (*ex parte* under seal). (R. 24 & 57.) The trial court granted funds of mitigation specialist – Mark Rooks, Ohio State Public Defender Office (R. 31.) On March 5, defense counsel filed a motion to compel Erie County Children Services to produce Clinton's records. (R. 84.) In fact, at request of defense counsel, defense counsel conducted a hearing where they were able to determine the extent – four banker boxes full - of Clinton's childhood Children Services records. (10/17/13 Hrg., p. 1-28.) Defense counsel were able to obtain the Children Services records for Clinton's siblings. (R. 88.) Defense counsel's thorough mitigation investigation is outlined under seal: Ex. A - Dr. Askenazi's Competency/Mitigation Report; Ex. B – Defense Timeline; Ex. C – Summary Interview with Dorris Baccus; Ex. D – Summary Interview with Willie Clinton Jr.; Ex. E – Summary Interview with Astella Cole; Ex. F – Summary Interview Crystal Miller; Ex. G – Summary Interview with Georgia Thomas; Ex. H – Summary Interview of Reyna Miller; Ex. I – Summary Interview with Linda McKinley; Ex. J – Summary Interview of Anthony Henson; Ex. K – Summary Interview of Mercedes Charlton; Ex. L – Summary Interview of Curtis Clinton; Clinton's GED Certificate; Erie County Children and Family Services Records; ODRC Mental Health Records; Interview of Jemal Glover. (11/14/13 J.E. 704/155.) In his report, Dr. Askenazi reported that he relied upon (1) four different interviews and tests conducted with Clinton (10/20/12, 1/24/2013, 10/1/2013, 11/6/13), indictment, investigative reports, interview transcripts, and videos, legal records, ODRC medical and mental health records, Henry Herbert Goddard High School records, and Erie County

Children Services Records. (Dr. Askenazi Rpt. p. 2.) Dr. Askenazi's report details Clinton's childhood, education, occupation, and medical, and psychological history. (Dr. Askenazi Rpt. p. 2-5.) He also detailed Clinton's medication and substance abuse history. (Dr. Askenazi Rpt. p. 5-6.) Dr. Askenazi reported the tests he conducted on Clinton and results: Weschler Adult Intelligence Scale, 4th Ed. (WAIS-IV), Repeatability Battery for the Assessment of Neuropsychological Status (RBANS, Form A); Structured Inventory of Malingered Symptomatology (SIMS), Dissociative Experience Scale (DES). (Dr. Askenazi Rpt. p. 6-7.) Clinton scored a 96 IQ. (Id.) Dr. Askenazi found that Clinton suffers from Major Depressive Disorder, in full remission; Posttraumatic Stress Disorder, with Dissociative Symptoms, in remission; and Borderline Personality Disorder, with Antisocial Features. (Dr. Askenazi Rpt. p. 8.) Dr. Askenazi reported that Clinton had "no evidence of intellectual deficit or cognitive impairment. (Id.) No one can seriously question the mitigation investigation conducted by counsel in this case. *See*, Def. Exhibits A-M (Penalty Phase proffered exhibits – under seal); Def. Exhibit O (ODRC Mental Health records – under seal); Def. Exhibit N (Erie Co. J&FS records – under seal).

Attorneys are not allowed to present a mitigation case specifically prohibited by the client. "The United States Supreme Court has never suggested that the Eighth Amendment requires forcing an unwilling defendant to present mitigation in a capital case." *State v. Roberts*, 110 Ohio St.3d 71, ¶139 (2006). In *State v. Tyler*, this Court upheld a death sentence of a defendant who refused to allow his attorneys to put on several mitigation witnesses, and instead offered an unsworn statement. 50 Ohio St.3d 24, 27-28 (1990). According to this Court, the constitutional requirement for individualized sentencing grants the accused "an opportunity to introduce the mitigation evidence available to him… [b]ut where he chooses to forego that

opportunity, no societal interest counterbalances his right to control his own defense." *Id*. at 28. "[T]he Eighth Amendment compels no one to present mitigation against his will." *State v. Cowans*, 87 Ohio St.3d 68, 80 (1999). Upon Clinton's instructions, defense counsel did not present any mitigation evidence, besides his unsworn testimony, to support any mitigating factors in his case. (Mit. Tr. 93.)

Because Clinton prohibited his attorneys from presenting evidence of mitigation, and chose to only given an unsworn statement, he cannot show prejudice. *Schriro*, 550 U.S. at 475; *See also*, *Cummings v. Sec. Dept. of Corr*., 588 F.3d 1331, 1358 (11th Cir. 2009) ("A competent defendant's clear instruction not to investigate or present mitigation also implicates the prejudice prong[.]") According to the Supreme Court, when a defendant instructs his attorneys not to present mitigation, "counselor's failure to investigate further could not have been prejudicial[.]" *Id*. In other words, "a defendant who refused to allow the presentation of any mitigation evidence could not establish *Strickland* prejudice based on his counsel's failure to investigate further possible mitigation evidence." *Id*. at 478; *See also*, *Taylor v. Horn*, 504 F.3d 416, 455 (3rd Cir. 2007) (Relief denied because "whatever counsel could have uncovered, [Clinton] would not have permitted any witness to testify, and was therefore not prejudiced by any inadequacy in counsel's investigation or decision not to present mitigation evidence.") Counsel was able and willing to present Clinton's mitigation case. The only obstacle to that presentation was Clinton himself.

19. Preparing a jury for mitigation during voir dire is a sound practice.

Clinton takes his attorneys to task for preparing the jury, during voir dire, about mitigation evidence they uncovered, and then not following through after Clinton pulled the rug out from under them. Due to the attorney / client privilege, there is uncertainty in the record as

to exactly when Clinton made the decision to present only an unsworn statement. Clinton could have made this decision after any time. Counsel cannot be ineffective for laying seeds during *voir dire* about mitigation, especially in a case like this one, where evidence of guilt is overwhelming. Furthermore, Clinton cannot show prejudice because even if defense counsel had abstained from mentioning mitigation during *voir dire*, he would have still been convicted and sentenced the death.

20. Because defense counsel did not believe the prosecutor was utilizing peremptories with discriminatory intent, he was not obligated to raise a *Batson* challenge.

Juror 255 was related to several individuals, including a brother, who had either been sent to prison by the elected prosecutor or were on their way. (Tr. 222-231.) A prosecutor may strike a jury for any reason that is not based on discriminatory intent. *Purkett v. Elem*, 514 U.S. 765 (1995). In fact, a prosecutor may strike a potential juror for a "silly or superstitious reasons." *Id*. at 768. Trial counsel was under no constitutional obligation to make a baseless *Batson* challenge where, as the record demonstrates, he did not personally believe the prosecutor utilized a preemptory challenge for discriminatory purposes. Under *Batson*, when the movant makes a challenge, he has the initial burden of demonstrating that the other side had discriminatory motive for utilizing a preemptory challenge. In other words, defense attorneys are not required to raise *Batson* challenges when they truly believe the prosecutor has a good faith basis for the preemptory. Simply stated, trial counsel are not constitutionally obligated to raise a *Batson* challenge as a matter of routine, but rather, only when they have a good-faith basis for the accusation of discriminatory purpose.

21. Clinton's counsel were not ineffective for failing to request a different cautionary instruction.

The trial court did not err in admitting a captioned video of Clinton's interview. The correction instruction provided by the trial court alerted the jurors that they should not rely on the captions and Clinton's counsel were not ineffective for agreeing that the instruction was proper.

22. Dr. Scala-Barnett's testimony was not objectionable and failing to raise an objection did not cause Clinton prejudice.

Clinton alleges that defense counsel should have objected to portions of Dr. Scala-Barnett's testimony. The decision of when to object is a tactical one. *State v. Mundt*, 115 Ohio St.3d 22, ¶ 90. "A competent trial attorney might well eschew objecting * * * in order to minimize jury attention to the damaging material." *Id.* quoting *United States v. Payne*, 741 F.2d 887, 891 (7th Cir. 1984); *see also Lundgren v. Mitchell*, 440 F.3d 754, 774 (6th Cir. 2006). Defense counsel may also decide not to object based on a reasonable calculation that the testimony will not be harmful or may even be helpful to the defense case. *See id.* Experienced trial counsel may also choose not to object because "[o]bjections tend to disrupt the flow of a trial, [and] are considered technical and bothersome by the fact-finder." *State v. Campbell*, 69 Ohio St.3d 38, 53 (1994), quoting Louis A. Jacobs, Ohio Evidence: Objections and Responses (1989), at iii-iv.

Clinton now argues that counsel should have objected to the description of the ligature used to strangle Wayne, Jr. as a "froggy blanket," and his clothing as "jammies." This description was a proper way to identify and describe the ligature and clothing and would have been permissible regardless of an objection. Second, that counsel should have objected to Dr. Scala-Barnett's testimony that Celina had been redressed. Dr. Scala-Barnett testified that she had seen redressed bodies many times before and that, based on her personal knowledge, it would be "very uncomfortable" to wear one's underwear that way. Tr. 1124-25. Based on her

extensive experience as a coroner, Dr. Scala-Barnett testified that "redressing" is routine, and thus a red flag, in sexual assaults. Tr. 1124-25.

Clinton then makes the argument that trial counsel was ineffective for not crossing the coroner on her unwillingness to offer a time of death. Clinton speculates that alternative unknown suspects "seeking revenge" could have entered the residence through a window on the west side of the house, outside the view of hospital surveillance. However, Heather had only been living in the house a week. It is highly unlikely that strung out drug dealers "seeking revenge" would have even thought about video surveillance from the hospital across the street, and how they are positioned with respect to house, before devising a plan to enter the house through the only window unrecorded by surveillance and then committing the murders. Also, strung out drug dealers "seeking revenge" would not have likely murdered toddler and an infant who could not have identified them, and sexually assaulted the toddler to boot. Both the motive and modus operandi of these crimes match Clinton. Speculation that questioning about time of death would have led the jury to find Clinton not guilty is just that – speculation.

