Supreme Court of Ohio Clerk of Court - Filed November 09, 2020 - Case No. 2019-0926

NO. 2019-0926

IN THE SUPREME COURT OF OHIO

CAPITAL CASE, APPEAL FROM
THE CUYAHOGA COUNTY COURT OF COMMON PLEAS
NO. CR-17-623243

STATE OF OHIO,

Plaintiff-Appellee

-vs-

JOSEPH McALPIN,

Defendant-Appellant

MERIT BRIEF OF APPELLEE STATE OF OHIO

CAPITAL CASE – NO EXECUTION DATE SET

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INTRODUCTION

Defendant-Appellant Joseph McAlpin murdered Trina Tomola-Kuznik and Michael Kuznik in Cleveland, Ohio as they were closing their pre-owned car business Mr. Cars to go home to spend Good Friday with their family on April 14, 2017. McAlpin shot Trina and Michael in their heads at close range, and also shot and killed their dog, Axel, after entering the Mr. Cars building. McAlpin was there, along with his co-defendants (his brother, Jerome Diggs, and Diggs's friend, Andrew Keener) who were waiting off-site, to steal pre-owned cars and the cars' titles. After murdering the victims, McAlpin stole the keys and titles to two vehicles as well as cash from Michael's pocket. McAlpin, Diggs, and Keener then made off with a used Mercedes and a used BMW.

The evidence of McAlpin's guilt at trial was overwhelming. His DNA was found inside Michael's back jeans pocket, on an AT&T modem that had been pulled from the wall of the Mr. Cars office, and on the steering wheel and driver's side door of the stolen BMW. His DNA also could not be excluded from Trina's pants leg. Further, cell tower records placed McAlpin at the scene during the timeframe of the crimes. Phone records also established that McAlpin had called Mr. Cars earlier that day, and then exchanged more than a dozen phone calls with Keener between 5:16 P.M. and 6:47 P.M that night. When law enforcement obtained a search warrant for McAlpin's Google account, records revealed that he had searched for, among other incriminating things, a 2008 BMW, whether you can switch a car title into your name without the other party's consent, and news articles related to the Mr. Cars murders.

The aggravating circumstances greatly outweighed any mitigation. Notably, McAlpin, proceeding *pro se*, declined to admit almost any mitigating evidence during the penalty phase of his case. And with regard to McAlpin's ability to represent himself during the death-related

portions of a capital trial, even though McAlpin suggests otherwise, as discussed in more detail below, this Court has previously upheld a defendant's right to proceed *pro se* at all phases of a capital trial. *State v. Jordan*, 101 Ohio St.3d 216, 2004-Ohio-783, 804 N.E.2d 1. McAlpin properly invoked his constitutional right to waive assistance of counsel, and after a lengthy colloquy with the trial court, he executed a written waiver of counsel. Because McAlpin's request to proceed *pro se* was unequivocal and his decision was knowingly and intelligently made, the trial court properly allowed McAlpin to represent himself. Many of his propositions of law before this Court are the result of his self-representation, and all of them are meritless. This Honorable Court should reject each of McAlpin's propositions of law and affirm his convictions and death sentences.

STATEMENT OF THE CASE AND RELEVANT FACTS

The following is a summary of the most pertinent information relating to McAlpin's appeal. As needed, additional facts are provided in the law and argument section below.

A. Timeline of Events

McAlpin murdered Trina and Michael sometime between 5:20 P.M. and 6:30 P.M. on April 14, 2017. Tr. 3437. At approximately 4:00 PM that afternoon, Diggs and Keener were hanging out when McAlpin pulled up in his car and started speaking to Diggs in his car. Tr. 3546-47. After approximately 20 to 35 minutes, Diggs called Keener over to McAlpin's car and asked him if he wanted to make some money. Tr. 3548-49. Diggs explained to Keener that they were going "to hit this spot for titles and car keys and they was going to sell the car." Keener and Diggs were friends and had known each other since middle school. Tr. 3528, 3534. At that point in time, Keener only knew Diggs's brother as "Joe", who he later learned was McAlpin. Tr. 3538. McAlpin first called Mr. Cars at 4:09 P.M. Tr. 4034.

Then, McAlpin, Keener, and Diggs drove to the area of Mr. Cars and parked on a side

street nearby. Tr. 3558. Around 5:20 P.M., the Kuzniks began to prepare for the close of business by parking "blocker cars" near the parking lot exits, to prevent car thefts. Tr. 4037, 2378. At the same time, armed with a firearm on his hip, McAlpin approached Mr. Cars and entered the business. Tr. 3561, 4037-4038. McAlpin was wearing red jogging pants, brown boots, and a black hoodie. Tr. 3560. Tr. 3560. Keener testified at trial that it appeared as if McAlpin was wearing more than one pair of clothing. Tr. 3561. Keener and Diggs waited in the car while McAlpin went inside the building. Tr. 3563. After a while, Diggs called McAlpin using Keener's cell phone, asking McAlpin what was taking so long, and hung up. Tr. 3564. Then, five minutes later, Diggs called McAlpin back and asked what was going on. Tr. 3565. After that second phone call, Keener exited the car and began pacing and walking up and down E. 185th Street near Mr. Cars. Tr. 3565-68. Keener testified that during the time that McAlpin was in Mr. Cars and he was pacing on E. 185th Street, he called McAlpin twice in which he asked what was taking so long. Tr. 3568-70. During trial, Keener identified himself from footage from a surveillance camera at the corner of E. 185th Street and Windward that were of the relevant time frame on the night of the incident. Tr. 3572, Exs. 1440, 1441, 1522. Then, Keener received a call from McAlpin, informing him that the "car's on and ready. Walk down here." Tr. 3573.

When Keener entered the parking lot at Mr. Cars, he saw McAlpin in the parking lot in a different wardrobe with a baseball cap on, holding a broom and dustpan in his hand and standing next to a BMW whose engine was running. Tr. 3574-76. McAlpin also was carrying a blue gym bag across his body. Tr. 3578. McAlpin pointed to a Mercedes for Keener to take and drive away. Tr. 3574, 3576. Keener drove the Mercedes out of the parking lot of Mr. Cars while McAlpin drove the BMW. Tr. 3580-81. After Keener drove out of the lot, he saw Diggs near a stop sign nearby. Tr. 3583. Keener then let Diggs drive the Mercedes with him in the passenger seat. Tr.

3583. Diggs drove the Mercedes, and McAlpin drove the BMW to the westside of Cleveland. Tr. 3583-84. While they were driving to the westside, Diggs called McAlpin, asking where they were going. Tr. 3585.

The trio stopped at what Keener thought was a bar on the westside and left the Mercedes. Tr. 3586-87. The Mercedes was not located by detectives until September 2018; it had been towed from La Villa Party Center on Brookpark Road on April 16, 2017. Tr. 2845-46, 2850-51, 3992, 4024-25.

Keener and Diggs then got in the BMW with McAlpin. Tr. 3587-88. Keener saw that McAlpin still had the blue gym bag and had bank cards in his hand that he handed over to Diggs. Tr. 3588-89. McAlpin then drove the BMW to a side street on the westside and left the BMW. Tr. 3591-92. McAlpin and Diggs were then picked up by a woman driving McAlpin's white car that Keener had driven in earlier. Tr. 3592.

Trina's son and Michael's stepson, Colin Zaczkowski, was the first to arrive at the scene after the murders, at approximately 10:00 P.M. that night. He became concerned that Trina and Michael had not come home yet. Tr. 2390. Upon arrival to Mr. Cars, Colin found what he believed to be his mother's body lying on the floor. Tr. 2392. The business was in disarray—pictures crooked on the walls, chairs on their sides, the candy machine had fallen over and broken. Tr. 2392. He then immediately ran out and called 9-1-1. Tr. 2393. When police arrived, they found not only Trina, but also Michael, and the family doberman, Axel, had been killed. Tr. 2423. Axel appeared to have been killed while he was approaching, or at, the door to the building. Tr. 3963. Both Trina and Michael's bodies appeared to have been moved post-mortem. Tr. 3961-3962. Trina's body was found in the back part of the business. Tr. 2584. Michael's body was found in the front part of the business. Tr. 2584. Michael had been shot in the head twice, once in the

middle of the forehead and once in the left cheek. Tr. 2590; 2592; 2604.

The medical examiner, Dr. Armstrong, determined that the cause of death for both victims was homicide. Tr. 2619; 2641. She also was able to determine that Michael's gunshot wound to his left cheek came from a gun that was fired just inches away, based on the presence of fouling. Tr. 2609-2610. She further determined, based on the presence of stippling on Michael's gunshot wound to his forehead, that this shot was fired from two and a half feet to three feet away, or closer. Tr. 2604-2606. Trina had also been shot in the head, specifically the back of her head. Tr. 3964; 2624. Again, Dr. Armstrong observed the presence of stippling around the wound, but no fouling. Tr. 2624. This meant the gun was fired from less than three feet away. Dr. Armstrong testified that she believed this shot was from a closer range than Michael's forehead gunshot wound. Tr. 2635-2636. She also observed abrasions on Trina's right hand and forearm, and both of legs had contusions. Tr. 2626.

Axel also had been shot in the head. Tr 2644. The main lobby of the building was in disarray, but also the office. Tr. 3963. Everything was on the floor—a broken computer, an AT&T modem, a wire basket, and papers where displaced. Tr. 3963-3965. Michael's wallet, a BMW, and a Mercedes had been stolen, and there was no cash found on scene at the dealership or on Michael. Tr. 3971, 3976. Colin testified that Michael always carried cash on him, and that at least one car had been sold that day. Tr. 2388, 2403.

The scene was processed for evidence, and police began their investigation. Tr. 3969-3970, 3986. Police obtained video surveillance footage from nearby businesses. Tr. 3987. This footage captured McAlpin wearing red pants, brown boots, and a dark hoodie entering Mr. Cars at approximately 5:24 P.M. and then exiting, over an hour later. Tr. 3448, 3663-64, Exs. 1520-1526. It also captured Keener pacing back and forth down E. 185th Street, the street Mr. Cars was located.

Tr. 3461, 3463, Ex. 1522, 1541. It further captured persons stealing vehicles off the Mr. Cars' lot. Tr. 3448, Exs. 1520-1526. In an attempt to identify suspects, whose identities were still unknown, law enforcement obtained a search warrant for cell tower "dump" information from nearby cell towers to try and determine which phone numbers were located in the area at the beginning and end of the crimes' timeframe. Tr. 3414-3415.

On April 20, 2017, the stolen BMW was recovered on W. 48th Street in Cleveland, Ohio. Tr. 3992. The BMW was processed for evidence. Tr. 3993. On June 8, 2017, Cleveland Police Detective Arthur Echols was notified that there had been a potential DNA match to Joseph McAlpin from multiple pieces of evidence recovered from the Mr. Cars crime scene. Tr. 3999. Based on the DNA matches, the police obtained an arrest warrant for McAlpin. Tr. 4001.

McAlpin was ultimately arrested on June 13, 2017. Tr. 4218. When McAlpin was arrested, he had an LG cellphone on him, with a phone number of 216-235-6259. Tr. 3419. While the physical phone itself was purchased after the murder, the phone number was ultimately proven to have been in use at the time of the crimes. Tr. 3419; 3425; 4003-4004; 4006-4008. Police obtained cell phone records related to the (216) 235-6259 number. Tr. 4008. Law enforcement also learned of a Google Gmail account associated with McAlpin, josephmcalpin87@gmail.com, and obtained records for that account. Tr. 4012.

B. The Evidence Against McAlpin

1. DNA

The evidence against McAlpin is overwhelming. First, his DNA was found all over the crime scene. His DNA was present inside the back pocket of Michael's jeans. Tr. 3230-3231; 3999-4000. Dr. Laura Evans testified that McAlpin's DNA match to Michael's jeans is 3.75 quadrillion times more probable than a coincidental match to an unrelated Caucasian person. Tr.

3231-3232. His DNA was also found on the AT&T modem that had been pulled off the wall of the back office. Tr. 3235-3236; 3999-40000. McAlpin's DNA match here was 413 nonillion times more probable than a coincidental match to an unrelated Caucasian person. Tr. 3236. Trina's DNA was also found on the modem, as the minor contributor. Tr. 3237. And McAlpin's DNA was found on the steering wheel and inside driver's side door of the recovered BMW stolen from the lot. Tr. 3239-3241; 3999-4000. Regarding the steering wheel, McAlpin's DNA match was 427 septillion times more probable than a coincidental match to an unrelated Caucasian person. Tr. 3240. And as to the driver's side door, McAlpin's DNA matched biological material on the door with 335,000 times more probability than a coincidental match to an unrelated Caucasian person. Tr. 3241-3242. McAlpin's DNA was not able to be included or excluded from a swab from the lower portion of Trina's blue jeans due to insufficient information. Tr. 3270-3271.

Andrew Keener's DNA also was found inside of the stolen BMW. Tr. 3283. Neither Keener nor Diggs's DNA was located on Michael's jeans' pocket, the AT&T modem, or Trina's jeans pant leg. Tr. 3285; 2389; 2394.

2. Cell Phone Records

Cell tower records for McAlpin's phone number, (216) 235-6259, placed McAlpin at or within the vicinity of the crime scene at the time of the homicides. Tr. 3451-3453, 4010. Cell phone records also showed that McAlpin made or received over a dozen calls from Keener between 5:16 P.M. and 6:47 P.M. on April 14, 2017. Tr. 3438-3439; 3451-3453. McAlpin's phone made or received a total of 18 phone calls during this time period. Tr. 3450-3451. All these calls pinged off a cell phone tower near Mr. Cars, just a bit north and east of the business at 635 E. 185th Street. Tr. 3451-3453; 3458. The records also showed that McAlpin called Mr. Cars at 4:09 P.M. on the day of the homicides. Tr. 3436; 4034. Records further revealed that McAlpin's cell phone traveled

to the west side of Cleveland that night. Tr. 3455. The phone pinged to a tower in the vicinity of W. 48th Street at 8:51 P.M., which is where the stolen BMW later was recovered. Tr. 3456-3457.

3. McAlpin's Google Search History

Law enforcement determined that McAlpin maintained a Google Gmail account under the name josephmcalpin87@gmail.com. Tr. 4008. Records were obtained for that Google account, including search histories conducted from that account. Tr. 4011. The search histories included several searches for handguns that occurred on April 5, 2017, which was about nine days before the Kuzniks were murdered. Tr. 3873-74; Ex. 1433. The searches in the early morning hours of April 15, 2017 included: a gray 2008 BMW; whether you can switch a title into your name without the other party's consent; and BMV salvaged for sale. Tr. 3874-3881; State's Ex. 1433. Records also showed multiple searches for news information on the Mr. Cars murders and the BMW stolen from the car lot murders, as well as a search for how to break windows easily. Tr. 3874-3881.

C. McAlpin's Prosecution

On November 20, 2017, McAlpin was charged in a 25-count indictment in CR-17-618317. His case was re-indicted twice, first in CR-17-620878 to add capital specifications to four aggravated murder counts, and then again in CR-17-623243, to add two co-defendants and additional counts relating only to those co-defendants, Andrew Keener and Jerome Diggs. Ultimately, McAlpin was charged with two counts of aggravated murder, in violation of R.C. 2903.01(B), alleging the purposeful killing of Trina Tomola-Kuznik and Michael Kuznik, and two counts of aggravated murder, in violation of R.C. 2903.01(A), alleging McAlpin murdered Michael and Trina with prior calculation and design. Each aggravated murder count included four capital specifications: two specifications of R.C. 2929.04(A)(7), alleging the murders occurred during the course of an aggravated robbery and an aggravated burglary; a course of conduct

specification pursuant to R.C. 2929.04(A)(5), and a R.C. 2929.04(A)(4) specification stating McAlpin committed the homicides while under detention or an escape. The aggravated murder counts also included one and three-year firearm specifications in violation of R.C. 2941.141(A) and R.C. 2941.145(A), respectively, a notice of prior conviction specification pursuant to R.C. 2929.13(F)(6), and a repeat violent offender specification, R.C. 2941.149(A).

McAlpin also was charged with two counts of aggravated robbery, R.C. 2911.01(A)(1), two counts of aggravated robbery in violation of R.C. 2911.01(A)(3), two counts of aggravated burglary, R.C. 2911.11(A)(1), two counts of aggravated burglary in violation of R.C. 2911.11(A)(2), two counts of kidnapping, R.C. 2905.01(A)(2), two counts of murder, in violation of R.C. 2903.02(B), and two counts of felonious assault, in violation of R.C. 2903.11(A)(2). Each of these counts also included one and three-year firearm specifications and notice of prior conviction and repeat violent offender specifications. Finally, McAlpin was charged with having weapons while under disability, R.C. 2923.13(A)(2), two counts of theft, R.C. 2913.02(A)(1), injuring animals, in violation of R.C. 959.02, and cruelty to animals, R.C. 959.131(C).

McAlpin was originally represented by counsel. He first expressed his intent to represent himself on June 21, 2018, in open court. Tr. 35. On July 12, 2018, the trial court held a hearing regarding McAlpin's request to represent himself. At the hearing, McAlpin made clear he wished to forgo his appointed counsel and represent himself. Tr. 44. The trial court engaged in a lengthy colloquy with McAlpin to ensure McAlpin understood his rights and did, in fact, wish to waive his right to counsel. *See* Tr. 44-108. The trial court then continued the matter for one week and ordered that McAlpin receive a transcript of the hearing. Tr. 106, 103. On July 19, 2018, McAlpin executed a written waiver of trial counsel, and the court granted McAlpin's request to represent himself. Tr. 116-119. The trial court originally appointed his assigned counsel as standby counsel,

but in August 2018, McAlpin filed a motion for appointment of new standby counsel, which the court granted. Tr. 119, 236.

On March 5, 2019, the court dismissed the R.C. 2929.04(A)(4) specifications (under detention or escape) against McAlpin.

McAlpin's jury trial commenced on March 26, 2019. On April 18, 2019, the jury found McAlpin guilty of all counts against him, including the capital specifications. McAlpin's penalty phase was set to begin shortly thereafter but was continued at McAlpin's request to prepare a presentence report and a court psychiatric evaluation. Tr. 4475. The penalty phase commenced on May 13, 2019. McAlpin did not offer any mitigating evidence other than the testimony of family members. McAlpin called the following people to testify: John McAlpin, Sr. (Tr. 4551), John Mills (Tr.4553), Kimilah McAlpin (Tr. 4555), John McAlpin (Tr. 4561), Tunisha Jackson (Tr. 4575), and Josephine Evans (Tr. 4582). He declined to admit the court psychiatric evaluation prepared by Dr. Rodio and/or Dr. Rodio's testimony. Tr. 4606-4607.

The jury returned a unanimous verdict of death on May 16, 2019. On May 21, 2019, after considering additional mitigating evidence not presented to the jury, but with the permission of McAlpin, the trial court issued its sentence of death on counts 1 and 2. Tr. 4687, 4701. McAlpin also was sentenced on the remaining counts, which after merger, included an 11-year sentence for counts 7 and 8 (aggravated robbery), consecutive to each other and the three-year firearm specification, an 11-year sentence for counts 11 and 12 (aggravated burglary) consecutive to one another and to the three-year gun specification. He received a three-year sentence on count 21, having weapons while under disability, 18 months for counts 23 and 24 (theft), and 12 months for count 26, cruelty to animals. Each sentence was imposed consecutively to one another and the firearm specification.

It is from these convictions and sentences that McAlpin now appeals to this Court, raising 17 propositions of law.

LAW AND ARGUMENT

Response to Proposition of Law I: A capital defendant has a Constitutional right to self-representation at all stages of his trial.

A. This Court has previously upheld the right of a capital defendant to represent himself, including during the penalty phase of trial

McAlpin claims that the Sixth Amendment right to represent oneself has not been extended to the penalty phase of a capital trial and should also not be available for the death-qualification process in jury selection. But this Court's precedent in previous capital cases clearly holds otherwise, and this Court can swiftly dispose of McAlpin's first proposition of law by looking to *State v. Jordan*, 101 Ohio St. 3d 216, 2004-Ohio-783, 804. N.E.2d 1 as well as *State v. Obermiller,* 147 Ohio St. 3d 175, 2016-Ohio-1594, 63 N.E.3d 93.

A criminal defendant has the constitutional right to represent himself at trial. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The Sixth and Fourteenth Amendments to the United States Constitution guarantee a state criminal defendant the constitutional right of self- representation, to proceed without counsel, when the defendant voluntarily, knowingly, and intelligently elects to do so. *State v. Gibson,* 45 Ohio St.2d 366, 74 Ohio Op. 2d 525, 345 N.E.2d 399, citing *Faretta.* And Crim.R. 44(A) provides that a defendant is entitled to counsel "unless the defendant, after being fully advised of their right to assigned counsel, knowingly, intelligently, and voluntarily waives their right to counsel."

