IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	**Case No. 2014-0313**
	:	
Appellee,	:	
	:	***Death Penalty Case***
- vs -	:	
	:	
RICHARD JAMES BEASLEY,	:	
	:	
Appellant.	:	

On Appeal from the Summit County
Court of Common Pleas
Summit County, Ohio, Case No. CR201201069

AMENDED MERIT BRIEF OF APPELLEE STATE OF OHIO

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INTRODUCTION

To avoid returning to prison in Texas, Richard "Dutch" Beasley decided to go on the lam and change his identity. Needing a long-term, sustainable identification to avoid his outstanding warrant, Beasley – with the help of his juvenile accomplice Brogan Rafferty – lured Ralph Geiger to a friend's rural farm in Caldwell, Ohio, shot him in the back of the head, and buried him there. For nearly three months, Beasley, posing as Ralph Geiger, rented apartments, held a job, opened a bank account, and even sought and obtained pain medication. With Rafferty's help, Beasley introduced his recently successful scheme to a more global market – the world-wide web. While residing in Akron, Beasley (primarily posing as "Jack") used his landlord's kitchen computer to post a series of advertisements on Craigslist seeking a farmhand to oversee a fictitious large cattle farm in southern Ohio. Beasley screened responses, made email contacts with applicants, and conducted interviews. David Pauley, Scott Davis, and Timothy Kern, all seeking employment, responded to the advertisements, were offered jobs, and accepted the position. For individuals hit hardest by a bad economy – Pauley, Davis, and Kern – Beasley's opportunities sounded like the promise of a new beginning. Unfortunately, those promises were too good to be true. Like Ralph Geiger, Beasley and Rafferty escorted David Pauley and Scott Davis to a remote, wooded area and shot them. Like Ralph Geiger, David Pauley was shot in the back of the head and buried in the woods. Fortunately for Scott Davis, due to a gun malfunction, he avoided that fate. After suffering a gunshot wound to the arm, Davis was able to escape, hide in the woods, and then alert police. Undeterred, Beasley continued his scheme, and duped Tim Kern to his death behind an abandoned mall in Akron. For these callous and depraved murders, the jury recommended that Beasley receive the death penalty, which trial judge imposed, along with several, well-deserved consecutive sentences for his non-capital crimes.

Because Beasley received a fair trial and well-deserved sentence, the State of Ohio asks this Court to affirm the judgment below.

STATEMENT OF THE CASE

Indictment.

Richard Beasley was indicted for, and charged with, nine separate counts of aggravated murder, a single count of attempted murder, four counts of aggravated robbery, four counts of kidnapping, four counts of having a weapon under disability, and one count of identity fraud. Counts (1), (2), and (3) charged, and dealt with, the aggravated murder of Ralph Geiger. (R. 2, Indictment; p. 2-7.) Counts (1), (2), and (3) each carried a gun specification [2942.145] a mass-murder specification [2929.04(A)(5)]; an aggravated robbery specification [2929.04(A)(7)]; a kidnapping specification [2929.04(A)(7)]; and a murder under detention specification [2929.04(A)(4)]. (R. 2, Indictment; p. 2-7.) Counts (4), (5), and (6) charged, and dealt with, the aggravated murder of David Pauley. (R. 2, Indictment; p. 8-13.) Like Counts (1), (2), and (3), counts (4), (5), and (6) carried the same specifications (gun specification, mass-murder specification, aggravated robbery specification, and kidnapping specification). (R. 2, Indictment; p. 8-13.) (R. 2, Indictment; p. 8-13.) Counts (7), (8), and (9) dealt with the aggravated murder of Timothy Kern. (R. 2, Indictment; p. 14-19.) Each count carried the same specifications. (R. 2, Indictment; p. 14-19.) Count (10) dealt with the attempted murder of Scott Davis [2903.02(A)/2923.02], which carried a firearm specification [2941.145]. (R. 2, Indictment, p. 20.) Counts (11), (12), (13), (14), charged, and dealt with, the aggravated robberies of Ralph H. Geiger, David M. Pauley, Scott W. Davis, and Timothy J. Kern. (R. 2, Indictment, p. 20-22.) The aggravated robbery charges carried gun specifications. (R. 2, Indictment, p. 22.) Counts (15), (16), (17), (18), charged, and dealt with, the kidnappings of Ralph Geiger, David Pauley, Scott Davis, and Timothy Kern. (R. 2, Indictment, p. 22-23.) Each charge of kidnapping carried