23. Any alleged victim-impact evidence did not cause Clinton prejudice.

Clinton makes no attempt to explain how Det. Nixon's testimony was victim-impact or how his counsel's failure to object caused him prejudice. The State denies any victim-impact evidence was introduced. The evidence of the murders was overwhelming and E.S. was adamant that Clinton was the person who raped and strangled her. Even a successful objection by defense counsel would not have resulted in a different verdict. Any alleged and unspecified victim-impact evidence did not result in Clinton's conviction – overwhelming evidence did that.

24. The rape charges against E.S. properly were going to the jury regardless of whether, or how, Clinton's attorneys requested a directed verdict.

In detail, E.S. described how Clinton raped her. (Tr. 1001-1010.) Regardless of how defense counsel would have argued for a directed verdict, the trial court would have ruled it was an issue was of credibility for the jury to decide.

25. The prosecutor's closing argument did not call for objections.

The State's closing arguments were proper and permissible, so counsel were not ineffective for deciding not to make additional objections. "[A] reasonable attorney may decide not to interrupt his opponent's closing argument." *State v. Myers*, 97 Ohio St.3d 335, ¶154, 780 N.E.2d 186 (2002). Moreover, objections can "'disrupt the flow of the trial' and 'are considered technical and bothersome by the'" jury. *State v. Campbell*, 69 Ohio St.3d 38, 53, 630 N.E.2d 339 (1994). Regardless, Clinton did not suffer prejudice due to overwhelming evidence of guilt.

26. Failure to object to court costs does not implicate the Sixth Amendment.

Strickland v. Washington is not about minor mistakes and omissions by defense counsel, but rather, representation so abysmal so as to deny a defendant his right to counsel under the Sixth Amendment. Clinton's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, at 687. Not objecting to imposition of court costs does not even remotely come close to constitutional abandonment required so as to trigger the Sixth Amendment.

27. Clinton cannot show cumulative errors by trial counsel.

Assuming cumulative error applies in a *Strickland* context, or that Clinton suffered any such trial counsel errors, he could not overcome the overwhelming evidence of guilt supporting his conviction and the nearly insurmountable aggravating factors supporting his death sentence.

Response to Proposition of Law 17: A prosecutor does not commit misconduct by offering relevant, admissible evidence or by making a proper, permissible closing argument.

A. Standard of Review

The test for prosecutorial misconduct is whether the prosecutor's conduct, at trial, was improper and prejudicially affected the substantial rights of the defendant. *State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶110; *State v. Lott*, 51 Ohio St.3d 160, 165, 555 N.E.2d 293 (1991) The analysis focuses on "the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). A prosecutor's conduct during trial cannot be grounds for error unless the conduct deprives the defendant of a fair trial. *Mammone* at ¶109; *State v. Apanovitch*, 33 Ohio St.3d 19, 24, 514 N.E.2d 394 (1987). "The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed2d 144 (1986), quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). If a prosecutor's conduct was improper, the Court "must consider the effect it had on the jury 'in the context of the entire trial.'" *Mammone* at ¶109, citing *State v. Keenan*, 66 Ohio St.3d 402, 410, 613 N.E.2d 203 (1993).

When the defendant does not object to the alleged misconduct during trial, the review is conducted using the plain-error standard, and the defendant must show "both that misconduct occurred and that but for the misconduct, the outcome of the trial clearly would have been otherwise." *Mammone* at ¶111; Crim.R. 52(B). Plain error can be found when the error is "obvious", *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002), and it is clear that "but for the error" the trial's outcome would have been different, *see State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), at paragraph two of the syllabus. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id.* at paragraph three of the syllabus.

B. The State did not violate Clinton's due process rights when it authorized BCI to consume some DNA evidence during testing.

As set forth in response to Proposition of Law V, Clinton's due process rights were not violated by the consumption of DNA evidence during forensic testing. The evidence was not materially exculpatory and there was no bad faith in authorizing the testing. *See Arizona v. Youngblood*, 488 U.S. at 58; *Geeslin*, 116 Ohio St.3d at ¶10. The suggestions set forth in the ABA guidelines do not change this result. The guidelines were not controlling authority and did not impose a duty on the State. This proposition of law lacks merit and should be denied.

C. The State offered relevant, admissible evidence.

In sub-part C, Clinton sets forth three types of evidence that, he contends, the state improperly offered. These claims are "[a]t bottom * * * evidentiary claims." *Mammone* at ¶114. All relevant evidence is generally admissible under Evid.R. 402, though it may be excluded if "its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence." Evid.R. 403(B). Evidence must be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice." Evid.R. 403(A). "If the evidence was properly admitted, then the prosecutor's decision to offer it cannot form the basis of a misconduct claim." *Mammone* at ¶116.

1. The State properly introduced relevant, probative photographs

As set forth in response to Proposition of Law IX, the trial court properly admitted the photographs. Because the photographs were properly admitted, they cannot form the basis of a misconduct claim.

2. The State did not introduce victim impact testimony

Clinton objects to five statements made by witnesses during the trial – two concerning the murders of the Jackson family and three concerning the rape of E.S.

As to the two statements regarding the murders, neither is a victim impact statement. The testimony does not concern the effect that the deaths of Heather, Wayne, and Celina had on their friends or family members, or the witness's opinion of the appropriate sentence to be imposed. *See State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶247-48; *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶237-39; *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶213 (Evidence was not victim impact evidence where it was not offered "to show the victim's suffering, the family's grief, or the loss to the community caused by these crimes."). This testimony was proper and permissible.

Likewise, none of the statements regarding E.S. concerned her opinion, or any other witness's opinion, about the appropriate sentence to be imposed. Even if this testimony were characterized as victim-impact evidence, it was related to the facts attendant to the offense and therefore "clearly admissible" in the guilt phase. *McKnight* at ¶98, quoting *State v. Fautenberry*, 72 Ohio St.3d 435, 440, 650 N.E.2d 878 (1995). E.S. herself testified only that she was involved in counseling. Tr. 1032. Her testimony regarding counseling was brief and "not overly emotional or directed to the penalty to be imposed." *Lang* at ¶237; *State v. Hartman*, 93 Ohio St.3d 274, 292, 754 N.E.2d 1150 (2001). Detective Nixon's testimony was offered and relevant to explain why E.S. was initially hesitant to agree to proceed with the case. Tr. 742-47. This testimony was proper and permissible.

Clinton's proposition that it was prosecutorial misconduct to introduce this evidence is without merit and should be overruled.

3. The State properly introduced "other acts" evidence

As set forth in response to Propositions of Law III and IV, the trial court properly admitted the other acts evidence. Because this evidence was properly admitted, it cannot form the basis of a misconduct claim.

All of the evidence was properly admitted. Clinton's proposition that it was prosecutorial misconduct to introduce this evidence is therefore without merit and should be overruled.

D. The State's Closing Argument Was Proper and Did Not Constitute Prosecutorial Misconduct

When an allegation of prosecutorial conduct concerns statements made during closing argument, the reviewing court considers the prosecutor's closing argument in its entirety, and in the context of the entire trial. *State v. Hill*, 75 Ohio St.3d 195, 204, 661 N.E.2d 1068 (1996); *State v. Keenan*, 66 Ohio St.3d 402, 410, 613 N.E.2d 203 (1993). In closing argument, the prosecutor may comment upon "what the evidence has shown and what reasonable inferences may be drawn therefrom." *State v. Stephens*, 24 Ohio St.2d 76, 82, 263 N.E.2d 773 (1970). Both the State and the defendant are given "wide latitude in summation." *Id.* During this examination, "isolated comments by a prosecutor are not to be taken out of context and given their most damaging meaning." *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88, ¶94.

If the prosecutor's closing remarks were improper, the question is "whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden*, 477 U.S. at 181, quoting *Donnelly v. DeChristoforo*, 416 U.S. at 643. But, if the defendant did not object to the remarks during trial, he cannot base a prosecutorial misconduct claim on those remarks unless they "serve[d] to deny the defendant a fair trial." *State v. Landrum*, 53 Ohio St.3d 107, 111, 559 N.E.2d 710 (1990), quoting *State v. Wade*, 53 Ohio St.2d 182, 373 N.E.2d 1244 (1978), paragraph one of the syllabus. See also

Crim.R. 52(B). "'Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.'" *Landrum*, quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), at paragraph three of the syllabus.

In this case, Clinton objected to only one of the statements about which he now alleges error; that objection was sustained and the prosecutor moved on in his closing argument. Tr. 1211-12. The prosecutor did not commit misconduct during his closing argument. Throughout closing argument, his comments were permissible proper. The State was allowed to, and did, use closing argument to discuss the evidence and the conclusions that could be drawn from the evidence. The State's closing argument, examined in its entirety and in context of the entire trial, did not prejudice Clinton's right to a fair trial. Clinton objected to only one of these statements during closing argument and has not demonstrated plain error as to any or all of the remaining remarks.

1. The prosecutor properly referred to questions posed by Clinton's counsel during trial to provide context to the closing argument

This Court looks unfavorably upon comments "the denigrate defense counsel for doing their job and thereby denigrate the defendant." *State v. Getsy*, 84 Ohio St.3d 180, 194, 702 N.E.2d 866 (1998). But "[a] prosecutor can respond to issues raised by an accused." *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81, ¶ 101.