Importantly, if a trial court denies the right to self-representation when that right is properly invoked, the denial is per se reversible error. *Obermiller* at ¶ 28, citing *State v. Reed*, 74 Ohio St.3d 534, 535, 1996-Ohio-21, 660 N.E.2d 456 (1996). Contrary to McAlpin's claims, both the

United States Supreme Court and this Court have applied *Faretta* in capital cases and have acknowledged that valid waivers of counsel in capital cases will be upheld. *Obermiller* at ¶ 28, citing *Godinez v. Moran*, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993) and *Jordan*. A trial court abuses its discretion if it refuses to allow a defendant in a capital case to proceed pro se if the defendant properly invokes the right to self-representation. *Id.,* citing *State v. Dean,* 127 Ohio St.3d 140, 2010-Ohio-5070, 937 N.E.2d 97, ¶ 74.

Obermiller involved a capital defendant who contemplated invoking his right to represent himself but ultimately did not waive counsel. But this Court has previously affirmed the right of a capital defendant to represent himself at all stages of the proceedings against him. In *State v. Jordan,* the defendant represented himself throughout the course of his trial, including voir dire and the penalty phase. This Court affirmed his convictions and sentence after finding his waiver of his right to counsel was competently made. *See Jordan* at ¶ 26-32. Therefore, McAlpin's right to self-representation is unmitigated, and the only question before this Court is whether McAlpin's right was properly invoked.

B. McAlpin's waiver of counsel was unequivocal and was voluntarily, knowingly, and intelligently made

McAlpin does not directly challenge the validity of his waiver of counsel in this appeal but instead argues that due process prohibits him from representing himself during the penalty phase of a capital case. In so doing, McAlpin attempts to weaken his Sixth Amendment rights through the Fifth and Fourteenth Amendments. But this is not the law, and ensuring McAlpin invoked his waiver of counsel properly is exactly the due process he is entitled to while simultaneously maintaining his Constitutional right to self-representation.

The Sixth Amendment right to counsel "implicitly embodies a 'correlative right to dispense with a lawyer's help.'" *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227, ¶

23, quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 63 S. Ct. 236, 87 L. Ed. 268 (1942). This right is thwarted when counsel is forced upon an unwilling defendant, who alone bears the risks of a potential conviction. *Obermiller*, ¶ 26, citing *Faretta v. California*, 422 U.S. 806, 819-820, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

A criminal defendant must "unequivocally and explicitly invoke" the right to self-representation. *State v. Cassano,* 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81, ¶ 38. Requiring that a request for self-representation be both unequivocal and explicit helps to ensure that a defendant will not "tak[e] advantage of and manipulat[e] the mutual exclusivity of the rights to counsel and self-representation." *Obermiller* at ¶ 29, citing *United States v. Frazier-El*, 204 F.3d 553, 559 (4th Cir.2000). Courts must therefore "indulge in every reasonable presumption against waiver" of the right to counsel. *Brewer v. Williams*, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977).

Additionally, the trial court must be sure that the criminal defendant "knowingly and intelligently" forgoes the "traditional benefits associated with the right to counsel." *Faretta* at 835. However, the defendant "need not himself have the skill and experience of a lawyer" in order to choose to represent himself, but he "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Id.,* quoting *Adams,* 317 U.S. at 279. Whether a defendant's choice was made with eyes open typically "depend[s], in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Obermiller* at ¶ 30, quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

McAlpin expressed his desire to represent himself on June 21, 2018, in open court. Tr. 35.

When doing so, McAlpin stated that he fully understood what he was saying, and that he was competent, referencing his completed competency evaluation. Tr. 35. McAlpin had also previously stated that he did not want to be represented by his current lawyers in January of 2018. Tr. 25. After McAlpin made this formal request, the trial court advised him that "we'll have to set this down for a hearing" because the court must advise him of the "pitfalls, shortcomings, and possible defenses and all the other things relative to your intended course of conduct." Tr. 40. The court then conducted such a hearing regarding McAlpin's request to represent himself on July 12, 2018. At that hearing, McAlpin unequivocally made clear that he wished to forgo his appointed counsel and represent himself. Tr. 44. The court's colloquy with McAlpin can be found in pages 44 through 108 of the trial transcripts. The trial court also ordered McAlpin to receive a copy of the transcript and continued the case one week to allow McAlpin time to think before executing a written waiver. Tr. 97, 102-103. On July 19, 2018, McAlpin did, in fact, execute a written waiver, relinquishing his right to counsel.

Additionally, the record is clear that McAlpin was referred for a competency evaluation, and in a report dated February 23, 2018, Dr. Delaney Smith opined that McAlpin presented no current signs or symptoms of mental illness that would interfere with his ability to understand the nature and objections of the legal proceedings against him or interfere with his ability to assist in his own defense. Tr. 48. The report also stated McAlpin was not intellectually disabled or suffering from a severe mental illness. Tr. 48. Clearly, McAlpin entered his waiver to counsel voluntarily, knowingly, and intelligently. McAlpin understood the nature of the charges and proceedings against him, the range of possible punishments—including death, was clearly advised of his right to counsel, and appreciated the consequences of waiving that right. While it cannot be denied that in most criminal prosecutions defendants could better defend with counsel's guidance

than by their own unskilled efforts, it is still a defendant's choice to exercise his right to self-representation and that choice "must be honored out of that respect for the individual which is the lifeblood of the law." *Faretta,* 422 U.S. at 834. Accordingly, "the competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself," meaning that "a criminal defendant's ability to represent himself has no bearing upon his competence to choose self-representation." *Moran,* 509 U.S. at 399-400, 125 L. Ed. 2d at 332-33; *see also Faretta,* 422 U.S. at 834. One of the fallacies of McAlpin's argument is that it is premised on the idea that a non-lawyer defendant can never understand the intricacies or complexities of death penalty litigation. But *Faretta* makes clear such analysis is irrelevant. Further, there is nothing about death penalty litigation that is inherently more complex than regular criminal litigation when it comes to say, understanding hearsay and its exceptions, or DNA evidence. Thus, McAlpin's proposition of law fails for multiple reasons.

Because McAlpin properly invoked his right to self-representation, this Court must uphold the trial court's decision to allow him to represent himself at all stages, including the penalty phase, of his trial. Denying McAlpin his Sixth Amendment right would have constituted per se reversible error, and McAlpin's first proposition of law is therefore without merit.

C. Forcing counsel upon an unwilling defendant for certain portions of litigation denies that defendant the right of self-representation and results in hybrid representation

Further, not only does McAlpin's proposition of law effectively deny McAlpin's right to self-representation, but it would also result in hybrid representation, which this Court has previously rejected. If capital defendants are now required to use the assistance of counsel for the penalty or death-related phases of capital litigation, but not the guilt phase, the result mandates hybrid representation. But a defendant has the right either to appear pro se or to have counsel; he has no corresponding right to act as co-counsel on his own behalf. *State v. Thompson*, 33 Ohio

St.3d 1, 6-7, 514 N.E.2d 407 (1987). This Court has established that in Ohio, a criminal defendant has the right to representation by counsel or to proceed pro se with the assistance of standby counsel. However, these two rights are independent of each other and may not be asserted simultaneously. *State v. Martin*, 103 Ohio St.3d 385, 390-391, 2004-Ohio-5471, 816 N.E.2d 227. And such an either/or requirement makes sense from a policy standpoint: in such hybrid scenarios, who is ultimately the decision maker? What happens when counsel and the defendant disagree on key issues? Further still, imagine the mess of a record such hybrid representation would create and the difficulties in determining who was responsible for which decisions, and when and where waiver might apply. Thus, even if McAlpin's proposition of law were not clearly established to the contrary, his suggestion is unworkable under the law and would result in great judicial inefficiency. For these reasons, the State respectfully requests this Court find McAlpin's first proposition of law meritless.

Response to Proposition of Law II: Standby counsel's assistance in overcoming routine procedural obstacles regarding trial preparation and strategy does not interfere with a defendant's right to self-representation.

Immediately after asking this Court to require he be represented by counsel, McAlpin then claims error for having been assisted by counsel. In his second proposition of law, McAlpin argues his standby counsel interfered with his right of self-representation when counsel determined that the DNA defense expert should not generate a report of her findings. McAlpin claims this constituted structural error because he wanted a report created, even though he had no intention to call the expert as a witness. He states in his brief that he would have used the report to cross-examine the DNA expert who testified in the State's case. But even if he would have received the report he complains of not having, McAlpin would not have been able to use the report to cross-examine a witness without calling the author of the report of the witness, (or perhaps receiving a

stipulation from the State). *See* Crim.R. 16(K). So, without even delving into the legal analysis of whether standby counsel infringed on McAlpin's Sixth Amendment rights, McAlpin cannot now claim error for not having something he would not have even been able to use in trial. On this basis alone, McAlpin's proposition of law is meritless.

McAlpin urges this Court to order the drastic remedy of requiring a new trial because, months after the guilt phase of his trial concluded, McAlpin decided he wanted a DNA expert report produced. And he wanted this report even though his standby counsel informed him that such a report would include inculpatory evidence confirming the DNA reports already obtained by the State and that McAlpin would then have an obligation to turn that report over in discovery. Tr. 4593-4604. McAlpin failed to raise his concerns at the time the State presented its DNA evidence and instead presented the issue in the form of a motion for new trial. This is because, as the record reflects, McAlpin did not even come across his concerns that the DNA reports and testimony might not be accurate until after he was found guilty. Tr. 4593-4595. Such a motion for new trial would have to have been considered pursuant to Crim.R. 33(A)(6), on the grounds of newly discovered material evidence. The rule requires the defendant to provide affidavits in support of his motion by whom such new evidence is expected to be given. It also requires the defendant to show he could not have, with reasonable diligence, discovered and produced said new evidence at trial. McAlpin did neither of these things. He also did not even actually assert newly discovered evidence; all he claimed is that he, in his opinion, believed the State's DNA evidence was wrong. Surely, such a convicted defendant's unfounded and unsupported claims do not give rise to any reason to even consider granting him a new trial.

McAlpin's concerns that standby counsel infringed upon his pro se rights in not ordering an expert report are also unfounded. A defendant's Sixth Amendment rights are not violated when

a trial judge appoints standby counsel -- even over the defendant's objection -- to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals. Participation by counsel to steer a defendant through the basic procedures of trial is permissible even in the unlikely event that it somewhat undermines the pro se defendant's appearance of control over his own defense. *McKaskle v. Wiggins*, 465 U.S. 168, 184, 104 S.Ct. 944, 954, 79 L.Ed.2d 122, 137. A defendant's right to self-representation plainly encompasses certain specific rights to have his voice heard. The pro se defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial. *Id.* None of these rights were circumvented by standby counsel; to the contrary, the record is replete with instances of McAlpin seeking counsel's guidance and consenting to their assistance. But with regard to this one isolated incident, McAlpin now cries foul.

The law distinguishes between standby counsel's alleged interference in the jury's presence and outside the jury's presence. The entire exchange regarding the non-existent DNA report occurred outside of the presence of the jury (and as stated previously, post-conviction). If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak instead of the defendant on any matter of importance, the *Faretta* right is eroded. *Id.* But *Faretta* rights are adequately vindicated in proceedings outside the presence of the jury if the *pro se* defendant is allowed to address the court freely on his own behalf and if disagreements between counsel and the pro se defendant are resolved in the defendant's favor

whenever the matter is one that would normally be left to the discretion of counsel. *Id.* Here, McAlpin was allowed to address the trial court freely and on his own behalf to state his disagreement with stand by counsel regarding the unobtained DNA report. While admittedly the disagreement did not resolve in McAlpin's favor in the sense that he did not ultimately obtain a new trial or the elusive DNA report, this was not something that was within counsel's discretion at the time McAlpin brought the issue to the court's attention. But the record is clear that counsel spent hours, if not days, attempting to assist McAlpin in speaking with the defense DNA expert team, all in May of 2019. The fact of the matter is that McAlpin was asking for something for which there was no remedy. And importantly, even in the hypothetical situation in which McAlpin made a timely complaint to the trial court over his inability to obtain the DNA report and he had then been able to obtain a DNA report, it would not have changed the outcome of the trial. Crim. R. 52(A); *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, ¶ 7.

The record reflects the DNA report would have simply confirmed what the State's evidence already showed. If anything, it would have helped the State, not McAlpin. While McAlpin now wants to say the ultimate usefulness of the report is irrelevant, that is not true. McAlpin's gripe with his standby counsel's decision not to obtain an expert DNA report did not affect his ability to control the organization and content of his own defense, or to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial. And, as discussed above, McAlpin was also provided the opportunity to voice his concerns with the trial court outside the presence of the jury. For these reasons, his second proposition of law is meritless, and the trial court did not err by denying McAlpin's motion for new trial.

<u>Response to Proposition of Law III</u>: McAlpin purposely, with prior calculation and design, caused the death of both victims.

McAlpin's third proposition of law argues there was insufficient evidence to establish that he murdered both victims with prior calculation and design, despite the overwhelming evidence that he killed them, execution-style, shooting them both in the head at close range. To determine whether a conviction is supported by sufficient evidence, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Walker*, 150 Ohio St.3d 409, 412, 2016-Ohio-8295, ¶ 12, 82 N.E.3d 1124, 1127, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. McAlpin was charged with two counts of aggravated murder pursuant to R.C. 2903.01(A) in counts three and four of the indictment. R.C. 2903.01(A) states: "[n]o person shall purposely, and with prior calculation and design, cause the death of another." The element of prior calculation and design "require[s] a scheme designed to implement the calculated decision to kill." *State v. McFarland,* Slip Opinion No. 2020-Ohio-3343, ¶ 31, citing *State v. Cotton*, 56 Ohio St.2d 8, 11, 381 N.E.2d 190 (1978). The phrase "prior calculation and design" by its own terms suggests advance reasoning to formulate the purpose to kill. Evidence of an act committed on the spur of the moment or after momentary consideration is not evidence of a premeditated decision or a studied consideration of the method and the means to cause a death. *Walker* at ¶ 18. All prior-calculation-and-design offenses will necessarily include purposeful homicides; not all purposeful homicides have an element of prior calculation and design. *Id.*

This Court has repeatedly stated that there is no "bright-line test that emphatically distinguishes between the presence or absence of 'prior calculation and design.' Instead, each case turns on the particular facts and evidence presented at trial." *State v. Taylor*, 78 Ohio St.3d 15, 20,

1997-Ohio-243, 676 N.E.2d 82 (1997); *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, 785 N.E.2d 439, ¶ 61; *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 148. Courts traditionally consider three factors in determining whether a defendant acted with prior calculation and design: "(1) Did the accused and victim know each other, and if so, was that relationship strained? (2) Did the accused give thought or preparation to choosing the murder weapon or murder site? and (3) Was the act drawn out or 'an almost instantaneous eruption of events?'" *Walker* at ¶ 20, citing *Taylor* at 19. Shooting a person execution-style may also establish, at least in part, prior calculation and design. *State v. Palmer*, 80 Ohio St.3d 543, 569-570, 1997-Ohio-312, 687 N.E.2d 685 (1997); *Braden* at ¶ 65, citing *State v. Campbell*, 90 Ohio St.3d 320, 330, 2000-Ohio-183, 738 N.E.2d 1178 (2000). It is well-established that the firing of shots into a victim's head at close range is crucial evidence of prior calculation and design and on the basis of which the Court has upheld juries' findings of prior calculation and design. *Palmer*, *supra*; *State v. Goodwin*, 84 Ohio St.3d 331, 344, 703 N.E.2d 1251, 1263 (1999).

> The jury was instructed on prior calculation and design as follows:
>
> There must have been sufficient time and opportunity for the planning of an act of homicide. And the circumstances surrounding the homicide must show a scheme designed to carry out the calculated decision to cause the death. No definite period of time must elapse, and no particular amount of consideration must be given. But acting on the spur of the moment or after a momentary consideration of the purpose to cause the death is not sufficient.

Tr. 4265. This definition applies under R.C. 2903.01(A) as well as the R.C. 2929.04(A)(7) death specification for prior calculation and design. (Although, because McAlpin was the principal offender of the killings, arguably, prior calculation was an unnecessary element in convicting him of the (A)(7) specifications.) McAlpin's actions were anything but spur of the moment and he did not commit them after only a momentary consideration. He executed his victims at point-blank range after planning an elaborate aggravated burglary to steal a few cars. He planned these crimes,

solicited people to help him carry them out, and entered Mr. Cars on April 14, 2017 with a loaded firearm. Tr. 3561. These were contrived, calculated decisions to go to Mr. Cars with a gun, rob the victims Michael and Trina of cash, car keys and titles, shoot them in the head from a distance of a couple of feet or even just inches away, and then ultimately drive off with a couple of used cars. And the evidence clearly supported that McAlpin gave thought and preparation to the murder weapon and the murder site. Further, the prosecution team pointed out much of the evidence that establishes prior calculation and design during its closing arguments. McAlpin, or McAlpin's phone, called Mr. Cars that day. Tr. 4333. McAlpin then drove to Mr. Cars with Diggs and Keener and entered Mr. Cars a little after 5:20 P.M. Tr. 4335. He did not exit the building for an hour and six minutes. Tr. 4337. And in that timeframe, McAlpin shot Michael once in the side of the head and then again, at much closer range, right at the top of the head. Tr. 4618. And he shot Trina in the back of the head as she tried to escape him. Tr. 4618. Afterwards, he calmly exits the building and begins placing license plates onto the BMW that he then steals. Tr. 4340. He even re-enters the building for a minute before leaving, and then starts calling his co-conspirators to help him steal the cars. Tr. 4341.

Nothing about the evidence presented suggested these were impulsive or chaotic shootings. And while just the evidence that the victims were shot at a close range may be enough to establish prior calculation and design standing alone, *see, e.g., State v. Campbell*, 90 Ohio St.3d 320, 330, 2000 Ohio 183, 738 N.E.2d 1178 (2000), the State presented a host of additional evidence proving McAlpin planned these deaths. From his choice to steal these cars while the victims were still present, to the amount of time he spent inside Mr. Cars, to his calculated decision to carry out the theft of the vehicles after the victims' deaths, and of course, the evidence that he shot the victims execution-style, it all adds up to sufficient prior calculation and design. McAlpin's third

proposition of law is therefore without merit.

<u>Response to Proposition of Law IV</u>: A prospective juror who is unable to promise "100%" that he can sign a death verdict in a properly proven case is substantially impaired warranting a dismissal for cause.

In his fourth proposition of law, McAlpin argues that prospective juror no. 30 (herein after "Juror 30") was impermissibly dismissed for cause during the *Witherspoon* phase of *voir dire* even though Juror 30 stated that he may be incapable of signing his name to a verdict of death. The record, as well as the established law of this Court and the United States Supreme Court, do not support McAlpin's claims. A prospective juror may not be excluded for cause simply because the prospective juror expresses reservations about imposing the death penalty. *State v. Madison*, Slip Opinion No. 2020-Ohio-3735, ¶ 87, citing *State v. Keith*, 79 Ohio St.3d 514, 519-520, 1997 Ohio 367, 684 N.E.2d 47 (1997), citing *Witherspoon v. Illinois*, 391 U.S. 510, 520-523, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). But a prospective juror may be excluded for cause if the prospective juror's beliefs about capital punishment "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." *Madison*, quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980).

In *Witherspoon*, the U.S. Supreme Court set forth the rule for juror disqualification in capital cases, recognizing that the Sixth Amendment's guarantee of an impartial jury confers on capital defendants the right to a jury not "uncommonly willing to condemn a man to die." *Id.* at 521. But the Court with equal clarity has acknowledged the State's "strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes." *Uttecht* v. *Brown*, 551 U.S. 1, 9, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007). The Supreme Court thus balanced these interests by determining that only "a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be

excused for cause." *Id.* A juror may be excused for cause "where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Wainwright v. Witt*, 469 U.S. 412, 425-426, 105 S.Ct. 844, 83 L.Ed. 2d 841.

A trial court's ruling on a challenge for cause will not be disturbed on appeal unless the trial court abused its discretion. *State v. Bryan,* 101 Ohio St.3d 272, 284, 2004-Ohio-971, ¶ 80, 804 N.E.2d 433, 452. The trial court's decision whether to strike a particular juror shall be given deference "regardless of whether the trial court engages in explicit analysis regarding substantial impairment; even the granting of a motion to excuse for cause constitutes an implicit finding of bias." *Uttecht* at 7. A trial court's "finding may be upheld even in the absence of clear statements from the juror that he or she is impaired . . . ." *White v. Wheeler,* 136 S.Ct. 456, 460, 577 U.S. 73, 77-78, 193 L.Ed.2d 384, 388-389, quoting *Witt* at 7. And "when there is ambiguity in the prospective juror's statements," the trial court is "entitled to resolve it in favor of the State." *Witt* at 434.

Juror 30 was unable to say, with certainty, that he could vote to impose the death penalty. The following exchange occurred during the State's voir dire exchange with Juror 30:

> MR. SCHROEDER: I guess my question to you is if I were to ask you today if you would be able to commit to being open to signing that verdict form at the end, could you commit to that?
>
> JUROR NO. 30: Could I commit to it?
>
> MR. SCHROEDER: Yes.
>
> JUROR NO. 30: I don't think I could.
>
> MR. SCHROEDER: Depending on what the evidence -- I know you haven't heard any evidence -- depending on what the evidence is, if we prove the things that we have to prove, could you commit to that? Signing that verdict form to impose the death penalty on someone?
>
> JUROR NO. 30: With a hundred percent certainty, no.