a gun specification. (R. 2, Indictment, p. 24.) Counts (19), (20), (21), and (22) charged having weapons while under disability [2929.13(A)(1)/(2)]. (R. 2, Indictment, p. 24-26.) Count (23) charged identity fraud [2913.49(B)(1)]. (R. 2, Indictment, p. 26.) Counts (24) and (25) charged Beasley with grand theft [4501.01, 2923.11, 2913.02(A)(1)] for stealing David Pauley's truck and gun. (R. 2, Indictment, p. 27.) Counts (26) and (27) charged Beasley with petty theft [2913.02(A)(1) – misdemeanors] for stealing miscellaneous property from David Pauley and Timothy Kern. (R. Indictment, p. 28.)

Pre-trial.

On January 25, 2012, Beasley was arraigned upon indictment, pled not guilty, and was appointed attorneys – Brian M. Pierce and Rhonda L. Kotnik. (R. 11 - 2/2/12 Entry; Arraignment Tr. p. 1-69.) On March 2, 2012, Beasley's attorneys requested funds for defense psychologist – John Fabian. (R. 25; Def. Mo. 4.) They also requested funds for an investigator, Tom Rea, and a mitigation specialist, Cecil McDonnell. (R. 26 & 27; Def. Mot. 2 & 3.) The trial court authorized funds for all three. (R. 30-32; Orders re: Mot. 2, 3, 4.) On June 12, 2012, attorneys for Beasley requested funds to hire a forensic computer expert – Mark T. Vassel (Midwest Data Group). (R. 61; Def. Mot. 7.) The trial court authorized funds for a forensic computer expert, and ordered Ohio Bureau of Criminal Investigation (BCI) to copy all computer hard drives seized. (R. 66; Order re: Mot. 7.) Due to the massive amount of discovery provided, defense counsel requested the assistance of attorney Frank Bartela "to aid the defense in the preparation and organization of documents in this matter." (R. 86; Def. Mot. 10.) The trial court granted this motion. (R. 95; Order re: Mot. 10.) On September 4, 2012, defense counsel requested that the trial court order the Akron Police Department, Gang Unit, to produce all documents relating to Beasley as a confidential informant, and documents relating to Jerry Hood Sr. and Jerry Hood

Jr., Mike Rafferty (Brogan's father), and the Brothers and North Coast Motorcycle clubs. (R. 222; Def. Mot. 71.) After considering these documents "en camera," and then providing those documents to both parties, the trial court was notified "the parties had come to an agreement regarding the documents" and found the motion moot. (R. 391; Order re: Mot. 71.) Defense counsel also moved to suppress all evidence obtained during the search of 456 Gridley Ave. in Akron. (R. 223; Def. Mot. 72.) The trial court denied Beasley's motion to suppress. (R. 275; 11/20/12 Entry re: Mot. 72.)

On August 3, 2012, defense counsel submitted a proposed juror questionnaire to be completed by prospective jurors before *voir dire*. (R. 134; Def. Mot. 31.) On the same day, defense counsel filed a motion for change of venue. (R. 135; Def. Mot. 32.) The trial court held Beasley's motion for change of venue in abeyance until *voir dire* was completed. (R. 266; 11/20/12 Entry re: Mot. 32.)

On September 17, 2012, James L. Burdon and Lawrence J. Whitney, entered notice of appearances as retained counsel for Beasley. (R. 226; 9/17/2012 notice.) Defense counsel filed a notice of its intent to use Dr. John Fabian (psychologist), Tom Rea (investigator), Cecil McDonnell (mitigation specialist), and Mark Vassell (computer forensic expert). (R. 647; 10/19/2012 - Def. Notice of Intent to Defense Team.) On November 9, 2012, the Court issued a proposed long form jury questionnaire that was to be provided to prospective jurors. The trial court gave a deadline – 11/9/2012 – to file objections or request additions. (R. 232; 10/5/2012 Entry.) On November 20, 2012, the trial court, noting a lack of objections or suggested additions, adopted its long form proposed questionnaire. (R. 266; 11/20/12 Entry re: Mot. 31.)

On December 7, 2012, trial counsel requested the trial court to continue the trial date because "mitigation preparation is well behind schedule and cannot be completed" by the trial

date because the "psychologist reported… that the mitigation strategy testing and report could not be completed" in time. (R. 308; 12/7/12, Def. Mot. 73; 12/14/12 Hrg. Tr. p. 1-4.) The trial court vacated the existing trial date and granted the continuance until February 19, 2012. (R. 311; Order re: Mot. 73.)