This Court has considered denigrating remarks in previous cases and, in each, the remarks attacked how the defense presented its case. In *State v. Keenan*, this Court found error in the prosecutor's comments attacking the defense attorneys for objecting because "[s]uch conduct infringes on the defendant's right to counsel and penalizes him for attempting to enforce

procedural rights." *Keenan*, 66 Ohio St.3d at 406. In *Getsy*, this Court noted that the prosecutor improperly argued that the defendant was attacking everybody and deflecting because he had no defense although it did not find error because the comments "occurred only during closing argument." *Getsy* at 194; *see also State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶167-68 (remarks implying that "the defense's case was untruthful and not honestly presented" were improper but did not warrant reversal because they did not pervade the trial or closing). Likewise, although this Court found that it was improper to refer to a defense expert as "being paid with taxpayer money," the comment did not rise to the level of prejudice found in *Keenan*. *State v. Fears*, 86 Ohio St.3d 329, 334, 715 N.E.2d 136 (1999).

None of the prosecutor's remarks in this case were improper denigration of the defense. The prosecutor, in order to provide context to his closing, referred to questions Clinton posed to the witnesses and responded to the inferences that were implicit in those questions. This was permissible argument. There was no comment by the prosecutor belittling the defense attorneys for doing their job or implying that they had dishonestly asked the questions. The prosecutor's remarks were fair comment and did not denigrate Clinton or his attorneys.

2. The prosecutor properly argued that the State's witnesses were credible by referring to the circumstances of their testimony, their demeanor, their opportunity to review the facts, their general intelligence, and their general awareness

Clinton alleges that the prosecutor improperly vouched for the State's witnesses. In this case, the prosecutor never insinuated that he knew evidence outside the record or placed his personal belief in issue. Each time the prosecutor referred to a witness's credibility, he referred to the evidence from which the jury could determine that the person was credible. *See State v. Hill*, 75 Ohio St.3d 195, 204, 661 N.E.2d 1068 (1996). "Vouching occurs when a prosecutor implies knowledge of facts outside the record or places his or her personal credibility in issue."

State v. Davis, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶232. A prosecutor may argue the evidence and "may state his opinion if it is based on the evidence presented at trial." *State v. Tyler*, 50 Ohio St.3d 24, 41, 553 N.E.2d 576 (1990); *State v. Stephens*, 24 Ohio St.2d 76, 83, 263 N.E.2d 773 (1970). And a prosecutor may refer "to facts in evidence that tend to make the witness more credible." *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836, N.E.2d 1173, ¶120.

When referring to Joshua Case, the prosecutor stated that "you can tell Josh was extremely credible" and recalled that Mr. Case talked about a previous felony conviction, admitted to giving Heather pills, admitted to drinking heavily on the night of Heather's death, and admitted to doing drugs on other occasions. Tr. 1174. The prosecutor also noted that Mr. Case's testimony was "confirmed by Billy Crawford" and described how their testimony matched one another's. Tr. 1175-76.

When discussing Thomas Hanson, the prosecutor described him as "cooperative" and recalled that Mr. Hanson came in "voluntarily" while referring to his testimony that he had not received the State's subpoena. The State permissibly referred to the circumstances surrounding Mr. Hanson's testimony, which the jury could use to determine the weight and credibility they would give his testimony.

The prosecutor did not vouch for Det. Wichman. The prosecutor referred to Det. Wichman as a "good detective" in recalling how he continued to follow up on Thomas Hanson as a possible suspect. Tr. 1193. And the prosecutor noted that Det. Wichman did not have DNA reports when, in the recorded interview, he asked Clinton about how he would explain his DNA being found on the ligatures. The prosecutor's comment explained that this prescient question

was a result of Det. Wichman's training and experience, which he had testified to. Tr. 1198; 772-73.

The prosecutor did not vouch for either Ms. Cox or Ms. Garofalo, but commented briefly on their intelligence, which was a permissible remark regarding their appearance on the stand and was supported by the same education and experience that qualified them as expert witnesses. The prosecutor explained, "You can tell on their articulation at the science that they're scientists that know their field." Tr. 1200-01. Likewise the prosecutor did not vouch for Dr. Barnett; he explained that she was an extremely credible witness based on the thousands of autopsies she had completed and her qualifications as a medical doctor and forensic pathologist. Tr. 1209.

Finally, the prosecutor did not vouch for E.S. or Nurse Dettling. The prosecutor explained that E.S.'s testimony was credible because the photographs were consistent with strangulation and, as Clinton notes, because, prior to coming in to testify, E.S. noticed a mistake in her medical records and made a correction. Tr. 1208-09. Likewise, the prosecutor did not vouch for Nurse Dettling but noted that she caught the same need for correction, independently of E.S., which corroborated E.S.'s testimony. Tr. 1209.

None of the complained-of comments constituted impermissible vouching. The State properly and permissibly used the evidence before the jury to argue why the State's witnesses were credible.

3. The prosecutor properly argued that the "other acts" evidence demonstrated identity as it was proof of Clinton's motive and modus operandi in raping E.S. and murdering the Jacksons

As set forth in response to Propositions of Law III and IV, the trial court properly admitted the other acts evidence. The prosecutor did not improperly use the "other acts" evidence to argue that the murders were in Clinton's character or that he had a propensity for that behavior. The prosecutor properly argued that Clinton's motive in contacting Heather and

travelling to her home was sex. Tr. 1210-13. This argument was responsive to Clinton's opening statement that, while the State did not have to prove motive, "it's something you need to consider. There's no bad blood between them. There was no drug deal between them. There was no indication of any - - any type of ill feelings between them at all." Tr. 384-85. The State's closing argument set forth its theory of the case, using the other acts evidence to establish that Clinton's motive was to find sex and that, in the course of raping Heather, he strangled her to death, consistent with his modus operandi. The prosecutor may "sum[] up the state's view of the evidence based on the testimony presented during a trial." *State v. Pickens*, 141 Ohio St.3d 462, 2014-Ohio-5445, 25 N.E.2d 1023, ¶136. The State's use of the other acts evidence to establish motive and modus operandi was proper and permissible.

4. The prosecutor's reference to the victims was proper

The first reference that Clinton complains was improper victim impact evidence in closing argument is the prosecutor's statement that Heather "was a beautiful girl and also a beautiful person; a person, I think that Danielle [Sorrell] had attributed certainly some value to. She valued her as a person and a friend." Tr. 1165-66. These remarks were part of the prosecutor's argument addressing the evidence that had come out during trial that Heather was a drug user, had been using drugs on the night of her death, was hanging around people who were a "bad influence" on her, and had been stopped with drugs in her car shortly before her death. Tr. 408-10, 419, 525, 534, 538. The prosecutor's brief comment on Heather's life was not overly emotional, did not mention the impact Heather's death had on her friends or family, and did not mention or recommend a sentence. A brief general mention of the victim's personal situation does not constitute misconduct. *State v. Goodwin*, 84 Ohio St.3d 331, 339, 703 N.E.2d 1251 (1999); *State v. Brinkley*, 105 Ohio St.2d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶140; *State v.*

Maxwell, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.2d 930, ¶ 244. There was no error in this remark.

Clinton next asserts that the prosecutor improperly referenced Joshua Case's testimony that he saw and held Celina hours before she died and that Mr. Case became emotional on the stand. This was not improper victim impact testimony. The remark that Mr. Case became emotional was permissible comment on Mr. Case's appearance on the stand, which goes to the jury's determination of the weight and credibility to give his testimony. The statements regarding Celina established that Celina was alive earlier that night and helped to address the presence of unidentified DNA on her person. This was not improper victim impact testimony. The prosecutor never discussed the impact Celina's death had on her family or friends and the statement was not overly emotional. There was no error in this remark.

Clinton also asserts that a number of references to E.S. were improper victim impact testimony. The complained-of remarks, placed in context, explained why E.S. was hesitant to go forward with a criminal case after she had already been through talking to a number of people about being raped and had been subjected to an intensive medical exam. Tr. 1187-88, 1205-07. The comments are a reasonable portrayal of the difficult time E.S. had, including being subjected to cross-examination at trial, as the victim of the offense. *See Goodwin*, 84 Ohio St.3d at 339. In his closing argument, Clinton argued that E.S. was not credible because she had not been entirely truthful at the hospital. Tr. 1223-24. On redirect, the prosecutor referred to "the burden * * * that a sexual assault victim carries." Tr. 1241. Placed in context of the entire closing argument, this comment refers back to the prosecutor's first closing statement, in which he discussed that the defendant was presumed innocent until proven guilty, so the victim had to testify and be

subjected to cross to demonstrate that she was credible. Tr. 1207-08. None of these comments were improper victim impact testimony; they were proper comments based on the record.

5. The prosecutor properly suggested conclusions that could be drawn from the facts in evidence

In closing argument, the prosecutor may comment upon "what the evidence has shown and what reasonable inferences may be drawn therefrom." *Stephens*, 24 Ohio St.2d at 82. And the prosecutor may "sum[] up the state's view of the evidence based on the testimony presented during a trial." *Pickens* at ¶136.

Each of the three remarks cited by Clinton is an instance of the prosecutor drawing a permissible inference from the testimony that Clinton raped Heather and Celina Jackson. Tr. 1211-13. And, in light of Clinton's call to the jury to consider the motive behind the crimes, it was appropriate for the prosecutor to argue a possible motive – a desire for sex – that was supported by the evidence. Tr. 384. This conclusion that Clinton raped Heather and Celina was supported by the coroner's findings that Heather and Celina's rectums were dilated perimortem and that Clinton's DNA was found in Celina's rectum and underwear. Tr. 907, 919, 1119, 1129. It was also supported by Clinton's own statement that his relationship with Heather was limited to having sex and giving her money. Suppr. Tr. 18. This inference was further supported by the other acts evidence that established Clinton's identity as the rapist and killer by showing his modus operandi of strangling and raping women, as explained in response to propositions of law III & IV, above. It is proper for the prosecutor to argue, in closing argument, that the circumstantial evidence presented to the jury supports the charges brought against the defendant. The prosecutor's remarks were proper and permissible.