Tr. 1396. Juror 30, at the very least, gave ambiguous answers as to whether he could appropriately consider the death penalty. And resolving any potential ambiguity in Juror 30's declaration in favor of the State, this is a sufficient reason to remove him for cause. *White v. Wheeler*, 136 S. Ct. at 461. This Court too has previously held that a juror who is incapable of signing a death verdict demonstrates substantial impairment in his ability to fulfill his duties. *State v. Franklin*, 97 Ohio St.3d 1, 9, 2002-Ohio-5304, ¶ 34, 776 N.E.2d 26, 38. Additionally, in his questionnaire, Juror 30 indicated he was not sure how he would vote if Ohio put the death penalty on the ballot in the next election. He also stated he was Catholic and held religious beliefs that would impede his ability to vote for the death penalty. And he again said he was unsure if he could sign his name to a death penalty verdict. All of this renders him substantially impaired in the ability to fulfill his duties as a juror in McAlpin's case. The trial court did not abuse its discretion in removing Juror 30 for cause, and McAlpin's fourth proposition of law is meritless.

Response to Proposition of Law V: An appellant cannot raise a Batson challenge on appeal where no objection was made during voir dire. Further, the State's use of its peremptory challenges did not violate the Equal Protection Clause of the Fourteenth Amendment.

McAlpin, in his fifth proposition of law, inexplicably argues the prosecution's exercise of its peremptory challenges violated the Equal Protection Clause of the Fourteenth Amendment pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), even though McAlpin failed to raise a *Batson* claim during voir dire. McAlpin states that the State created a pattern of discrimination after striking four women (out of five total challenges) from the jury pool. He conveniently then claims that *Batson* was violated because the State did not provide gender-neutral reasons for their removal. But of course there are no gender-neutral reasons in the record; no one was put on notice or given an opportunity to do so because there was no objection to the female jurors' excusal. Without an adequate record, an appellate court cannot consider a *Batson*

challenge on direct appeal. *See State v. Maxwell,* 139 Ohio St. 3d 12, 30, 2014-Ohio-1019, ¶ 84-85, 9 N.E.3d 930, 955; *see also State v. Hawkins*, 3rd Dist. Allen No. 1-18-08, 2018-Ohio-4649, ¶ 34; *see also State v. Burks*, 10th Dist. Franklin No. 07-AP-553, 2008-Ohio-2463, ¶ 57. This Court cannot, and should not, determine, ex post facto, whether the prosecution had gender-neutral reasons for its peremptory challenges, and/or whether the trial court would have accepted those explanations as credible and not pretextual. See *Maxwell* at ¶ 84. Simply, McAlpin's proposition of law is not a cognizable claim on appeal without an objection in the record. This Court should summarily dismiss it as without merit on these grounds.

Even still, if this Court were to engage in a *Batson* analysis, assuming arguendo McAlpin had raised a proper objection, the record contains possible gender-neutral reasons for striking each female prospective juror that McAlpin now attempts to challenge. The State excused prospective juror numbers 8, 53, 16, 68, and 41, in that order. Juror No. 68 was a male, the other four prospective jurors were female. Juror No. 8 stated in voir dire that her brother worked as a Cuyahoga County bailiff for 25 years. Tr. 2113-2114. In the *Witherspoon* phase of *voir dire*, Juror No. 8 stated that it is God's decision to take a life. Tr. 736. Juror No. 8 also indicated during *voir dire* and in her questionnaire that she was "unsure of the integrity of some of the people in positions to make decisions regarding others' lives." And finally, she indicated in her questionnaire that members of her family or someone close to her had been accused of or charged with crimes. Any of these answers would constitute a gender-neutral reason for excusing Juror No. 8. The State next excused Juror No. 53, who informed the Court that her stepmother was an Assistant Cuyahoga County Public Defender. Tr. 2221. Surely, her excusal was for a gender-neutral reason. Juror No. 16 explained in her questionnaire that her boyfriend had been arrested for various crimes, and she was tangentially involved in that by association. She indicated as much

during *voir dire* as well. Tr. 2053. This is also a valid neutral reason for excusing her from service in this case. Finally, Juror No. 41 stated she had medical problems, including short-term memory loss. Tr. 2053. Such a potential inability to remember the testimony presented over the course of months in a death penalty eligible case is clearly a gender-neutral reason for a party to exercise a preemptory challenge. Even though there was no challenge presented to the State, the State would have had valid gender-neutral reasons for excusing each of the jurors McAlpin claims constituted error. Had he objected to their excusal, he still would not have prevailed on a *Batson* claim. Therefore, McAlpin's fifth proposition of law is unsupported by law or fact, and this Court should overrule it.

Response to Proposition of Law VI: The evidence admitted during the guilt phase was proper. But even if some of the evidence was not properly offered, any admission of irrelevant victim-impact testimony during the guilt phase of McAlpin's trial did not constitute plain error and did not unfairly prejudice him during the penalty phase.

In his sixth proposition of law, McAlpin claims the State of Ohio introduced pieces of irrelevant, prejudicial evidence that constituted impermissible victim impact testimony. Because McAlpin did not object to the admission of any of this evidence, this Court reviews for plain error. *State v. Madison*, Slip Opinion No. 2020-Ohio-3735, ¶ 138. When reviewing a claim of plain error, an appellate court examines the evidence properly admitted at trial and determines whether the jury would have convicted the defendant even if the error did not occur. *State v. Slagle*, 65 Ohio St.3d 597, 605 N.E.2d 916 (1992). Plain error review is undertaken with the utmost caution, under exceptional circumstances and only to prevent a miscarriage of justice. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus (1978). First, the State contends that most, if not all, of the testimony McAlpin complains of was properly admitted evidence relating to facts attendant to his offenses. True victim-impact evidence, pursuant to the terms of R.C. 2930.13, 2930.14 and 2947.051, shall be considered by the trial court prior to

imposing sentence upon a defendant, not during the guilt phase of the proceedings. *State v. Fautenberry*, 72 Ohio St.3d 435, 439-440, 650 N.E.2d 878, 882-883, 1995-Ohio-209. Evidence relating to the facts attendant to the offense, however, is clearly admissible during the guilt phase. *Id*; *see also State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 98 ("[e]vidence relating to the facts attendant to the offense is 'clearly admissible' during the guilt phase, even though it might be characterized as victim-impact evidence."). And evidence which depicts both the circumstances surrounding the commission of a murder and also the impact of the murder on the victim's family may be admissible during both the guilt and the sentencing phases. *Fauntenberry* at 882-883.

Moreover, the evidence McAlpin complains of was relevant evidence. Evid. R. 401 defines "relevant evidence" as that which has "* * * any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Generally speaking, the question of whether evidence is relevant is ordinarily not one of law but rather one which the trial court can resolve based on common experience and logic. *State v. Lyles,* 42 Ohio St.3d 98, 99, 537 N.E.2d 221, 222. "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of the syllabus (1987).

A. The witness testimony was relevant and not unfairly prejudicial

McAlpin complains that Colin Zackowski, Trina Tomola-Kuznik's son, improperly testified that Trina and Michael were high school sweethearts because such information is irrelevant to the case. Tr. 2366. But Zackowski said this in his response to a question from the prosecution that was simply meant to garner background information on the victims and ultimately establish them as the owners of Mr. Cars. Not only is this evidence relevant to the circumstances

of McAlpin's case, its probative value is not outweighed by a danger of unfair prejudice. Evid. R. 403. McAlpin also argues Zackowski should not have been allowed to testify regarding Axel, the family dog that McAlpin killed. Again, his testimony that Michael brought Axel home as a surprise for Trina is not overly prejudicial to McAlpin; it is merely background information explaining to the trier of fact how Axel came into their family and why he would have been at Mr. Cars on the night McAlpin killed him. Finally, Colin explained that Michael was not his biological father and that his biological father had passed away from an overdose. Tr. 2395. His answer came as he was explaining how he was the first one to find his mother and stepfather the night they died. The prosecution's question asking Colin about the loss of his biological dad was relevant to Colin's state of mind when he arrived on scene to Mr. Cars. His prior life experiences may or may not have helped shape how he responded to finding his mother dead on the floor of their family business. But regardless of the information's relevance, it certainly was not harmful to McAlpin and did not subject him to any danger of unfair prejudice.

McAlpin next argues that the State should not have presented testimony from Albert Martin, who told the jury that he had battled drugs and injuries and had not led an easy life. Tr. 3041-3042. He claims that this was the prosecution opening the door to bring out the "stellar character of the victims" because Martin explained that they were good, hard-working people who invited him to their home for holidays and helped him overcome his addiction. Tr. 3044. None of this evidence was offered for impermissible reasons. In fact, the State, in its closing argument, told the jury exactly why Albert testified: to prove he was not the killer. Tr. 4334. Albert was the last known person to see the victims alive. In order to help prove McAlpin's guilt, Albert needed to be eliminated as a suspect. Albert's testimony regarding his affection and regard for the victims helped to do so, and is therefore relevant and admissible evidence.

McAlpin states that Barbara Bonnes should not have been allowed to testify regarding certain family members' reactions to learning of the victims' deaths. See Tr. 2861-2862. However, Bonnes's testimony came as part of her explaining to the jury who she was (Michael's sister), and what she did on the night of the murders. Her testimony establishes some of the timeline of events that occurred right after the crimes took place. Her explanation of family members' reactions as well as her conversations with Corrine also help to explain why Corrine's timeline might not match up with others, which is something the State needed to explain. Corrine was a 13-year-old girl who had just lost her parents and was in shock. This is relevant to explaining any discrepancies in her timeline away. And in any event, nothing about Bonnes's testimony was unfairly prejudicial to McAlpin.

McAlpin also claims that the prosecution showing Andrew Keener a photograph of Trina constituted error. While this did occur over McAlpin's objection, Keener's testimony cannot be considered victim impact testimony—he is certainly not a victim in this case. And furthermore, his testimony is relevant because it explains his dynamic with McAlpin—and rightfully describes his fear in testifying against him, which may affect his credibility. Thus, the probative value of Keener's testimony outweighed any prejudicial effect it may have had.

B. The jury instructions properly instructed the jury what evidence to consider in the penalty phase

Second, McAlpin concedes there was no impermissible evidence admitted in the penalty phase and instead innovatively argues some of the evidence submitted during the guilt phase had a "carry-over effect." Even if this Court were to accept such a hypothetical effect, it can be cured with proper jury instructions. Here, the trial court properly instructed the jury on what evidence it may consider when determining the existence of aggravating circumstances in the penalty phase. *See State v. Thompson*, 141 Ohio St.3d 254, 300, 2014-Ohio-4751, P237, 23 N.E.3d 1096, 1147,

finding mitigation-phase jury instructions cured any earlier misstatements on the same point during voir dire. At the penalty phase, the trial court instructed the jury as follows:

> It is your sworn duty to accept these instructions, to apply the law as it is given to
> you. You are not permitted to change the law, or to apply your own idea of what you think the law should be. Tr. 4650.
>
> Only the aggravating circumstances related to a given count may be considered and weighed against the mitigating factors in determining the penalty for that count. Tr. 4652.
>
> Aggravating circumstances do not include -- the aggravated murder itself is not an aggravating circumstance. You may only consider the aggravating circumstances which accompany the aggravated murders that were just described to you. Tr. 4654.
>
> For purposes of this proceeding, only that evidence admitted into the trial phase --admitted in the trial phase that is relevant to the aggravating circumstances and to any of the mitigating factors is to be considered by you. You will also consider all of the evidence admitted during the sentencing phase together with the defendant's own statement. Tr. 4659.
>
> When you consider the nature and circumstances of the offense, you may consider them only if they have mitigating value. You may not consider the nature and circumstances of the crime as an aggravating circumstance. You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the Court to your findings and to render your verdict accordingly. In fulfilling your duty, your efforts must be to arrive at a just verdict. Consider all the evidence and make your finding with intelligence and impartiality and without bias, sympathy or prejudice. Tr. 4661.

And to further ensure the jury understood their obligations at the penalty phase, the prosecution also advised them that:

> The aggravating circumstances that I go over for you are the only things that can be weighed on the aggravation side of that scale. You cannot weigh anything else as a reason to impose the death penalty other than the aggravating circumstances. The law wants me to emphasize that to you at this point. That is very important. Tr. 4613.

The State also advised the jury in its opening statement of the penalty phase that they are relying

on the evidence in the guilt phase that "established those aggravating circumstances of the case," and explained that it was not going to re-present every piece of evidence used in the guilt phase. Tr. 4544. The jury was told multiple times of the proper evidence to consider when determining the aggravated circumstances of McAlpin's case. Therefore, even if this Court were to find that any of the evidence McAlpin now suggests was irrelevant or improperly admitted at the guilt phase was admitted erroneously, that error was cured by the jury instructions.

Further, any hypothetical error in allowing improper victim impact testimony into evidence did not change the outcome of the proceedings, because the jury would have convicted McAlpin anyway in light of the overwhelming evidence against him. McAlpin's DNA was present on multiple items, including one of the victims, at the crime scene and in one of the stolen cars; his cell phone records place him on scene at the time of the murders, and his co-defendant testified that he was the man who went into Mr. Cars on the day of the crimes. He was also captured on video surveillance coming and going from Mr. Cars. While the State maintains this evidence was admissible and did not constitute error, even if it did, it does not rise to the level of plain error. *See, e.g., State v. Hough*, 8th Dist. Cuyahoga No. 91691, 2010-Ohio-2770, ¶ 32-35, (finding brief amounts of victim impact testimony did not result in prejudice to appellant where overwhelming evidence of the appellant's guilt existed and contrasting the case at bar to *Fautenberry* in which victims testified regarding the sentence that should be imposed.) The State therefore requests this Court overrule McAlpin's sixth proposition of law.

Response to Proposition of Law VII: McAlpin's Google search history contained relevant, probative information that was not outweighed by the danger of unfair prejudice. Even if some of the contents of the Google history did contain unfairly prejudicial evidence, its admission constituted harmless error.

In his seventh proposition of law, McAlpin claims his Google searches should not have been admitted as they were unfairly prejudicial, irrelevant, and inflammatory. In general, where

error in the admission of relevant evidence is alleged under Evid.R. 403, the decision of the trial court will not be reversed unless the trial court clearly abused its discretion and the defendant has been materially prejudiced as a result. *State v. Maurer*, 15 Ohio St.3d 239, 473 N.E.2d 768 (1984). A trial court's improper evidentiary ruling, over an objection, cannot be the basis for reversal of the judgment when the alleged error was harmless. *See Lyles*, 42 Ohio St.3d 98, 100, 537 N.E.2d 221; Evid.R. 103(A); Crim.R. 52(A). Criminal Rule 52(A), which defines harmless error, provides: "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." In a review for harmless error, the State has the burden of proving that the error did not affect the substantial rights of the defendant. *Morris,* 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, ¶ 23, citing *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 15. Whether the error affected the substantial rights of the defendant has been interpreted to require that the error must have been prejudicial. *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, ¶ 7, citing *United States v. Olano*, 507 U.S. 725, 732-733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). For the error to have been prejudicial, it must have affected the outcome of the trial court proceedings. *Id.*

The State offered McAlpin's Google search history as State's Exhibit 1433, which the trial court accepted into evidence over McAlpin's objection. Tr. 4186. State's Exhibit 1433 provided evidence that McAlpin, or someone using McAlpin's Google account, searched for or accessed the following information during the timeframe before and after the Mr. Cars murders:

- How to break into windows easily
- Can you switch a title into your name without the other party's permission?
- BMV salvaged for sale, and other BMW related searches
- Multiple news articles about the Mr. Cars murders
- Searches for the latest news on the stolen BMV from the car lot murder
- Searches related to guns.

State's Ex. 1433; *see also* Tr. 3874-3881. State's Exhibit 1433 clearly contained relevant,

incriminating information that helped to establish McAlpin's guilt and further identify him as the perpetrator of these crimes. McAlpin now complains that his search history also contained inflammatory information including searches for strip clubs and pornographic websites. While these searches may be prejudicial to McAlpin, the exhibit as a whole contains great probative evidence of his guilt and the prejudice does not outweigh its probative value. Further, McAlpin sought to keep out the entirety of the records as wholly irrelevant and did not request any redactions be made. Tr. 4186. Perhaps if he had requested redactions at the time, the prosecution would have obliged him, or the trial court would have ordered such redactions in an abundance of caution. But these records prove that the user of the Gmail account josephmcalpin87@gmail.com searches for things only the Mr. Cars murderer would have searched for. They helped identify him as the perpetrator of the murders, which is highly probative information. Because Exhibit 1433 contained probative information that was not outweighed by its prejudicial effect, it was properly admitted pursuant to Evid. R. 403. The trial court did not abuse its discretion in admitting the Google search records.

Further, even if the parts of Exhibit 1433 containing information regarding strip clubs and porn is deemed to be unfairly prejudicial, their admission still constitutes harmless error. Surely the jury did not convict McAlpin and sentence him to death because he may have looked at porn or frequented a gentlemen's club. McAlpin was convicted because he brutally murdered two people and his DNA identified him as the culprit. For these reasons, McAlpin's seventh assignment of error is without merit.

Response to Proposition of Law VIII: The trial court used its sound discretion when limiting the scope of McAlpin's cross-examination of Special Agent Brian Young and did not violate McAlpin's Sixth Amendment Right to Confrontation.

McAlpin argues that the trial court improperly limited his cross-examination of Special

Agent Brian Young of the Federal Bureau of Investigation and violated his right to confrontation. The Right to Confrontation under the Sixth Amendment of the United States Constitution is a "trial right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination." *Pennsylvania v. Ritchie*, 480 U.S. 39, 52, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987), citing *California v. Green*, 399 U.S. 149, 157 (1970); *Barber v. Page*, 390 U.S. 719, 725, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968). The right to confront is not absolute. As the United States Supreme Court has explained:

> Normally the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses. *Delaware v. Fensterer*, 474 U.S., at 20. In short, the Confrontation Clause only guarantees "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* at 20. (emphasis in original). See also *Ohio v. Roberts*, supra, at 73, n 12 (except in 'extraordinary cases, no inquiry into 'effectiveness' [of cross-examination] is required.").

Ritchie at 53.

"The scope of cross-examination 'lies within the sound discretion of the trial court, viewed in relation to the particular facts of the case. Such exercise of discretion will not be disturbed in the absence of a clear showing of an abuse of discretion.'" *State v. Slagle*, 65 Ohio St.3d 597, 605, 605 N.E.2d 916 (1992), quoting *State v. Acre*, 6 Ohio St.3d 140, 145, 451 N.E.2d 802 (1983); *see also Ritchie* at 53, n. 9 ("[W]e hardly need say that nothing in our opinion today is intended to alter a trial judge's traditional power to control the scope of cross-examination by prohibiting questions that are prejudicial, irrelevant, or otherwise improper. See *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986)."). Abuse of discretion is "more than a mere error of law or judgment, instead requiring a finding that the trial court's decision is unreasonable, arbitrary, or unconscionable." *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5847, 817 N.E.2d 59, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

McAlpin claims that his rights were violated by the trial court not permitting him to ask Special Agent Young if he knew that McAlpin lived in close proximity of the cell tower where his cell phone was "pinging" to, which was in close proximity to where Mr. Cars was located, during the relevant period of the murders of Trina and Michael Kuznik. McAlpin's questions regarding this topic were improper. McAlpin was attempting to testify and provide evidence to the jury regarding where he lived through cross-examination questioning. *See* Tr. 3478-79. He did not ask whether Special Agent Young researched where McAlpin or Andrew Keener lived as part of his investigation. Instead, McAlpin asked questions that provided information regarding his residence without having to introduce evidence supporting that information as fact. The trial court properly limited the scope of McAlpin's cross-examination of Special Agent Young.

Even if it was error for the trial court to limit McAlpin's cross-examination of Special Agent Young, it was harmless error. As McAlpin points out in his brief, he was attempting to "present[] the jury with a reasonable explanation as to why his cell phone was pinging of [*sic*] an area cell tower." Appellant's Br. at 54. But McAlpin was able to present this argument through other questions he posed to Special Agent Young. Special Agent Young admitted that there could have been many reasons why Kenner or McAlpin could have been on the west side or on East 185th Street during the relevant time period. *See* Tr. 3481. McAlpin also asked questions regarding what the cell tower data shows and does not show, which elicited testimony from Special Agent Young that the data only shows the proximate location of a cell phone, not necessarily the location of a person or the person who is using the phone. *See* Tr. 3469-70, 3473-74, 3491. Thus, even if it was error to limit the scope of McAlpin's cross-examination of Special Agent Young, it was harmless. McAlpin's eighth proposition of law should be overruled.

<u>Response to Proposition of Law IX</u>: The State did not commit prosecutorial misconduct during the guilt phase of McAlpin's trial.

A. Standard of review

The test for prosecutorial misconduct is whether the prosecutor's remarks were improper and, if so, whether they prejudicially affected the accused's substantial rights. *See State v. Smith,* 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). The touchstone of that analysis "is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips,* 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). Prosecutorial misconduct constitutes reversible error only in "'rare instances.'" *State v. Keenan*, 66 Ohio St.3d 402, 405, 613 N.E.2d 203 (1993), quoting *State v. DePew*, 38 Ohio St.3d at 288, 528 N.E.2d 542. "The closing argument is considered in its entirety to determine whether it was prejudicial." *State v. Slagle*, 65 Ohio St.3d 597, 607, 605 N.E.2d 916 (1992), citing *State v. Moritz,* 63 Ohio St.2d 150, 157, 407 N.E.2d 1268 (1992).

