

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)	CASE No. 2014-1922
)	
Plaintiff-Appellee)	Appeal from the Trumbull County
)	Court of Common Pleas
-vs-)	Case No. 2012 CR 735
)	
DAVID MARTIN,)	
)	
Defendant-Appellant)	A DEATH PENALTY CASE

MERIT BRIEF PLAINTIFF-APPELLEE OF STATE OF OHIO

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STATEMENT OF THE CASE

This case began with the execution style slaying of victim Jeremy Cole (“Mr. Cole”) and the attempted aggravated murder of Melissa Putnam (“Ms. Putnam”) on September 27, 2012. Because Ms. Putnam survived the shooting, the identity of Defendant Appellant David Martin (“Appellant”) was established early in the investigation. Appellant was arrested October 16, 2012. On October 27, 2012, the Trumbull County Grand Jury returned a 10-count, capital indictment (T.d. 1). Appellant correctly recites the highlights of that indictment at page 4 of his brief, and the State takes no exception to that condensed recitation. After the standard fare of pre-trial motions, Appellant’s capital murder case proceeded to a jury trial August 28, 2014. Appellant accurately notes in his brief that his trial counsel conceded guilt during opening statements. (T.p. Vol. VII, p. 1461) The jury heard the following testimony during Appellant’s trial:

Ms. Putnam was the mother of a school-age child, a lifelong resident of Trumbull County, and a small-time marijuana dealer. (T.p. Vol. VII, p. 1464-1470, 1529). On September 27, 2012, Ms. Putnam sent her 11-year old daughter off to school, and then met up with her best friend, Mr. Cole, who chauffeured her around on a job search. They returned to her home at 2220 Oak St., Warren, Ohio, Trumbull County, around 10:30 a.m. and started to smoke some marijuana. They were interrupted by an unexpected knock at the front door. Mr. Cole opened the door to find Appellant on the other side, a man Ms. Putnam knew only as “D.” (T.p. Vol. VII, p. 1470-1471, 1485).

Ms. Putnam recognized “D” from numerous prior drug sales. In fact, “D” had been inside her home the previous day when she noticed “D” was toting a black gun. Nevertheless, Mr. Cole invited in “D.” The trio sat down in the living room to enjoy a mid-morning pot party. “D” excused himself and walked into Ms. Putnam’s kitchen. He returned carrying the very same

gun Ms. Putnam noticed the prior day, only this time it was pointed directly at Mr. Cole. (T.p.Vol. VII, p. 1470-1474).

“D” announced that he had been paid \$5,000 to kill Mr. Cole because someone accused him of child molestation. (T.p. Vol. VII, p. 1474-1476). Ms. Putman protested her friend’s innocence to no avail. “Whoa, bro. You got the wrong guy.***Mr. Martin is telling Jeremy that he’s a child molester.***And I’m telling Mr. Martin, no he’s not. I’m with him every day. I would know something like that.***You have him mixed up with the wrong person. He’s not who you think he is.” (T.p. Vol. VII, p. 1475-1476).

Appellant ordered Mr. Cole to the floor and told him to lie face down. Appellant then ordered Ms. Putman to first tie up Mr. Cole with a smartphone charging cord and then to secure herself with an extension cord. She did as told, but did not bind Mr. Cole’s restraints tightly, a fact which did not escape Appellant. (T.p. Vol. VII, p. 1478-1480,1485). “Bitch, you think I’m playing with you. Tie him up.” (T.p. Vol. VII, p. 1481). Though still tied herself, Ms. Putman did as instructed. With both victims incapacitated, Appellant ordered Ms. Putman back to her bedroom, which caused her to believe she was about to be raped. She started bargaining with him. “You don’t gotta do this. You can have whatever you want.” (T.p. Vol. VII, p. 1483). This caused Appellant to pause. He dumped Ms. Putman’s purse, took approximately \$100, her phone and her marijuana. (T.p.Vol. VII, p. 1484). Appellant told Mr. Cole to crawl around on his face, which he did. (T.p. Vol. VII, p. 1492-1493). He next forced both victims into Ms. Putnam’s bedroom. As they lay on the bed, he went through Mr. Cole’s pockets taking his cell phone and demanding cash which the victim did not have. (T.p. Vol. VII, p. 1495-1497).

Appellant next demanded Mr. Cole’s car keys, which triggered a glimmer of false hope for Ms. Putnam that she and Mr. Cole would survive this ordeal. Appellant marched Ms. Putnam

out into the living room area to look for the keys. She thought she could coax him out of the house at that point. She thought wrong. Appellant would not leave nor would he allow Ms. Putnam to escape. (T.p. Vol. VII, p. 1497-1500). When the search for the car keys proved fruitless, Appellant ordered Ms. Putnam into her daughter's bedroom thereby separating the two victims. Appellant tossed a black cloth over her head. Even with her field of vision impaired, Ms. Putnam noticed the very distinctive black and blue high-top Nike shoes Appellant was wearing. Ms. Putnam heard sounds consistent with a struggle and then a "pow." (T.p. Vol. VII, p. 1502-1505). Ms. Putnam jerked her restraints from her wrists just in time to find Appellant standing directly over top of her. She begged him not to shoot her in the face, and tried shielding her face with her hand. Appellant apologized and fired. Just before Ms. Putnam lost consciousness, she saw Appellant leave the bedroom. (T.p. Vol. VII, p. 1505-1507).

Ms. Putnam awoke to find her hand bones protruding through her skin. She crawled out a bedroom window and ran to a neighbor's for help. Her neighbor called 9-1-1. (T.p. Vol. VII, p. 1509-1511; State's Ex. 16). The first responding Warren City Police Officers were uncertain as to the exact address of the shooting. Fortunately, Officers Messaro and Mines encountered Ms. Putnam at near Oak Street and Oak Circle. She was blood-covered, bleeding and almost incoherent, but was able to relay that she and Mr. Cole had been shot. Officers found Mr. Cole barely clinging to life. (T.p. Vol. VII, p. 1535-1538).

Ms. Putnam survived her injuries; Mr. Cole did not. According to testimony offered by Trumbull County Coroner Dr. Humphrey Germaniuk, Mr. Cole suffered a single gunshot wound to the head along with multiple skull fractures, a collapsed right eye and two black eyes. (T.p. Vol. VIII, p. 1671, 1693-1694). According to the coroner, Mr. Cole was shot between the eyes at a distance of no more than three to eight inches. (T.p. Vol. VIII, p. 1675, 1680). Ms. Putnam

underwent four hours of surgery the day of the shooting, and required additional surgery a week later to remove a bullet fragment from her head. (T.p. Vol. VII, p. 1518-1519; State's Ex. 9).

Though Ms. Putnam had encountered Appellant on numerous occasions prior to the shootings, she did not know his real name and could not immediately identify him for police. (T.p. Vol. VIII, p. 1628-1629). Warren Det. Wayne Mackey showed Ms. Putnam three photo arrays on three separate occasions. On October 1, 2012, five days after the shooting, she viewed the third array, "became hysterical," and identified Appellant's photograph with "one thousand percent certainty." (T.p. Vol. VIII, p. 1634). To further corroborate the identification, Det. Mackey discovered security footage from a local fast-food restaurant which showed a customer who resembled Appellant wearing distinctive Nike high-tops on the morning of the homicide. (T.p. Vol. VIII, p. 1634-1638).

With this evidence, Det. Mackey obtained a warrant for Appellant's arrest. (T.p. Vol. VIII, p. 1638). Dep. U.S. Marshal William Boldin located Appellant in a Tallmadge, Ohio, apartment. Dep. Marshal Boldin entered the apartment and spotted Appellant. Initially, Appellant ignored Dep. Marshal Boldin's orders to surrender and momentarily ducked out of view. He reappeared with his hands in the air. As Dep. Marshal Boldin cuffed Appellant, he noticed a loaded and operable Charles Daly semi-automatic handgun on the floor. Appellant admitted the weapon was his. (T.p. Vol. VIII, p. 1558-1566, 1711; State's Ex. 1, 2, 42)

En route to the Warren Police Department, Appellant volunteered, "I can accept the needle. I did what I had to. I'm the trigger man. You got the gun. I'm hot. I got no reason to lie." (T.p. Vol. VIII, p. 1569, 1585). Once they drove into the Warren City limits, Appellant offered to show Dep. Marshal Boldin where he burned the clothes he was wearing the day of the shootings. He directed the marshals to the Reserve South Avenue Bridge where Dep. Marshal

Boldin located a burn pile. (T.p. Vol. VIII, p. 1571-1573; State's Ex. 30, 31, 32). Appellant submitted to a recorded interview and admitted the shootings though he adamantly denied robbing either victim. (T.p. Vol. VIII, p. 1642; State's Ex. 34; T.d. 281).

Appellant called no witnesses during the guilt phase of his trial to testify on his behalf. After less than three hours of deliberation, the jury convicted Appellant on all counts and specifications. (T.p. Vol. IX, p. 1819-1823; T.d. 232-252).

The matter proceeded to a mitigation hearing September 17, 2014. Appellant called three lay witnesses. The first witness, Alegra Martin, is a first cousin on Appellant's father's side who is ten years Appellant's senior. She told the jury Appellant grew up in the Morris Black public housing project on Cleveland's east side. Her father and Appellant's father abused drugs. She has had little contact with Appellant throughout his life due in part to his frequent incarcerations. (T.p. Vol. IX, p. 1855-1861). "He's been in and out of jail. I don't visit people in jail." (T.p. Vol. IX, p. 1864). Another cousin, Lucretia Norton, testified Appellant's mother was a prostitute and his father was a drug abuser. Though the two were close as children, she admitted – as did Alegra Martin – that she'd seen very little of him as an adult because of his repeated stints in prison. (T.p. Vol. IX, p. 1868, 1876). It was apparently Martin family lore that Appellant's mother was murdered when he was a small child and he witnessed that event. The two cousins offered unsolicited testimony to that end. (T.p. Vol. IX, p. 1857, 1868). Appellant said the same in his confession to Warren Police. (State's Ex. 16, T.d. 281, p. 12) However, defense counsel stipulated during a bench conference that Appellant did not actually witness the killing and did not argue this scenario in his closing argument. (T.p. Vol. IX, p. 1873-1874).

Appellant's final witness was Landon Nicholson who described the crime ridden and violent environment in the Morris Black housing project. (T.p. Vol. IX, p. 1880). His testimony

was very contradictory about Appellant's age when they first met or how long he had known Appellant. (T.p. Vol. IX, p. 1881, 1888). Nevertheless, Mr. Nicholson testified that one of Appellant's childhood mentors, Donald Ray, ran a boxing gym and drugs through the Cleveland projects. At the time of Appellant's trial, Mr. Ray was serving time for murder, according to Mr. Nicholson. (T.p. Vol. IX, p. 1884-1885).

Appellant made an unsworn statement to the jury which was not subject to cross examination. He apologized to Ms. Putnam and Mr. Cole's surviving family members. Though he did not "blame" the murder on drugs, he did make clear that his participation in a drug and gun culture factored into his actions. "Something that I have grown to highly understand is drugs really do take lives." (T.p. Vol. IX, p. 1893). He said he took responsibility for the shootings and expressed remorse, though he stated he refused to cry crocodile tears for the jury because "I was not crying when I did such crimes." (T.p. Vol. IX, p. 1894). He did not ask the panel to spare his life. "I am only asking that you do what is in your hearts." (T.p. Vol. IX, p. 1895).

Appellant's contrite remarks were in sharp contrast to his behavior in court just weeks before his trial. He spotted Ms. Putnam in the courtroom during pre-trial proceedings and told her, "Bitch, I should have shot you in the face." (T.p. Vol. VII, p.1525-1526). An in-court melee ensued and Ms. Putnam was arrested. (T.p. Vol. VII, p. 1527).

After two hours of deliberations, Appellant's jury determined that the aggravating circumstances outweighed the mitigating factors and voted to recommend the death penalty. (T.p. Vol. IX, p. 1951; T.d. 260). Appellant appeared for sentencing September 24, 2014. Though he waived his Crim. R. 32(A)(1) rights to make a formal allocution, he did exercise his First Amendment right to free speech by making an obscene gesture toward the prosecution team

and referring to the lead prosecutor as a “Bitch.” (T.p. Vol. IX, p. 1957-1958). The court addressed each and every mitigating factor listed in R.C. 2929.04(B), but found only R.C. 2929.04(B)(7), the so called “catchall” factor, applicable to Appellant. The court cited Appellant’s childhood in a Cleveland public housing project with parents ill-equipped to properly supervise him as mitigating factors considered for sentencing purposes. (T.p. Vol. IX, p. 1963-1970). The court sentenced Appellant to death on the aggravated murder count and an aggregate 61 years imprisonment on the remaining felonies upon which Appellant stood convicted. (T.p. Vol. IX, p. 1970-1972; T.d. 263).

In Procedural History portion of his brief, Appellant delves extensively into various aspects of the jury selection process. The State will forego any recitation of those facts at this juncture, but instead will bring the facts to the Court’s attention as necessary in the Argument portion of the State’s brief. Appellant filed a timely Notice of Appeal in this Court and followed with his brief on October 12, 2015. The State follows with this brief in response.

ARGUMENT

STATE'S RESPONSE TO APPELLANT'S PROPOSITION OF LAW NO.1

A capital defendant does not suffer a due process violation, nor is trial counsel ineffective, when counsel opts to selectively question potential jurors concerning their knowledge of Appellant's role in a county jail hostage episode occurring several months before trial.

Appellant argues that his trial counsel were ineffective in their approach to the pre-trial publicity issue during the jury selection process. The State submits the record demonstrates that counsel for both the State and Appellant thoroughly interrogated each potential juror on this subject and that Appellant cannot point to a single, seated juror who expressed any knowledge of a hostage taking incident in which Appellant willingly participated.

Appellant couches this argument in the form of a due process and ineffective assistance of counsel argument. When considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness." *State v. Lytle*, 48 Ohio St.2d 391, 396–397, 2 O.O.3d 495, 498, 358 N.E.2d 623, 627, (1976) vacated in part on other grounds (1978), 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154. This standard is essentially the same as the one enunciated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Moreover, this Court recently addressed the issue of capital counsel's effectiveness during voir dire and noted as follows: "When evaluating claims of ineffective assistance at voir dire, we have 'recognized that counsel is in the best position to determine whether any potential juror should be questioned and to what extent.' *State v. Murphy*, 91 Ohio St.3d 516, 539, 747

N.E.2d 765 (2001); see *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, 873 N.E.2d 828, ¶ 65 (in some cases, counsel may decide the best tactic is to ‘ask[] few or no questions of a prospective juror’). In fact, ‘[f]ew decisions at trial are as subjective or prone to individual attorney strategy as juror *voir dire*, where decisions are often made on the basis of intangible factors.’ *Mundt* at ¶ 64, quoting *Miller v. Francis*, 269 F.3d 609, 620 (6th Cir.2001). We consistently decline to ‘second-guess trial strategy decisions’ or impose ‘hindsight views about how current counsel might have *voir dired* the jury differently.’ *Mundt* at ¶ 63, quoting *State v. Mason*, 82 Ohio St.3d 144, 157, 694 N.E.2d 932 (1998).” *State v. Thompson*, 141 Ohio St.3d 254, 297, 2014-Ohio-4751, 23 N.E.3d 1096, 1144-45, ¶ 225 (2014) *reh'g denied*, 141 Ohio St.3d 1458, 2015-Ohio-239, 23 N.E.3d 1198, ¶ 225 (2015) and *cert. denied*, 136 S.Ct. 83 (2015) *reh'g denied*, U.S. No. 14-100092015 WL 7692797 (Nov. 30, 2015).