6. The prosecutor's arguments were not emotional or an appeal to the sympathy of the jury

In order to be an improper appeal to the sympathy of the jury, the prosecutor's remarks must be "so inflammatory as to render the jury's decision a product solely of passion and prejudice." *State v. Williams*, 23 Ohio St.3d 16, 20, 490 N.E.2d 906 (1986). The prosecutor's wide latitude in closing argument is not exceeded by argument in which the prosecutor displays photos of the murder victims and explains that one victim "can't tell us what happened" because the defendant "and his brother shot her and she died;" and that the defendant "turned [the other victim,] that beautiful little three year old girl into a specimen on the Lucas County Coroner's Table." *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶111-13.

Clinton asserts that two of the prosecutor's comments were improperly emotional. The first, a reference to a BCI agent becoming emotional when recalling removing the bodies of Celina and Wayne Jr. from the utility closet, was a proper comment appearance on the stand, which goes to the jury's determination of the weight and credibility to give his testimony. The second came during a portion of the closing argument describing the police investigation and how it, at one point, focused in on Mr. Hanson as a possible suspect. Tr. 1192-94. Neither comment was an appeal to the emotion or sympathy of the jury. The prosecutor's arguments were brief statements regarding the evidence and testimony of two witnesses.

The prosecutor's closing argument was permissible and proper. Clinton only objected to one of the prosecutor's statements, and that objection was sustained. Tr. 1212. Clinton has not demonstrated that plain error occurred or that the comments deprived him of a fair trial.

E. The prosecutor did not commit misconduct so this Court does not need to consider the cumulative effect

The State did not commit misconduct in the guilt phase of the trial so there are no errors to cumulate. Any error that did occur was isolated and did not deprive Clinton of a fair trial because the evidence of his guilt was overwhelming.

This proposition of law is without merit and should be denied.

Response to Proposition of Law 18: Imposition of costs on an indigent defendant does not even implicate the Constitution.

In his eighteenth proposition of law, Clinton argues that imposing court costs on an indigent defendant violates the Eighth Amendment. Clinton failed to object to the imposition of court costs so he has waived this issue on appeal. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶305 citing *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶23. Therefore, his claim can only be reviewed for plain error.

Clinton's argument has been repeatedly denied. This Court has rejected the argument that it is a violation of the Equal Protection Clause of the United States Constitution to impose court costs on an indigent defendant. *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393. Since *White*, this Court has been presented several times with Clinton's "spirit-of-the-Eighth –Amendment" claim regarding court costs and has routinely rejected the argument. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶245; *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶305. This Court should apply *Hale* and *Lang* and deny Clinton's claim.

The Eighth Amendment to the United States Constitution states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Clinton's argument fails because it is not one of the harms that the Eighth Amendment seeks to prevent. Court costs are not punishment; they are "more akin to a civil judgment for money." *Threatt* at ¶16. They are imposed to lighten the burden on taxpayers financing the court system. *Id*. Court costs are also neither bail nor fines. Therefore, Clinton's claim should be denied.

"Eighth Amendment violations are rare, and instances of cruel and unusual punishment are limited to those punishments which, under the circumstances, would be considered shocking to

any reasonable person." *State v. Fannon*, 2nd Dist. Montgomery App. No. , 2014-Ohio-2673, ¶25 citing *State v. Harding*, 2nd Dist. Montgomery App. No. 20801, 2006-Ohio-481, ¶77. The imposition of court costs on an indigent defendant doesn't shock the conscious. Clinton had an opportunity to waive costs and there are administrative procedures in place to ensure that he is left with enough money to make purchases from the commissary. *State v. Clevenger*, 114 Ohio St.3d 258, 2007-Ohio-4006, 871 N.E.2d 859; R.C. 5120.133. Clinton's Eighth Amendment argument lacks merit and his eighteenth proposition of law should be overruled.

Response to Proposition of Law 19: **The death sentence for Clinton was appropriate, proportionate and not excessive because the aggravating circumstances established by the evidence outweigh any mitigating factors presented and any proffered evidence was properly withheld from the jury due to Clinton's own instructions and should not be considered during reweighing.**

This Court should affirm a sentence of death because the record demonstrates that the aggravating circumstances outweigh the mitigating factors presented below. R.C. 2929.05(A). Here, the aggravating factors significantly outweigh the meager mitigation presented during Clinton's unsworn statement. Additionally, the proffered evidence cannot be considered because it was deliberately, not erroneously, withheld from the jury by Clinton himself.

During the penalty phase, Clinton chose to present only his unsworn statement in mitigation. Now that he has been sentenced to death, Clinton asks this Court to ignore the jury's recommendation, and the trial judge's sentence, and find that the mitigation evidence that Clinton refused to allow the jury to consider in first instance outweighs the aggravating factors. This Court should decline Clinton's invitation because the mitigation evidence uncovered by his

trial attorneys, during their pretrial investigations, was not erroneously withheld. Clinton made a deliberate, considered decision to withhold this evidence.

Factual and Procedural Background

Per Clinton's instructions, his unsworn testimony was the only evidence presented as mitigation. (Mit. Tr. 28.) Clinton did not wish to present any other evidence. (Mit. Tr. 92.) Before the penalty phase, Clinton was examined by forensic psychologist Dr. Galit Askenazi and deemed competent to waive mitigation, as discussed in response to Proposition of Law I. (Askenazi Rpt. p. 8-10; Mit. Tr. 93.) Defense counsel proffered the mitigation evidence they had uncovered but, in accordance with Clinton's wishes, did not present it to the jury. This evidence was sealed and not considered by the jury. *Id.* Clinton gave an unsworn statement. After deliberation, the jury found that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. (Mit. Tr. 131.)

A. The mitigating factors presented within Clinton's unsworn testimony do not outweigh the aggravating circumstances therefore the death sentence was reliable and appropriate.

Section 2929.05 of the Revised Code requires this court to review the record and independently determine whether the aggravating circumstances the defendant was found guilty of committing outweigh the mitigating factors found to exist. Here, the aggravating circumstances presented by the State outweigh the few mitigation factors presented by Clinton in his unsworn testimony.

During the mitigation phase, Clinton offered only his unsworn testimony. Per Clinton's directives, the defense did not present any of the evidence they had uncovered during their pretrial mitigation investigation. (Mit. Tr. 92.) During his unsworn statement, Clinton did not discuss his childhood, any alleged mental illness, or any substantial redeeming traits. (Mit. Tr.

28-91.) Rather, Clinton chose to focus on issues pertaining to the damning DNA evidence offered against him, other evidence of his guilt, his version of the events leading up to the night of the crime, his general mental state during this time, his relationship with Heather, and his issues relating to prison life. *Id*. Clinton occasionally, albeit briefly, touched on topics that related to his "history, character, and background." *See*, R.C. 2929.03 (Mit. Tr. p. 41-48, 88.) The subjects Clinton spoke about during his unsworn testimony presented very little statutory mitigating factors for the jury to consider. Clinton deliberately chose this strategy; he told Dr. Askenazi that "he wants to fight his case, just not via mitigation." (Askenazi Rpt. p. 9.)

In contrast, the State proved that Clinton murdered Heather, Celina, and Wayne Jr. – a mother, a toddler, and an infant – by ligature strangulation. The State proved that Heather and Celina were anally raped by the Defendant and were murdered in the commission of, or during flight from, these rapes. The State proved that Heather and Celina's murders were sexually motivated. The State proved that both Celina and Wayne Jr. were children when they were murdered. Whatever weight Clinton's mitigation statement is entitled to, the aggravating factors in this case are grave and include multiple murders, murders committed in the course of a rape, murder committed in the course of an aggravated burglary, and murders of children. Thus, the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt.

The purpose of the independent review by this court is to insure that the death penalty has not been arbitrarily or disproportionately imposed by the jury. *State v. Holloway*, 38 Ohio St. 3d 239 (1988). Here, the jury acted properly and prudently in its sentencing recommendation by concluding that the aggravating circumstances outweighed the very little mitigation touched upon in Clinton's unsworn testimony.

The death sentence in this case is appropriate and proportionate when compared to the sentences approved in cases involving the aggravating factors present here. This Court has affirmed death sentences in other multiple murder cases. *See State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶241; *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶1164; *State v. Hughbanks*, 99 Ohio St.3d 365, 2003-Ohio-4121, 792 N.E.2d 1081, ¶145; *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, 785 N.E.2d 439, ¶153-62; *State v. Allard*, 75 Ohio St.3d 482, 663 N.E.2d 1277 (1996). This Court has also upheld the death penalty for other child murderers and explained that the "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, 2012-Ohio-2577, 971 N.E.2d 865, ¶282, quoted in *Mammone* at ¶240; *and see State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶206; *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, ¶120; *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185, ¶196. This Court has upheld the death penalty for other rape-murders. *See Lynch* at ¶196; *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, 793 N.E.2d 446, ¶119; *State v. Phillips*, 74 Ohio St.3d 72, 656 N.E.2d 643 (1995); *State v. Mason*, 82 Ohio St.3d 144, 170-71, 694 N.E.2d 932 (1998). And this Court has upheld the death penalty for other murders occurring during an aggravated burglary. *See Mammone* at ¶240; *State v. Goff*, 82 Ohio St.3d 123, 143-44, 694 N.E.2d 916 (1998); *State v. Bonnell*, 61 Ohio St.3d 179, 187, 573 N.E.2d 1082 (1991).

B. It was proper for the jury not to consider the proffered evidence because Clinton was competent in deciding he did not wish to admit such evidence for review.