McAlpin did not object to any statements made during the State's closing argument in the guilt phase that he now argues were improper and prejudicial. *See generally* Tr. 4318-4357, 4394-4413. Therefore, McAlpin has waived all but plain error. "An alleged error 'does not constitute a plain error or defect under Crim.R. 52(B) unless, but for the error, the outcome of the trial clearly would have been otherwise.'" *State v. Campbell*, 69 Ohio St.3d 38, 41, 630 N.E.2d 339 (1994), quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph two of the syllabus. Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Long* at paragraph three of the syllabus.

B. Law and analysis

McAlpin claims several instances of prosecutorial misconduct during the State's closing argument in the guilt phase of his trial; none of those arguments warrant relief.

1. <u>Alleged "victim-character evidence"</u>

As discussed in response to McAlpin's sixth proposition of law, the testimony of Albert Martin was proper and offered for a permissible purpose: to show that Mr. Martin did not kill Trina and Michael Kuznik. Albert was the last known person to see the victims alive. Therefore, the State's introduction of this evidence was not improper.

Additionally, the State did not reference Albert Martin's testimony in closing argument during the guilt phase to "evoke emotion from the jury", as McAlpin argues. Instead, the State referenced Martin's testimony during closing argument to show that Martin did not kill the victims. To prove McAlpin's guilt, Martin needed to be eliminated as a suspect. Viewing the prosecutor's statements regarding Martin's testimony and the testimony of Daryl Sanders during closing argument supports this fact:

> At 5:00:38 p.m., we have a phone call from Daryl Sanders. Why do we give you information related to Daryl? Why do we give you information related to the other people that were there that day, the other car owners that bought cars that day?
>
> We do that to show you folks that they're not the ones that were responsible for the deaths of Trina and Michael.
>
> Daryl calls at 5:00. We know that Daryl speaks to them at 5:00 based on the information he provided. And, again, that helps to limit the window of when Michael and Trina were killed.
>
> 5:03 p.m., Albert. You can say what you want about Albert. Albert lost two people that he loved dearly. Albert has his own problems. Albert's not a killer. That's why Albert was in here. You got to see Albert. Brought a bone for Axel the next day and left it at the front. You can evaluate Albert.
>
> We know Albert leaves at 5:03 p.m. because we see his car leave. That's not only important, folks, for you to see that Albert leaves, but it's an important correlation to what information we had from Corrine about when she thinks she talks to her parents.

(Tr. 4333-34.) These statements were not improper.

2. <u>Alleged "emotionally charged evidence"</u>

Next, McAlpin argues that the State's closing argument was "laden with inappropriate remarks containing victim impact evidence intended to evoke an emotional response from the jurors and prejudice McAlpin." Appellant's Br. at 59. The record does not support this claim.

First, the prosecutors' statements regarding the State's decision not to call the victims' daughter, Corrine, were proper and a direct response to McAlpin's arguments that the State should have had the daughter testify to establish the last time she spoke with her parents on the phone the evening of their murders. McAlpin claims that the prosecutors should have just referenced the phone records that establish the last call the daughter made to the Mr. Cars landline. But "[b]oth parties have latitude in responding to arguments of opposing counsel and may be 'colorful or creative.'" *State v. Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, ¶ 366, quoting *State v. Brown*, 38 Ohio St.3d 305, 317, 528 N.E.2d 523 (1988). And although McAlpin now claims that prosecutors should have just referenced the phone records to rebut McAlpin's argument, during McAlpin's own closing argument he refuted the phone records as providing enough evidence to support the State's argument regarding the last time the daughter spoke to her parents versus the last time she called her parents. *See* Tr. 4390-91. Therefore, the prosecutors' comments regarding not calling the daughter to testify were proper.

Second, the prosecutor's statements about the fear the victims felt in their "final moments" was not speculation but based on testimony from Daryl Sanders. Contrary to McAlpin's argument, Sanders's testimony creates circumstantial evidence that Trina was scared in the final minutes before she was killed, including that the person who killed the victims, which other evidence shows was McAlpin, was inside the building, committing the offenses, when Sanders spoke with Trina on the phone, and that Trina seemed "nervous" and did not want someone to hear her talking on

the phone, which Sanders testified was strange. *See* Tr. 3793-94, 3803. The fact that the gunshot wounds to the victims would have killed them quickly does not mean that McAlpin shot the victims right after he entered the building or that McAlpin shot them instantly after he pulled out his gun. Sanders's testimony supports the prosecutor's closing argument that Trina was scared while the person who was about to kill her was in the building with her, which were her final moments. Furthermore, even if the prosecutor's statements regarding the victims' final moments were improper, those statements do not establish plain error.

Third, the prosecutor's statements regarding Keener fearing McAlpin and what McAlpin might do to him and his family were based on Keener's testimony, not on speculation, and were a direct response to McAlpin's argument throughout the trial that Keener was not credible because he was afraid and lied in his initial statement to the police. Throughout Keener's testimony, including cross-examination and re-direct examination, Keener testified that he lied to police when he gave his initial statement because he feared McAlpin and his family and what they might do to him and his family. *See, e.g.,* Tr. 3649 ("Q. Why was you scared of my family? A. Because if you just did those innocent people like that, you'll do somebody else like that."); Tr. 3650 ("Q. Scared of what? A. My family getting hurt."); Tr. 3651, 3653. During re-direct examination of Keener, after the prosecutor showed Keener photographs of Trina and Michael Kuznik as they were shot, the following exchange occurred:

> Q. When you talk about fear, do you fear that those things that you just saw in those two pictures are going to happen to somebody in your family?
>
> A. Yes, sir.
>
> Q. And despite that, you sit in this courtroom and you tell these ladies and gentlemen of the jury what happened that day?
>
> A. Yes sir.

Tr. 3714. Therefore, the prosecutor's statements regarding Kenner fearing McAlpin were proper, based in evidence, and responsive to McAlpin's arguments during the trial.

Fourth, the prosecutor was not resorting to "fear-mongering", as McAlpin claims, when he described what Colin Zaczkowski saw when he entered Mr. Cars and found Trina and Michael Kuznik dead due to gunshot wounds to the head. Instead, the prosecutor was explaining the condition Colin was in when he spoke to law enforcement and made the 9-1-1 call after he arrived at Mr. Cars that night due to what he witnessed. The prosecutor was explaining why Colin might have made certain statements to law enforcement and 9-1-1 after witnessing the crime scene. These statements were in direct rebuttal to McAlpin's closing argument that the timeline of events provided by the State was inaccurate. The full statement by the prosecutor regarding this issue explains the relevancy of these statements to the prosecutor's argument:

> You saw him on the video run out to the street, and make the 9-1-1 call frantic, not knowing what to do in those moments. You saw it.
>
> See, the video tells some of the story, but it doesn't describe the pain. And, yes, he did tell Detective Echols 7:30. Absolutely, he did. In what condition?
>
> In what condition was he in discovering his mother on the floor with a gunshot wound to her head. What he thought was his mother was actually Michael, his stepdad, with two bullets going from the top of his head exiting out his left ear, and then a cheek contact wound going out his right side of his brain, this way. You saw the anatomical.
>
> Ladies and gentlemen, don't be deceived or misled by this nonsense that you've heard. The evidence speaks for itself. So does the video. And we put on evidence, ladies and gentlemen, when we didn't have to.

Tr. 4405-06.

Fifth, during closing argument, the prosecutor is permitted to provide context regarding the evidence that was presented during the trial. This Court has "previously held that the prosecution is entitled to a certain degree of latitude in summation." *State v. Treesh*, 90 Ohio St.3d 460, 466,

739 N.E.2d 749 (2001). The prosecutor's comments regarding what the surveillance video of Mr. Cars on the night of the incident showed were fair arguments based on what the video depicted and therefore based on evidence admitted at trial.

3. Alleged "remarks implicating McAlpin's decision not to testify"

McAlpin claims that the State violated his Fifth Amendment right to remain silent and not to testify during closing argument. This argument has no merit when the prosecutor's statements are viewed in their entirety and with the proper context. The statement at issue was a fair comment on McAlpin's reliance on his own demonstrative evidence and on his own leading questions to allege facts under the guide of cross-examination. It was not in any way a comment on or about McAlpin's decision not to testify.

The Fifth Amendment of the United States Constitution prohibits a prosecutor from arguing for a conviction because the defendant did not testify. *See generally Griffin v. California*, 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L.Ed.2d 106 (1965). A prosecutor also may not indirectly comment on the defendant's silence through a comment either manifestly intended to reflect on the defendant's silence or of such a character that the jury would naturally and reasonably take it to be a comment on the failure of the accused to testify. *See United States v. Wells*, 623 F.3d 332, 338 (6th Cir.2010).

In closing argument, the State did not argue – either directly or indirectly – that the jury should find McAlpin guilty because he did not testify. The State's exasperation was the result of McAlpin's repeated attempts to testify during his cross-examinations and during his closing argument without taking the witness stand. "Prosecutors are granted wide latitude in closing argument[.]" *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 149.

Whether a prosecutor's statement is an indirect comment on the defendant's silence

"requires a probing analysis of the context of the comment[.]" *United States v. Robinson*, 651 F.2d 1188, 1197 (6th Cir.1981). This Court has cautioned that "isolated comments by a prosecutor are not to be taken out of context and given their most damaging meaning." *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88, ¶ 94, citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 647, 94 S. Ct. 1868, 40 L.Ed.2d 431 (1974) ("a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through a lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations").

In context, the prosecutor was explaining that McAlpin was attempting to give the jury his version of events disguised as leading questions on cross-examination. This Court "must review a closing argument in its entirety to determine whether prejudicial error exists." *Noling* at ¶ 94. It was fair for the State to point out that McAlpin was trying to testify directly to the jury through a thinly veiled, dissembling soliloquy on cross-examination. This did not violate McAlpin's Fifth Amendment rights.

Almost directly on point is *United States v. McCaskill*, 202 Fed. Appx. 70 (6th Cir.2006). In *McCaskill*, a defendant "represented himself during trial and elected not to testify on his own behalf." *Id.* at 73-74. The defendant then "repeatedly made factual assertions during his closing argument about his own actions and intentions – factual assertions that were not supported by the evidence adduced at trial." *Id.* at 74. The prosecutor objected, saying, "Maybe if Mr. McCaskill would like to be put under oath." *Id.* The Sixth Circuit found that it was "abundantly clear that the prosecutor's

isolated remark about McCaskill's being 'put under oath' was made in response to McCaskill's repeated attempts to argue facts to the jury that were not introduced into evidence at trial." *Id.* The same reasoning applies here.

Additionally, the Supreme Court of the United States has held that the Fifth Amendment allows a prosecutor to refer to a defendant's opportunity to testify in "fair response to a claim made by defendant or his counsel[.]" *United States v. Robinson*, 485 U.S. 25, 32, 108 S. Ct. 864, 99 L.Ed.2d 23 (1988). The State's claim in this case that McAlpin "might as well [have] been testifying" during his cross-examination of Laura Evans was a fair response to McAlpin's repeated, purposeful, and calculated attempts to testify through cross-examination and closing argument.

Even if the remark in question was improper, it certainly is not plain error. It did not tend to mislead the jury or prejudice McAlpin. It did not ask the jury to find McAlpin guilty based on his failure to testify. This Court instructed the jurors that McAlpin "has a Constitutional right not to testify. The fact that the defendant did not testify must not be considered for any purpose." Tr. 4257. A jury is presumed to follow its instructions. The statement could not have resulted in prejudice. And contrary to McAlpin's claim now, when he did not object when the statement was made, this statement was isolated. Claims of prosecutorial misconduct are generally "harmless when they are incidental and isolated." *State v. Lorraine*, 66 Ohio St.3d 414, 420, 613 N.E.2d 212 (1993). And the evidence against McAlpin, which included DNA, his co-defendant Keener's testimony, cell phone location data, and his own Google searches, was overwhelming.

Lastly, the prosecutor did not comment on McAlpin not testifying when he referenced McAlpin's opening statement during the State's rebuttal closing argument. Instead, the prosecutor was responding to McAlpin's closing argument that implied that there was a conspiracy to frame him for the murders of Trina and Michael Kuznik. The prosecutor highlighted McAlpin's opening statement to rebut McAlpin's closing argument (and arguments throughout trial) that there is a conspiracy to frame him for the murders of the Kuzniks. When the prosecutor's statements during

closing argument are viewed in their full context, they were proper:

> Listening to Mr. McAlpin, I would imagine that you all learned from his performance that this is a great big conspiracy that involves, myself, Brian, Detective Echols, Laura Evans from the Cuyahoga County Regional Forensic Laboratory that testified about the DNA.
>
> A big conspiracy concerning Lisa Przepyszny and our trace evidence department. A big conspiracy to frame who? Joseph McAlpin.
>
> Really, ladies and gentlemen? Is that what we swear to serve you and serving this community for? To frame him? Really?
>
> I heard from the opening statement that again he told you that he was involved in a crime. I'm going to be honest with you. I am going to put it all out there.
>
> I am going to tell you that some lady said that I came behind her and put a knife up to her throat and robbed her. But I guess because I was just a lump of coal sitting over there, that they had to find me guilty. I had to do eight and half, nine years.
>
> Well, here we go again, ladies and gentlemen. But this time, it's the brutal, the horrific, the unimaginable execution of the Kuzniks. This time, he's graduated from not a knife, but a gun to people's heads, unfortunately.
>
> This is not about Wes Craven. I don't even know what Wes Craven is. This is not about apple pie. This is the State of Ohio versus this man.

Tr. 4394-96.

Moreover, case law is clear that a party can open the door to the introduction of evidence in opening statement. "Though opening statements of counsel are not evidence, they usually state the defense's theory of the case." *State v. Warmus*, 197 Ohio App.3d 383, 2011-Ohio-5827, 967 N.E.2d 1223, ¶ 24 (8th Dist.) (citation omitted) (defense counsel's claim in opening that the defendant responded to a threat just as a police officer would have responded opened the door to the State to "offer police testimony to rebut that assertion"); *State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, 860 N.E.2d 91, 44 (defense counsel's attack on the victim's credibility in opening statements opened the door to expert testimony regarding battered-woman syndrome to

explain the victim's delay in reporting the crimes); *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶ 64 (evidence that the defendant previously pleaded guilty before withdrawing his plea was admissible where "defendant's attorneys first inserted the issue of the guilty plea into the case, in opening statement"); *State v. Hill*, 75 Ohio St.3d 195, 202, 661 N.E.2d 1068 (1996) ("[t]he prosecutor could fairly comment on facts properly in evidence" after the defendant's "opening statement during the sentencing proceeding discussed the topics he now complains about"). McAlpin's decision to discuss his criminal record in opening waived any claim of prejudice as to the State's discussion of the same.

4. Alleged "comments disparaging the defense and denigrating the defendant"

McAlpin claims that the prosecution made "numerous disparaging remarks" and "mocked McAlpin's closing argument and no less than twenty-one times during rebuttal, scornfully belittled his argument and responded by prefacing claims with 'what a coincidence.'" Appellant's Br. at 66, 67. But the comments that McAlpin claims were improper were not objected to by him at trial and were responsive to and directed at McAlpin's closing argument. As discussed above, "counsel for both parties are afforded wide latitude during closing argument" and can be "colorful or creative." *Brown*, 38 Ohio St.3d at 317, 528 N.E.2d 523.

First, the prosecutor's statement of "what a coincidence" was directed at the merits of McAlpin's argument. *Compare Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, ¶ 370, citing *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 221 ("[T]he prosecutor's characterization of the defense argument as 'really funny' was directed at the merits of the argument and not counsel.").

Second, the prosecutor's statements that McAlpin's arguments are "ridiculous" and "fraudulent" and the example regarding the American flag were not improper because they were

demonstrating that McAlpin's arguments were not well-founded. *Compare Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, ¶ 366 ("The prosecutor's comment about 'the Jedi mind trick' was a creative response to defense counsel's argument and was not aimed at denigrating him. *State v. Smith*, 87 Ohio St. 3d 424, 442-443, 2000-Ohio-450, 721 N.E.2d 93 (2000). Thus, no plain error occurred.") and *State v. Thompson*, 141 Ohio St.3d 254, 291, 2014-Ohio-4751, 23 N.E.3d 1096, ¶ 193 ("Although the term 'absurd' is extreme, there is nothing improper about arguing that the defense theory is not well-founded.").

Lastly, the other statements that McAlpin claims were disparaging were permissible responses to his arguments throughout the trial, including his closing argument, and not an attack on his character.

C. Conclusion

Reviewing the prosecutors' comments in the context of the entire record, it cannot be said that McAlpin was deprived of a fair trial. Even assuming improper comments were made, those comments do not establish plain or cumulative error. McAlpin cannot show that the outcome of his trial clearly would have been different. The evidence against McAlpin was overwhelming.

Response to Proposition of Law X: McAlpin committed multiple aggravating factors to be considered during the penalty phase of his trial which should not have merged because they did not arise from the same act or an indivisible course of conduct.

McAlpin's tenth proposition of law asks this Court to merge all three of his capital specifications into a single specification. McAlpin failed to raise the issue of merger at trial and has thus waived all but plain error. *State v. Elmore,* 111 Ohio St.3d 515, 524, 2006-Ohio-6207, ¶ 52, 857 N.E.2d 547, 560, citing *State v. Williams* , 51 Ohio St.2d 112, 5 O.O.3d 98, 364 N.E.2d 1364, paragraph one of the syllabus (1977); *State v. Comen* , 50 Ohio St.3d 206, 211, 553 N.E.2d 640 (1990). The jury considered three capital specifications during the penalty phase on both

count 1 and count 2 of the indictment. The trial court properly merged some of the other specifications of which the jury convicted McAlpin and instructed the jury that they should not consider any specifications the court did not present to them. Tr. 4654. The three specifications which were considered as aggravating circumstances were: a course of conduct specification pursuant to R.C. 2929.04(A)(5), a felony murder specification involving aggravated burglary pursuant to R.C. 2929.04(A)(7),and an additional felony murder specification involving aggravated robbery pursuant to R.C. 2929.04(A)(5). Duplicative death-penalty specifications should be merged when they "arise from the same act or indivisible course of conduct." *State v. Adams,* 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29; *State v. Jenkins,* 15 Ohio St.3d 164, 15 Ohio B. 311, 473 N.E.2d 264, paragraph five of the syllabus. "However, when the offenses illustrate a separate animus and do not show an indivisible course of conduct, merger is not required." *Adams, supra*. McAlpin first argues that the felony murder specifications should have merged with the course of conduct specifications, but appellate courts, including this Court, have repeatedly held that not to be true. Murder while committing a felony, R.C. 2929.04(A)(7), and during a course of conduct of purposeful killing, R.C. 2929.04(A)(5) are not duplicative. *State v. Ervin,* 8th Dist. Cuyahoga No. 88618, 2007-Ohio-5942, ¶ 50, citing *State v. Adams, supra*; and *State v. Smith*, 80 Ohio St. 3d 89, 116, 1997 Ohio 355, 684 N.E.2d 668. McAlpin's crimes did not arise from the same act or indivisible course of conduct, and his course of conduct specification was not duplicative of the felony murder specifications. The failure to merge them did not constitute plain error.

McAlpin also argues that the felony murder specifications for aggravated robbery and aggravated burglary should also have merged with one another. Plain error analysis again applies. *Elmore* at ¶ 127. Because McAlpin committed the aggravated burglary and aggravated robbery

specifications with a separate animus, they were not subject to merger. *Elmore* at ¶ 128. Aggravated burglary and aggravated robbery, in violation of R.C. 2911.01 and 2911.11, are separate offenses with separate animus, and accordingly, they are not allied offenses of similar import under R.C. 2941.25 which are subject to merger. *State v. Ketterer,* 2006-Ohio-5283, 111 Ohio St. 3d 70, P 69, 855 N.E.2d 48. Similarly, death-penalty specifications under R.C. 2929.04 based on those crimes are also not subject to merger where the criminal conduct did not arise from the same act. *Id.* McAlpin completed the aggravated burglary as soon as broke into Mr. Cars with the intent to rob, kidnap, and murder the victims. He did not begin actually robbing the victims until after his burglary had already occurred. McAlpin then did not complete his aggravated robberies until after the victims' deaths, as evidenced by the items he stole off Michael's person. Thus, the aggravated burglaries and aggravated robberies were separate offenses and constituted separate aggravating circumstances because they arose from different acts. *See Elmore* at ¶ 128; citing *State v. Monroe,* 105 Ohio St. 3d 384, 2005-Ohio-2282, 827 N.E.2d 285, ¶ 68; *State v. Williams*, 74 Ohio St.3d 569, 580, 1996 Ohio 91, 660 N.E.2d 724 (1996); *State v. Frazier*, 58 Ohio St.2d 253, 256, 389 N.E.2d 1118 (1979).