Essentially, Appellant assigns error here because his trial counsel opted to **not** interrogate prospective jurors about whether they knew Appellant was the ringleader in a hostage taking episode at the Trumbull County Jail on April 23, 2014. Pure and simple, this was a matter of trial strategy. Indeed, prior to the commencement of individual *voir dire* the following exchange occurred:

[Assistant Prosecutor] Becker: I just wanted to make sure that if someone has heard the hostage situation that we---

The Court: Highly unlikely.

[Defense Counsel] Meyers: How can you say hypothetically?

The Court: It will be dealt with one by one.

(Vol. IV, pp. 577-578).

It should be noted that trial counsel filed a motion for change of venue and specifically referenced the hostage situation and the publicity that followed. (T.d. 209). The trial court found the motion “presumptive” and “premature” and held the motion in abeyance pending jury selection. (T.d. 217). Additionally, the State submits the decision to forego references to the hostage-taking incident was a matter of sound trial strategy. Appellant is asking this Court to do just what it stated in *Thompson* it will not do, to wit, second guess counsel’s trial strategy. Indeed, Appellant’s participation in the siege, which included generous interviews with the local news media, may have been calculated to pollute his jury pool. Frankly, such behavior smacks of invited error. That being the case, trial counsel cannot be said to have violated an essential duty to their client by opting not to advertise Appellant’s felonious conduct committed while incarcerated.

While Appellant criticizes his trial counsel for opting to not examine potential jurors about the hostage situation, counsel and the court were provided with the juror questionnaires completed by every potential juror. Though it does not appear that the completed forms are part of the record, a proposed form asks of every potential juror: Are you acquainted with or have you heard of the Defendant in this case, David Martin. If so, how are you acquainted with him or *what have you heard about him?* (Emphasis added) (T.d. 156). This question certainly opens the door for jurors to expound as to their knowledge about the capital murder case, as well as any other activity that may cause the juror to have a familiarity with him. Nothing appears in the record to suggest any seated juror in September of 2014, connected Appellant’s name to the jail hostage episode occurring in April of 2014. Therefore, trial counsel cannot be labeled ineffective for failing to question jurors further about an episode that does not reflect well on their client.

Appellant cites to the interrogation of Lora Dennis whose husband was a reserve deputy for the Trumbull County Sheriff's Department. It was on cross examination, by Appellant's trial counsel, that Ms. Dennis discussed her knowledge, or lack thereof, concerning the hostage episode. Even though her husband was a reserve deputy, she said she had "no clue" that she had been summoned for a capital murder trial, and did not discuss the case with her husband. (T.p. Vol. V, p. 644). She told counsel she had not heard anything about the case for which she had been summoned. (T.p. Vol. V, p. 648). Ms. Dennis testified her husband only worked 16 hours per month for the sheriff's department and there is no indication that he was pressed into duty for the siege. *Id.* Moreover, counsel challenged Ms. Dennis for cause, but the challenge was overruled by the court. (T.p. Vol. V, pp. 650-651). Though the challenge came over counsel's concern for her answer to questions regarding mitigation, defense counsel nonetheless sought to exclude her from the panel. *Id.* Ms. Dennis was ultimately seated on Appellant's jury, but despite extensive questioning, there is no indication she had any "clue" about Appellant's pre-trial notoriety.

In his brief, Appellant delves deeply into the pre-trial publicity that prompted counsel to file the Motion for Change of Venue. For example, he cites to news coverage of the in-court row which resulted in Melissa Putnam's arrest, the hostage taking at the county jail and Appellant's 22-year sentence on federal charges. (Appellant's brf. a pp. 22-26). This coverage was meticulously documented by his trial counsel in their motion. (T.d. 209). The State does not dispute that the local news media and social media covered Mr. Cole's murder, Appellant's arrest, public pre-trial proceedings, and the hostage situation. However, with the aid of juror questionnaires and questioning in open court by the judge and counsel for both parties, it is patently obvious from the record that jurors seated in this case paid little attention to this

coverage or simply did not retain what they read, heard or viewed. If indeed there was an inordinate amount of pre-trial publicity in this case – a point neither conceded by the State nor proven by the record – the jurors ultimately selected for this case seemed unaffected by it. Very frankly, if the coverage affected them in any way that effect had dissipated by the time Appellant’s case went to trial.

At page 29 of his brief, Appellant claims “the trial court ignored [constitutional] safeguards here.” Nothing could be further from the truth. The trial court presided over five days of jury selection during which 74 potential jurors were thoroughly examined by the court and counsel for both the State and the Appellant to determine if they had encountered any of the pre-trial publicity about which Appellant now complains, and if so, if that news coverage engendered an impermissible bias. (T.p. Vol. IV – VII, pp. 482-1432). Such exhaustive examinations show scrupulous adherence to Appellant’s constitutional rights, not a casual disregard for constitutional protections.

Further, Appellant argues that because the pre-trial publicity was “not kind” to Appellant and because it repeated the fact that Appellant confessed to killing Mr. Cole, the trial court was required to “presume prejudice” on the part of all potential jurors. Appellant’s brief at page 31. He cites to the U.S. Supreme Court cases of *Skilling v. United States*, 561 U.S. 358, 130 S.Ct. 2896, 177 L.Ed 2d 619 (2010) and *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663(1963) But presumed prejudice is not the law from this Court. In the recent case of *State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, this Court held that even when a criminal defendant elects to provide a written confession to a local newspaper, the trial court is not required to “presume prejudice.”

“***[A]lthough Mammone claims that ‘[t]he venires were replete with potential jurors who had been extensively prejudiced by media accounts and had formed such strong opinions as to not be able or willing to change their minds,’ the voir dire transcript reveals otherwise.

Prejudice should not be presumed.

“The trial court was very conscious of pretrial publicity in Mammone's case. Each potential juror was asked to complete an extensive publicity questionnaire, and the court permitted thorough questioning about publicity issues during small-group voir dire. Dozens of potential jurors stated that they knew nothing about the case. The court instructed the potential jurors during voir dire to disregard all information from outside sources and sought assurances that every juror would set aside any preexisting opinions and be fair to both sides. The potential jurors were reminded that the media is not always accurate, and they were warned to avoid additional publicity. Most importantly, the trial court excused potential jurors who expressed an inability to set aside preexisting opinions.

“Under these circumstances, we cannot conclude that extensive pretrial publicity rendered Mammone's trial a ‘hollow formality.’ *Compare Rideau*, 373 U.S. at 726, 83 S.Ct. 1417, 10 L.Ed.2d 663. As a result, we hold that this is not one of the extraordinary cases in which prejudice should be presumed based solely on the amount and nature of the pretrial publicity alone.” (Emphasis added). *Mammone, supra*, at ¶¶ 66-68. Clearly, none of the seated jurors’ responses indicated an oversaturation with the facts of the case, or the pre-trial sideshows orchestrated by Appellant. Moreover, given that Appellant’s counsel made it clear from the outset that Appellant was the killer, whether the media published accounts of his confession would have no bearing on the juror’s impartiality.

Appellant criticizes his counsels' voir dire of Claudia Ware, who lives near where the shootings occurred. Appellant's brf. pp. 36-37. The leading question he proposes at page 37 of his brief would have been subject to objection. In the end, despite living somewhat close to the crime scene, it was clear Ms. Ware knew little about the facts of the case, or Appellant's other criminal activity, and both parties were satisfied that she could be fair and impartial. Likewise, Juror Sharon Crum said she had heard some of the facts of the case and thought it was "bad." However, this Court has made clear that total ignorance of the facts of a capital case is not a prerequisite for jury service: "The fact that they had heard of the case does not obviate their stated willingness to function as impartial jurors. 'While fairness requires that jurors be impartial, jurors need not be totally ignorant of the facts and issues involved. *State v. Sheppard* (1998), 84 Ohio St.3d 230, 235, 703 N.E.2d 286, 292. The trial court [is] entitled to accept [a juror's] assurances that he would be fair and impartial and would decide the case on the basis of the evidence. '[D]eference must be paid to the trial judge who sees and hears the juror.' *Wainwright*, 469 U.S. at 426, 105 S.Ct. at 853, 83 L.Ed.2d at 853.' *State v. Jones* (2001), 91 Ohio St.3d 335, 744 N.E.2d 1163." *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, ¶ 38. Ms. Crum acknowledged that news accounts were not evidence and that she would judge the case solely on the evidence presented in court. (T.p. Vol. IV, p. 585). Both sides passed for cause on Ms. Crum. (T.p. Vol. IV, p. 588).

Appellant challenges the inclusion of Eric Butler on the panel. Since this argument is presented in terms of ineffective assistance of counsel, it should be stated that Appellant's counsel challenged Mr. Butler for cause, but the trial court denied the challenge. (T.p. Vol. IV, p. 614). While Appellant reprints much of Mr. Butler's voir dire, he omits that fact that while Mr. Butler knew the victim, Mr. Cole, he only knew him for a month, thought of him as a co-

worker and not a friend, and would be comfortable rendering a verdict which might disappoint Mr. Cole's family. (T.p. Vol. IV, pp. 600, 611, 613). Therefore, anymore probing questions - as suggested by Appellant - about fairness would have been wholly unnecessary in light of the answers already elicited.

Appellant also cites to John Corman. Mr. Corman stated he knew a man was killed and a woman was injured but remembered no other facts. "Like I said just happened to see it. When I first saw it, I wasn't even sure it was the case I'm sitting here for." (T.p. Vol. V, p. 715-716). He also stated he wasn't biased toward either party. (T.p. Vol. V, p. 716). Finally, any criticism of Dennis Gore is not supported by the record. His pre-trial knowledge of the case was confined to walking past a newspaper rack and glancing at headlines. (T.p. Vol. V, p. 827). Even then, he assured the court that he could put aside the headlines he saw and had not formed any opinion about the facts in the case. (T.p. Vol. V, p. 828).

None of the jurors who remained on the panel appeared swayed by any of the pre-trial publicity which Appellant terms "pervasive." This is particularly true when Appellant's guilt was never in question, and his own mitigation witnesses revealed that he had served time in prison prior to his arrest for the double shootings at issue here.

Appellant fails to demonstrate a substantial violation of his trial counsel's duties or that he suffered prejudice. This Court historically has been deferential to trial counsel, even in capital cases, regarding questions posed in voir dire and it typically declines to second guess how they might have handled voir dire differently. This case is not one to deviate from that well-established pattern. Appellant's Proposition of Law No. I is without merit.

STATE'S RESPONSE TO APPELLANT'S PROPOSITION OF LAW NO.2

A reviewing court grants great deference to trial counsel in their voir dire strategy and will not reverse a conviction or sentence absent a showing that counsel's performance fell below an objective standard of reasonableness.

Appellant next argues that his convictions and sentence are subject to reversal because of so-called "cumulative errors" by his defense counsel. This argument is without merit.

As quoted in the State's response to the previous Proposition of Law, this Court has held consistently that trial counsel, not a reviewing court, are in the best position to determine whether any potential juror should be questioned and to what extent. This Court is disinclined to second-guess trial counsel or to impose "hindsight views" on different ways to conduct a capital voir dire. *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, ¶ 225 (2014) *reh'g denied*, 141 Ohio St.3d 1458, 2015-Ohio-239, 23 N.E.3d 1198, ¶ 225 (2015) and *cert. denied*, 136 S.Ct. 83 (2015) *reh'g denied*, U.S. No. 14-100092015 WL 7692797 (Nov. 30, 2015).

It is well-settled Ohio and Federal law that in order to prevail on a claim of ineffective assistance of counsel, Appellant must show that counsel's performance fell below an objective standard of reasonableness and, in addition, prejudice arose from counsel's performance. *State v. Bradley* 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989) citing *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed. 674. Moreover, Appellant submits this argument in terms of "cumulative errors" on the part of his trial counsel. But this Court has been slow to overturn convictions or even death sentences based on a "cumulative error" argument. "This court has found in the past that multiple errors that are separately harmless may, when considered together, violate a person's right to a fair trial in the appropriate situation. See *State v. DeMarco* (1987), 31 Ohio St.3d 191, 31 OBR 390, 509 N.E.2d 1256, paragraph two of the syllabus. However, in order even to consider whether 'cumulative' error is

present, we would first have to find that multiple errors were committed in this case.” *State v. Goff*, 82 Ohio St.3d 123, 140, 1998-Ohio-369, 694 N.E.2d 916, 929 (1998). The State submits no error occurred, let alone cumulative errors worthy of reversal.

Appellant criticizes his trial counsel for not “pressing” jury foreman Eric Butler as to his views on the death penalty. However, the record reveals that counsel for the State thoroughly queried Mr. Butler about his views on the death penalty, and he expressed some reservations about the punishment. This Court has held it is not necessary for counsel to repeat questions about topics that have already been covered by opposing counsel or the judge. *State v. Coleman*, 85 Ohio St.3d 129, 135, 707 N.E.2d 476. (1999). On his questionnaire, Mr. Butler answered that he did not believe the death penalty was the appropriate punishment in all murder cases. (T.p. Vol. IV, p. 604). Contrary to Appellant’s argument, Mr. Butler did not just recite a “mantra” about being fair.

Q: Are you going to be able to set aside any preconceived opinions that you have, listen to the evidence and make a decision based on the evidence?

A (By Mr. Butler) Yes.

(T.p. Vol. IV, p. 605).

Q: He’s (the judge) gonna instruct you, on the other hand, if we (the State) don’t meet our burden, if we fall short, if the evidence falls short, we don’t prove the aggravating facts outweigh the mitigating facts, that you have to return a verdict and consider one of the life options; can you do that?”

A: Yep.

(T.p. Vol. IV, p. 606).

For a second time, Mr. Butler assured the prosecutor that he would consider a life sentence if the State failed to prove that the aggravating circumstances outweighed the mitigating factors. (T.p. Vol. IV, p. 608).