It cannot be considered an erroneous mistake that the proffered evidence was never reviewed by the jury because Clinton himself, chose not to present this evidence. (Mit. Tr. 92-93.) "The United States Supreme Court has never suggested that the Eighth Amendment

requires forcing an unwilling defendant to present mitigation in a capital case." *State v. Roberts*, 110 Ohio St.3d 71, ¶139 (2006). In *State v. Tyler*, this Court upheld a death sentence of a defendant who refused to allow his attorneys to put on several mitigation witnesses, and instead offered an unsworn statement. 50 Ohio St.3d 24, 27-28 (1990). According to this Court, the constitutional requirement for individualized sentencing grants the accused "an opportunity to introduce the mitigation evidence available to him… [b]ut where he chooses to forego that opportunity, no societal interest counterbalances his right to control his own defense." *Id*. at 28. As such, "[t]he Eighth Amendment compels no one to present mitigation against his will." *State v. Cowans*, 87 Ohio St.3d 68, 80 (1999). In other words, "a defendant is entitled to decide what (he or she) wants to *argue and present* at mitigation in the penalty phase…" *Roberts*, 110 Ohio St.3d at ¶140 (emphasis added.) Clinton was unquestionably competent during the penalty phase. Thus, the trial court committed no error in allowing Clinton to forego the mitigation evidence uncovered by his attorneys and instead rely solely upon his unsworn statement.

Clinton erroneously asks this Court to reweigh the aggravating and mitigating factors with evidence Clinton deliberately withheld from the jury. This Court should decline the invitation. This Court has stated that the independent appellate reweighing "does not contravene the role of the jury in the penalty proceeding." *Holloway*, 38 Ohio St. 3d at 240. Rather, in a death penalty case, the true purpose of independent appellate review is to provide "a procedural safeguard against the arbitrary imposition of the death penalty." *Id*. Appellate reweighing allows the court to consider proffered evidence that the jury was *erroneously* not allowed to consider. *State v. Williams*, 74 Ohio St. 3d 569 (1996). Thus, any deficiency in the lower court's decision can be cured by the reviewing court's independent sentence assessment. *Id*. In this case, the

proffered mitigating evidence was not erroneously withheld, it was deliberately withheld, and so should not be considered in this Court's reweighing.

Furthermore, R.C. 2929.03(D)(1) provides that, if the offender was tried to a jury, all mitigating evidence must be presented to that jury. *State v. Cambell*, 90 Ohio St.3d 320, 326 (2000). A defendant may not wait for an unfavorable jury recommendation before presenting all relevant mitigation evidence. *State v. Roe*, 41 Ohio St.3d 18, 26 (1989) ("[a] defendant may not wait for an unfavorable jury recommendation before presenting all evidence of mitigation of sentence.") Recently, this Court rejected the argument that capital defendants are permitted to present mitigation evidence to the trial judge even if that evidence was withheld from jury. *State v. Short*, 129 Ohio St.3d 360, ¶76-90 (2011). As this Court explained, capital defendants are not entitled to "two evidentiary hearings: one before the judge and jury, and the second before the judge alone." *Id.* at ¶76-90. This Court emphasized in *Short*, "[n]othing in Eighth Amendment jurisprudence entitle[s][a capital defendant] a second opportunity to present before the judge alone mitigation that he had chosen to withhold from the jury." *Id*. at ¶89. Likewise, neither the Ohio statutory capital scheme nor the Eighth Amendment entitles capital defendants to have this Court, during its independent reweighing, to weigh mitigating evidence the defendant deliberately chose to withhold from the jury.

Requiring the defendant to proffer mitigation to the jury, instead of withholding it for appeal, allows the State to test the veracity of the information through means of cross-examination. Moreover, it prevents defendants in particularly egregious murders facing nearly insurmountable aggravating factors from attempting to bypass the jury's determination as to the strength of its mitigation evidence by presenting untested documents to the court to be weighed in this Court at the first instance. Unlike a jury, this Court is only reading a cold record and has

no means of deciphering a witness' behavior / credibility. Furthermore, although relaxed, the Rules of Evidence still apply during the penalty phase of a capital trial. *State v. Lorraine*, 66 Ohio St.3d 414, 422 (1993); *State v. Esparza*, 39 Ohio St.3d 8, 11-12 (1988). Clinton should not be permitted to rely on records never identified and authenticated by a witness, and never subjected to cross-examination by the prosecution, and then ask this Court to consider during its reweighing analysis as if they were properly admitted.

Even if this Court does agree to consider the mitigation evidence uncovered by Clinton's defense attorneys, and conduct a reweighing analysis, the death sentence would remain because Clinton's proffered mitigation pales in comparison to the nearly insurmountable aggravating factors – the rape and murder of a mother, the rape and murder of her toddler daughter, and the murder of her infant son. The aggravating factors in this case are nearly insurmountable; and Clinton's proffered mitigation – bad childhood and questionable mental issues – comes woefully short of tipping the scales.

Accordingly, this Court should conclude that this Proposition of Law lacks merit and the sentence of death should be affirmed as reliable and appropriate for the crimes committed.

Response to Proposition of Law 20: The evidence in this case strongly supports the jury's guilty verdicts. The Defendant has not shown insufficient evidence of guilt or that the jury lost its way and created a manifest miscarriage of justice.

In his twentieth proposition of law, Clinton asserts that the trial evidence against him was insufficient to establish guilt beyond a reasonable doubt and that his guilty verdicts are against the manifest weight of the evidence. This proposition of law lacks merit because there is no showing that the jury lost its way and created a manifest miscarriage of justice. To the contrary, the evidence strongly supports the jury's guilty verdicts and they should be upheld.

A. Standard of Review

Sufficiency of the evidence and manifest weight of the evidence are significantly different concepts that "differ both qualitatively and quantitatively." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). A sufficiency-of-the-evidence claim is rooted in the due process clause, but a manifest-weight-of-the-evidence claim is grounded solely in state law and does not implicate the federal constitution. *Tibbs v. Florida*, 457 U.S. 31, 45-46 [add S.Ct. and L.Ed. cites] (1982). "[S]ufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief." *State v. Wilson*, 113 Ohio St.3d 382, 387 (2007), citing *Thompkins*, 78 Ohio St.3d at 386–387.

In conducting a review for manifest weight, the reviewing court:

> [t]he court reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether the resolving conflicts of evidence, the jury clearly lost its way, and created a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.

Id. at 387; *see State v. Jenks* 61 Ohio St. 3d, 574 N.E.2d 492 (1981). That review considers that "the weight to be given to the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212, at paragraph one of the syllabus (1967). "[T]he demeanor, attitude, and credibility of each witness * * * does not translate well on the written page." *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997). Accordingly, an appellate court should order a new trial "only in the exceptional case in which the evidence weighs heavily against the conviction." *Thompkins* at 387. To sustain a manifest-weight challenge, a defendant must show "the jury lost its way and created a manifest miscarriage of justice in finding" the defendant guilty. *State v. Scott*, 101 Ohio St.3d 31, 38 (2004). To preserve the sanctity of the jury system, an appellate court may only reverse a

conviction based on a manifest-weight claim if it acts unanimously. Ohio Constitution, Article IV, Section 3(B)(3); *Thompkins* at 309; *State v. Miller*, 96 Ohio St.3d 384, 391 (2002).

Unlike a manifest-weight claim, which is grounded in Ohio law, "[a] claim of insufficient evidence invokes a due process concern and raises the question whether the evidence is legally sufficient to support the verdict as a matter of law." *State v. Hunter*, 131 Ohio St.3d 67, 84 (2011); *see also Jackson v. Virginia*, 443 U.S. 307 46 (1979). In determining whether evidence is sufficient, the appellate court must decide "whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Jenks*, 61 Ohio St.3d at paragraph two of the syllabus. All the evidence 'must be considered in a light most favorable to the prosecution." *State v. Grant*, 67 Ohio St.3d 50, 65 (1993). A reviewing court "do[es] not reweigh the evidence, re-evaluate the credibility of witnesses, or substitute [its] judgment for that of the jury." *Johnson v. Mitchell*, 585 F.3d 923, 931 (6th Cir.2009). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rationale trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319.

B. Clinton's Convictions For Aggravated Murder Are Supported By The Evidence And There Is No Showing That The Jury Lost Its Way

Clinton was convicted of three counts of Aggravated Murder, one for each member of the Jackson family – Heather, Celina, and Wayne, Jr. The State presented the testimony of the investigating officers, the coroner, a DNA expert, the two men who found Heather's body, and the friends who saw Heather the night before her death. Tr. 393, 421, 443, 474, 498, 518, 544, 562, 612, 727, 771, 865, 895, 951. The jury was in the best position to observe these witnesses and determine what weight to give their testimony. In addition to the testimony of these witnesses, the State presented documents and physical evidence, including the results of the

DNA analysis, the autopsy reports, video surveillance of Heather Jackson's home, cellular telephone records, photographs, defendant's interview with law enforcement, and physical evidence, including the ligatures used to kill each victim. Ex. 120-124, 134, 142,150, 113-116, 506, 55, 56, 60, 62, 63, 65-69, 72-85, 117, 89-91.

The testimony established that Curtis Clinton arrived at Heather Jackson's home at 3:10 a.m. Tr. 756, 792; St. Ex. 113, 114. Heather's phone records showed that she received calls at 2:59 a.m. and 3:12 a.m. from Clinton. Tr. 757-59, 787-88. Video surveillance showed that Clinton's car left Heather's house at 4:16 a.m., returned around 4:20 a.m., then left again a minute and a half later. Tr. 792, 806-07, 811-12; St. Ex. 114. The surveillance camera did not show any other people arriving at the Jackson's home after Clinton left. During his interview with Det. Wichman, Clinton admitted that he had sex with Heather the day she was killed. Supp. Hrg. 34-35; St. Ex. 117.