Because each capital specification did not arise from the same acts and were not inextricably intertwined, merger was not required. But even if merger should have occurred, the jury's consideration of duplicative aggravating circumstances would not warrant reversal of McAlpin's sentence. The inquiry for the Court in this circumstance is whether the jury's penalty-phase consideration of those duplicative aggravating circumstances affected its verdict, and to independently determine whether the merged aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt." *State v. Mitts*, 81 Ohio St.3d 223, 231-232, 690 N.E.2d 522, 529-530. Merging of aggravating circumstances may take place upon appellate review and

"resentencing is not automatically required." *State v. Jenkins*, 15 Ohio St. 3d 164, 15 Ohio B. Rep. 311, 473 N.E.2d 264, at paragraph five of the syllabus; *State v. Garner,* 74 Ohio St. 3d at 53, 656 N.E.2d at 630; *State v. Spisak,* 36 Ohio St.3d 80, 84, 521 N.E.2d 800 (1988). In McAlpin's case, the outcome of the penalty phase did not hinge on the failure to merge any of the three specifications. Merger would not have changed the nature of the evidence the jury was required to consider. And considering the underwhelming amount of mitigation evidence McAlpin presented, merger of any of the specifications would not have affected the outcome. The jury would have still found the aggravated circumstance(s) outweighed the mitigation factors and thus would have invoked the death penalty either way. Because plain error does not exist, McAlpin's tenth proposition of law should therefore be deemed meritless and overruled.

Response to Proposition of Law XI: The exhibits admitted during the penalty phase of McAlpin's trial were relevant to the aggravating circumstances the jury found McAlpin guilty of committing. The jury was instructed only to consider the evidence admitted in the guilt (or trial) phase that is relevant to the aggravating circumstances and to any of the mitigating factors.

A. Standard of review

"The trial court has broad discretion in the admission of evidence, and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, an appellate court should not disturb the decision of the trial court." *State v. Issa*, 93 Ohio St.3d 49, 64, 2001-Ohio-1290, 752 N.E.2d 904, citing *State v. Maurer*, 15 Ohio St.3d 239, 265, 473 N.E.2d 768 (1984).

McAlpin did not object to the exhibits from the guilt phase being admitted during the penalty phase. *See* Tr. 4550. The trial court explicitly asked McAlpin whether he had any objection to the admission of the State's exhibits from the guilt phase, and McAlpin replied "No." *Id.* Therefore, McAlpin has waived all but plain error, meaning McAlpin must show "but for the error, the outcome of the trial clearly would have been otherwise.'" *State v. Campbell*, 69 Ohio St.3d 38, 41, 630 N.E.2d 339 (1994), quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph

two of syllabus; *see also State v. Hundley*, Slip Opinion, No. 2020-Ohio-3775, ¶ 116, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240 (2002), finding that an error affects substantial rights only if it affected the outcome of the trial.

Regarding the admission of evidence during the penalty phase, this Court has found:

> R.C. 2929.03(D)(1) provides that at the penalty stage of a capital proceeding, the jury shall consider, among other things, 'any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing * * * [and] hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing.' *See State v. Maxwell*, 139 Ohio St. 3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 240; *State v. DePew*, 38 Ohio St.3d 275, 282-283, 528 N.E.2d 542 (1988).

State v. Ford, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, ¶ 353. Because the jury considers the nature and circumstances of the aggravated circumstances McAlpin was found guilty of committing, R.C. 2929.03(D)(1) "appears to permit repetition of much or all that occurred during the guilty stage". *State v. Depew*, 38 Ohio St.3d 275, 282-83, 528 N.E.2d 542 (1988). "[A] literal reading of the statute given to us by the General Assembly mandates such a result." *Id.*

Inclusion of all the exhibits admitted during the guilt phase is not *per se* error. *See State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 132-133.

B. Law and analysis

McAlpin argues that numerous exhibits admitted during the guilt phase should not have been admitted during the penalty phase of the trial. The admission of these exhibits during the penalty phase was not error, plain or otherwise.

First, McAlpin argues that the crime scene photographs, including photographs that depict the victims and their dog and blood spatter, autopsy photographs, and photographs of Trina in a body bag and of Trina's clothing were prejudicial and should not have been admitted during the penalty phase of the trial. But the crime scene photographs were relevant to the aggravated-robbery

and aggravated-burglary specifications and the course-of-conduct specification. Additionally, the autopsy photographs and the photographs of Trina in a body bag and of Trina's clothing were relevant to the course-of-conduct aggravating circumstance. Any prejudice from this evidence was outweighed by their relevancy. *Compare State v. Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, ¶ 355.

Although the photograph of Axel, the Kuznik's dog, does not have relevance to the aggravating circumstances that McAlpin was found guilty of committing, it was an isolated photograph. The jury also was instructed only to consider the evidence "admitted in the trial phase that is relevant to the aggravating circumstances and to any of the mitigating factors". Tr. 4659. Therefore, the photograph could not have any effect on the jury's decision.

Second, McAlpin argues that the autopsy report, trace evidence report, and other laboratory reports are not relevant to the capital specifications and are prejudicial. These reports are relevant to the course-of-conduct aggravating circumstance, and any prejudice was outweighed by their relevancy. *Compare Ford* at ¶ 355.

Third, McAlpin argues that the detectives' body camera footage showing them receive the dispatch call and walk through the crime scene and the 9-1-1 call from Colin Zaczkowski are also not relevant to any specification and are prejudicial. This evidence was relevant to the aggravated-burglary and aggravated-robbery aggravating circumstances and the course-of-conduct specification because they provide details regarding how the aggravated murder was committed during the course of the aggravated burglary and aggravated robbery. *Compare State v. Johnson*, 144 Ohio St.3d 518, 2015-Ohio-4903, 45 N.E.3d 208, ¶ 64 ("Norman's statements on the 9-1-1 call convey the circumstances in which Johnson left his victim.").

Fourth, McAlpin argues that the admission of the printout of his Google searches were not

relevant to any of the aggravating circumstances that he was found guilty of committing. But as discussed in response to McAlpin's seventh proposition of law, most of this search history was circumstantial evidence of his guilt, including evidence of him committing the aggravated robbery and aggravated burglary. The searches relevant to the aggravated-robbery and aggravated-burglary aggravating circumstances, include, but are not limited to:

- How to break into windows easily
- Can you switch a title into your name without the other party's permission?
- BMV salvaged for sale, and other BMW related searches
- Searches related to guns

Even assuming the Google search history containing information regarding strip clubs and pornographic websites is considered prejudicial, McAlpin did not object to its admission, even when he was asked directly by the trial court whether he objected. McAlpin has waived all but plain error regarding the admission of this evidence. Based on the very little mitigation McAlpin had and the overwhelming evidence supporting the aggravating circumstances that he was found guilty of committing, the jury still would have found the aggravating circumstances outweighed the mitigating factors without this evidence being admitted during the penalty phase.

Lastly, contrary to McAlpin's claim, the trial court gave a limiting instruction to the jury regarding what evidence it was permitted to consider during the penalty phase: "For purposes of this proceeding, only that evidence admitted into the trial phase – admitted in the trial phase that is relevant to the aggravating circumstances and to any of the mitigating factors is to be considered by you." Tr. 4659. And the jury is assumed to follow its instructions. *See State v. Garner*, 74 Ohio St.3d 49, 59, 656 N.E.2d 623 (1995).

C. Conclusion

The trial court's admission of the State's exhibits from the guilt phase in the penalty phase was not plain error. The trial court provided a limiting instruction to the jury regarding what it was

permitted to consider during the penalty phase, which included only evidence admitted in the trial phase that was relevant to the aggravating circumstances and to any mitigating factors. Even assuming the admission of some of the State's exhibits was improper, the admission of those exhibits was not plain error. There was minimal mitigation for McAlpin, and the aggravating factors greatly outweighed any mitigation.

Response to Proposition of Law XII: McAlpin received a fair trial, including during the penalty phase of the trial. The trial court's statements to the jury regarding the reason for a recess in the trial were not improper. McAlpin did not object to the remarks at trial, and therefore, has waived this argument.

"The judge of the trial court shall control all proceedings during a criminal trial, and shall limit the introduction of evidence and the argument of counsel to relevant and material matters with a view to expeditious and effective ascertainment of the truth regarding the matters in issue." R.C. 2945.03. "In the exercise of this duty, the judge must be cognizant of the effect of his comments upon the jury ***." *State v. Wade*, 53 Ohio St.2d 182, 187, 373 N.E.2d 1244 (1978), *vacated, in part, and remanded on other grounds by* 438 U.S. 911, 98 S.Ct. 3135, 57 L. Ed.2d 1154 (1978), citing *State v. Thomas*, 36 Ohio St.2d 68, 303 N.E.2d 882 (1973) ("It must be noted that no absolute prohibition exists to preclude comment by a court during trial. It must also, however, be borne in mind that '*** the influence of the trial judge on the jury is necessarily and properly of great weight***,' *Starr v. United States* (1894), 153 U.S. 614, 626.").

This Court has established the following standard for determining whether a trial court's statements to the jury were prejudicial and thus affected the fairness of the trial:

> (1) The burden of proof is placed upon the defendant to demonstrate prejudice, (2) it is presumed that the trial judge is in the best position to decide when a breach is committed and what corrective measures are called for, (3) the remarks are to be considered in light of the circumstances under which they are made, (4) consideration is to be given to their possible effect upon the jury, and (5) to their possible impairment of the effectiveness of counsel. See, generally, Annotation, 62 A. L. R. 2d 166 (1958).

Wade at 188.

If the defendant does not object during trial to the statements made by the trial court to the jury as being prejudicial, the defendant waives the error on appeal. *See id.* “The failure to object has been held to constitute a waiver of the error and to preclude its consideration upon appeal, for, absent an objection, the trial judge is denied an opportunity to give corrective instructions as to the error. *Id.*, citing *State v. Williams*, 39 Ohio St.2d 20 (1974); *State v. Childs*, 14 Ohio St.2d 56 (1968); *State v. Flescher*, 12 Ohio St.2d 107 (1967); *United States v. Gaines*, 450 F.2d 186 (C.A. 3 1971), *certiorari denied*, 405 U.S. 927; *United States v. Bessesen*, 433 F.2d 861 (C.A. 8, 1970), 433 F.2d 861, *certiorari denied*, 401 U.S. 1009.

McAlpin claims that the trial court’s comments to the jury during the sentencing phase regarding the trial being in recess for a few days because McAlpin wanted to have prepared a mitigation report and have Dr. Rodio testify violated the court’s duty to appear neutral during the trial. *See* Appellant’s Br. at 83. But the trial court’s remarks to the jury regarding the need to recess were not improper, and with standby counsel present, McAlpin did not object to the remarks. (*See* Tr. 4587-92.) McAlpin’s argument on appeal that the trial court’s remarks implied that he was being unreasonable is unsupported. If after the remarks were made McAlpin informed the trial court that he took issue with the remarks because he found them to be prejudicial to his defense, the trial court could have clarified its statements to the jury or provided a corrective instruction. Thus, McAlpin has waived this argument on appeal. *Accord Wade* at 188.

Furthermore, McAlpin’s claim that the trial court’s remarks prejudiced him due to the jury being aware that there was a mitigation report and other evidence not presented to them when McAlpin later decided not to present that evidence after asking for a recess to obtain that evidence is invited error. “The doctrine of invited error holds that a litigant may not ‘take advantage of an

error which he himself invited or induced.'" *State v. Campbell*, 90 Ohio St.3d 320, 324, 738 N.E.2d 1178 (2000), quoting *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.*, 28 Ohio St.3d 20, 28 Ohio B. 83, 502 N.E.2d 590 (1986), paragraph one of the syllabus. "A litigant cannot be permitted, either intentionally or unintentionally to induce or mislead a court into the commission of an error and then procure a reversal of the judgment for an error for which he was actively responsible." *Lester v. Leuck*, 142 Ohio St. 91, 93, 50 N.E.2d 145 (1943). The trial court held a recess in the trial and advised the jury of the recess because McAlpin made a delayed request for a mitigation report and wanted to call Dr. Rodio to testify regarding the report. The fact that McAlpin later changed his mind after the recess and did not present this evidence does not make the trial court's statements prejudicial. McAlpin misled the trial court into any error and cannot benefit from that on appeal.

Lastly, McAlpin contributed to any alleged error in the trial court answering the jury's question that asked for "the report the defense requested", because he advised the trial court what he would like the answer to be, and the trial court answered how McAlpin wanted:

> MR. McALPIN: Just put you have what's been submitted into evidence.
>
> THE COURT: Okay. You have all the reports that have been admitted into evidence, period. Doesn't say anything. Okay. Today is the 16th.

Tr. 4669-70.

McAlpin had multiple opportunities during the sentencing phase to inform the trial court that he objected to how the trial court was advising the jury of the procedural aspects of how the sentencing phase was evolving and did not do so. Any error McAlpin now raises regarding those remarks is waived or was invited error.

Lastly, the trial court instructed the jury during the penalty phase that "[i]f during the course of the trial, the Court said or did anything you consider an indication of the Court's view on the facts, you are instructed to disregard it." Tr. 4661-62. The jury is presumed to follow its

instructions. *See State v. Garner*, 74 Ohio St.3d 49, 59, 656 N.E.2d 623 (1995). Therefore, even assuming those statements to the jury were improper, which the State does not believe they were, the instructions to the jury cured any possible prejudice. This proposition should be overruled.

Response to Proposition of Law XIII: The State did not commit prosecutorial misconduct during the penalty phase of McAlpin's trial. McAlpin's due process rights were not violated.

A. Standard of review

As stated in response to McAlpin's ninth proposition of law, the test for prosecutorial misconduct is whether the prosecutor's remarks were improper and, if so, whether they prejudicially affected the accused's substantial rights. *State v. Smith,* 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). The touchstone of that analysis "is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips,* 455 U.S. 209, 219, 102 S. Ct. 940, 71 L.Ed.2d 78 (1982). Prosecutorial misconduct constitutes reversible error only in "'rare instances.'" *State v. Keenan*, 66 Ohio St.3d 402, 405, 613 N.E.2d 203 (1993), quoting *State v. DePew*, 38 Ohio St.3d at 288, 528 N.E.2d 542.

B. Law and analysis

McAlpin claims several instances of prosecutorial misconduct during the penalty phase of his trial. None of those argument have merit when the record is reviewed.

1. The prosecutor never argued that the nature and circumstances of the offenses should be weighed as aggravation.

McAlpin argues that the prosecutor improperly discussed the nature and circumstances of the offenses during closing argument in the penalty phase. But the jury must consider the nature and circumstances of the offense to determine whether they are mitigating.

> "R.C. 2929.04(B) *requires* the jury, trial court, or three-judge panel to '*consider*, and weigh against the aggravating circumstances proved beyond a reasonable doubt, *the nature and circumstances of the offense* * * *.' (Emphasis added.) In a particular case, the nature and circumstances of the offense may have a mitigating

impact, or they may not. Either way, they must be considered."

State v. Stumpf, 32 Ohio St.3d 95, 99, 512 N.E.2d 598 (1987) (citation omitted).

"[B]ecause the trial court must consider the nature and circumstances of the offense, R.C. 2929.03(D)(1) 'permits repetition of much or all that occurred during the guilt stage.'" *State v. Fears*, 86 Ohio St.3d 329, 435-346, 715 N.E.2d 136 (1999), quoting *State v. DePew*, 38 Ohio St. 3d at 289, 528 N.E.2d 542. "Comments about the heinous nature of the crime can be considered fair comment." *State v. Grant*, 67 Ohio St.3d at 482, 620 N.E.2d 50. The State never argued that the nature and circumstances of the crimes should be weighed as aggravation. Rather, the State discussed the nature and circumstances of the aggravated burglary and aggravated robbery to cast doubt on McAlpin's mitigating evidence and to argue that such evidence should be given no weight. This was a proper usage of the nature and circumstances of the crimes.

Furthermore, the prosecutor's reference to the killings of the Kuzniks as "execution style" and "in cold blood" were based on the evidence presented and not improper. This Court has described similar shootings as "execution style." *See, e.g., State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 139, describing four gunshots as an "execution-style" murder where at least three of those shots were from "close range, to the head"; *State v. Palmer*, 80 Ohio St.3d 543, 570, 1997 Ohio 312, 687 N.E.2d 685, describing the murder of the victim as in an "execution-style manner" when shots were fired on either side of the victim's head into his temple. This Court also has referred to murders in capital cases as "cold-blooded". *See, e.g., State v. Fears*, 86 Ohio St.3d 329, 348, 1999-Ohio-111, 715 N.E.2d 136 (1999) ("This was a cold-blooded killing that has no mitigating features."); *State v. Goodwin*, 84 Ohio St.3d 331, 344, 1999-Ohio-356, 703 N.E.2d 1251 (1999) ("Appellant did not flee the store after this cold-blooded killing; rather, he placed the gun to the head of the other clerk and continued robbing the store.").

McAlpin also argues it was improper for the prosecutor to "pontificate[] about the

circumstances that satisfied the 'theft offense' element of the aggravated robbery aggravator, and the 'course of conduct' specification of killing two or more people[.]' Appellant's Br. at 88. But "[p]rosecutors can urge the merits of their cause and legitimately argue that defense mitigation evidence is worthy of little or no weight." *State v. Wilson*, 74 Ohio St.3d at 399, 659 N.E.2d 292. Moreover, "counsel for both parties are afforded wide latitude during closing argument." *State v. Brown*, 38 Ohio St.3d 305, 317, 528 N.E.2d 523 (1988). The prosecutor discussed McAlpin being motivated to kill two innocent people for two used cars and cash to show how little weight McAlpin's mitigation should be given and the nature and circumstances of the aggravated robbery and course-of-conduct aggravating circumstances.

Lastly, the prosecutor argued the nature and circumstances of the course-of-conduct specification by describing the way Trina was shot and how Trina was found postmortem. *See* Tr. 4624-26. Those comments were based in evidence and not improper. "Counsel is entitled to latitude in closing arguments as to what the evidence has shown." *State v. Twyford*, 94 Ohio St.3d 340, 356, 2002-Ohio-894, 763 N.E.2d 122, citing *State v. Smith*, 80 Ohio St.3d 89, 111, 684 N.E.2d 668 (1997); *State v. Loza*, 71 Ohio St.3d 61, 78, 641 N.E.2d 1082 (1994). And "isolated comments by a prosecutor are not to be taken out of context and given their most damaging meaning. *State v. Twyford*, 94 Ohio St.3d 340, 356, 2002-Ohio-894, 763 N.E.2d 122, citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 647, 94 S.Ct. 1868, 1873, 40 L.Ed.2d 431, 439 (1974); *State v. Hill*, 75 Ohio St.3d 195, 204, 661 N.E.2d 1068, 1078 (1996). The prosecutor's statements were proper when his statements are reviewed in full. *See* Tr. 4624-26.

2. The prosecutor's statements regarding McAlpin's unsworn statement were proper.

McAlpin argues that the prosecutor improperly undermined his unsworn statement by emphasizing that it was not subjected to cross-examination and by opining that his statement

should not be given any weight. *See* Appellant's Br. at 90. But the prosecutor's statements were not prejudicial based on this Court's precedent. In *State v. Scott*, 26 Ohio St.3d 92, 107-08, 497 N.E.2d 55 (1986), this Court found no prejudice where a prosecutor during closing argument referred to the unsown nature of the defendant's statement and the fact that the statement was not subject to cross-examination. *Id.*; *see also State v. Jenkins*, 15 Ohio St.3d 164, 217, 15 Ohio B. Rep. 311, 473 N.E.2d 264 (1984) ("The prosecutor said nothing more than what the jury already knew to be true, namely, that all other defense witnesses testified under oath and that appellant did not.").

The prosecutor was permitted to point out McAlpin's lack of remorse. R.C. 2929.04(B) requires a capital jury to consider the "history, character, and background" of the defendant, regardless of whether the defense raises those issues as mitigating factors. A defendant's "lack of remorse reflects upon his character." *State v. Lundgren*, 73 Ohio St.3d 474, 493, 653 N.E.2d 304 (1995). The prosecutor, therefore, was entitled to comment on McAlpin's lack of remorse to argue that the jury should give no weight to McAlpin's character in mitigation.

Lastly, the prosecutor's reference to McAlpin "stand[ing] on his innocence" was to explain that McAlpin was arguing residual doubt, which the jury is not permitted to consider as mitigation. *See* Tr. 4632-33. Those comments were a proper recitation of the law.

3. <u>The prosecutor did not disparage McAlpin during closing argument. The prosecutor's comments were a direct response to McAlpin's closing argument.</u>

McAlpin argues that the prosecutor "made his outright disdain for McAlpin evident to the jurors" during rebuttal closing argument by the State. Appellant's Br. at 91. But the prosecutor's comments on rebuttal attacked the validity of McAlpin's closing argument to the jury. *See* Tr. 4643-47. Essentially, McAlpin was arguing for mercy and sympathy, which cannot be considered by a jury as mitigating factors, and the prosecutor was responding to those arguments in a creative

way, which is proper. *See State v. Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, ¶ 366, quoting *State v. Brown*, 38 Ohio St.3d 305, 317, 528 N.E.2d 523 (1988) ("Both parties have latitude in responding to arguments of opposing counsel and may be 'colorful or creative.'").