Understandably, defense counsel's questioning of Mr. Butler focused on his familiarity with the deceased victim, Jeremy Cole. As previously stated, the pair worked together for only one month. Mr. Butler made clear they were co-workers and were not "friends." (T.p. IV, p. 600). To "press" Mr. Butler about his views on the death penalty would have been highly repetitive of the State's questioning. Defense counsel should not be branded ineffective if they elect not to repeat questions thoroughly covered by the State and hone in on the nature of the relationship between a potential juror and a dead victim. Even with assurances from Mr. Butler that his month-long relationship with Mr. Cole would not impede his ability to serve as a fair and impartial juror (T.p. Vol. IV, pp. 610-614), defense counsel still challenged Mr. Butler for cause because of his "[f]amiliarity with the decedent, Jeremy Cole." (T.p. Vol. IV, p. 614). As the trial court noted: "****[H]e answered every question correctly and indicated that he could be a fair juror under these circumstances, and I don't believe his knowledge of the victim was so intense that it should overcome his statements here in court." *Id.*

The fact that defense counsel did not use a peremptory challenge to excuse Mr. Butler is not indicative of ineffectiveness. Mr. Butler revealed that he was not a death penalty enthusiast and assured the prosecutor several times over that he would render a life verdict if the mitigating factors outweighed the aggravating circumstances. Thus, permitting Mr. Butler to remain on the panel does not demonstrate ineffective performance on the part of trial counsel.

Appellant at page 55 of his brief criticizes trial counsel for not delving into the pre-trial publicity area more thoroughly with potential juror Alan Armstrong. The trial court excused Mr. Armstrong for cause – pursuant to a defense motion - after he expressed reservations about his ability to concentrate and the effect jury service might have on his job. (T.p. Vol. IV, pp. 795-809). Therefore, counsel's lack of an interrogation on the pre-trial publicity issue is completely

non-prejudicial. Appellant's counsel was functioning as counsel by challenging Mr. Armstrong for cause and eliminating him from the panel.

Appellant again cites to juror Lora Dennis, the wife of a part-time reserve sheriff's deputy, and again suggests that counsel's election to not confront her about her knowledge of Appellant's involvement in a county jail hostage siege occurring four months ahead of trial constitutes ineffectiveness. Ms. Dennis's questioning was covered thoroughly in the State's response to Appellant's first Proposition of Law. Suffice to say she told the court she had "no clue" she was even summoned for a capital trial and had never discussed the facts of the case with her husband. (T.p. Vol. V, p. 644). Moreover, defense counsel challenged Ms. Dennis for cause because they were uncertain that she would weigh fairly the mitigating evidence. However, the trial court overruled that challenge. (T.p. Vol. V, pp. 650-651).

Appellant splits hairs over seated juror Marion Gresko. As quoted at page 58 of his brief, defense counsel specifically asked Ms. Gresko, "[i]f you got to that point where you're deciding whether or not the death penalty or one of the life options, *would it be important to you to know* about David's background and history in making that decision?" (Emphasis added) (T.p. Vol. IV, p. 551). Appellant then finds fault with his counsel for not asking if Ms. Gresko "would consider" that background. If Ms. Gresko agrees that it is important to *know* about Appellant's "background and history" it should be apparent that she is going to *consider* that background when rendering her decision about the weight assigned to mitigating factors. Without any prompting from any party, Ms. Gresko stated she would find such information important because "it might have a lot to do with why he did what he did." (T.p. Vol. IV, pp. 551-552). Indeed, trial counsel's entire theme in mitigation closing argument dealt with Appellant's so-called "fractured foundation," evidenced by his parents inability to cope with parenting, his father's

HIV diagnosis and drug addiction, his mother's drug addiction financed by prostitution, his life in the Morris Black projects of East Cleveland, and his propensity to run the streets instead of reporting for school. (T.p. Vol. IX, pp. 1911-1921). Therefore, trial counsel's mitigation strategy was to highlight Appellant's "fractured foundation" to explain why he did what he did. Ms. Gresko's willingness to process this information and apply it to the facts in mitigation speaks volumes as to why Appellant's counsel made no effort to strike her from the panel.

Similarly, Appellant views as deficient the questioning of Sharon Crum. He implies that Ms. Crum seemed pre-disposed to recommending a death sentence as long as the jury found him guilty of aggravated murder. But that is not what Ms. Crum said. She agreed that if the State failed to prove that the aggravating circumstances outweighed the mitigating factors she would be required to return a life verdict. (T.p. IV, p. 582). She did not believe the death penalty was the appropriate sentence in all murder cases. (T.p. IV, p. 586). Ms. Crum agreed to fairly consider information about Appellant's background in deciding the balance of the aggravating circumstances and mitigating factors. (T.p. Vol. IV, p. 593). Appellant writes at length about the use of a preemptory challenge, yet does not explain why Ms. Crum should have been excluded. Appellant's argument at page 63 of his brief that his counsel failed to interrogate the jurors about their views on the death penalty is simply not supported by the record.

Appellant next argues that his trial counsel were ineffective because they failed to renew their motion for change of venue at the close of voir dire. However, this Court has held that even in a capital case, counsel's election to forego renewing a motion for change of venue is not per se ineffective: "Trial counsel's failure to renew the motion was not tantamount to ineffective assistance. This court has rejected ineffective-assistance claims based on venue in cases where 'voir dire about pretrial publicity was adequate,' as here. *See Davis*, 116 Ohio St.3d 404, 2008-

Ohio-2, 880 N.E.2d 31, at ¶ 49; *see also State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 228–229. Under those circumstances, a defendant's counsel may ‘have reasonably decided not to renew the motion for a change of venue after voir dire was completed. *Diar* at ¶ 229; *see also Davis* at ¶ 49.’ *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, ¶¶ 239-240.

The State submits that the all jurors were adequately voir dired on the subject of pre-trial publicity. Not one of the seated jurors expressed any in depth knowledge about the Cole homicide, and no juror connected Appellant to the hostage siege at the county jail. Therefore, the record gives no reason to renew the motion to change venue. As pointed out in *Thompson*, given that a change of venue is discretionary upon the trial court, there is no guarantee that the motion would have been granted even if renewed, so the failure to renew is not prejudicial.

Appellant makes a glancing reference to juror Franko Mancini, but the record is clear that his pre-trial knowledge of the case was minimal. As Appellant correctly notes, the prosecutor directly asked Mr. Mancini about his “just a little bit of exposure to the media in this case.” (T.p. Vol. V, p. 751). Mr. Mancini did not correct that observation. Moreover, Appellant conceded his guilt in this case. Thus, even assuming *arguendo* that Mr. Mancini had completely immersed himself in the pre-trial coverage of this case, Appellant suffers no prejudice because he did not challenge his guilt. However, the record does not reflect any oversaturation on Mr. Mancini’s part concerning the details of this crime. Also at page 65 of his brief, Appellant references Mr. Armstrong who, again, was excused and was not seated on the panel for reasons not connected to pre-trial publicity.

The last juror about whom Appellant complains is Margaret Talbott. Ms. Talbott stated on her juror questionnaire that as a practicing Catholic, she could not recommend a death

sentence. (T.p. Vol. V, p. 736). The court attempted to rehabilitate her, by asking her if she could follow the court's instructions. She expressed uncertainty. "I don't know. I just---I'm trying to be very, very honest." (T.p. Vol. V, p. 737). When asked if she could sign a death verdict, she responded "I don't know.***This is rough." (T.p. Vol. p. 738). Her final answer to the court was "No, I couldn't." (T.p. Vol. V, p. 739). Finally the court asked, "But you don't feel he should pay with the death penalty? It should be one of the life sentences?" Ms. Talbott responded, "Right. Right. Right." (T.p. Vol. V, p. 744).

This Court recently restated its long-held position that a trial court does not abuse its discretion in dismissing a potential capital juror who will not follow the law and impose a death verdict even if convinced beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors. "The constitutional standard governing dismissal of a prospective juror for cause based on opposition to the death penalty is set forth in *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). Dismissal for cause is proper under R.C. 2945.25(O) if 'the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath.' *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶ 40. Prospective juror Nos. 55 and 233 both said that they could not sign a death verdict. It was proper to excuse them under R.C. 2945.25(O) because they could not perform their duties as jurors. *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶ 86–92 (trial court did not abuse its discretion by excusing prospective juror who would not vote for death penalty even if the law required it)." *State v. Adams*, --N.E. 3d --, 2015-Ohio-3954, 2015 WL 5728458, ¶¶ 141-142.

Appellant finds error with his trial counsel because they did not attempt to rehabilitate Ms. Talbott. The record reflects Ms. Talbott's stated inability to follow the law in this matter.

The American Bar Association standards reprinted at pages 69 and 70 of Appellant's brief offers no guidance as to how a capital defense attorney can unring the proverbial bell of an unequivocal statement concerning a juror's inability or unwillingness to follow the law.

The State agrees that the standard in Ohio in judging trial counsel's ineffectiveness is that but for those errors, there is a reasonable probability that the outcome of the case would have been different. "Even assuming that counsel's performance was ineffective, this is not sufficient to warrant reversal of a conviction. 'An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States v. Morrison*, 449 U.S. 361, 364–365 [101 S.Ct. 665, 667–68, 66 L.Ed.2d 564] (1981).' [*Washington v.*] *Strickland* 466 U.S. [668] at 691, 104 S.Ct. [2052] 2066. To warrant reversal, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' *Strickland, supra*, at 694, 104 S.Ct. at 2068. In adopting this standard, it is important to note that the court specifically rejected lesser standards for demonstrating prejudice." *Bradley, supra*, 142.

The State does not concede that any of the voir dire conducted by Appellant's trial counsel constitutes ineffectiveness. But even if it did, more aggressive or repetitive questioning would not have changed the outcome of this case. Appellant's guilt was never in question. Any of the examples cited above regarding pre-trial publicity or preconceived notions of Appellant's guilt are irrelevant because Appellant's trial strategy was to admit guilt from the very beginning of the voir dire process. Appellant acknowledges that this case was all about mitigation. He offers only mere speculation that different questions or the use of peremptory challenges would

have changed the outcome of the mitigation hearing. Appellant cannot cite to a single, death-qualified juror who would have changed the outcome of this case.

Because Appellant fails to demonstrate that his trial counsel were ineffective, or that there is a reasonable probability that a different approach to jury selection would have changed the outcome of this case, Appellant's argument of ineffectiveness due to cumulative errors must fail. This Proposition of Law is without merit.

STATE'S RESPONSE TO APPELLANT'S PROPOSITION OF LAW NO. 3

A capital defendant suffers no constitutional violation at the penalty phase when the State confines arguments and evidence to the aggravating circumstances already proved beyond a reasonable doubt.

In his third Proposition of Law, Appellant argues that the trial court permitted the State to proffer an excessive amount of guilt phase testimony and evidence during his mitigation hearing. The record reflects the State engaged in a great deal of self-censorship in its arguments to prove that the aggravating circumstances outweighed the mitigating factors and that no error occurred.

The State's burden at mitigation was to prove beyond a reasonable doubt that by killing Jeremy Cole with prior calculation and design, while purposefully attempting to kill two or more people, during the course of an aggravated robbery and kidnapping, as the principal offender, the aggravating circumstances outweighed the mitigating factors presented by Appellant. Any argument or evidence presented on these points during the guilt phase was fair game for the mitigation hearing.

From pages 77 through 79 of his brief, Appellant rehashes a considerable amount of trial testimony which was decidedly *not* repeated or re-argued by the State during the mitigation hearing. For example, there was no recitation of Melissa Putnam's appearance when the EMS responded, or that Appellant burned potentially incriminating evidence, or graphic descriptions of the crime scene. Yes, the State did revisit some of Dr. Germaniuk's testimony that Mr. Cole was shot at close range, in the head, but such testimony is completely relevant to Appellant's "purposefully" killing or attempting to kill two or more people, an aggravating circumstance which must be weighed against the mitigating factors.

The record reflects that the State pared down the number of trial exhibits from 48 (T.d. 280) to a mere 15 for mitigation. (T.d. 259). It is apparent from the list of the mitigation exhibits (T.d. 259) that the 15 exhibits re-introduced by the State for mitigation review directly

relate to the aggravating circumstances upon which the jury convicted and which were the focus of the mitigation hearing.

This Court considered an almost identical argument to the one raised here in another Trumbull County capital murder case, *State v. Getsy*, 84 Ohio St. 180, 1998-Ohio-533, 702 N.E. 2d 866. On appeal, Getsy argued error because of what he labeled irrelevant evidence - a shotgun, ballistic reports, blood samples - and because the trial court instructed the panel that it should “consider all the evidence, including exhibits presented in the first phase of this trial *which you deem to be relevant.*” (Emphasis added.) *Id.* at 201.

The *Getsy* court set the following perimeters as to what evidence may be re-introduced by the State during the penalty phase of a capital case. “ ‘Subject to applicable Rules of Evidence, and pursuant to R.C. 2929.03(D)(1) and (2), counsel for the state at the penalty stage of a capital trial may introduce and comment upon (1) any evidence raised at trial that is relevant to the aggravating circumstances specified in the indictment of which the defendant was found guilty, (2) any other testimony or evidence relevant to the nature and circumstances of the aggravating circumstances specified on the indictment of which the defendant was found guilty, (3) evidence rebutting the existence of any statutorily defined or other mitigating factors first asserted by the defendant * * *.’ This holding appears to require the trial court to determine what evidence is relevant. ” *Id.* citing *State v. Gumm*, 73 Ohio St. 3d 413, 653 N.E. 2d 253 (1995), syllabus.

Appellant objected to the readmission of the murder weapon, cartridges, gun magazine and extension cords. However, the trial court properly overruled Appellant’s objection because the weapon, cartridges and magazine all point to the purposeful nature of the killing and attempted killing, and the extension cords were used to facilitate the kidnappings. (T.p. Vol. IX,

pp. 1828-1830). Pursuant to *Getsy* and *Gumm* these items are relevant to the aggravating circumstances upon which the jury convicted Appellant.

Appellant complains at pages 76-77 of his brief that the jury was not instructed to disregard the evidence and testimony that did not bear upon the aggravating circumstances on which the panel convicted. However, Appellant never requested such an instruction, nor does he cite to any other Ohio capital case where such an instruction was given, therefore this argument is waived for appellate purposes. “Appellant at trial did not propose instructions on issues he now raises or object to the instructions given. Appellant's failure to propose instructions and to object to those given waives any error ‘unless, but for the error, the outcome of the trial clearly would have been otherwise’.” *State v. Taylor*, 78 Ohio St. 3d 15, 27, 1997-Ohio-243, 676 N.E. 2d 82, quoting *State v. Underwood*, 3 Ohio St.3d 12, 3 OBR 360, 444 N.E.2d 1332, at the syllabus. See, also, *Getsy, supra*, at 200. Appellant does not argue, much less demonstrate, that an instruction to disregard trial testimony would have changed the outcome of his mitigation proceedings. When given the opportunity to object to the instructions as purposed, he had no objections (T.p. Vol. IX, p. 1931). Therefore, this portion of Appellant’s Proposition of Law should be disregarded by this Court.