Trial.

Voir dire began on February 19, 2013, and was conducted at the Civic Theater, because two hundred and thirty potential jurors were summoned for jury duty. (Tr. p. 22.) After a jury was seated and sworn, opening statements were given on February 25. (Tr. 1249.) The State called 42 witnesses and rested on March 6. (Tr. 2871.) On behalf of Beasley, the defense moved for a directed verdict which the trial court denied as to every count except Count 25 (theft of a gun from David Pauley) which the court granted. (Tr. 2874.) On March 6, the defense began its case and chief and presented four witnesses. (Tr. 2877.) Richard Beasley took the stand and testified on his own behalf. (Tr. 2877-2999.) On March 7, the State presented its rebuttal case. (Tr. 2083.) On March 11, the parties gave closing arguments.

On March 12, the jury found Beasley "guilty beyond a reasonable doubt" for the aggravated murder of Ralph Geiger in Counts (1), (2), and (3), and all four death penalty specifications (mass murder, aggravated robbery, kidnapping, and murder under detention) for each count. (Tr. 3479-95; R. 523-543; Verdict Form – Count 1, 2, 3; Verdict Forms on Specifications for each Count.) The jury found Beasley guilty of the aggravated murder of David Pauley in Counts (4), (5), and (6), and all four death penalty specifications. (Tr. 3479-95; R. 544-564; Verdict Form – Count 4, 5, 6; Verdict Forms on Specifications for each Count.) Likewise, the jury found Beasley guilty of the aggravated murder of Timothy Kern in Counts (7), (8), and (9), and all four death penalty specifications. (Tr. 3479-95; R. 565-585; Verdict Form –

Count 7, 8, 9; Verdict Forms on Specifications for each Count.) Although the jury found that Beasley was "not guilty" of being the principal offender (i.e. shooter) for the two felony-murder specifications – aggravated robbery and kidnapping – in Tim Kern's murder, they did find he acted with prior calculation and design. (Tr. 3479-95; R. 567, 569, 574, 576, 581, 583.) The jury also found Beasley guilty of the attempted murder of Scott Davis in Count 10. (Tr. 3479-95; R. 586; Verdict Form – Count 10.) The jury found Beasley guilty of all four counts of aggravated robbery and kidnapping. (Tr. 3479-95; R. 587-594, Verdict Form – Counts 11-18.) Beasley was also convicted of four counts of having a weapon under disability, identity fraud, grand theft, and two counts of petty theft. (Tr. 3479-95; R. 595-602 - Verdict Form – Counts 19-27.)

Penalty phase:

The trial court merged Counts (2) and (3) into Count (1); merged Counts (5) and (6) into Count (4); and merged Counts (8) and (9) into Count (7). (R. 3/21/13 Entry.) The penalty phase began on March 20, 2011. (Mit. Tr. Hrg. p. 4.) To support their mitigating factors, Beasley called three witnesses: Bill Jeffries (best friend), Carol Beasley (mother), and Dr. John Fabian (psychologist). (Tr. 58-162.) After deliberating, the jury found that the "aggravating circumstances that (Beasley) was found guilty of committing, do outweigh the mitigating factors" and imposed a sentence of death upon Beasley for the aggravated murders of Ralph Geiger, David Pauley, and Timothy Kern. (Tr. 232-35; R. 618, 622, 626 – Verdict Forms; 3/21/13 Entry.) On April 4, 2011, Judge Callahan, the presiding trial judge, accepted the jury's recommendation and sentenced Beasley to death. (Tr. 7-8; R. 638, 699 – Judgment, Sentencing Opinion.)