Additionally, the trial court sustained McAlpin's objection when the prosecutor referred to McAlpin giving "half ass respect to the family. 'I know what you're going through.' You have no idea what they went through. You have no idea -- ** what they're going through now. You have no idea." Tr. 4647. The trial court instructed the prosecutor to "move forward" after it sustained the objection. *Id.* A sustained objection cannot be the basis for error.

C. Conclusion

Reviewing the prosecutors' comments in the context of the entire record, it cannot be said that McAlpin was deprived of a fair trial.

Response to Proposition of Law XIV: This Court's well-established precedent should be upheld; residual doubt is not a mitigating factor under R.C. 2929.04(B).

McAlpin argues that this Court should overrule its long-standing precedent prohibiting a jury from considering residual doubt as a mitigating factor. The United States Supreme Court has held that there is no constitutional right to consideration of "residual doubt" as a mitigating factor. *See Franklin v. Lynaugh*, 487 U.S. 164, 174, 108 S.Ct. 2320, 101 L.E.2d 155 (1988). "Such lingering doubts are not over any aspect of petitioner's 'character,' 'record,' or a 'circumstance of the offense.'" *Id.* at 174, quoting *Eddings v. Oklahoma*, 455 U.S. at 110, 102 S. Ct. 869, 71 L.Ed.2d 1. This Court subsequently adopted the Supreme Court's holding in *Franklin* in *State v. McGuire*, 80 Ohio St.3d 390, 403-404, 686 N.E.2d 1112 (1997): "Residual doubt is not an acceptable mitigating factor under R.C. 2929.04(B), since it is irrelevant to the issue of whether a defendant should be sentenced to death." Since *McGuire*, this Court consistently has rejected any argument that residual doubt should be a mitigating factor, and McAlpin has not offered any persuasive

reasons to uproot this Court's precedent. *See, e.g., State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶ 160; *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865 ¶ 192, citing *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151, ¶ 260 and *McGuire*; *State v. Wilks*, 154 Ohio St.3d 359, 2018-Ohio-1562, 114 N.E.3d 1092, ¶ 225, 245.

Contrary to McAlpin's claim, the United States Supreme Court did not overrule *McGuire* in *Oregon v. Guzek*, 546 U.S. 517, 126 S.Ct. 1226, 163 L.Ed.2d 1112 (2006). McAlpin misinterprets the holding of *Guzek*. In *Guzek*, the United States Supreme Court held that states can prohibit a capital defendant from introducing evidence related to his innocence for the first time in the sentencing phase of his trial. *See id.* at paragraph two of syllabus. The Court held that "[t]his Court's cases have not interpreted the Eighth Amendment as providing such a defendant the right to introduce at sentencing evidence designed to cast 'residual doubt' on his guilt of the basic crime of conviction." *Id.*, citing *Franklin v. Lynaugh*, 487 U.S. 164, 173, n.6, 108 S.Ct. 2320, 101 L.Ed.2d 155 (plurality opinion). One year after *Guzek*, the Court emphasized that "we have never held that capital defendants have an Eighth Amendment right to present 'residual doubt' evidence at sentencing." *Abul-Kabir v. Quarterman*, 550 U.S. 233, 250-51, 127 S.Ct. 1654, 167 L.Ed.2d 585 (2007), citing *Guzek* at 523-27. Therefore, McAlpin's argument that the jury should be permitted to consider residual doubt is without merit and should be overruled.

Response to Proposition of Law XV: There were no errors, cumulative or otherwise, in the penalty phase jury instructions. The jury instructions followed the proposed jury instructions provided in 2 Ohio Jury Instructions Section 503.011. McAlpin received a fair trial.

In his fifteenth proposition of law, McAlpin argues cumulative error with the jury instructions for the penalty phase of the trial. A conviction will be reversed for cumulative error only "when the cumulative effect of errors in a trial deprives a defendant of a fair trial even though each of the numerous instances of trial-court error does not individually constitute cause for reversal." *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 223.

"However, to even consider whether 'cumulative' error is present, we would first have to find that multiple errors were committed in this case." *State v. Madrigal*, 87 Ohio St.3d 378, 398, 721 N.E.2d 52 (2000).

Because McAlpin did not object to the jury instructions during the penalty phase, he has waived all but plain error. "An alleged error 'does not constitute a plain error or defect under Crim.R. 52(B) unless, but for the error, the outcome of the trial clearly would have been otherwise.'" *State v. Campbell*, 69 Ohio St.3d 38, 41, 630 N.E.2d 339 (1994), quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph two of syllabus. Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Long* at paragraph three of syllabus.

A. This Court's well-established precedent dictates that the jury should not be instructed that it can consider mercy or sympathy for the defendant

First, the United States Supreme Court has prohibited considerations of "sympathy", finding that such a prohibition "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." *California v. Brown*, 479 U.S. 538, 543, 107 S. Ct. 837, 93 L.Ed.2d 934 (1987). This rule also "fosters the Eighth Amendment's 'need for reliability * * *'" and "ensures the availability of meaningful judicial review [.]" *Id.*

This Court also has prohibited consideration of sympathy during the penalty phase:

> The 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 a 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, 15 Ohio B. 311, 473 N.E.2d 264 (1984), paragraph three of

the syllabus.

Second, this Court consistently has held that a jury cannot consider mercy, and therefore, jury instructions should not include such an instruction. *See State v. Hundley*, Slip Opinion, No. 2020-Ohio-3775, ¶ 121; *State v. Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, ¶ 362; *State v. Sowell*, 148 Ohio St.3d 554, 2016-Ohio-8025, 71 N.E.3d 1034, ¶ 131; *State v. Lorraine*, 66 Ohio St.3d 414, 417-18, 613 N.E.2d 212 (1993). And contrary to McAlpin's claims, *Kansas v. Marsh*, 548 U.S. 163, 126 S. Ct. 2516, 165 L.Ed.2d 429 (2006) does not require an instruction on mercy. *See Ford* at ¶ 362.

B. This Court's precedent dictates that a jury cannot be instructed that it can consider residual doubt as a mitigating factor

As discussed in response to McAlpin's fifteenth proposition, a jury in a capital trial cannot consider residual doubt as a mitigating factor. *See State v. McGuire*, 80 Ohio St.3d 390, 403-404, 686 N.E.2d 1112 (1997). If a jury is prohibited from considering residual doubt, it cannot be instructed on residual doubt. McAlpin has not provided any compelling argument to overturn this Court's precedent regarding residual doubt.

C. The trial court properly instructed the jury in the penalty phase that one juror could prevent a sentence of death if he or she found the aggravated circumstances do not outweigh the mitigating factors

McAlpin claims that "the trial court did not explain to the jury how to proceed if an [*sic*] one of the jurors determined that the aggravating factors were in equipoise with the mitigation." Appellant's Br. at 109. But the trial court did that:

> If the weight of the aggravating circumstances and the mitigating factors are equal, then you must proceed to consider the life sentence alternatives.
>
> Unanimity. You are not required to unanimously find the State failed to prove that the aggravated circumstances outweigh the mitigating factors before considering one of the life sentences.

> You should proceed to consider and choose one of the life sentence alternatives if any one or more of you conclude the State has failed to prove beyond a reasonable doubt the aggravating circumstances outweigh the mitigating factors.
>
> One juror may prevent a death penalty determination by finding the aggravating circumstances do not outweigh the mitigating factors.

(Tr. 4657-58.) This instruction was in accordance with the proposed jury instructions contained within the Ohio Jury Instructions. *Compare* Tr. 4657-58 *with* 2 Ohio Jury Instructions Section 503.011.

D. Conclusion

As shown above, there were no errors, plain or otherwise, in the jury instructions for the penalty phase.

Response to Proposition of Law XVI: Cumulative error is not present in this case. McAlpin received a fair trial.

In his sixteenth proposition of law, McAlpin argues cumulative error and argues for a "more lenient' standard of review for *pro se* capital defendant appeals. A conviction will be reversed for cumulative error only "when the cumulative effect of errors in a trial deprives a defendant of a fair trial even though each of the numerous instances of trial-court error does not individually constitute cause for reversal." *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 223. "However, to even consider whether 'cumulative' error is present, we would first have to find that multiple errors were committed in this case." *State v. Madrigal*, 87 Ohio St.3d 378, 398, 721 N.E.2d 52 (2000).

As shown above, there were no errors committed in this case. And even if there were, errors "cannot become prejudicial by sheer weight of numbers." *State v. Hill*, 75 Ohio St.3d 195, 212, 661 N.E.2d 1068 (1996). Considering the overwhelming evidence of McAlpin's guilt, the cumulative effect of any errors did not deprive him of a fair trial.

In addition to arguing cumulative error, McAlpin implores this Court to create a different standard of review for capital appeals brought by defendants who proceeded *pro se* during trial to prevent a miscarriage of justice. *See* Appellant's Br. at 121-24. But the standard of review is established by the Ohio Rules of Criminal Procedure. *See* Crim.R. 52.

This Court has explained succinctly the reasoning behind the plain error standard of review:

> As a general rule an appellate court will not consider an alleged error that the complaining party did not bring to the trial court's attention at the time the alleged error is said to have occurred. This rule is a product of our adversarial system of justice. "Its purpose is practical: to prevent the defensive trial tactic of remaining silent on a fatal error during trial with the expectation of demanding a reversal on appeal if the verdict is guilty." *State v. Craft* (1977), 52 Ohio App.2d 1, 4-5, 6 O.O.3d 1, 3, 367 N.E.2d 1221, 1224. The rule is also consistent with the structure of our court system. An appellate court is not to be the first court to decide an issue; it is to review decisions made by the trial court after the lower court has had an opportunity to hear the arguments of the parties. "The traditional appeal calls for an examination of the rulings below to assure that they are correct, or at least within the range of error the law for sufficient reasons allows the primary decision-maker." Carrington, Meador & Rosenberg, Justice on Appeal (1976) 2.
>
> But this general rule cannot be applied mechanically, especially to criminal appeals. Crim.R. 52(B) softens the general rule forbidding our consideration of unobjected-to errors. The rule provides that: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." This rule allows the appellate court, at the request of appellate counsel or *sua sponte*, to consider a trial error that was not objected to when that error was a "plain error."
>
> The courts, however, have struggled to define "plain error" with precision. "Indeed," Professor Charles Alan Wright criticized, "the cases give the distinct impression that 'plain error' is a concept appellate courts find impossible to define, save that they know it when they see it." 3A Wright, Federal Practice and Procedure, Criminal 2d (1982) 337, Section 856.
>
> The rule allowing appellate courts to consider "plain error" protects different interests and requires distinct inquiries. One question a reviewing court must ask is whether the alleged error substantially affected the outcome of the trial. The appellate court must examine the error asserted by the defendant-appellant in light of all of the evidence properly admitted at trial and determine whether the jury would have convicted the defendant even if the error had not occurred. *This inquiry assures that justice is done in individual cases.*

(Emphasis added) *State v. Slagle*, 65 Ohio St.3d 597, 604-605, 605 N.E.2d 916 (1992).

If this Court were to change the standard of review on appeal for *pro se* capital defendants, defendants would be incentivized to represent themselves and ignore the advice of stand-by counsel regarding when to object, with the expectation of reversal on appeal if they are found guilty.

Plain error already is reserved for "exceptional circumstances" and "to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of syllabus. A standard of review only for capital defendants who decide to proceed *pro se* after being advised of the consequences of such action, including what rights they are waiving, is not necessary and would undermine the Court's reasoning for plain error review under Crim.R. 52(B). McAlpin's sixteenth proposition of law is without merit and should be overruled.

Response to Proposition of Law XVII: The death penalty is and remains constitutional under repeated decisions by both the United States Supreme Court and this Court.

A. Ohio does not impose the death penalty in an arbitrary or unequal manner

McAlpin argues that prosecutors have virtually uncontrolled discretion, allowing arbitrary and discriminatory imposition of the death penalty. This conclusory argument has been rejected previously by this Court. *State v. Jenkins*, 15 Ohio St.3d 164, 473 N.E.2d 264 (1984).

In *Jenkins*, this Court held, "'[a]bsent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts.'" *Id.* at 169, quoting *Gregg v. Georgia*, 428 U.S. 153, 225, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). To conclude otherwise would represent "an indictment of our entire criminal justice system which must be constitutionally rejected." *Jenkins* at 170, quoting *Gregg* at 226.

McAlpin only offers statistics compiled by the Death Penalty Information Center to support his argument. This Court has recognized, however, that "mere statistics do not establish that the

administration of capital punishment" is unconstitutional. *State v. Steffen*, 31 Ohio St.3d 111, 124, 509 N.E.2d 383 (1987).

McAlpin's claims that the death penalty is not the "least restrictive" punishment or "an effective means of deterrence" also fail. "[W]e have previously rejected claims that the death penalty is unconstitutional because it is neither the least restrictive punishment nor an effective deterrent." *State v. Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, 805 N.E.2d 1064, ¶ 103, citing *State v. Jenkins*, 15 Ohio St.3d at 168, 473 N.E.2d 264.

B. Ohio's capital sentencing statute is reliable

McAlpin claims that Ohio law is unconstitutional because it does not require the State to prove either the absence of any mitigating factors or that death is the only appropriate penalty. But the Constitution does not require the State to prove these things. The United States Supreme Court has held that states may constitutionally place the burden of proving mitigating factors on the defendant. *See Kansas v. Marsh*, 548 U.S. 163, 173-74, 126 S. Ct. 2516, 165 L.Ed.2d 429 (2006). The only constitutional requirement is that the State must prove the existence of the aggravating circumstances by proof beyond a reasonable doubt:

> So long as a state's methods of allocating the burdens of proof does not lessen the state's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for lenience.

Walton v. Arizona, 497 U.S. 639, 650, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). Ohio law contains that requirement. *See* R.C. 2929.03(B).

McAlpin argues that Ohio's procedure is "arbitrary" because it requires "only that the sentencing body be convinced beyond a reasonable doubt that the aggravating circumstances were marginally greater than the mitigating factors." Appellant's Br. at 127. McAlpin essentially asks this Court to require a standard of proof greater than beyond a reasonable doubt. But the

Constitution only requires the prosecution to prove the *existence* of one or more aggravating circumstances beyond a reasonable doubt. The Constitution does not require a state to place any other burdens on either party at a capital sentencing proceeding. "[W]e have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required." *Franklin v. Lynaugh*, 487 U.S. 164, 179, 108 S.Ct. 2320, 101 L.E.2d 155 (1988). Rather, the "State enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed." *Marsh* at 174.

McAlpin argues that Ohio's "mitigating circumstances are vague" and that juries having too much discretion in weighing aggravating circumstances against mitigating factors "inevitably leads to arbitrary and capricious judgments." Appellant's Br. at 128. But the Constitution does not require any particular definition of "mitigation," nor does it require any specific weighing process. Once a capital case proceeds to the sentencing phase, "the State is not confined to submitting specific propositional questions to the jury and may indeed allow the jury unbridled discretion." *Buchanan v. Angelone*, 522 U.S. 269, 276, 118 S.Ct. 757, 139 L.E.2d 702 (1998), citing *Tuilaepa v. California*, 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994).

C. Ohio's capital sentencing statute does not create an impermissible risk of death on defendants who choose to exercise their right to a jury trial

Under Crim.R. 11(C)(3), if a capital defendant waives a jury trial and enters a guilty plea, a trial court may dismiss capital specifications "in the interests of justice." But there is no analogous rule that allows the court to do so in cases in which the defendant exercises his or her right to a jury trial. McAlpin claims that this distinction creates an "impermissible risk of death on capital defendants who choose to exercise their right to a jury trial." Appellant's Br. at 129. This Court has "rejected similar attacks on Crim.R. 11(C)(3)." *State v. McKnight*, 107 Ohio St.3d 101,

2005-Ohio-6046, 837 N.E.2d 315, ¶ 51, citing *State v. Dickerson*, 456 Ohio St.3d 206, 214, 543 N.E.2d 1250 (1989) ("All of these arguments attacking the constitutionality of Crim.R. 11(C)(3) have been rejected by this court in *State v. Buell*"); *State v. Buell*, 22 Ohio St.3d 124, 138, 489 N.E.2d 795 (1986) ("Since, in Ohio, a sentence of death is possible whether a defendant pleads to the offense or is found guilty after a trial, Crim.R. 11(C)(3) does not violate *Jackson*").

D. A capital defendant has the option, and is never required to, submit to a presentence investigation report, and decides whether to expose himself to a mental examination

McAlpin claims R.C. 2929.03(D)(1) is unconstitutional because it requires the submission of the pre-sentence investigation report and mental evaluation to the jury or judge once requested by a defendant. This Court has rejected this argument. *See State v. Osie*, 140 Ohio St.3d 131, 2014-Ohio-2966, 16 N.E.3d 588, ¶ 238, citing *State v. Buell*, 22 Ohio St.3d at 138, 489 N.E.2d 795 ("[T]he defendant decides whether to expose himself to the risk of potentially incriminating presentence investigations, including mental examinations. There is no constitutional infirmity in providing the defendant with such an option").

E. R.C. 2929.03(D)(1) and R.C. 2929.04 are not unconstitutionally vague

R.C. 2929.03(D)(1) provides that at the sentencing phase, the trier-of-fact "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[.]" McAlpin claims that this statute is unconstitutionally vague because it gives "the sentencer unfettered discretion to weigh a statutory mitigating factor as an aggravator." Appellant's Br. at 130. McAlpin contends the language in R.C. 2929.03(D)(1) captures the mitigating factors found in R.C. 2929.04(B), which include "the nature and circumstances of the offense," improperly making them part and parcel of the aggravating circumstances.

This Court rejected McAlpin's argument in *State v. McNeill*, 83 Ohio St.3d 438, 453, 700

N.E.2d 596 (1998):

> We do not find the statutory language at issue, or the concepts it conveys, unconstitutionally vague. The reasoning employed in *Gumm* clarified that the 'nature and circumstances of the aggravating circumstances' referred to in R.C. 2929.03(D)(1) are separate and distinct from the 'nature and circumstances of the offense' referred to in 2929.04(B). *Gumm*, 73 Ohio St. 3d at 416-423, 653 N.E.2d at 259-264. See, also, *State v. Wogenstahl* (1996), 75 Ohio St. 3d 344, 352-355, 662 N.E.2d 311, 318-321; *State v. Hill* (1996), 75 Ohio St. 3d 195, 199-201, 661 N.E.2d 1068, 1075-1076. Accordingly, McNeill's twelfth proposition is overruled.

See also State v. Ferguson, 108 Ohio St.3d 451, 2006-Ohio-1502, 844 N.E.2d 806, ¶ 92 ("Ferguson asserts that language in R.C. 2929.03(D)(1) is unconstitutionally vague because it gives the sentencer unfettered discretion to weigh a statutory mitigating factor (*see* R.C. 2929.04(B): 'the nature and circumstances of the offense') as an aggravator. We have also previously overruled this claim").

The key here is that R.C. 2929.03(D)(1) refers to "the nature and circumstances of the aggravating circumstances[,]" not to the nature and circumstances of the underlying *offense*. The jury or panel certainly can weigh the nature and circumstances of the aggravating circumstances as aggravating factors. As such, there is no possibility of prejudice.

F. Ohio provides meaningful review of proportionality and appropriateness of each individual death sentence

McAlpin next contends that Ohio's death penalty scheme is unconstitutional because it fails to provide for adequate proportionality review. McAlpin faults R.C. 2929.021 for requiring only minimal information on cases. The Eighth District Court of Appeals recently rejected this claim, finding that the defendant "failed to demonstrate that the alleged inadequacies in the reporting system prejudiced the proportionality review conducted by the Supreme Court[.]" *State v. Hale*, 8th Dist. Cuyahoga No. 103654, 2016-Ohio-5837, ¶ 48. The purpose of R.C. 2929.021's reporting requirement is merely "to provide the reviewing courts with some basis for reviewing

the proportionality of the imposition of the death sentence in comparison with sentences entered in similar cases." *State v. Jenkins*, 15 Ohio St.3d at 209, 473 N.E.2d 264. The data compiled by the Clerk of Courts for the Supreme Court of Ohio is considerable and is more than enough to fulfill that task.

McAlpin's challenge to the scope of Ohio's proportionality review also is without merit. The United States Supreme Court has held that the Constitution does not require proportionality review at all. *Pulley v. Harris*, 465 U.S. 37, 44-51, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Where the statutory scheme "adequately channel[s] the sentencer's discretion, such proportionality review is not required." *McCleskey v. Kemp*, 481 U.S. at 306, 107 S.Ct. 1756, 95 L.Ed.2d 262.

The scope of Ohio's statutorily mandated proportionality review has been determined by this Court. In *State v. Steffen*, 31 Ohio St.3d at 124, 509 N.E.2d 383, this Court held that proportionality review is limited to the pool of cases where the death penalty was actually imposed. This Court also clarified that "proportionality review in this court will be limited to a review of cases we have already announced. No reviewing court need consider any case where the death penalty was sought but not obtained or where the death sentence could have been sought but was not." *Id.* McAlpin is not free to override this Court's interpretation of the law.