The State does not disagree with Appellant’s commentary at pages 80 and 81 of his brief that authority from this Court bars the jury from considering, and the prosecution from arguing, nonstatutory aggravating circumstances. However, the lone example cited by Appellant in his brief that even arguably qualifies as a nonstatutory aggravating circumstance is the State’s reference to Appellant’s statement upon arrest that “he could accept the needle.” (Appellant’s brf. at p. 81 citing T.p. Vol. IX, p. 1901). Again, Appellant did not object to that statement when uttered by counsel for the State. An appellate court need not consider an error which a

party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. *State v. Williams*, 51 Ohio St.2d 112, 119, 120, 364 N.E. 2d 1364 (1977); *State v. Cunningham*, 105 Ohio St. 3d 197, 2004-Ohio-7007, 824 N.E. 2d 504, ¶89. Therefore, no reversible error is present here, especially in light of the fact that the prosecutor accurately quoted the record and did not misstate the law or attempt to inflame the jury. See, *State v. Garner*, 74 Ohio St. 3d 49, 58, 1995-Ohio-168, 656 N.E. 2d 623.

The State disagrees with Appellant's concluding paragraph that the State presented "all of the evidence from the first phase" and that "there was no limit as to what evidence the jury could consider." As the record reflects, the State significantly limited the amount of physical evidence it re-presented during the penalty phase. (T.d. 259, 280). In open court, prior to the panel's dismissal, the prosecutor announced in open court: "Your honor, at this time, we would move for admission for [sic] the Court and this jury all the exhibits *that are relevant to these aggravating circumstances*, as well as the *testimony* that exists from the first phase *relevant to those items*. (Emphasis added). (T.p. Vol. IX, p. 1852).

The panel was instructed as follows: "Some of the evidence and testimony that you considered in the trial phase of this case may not be considered in the sentencing phase. For purposes of this proceeding, you are to consider only the evidence admitted in the trial phase that is relevant to the aggravating circumstances of which David Martin has been found guilty and any of the mitigating factors." (T.p. Vol. IX, p. 1935). The court then reviewed the aggravating circumstances previously discussed in this argument. *Id.* The court continued: "You will also consider all of the evidence admitted during the sentencing phase, together with David Martin's own statement." *Id.* A jury is presumed to follow the court's instruction. *State v. Herring*, 94

Ohio St. 3d 246, 254, 2002-Ohio-796, 762 N.E. 2d 940. The State's arguments and the court's instructions adequately informed the jury as to the prior testimony appropriate for mitigation review.

To suggest that Appellant's mitigation phase was nothing more than an evidentiary free-for-all for the State is simply not supported by the record. The State carefully restricted its arguments to evidence presented during the guilt phase which was directly and indisputably relevant to the aggravating circumstances in this case. In this argument, Appellant references only one statement – the needle testimony – which may fall outside the umbrella of the aggravating circumstances; yet Appellant failed to object to that remark at trial. Appellant failed to propose any more precise instructions than those portions previously quoted by the State and did not object to the instructions as presented. Appellant was not improperly sentenced to death due to the introduction of any nonstatutory aggravating circumstances. Appellant's Proposition of Law No. 3 is without merit.

STATE'S RESPONSE TO APPELLANT'S PROPOSITION OF LAW NO.4

A sentencing opinion which accurately recounts facts testified to during the guilt phase of a capital murder trial that are directly tied to the aggravated circumstances subject to the weighing process in the penalty phase does not improperly inject "the nature and circumstances" of the offense into the weighing of aggravating circumstances against mitigating factors.

In Proposition of Law No. 4, Appellant argues that the trial court improperly weighed the facts of the aggravated murder of Jeremy Cole, rather than tailoring the sentencing opinion exclusively to the aggravating circumstances found by the jury. This argument is without merit.

By way of review, Appellant's jury found him guilty of the following aggravating circumstances which were proven at trial beyond a reasonable doubt: (1) That the offense at bar was part of a course of conduct involving the *purposeful killing of or attempt to kill two or more persons*. (2) That the offense was committed *while Defendant Martin was committing, attempting or to commit, or fleeing immediately after or attempting to commit kidnapping*, and that Defendant David Martin was the principal offender in the commission of the aggravated murder. (3) That the offense was committed *while Defendant Martin was committing, attempting to commit, or fleeing immediately after or attempting to commit aggravated robbery*, and that Defendant Martin was the principal offender in the commission of the aggravated murder. (Emphasis added). (T.d. 264, p. 2).

Despite these clearly delineated aggravating circumstances, Appellant argues in his brief a page 83 that the court referenced the fact that Appellant held both victims at gunpoint, restrained them with electrical cords, and shot them both at close range. Appellant alleges that these facts are not statutory aggravating circumstances and that Appellant's death sentence must be vacated. This is not the case. Moreover, as this Court once aptly noted, "[c]ontentions similar to those raised by appellant (that the nature and circumstances of the offense were converted into 'nonstatutory aggravating circumstances') arise in nearly every capital case we review."

State v. Wogenstahl, 75 Ohio St.3d 344, 352, 1996-Ohio-219, 662 N.E.2d 311, 319 (1996). This case is no exception, but the trial court's opinion complies with both the Ohio Revised Code and holdings in prior capital cases for these reasons:

The following portions of R.C. 2929.04(A) are applicable to Appellant's convictions on the aggravating circumstances: (A) Imposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt: (5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, *or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.* (7) *The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.* (Emphasis added).

Appellant argues that the aggravated robbery and kidnapping of Melissa Putnam were not part of the aggravating circumstances and therefore the trial court erred in weighing those crimes against the mitigating factors. The State submits that any of the trial court's de minimis references to Ms. Putnam's ordeal go to the heart of Appellant's purposeful killing of Mr. Cole and purposeful attempt to kill Ms. Putnam. These references are directly relevant to R.C. 2929.04(A)(5) and do not evidence that the trial court factored in nonstatutory aggravating

circumstances or counted the nature and circumstances of the offenses involving both victims as an aggravating circumstance.

The restraining of Ms. Putnam qualifies as an element of her kidnapping, the activity which is covered in Count 7 of the indictment; it also directly relates to the fact that Appellant purposefully tried to kill her. Both victims were bound to prevent resistance. It is far easier to shoot two stationary targets, rather than two moving targets. Therefore, the fact that both victims were bound is relevant not just to the kidnapping count, but the multiple victim specification as well. Likewise, reference to shooting both victims at close range is completely relevant to Appellant's purposeful conduct in killing Mr. Cole and attempting to kill Ms. Putnam.

At page three of the opinion, the trial court references only Mr. Cole in connection to the aggravated robbery specification. The lone reference concerning the aggravated robbery of Ms. Putnam comes at page 8 of the entry *after* the trial court "finds the aggravating circumstances grossly outweigh the limited mitigation factors on Martin's behalf." (T.d. 264). The court states that "Martin held Putnam and Cole at gunpoint; *robbed them*; restrained them with electrical cords and shot them both from close range." (Emphasis added). (T.d. 264, p.8). The robbery and the restraining were part of a course of conduct that culminated in Appellant shooting both victims.

Indeed, Appellant was charged with and convicted of the kidnapping and aggravated robbery of Ms. Putnam. This Court has upheld a trial court and court of appeals opinion in a capital case where a second victim was referenced, but crimes committed against her were not even part of the capital indictment:

"Fox argues that both the trial court and the court of appeals relied upon nonstatutory, uncharged, and unproved aggravating circumstances to justify the death sentence. We

disagree.*** [T]he trial court could appropriately refer to the ‘manner in which [Fox] planned and executed the events’ that led to the kidnapping and murder. Kidnapping was the specified statutory aggravating circumstance. Moreover, ‘[u]nder R.C. 2929.03(F), a * * * three-judge panel may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors.’ *State v. Stumpf, supra*, at paragraph one of the syllabus. See, also, *State v. Lott, supra*, 51 Ohio St.3d at 171, 555 N.E.2d at 305.

“Fox also argues the court of appeals erred in commenting that ‘Fox purposely used deception to lure two young women into his control.’ We find no error even though Fox was not charged with any offense against Ritchey [the second victim]. The facts of the Ritchey incident were interwoven with the facts and circumstances of the Keckler kidnapping and murder. Moreover, the Ritchey offense was part of Fox's social history and background and reflected upon his character. See *State v. Slagle* (1992), 65 Ohio St.3d 597, 612, 605 N.E.2d 916, 930; *State v. Cooley* (1989), 46 Ohio St.3d 20, 35, 544 N.E.2d 895, 914.” *State v. Fox*, 69 Ohio St.3d 183, 193, 631 N.E.2d 124, 132 (1994).

The facts in the case sub judice are far more interwoven than the facts and circumstances in *Fox*. Both Ms. Putnam and Mr. Cole were primary victims in this matter. The circumstances of their victimization are completely intertwined. The aggravated murder, attempted aggravated murder, kidnappings and aggravated robberies occurred within moments of one another at the same location, Ms. Putnam’s home. Both victims knew one another and Ms. Putnam worked as hard to save her own life as she did to save Mr. Cole’s life. As the sole, surviving eyewitness, Ms. Putnam offered competent, credible evidence not only about the charges relating to her, but relating to Mr. Cole as well. Therefore, references by the trial court to the crimes occurring

against Ms. Putnam while Appellant also victimized Mr. Cole are appropriate, permissible and do not constitute reversible error.

The State recognizes that “for purposes of determining whether a capital defendant should be sentenced to death, the nature and circumstances of the offense are *not* to be weighed against the R.C. 2929.04(A) specifications of aggravating circumstances but, rather, are to be reviewed for any possible mitigating value.” (Emphasis original). *Wogenstahl, supra*, at 354. It should be noted that at no point in the opinion does the trial court label the robbery or kidnapping of either victim as a “nature and circumstance” of the crime. Indeed, the only reference to “nature and circumstances of the offense” comes at page 4 of the sentencing opinion just before the trial court launches into a thorough review of each and every mitigating factor listed in R.C. 2929.04(B) and its individual application to the facts in this case. The court states that it “now must *weigh* those aggravating circumstances *against* the nature and circumstances of the offense, the history, character and background of the offender, plus the additional statutory factors set forth in R.C. 2929.04(B) as mitigating factors.” (T.d. 264, p.4). Such weighing complies with the statute and with prior holdings of this Court. “[T]he sentencing body is not only permitted, but required, by R.C. 2929.04(B) to consider the nature and circumstances of the case in deciding whether the aggravating circumstances outweigh the mitigating factors. *State v. Cook*, 65 Ohio St.3d 516, 529, 605 N.E.2d 70, 84 (1992).

Moreover, neither the indictment nor the verdict forms are victim specific with respect to the second and third specifications to Count 2 (T.d. 1, 239, 240).¹ Given that the jury convicted on Counts 4 (Cole, aggravated robbery), 5 (Putnam, aggravated robbery), 6 (Cole, kidnapping)

¹ In the interest of full disclosure, in its guilt phase instruction for the third specification, the court read Appellant “was the principal offender in the commission of the aggravated *robbery* of Jeremy Cole,” instead of “aggravated *murder* of Jeremy Cole,” but that appears to be either a misspeak or typographical error. (T.p.Vol. IX, p. 1804).

and 7 (Putnam, kidnapping), it is clear that the jury found, beyond a reasonable doubt, that Appellant kidnapped and robbed both victims in the course of the aggravated murder of Mr. Cole and the attempted aggravated murder of Ms. Putnam. Therefore, any reference to Ms. Putnam's robbery and kidnapping by the court do not impermissibly transmogrify nonstatutory aggravated circumstance or the nature and circumstances of the offense into aggravating circumstances. The court did not factor in additional aggravating circumstances into the weighing exercise. The crimes committed against Ms. Putman, like those committed against Mr. Cole, were part of a continuing course of criminal conduct that resulted in Mr. Cole's death and were clearly designed to result in Ms. Putman's death as well.

Precedent from this Court indicates that it is prone to consider the sentencing opinion as a whole, rather than parsing disconnected phrases to place the opinion in the worst possible light. “[A]lthough the language cited by appellant suggests that the trial court may have weighed the nature and circumstances of the offense against the mitigating factors, we have previously held that ‘[w]hen a trial court correctly identifies a statutory aggravating circumstance, ‘this court will infer that the trial court ‘understood’ the difference between statutory aggravating circumstances and facts describing the nature and circumstances of the offense.’” *State v. Green* (1993), 66 Ohio St.3d 141, 149, 609 N.E.2d 1253, 1260, citing *State v. Wiles* (1991), 59 Ohio St.3d 71, 90, 571 N.E.2d 97, 120, and quoting *State v. Sowell* (1988), 39 Ohio St.3d 322, 328, 530 N.E.2d 1294, 1302’.” *State v. Bengt* 75 Ohio St.3d 136, 145-146, 1996 -Ohio- 227, 661 N.E.2d 1019.

The organization of the sentencing opinion demonstrates that the trial court understood the distinction between statutory aggravating circumstances and the nature and circumstances of the offense. The trial court correctly reprints the aggravating circumstances upon which the jury found Appellant guilty at page 2 of the opinion. The court follows with a two-page recitation of

the facts leading to those convictions. As previously stated, the court does not even reference the “nature and circumstances of the offense” until page 4. Tellingly, the phrase introduces the trial court’s recitation of all the mitigating factors listed in R.C. 2929.04(B) and the court’s analysis as to whether they apply to Appellant. The very face of the sentencing opinion demonstrates the trial court did not meld or bleed the “nature and circumstances” of the offenses into the aggravating circumstances.

As a final point, the State concedes no error in the trial court’s sentencing opinion. However, it is well-settled law from this Court that its own independent reweighing of the aggravating circumstances and the mitigating factors can rectify any errors in the sentencing opinion. *Fox, supra* at 191; See also, *State v. Hessler*, 90 Ohio St.3d 108, 127, 2000-Ohio-30, 734 N.E.2d 1237, 1255 (2000).

The trial court did not engage in an improper weighing exercise in writing its sentencing opinion. The trial court did not confuse or blend the aggravating circumstances with the “nature and circumstances of the offense.” The trial court’s accurate recitation of the evidence as it relates to the aggravating circumstances does not merit a vacation of Appellant’s death sentence. His Proposition of Law No. 4 is without merit.

STATE'S RESPONSE TO APPELLANT'S PROPOSITION OF LAW NO. 5
Appellant's due process rights including his ability to remain free from cruel and unusual punishment were not violated, as the trial court was not required to give the jury a "mercy" instruction.