DNA was collected from the bodies of Heather, Celina, and Wayne at the scene and rape kits were completed during the autopsies. Tr. 653-54, 662-63, 1119-20. Clinton's DNA is found on all three bodies and on the ligatures used to kill the children. Although semen was not found during the analysis of the rape kit from Heather Jackson, seminal fluid was found in anal samples from Celina's rape kit and a sperm cell was found in Celina's underwear. Tr. 878-79, 883-84. Clinton could not be excluded as the contributor of DNA found on Celina's ankles[2], Celina's left wrist[3], and Heather's right wrist[4], or as the source of semen found in Celina's rape kit[5]. Nor

[2] The possibility of a coincidental match was 1 in "5 quintillion 74 quadrillion" on the left ankle; 1 in 1,871 on the right ankle. Tr. 914-16.

[3] The possibility of a coincidental match was 1 in 3,643. Tr. 911.

[4] The possibility of a coincidental match was 1 in 2,083,000 unrelated individuals. Tr. 909.

[5] The possibility of a coincidental match was 1 in 27,140 unrelated individuals. Tr. 907-08.

could Clinton be excluded as a contributor of DNA found in Celina's underwear[6] or of DNA found on the ligatures used to kill Celina[7] and Wayne[8]. Tr. 907-20.

The evidence placed Clinton at the scene of the crime during the final hours of the victim's lives and his DNA was found on every victim's body and on the ligatures used to strangle the children. Additionally, Heather was strangled by the same kind of ligature. Tr. 669, Ex. 89. No other person was seen entering the house via the surveillance camera after Clinton's departure. This evidence proved that Clinton purposely caused the deaths of Heather, Celina, and Wayne, Jr. There is no showing that the jury lost its way and created a manifest miscarriage of justice. The evidence in the present case did not weigh heavily against the judgment; it supports the jury's verdict.

C. Clinton's Convictions for Rape Are Supported by the Evidence and There Is No Showing That the Jury Lost Its Way.

Clinton was convicted of two counts of rape, one for Celina Jackson and one for E.S. The State presented the testimony of the coroner, a DNA expert, a medical examiner and E.S. Tr. 971, 1057. The jury was in the best position to observe these witnesses and determine what weight to give their testimony. In addition to the testimony of these witnesses, the State presented documents and physical evidence, including the results of the DNA analysis, the autopsy reports, photographs of injuries sustained, medical records and the ligature used to strangle Celina Jackson. Ex. 120-124, 83-85, 150, 133, 110, 90.

Evidence as to the rape of E.S.

[6] The possibility of a coincidental match was 1 in 490 unrelated individuals; 1 in 4, 425 with the same Y chromosome DNA profile. Tr. 919-20.

[7] The possibility of a coincidental match was 1 in 74,960,000. Tr. 916.

[8] The possibility of a coincidental match was 1 in 55,930. Tr. 916-17.

The testimony established that after a night out together, Clinton choked E.S. and put her in a headlock. Tr. 1003-1004. E.S. testifies she asked Clinton not to hurt her and he responded, "Don't say a word." *Id.* He had sexual contact with her and choked her once again until she passed out. Tr. 1007 When she awoke from her unconsciousness, he resumed sexual contact with her. *Id.* The next day, E.S. testifies to the jury she went to the hospital to be examined. Tr. 1022. She met with Sandusky police department in the following week and gave a videotaped statement identifying Clinton as the person who raped her Tr. 1027 – 1029, 1034.

Further testimony was given by registered nurse, Lisa Dettling, who examined E.S. at the hospital. Additional evidence regarding the rape of E.S. was provided by registered nurse, Lisa Dettling who examined E.S. at the hospital. Dettling testified that for purposes of taking a patient history, she recorded in the medical records that E.S. said she had been raped. Tr. 1070 – 1071. E.S. also told Dettling her injuries were in part due to being choked by Clinton. Tr. 1072 – 1073.

The State introduced Exhibit 133 to the jury which show photos taken by Dettling to document the bruises sustained to her neck. Tr. 1074 – 1076. The State also introduces Ex. 110, 110A and 110B, as the rape kit from the examination. Tr. 1080 – 1081. The jury obviously believed E.S. testimony, and corroborating evidence.

Evidence as to the rape of Celina Jackson

The testimony established that relative to the anal swabs from Celina, Clinton could not be excluded as a source of the semen, and that the chances of a coincidental match was one in 27,140 unrelated individuals. Tr. 907 – 909. Testimony from Garofalo further identified St. Ex. 123 the DNA testing report, dated November 20, 2012, she authored in connection with her analysis of the likelihood of the conventional DNA profile and the Y profile happening in

conjunction with one another, as it relates to the anal swabs from the child Celina. "The combined expected frequency of occurrence of these DNA profiles on the anal swab is one in 120,094,500 unrelated individuals." Tr. 920 – 923, quotation at Tr. 921.

As to the sperm cell found on Celina's underwear, Garofalo determined that Clinton cannot be excluded as a source of the DNA, and that the chances of a coincidental match is one in 490 unrelated individuals. As to this same touch DNA sample from the sperm cell from the underwear of the child Celina, Garofalo determined through Y-STR testing, where male-specific DNA is isolated, that neither Clinton nor any of his paternal male relatives could be eliminated as a source of the DNA, and that the chances of a coincidental match was one in 4,425 male individuals. Tr. 918 – 920.

Relative to touch DNA from the left wrist of the child Celina, Garofalo determined that Clinton cannot be excluded as a source of the DNA, and that the chances of a coincidental match was one in 3,643 unrelated individuals. Tr. 911. As to this same touch DNA sample from the left wrist of the child Celina, Garofalo determined through Y-STR testing, where male-specific DNA is isolated, that Clinton nor any of his paternal male relatives could be eliminated as a source of the DNA, and that the chances of a coincidental match was one in 4,425 male individuals. Tr. 911 – 912.

Relative to touch DNA from the right ankle of the child Celina, Garofalo determined that Clinton cannot be excluded as a source of the DNA, and that the chances of a coincidental match was one in 1,871 unrelated individuals. As to this same touch DNA sample from the right ankle of the child Celina, Garofalo determined through Y-STR testing, where male-specific DNA is isolated, that neither Clinton nor any of his paternal male relatives could be eliminated as a

source of the DNA, and that the chances of a coincidental match was one in 4,425 male individuals. Tr. 914 – 915.

Relative to touch DNA from the left ankle of the child Celina, Garofalo determined that Clinton cannot be excluded as a source of the DNA, and that the chances of a coincidental match was one in 5 quintillion 74 quadrillion unrelated individuals. Tr. 915 - 916.

Relative to touch DNA from the ligature of the child Celina, Garofalo determined that Clinton cannot be excluded as a source of the DNA, and that the chances of a coincidental match is one in 74,960,000 unrelated individuals. As to this same touch DNA sample from the ligature of Celina, Garofalo determined through Y-STR testing, where male-specific DNA is isolated, that neither Clinton nor any of his paternal male relatives could be eliminated as a source of the DNA, and that the chances of a coincidental match was one in 4,425 male individuals. Tr. 916.

Further testimony established that Celina's rectum was found abnormally dilated. Tr. 1130. Lucas County Deputy Coroner, Dr. Diane Scalia-Barnett, testified in regards to the autopsy of Celina Jackson. As a reference, exhibit 160 was introduced to show a normal post mortem 5 year old's rectum. *Id.* This photograph aided in Barnett's conclusion that Celina's postmortem rectum was abnormal. Barnett testified that Celina's rectum was similar to that of Heather's rectum which supported Barnett's conclusion that Celina was likely sexually assaulted. Tr. 1131. She further testified as to Exhibit 152 of Celina Jackson which exhibited her rolled up underwear indicating the body was redressed, a common occurrence in sexual assaults. Tr. 1124-1125.

The evidence establishes that Clinton raped both E.S. and Celina Jackson. E.S. testifies as to the sexual assault and forceful choking from Clinton and she identifies Clinton as the perpetrator. E.S.'s medical examiner shows the jury photographs of the injuries sustained from

the choking. Clinton's DNA was found on the anal swabs from Celina as well as in her underwear and on her body. Celina Jackson was strangled and Clinton's DNA is found on the ligature used to strangle her. Her rectum was dilated and her underwear, which had Clinton's DNA inside of it, was rolled up as if she had been redressed. This evidence proved that Clinton purposely engaged in sexual conduct through the use of force with E.S. and Celina Jackson. There is no showing that the jury lost its way and created a manifest miscarriage of justice. The evidence in the present case did not weigh heavily against the judgment; it supports the jury's verdict.

D. Clinton's Conviction For Aggravated Burglary Is Supported By The Evidence And There Is No Showing That The Jury Lost Its Way.

Clinton was convicted of Aggravated Burglary for purposefully trespassing onto Heather Jackson's property and inflicting physical harm upon each member of the Jackson family – Heather, Celina, and Wayne, Jr. The State presented the testimony of the investigating officers, the coroner, a DNA expert, the two men who found Heather's body, and the friends who saw Heather the night before her death. Tr. 393, 421, 443, 474, 498, 518, 544, 562, 612, 727, 771, 865, 895, 951. The jury was in the best position to observe these witnesses and determine what weight to give their testimony. In addition to the testimony of these witnesses, the State presented documents and physical evidence, including the results of the DNA analysis, the autopsy reports, video surveillance of Heather Jackson's home, cellular telephone records, photographs, defendant's interview with law enforcement and physical evidence, including the ligatures used to kill each victim. Ex. 120-124, 134, 142,150, 113-116, 506, 55, 56, 60, 62, 63, 65-69, 72-85, 117, 89-91.