McAlpin also claims that Ohio's "appropriateness" review is deficient because R.C. 2929.05(A) requires Ohio appellate courts to review the "appropriateness" of each death sentence separately from whether the aggravating circumstances outweigh the mitigating factors. *See* Appellant's Br. at 131. R.C. 2929.05(A) requires this, but that review is incorporated as part of this Court's proportionality review:

> The 'appropriateness' of any death sentence must be determined under the overall principle that the death sentence is, in the judgment of the Ohio General Assembly, speaking for the people of Ohio, an appropriate sentence in certain particularized circumstances and that the Ohio statutory framework for imposing it in a way that

> considers all aggravating circumstances and mitigating factors relevant to the offense and the offender meets all constitutional requirements. *State v. Steffen, supra*. The principal considerations required by statute are whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases. *Id.*

State v. Denson, 1st Dist. Hamilton No. C-850311, 1986 Ohio App. LEXIS 8550, *46-47 (Oct. 1, 1986).

By independently reviewing the proportionality of each death sentence, this Court fulfills its statutory mandate under R.C. 2929.05(A) to separately review the "appropriateness" of the sentence. McAlpin's claim that this Court's review of each sentence is "very cursory" is disproven by the fact that this Court has, on several occasions, reversed a death sentence using its independent sentence review under R.C. 2929.05(A). *See State v. Johnson*, 144 Ohio St.3d 518, 2015-Ohio-4903, 45 N.E.3d 208, ¶¶ 98-141 (death sentence vacated); *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶¶ 67-106 (death sentence vacated). This Court's review is not cursory, and McAlpin's claim that the court's review is so inadequate as to violate the Constitution must fail.

G. Ohio's capital sentencing statutes are constitutional under *Hurst v. Florida*

McAlpin next argues that Ohio's capital sentencing statute, R.C. 2929.03, is unconstitutional under *Hurst v. Florida*, 577 U.S. 92, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), because it violates his Sixth Amendment right to a trial by jury by requiring the judge to impose the actual sentence. This Court unanimously rejected this argument in *State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319, ¶¶ 58-59, and again in *State v. Mason*, 153 Ohio St.3d 476, 2018-Ohio-1462, 108 N.E.3d 56. This Court should do so again here.

McAlpin argues that "[t]he evolving standards of decency required by the Eighth Amendment are in line with a reading of Hurst and Caldwell [v. Mississippi, 473 U.S. 320, 105 S.Ct. 2633 (1985)] together to conclude that the practice of using language to diminish the

seriousness of the jury's verdict by reminding them that their verdict is only a recommendation is unconstitutional." Appellant's Br. at 134. But the jury was never told or instructed during the penalty phase in this case that their verdict was a recommendation. *See generally* Tr. 4650-68. A jury is presumed to follow its instructions. *See State v. Garner*, 74 Ohio St.3d 49, 59, 656 N.E.2d 623 (1995).

Additionally, as stated in *Mason*, there is a "material difference" between the process in Ohio and in Florida:

> The Florida statute required the jury to render an 'advisory sentence' after hearing the evidence presented in a sentencing-phase proceeding[.] *** Ohio law, in contrast, requires a jury to find the defendant guilty beyond a reasonable doubt of at least one aggravating circumstance, R.C. 2929.03(B), before the matter proceeds to the penalty phase, when the jury can recommend a death sentence. Ohio's scheme differs from Florida's because Ohio requires the jury to make this specific and critical finding.

Id. at ¶ 31-32. "[A] jury (opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range." *State v. Hundley*, Slip Opinion, No. 2020-Ohio-3775, ¶ 125, citing *McKinney v. Arizona*, __ U.S. __, 140 S.Ct. 702, 707, 206 L.Ed.2d 69 (2020).

H. Conclusion

For all these reasons, Ohio's capital sentencing statute is and remains constitutional. McAlpin's seventeenth proposition of law should be overruled.

CONCLUSION

For these reasons, the State of Ohio respectfully asks this Honorable Court to affirm Defendant-Appellant Joseph McAlpin's convictions and death sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Appellee the State of Ohio has been served via e-mail on this 9th day of November, 2020, on David L. Doughten (ddoughten@yahoo.com) and John B. Gibbons (jgibbons4@sbcglobal.net), Counsel for Defendant-Appellant.

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NO. 2019-0926

IN THE SUPREME COURT OF OHIO

CAPITAL CASE, APPEAL FROM
THE CUYAHOGA COUNTY COURT OF COMMON PLEAS
NO. CR-17-623243

STATE OF OHIO,

Plaintiff-Appellee

-vs-

JOSEPH McALPIN,

Defendant-Appellant

APPENDIX TO MERIT BRIEF OF APPELLEE STATE OF OHIO

CAPITAL CASE – NO EXECUTION DATE SET

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RULE 52. Harmless Error and Plain Error

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

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

[Effective: July 1, 1973.]

ARTICLE IV. RELEVANCY AND ITS LIMITS

RULE 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

[Effective: July 1, 1980.]

2 503 OJI CR 503.011

Ohio Jury Instructions - Criminal > Part II Criminal Instructions > Title 5 Criminal Subject Matter Instructions > Chapter CR 503 HOMICIDE AND ASSAULT

CR *503.011* Aggravated murder: death penalty--sentencing phase R.C. 2929.03(D), 2929.04 *[Rev. 8/6/14]*

COMMENT

The Committee believes that it is not appropriate for the jury to be advised that their sentencing verdict is a recommendation, that a verdict of death is not binding on the court, or that a verdict of death is subject to automatic appeal. "We prefer that no reference be made to the finality of the jury's sentencing decision at all." State v. Keith (1977), 79 Ohio St.3d 514, 518 .

"... [I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe, as the jury was in this case, that the responsibility for determining the appropriateness of the defendant's death rests elsewhere," Caldwell v. Mississippi (1985), 472 U.S. 320, 329 .

Although R.C. 2929.03 states that a "jury shall recommend" the sentence to be imposed on the offender, the Ohio Supreme Court has repeatedly stated that "because of the possible risk of diminishing jury responsibility, '... we prefer that in the future no reference be made to the jury regarding the finality of their decision... .' " State v. Williams (1986), 23 Ohio St.3d 16, 22 , quoting State v. Jenkins (1984), 15 Ohio St.3d 164, 202-203 .

"As we stated in Jenkins, supra at 202 , and we now emphatically emphasize, the better procedure would be to have no comment by the prosecutor or by the trial judge on the question of who bears the ultimate responsibility for determining the penalty." State v. Buell (1986), 22 Ohio St.3d 124, 144 .

The Committee recommends that the following § 1, PRELIMINARY INSTRUCTIONS, be given prior to opening statements in the sentencing phase.

The Committee believes that the best practice is for the trial judge to provide each juror with an individual, written copy of the final instructions at the time of the oral delivery of the instructions so that the jurors can follow along while the judge reads the instructions. This more comprehensive practice covers additional styles of learning to assist auditory, visual, and tactile learners in understanding the instructions. The recommendation applies to final instructions delivered at each phase of any trial when the trial is divided into multiple phases.

1. PRELIMINARY INSTRUCTIONS. Members of the jury, during the trial phase of this case, you heard evidence, testimony and arguments of counsel and found (*insert name of defendant*) guilty of (a) specification(s). In this sentencing phase, (that) (those) (some of those) specification(s) will be addressed and called (an) aggravating circumstance(s). You also heard during the trial phase some evidence, testimony and arguments of counsel as to possible factors in mitigation of the death sentence. In this sentencing phase, which concerns only the determination of sentence, you will hear additional evidence, testimony, arguments of counsel, and perhaps a statement of the defendant. It is not necessary that the

defendant take the witness stand or make a statement. The defendant has a constitutional right not to testify or make a statement. The fact that the defendant does not testify or make a statement must not be considered for any purpose. The state will address the aggravating circumstance(s) of which the defendant was found guilty and the defense will address mitigating factors.

In this case, the aggravating circumstance(s) (is) (are) precisely (that) (those) set out in your verdict on specification(s) (*insert number of specification*) to the (*insert number of count*) count of the indictment. (It is) (They are) as follows: (*insert applicable aggravating circumstance[s]*). (This) (These) aggravating circumstance(s) (was) (were) proven in the trial phase and it is not necessary for the State of Ohio to present further evidence to you regarding (this) (these) aggravating circumstance(s). However, only (this) (these) aggravating circumstance(s) may be considered by you during this sentencing proceeding. The aggravated murder itself is not an aggravating circumstance.

Because you found that (an) aggravating circumstance(s) (is) (are) present, the law provides the following four (4) sentencing options for your consideration:

(A) life imprisonment without parole eligibility for twenty-five full years; or

(B) life imprisonment without parole eligibility for thirty full years; or

(C) life imprisonment without the possibility of parole; or

(D) death.

You are here today to consider which of these sentences to impose. The aggravating circumstance(s) will be weighed against the mitigating factors that have been or will be presented. 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.

In order for you to decide that the sentence of death shall be imposed upon (*insert name of defendant*), the State of Ohio must prove beyond a reasonable doubt that the aggravating circumstance(s) of which the defendant was found guilty (is) (are) sufficient to outweigh the factors in mitigation of imposing the death sentence. The defendant does not have any burden of proof. Reasonable doubt is present when, after you have carefully considered and compared all the evidence, you cannot say you are firmly convinced that the aggravating circumstance(s) of which the defendant was found guilty outweigh(s) the mitigating factors. Reasonable doubt is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his or her own affairs.

I remind you not to discuss this case among yourselves or with anyone else, not to permit anyone to discuss this case with you or in your presence, and not to form or express any opinion on the case until it is finally submitted to you. I also remind you not to watch, read, listen to, or discuss news media accounts of this case.

The order of trial in the sentencing phase is as follows: opening statements of counsel; the state's evidence, if any; the defendant's evidence, if any; the state's rebuttal evidence, if any; the defendant's statement, if any; the final arguments of counsel; the final instructions of law from the court; and your deliberations.

Again, you will be deciding whether the State of Ohio has proved beyond a reasonable doubt that the aggravating circumstance(s) outweigh(s) the mitigating factors. If you find the aggravating circumstance(s) outweigh(s) the mitigating factors, then you must find that the death sentence be

imposed upon (*insert name of defendant*). However, if you find that the State of Ohio did not prove beyond a reasonable doubt that the aggravating circumstance(s) outweigh(s) the mitigating factors, then you will enter a verdict imposing one of the life sentences, life imprisonment without parole eligibility for twenty-five full years, life imprisonment without parole eligibility for thirty full years, or life imprisonment without the possibility of parole, whichever you deem appropriate.

You will again be sequestered during your deliberations.

COMMENT

The order of proceedings is a matter of judicial discretion. The defendant's statement, if any, may be made at any time during the sentencing phase.

2. JURY FUNCTION. Members of the jury, you have heard the evidence and the arguments of counsel, and it is now my duty to instruct you on the law that is applicable to this proceeding. The court and the jury have separate and distinct functions. It is your function to decide the disputed questions of fact and to determine what sentence shall be imposed upon (*insert name of defendant*), and it is my function to provide to you appropriate instructions on the law. It is your sworn duty to accept these instructions and to apply the law as it is given to you. You are not permitted to change the law or to apply your own idea of what you think the law should be.

3. SENTENCING DETERMINATION. During your deliberations you will decide whether (*insert name of defendant*) shall be sentenced to

(A) life imprisonment without parole eligibility for twenty-five full years; or

(B) life imprisonment without parole eligibility for thirty full years; or

(C) life imprisonment without the possibility of parole; or

(D) death.

COMMENT

Subdivision (A) was changed from twenty to twenty-five years for offenses committed on and after 7/1/96.

Subdivision (C) was added as a new sentence option effective 7/1/96.

4. BURDEN OF PROOF. In order for you to decide that the sentence of death shall be imposed upon (*insert name of defendant*), the State of Ohio must prove beyond a reasonable doubt that the aggravating circumstance(s) of which the defendant was found guilty (is) (are) sufficient to outweigh the factors in mitigation of imposing the death sentence. The defendant does not have any burden of proof.

COMMENT

In State v. Lawrence (1989), 44 Ohio St.3d 24, 27 , the Ohio Supreme Court found that a jury instruction that closely tracks R.C. 2929.03(D)(1) and that does not place the burden of proving the existence of a mitigating factor by a preponderance of the evidence on the defendant would adequately guide a jury in its deliberations during the sentencing phase of a capital trial.

Further, such an instruction would ensure that Ohio jurors clearly understand that they are to consider all mitigating evidence in reaching their sentencing recommendation.

5. REASONABLE DOUBT (SENTENCING PHASE). Reasonable doubt is present when, after you have carefully considered and compared all the evidence, you cannot say you are firmly convinced that the

aggravating circumstance(s) of which the defendant was found guilty outweigh(s) the mitigating factors. Reasonable doubt is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his or her own affairs.

COMMENT

The definition of reasonable doubt set forth in OJI-CR 405.07 and used in the trial phase of the case is not appropriate for the sentencing phase. The instruction should convey to jurors that they must be firmly convinced that the aggravating circumstance(s) outweighs the mitigating factor(s). State v. Goff, 82 Ohio St.3d 123, 1998-Ohio-369 ; State v. Taylor, 78 Ohio St.3d 15, 1997-Ohio-243 .

6. MULTIPLE COUNTS. (*Insert name of defendant*) has been convicted of more than one count of aggravated murder with (an) aggravating circumstance(s). The penalty for each separate count must be determined separately. Only the aggravating circumstance(s) related to a given count may be considered and weighed against the mitigating factors in determining the penalty for that count.

COMMENT

When a capital defendant is convicted of more than one count of aggravated murder, the penalty for each individual count must be determined separately. Only the aggravating circumstance(s) related to a given count may be considered in determining the penalty for that count. State v. Cooey (1989), 46 Ohio St.3d 20 , paragraph 3 of the syllabus; State v. Poindexter (1988), 36 Ohio St.3d 1 ; State v. Hooks (1988), 39 Ohio St.3d 67 .

7. AGGRAVATING CIRCUMSTANCE(S).

COMMENT

The instructions must inform the jury what aggravating circumstances the jury is to consider in this phase and must identify them specifically. See State v. Hutton (1990), 53 Ohio St.3d 36, 51 , Brown, J. dissenting; State v. Dorian Hill (April 25, 1991), 1991 Ohio App. LEXIS 1830 , jurisdiction denied at 62 Ohio St.3d 1422 (1991) .

If there are guilty findings to any specification on multiple counts, the court must provide the following instruction separately for each count.

Where two or more aggravating circumstances arise from the same act or indivisible course of conduct, and are thus duplicative, the aggravating circumstances will be merged for purposes of sentencing. State v. Jenkins (1984), 15 Ohio St.3d 164 , paragraph 5 of the syllabus. For example, see State v. Wiles (1991), 59 Ohio St.3d 71 , (principal offender (A)(7) and escaping detection (A)(3) aggravating circumstances were duplicative and should have been merged); State v. Spisak (1988), 36 Ohio St.3d 80, 84 ; State v. Mitts (1998), 81 Ohio St.3d 223, 231, 1998-Ohio-635 (there should not be multiple murder specifications listed for each victim, only one course of conduct specification is appropriate for each count); State v. Wickline (1990), 50 Ohio St.3d 114, 122 (merger of escape detection (A)(3) and course of conduct (A)(5) aggravating circumstances); cf. State v. Waddy (1992), 63 Ohio St.3d 424, 448 (not required to merge specifications which were based on aggravated burglary and kidnapping.)

The aggravating circumstance(s) that you shall consider as to Count (*insert number of count*) (is) (are)

(*Use appropriate alternative[s]*)

(A) the offense was the assassination of (the president of the United States) (a person in line of succession to the presidency of the United States) (the [governor] [lieutenant governor] of Ohio) (the [president-elect] [vice president-elect] of the United States) (the [governor-elect] [lieutenant governor-elect] of Ohio) (a candidate for [*insert name of an office described in this division*]).

COMMENT

Drawn from R.C. 2929.04(A)(1).

(*or*)

(B) the offense was committed for hire.

COMMENT

R.C. 2929.04(A)(2).

(*or*)

(C) the offense was committed for the purpose of escaping (detection) (apprehension) (trial) (punishment) for another offense committed by the defendant.

COMMENT

Drawn from R.C. 2929.04(A)(3).

(*or*)

(D) the offense was committed while the defendant was a prisoner in a detention facility.

COMMENT

Drawn from R.C. 2929.04(A)(4) in effect prior to 12/29/98.

Subdivision (D) of this instruction applies to offenses committed before 12/29/98.

(*or*)

(E) the offense was committed while the defendant was (under detention) (at large after having broken detention).

COMMENT

Drawn from R.C. 2929.04(A)(4) in effect on and after 12/29/98.

Subdivision (E) of this instruction applies to offenses committed on and after 12/29/98.

(*or*)

(F) prior to the commission of this offense the defendant was convicted of (*insert name of alleged offense, an essential element of which was the purposeful killing of or attempt to kill another*).

COMMENT

Drawn from R.C. 2929.04(A)(5).

(*or*)

(G) this offense was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the defendant.

COMMENT

Drawn from R.C. 2929.04(A)(5).

(*or*)

(H) the victim of the offense was a law enforcement officer, whom the defendant had reasonable cause to know or knew to be a law enforcement officer, and

(*Use appropriate alternative[s]*)

(1) the victim, at the time of the commission of the offense, was engaged in his/her duties.

(*or*)

(2) it was the defendant's specific purpose to kill a law enforcement officer.

COMMENT

Drawn from R.C. 2929.04(A)(6).

(*or*)

(I) the offense was committed while the defendant was (committing) (attempting to commit) (fleeing immediately after [committing] [attempting to commit]) the offense of (kidnapping) (rape) (aggravated arson) (aggravated robbery) (aggravated burglary) and the defendant

(*Use only one alternative*)

(1) was the principal offender in the commission of the aggravated murder.

(*or*)

(2) committed the aggravated murder with prior calculation and design.

COMMENT

Drawn from R.C. 2929.04(A)(7).

Use only the alternative found in the trial phase.

(*or*)

(J) the victim of the aggravated murder was a witness to an offense and was purposely killed to prevent his/her testimony in any criminal proceeding and the aggravated murder was not committed during the (commission) (attempted commission) (flight immediately after the [commission] [attempted commission]) of the offense to which the victim was a witness.

COMMENT

Drawn from R.C. 2929.04(A)(8).

(*or*)

(K) the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his/her testimony in any criminal proceeding.

COMMENT

Drawn from R.C. 2929.04(A)(8).

(*or*)

(L) the defendant, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense, and the defendant

(*Use only one alternative*)

(1) was the principal offender in the commission of the offense.

(*or*)

(2) committed the offense with prior calculation and design.

COMMENT

Drawn from R.C. 2929.04(A)(9).

Subdivision (L) applies only to offenses committed on and after 8/6/97.

Use only the alternative found in the trial phase.

8. AGGRAVATING CIRCUMSTANCES DO NOT INCLUDE. The aggravated murder itself is not an aggravating circumstance. You may only consider the aggravating circumstance(s) that (was) (were) just described to you and which accompanied the aggravated murder.

COMMENT

The instructions must inform the jury that the aggravated murder is not itself an aggravating circumstance. State v. Henderson (1988), 39 Ohio St.3d 24 .

9. MERGER OF AGGRAVATING CIRCUMSTANCES. Although there were more aggravating circumstances found by you during the trial phase of this case, you will only consider the aggravating circumstance(s) that I have just described to you.

COMMENT

Where two or more aggravating circumstances arise from the same act or indivisible course of conduct, and are thus duplicative, the aggravating circumstances will be merged for purposes of sentencing. State v. Jenkins (1984), 15 Ohio St.3d 164 , paragraph 5 of the syllabus. For example, see State v. Wiles (1991), 59 Ohio St.3d 71 (principal offender (A)(7) and escaping detection (A)(3) aggravating circumstances were duplicative and should have been merged); State v. Spisak (1988), 36 Ohio St.3d 80 ; State v. Mitts, 81 Ohio St.3d 223, 1998-Ohio-635 (there should not be multiple murder specifications listed for each victim, only one course of conduct specification is appropriate for each count); State v. Wickline (1990), 50 Ohio St.3d 114 (merger of escape detection (A)(3) and course of conduct (A)(5) aggravating circumstances); cf. State v. Waddy (1992), 63 Ohio St.3d 424 (not required to merge specifications which were based on aggravated burglary and kidnapping).

10. MITIGATING FACTORS. 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 diminish the appropriateness of a death sentence. You must consider all of the mitigating factors presented to you. Mitigating factors include, but are not limited to, the nature and circumstances of the offense, the history, character and background of the defendant, and

(*Use appropriate alternative[s]*)

(A) whether the victim of the offense induced or facilitated the offense.

(*or*)

(B) whether it is unlikely that the offense would have been committed, but for the fact that the defendant was under duress, coercion, or strong provocation.

(*or*)

(C) whether, at the time of committing the offense, the defendant, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his/her conduct or to conform his/her conduct to the requirements of the law.

(*or*)

(D) the youth of the defendant.

(*or*)

(E) the defendant's lack of a significant history of prior criminal convictions and delinquency adjudications.

(*or*)

(F) since the defendant was not the principal offender, the degree of the defendant's participation in the offense and the degree of the defendant's participation in the acts that led to the death of the victim.

(*or*)

(G) 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.