Appellant contends that the trial court erred when it denied instructing the jury on "mercy." A reviewing court must determine whether a trial court abused its discretion in light of the facts and circumstances of the case when a trial court refuses to give a requested jury instruction. *State v. Wolons*, 44 Ohio St.3d 64, 68 (1989). In essence, the Appellant is extending to this Court an invitation and opportunity to reconsider its well-reasoned opinion articulated in *State v. Lorraine*, 66 Ohio St.3d 414, 613 N.E.2d 212 (1993). The State submits this Court should pass on that opportunity and decline the invitation.

In the instant case, the trial court did not abuse its discretion by refusing to instruct the jury on "mercy." This Court has previously held in that a trial court's failure to give the jury a limited instruction on "mercy" is consistent with the Eighth Amendment, as it "would violate the well-established principle that the death penalty must not be administered in an arbitrary, capricious, or unpredictable manner." *Id.* at 417 citing *California v. Brown*, 479 U.S. 538, 541 (1987); *Gregg v. Georgia*, 428 U.S.153 (1976); and *Furman v. Georgia*, 408 U.S. 238 (1972).

There are two separate prerequisites to a valid death sentence that have been established by The U.S. Supreme Court's Eighth Amendment jurisprudence. "First, sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses. The Constitution instead requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." *California v. Brown*, 479 U.S. 538 at 541. "Second, even though the sentencer's discretion must be restricted, the capital

defendant generally must be allowed to introduce any relevant mitigating evidence regarding his character or record and any of the circumstances of the offense.” *Id.*

Prior to the decision in *Brown*, this Court held that “[t]he instruction to the jury in the penalty phase of a capital prosecution to exclude consideration of bias, sympathy or prejudice is intended to insure that the sentencing decision is based upon consideration of the reviewable guidelines fixed by statute as opposed to the individual juror’s personal biases or sympathies.” *State v. Jenkins*, 15 Ohio St.3d 164 at ¶3 of the syllabus (1984). See also *Lorraine, supra*.

In *Brown*, the trial court instructed the jury not to be persuaded by “mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.” *Id.* at 542. The U.S. Supreme Court concluded that such an instruction was proper because the instruction was consistent with the Eighth Amendment’s need for reliability and provided a safeguard to ensure that reliability was present in the sentencing process. The U.S Supreme Court stated:

An instruction prohibiting juries from basing their sentencing decisions on factors not presented at the trial, and irrelevant to the issues at the trial, does not violate the United States Constitution. It serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors, which, we think, would be far more likely to turn the jury against a capital defendant than for him. And to the extent that the instruction helps to limit the jury's consideration to matters introduced in evidence before it, it fosters the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct., 2978, 2991. Indeed, by limiting the jury's sentencing considerations to record evidence, the State also ensures the availability of meaningful judicial review, another safeguard that improves the reliability of the

sentencing process. See *Roberts v. Louisiana*, 428 U.S. 325, 335, and n. 11, 96 S.Ct. 3001, 3007, and n. 11, 49 L.Ed.2d 974 (1976) (opinion of Stewart, Powell and Stevens, JJ.).

Id.

According to *Brown*, a trial court may admonish the jury to "ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase[.]" however, the jury instructions "must clearly inform the jury that they are to consider any relevant mitigating evidence about a defendant's background and character, or about the circumstances of the crime." *Brown, supra* at 544-545. This Court stated that [w]hile the court in *Brown* was specifically considering the issue of sympathy, its reasoning is applicable also to a plea for mercy." *Lorraine, supra*, at 417. "Mercy, like bias, prejudice, and sympathy, is irrelevant to the duty of the jurors." *State v. Clark*, 8th Dist. No. 89371, 2008 Ohio 1404, ¶57 citing *Lorraine, supra* at 418. This Court has consistently held that "[m]ercy is not a mitigating factor under Ohio law." *State v. Jackson*, 141 Ohio St. 3d 171, 2014-Ohio-3707, 23 N.E.3d 1023, ¶239.

This Court reasoned that "[p]ermitting a jury to consider mercy, which is not a mitigating factor and thus irrelevant to sentencing, would violate the well-established principle that the death penalty must not be administered in an arbitrary, capricious or unpredictable manner *** [and] [t]he arbitrary result which may occur from a jury's consideration of mercy is the exact reason the General Assembly established the procedure now used in Ohio." *Lorraine, supra*, at 417.

In the instant case, the Appellant argues that the trial court's violated his Eighth and Fourteenth Amendments right to be free from cruel and unusual punishment by refusing to give a mercy instruction to the jury; however, the General Assembly commands that: "[i]f the trial jury

unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender." *Id.*, at 417-418 and R.C. 2929.03(D)(2). This Court further reasoned that the "statutory requirement eliminates the subjective state of mind the issue of mercy generally adds to a jury's deliberation." *Id.* at 418.

The trial court's instructions in the instant case did not instruct the jury to consider "mercy" however, the instructions did clearly inform the jury that they were to consider any relevant mitigating evidence about Appellant's background and character, or about the circumstances of the crime. The *Brown* Court stated: "Mitigating factors are factors about an individual or an offense that weigh in favor of a decision that a life sentence rather than a death sentence is appropriate. Mitigating factors are factors that lessen the moral culpability of the defendant or diminish the appropriateness of a death sentence. You must consider all the mitigating factors presented to you. Mitigating factors include, but are not limited to, the history, character, and background of the defendant, specifically his rehabilitative efforts during his prior incarceration, his education, his employment in prison and out, his love and support for his family and their love and support for him, and any other factors that weigh in favor of a sentence other than death. This means you are not limited to the specific mitigating factors that have been described to you. You should consider any other mitigating factors that weigh in favor of a sentence other than death." *Brown, supra*, 479 U.S. at 544-545.

Thus, the trial court did not err by refusing Appellant's request to instruct the jury on "mercy." Such a refusal is consistent with both the U.S. and Ohio Constitutions. Furthermore, the instructions to the jury by the trial court were precisely what due process demands. See *State v.*

Davis, 116 Ohio St.3d 404(2008); *State v. Carter*, 89 Ohio St.3d 593(2000). As such, Appellant's fifth proposition of law is without merit.

STATE'S RESPONSE TO APPELLANT'S PROPOSITION OF LAW NO. 6
The Trial Court did not err in the excusal of prospective capital jurors and such excusal did not violate the principles of Federalism and Separation of Powers.

Appellant contends that the trial court erred when it employed an improper standard of excusing prospective jurors based on their views of the death penalty. Appellant asks this Court to reconsider its well-reasoned opinion articulated in *Rogers, infra*. The State submits this Court should refrain from such reconsideration. Furthermore, Appellant fails to cite to any juror that was allegedly excused due to the standard employed by the trial court. This argument is wholly without merit.

The Supreme Court of the United States has held that jurors may be excluded from the venire if their views on capital punishment would prevent or substantially impair the performance of their duties as jurors. *Witherspoon v. Illinois*, 391 U.S. 510, 512, 88 S.Ct. 1770, 1772 (1968). The *Witherspoon* Court held "that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.* at 522. However, the Court expounded that a venireman *may* be excluded if their views regarding the death penalty impairs their ability to decide the defendant's guilt. The Court stated "***[n]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude

toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." *Id.* at 522-523.

In fact, the Supreme Court of the United States has repeatedly referred to the language above as setting the standard for excluding veniremen opposed to capital punishment. See *Wainwright v. Witt*, 469 U.S. 412, 418 (1985), *Maxwell v. Bishop*, 398 U.S. 262, 265 (1970), *Boulden v. Holman*, 394 U.S. 478, 482 (1969), and *Lockett v. Ohio*, 438 U.S. 586, 596 (1978). In *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521 (1980), the Supreme Court of the United States acknowledged that cases following the decision outlined in *Witherspoon*, "establishe [d] the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." *Adams*, at 45.

In *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844 (1985), the Supreme Court of the United States held that the test set forth in *Adams* is the appropriate and preferable standard for challenging prospective jurors for cause due to their views on capital punishment. *Id.* at 424. The Supreme Court of the United States stated: "[i]n *Witherspoon* the jury was vested with unlimited discretion in choice of sentence. Given this discretion, a juror willing to *consider* the death penalty arguably was able to 'follow the law and abide by his oath' in choosing the 'proper' sentence. Nothing more was required. Under this understanding the only veniremembers who could be deemed excludable were those who would never vote for the death sentence or who could not impartially judge guilt." (Emphasis sic.) *Witt*, at 421-422.

The *Witt* Court further noted that "the State still may properly challenge that venireman if he refuses to follow the statutory scheme and truthfully answer the questions put by the trial judge. To hold that *Witherspoon* requires anything more would be to hold, in the name of the Sixth Amendment right to an impartial jury, that a State must allow a venireman to sit despite the fact that he will be unable to view the case impartially." *Witt*, at 422.

Prior to the decision in *Witt*, the Ohio General Assembly codified the standard in *Witherspoon* when it enacted R.C. 2945.25(C). R.C.2945.25(C) states that a venireman may be challenged if "he unequivocally states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a particular case. A prospective juror's conscientious or religious opposition to the death penalty in and of itself is not grounds for a challenge for cause."

Since *Witt*, this Court, in *State v. Rogers*, 17 Ohio St.3d 174 (1985), has held that "[t]he proper standard for determining when a prospective juror may be excluded for cause based on his views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." *Rogers*, at ¶3 of the syllabus. In *Rogers* and ensuing cases, this Court has concluded that *Witt* was now applicable to Ohio courts. See *State v. Scott*, 26 Ohio St.3d 92, 97 (1986), *State v. Moore*, 81 Ohio St.3d 22, 27 (1998), *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981. In the instant case, Appellant notes that he filed a motion in the trial court regarding the appropriate standard for excusing prospective jurors based on their views of the death penalty. (T.d. 54). More specifically, the Appellant asked the trial court to apply the standard outlined in R.C. 2945.25(C) and *Witherspoon, supra*. On September 16, 2013, the trial court issued its

judgment entry announcing that the court would follow the standard declared in *Witt, supra* which has been approved and adopted by the Ohio Supreme Court in *Jackson, supra*. (T.d. 139).

Recently, this Court has again held that *Witt* is the appropriate standard for excusing jurors for cause based on their views of the death penalty. In *State v. Adams*, --N.E. 3d --, 2015-Ohio-3954, 2015 WL 5728458, the appellant argued that R.C. 2945.25(C) and *Witherspoon, supra*, permit a trial court in a death penalty case to excuse prospective juror for cause only if the juror unequivocally states that he or she will not recommend death penalty under any circumstance.

This Court held, “[w]e have rejected this argument more than once. *See State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, at ¶ 55. The constitutional standard governing dismissal of a prospective juror for cause based on opposition to the death penalty is set forth in *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). Dismissal for cause is proper under R.C. 2945.25(O) if ‘the juror’s views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath.’ *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶ 40.” *Adams, supra*, at ¶¶ 140-141.

Therefore, the trial court did not err when using the standard adopted by this Court and outlined in R.C. 2945.25(O). Furthermore, the Appellant does not cite to any place in the record to any juror that was excused over his objection. Thus, Appellant's Sixth Proposition of Law is without merit.

STATE'S RESPONSE TO APPELLANT'S PROPOSITION OF LAW NO. 7
Ohio's Death Penalty does not violate either the Ohio or the United States
Constitutions, and does not violate International Law.

Appellant contends that Ohio's Death Penalty scheme violates the Ohio and the United States Constitutions as well as International Law. This argument is wholly without merit. Noteworthy, Appellant filed a *Motion to Dismiss Capital Components of this Case Due to Constitutional and International Law Violations* on March 18, 2013. (T.d. 72). The State filed its response on May 31, 2015. (T.d. 106). On September 16, 2013, the trial court denied Appellant's motion. (T.d. 151).

It is well established that the death penalty is constitutional in Ohio. Per the Eighth Amendment of the United States Constitution, capital punishment has been a feature of the law in the United States. Throughout the decades, the death penalty has never been found per se unconstitutional.

However, in 1972, the United States Supreme Court halted executions per its decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726 (1972). The *Furman* Court held that the death penalty statutes in question were discretionary in nature specifically in regards to the imposition of the death penalty, and that that discretion violated the Eighth and Fourteenth Amendments. *Id.* While the *Furman* Court held that the death penalty statutes were unconstitutional, the Court did **not** find the death penalty per se unconstitutional. Four years later, the United States Supreme Court concluded as much in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909 (1976), where it held that "the punishment of death does not invariably violate the Constitution." *Id.* at 169.

In order for punishment to be found neither cruel nor unusual, the punishment must not involve "unnecessary and wanton infliction of pain," nor "be grossly out of proportion to the severity of the crime." *Id.* at 173. The *Gregg* Court then held that the death penalty is an appropriate penalty

for murder: “[T]he death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.” *Id.* at 187.

The United States Supreme Court went on to conclude that a carefully crafted statute that provides safeguards such as bifurcated trials and an appeals process would protect against discriminatory and random impositions of the death penalty. *Id.* at 195-198. In so doing, the *Gregg* Court affirmed the Georgia death penalty statute, upheld the defendant’s death sentence and essentially reinstated the death penalty.

Following the United States Supreme Court’s decision in *Gregg*, the Ohio General Assembly enacted a new death penalty statute. In 1978, this was struck down by the United States Supreme Court as being unconstitutional. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954 (1978). The United States Supreme Court concluded that the statute “[did] not permit the type of individualized consideration of mitigating factors we now hold to be required by the Eighth and Fourteenth Amendments in capital cases.” *Id.* at 606. The *Lockett* Court specifically found that the statute did not allow the sentencer to consider “any aspect of the defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death” as part of mitigation. *Id.* at 604-606.

The Ohio General Assembly responded and enacted a revised death penalty statute in 1981. The revised statute was again challenged as unconstitutional; but this time, the United States Supreme Court found the statute to be constitutional. *State v. Jenkins*, 15 Ohio St.3d 164 (1984); cert. denied, *Jenkins v. Ohio*, 472 U.S. 1032 (1985). This Court has since concluded that “Ohio’s death penalty statute is constitutional ‘in all respects.’” (Emphasis added.) *State v. Bey*, 85 Ohio St.3d 487, 502 (1999) quoting *State v. Evans*, 63 Ohio St.3d 231, 253 (1992). In

addition, in *State v. Carter*, 89 Ohio St. 3d 593 (2000), this Court held that death by electrocution and/or lethal injection is not unconstitutional. However, in 2001, the Ohio General Assembly again revised the death penalty statute. R.C. 2949.22. While the statute eliminated the option of electrocution, it reserved the right to re-impose the option of electrocution if lethal injection was later deemed unconstitutional. Therefore, it is well established that the death penalty is constitutional.