The testimony and evidence established that Clinton entered into Jackson Residence on the day of their murders. Whether Clinton had permission to enter the Jackson Residence is

immaterial to this conviction. As soon as Clinton engaged in his initial violent assault, the permission was revoked. Ohio Supreme Court ruled that a jury could infer from a subsequent violent assault that permission to remain on the premises was revoked. *State v. Steffen*, 31 Ohio St.3d 111 (1987). "Where a Defendant lawfully entered residential premises, the privilege to be in or upon this premises can be inferred to have been revoked where the Defendant thereafter committed a violent felony directed against another person in the premises who had the ability and authority to revoke the privilege." *State v. Morten*, Ohio App.3d 43 (2002). Given this was Heather Jackson's home she had the authority to revoke her permission. It is presumed Clinton's permission was revoked upon the initiation of his violence. Given this presumption and the overwhelming evidence against Clinton as to the murders of Heather, Celina and Wayne and as to the rape of Celina, the evidence proved that Clinton purposely trespassed onto the Jackson residence and inflicted physical harm upon each member of the Jackson family. There is no showing that the jury lost its way and created a manifest miscarriage of justice. The evidence in the present case did not weigh heavily against the judgment; it supports the jury's verdict.

The aforementioned evidence, along with Clinton jail house call with his mother, leaves no room for doubt.

Where the direct and circumstantial evidence strongly support the crimes for which Clinton was convicted, this Court should find Proposition 20 not well taken.

Response to Proposition of Law 21: The trial court did not fail to follow Ohio's sentencing laws or violate the Defendant's right to Due Process.

In 2008, this Court created a two-part test for reviewing felony sentences post-*Foster*. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. As a result of various legal developments since *Kalish* (namely *Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711 (2009) and the enactment of H.B. 86), multiple district appellate courts have concluded that Kalish is no longer

good law. See *State v. Long*, 19 N.E.3d 981, 2014-Ohio-4416, ¶78 (11th Dist. Lake) citing *State v. Bever*, 4th Dist. Washington No. 13CA21, 2014-Ohio-600, ¶13. See also *State v. White*, 2013-Ohio-997 N.E.2d 629, ¶9 (1st Dist.); *State v. Worth*, 10th Dist. No. 10AP-1125, 2012-Ohio-666, ¶83; *State v. Rodeffer*, 2nd Dist. Montgomery Nos. 25574, 25575, & 25576, 2013-Ohio-5759, ¶29; *State v. A.H.*, 8th Dist. No. 98622, 2013-Ohio-2525, ¶7; *State v. Crawford*, 12th Dist. Clermont No. CA2012-12-088, 2013-Ohio-3315, ¶6; *State v. Fletcher*, 3rd Dist. Auglaize No. 2-13-02, 2013-Ohio-3076, ¶14. Those courts now instead review felony sentences pursuant to R.C. 2953.08(G)(2). R.C. 2953.08(G)(2) limits relief to those situations where a reviewing court finds, by clear and convincing evidence, that either (1) the record does not support the sentencing court's findings or (2) the sentence is otherwise contrary to law.

Clinton argues that the trial court neither "mentioned nor cited" Ohio's sentencing guidelines found in R.C. 2929.11 and 2929.12. (Appellant's Br., pg. 199). The record belies this claim. At the sentencing hearing, the Court explicitly stated, "[t]he Court will state for the record that it's cognizant of the overriding purposes and principles of felony sentencing here in Ohio. The Court does adhere to those purposes and principles, as it must, pursuant to 2929.11(A), (B), and (C) of the Ohio Revised Code." Sent. Tr. 5. Additionally, it reviewed any relevant factors set forth in R.C. 2929.12 such as the seriousness of the crime and recidivism. Sent. Tr. 5-6. However, "even if there is no specific mention of R.C. 2929.11 and R.C. 2929.12, ***it is presumed*** that the trial court gave proper consideration to those statutes." *State v. Bailey*, 2nd Dist. Clark No. 2011-CA-40, 2012-Ohio-1569, ¶12-14 citing *State v. Barker*, 183 Ohio App.3d 414, 2009-Ohio-3511, 917 N.E.2d 324, ¶36-37. (Emphasis Added). See also *State v. Cyrus*, 63 Ohio St.3d 164, 586 N.E.2d 94 (1992) (defendant bears burden to rebut presumption that the trial court considered the sentencing criteria).

To the extent that Clinton claims that his sentence is invalid because he received the maximum punishment, his argument lacks merit. Neither Ohio's sentencing statutes nor the modifications contained in H.B. 86 require a trial court to impose the minimum sentence. Rather, courts are instructed to consider the sentencing factors and impose a sentence consistent with the principles and purposes of Ohio's sentencing laws. That is precisely what happened here; Clinton couldn't be more deserving of capital punishment. Because the record clearly reflects that the trial court considered and applied R.C. 2929.11 and R.C. 2929.12, the State respectfully requests this Court overrule Clinton's twenty-first proposition of law.

Response to Proposition of Law 22: Ohio's statutory death penalty scheme is not unconstitutional and does not violate international law.

In his twenty-second claim for relief, Clinton raises many of the same enervated constitutional challenges to Ohio's death penalty that have been repeatedly rejected by this Court, and the federal courts, for more than two decades.

A. Ohio's capital punishment scheme is not imposed in an arbitrary and discriminatory manner.

This Court has repeatedly rejected arguments that "Ohio death penalty statutory scheme violates constitutional prohibitions against arbitrary and unequal punishment." *State v. Jackson*, 2014-Ohio-3707, ¶ 268 (2014); *State v. Fergusan*, 108 Ohio St.3d 451, 464 (2006). Moreover, in *Gregg v. Georgia*, 428 U.S. 153, 199 (1976), the Supreme Court approved the existence of "discretionary stages" in capital proceedings, including prosecutorial discretion whether to prosecute and/or to plea bargain. The fact that prosecutors in Ohio exercise discretion—in deciding whether or not to present a capital case for indictment—is fully constitutional. In Ohio,

prosecutors are elected officials and are responsible to the electorate. If the electorate have issues with an elected prosecutor's charging decisions, they can let him know about it in November. Without a specific allegation of an improper motive, Clinton's claim fails.

B. Ohio death penalty scheme does not invite arbitrary and capricious jury decisions.

As to Clinton's claim that Ohio death penalty statute invites arbitrary and capricious jury decisions, this Court has repeatedly rejected such arguments. *State v. Mammone*, 139 Ohio St.3d 467, 506 (2014); *State v. Jenkins*, 15 Ohio St.3d 164, 171-173 (1984). The Ohio death penalty statutes "embod(y) the two basic components the Supreme Court has held a capital sentencing scheme must have in order to be constitutional: it 'perform[s] a narrowing function with respect to the class of persons eligible for the death penalty,' and it also 'ensure[s] that capital sentencing decisions rest upon an individualized inquiry.'" *United States v. Taylor*, 646 F.Supp.2d 1237, 1241 (D. New Mex. 2008), *citing*, *Jones v. United States*, 527 U.S. 373, 376-79 (1999). Furthermore, this Court has held that Ohio's mitigating factors are not unconstitutionally vague. *State v. Buell*, 22 Ohio St.3d 124, 140, 489 N.E.2d 795 (1986). As such, this claim is meritless.

C. Ohio death penalty scheme does not unconstitutionally encourage guilty pleas.

Clinton next argues that Ohio's death penalty statutes unconstitutionally encourage guilty pleas. The Supreme Court has held that a guilty plea is not invalid simply because of the possibility of the death penalty. *Brady v. United States*, 397 U.S. 742, 751 (1970). Moreover, Clinton did not plead guilty. Accordingly, it is objectively reasonable to conclude that Ohio's statutes either facially, or as applied to Clinton, does not offend the Constitution. *See Wickline v. Mitchell*, 319 F.3d 813, 824 (6th Cir. 2003) (rejecting claim that Ohio's death penalty unconstitutionally encourages guilty pleas).

Ohio R. Crim. P. 11(C)(3) does not impose an impermissible "risk of death" on defendants who exercise their right to a jury trial. *State v. Buell*, 22 Ohio St.3d 124, 138 (1986). In *Beull*, this Court rejected the contention "that Crim. R. 11(c)(3) encourages guilty pleas, and thereby (acts) as a waiver of fundamental rights." *Id.* According to this Court, "[e]ven in cases where a plea has been accepted, Crim. R. 11(c)(3) [omit] provide(s) no advantage at all." *Id.*

D. O.R.C. 2929.03(D)(1) does not render Ohio's entire death penalty statutory scheme unconstitutional.

"When death may be imposed as a penalty, the court, *upon the request of the defendant*, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court" *See*, O.R.C. 2929.03(D)(1) (emphasis added). In the present case, the trial court appointed Clinton an "independent" licensed psychologist, Dr. Askenazi.

Regardless, in *Ake v. Oklahoma*, the Supreme Court clearly held a defendant is entitled to only one qualified expert at the expense of the state, even if the conclusions are contradictory to his defense. 470 U.S. 62, 83 (1985). Furthermore, "[t]he Constitution does not require that an indigent criminal defendant be able to retain the expert of his choosing, only that a competent expert be made available." *Lundgren v. Mitchell*, 440 F.3d 754, 772 (6th Cir. 2006). Moreover, due process concerns are met with a "friend of the court" expert appointment, and the constitution does not require the appointment of an "independent" expert. *Wogenstahl v. Mitchell*, 668 F.3d 307, 340 (6th Cir. 2012). Therefore, this claim has no merit.