Any one of these mitigating factors standing alone is sufficient to support a sentence of life imprisonment if the aggravating circumstance(s) (is) (are) not sufficient to outweigh that mitigating factor beyond a reasonable doubt. Also, the cumulative effect of the mitigating factors will support a sentence of life imprisonment if the aggravating circumstance(s) (is) (are) not sufficient to outweigh the mitigating factors beyond a reasonable doubt.

It is not necessary that the members of the jury unanimously agree on the existence of a mitigating factor before that factor can be weighed by any juror against the aggravating circumstance(s).

COMMENT

Drawn from R.C. 2929.04(B).

The Ohio Supreme Court has described a mitigating factor as one that "lessens the moral culpability of the offender or diminishes the appropriateness of death as a penalty." State v. DePew (1988), 38 Ohio St.3d 275, 292 , quoting State v. Steffen (1987), 31 Ohio St.3d 111, 129 . A more recent case puts in doubt the appropriateness of the "lessens the moral culpability" language. State v. Hale, 119 Ohio St.3d 118, 2008-Ohio-3426 . Until the Ohio Supreme Court clarifies this discrepancy, the Committee believes that the language should be deleted from the definition of mitigating factors. The current instruction deletes the language. Instructions should also not define mitigating factors as those that "reduce culpability" because the jury has already found the defendant culpable by returning a guilty verdict. Further, instructions suggesting consideration of "blameworthiness," or suggesting "excuse" are also wrong. See Boyde v. California (1990), 494 U.S. 370 ; State v. Woodard, 68 Ohio St.3d 70, 1993-Ohio-241 ; State v. Lawrence (1989), 44 Ohio St.3d 24 ; State v. Holloway (1988), 38 Ohio St.3d 239 .

The court should not instruct on mitigating factors in R.C. 2929.04(B)(1)-(7) not raised by the defense. State v. DePew (1988), 38 Ohio St.3d 275 ; State v. Hicks (1989), 43 Ohio St.3d 72 ; State v. Cooey (1989), 46 Ohio St.3d 20 . The Committee believes that the court should instruct on these mitigating factors raised by the evidence regardless of who produced it, if requested by the defense.

Further, an instruction should not suggest that the jury must be unanimous in finding a mitigating factor is present before such mitigating factor is considered in sentencing. Mills v. Maryland (1988), 486 U.S. 367 ; State v. Lawrence (1989), 44 Ohio St.3d 24 ; State v. Seiber (1990), 56 Ohio St.3d 4 .

11. DURESS AND COERCION.

(A) "Duress" means that the defendant was compelled to act, either by actual physical force or threatened physical force directed toward (him/her) (a near relative of defendant).

(B) "Coercion" means ([force] [threat of force] [strong domination] by another) (urgent circumstances) (or some combination of them) which overcame the (mind) (volition) of the defendant so that he/she acted other than he/she would have acted in the absence of these influences.

(C) Whether a course of conduct placed the defendant under (duress) (coercion) depends on the effect of the conduct upon the defendant considering the defendant's age, sex, health, mental condition, (the relationship of the near relative to the defendant), and all the surrounding circumstances.

COMMENT

In State v. Getsy, 84 Ohio St.3d 180, 1998-Ohio-533 , the Ohio Supreme Court held that "duress" and "coercion" are to be construed more broadly when considered as mitigating factors than when considered as affirmative defenses. See also State v. Woods (1976), 48 Ohio St.2d 127 . "These constructions appropriately allow consideration of the broad range of information relevant to mitigation set out in R.C. 2929.04." State v. Osborne (1976), 49 Ohio St.2d 135, 147 . Therefore, even when duress is not an affirmative defense to aggravated murder under R.C. 2903.01(B), it is entitled to some weight as a mitigating factor. However, see State v. Dickerson (1989), 45 Ohio St.3d 206 and State v. Bedford (1988), 39 Ohio St.3d 122 (The stress from the personal turmoil in defendant's life does not qualify as a [B] [2] mitigating factor).

The application of the concepts of duress and coercion varies greatly, and turns largely upon the circumstances of each individual case, including the character of the one sought to be influenced. "In determining whether a course of conduct results in duress, the question is not what effect such conduct would have upon an ordinary man but rather the effect upon the particular person toward whom such conduct is directed, and in determining such effect the age, sex, health and mental condition of the person affected, the relationship of the parties and all the surrounding circumstances may be considered." Tallmadge v. Robinson (1952), 158 Ohio St. 333 , paragraph two of the syllabus.

12. WEIGHING PROCESS. The procedure that you must follow in arriving at your verdict in this phase of the trial is prescribed by law, and in this regard, you shall consider all of the testimony and evidence relevant to the aggravating circumstance(s) the defendant was found guilty of committing and mitigating factors raised at both phases of the trial, the (statement of [*insert name of defendant*]) (pre-sentence investigation report) (mental examination report) (final arguments of counsel). You shall then decide whether the State of Ohio proved beyond a reasonable doubt that the aggravating circumstance(s) outweigh(s) the mitigating factors present in this case.

It is the quality of the evidence regarding aggravating circumstance(s) and mitigating factors that must be given primary consideration by you. The quality of the evidence may or may not be the same as the quantity of evidence; that is, the number of witnesses or exhibits presented in this case.

13. FINDINGS. If all twelve of you find that the State of Ohio proved beyond a reasonable doubt that the aggravating circumstance(s) the defendant was guilty of committing (is) (are) sufficient to outweigh the mitigating factors in this case, then it will be your duty to decide that the sentence of death shall be imposed upon (*insert name of defendant*).

If you find that the State of Ohio has failed to prove beyond a reasonable doubt that the aggravating circumstance(s) (*insert name of defendant*) was guilty of committing (is) (are) sufficient to outweigh the mitigating factors present in this case, then it will be your duty to decide which of the following life sentence alternatives should be imposed: the sentence of life imprisonment with no parole eligibility until twenty-five full years of imprisonment have been served; the sentence of life imprisonment with no parole

eligibility until thirty full years of imprisonment have been served; or life imprisonment without the possibility of parole.

14. EQUAL WEIGHT. If the weight of the aggravating circumstance(s) and mitigating factors are equal then you must proceed to consider the life sentence alternatives.

15. UNANIMITY. You are not required to unanimously find that the State failed to prove that the aggravating circumstance(s) outweigh(s) the mitigating factors before considering one of the life sentence alternatives. You should proceed to consider and choose one of the life sentence alternatives if any one or more of you conclude that the state has failed to prove beyond a reasonable doubt that the aggravating circumstance(s) outweigh(s) the mitigating factors. One juror may prevent a death penalty determination by finding that the aggravating circumstance(s) do not outweigh the mitigating factors.

You must be unanimous on one of the life sentence alternatives before you can render that verdict to the court. If you cannot unanimously agree on a specific life sentence, you will then inform the court by written note that you are unable to render a sentencing verdict.

COMMENT

The jury need not be unanimous in finding death was inappropriate before considering the life sentences. The instruction "[y]ou are not required to determine unanimously that the death sentence is inappropriate before you consider the life sentences" is desirable, but absent a request by counsel, will not constitute plain error. State v. Madrigal, 87 Ohio St.3d 378, 393-395, 2000-Ohio-448 ; State v. Taylor, 78 Ohio St.3d 15, 29, 1997-Ohio-243 ; State v. Brooks, 75 Ohio St.3d 148, 159-160, 1996-Ohio-134 .

"In Ohio a solitary juror may prevent a death penalty recommendation by finding that the aggravating circumstances in the case do not outweigh the mitigating factors. Jurors from this point forward should be so instructed." State v. Brooks, 75 Ohio St.3d 148, 159-160, 1996-Ohio-134 .

16. EVIDENCE. The opening statements and final arguments of counsel are designed to assist you, but they are not evidence. Although the arguments of counsel are not evidence in this case, the law permits you to consider the arguments of counsel to the extent that they are relevant to the sentence that should be imposed upon (*insert name of defendant*).

Some of the evidence and testimony that you considered in the trial phase of this case may not be considered in this sentencing phase. For purposes of this proceeding, you are to consider only that evidence admitted in the trial phase that is relevant to the aggravating circumstance(s) of which the defendant has been found guilty and to any of the mitigating factors. (*Provide case specific instructions as to trial phase evidence and exhibits not being admitted during the sentencing phase.*) You will also consider all of the evidence admitted during the sentencing phase (together with the defendant's own statement).

COMMENT

It is the trial court's responsibility, not the jury's, to determine what evidence is relevant. The trial court must provide case specific instructions as to trial phase evidence and exhibits not admissible in the sentencing phase. The trial court errs in admitting all the evidence from the trial phase into the penalty phase and instructing the jury to consider "all the evidence, including exhibits presented in the first phase of this trial which you deem to be relevant," without making a relevancy determination. State v. Getsy, 84 Ohio St.3d 180, 201, 1998-Ohio-533 .

Under State v. DePew (1988), 38 Ohio St.3d 275 , paragraph one of the syllabus and 282-283, 287, "only those exhibits and photos relevant to the (particular) aggravating circumstance (the offender was found guilty of committing)" are to be introduced by the State at the penalty phase.

17. SPECULATION. You must not speculate as to why the court sustained an objection to any question or what the answer to such question might have been. You may not draw any inference or speculate on the truth of any suggestion included in a question that was not answered.

18. CREDIBILITY. You are the sole judges of the facts, the credibility of the witnesses and the weight of the evidence. To weigh the evidence, you must consider the credibility of the witnesses (including the defendant). You will apply the tests of truthfulness which you apply in your daily lives. These tests include the appearance of each witness upon the stand; his or her manner of testifying; the reasonableness of the testimony; the opportunity he or she had to see, hear and know the things concerning which he or she testified; his or her accuracy of memory; frankness or lack of it; intelligence; interest and bias, if any; together with all the facts and circumstances surrounding the testimony.

Applying these tests, you will assign to the testimony of each witness such weight as you deem proper. You are not required to believe the testimony of any witness simply because he or she was under oath. You may believe or disbelieve all or any part of the testimony of any witness. It is your province to determine what testimony is worthy of belief and what testimony is not worthy of belief.

19. DEFENDANT TESTIFIES. The (testimony) (statement) of the defendant is to be weighed by the same rules that apply to other witnesses.

COMMENT

An instruction should not suggest that the defendant's testimony is less credible or less valuable due to its unsworn nature, or inferring that the failure to make a sworn statement gives rise to an adverse inference. State v. DePew (1988), 38 Ohio St.3d 275 , paragraph two of the syllabus.

20. DEFENDANT DOES NOT TESTIFY. It is not necessary that the defendant take the witness stand or make a statement. The defendant has a constitutional right not to testify or make a statement. The fact that the defendant did not testify or make a statement must not be considered for any purpose.

21. EXPERT WITNESSES. Generally a witness may not express an opinion. However, a person who follows a (profession) (special line of work) may express his/her opinion because of his/her education, knowledge and experience. Such testimony is admitted for whatever assistance it may provide.

22. HYPOTHETICAL QUESTION. Questions have been asked in which (an) expert witness(es) (was) (were) permitted to assume that certain facts were true and to give an opinion based upon such assumption. You must decide whether the assumed facts, upon which the expert(s) based his/her opinion, are true. If any assumed fact was not established, you will determine its effect upon the opinion of the expert(s).

23. WEIGHT OF EXPERT TESTIMONY. As with other witnesses, upon you alone rests the duty of deciding what weight should be given to the testimony of the expert(s). In deciding its weight, you may take into consideration his/her skill, experience, knowledge, veracity, familiarity with the facts of this case, and the usual rules for testing credibility and deciding the weight to be given to testimony.

24. NATURE AND CIRCUMSTANCES. When you consider the nature and circumstances of the offense, you may only consider them if they have any mitigating value. You may not consider the nature and circumstances of the crime as an aggravating circumstance.

COMMENT

In the sentencing phase of a capital trial, the "aggravating circumstance(s)" against which the mitigating evidence is to be weighed are limited to the specifications of aggravating circumstance(s) set forth in R.C. 2929.04(A)(1) through (8) that have been alleged in the indictment and proved beyond a reasonable doubt. State v. Wogenstahl, 75 Ohio St.3d 344, 1996-Ohio-219 , paragraph one of the syllabus. It is improper for prosecutors in the penalty phase of a capital trial to make any comment before a jury that the nature and circumstances of the offense are "aggravating circumstances." State v. Wogenstahl, 75 Ohio St.3d 344, 1996-Ohio-219 , paragraph two of the syllabus.

25. JUST VERDICT. You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the court to your findings, and to render your verdict accordingly. In fulfilling your duty, your efforts must be to arrive at a just verdict. Consider all the evidence and make your finding with intelligence and impartiality, and without bias, sympathy or prejudice. If, during the course of the trial, the court said or did anything that you consider an indication of the court's view on the facts, you are instructed to disregard it.

COMMENT

"The 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 a consideration of the reviewable guidelines fixed by statute as opposed to the individual juror's personal biases or sympathies." State v. Jenkins (1984), 15 Ohio St.3d 164 , paragraph three of the syllabus; State v. Steffen (1987), 31 Ohio St.3d 111, 125 .

26. VERDICTS. You will have four verdict forms in your possession during your deliberations in the jury room. I will read these four verdict forms in precisely the same order as my previous instructions were presented to you. You are not to make any inference from the order in which I read these forms to you.

(A) We, the jury, being duly impaneled and sworn, do hereby find that the aggravating circumstance(s) that the defendant was found guilty of committing, do(es) not outweigh the mitigating factors presented in this case by proof beyond a reasonable doubt.

We therefore unanimously find that the sentence of life imprisonment without parole eligibility for twenty-five full years should be imposed upon (*insert name of defendant*).

(B) We, the jury, being duly impaneled and sworn, do hereby find that the aggravating circumstance(s) that the defendant was found guilty of committing, do(es) not outweigh the mitigating factors presented in this case by proof beyond a reasonable doubt.

We therefore unanimously find that the sentence of life imprisonment without parole eligibility for thirty full years should be imposed upon (*insert name of defendant*).

(C) We, the jury, being duly impaneled and sworn, do hereby find that the aggravating circumstance(s) that the defendant was found guilty of committing, do(es) not outweigh the mitigating factors presented in this case by proof beyond a reasonable doubt.

We therefore unanimously find that the sentence of life imprisonment without the possibility of parole should be imposed upon (*insert name of defendant*).

(D) We, the jury, being duly impaneled and sworn, do hereby find that the aggravating circumstance(s) that the defendant was found guilty of committing, do(es) outweigh the mitigating factors presented in this case by proof beyond a reasonable doubt.

We therefore unanimously find that the sentence of death should be imposed upon (*insert name of defendant*).

To render a verdict, all twelve jurors must agree and sign the particular verdict form. When all twelve jurors agree upon a verdict, all twelve jurors will sign the appropriate verdict form in ink and inform the bailiff. The bailiff will then return you to the courtroom.

Should you be unable to reach a verdict after complete and full deliberations, you shall advise the court accordingly in writing. You will then receive further instructions from the court.

27. FOREPERSON. The foreperson, whom you previously selected, may continue in that capacity or you may elect someone entirely different for this phase of the proceedings. The foreperson will make sure that your discussions are orderly and that each juror has an opportunity to discuss the case and to cast his or her vote. Otherwise, the authority of the foreperson is the same as any other juror.

28. CONDUCT WHILE DELIBERATING. Your initial conduct upon entering the jury room is a matter of importance. It is not wise to immediately express a determination to insist upon a certain verdict because, if your sense of pride is aroused, you may hesitate to change your position even if you decide that you are wrong. Consult with one another. Consider each other's views and deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourselves, but you should do so only after a discussion and consideration of the entire case with your fellow jurors. Do not hesitate to change an opinion, if convinced it is wrong. However, you should not surrender honest (convictions) (beliefs) in order to be congenial or to reach a verdict solely because of the opinion of the other jurors.

29. JURY HAS A QUESTION. If during your deliberations you have a question it should be discussed in the privacy of your jury room. It should not reflect the status of your deliberations. It should be reduced to writing so that there will be no misunderstanding as to what you request. It should then be delivered to the bailiff who will submit it to the court.

30. FINAL REMARKS. I will place in your possession the exhibits and the four verdict forms. The foreperson will retain possession of the exhibits and the verdict forms and return them to the courtroom when you have reached a verdict. These are the only exhibits you may consider. Until your verdict has been announced in open court, you are not to disclose to anyone else the status of your deliberations or the nature of your verdict.

Deliberation should take place only when all twelve jurors are in the jury deliberation room together. Should any one juror absent himself or herself at any time, all deliberations must cease until all twelve jurors are together in the jury deliberation room.

31. ALTERNATE JURORS. Those of you selected as alternate jurors to serve on this jury panel must remain and be sequestered until the jury has returned its verdict in open court. A juror selected as an alternate is not permitted to participate in the jury's deliberations unless one of the deliberating jurors is found by the court to be unable or disqualified to perform his or her duties. You will be taken to (*insert location*) apart from the other jurors and will remain under the direction of the bailiff(s) until the verdict is reached. The alternate juror(s) will not accompany the jury to the jury room or participate in deliberations unless directed by the court. The alternate juror(s) continue(s) to be a part of the jury panel while the

other jurors are deliberating until you are fully released from this case by the court. You shall not discuss this case with anyone or each other or tell anyone how you would have voted until you are fully released from this case by the court.

COMMENT

*Crim.R. 24(G)(2) provides that alternate jurors in capital cases shall continue to serve during all phases of the deliberations. Alternate jurors may not be present directly or indirectly in the jury room during any deliberation. Alternate jurors may be substituted during sentencing phase deliberations pursuant to Crim.R. 24(G)(2). If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew. If a substitution of an alternate is necessary during deliberations in the sentencing phase, the court should give the instruction found in the comment to OJI-CR **503**.01 § 26 that the juror is bound by the trial phase guilty verdict.*

32. SEQUESTRATION. You will be sequestered during your deliberations in the sentencing phase of this case. It is impossible for the court to determine the length of time that your deliberations will take. Take that time which you believe to be appropriate to thoroughly and carefully review all of the evidence and other information provided to you. The rules to be followed during sequestration will be identical to the rules which were followed by you during the trial phase of this case.

33. INSTRUCTIONS GIVEN TO THE JURY IN THE SENTENCING PHASE WHEN THEY ARE "DEADLOCKED." In a large portion of cases, absolute certainty cannot be attained or expected. Although the verdict must reflect the verdict of each individual juror and not mere acquiescence in the conclusion of other jurors, each question submitted to you should be examined with proper regard and deference to the opinion of others.

It is desirable that the case be decided. It is your duty to decide the case if you can conscientiously do so. You should listen to one another's arguments with a disposition to be persuaded. Do not hesitate to reexamine your views and change your position if you are convinced that it is erroneous. If there is disagreement, all jurors should reexamine their positions, given that a unanimous verdict has not been reached. Jurors for any of the verdicts should consider whether their doubt is reasonable, considering that it is not shared by others equally honest who have heard the same evidence and with the same desire to arrive at a verdict, and under the same oath.

Likewise, jurors for any of the verdicts should ask themselves whether they might not reasonably doubt the correctness of the judgment not concurred in by all the other jurors. You shall return a verdict of death if you unanimously, and that means all twelve, find beyond a reasonable doubt that the aggravating circumstance(s) outweigh(s) the mitigating factors. If you do not so find, you shall then begin deliberations on the life sentence options, and if possible, unanimously return a verdict of life imprisonment with parole eligibility after twenty-five full years, or life imprisonment with parole eligibility after thirty full years, or life imprisonment without the possibility of parole. However, you should not surrender honest convictions in order to be congenial or to reach a verdict solely because of the opinion of other jurors. If it is impossible for you to reach a decision in this case, please report this fact to the court in writing. You will now be excused to resume your deliberations.

COMMENT

"When a jury becomes irreconcilably deadlocked during its sentencing deliberations in the penalty phase of a capital murder trial and is unable to reach a unanimous verdict to recommend any sentence authorized by R.C. 2929.03(C)(2), the trial court is required to sentence the offender to life imprisonment with parole eligibility after serving twenty full years, or life imprisonment with parole

eligibility after serving thirty full years." State v. Springer (1992), 63 Ohio St.3d 167 , syllabus. Since Springer was decided, the General Assembly has modified the life sentence options to: life imprisonment with parole eligibility after serving twenty-five full years or life imprisonment with parole eligibility after serving thirty full years, or life imprisonment without the possibility of parole.

No exact line can be drawn as to how long a jury must deliberate in the penalty phase before a trial court should instruct the jury to limit itself to the life sentence options or take the case away from the jury, as done in State v. Springer (1992), 63 Ohio St.3d 167 . Each case must be decided based upon the particular circumstances. In State v. Mason, 82 Ohio St.3d 144, 1998-Ohio-370 , the Court found that after only four and one-half hours of deliberations, the trial court acted appropriately by giving a modified Howard [State v. Howard (1989), 42 Ohio St.3d 18] charge. The circumstances show that the jury was not irreconcilably deadlocked, and the modified Howard charge did not coerce a death verdict. The Ohio Supreme Court has approved using supplemental instructions urging jurors to continue deliberations to try to reach a unanimous penalty verdict. See, e.g., State v. Tyler (1990), 50 Ohio St.3d 24, 26 . Such supplemental instructions to a jury considering the death penalty do not violate due process. Lowenfield v. Phelps (1988), 484 U.S. 231 .

Source: Matthew Bender

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