Appellant further contends that his death sentence should be compared to other sentences (death or otherwise) for all defendants charged with similar crimes. But, as Appellant concedes in his merit brief, Ohio law only requires proportionality review when a death sentence is *actually* imposed.

Revised Code 2929.05(A) states, in relevant part, that this Court: “[s]hall review and independently weigh all of the facts and other evidence disclosed in the record in this case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in this case, and whether the sentence of death is appropriate.” Furthermore, R.C. 2929.05(A) requires this Court to “consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases,” to “review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances ***and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors.” R.C. 2929.05 (A) further states that this Court “shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case.”

Appellant argues that "similar cases" should include even those cases where the death penalty is not imposed. This Court, however, has previously rejected this argument. See *State v. Perez*, 124 Ohio St.3d 122, 147-148 (2009); *State v. Scott*, 101 Ohio St. 3d 31, 2004-Ohio-10, *State v. Hutton*, 100 Ohio St.3d 176, 191 (2003); *State v. Green*, 66 Ohio St.3d 141 (1993); *State v. Davis*, 63 Ohio St.3d 44 (1992).

Lastly, the Appellant alleges that the Ohio Death Penalty violates International Law and a number of various treaties. However these claims have been rejected by this Court several times. Ohio's death-penalty scheme does not violate international law. See *State v. Mamzone*, 139 Ohio St. 3d 467, 507, 2014-Ohio-1942, ¶ 184, *State v. Phillips*, 74 Ohio St.3d 72, 656 N.E.2d 643, 671 (1995), *State v. Keens*, 81 Ohio St. 3d 646 (1998), *State v. Ashworth*, 85 Ohio St.3d 56 (1999), *State v. Craig*, 110 Ohio St. 3d 306, 327, 2006-Ohio-4571, ¶ 127, and *State v. Kirkland*, 140 Ohio St. 3d 73, 91, 2014-Ohio-1966, ¶ 120.

As noted above, these issues were raised by trial counsel in their motion and the trial court properly concluded that this Court has previously found each one to be meritless. Therefore, it is well established that Ohio's death penalty is constitutional. As such, Appellant's Seventh Proposition of Law is meritless.

STATE'S RESPONSE TO APPELLANT'S PROPOSITION OF LAW NO. 8
When the State introduces evidence of a capital defendant's admission to destroying clothing worn during the commission of a homicide and leads law enforcement to a burn pile, the State has produced sufficient evidence of tampering with evidence.

Appellant next argues that the State presented insufficient evidence to prove him guilty of tampering with evidence in this case. The record says otherwise.

The State submits that the issue of the sufficiency of the evidence on any of the charges upon which Appellant has been convicted has not been properly preserved for appellate review. No Crim. R. 29 motion was filed, and the State could not locate anywhere in the record where Appellant's trial counsel made an oral motion for acquittal on any of the charges. To preserve the right to appeal the sufficiency of the evidence upon which a conviction is based, an appellant must move for acquittal as provided under Crim. R. 29. *State v. Roe*, 41 Ohio St. 3d 18, 25, 535 N.E. 2d 1351 (1989). Therefore, Appellant's argument regarding the sufficiency of the evidence on the tampering charge has been waived for purposes of this appeal.

Should this Court disagree and elect to review this issue on appeal, Appellant was indicted on one count of tampering with evidence, in violation of R.C. 2921.12(A)(1), which provides as follows: No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall alter, destroy, conceal or remove any record, document, or thing with purpose to impair its value or availability as evidence in such proceeding or investigation.

This Court's holding in *State v. Thompkins*, 78 Ohio St.3d 380, 386-87, 1997-Ohio-52, 678 N.E.2d 541, remains the controlling law in Ohio when determining whether the State has produced sufficient evidence to convict a criminal defendant: "With respect to sufficiency of the evidence, 'sufficiency' is a term of art meaning that legal standard which is applied to determine

whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law.’ Black's Law Dictionary (6 Ed.1990) 1433. See, also, Crim.R. 29(A) (motion for judgment of acquittal can be granted by the trial court if the evidence is insufficient to sustain a conviction). In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio St. 486, 55 O.O. 388, 124 N.E.2d 148. In addition, a conviction based on legally insufficient evidence constitutes a denial of due process. *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 2220, 72 L.Ed.2d 652, 663, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.” *Thompkins, supra*, at 386-87.

When the evidence produced regarding the tampering charge is reviewed in the light most favorable to the prosecution, and the court finds that a jury could reasonably conclude that all the essential elements of the crime have been proven beyond a reasonable doubt, an appellate court will not reverse on grounds of insufficient evidence. *State v. Eley*, 56 Ohio St.2d 169, 10 O.O.3d 340, 383 N.E.2d 132, syllabus, (1978).

The bulk of the State’s evidence on the tampering charge was introduced through Dep. U.S. Marshal William Boldin who testified that during Appellant’s ride from his arrest in Summit County to Trumbull County, he volunteered, “Do you want me to show you were I burned my clothes that night?” (T.p. Vol. VIII, p. 1571). He then directed Dep. Marshal Boldin to the Reserve Avenue Southwest Bridge where the marshal and his partner, Dep. U.S. Marshal Anne Murphy, discovered a “burn pile.” The only discernable object in the pile was a partially melted watch band. (T.p. Vol. VIII, p. 1572, 1585-1586). Both witnesses identified three photographs of the burn pile (State’s Ex. 30, 31, 32). *Id.*

Additionally, Warren Police Det. Wayne Mackey directly asked Appellant during his interview, "Why did you burn – get rid of your clothes? Why did you burn 'em?" (T.d. 281, p. 19). The written transcription of Appellant's response is "inaudible." *Id.* Appellant states in his brief at page 169 he said, "Why not?" Either way, it can be extrapolated that he did not deny having burned the clothes and did nothing to disavow statements to Dep. Marshals Boldin and Murphy that he had destroyed the clothes he wore during the aggravated murder and attempted aggravated murder.

Appellant argues at page 169 of his brief that while the State proved that Appellant burned his clothes and watch, the State failed to prove that there was any evidentiary value in the clothing or that it was burned with the purpose to impair the value or availability of that clothing. The trial court defined the element "purposely" as follows: "A person acts purposely when it is his specific intention to cause a certain result. ***Purpose is a decision of the mind to do an act with a conscious objective of producing a specific result. To do an act purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing. The purpose with which a person does an act is known only to himself, unless he expresses it to others or indicates it by his conduct. The purpose with which a person does an act is determined from the manner in which it is done, the means used and all the other facts and circumstances in evidence." (T.p. Vol. IX, p. 1794).

The jury instructions reflect that unless the actor states his purpose in doing an act, the panel must determine what that purpose is. It does not appear in the record that Appellant stated *why* he burned the clothes he wore the day of the shootings; that purpose was for the jury to discern. Following the trial judge's instructions, the panel would have decided the manner and means in which Appellant destroyed his clothing. This conclusion does not take the deductive

reasoning of a Hercule Poirot. Appellant readily volunteered he burned the clothing worn the day of the crimes and then led two federal marshals to a “burn pile” where he said he performed the destruction. The facts and circumstances surrounding this activity include the fact that he fired an operable firearm into two human victims at extremely close range. Both victims were hit with projectiles. This event caused blood loss by both victims. (T.p. Vol. VII, p. 1505-1517; State’s Ex. 17-24, 25). Again, it does not take a seasoned detective to reason that any article of clothing worn by Appellant may have been spattered in the victims’ blood or may have retained gunshot residue. Thus, even if Appellant did not spell out the purpose of the clothing destruction with flash cards or a power point presentation, the jury could easily find that he burned his clothing because he knew - or at least assumed - that his clothing contained some evidence of the crimes.

Moreover, Appellant certainly would have known that an investigation would ensue and that ultimately the authorities would have come looking for him. Appellant would have known he would be the target of the investigation, especially once he learned that Melissa Putnam survived the shooting. Based on his statements to Det. Mackey, he was following the news accounts of the killing and undoubtedly would have read that Ms. Putnam was still alive and would be able to positively identify him. Appellant also would know that setting fire to clothing and letting it burn to mere ashes would impair any potential evidentiary value contained therein.

The State produced legally sufficient evidence as to the elements of tampering with evidence beyond a reasonable doubt. Appellant failed to motion the court for a Crim. R. 29 acquittal; therefore this issue has not been properly preserved for appellate review. Appellant’s Proposition of Law No. 8 is without merit.

STATE'S RESPONSE TO APPELLANT'S PROPOSITION OF LAW NO. 9

A trial court does not err in declining to suppress a weapon found within the reach of an aggravated murder suspect, when the weapon is not referenced in the motion to suppress and when the gun is discovered in plain view of the arresting officer.

In Proposition of Law No. 9, Appellant alleges error in the trial court's refusal to suppress the firearm confiscated from a third party's apartment during Appellant's arrest. This argument lacks merit.

Appellant filed his Motion to Suppress on January 3, 2014 (T.d. 164). He requested a hearing. The hearing commenced January 17, 2014 and concluded February 21, 2014. Appellant spends most of this argument discussing the seizure of a loaded handgun (State's Ex. 1) which was found on the floor, near Appellant, as deputy U.S. Marshals served the arrest warrant. However, it should be noted that Appellant's Motion to Suppress did not specify that he sought to suppress any weapons whatsoever. The motion references "all evidence seized," "all statements obtained from or made by Defendant," "identifications allegedly made from photolineups [sic]," and "any and all fruits of such unlawful and illegal searches, seizures, statements, and identifications." (T.d. 164). To be clear, there is absolutely no reference in this motion to the loaded gun discovered dangerously close to Appellant at the time of his arrest.

Appellant called no witnesses at the hearing on his motion to suppress. Neither side offered oral arguments. Appellant's counsel told the trial court, "We probably would like to present a written statement, if we're going to do anything at all." (T.p. Vol. II, p. 291). They did nothing at all. The State filed a "Response in Opposition to Defendant's Motion to Suppress" on March 27, 2014. (T.d. 188). The trial court waited until May 15, 2014, before filing a Judgment Entry denying Appellant's motion. (T.d. 192) The court referenced the murder weapon, recovered from the apartment of David Fleetwood, the leaseholder of the apartment

where authorities arrested Appellant. “The Court finds any search of the apartment was conducted under exigent circumstances and was further incident to the lawful arrest of Martin. Therefore, the motion to suppress all evidence seized at the apartment is hereby denied.” (T.d. 192).

STANDARD OF REVIEW

As is well-established Ohio law, “[a]ppellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19, [20], 1 OBR 57, 437 N.E.2d 583. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539.” *State v. Burnside*, 100 Ohio St. 3d 152, 2003-Ohio-5372, 797 N.E. 2d 71, ¶ 8. As there are no factual questions for this Court to resolve, the suppression issue here turns on whether the facts satisfy the applicable legal standard.

Appellant argues in his brief at page 172 that he filed “a pretrial motion to suppress all items seized pursuant to the unlawful entry [of David Fleetwood’s apartment].” Point of fact: Appellant did not argue in the trial court that the officers, who were armed with a valid arrest warrant, made an illegal entry into the Fleetwood apartment. (T.d. 164). Indeed, neither side queried the arresting officers as to why they sought to arrest Appellant at the Fleetwood apartment. Nevertheless, Mr. Fleetwood opened the door to the apartment, Dep. Marshal Boldin

began to speak with Mr. Fleetwood when he spotted Appellant, and Mr. Fleetwood offered no objection as the officers entered his apartment. (T.p. Vol. II, p 98-99, 124-125).

The U.S. Supreme Court has held that “for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.” *Payton v. New York*, 445 U.S. 573, 603; 100 S.Ct. 1371, 1388, 63 L.Ed.2d 639, 661(1980). The State acknowledges Appellant was not the leaseholder of the apartment in question. However, the Ninth Circuit Court of Appeals has held: “The right of a third party *not* named in the arrest warrant to the privacy of his home may not be invaded without a search warrant, *Steagald v. United States*, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981). *But this right is personal to the home owner and cannot be asserted vicariously by the person named in the arrest warrant. See Steagald v. United States*, 451 U.S. at 218–19, 101 S.Ct. at 1650–51; *Rakas v. Illinois*, 439 U.S. 128, 133–34, 99 S.Ct. 421, 424–25, 58 L.Ed.2d 387 (1978). *United States v. Salvucci*, 448 U.S. 83, 85, 100 S.Ct. 2547, 2549, 65 L.Ed.2d 619 (1980).” (Emphasis added). *United States v. Underwood*, 717 F.2d 482, 484 (9th Cir.1983).

For the first time in this appeal, Appellant argues a vicarious violation of his own rights as a result of the officers’ lawful entry into Mr. Fleetwood’s apartment. However, legal issues which are not raised in the trial court may not generally be raised for the first time in the appellate court. The general rule is that an appellate court will not consider any error which counsel for a party complaining of the trial court’s judgment could have called but did not call to the trial court’s attention at a time when such error could have been avoided or corrected by the trial court. *State v. Childs*, 14 Ohio St.2d 56, 236 N.E.2d 545, paragraph three of the syllabus (1968). The State submits the officers’ entry into the Fleetwood apartment to serve the arrest

warrant was legal, but even if it were not, the legality of the entrance is not properly preserved for appellate review.

For the remainder of this argument, Appellant focuses on the trial court's admission of the firearm recovered from Mr. Fleetwood's apartment and his spontaneous statements made prior to the admission of Miranda warnings. The State will address these arguments separately:

THE GUN

First, the State avers that, like the entrance into the Fleetwood apartment, this issue is waived for purposes of appellate review as it relates to the gun recovered from Mr. Fleetwood's apartment. Appellant made absolutely no reference to a firearm in his motion to suppress. (T.d. 164). Even after the presentation of evidence, which included testimony about the gun, Appellant called no witnesses and failed to offer either oral or written arguments to explain why the weapon qualified as "fruits" of a "search" subject to exclusion.

It is well-settled law from this Court that "the accused must state the motion's legal and factual bases with sufficient particularity to place the prosecutor and the court on notice of the issues to be decided." *State v. Shindler* 70 Ohio St.3d 54, at syllabus (1994), (construing and following Crim.R. 47 and *Xenia v. Wallace* (1988), 37 Ohio St.3d 216). "By requiring the defendant to state with particularity the legal and factual issues to be resolved, the prosecutor and court are placed on notice of those issues to be heard and decided by the court and, by omission, those issues which are otherwise being waived." *Shindler* at 58. Since *Shindler*, this Court recently held, "failure to include or particularly state the factual and legal basis for a motion to suppress waives that issue. See *Defiance v. Kretz*, 60 Ohio St.3d 1, 573 N.E.2d 32 (1991)." *State v. Codeluppi*, 139 Ohio St.3d 165, 2014-Ohio-1574, 10 N.E.3d 691, ¶ 10. Based on prior authority from this Court, the State avers that the issue of whether Appellant suffered a

constitutional violation as a result of his perceived “search” and seizure of the handgun is waived for appellate purposes.