E. Ohio death penalty statutory aggravating factors are not overly vague.

This Court has held that Ohio's statutory "aggravating circumstances" were not "unconstitutionally vague[.]." *State v. McNiell*, 83 Ohio St.3d 438, 453 (1998); *State v. Gumm*,

73 Ohio St.3d 413, 416 -423 (1995).

F. Proportionality review is not mandated by the Constitution.

It is well settled that "proportionality review in Ohio includes only cases 'in which the death penalty has been imposed.'" *State v. Robb*, 88 Ohio St.3d 59, 86 (2000). This Court has continuously denied challenges to the constitutionality of Ohio's death penalty proportionality review under O.R.C. 2929.05. *State v. Lamar*, 95 Ohio St.3d 181, 186 (2002); *State v. Smith*, 80 Ohio St.3d 89, 118 (1997); *State v. Steffen*, 31 Ohio St.3d 111 (1987). Despite binding precedent, Clinton contends that Ohio's death penalty is constitutionally deficient because it does not require the jury to explain its reasons for adjudging a *life* sentence, thereby failing to provide a meaningful basis for distinguishing between life and death sentences. However, the Supreme Court has upheld a state statutory scheme that did not enunciate specific factors to consider or a specific method of balancing the competing considerations. *Franklin v. Lynaugh*, 487 U.S. 164, 172-173 (1988); *Zant v. Stephens*, 462 U.S. 862, 875 (1983). Accordingly, it is objectively reasonable to conclude that the constitution does not require a jury to explain its reasons for adjudging a life sentence. *See Buell*, 274 F.3d at 368 (rejecting claim that Ohio's statute is unconstitutional because it does not require jury to identify mitigating factors when life sentence is imposed).

Furthermore, proportionality review is not even constitutionally required. *Pulley v. Harris*, 465 U.S. 37, 44-51 (1984); *Walton v. Arizona*, 497 U.S. 639 (1990); *Lewis v. Jeffers*, 497 U.S. 764, 779 (1990); *McQueen v. Scroggy*, 99 F.3d 1302 (6th Cir. 1996); *Getsy v. Mitchell*, 495 F.3d 295, 305-306 (6th Cir. 2007) (en banc). Since proportionality review is not constitutionally required, states are accorded great latitude in defining the pool of cases used for comparison. *See Lindsey v. Smith*, 820 F.2d 1137, 1154 (11th Cir. 1987). Ohio has defined the pool of cases to be

used in its proportionality review in a rational manner. As such, no constitutional provision is implicated by this process.

G. Ohio's death penalty statutes do not violate International Law; the International Convention on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT), or the Universal Declaration of Human Rights (DHR).

International law does not prohibit capital punishment in Ohio. *State v. Issa*, 93 Ohio St.3d 49, 69 (2001); *See also, Buell v. Mitchell*, 274 F.3d at 370-376, ("whether customary international law prevents a State from carrying out the death penalty, when the State otherwise is acting in full compliance with the Constitution, is a question that is reserved to the executive and legislative branches of the United States government, as it their constitutional role to determine the extent of this country's international obligations and how best to carry them out.") In *Medellin v. Texas*, 554 U.S. 759 (2008), the Supreme Court held that all treaties are international commitments, but unless Congress conveys its intention to make the treaty self-executing, or pass an implementing statute, then it will not be enforceable by domestic courts. *Medellin*, 554 U.S. at 505. The Court distinguished self-executing treaties from regular treaties. *Id.* According to the Court, a self-executing treaty is specifically enforceable without the aid of supplemental legislation. *Id.* However, a treaty will only be deemed self-executing if there are stipulations in the treaty that make it clear that it was intended to be specifically enforceable by domestic courts. *Id.*at 506. Without the clear intent of self-execution, a treaty is only an obligation of the political branches, and not specifically enforceable by domestic courts. *Id.* The Court also held that the Executive Branch has no authority under the Constitution to convert a non-self-executing treaty into a self-executing treaty. *Id*. at 525. Although a President can make a treaty, he or she is powerless to make it enforceable by domestic courts unless the Congress

consents. *Id*. at 526, *citing*, U.S. Cons. Art. II, § 2. The Supreme Court concluded "[t]he responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress." *Id*.

This Court has held that Ohio's death penalty scheme does not violate the ICCPR, the ICERD, the CAT, or the DHR. *State v. Kirkland*, 140 Ohio St.3d 73, 89 (2014); *State v. Short*, 129 Ohio St.3d 360, 381 (2011); *State v. Phillips*, 74 Ohio St.3d 72, 103-104 (1995). "Because the United States declared, when signing the ICCPR, that the treaty would not be self-executing, see 138 Cong. Rec. S4781, S4784, its provisions cannot be enforced in the United States courts absent enabling legislation." *Commonwealth v. Judge*, 916 A.2d 511, 523 (Pa S.Ct. 2007). Moreover, Article 6 of that agreement specifically allows for capital punishment. See, ICCPR, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976). Likewise, the ICERD is not self-executing and therefore cannot be enforced by domestic courts within the United States. *Johnson v. Quander*, 370 F.Supp.2d 79, 100-101 (D.C. 2005). Furthermore, "[T]he United States ratified the (CAT) Covenant on the express understanding that it did not create obligations enforceable in American courts." *Baird v. State*, 831 N.E.2d 109, 115 (Ind. S.Ct. 2005). Lastly "the United States ratified the (Universal Declaration of Human Rights) on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the (domestic) courts." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004) (finding the DHR was not self-executing.)

It is highly questionable, under the Tenth Amendment, whether Congress has the authority under any enumerated power (commerce clause or treaty clause) to prohibit the states from imposing capital punishment. *United States v. Lopez*, 514 U.S. 549, 609 (2000); *United States v. Harris*, 106 U.S. 629 (1883). However, to avoid a constitutional issue under Art. II's

Treaty powers, the Supreme Court recently held that Congress could not abridge a State's inherent powers under the Tenth Amendment, unless Congress's language was obvious and specific when a treaty was ratified or enabled. *Bond v. United States*, 134 S.Ct. 2077, 2087 (2014). According to *Bond*, "'it is incumbent upon … courts to be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers.'" *Id.* at 2089, *citing*, *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) ("Application of the plain statement rule thus may avoid a potential constitutional problem.")

Because the enforcement of state law judgments in an inherent power of the State under its police powers, to prevail, Clinton must show that one of the treaties he cites is not only self-executing but Congress specifically prohibited capital punishment when it ratified or enabled the treaty. This he cannot do. The Supreme Court recognized that Constitution must leave room for "the 'essential attributes of sovereign power,' . . . necessarily reserved by the States to safeguard the welfare of their citizens[.]" *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 50 (1977). "Perhaps the clearest example of traditional state authority is the punishment of local criminal activity." *Id.*, *citing*, *United States v. Morrison*, 529 U.S. 598, 618 (2000). Hence, the State of Ohio has a compelling interest in ensuring that state court judgments, including those that impose capital sentences, are enforced in a timely fashion. *Hill v. McDonough*, 547 U.S. 573, 583–584 (2006) (Both the State and the victims of crime "have an important interest in the timely enforcement of a sentence.") Moreover, the Supreme Court has recognized an "enduring respect" for the "finality of convictions that have survived direct review within the state court system." *Calderon v. Thompson*, 523 U.S. 538, 555 (1998). More particularly, the death penalty serves a compelling state interest. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). Due to federalism and Tenth Amendment concerns, because neither the President, nor the Senate, have

ratified a self-executing treaty that expressly and specifically prohibits capital punishment, Clinton's claims of international law violations must fail. *Bond*, 134 S.Ct. at 2090.

Response to Proposition of Law 23: Because there were no errors below to accumulate, Clinton's claim must fail.

"[A] conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.D.2d 955, ¶132 citing *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987.) The doctrine of cumulative error does not apply in cases where, as here, there are not multiple errors. *Id*. If multiple errors were committed at trial, this Court must then find "a reasonable probability that the outcome of the trial would have been different but for the combination of the separately harmless errors." *State v. Djuric*, 8th Dist. No. 87745, 2007-Ohio-413, ¶52 citing *State v. Durant*, 159 Ohio App.3d 208, 219, 2004-Ohio-6224, 823 N.E.2d 506, ¶38.

Cumulative error does not apply in this case as Clinton had a fair trial. "[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and *** the Constitution does not guarantee such a trial." *United States v. Hasting*, 461 U.S. 499, 508-09, 103 S.Ct. 1974 (1983.) Clinton received highly experienced counsel who zealously advocated for their client despite overwhelming evidence of his guilt. To the extent that there may have been any error in this case, it did not individually or combined deprive Clinton of a fair trial. Therefore, this Court should overrule Clinton's final proposition of law and affirm his convictions.

CONCLUSION

For the reasons expressed, this Court should conclude that none of Clinton's assignments of error are well taken, and furthermore that the death sentences imposed on Clinton are appropriate.

Respectfully submitted,

MICHAEL DEWINE
Ohio Attorney General

/s/ Thomas Madden
THOMAS MADDEN (#0077069)
Counsel of Record
Assistant Attorney General
150 E. Gay Street, 16th Floor
Columbus, OH 43215
614-995-3234 (voice)
866-239-5489 (facsimile)
Thomas.Madden@ohioattorneygeneral.gov

/s/ Stephen Maher
STEPHEN MAHER (#0032279)
Senior Assistant Attorney General
150 E. Gay Street, 16th Floor
Columbus, OH 43215
614-644-8328 (voice)
866-440-6159 (facsimile)
Stephen.Maher@ohioattorneygeneral.gov

/s/ Jocelyn K. Lowe
JOCELYN K. LOWE (#0083646)
Assistant Attorney General
150 E. Gay Street, 16th Floor
Columbus, OH 43215
614-644-7657 (voice)
866-468-5382 (facsimile)
Jocelyn.Lowe@ohioattorneygeneral.gov

COUNSEL FOR APPELLEE, STATE OF OHIO

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief of Appellee State of Ohio has been delivered by e-mail to Kimberly S. Rigby, Counsel of Record, and to Elizabeth Arrick and Jessica Carrico, co-counsel, on this 1st day of May, 2015.

/s/ Thomas Madden
THOMAS MADDEN (#0077069)

COUNSEL FOR APPELLEE, STATE OF OHIO