Should this Court disagree and opt to consider this matter further, the State posits, with due respect to the trial court, that there was no “search” here at all. The Fourth Amendment to the United States Constitution provides for “[t]he right of the people to be secure *in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*” (Emphasis added). The apartment in which Appellant was arrested was not his house or home. The leasehold was Mr. Fleetwood.

Further, the Fourth Amendment has been interpreted to protect against unreasonable government intrusions into areas where legitimate expectations of privacy exist. *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that “searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment, subject to only a few specifically established and well-delineated exceptions.” *Mincey v. Arizona*, 437 U.S. 385, 390, 98 S.Ct. 2408, 57 L.Ed.2d 290, 298 (1978); quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576, 585 (1967). The touchstone of a Fourth Amendment analysis of the lawfulness of a search is whether a person has a constitutionally protected reasonable expectation of privacy. *Katz, supra*.

One of these “well defined” exceptions to the Fourth Amendment warrant requirement discussed in *Mincey* is when a search is initiated incident to a lawful arrest. See, generally,

Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), overruled in part by *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). In *Chimel*, the United State Supreme Court stated, “[a]n arresting officer may search the person arrested, in order to remove any weapons and to seize evidence on arrestee's person, and area into which arrestee might reach in order to grab weapon or evidentiary items.” *Chimel* at 763. The Court in *Chimel* continued, “[t]here is ample justification, therefore, for a search of the arrestee's person and the area ‘within his immediate control’—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.” *Id.*

The State produced uncontroverted evidence through the testimony of Dep. U.S. Marshal William Boldin that he entered Mr. Fleetwood’s apartment, instantly caught sight of Appellant who “immediately began bending over or reaching out of my sight. ***[I] Began calling out commands to Mr. Martin to put his hands up or to not move.***I could see him reach out of my view with his hand. He then stepped completely out of my view. ***Almost immediately after he left my view he came back into view and he had his hands in the air and he voluntarily surrendered.***[A]fter I placed handcuffs on him and he was on the floor, I observed a firearm laying on the floor. ” (T.p. Vol. II, pp. 100-102).

Chimel grants officers the authority to search the person under arrest, as well as “the area within his immediate control” to prevent the arrestee from “gain[ing] possession of a weapon or destructible evidence.” In this case, Appellant had access to both a weapon *and* evidence. Appellant suffers no constitutional violation by officers confiscating and securing a weapon found unattended on the floor near a suspected murderer alleged to have shot two victims with a handgun. The court found the circumstances surrounding Appellant’s initial encounter with police to constitute “exigent circumstances” and was incident to a lawful arrest. (T.d. 192).

Though not referenced by the trial court, the State submits that the “plain view” exception to the warrant requirement also applies here. This Court in *State v. Waddy*, 63 Ohio St. 3d 424, 442, 588 N.E. 2d 819, 833 (1992) held as follows: “Under [the plain view] doctrine, an officer may seize an item without a warrant if the initial intrusion leading to the item's discovery was lawful and it was ‘immediately apparent’ that the item was incriminating.” As stated earlier, there was no “search” here. Officers did not rummage or rifle through anyone’s personal effects to find the gun; it was located on the apartment floor near Appellant when Dep. Marshal Boldin was securing Appellant with handcuffs in the process of lawfully executing an arrest warrant. Moreover, the incriminating nature of the gun is immediately apparent. Officers were serving an arrest warrant for aggravated murder on a known violent felon. In addition to being a potential hazard to any of the arresting officers, the incriminating nature of a firearm in these circumstances was readily apparent.

The weapon was located and confiscated pursuant to at least three long-established exceptions to the warrant requirement of the Fourth Amendment. As will be discussed *infra*, Mr. Fleetwood did not claim ownership of the weapon nor did he object to its confiscation from his home; instead, Appellant volunteered the firearm was his. The trial court properly denied Appellant’s motion to suppress as it relates to the gun.

THE STATEMENTS

In his final paragraph to this argument, Appellant makes only glancing references to the statements uttered by Appellant prior to the administration of Miranda warnings. In fairness, this subject is more thoroughly fleshed out in Appellant’s final Proposition of Law and the State will respond accordingly. Suffice it to say that without any questions whatsoever from the arresting officers, Appellant volunteered that the gun found on the floor belonged to him and that he had

shot the victims in this case. “Volunteered statements of any kind are not barred by the Fifth Amendment***.” *Miranda v. Arizona*, 384 U.S. 436, 478, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 694 (1966). Thus, the trial court did not err in denying the motion to suppress as it relates to Appellants statements to authorities in Mr. Fleetwood’s apartment, or en route to the Summit County Jail.

HARMLESS ERROR

Though the State concedes no error in the trial court’s admission of the murder weapon and Appellant’s spontaneous statements, the State avers that if this Court disagrees, any error here is at worst harmless error. Under Crim.R. 52(A), harmless error is “[a]ny error, defect, irregularity, or variance which does not affect substantial rights.” As one Ohio court explained: “The Ohio test then for determining whether the admission of *** otherwise erroneous evidence is harmless non-constitutional error requires the reviewing court to look at the whole record, leaving out the disputed evidence, and then to decide whether there is other substantial evidence to support the guilty verdict. If there is substantial evidence, the conviction should be affirmed, but if there is not other substantial evidence, then the error is not harmless and a reversal is mandated.” *State v. Davis*, 44 Ohio App.2d 335, 347, 338 N.E.2d 793, 803 (8th Dist.1975).

Even when the gun and volunteered statements are extracted from this case, there is still overwhelming evidence to prove Appellant’s guilt. After executing a written Miranda form, Appellant admitted to shooting both victims. The surviving victim, Melissa Putnam, was able to positively identify Appellant as the lone shooter in this case. Therefore, any admission of the firearm and spontaneous utterances is harmless beyond a reasonable doubt.

To conclude, Appellant failed to properly preserve the issue of a supposed illegal entrance to the Fleetwood apartment by not articulating this argument in his motion to suppress

and by failing to argue at any time in the court below that the entry was unlawful. Even if he had, Appellant cannot vicariously assert a right of privacy in a third party's domicile. Likewise, Appellant filed a motion, but neglected to state with particularity that he sought to suppress a firearm which turned out to be the murder weapon. Therefore, the issue is not properly preserved for appellate review. In the alternative, the gun was recovered incident to a lawful arrest, pursuant to exigent circumstances, and was found in plain view of the arresting officers. For these reasons, Appellant's Proposition of Law No. 9 is without merit.

STATE'S RESPONSE TO APPELLANT'S PROPOSITION OF LAW 10

Arresting officers are under no legal obligation to administer a Miranda warning to an arrestee unless the officers intend to initiate a custodial interrogation.

In his tenth, and final Proposition of Law, Appellant argues that the trial court erred in refusing to suppress statements Appellant made in the presence Deputy U.S. Marshals William Boldin and Anne Murphy. This argument is without merit.

The State does not dispute that neither marshal administered a warning pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed 2d 694 (1966), until Appellant and the marshals were traveling together in a car transporting Appellant from David Fleetwood's apartment to the Summit County Jail. According to Dep. Marshal Murphy's suppression hearing testimony, Dep. Marshall Boldin read aloud the Miranda warnings as they were en route to the Summit County Jail. (T.p. Vol. II, p. 153, 165).

At the outset, the State would like to expand on Appellant's characterization at page 181 of his brief that "Appellant was arrested by United States Marshals in Tallmadge, Ohio. When officers entered the apartment, Appellant immediately put his hands up and surrendered." While this is technically correct, the State would note that when Mr. Fleetwood opened the apartment door and Dep. Marshal Boldin stood at the threshold, Appellant did not immediately surrender. He dove; he dodged, and –by his own admission - dropped the murder weapon out of Dep. Marshal Boldin's direct line of sight. (T.p. Vol. II, p. 101). "He made a comment that the reason that he put the gun down is because he ***knew that if the gun was near him that we would shoot him.***He stated that he didn't want us to shoot him, so he was trying to get the gun away from him." (T.p. Vol. II, p. 103).

Other than these initial evasive actions, Appellant cooperated with authorities, to the point of making unsolicited comments to arresting officers. As Appellant notes at page 182 of his

brief, Appellant was volunteering information, absent any interrogation by any officer, from the time Dep. Marshal Boldin placed the handcuffs on him inside Mr. Fleetwood's apartment. As discussed in the previous Proposition of Law, Appellant immediately claimed ownership of an unattended handgun Dep. Marshal Boldin spotted on the floor. "His statement was that the gun***belonged to him and not the homeowner.***He didn't want the homeowner or the tenant to get in any trouble." (T.p. Vol. II, p. 103). However, this admission was not the result of *any* questioning by Dep. Marshal Boldin. "We did not ask him any questions whatsoever. Confirmed his identity was the only question we would have asked, but that was it." *Id.* Dep. Marshal Murphy corroborated this testimony. "I did not ask him any questions. It's not my responsibility to. I'm not a detective for the case. Our job is to get him into custody and move it along, in all honesty." (T.p. Vol. II, p. 149). She confirmed Dep. Marshal Boldin did not question Appellant. (T.p. Vol. II, p. 151). Nonetheless, Appellant's demeanor was "cooperative," "talkative," and "almost friendly." (T.p. Vol. II, pp. 103, 107).

Appellant's loquaciousness continued once seated in the car heading for the Summit County Jail. During the ride, Appellant volunteered that he was the trigger man in the double shooting, that the gun recovered from Mr. Fleetwood's apartment was the murder weapon, and that he would "accept the needle." (T.p. Vol. II, p. 107). Again, neither marshal questioned Appellant to elicit these statements. "I couldn't have questioned him about the crime if I wanted to. I did not know anything about the initial crime other than it was a firearm crime." *Id.* Dep. Marshal Murphy testified that their only inquiry was whether he was willing to sign the Crim. R. 4 waiver for transport to Trumbull County. (T.p. Vol. II, p. 155). But because Appellant continued to discuss the facts surrounding the Jeremy Cole murder, Dep. Marshal Murphy thought it prudent to read aloud a Miranda warning: "Because he had already started telling us

about what happened, we wanted to make it clear, and he knew we were police officers, but we wanted to make it clear that he was in custody and what he told us could be used against him.”

Id.

The State produced competent, credible evidence that Appellant was not subject to a custodial interrogation, yet continued to offer unsolicited commentary on the double shooting. Under *Miranda, supra*, a person in police custody who is to be interrogated must first be made aware of his rights. The term “interrogation” under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. *State v. Williams*, 4th Dist. Scioto No. 10CA3381, 2012–Ohio–6083, ¶ 18, quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).

To determine whether a suspect has been “interrogated,” the heart of the inquiry focuses on police coercion, and whether the suspect has been compelled to speak by that coercion. *State v. Tucker*, 81 Ohio St.3d 431, 436, 692 N.E.2d 171 (1998). See also, *State v. Perry*, 14 Ohio St. 2d 256, 261, 237 N.E. 2d 891, 894 (1968). Thus, “[a] suspect who volunteers information without being asked any questions is not subject to a custodial interrogation and is not entitled to *Miranda* warnings.” *Williams* at ¶ 19, citing *State v. McGuire*, 80 Ohio St.3d 390, 401, 686 N.E.2d 1112 (1997). “When defendant initiates communication, ‘nothing in the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered statements and using them against him at the trial.’” *Id.*, quoting *Edwards v. Arizona*, 451 U.S. 477, 485, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

In his brief at page 189, Appellant quotes this Court's decision in *State v. Farris*, 109 Ohio St. 3d 519, 2006-Ohio-3255, 849 N.E. 2d 985, to support his argument that the written *Miranda* waiver Appellant signed in Warren prior to his video-taped confession does not apply retroactively to statements made in Summit County prior to the written waiver. But *Farris* is not on point. The officer in *Farris* interrogated the defendant before the administration of the written waiver. "Without administering a *Miranda* warning or seeking consent to search the car, [Ohio State Patrolman] Menges asked Farris about the smell of marijuana. Farris told Menges that his housemates had been smoking marijuana when he left the house. Menges told Farris that he was going to search the car and then specifically asked whether there were any drugs or drug devices in the car. Farris admitted that there was a 'bowl,' i.e., a marijuana pipe, in a bag in his trunk." *Farris, supra*, at ¶ 3. Dep. Marshals Boldin and Murphy testified repeatedly that they did not question Appellant. Their function was to arrest, not to interrogate. The trial court determined this issue as follows:

"Martin was transported from Tallmadge to the Summit County Jail and then to the Warren Police Department by US Marshall [sic] Deputy Ann Murphy. Murphy did not administer *Miranda* rights to Martin prior to or during the initial transport to the Summit County Jail. The Court finds it was unnecessary to administer *Miranda* at that time. Murphy testified she did not prompt or question Martin in any manner. However, Martin offered voluntary statements while en route. 'Volunteered statement [sic] of any kind are not barred by the Fifth Amendment***' and do not require the administration of *Miranda* rights. *Miranda v. Arizona* (1966), 384 U.S. 436, 478. There is no evidence before the Court to suggest Martin's statements during transport to Summit County Jail were anything other than unsolicited, spontaneous and voluntary statements." (T.d. 192).

The record plainly demonstrates there was no prompting, no questioning, no compulsion, no coercion and no interrogation, only volunteered statements from an arrestee who - by Appellant's own admission - had been through this drill before, knew his rights and decided to speak freely anyway. (T.p. Vol. II, pp. 153-154).

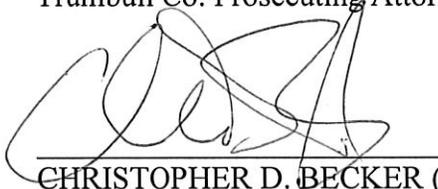
Once again, the State concedes no error here. But should this Court reject the above-quoted authority and find constitutional error in not immediately administering a *Miranda* warning, the State submits that any error is at worst harmless error. Crim. R. 52. *State v. Davis*, 44 Ohio App.2d 335, 347, 338 N.E.2d 793, 803 (8th Dist.1975). Appellant does not challenge his statements given after Det. Wayne Mackey administered the written *Miranda* form at Warren City Police. Appellant essentially repeated the admissions already given. If the volunteered statements were completely extracted from the jury's consideration it had overwhelming evidence upon which to convict Appellant. Therefore, the harmless error doctrine applies.

Appellant was not subject to a custodial interrogation when he offered his spontaneous, volunteered and unsolicited admissions. Appellant was a career criminal who was well aware of his rights and elected to speak freely with his arresting officers. Officers who merely "slap the cuffs" on an arrestee are not obligated to administer a *Miranda* warning unless they intend to interrogate a suspect. The trial court properly held that Appellant's statements were not subject to suppression. Appellant's Proposition of Law No. 10 is without merit.

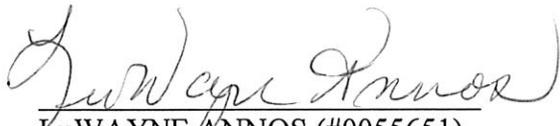
CONCLUSION

The State submits that none of Appellant's ten Propositions of Law has merit. Appellant has never challenged his guilt in this case. This Court's independent weighing will demonstrate that the State proved beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors and that a recommendation of death was merited and a sentence of death was appropriate. The State urges this Court to affirm Appellant's convictions and death sentence.

Respectfully submitted,
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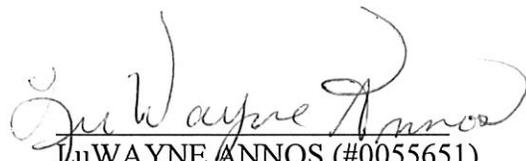


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CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing brief was sent by ordinary U.S. Mail to Attys. John B. Juhasz and Lynn A Maro, Counsel for Defendant-Appellant David Martin, 7081 West Boulevard, Suite No. 4, Youngstown, Ohio 44512-4362, on this 8th Day of February 2016.

A handwritten signature in cursive script, appearing to read "Lu Wayne Annos".

LuWAYNE ANNOS (#0055651)
Assistant Trumbull Co. Prosecuting Atty.

APPENDIX

WESTLAW

Baldwin's Ohio Revised Code Annotated
Rules of Criminal Procedure (Refs & Annos)

Crim R 29 Motion for acquittal
Baldwin's Ohio Revised Code Annotated Rules of Criminal Procedure (App. 10x 2 pages)

Crim R 29 Motion for acquittal

Currentness

(A) Motion for judgment of acquittal

The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

(B) Reservation of decision on motion

If a motion for a judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict, or after it returns a verdict of guilty, or after it is discharged without having returned a verdict.

(C) Motion after verdict or discharge of jury

If a jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within fourteen days after the jury is discharged or within such further time as the court may fix during the fourteen day period. If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal. It shall not be a prerequisite to the making of such motion that a similar motion has been made prior to the submission of the case to the jury.

CREDIT(S)

(Adopted eff. 7-1-73)

Notes of Decisions (287)

Rules Crim. Proc., Rule 29, OH ST RCRP Rule 29
Current with amendments received through August 15, 2015

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NOTES OF DECISIONS (287)

- In general
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- Double jeopardy
- Purpose of motion
- Discretion of court
- Effect of pleas
- Evidence most favorable to state
- Elements proven beyond a reasonable doubt
- Challenge beyond face of indictment
- Multiple counts or charges
- Lesser included offenses
- Failure to make motion
- Assistance of counsel, failure to make motion
- Failure to renew motion
- Waiver of motion
- Acquittal motion rendered moot
- Juvenile proceedings
- Motion after verdict or discharge of jury
- Venue
- Burden of proof
- Instructions
- Appellate review

WESTLAW

Baldwin's Ohio Revised Code Annotated
Rules of Criminal Procedure (Refs & Annos)

Crim R 52 Harmless error and plain error

Baldwin's Ohio Revised Code Annotated | Rules of Criminal Procedure (Applicable Page)

Crim R, Rule 52

Crim R 52 Harmless error and plain error

Currentness

(A) Harmless error

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

(B) Plain error

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

CREDIT(S)

(Adopted eff. 7-1-73)

Notes of Decisions (1075)

Rules Crim. Proc., Rule 52, OH ST RCRP Rule 52

Current with amendments received through August 15, 2015

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Comments and arguments, harmless error
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Victim testimony
Witness testimony
Law enforcement personnel testimony, harmless error
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Expert testimony, harmless error
Hearsay testimony, harmless error
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Lesser included offense instructions
Curative instructions, harmless error
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Closing argument, harmless error
Opinion of prosecutor, harmless error
New trial, harmless error
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Plain error
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Miscarriage of justice, plain error
Outcome change, plain error
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Competency of defendant, plain error
Restraint of defendant, plain error
Sentencing, plain error
Withdrawal of counsel, plain error
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Spousal testimony, plain error
Hearsay, plain error
Photographs, plain error
Jury instructions generally, plain error
Limiting instructions, plain error
Alibi instructions, plain error
Self-defense instructions, plain error
Accomplice instructions, plain error
Jury questions, plain error
Waiver of instruction errors, plain error
Review of instructions, plain error
Prosecutorial misconduct, plain error

WESTLAW

2921.12 Tampering with evidence

Baldwin's Ohio Revised Code Annotated Title XXIX. Crimes--Procedure (Approx. 2 pages)

Baldwin's Ohio Revised Code Annotated
 Title XXIX. Crimes--Procedure (Refs & Annos)
 Chapter 2921. Offenses Against Justice and Public Administration (Refs & Annos)
 Perjury
 Title XXIX. Crimes--Procedure (Approx. 2 pages)

R.C. § 2921.12

2921.12 Tampering with evidence

Currentness

(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:

(1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation;

(2) Make, present, or use any record, document, or thing, knowing it to be false and with purpose to mislead a public official who is or may be engaged in such proceeding or investigation, or with purpose to corrupt the outcome of any such proceeding or investigation.

(B) Whoever violates this section is guilty of tampering with evidence, a felony of the third degree.

CREDIT(S)

(1972 H 511, eff. 1-1-74)

LEGISLATIVE SERVICE COMMISSION**1973:**

In some respects, this section complements the section on perjury, in that it deals with the falsification of physical evidence while perjury deals with the falsification of testimony. The purview of this section is broader than that of perjury, however, since it includes not only falsification but removal, concealment, or destruction as well, and also includes tampering with evidence not only in an official proceeding, but also when the offender knows that such a proceeding is about to be or is likely to be instituted, and also when he knows that an official investigation is being, or is about to be, or is likely to be made.

Notes of Decisions (159)

R.C. § 2921.12, OH ST § 2921.12

Current through 2015 Files 1 to 45 of the 131st General Assembly (2015-2016) and 2015 State Issues 1 and 2.

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NOTES OF DECISIONS (159)

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 Knowledge of official proceeding or investigation
 Police misconduct
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 Theft of evidence; failure to locate evidence
 Sanitizing crime scene
 Allied offenses of similar import
 Sentence
 Procedure

WESTLAW

Baldwin's Ohio Revised Code Annotated
 Title XXIX. Crimes--Procedure (Refs & Annos)
 Chapter 2929. Penalties and Sentencing (Refs & Annos)
2929.03 Imposing sentence for a capital offense; procedures; proof of relevant factors; alternative sentences
 Baldwin's Ohio Revised Code Annotated Title XXIX. Crimes--Procedure | Effective: January 1, 2008 (Approx. 5 pages)

Proposed Legislation

Effective: January 1, 2008

R.C. § 2929.03

2929.03 Imposing sentence for a capital offense; procedures; proof of relevant factors; alternative sentences

Currentness

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose sentence on the offender as follows:

(1) Except as provided in division (A)(2) of this section, the trial court shall impose one of the following sentences on the offender:

- (a) Life imprisonment without parole;
- (b) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty years of imprisonment;
- (c) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;
- (d) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(e) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (A)(1)(a) of this section, the trial court shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that shall be served pursuant to that section.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard. The instruction to the jury shall include an instruction that a

NOTES OF DECISIONS (744)

- Constitutional issues
- Procedure for imposing death penalty, constitutional issues
- Retarded defendant, constitutional issues
- Procedure for imposing life sentence, constitutional issues
- Effective assistance of counsel, constitutional issues
- Double jeopardy, constitutional issues
- Juries, constitutional issues
- Cruel and unusual punishment, vagueness, constitutional issues
- Due process and equal protection, constitutional issues
- Age at time of crime, constitutional issues
- Penalty phase of trial; evidence
- Transcript
- Presentence investigation; psychiatric examination
- Plea bargaining
- Jury
- Waiver, jury
- Voir dire, jury
- Remarks of counsel, jury
- Instructions, jury
- Verdict, jury
- Hung jury, jury
- Jury instructions
- Statement of defendant
- Aggravating and mitigating factors
- Factors to be considered, aggravating and mitigating factors
- Burden and degree of proof, aggravating and mitigating factors
- Evidence, aggravating and mitigating factors
- Consideration; findings, aggravating and mitigating factors
- Felony murder, aggravating and mitigating factors
- Multiple homicides, aggravating and mitigating factors
- Age, aggravating and mitigating factors
- Diminished capacity, aggravating and mitigating factors
- Intoxication, aggravating and mitigating factors
- Probability of continued crimes, aggravating and mitigating factors
- Victim impact, aggravating and mitigating factors
- Resentencing
- Parole eligibility
- Journal entry
- International law and treaties
- Federal "Anti-terrorism and effective death penalty" act
- Appealable order
- Appellate review

APP 4

specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but the instruction shall not mention the penalty that may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 of the Revised Code, the trial court shall impose sentence on the offender as follows:

(a) Except as provided in division (C)(1)(b) of this section, the trial court shall impose one of the following sentences on the offender:

(i) Life imprisonment without parole;

(ii) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving twenty years of imprisonment;

(iii) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(iv) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(v) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (C)(1)(a)(i) of this section, the trial court shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(2)(a) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be one of the following:

(i) Except as provided in division (C)(2)(a)(ii) or (iii) of this section, the penalty to be imposed on the offender shall be death, life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(ii) Except as provided in division (C)(2)(a)(iii) of this section, if the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of death or life imprisonment without parole on the offender pursuant to division (C)(2)(a)(i) of this section, the penalty to be imposed on the offender shall be an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that shall be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code and served pursuant to that section.

(iii) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the penalty to be imposed on the offender shall be death or life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(b) A penalty imposed pursuant to division (C)(2)(a)(i), (ii), or (iii) of this section shall be determined pursuant to divisions (D) and (E) of this section and shall be determined by one of the following:

(i) By the panel of three judges that tried the offender upon the offender's waiver of the right to trial by jury;

(ii) By the trial jury and the trial judge, if the offender was tried by jury.

(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. 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, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or the offender's counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, the offender is subject to cross-examination only if the offender consents to make the statement under oath or affirmation.

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

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to one of the following:

(a) Except as provided in division (D)(2)(b) or (c) of this section, to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(b) Except as provided in division (D)(2)(c) of this section, if the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the jury does not recommend a sentence of life imprisonment without parole pursuant to division (D)(2)(a) of this section, to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code and served pursuant to that section.

(c) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, to life imprisonment without parole.

If the trial jury recommends that the offender be sentenced to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, life imprisonment with parole eligibility after serving thirty full years of imprisonment, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code, the court shall impose the sentence recommended by the jury upon the offender. If the sentence is an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment imposed as described in division (D)(2)(b) of this section or a sentence of life imprisonment without parole imposed under division (D)(2)(c) of this section, the sentence shall be served pursuant to section 2971.03 of the Revised Code. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Except as provided in division (D)(3)(b) of this section, one of the following:

(i) Life imprisonment without parole;

(ii) Subject to division (D)(3)(a)(iv) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(iii) Subject to division (D)(3)(a)(iv) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(iv) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (D)(3)(a)(i) of this section, the court or panel shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Except as provided in division (E)(2) of this section, one of the following:

(a) Life imprisonment without parole;

(b) Subject to division (E)(2)(d) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(c) Subject to division (E)(2)(d) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(d) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (E)(2)(a) of this section, the court or panel shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. For cases in which a sentence of death is imposed for an offense committed before January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. For cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G)(1) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed before January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

(2) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed on or after January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the supreme court.

CREDIT(S)

(2007 S 10, eff. 1-1-08; 2004 H 184, eff. 3-23-05; 1996 H 180, eff. 1-1-97; 1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1-96; 1995 S 4, eff. 9-21-95; 1981 S 1, eff. 10-19-81; 1972 H 511)

LEGISLATIVE SERVICE COMMISSION

1973:

This section specifies the procedure to be followed in determining whether the sentence for aggravated murder is to be life imprisonment or death.

The death penalty is precluded unless the indictment contains a specification of one or more of the aggravating circumstances listed in section 2929.04. In the absence of such specifications, life imprisonment must be imposed. If the indictment specifies an aggravating circumstance, it must be proved beyond a reasonable doubt, and the jury must return separate verdicts on the charge and specification. If the verdict is guilty of the charge but not guilty of the specification, the penalty is life imprisonment.

If the verdict is guilty of both the charge and the specification, the jury is discharged and the trial begins a second phase designed to determine the presence or absence of one or more mitigating circumstances. If one of the three mitigating factors listed in section 2929.04 is established by a preponderance of the evidence, the penalty is life imprisonment. If none of such factors is established, the penalty is death. The procedure is essentially the same in the first phase of an aggravated murder trial whether the case is tried by a jury or by a three-judge panel on a waiver of a jury. The burden of proof still rests on the state, the same rules

of evidence apply, the specification must be proved beyond a reasonable doubt, and the panel's verdict must be unanimous.

With respect to the mitigation phase of the trial, the procedure is somewhat different depending on whether the case is tried by a jury or a three-judge panel. A jury tries only the charge and specification, and the judge in a jury trial determines mitigation. If a jury is waived, the same three-judge panel tries not only the charge and specification, but also determines the presence or absence of mitigation. Also, the statute expressly provides that the panel's finding that no mitigating circumstance is established must be unanimous, or the death penalty is precluded. In other respects, the procedure for determining mitigation is similar whether the trial judge or a three-judge panel tries the issue. Mitigation must be established by a preponderance of the evidence, and the rules of evidence also apply in this phase of the trial (the requirement for a pre-sentence investigation and report, the requirement for a psychiatric examination and report, and the provision for an unsworn statement by the defendant, represent partial exceptions to the rules of evidence).

Notes of Decisions (744)

R.C. § 2929.03, OH ST § 2929.03

Current through 2015 Files 1 to 45 of the 131st General Assembly (2015-2016) and 2015 State Issues 1 and 2.

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- Section 1. [Voting by Persons Eighteen Years of Age.]
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27. [Compensation of Senators and Representatives]

AMENDMENT 1

[FREEDOM OF RELIGION, OF SPEECH, AND OF THE PRESS]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT 2

[RIGHT TO KEEP AND BEAR ARMS]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT 3

[QUARTERING SOLDIERS]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT 4

[SECURITY FROM UNREASONABLE SEARCH AND SEIZURE]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause; supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT 5

[CRIMINAL ACTIONS, DUE PROCESS OF LAW, JUST COMPENSATION]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of