STATEMENT OF THE FACTS

Chart of Key Dates

August 8, 2011	Ralph Geiger leaves Akron homeless shelter and is never seen in Akron again
August 9, 2011	Ralph Geiger checks out of Caldwell, Ohio Best Western; Rafferty's cellphone and 4914 prepaid cellphone connected to Caldwell, Ohio cell tower. Geiger is never seen again.
Late August 2011	Beasley uses Ralph Geiger's name while employed with Waltco Inc.; a PNC bank account is opened in Geiger's name, using Joyce Grebelsky's address; 4914 prepaid cellphone linked to Joe Bias, owner of 2585 Shelburn, and Beasley begins to reside at 2585 Shelburn Ave. as Ralph Geiger
September 2011	Beasley uses Ralph Geiger's name in seeking medical treatment at Akron Community Health Clinic
September 5, 2011	Jerry Hood, Sr. falls and sustains serious head injury; he is hospitalized for a couple of months and remains incapacitated
October 9, 2011	Scott Davis responds to Beasley's email address provided in Craigslist posting; David Pauley responds to Beasley's email address provided in Craigslist posting
October 10, 2011	Tim Kern responds to Beasley's email address provided in Craigslist posting
October 22, 2011	David Pauley last speaks to twin sister, Debra Bruce, telling her he rented U-Haul in Virginia and is travelling to Ohio for farmhand job; David Pauley spends night in Parkersburg, West Virginia; 8961 prepaid cellphone connects with David Pauley's cellphone
October 23, 2011	8961 prepaid cellphone connects to David Pauley cellphone near Caldwell, Ohio; 8961 prepaid cellphone connects with Donald Walters' cellphone first in Cambridge, Ohio, then in Akron, Ohio; Beasley brings U-Haul full of property, later identified as David Pauley's property, to store at Walters' home
October 24, 2011	Beasley returns to Akron U-Haul Moving & Storage a U-Haul that had been picked up in Virginia and was scheduled for return in Marietta, Ohio.
November 1, 2011	Beasley moves to 456 Gridley Ave., renting a room under the name of Ralph Geiger

November 6, 2011	1804 prepaid cellphone connects with Scott Davis's cellphone twice, first near Caldwell, Ohio, then near Marietta, Ohio; Scott Davis meets Beasley and Rafferty at Shoney's in Marietta and they travel to farm; Beasley shoots Scott Davis in woods near the graves of Geiger and Pauley; Davis escapes and notifies Sheriff; Sheriff begins investigating Hood family; Sheriff learns Jerry Hood, Jr. still has long beard, which is inconsistent with Davis's description of the shooter
November 8, 2011	Investigators find Scott Davis's hat in the woods
November 9, 2011	Tim Kern's son drives him to interview at the Arlington Road Waffle House for farmhand job; 5353 cellphone makes connection with Tim Kern's cellphone near the Arlington Road Waffle House
November 11, 2011	Debra Bruce contacts Ohio authorities about her missing brother, David Pauley
November 13, 2011	Tim Kern reports for work as farmhand and is not seen again
November 14, 2011	David Pauley's body is found near where Scott Davis's hat was found; an additional empty grave is found
November 16, 2011	Investigators search 2585 Shelburn Ave. home, which is linked to IP address of email listed in Craigslist postings, and interview homeowner, Bias; investigators locate a former tenant, Beasley, on Gridley Ave. and arrest him and search his room; investigators arrest Brogan Rafferty and search his home
November 17, 2011	Beasley's letter to Joyce Grebelsky, telling her to destroy laptops and sell truck, is postmarked
November 21, 2011	Tina Kern contacts the FBI about her missing ex-husband, Tim Kern
November 25, 2011	Investigators discover Ralph Geiger's body near where David Pauley's grave and Scott Davis's hat were discovered; investigators also discover Tim Kern's body in a grave behind the Rolling Acre Mall in Akron; Joyce Grebelsky tells authorities about letter from Beasley, requesting destruction of laptop and sale of truck
December 2, 2011	FBI interviews Donald Walters and seizes property given to him by Beasley and identified as belonging to David Pauley

1) ***In the late summer of 2011, Ralph Geiger takes a job as a farm hand is southern Ohio and is not seen again.***

During the summer of 2011, Ralph Geiger had fallen on tough times, and had been living in a homeless shelter called "Haven of Rest" in Akron, Ohio. (State's Ex. 98 – business record; Tr. 1323-24, 37, 40-41.) Geiger had once owned his own construction company; but with a downturn in the economy, he had lost everything. (Tr. 1321-22.) That summer, Geiger told a friend, Summer Rowley, that he got a job as a farmhand in southern Ohio. (State Ex. 35 – photo of Summer and Ralph; Tr. 1326-27.) Geiger left for his new job in early August. Geiger told Summer that his new boss was picking him up at the shelter and driving him to the farm. (Tr. 1327-1330.) Geiger left the shelter on August 8, 2011, telling a shelter employee (Dwight Johnson) he got a job as a farmhand in southern Ohio. (State's Ex. 98 – Haven of Rest record; Tr. 1341-44.) After he left Akron, Ralph Geiger was not heard from again. (Tr. 1344.)

Evidence of Ralph Geiger next appeared in Caldwell, Ohio. A Best Western hotel manager, located in Caldwell, produced a guest registration record that contained Geiger's signature and cell-phone number (#330-431-5411). (State's Ex. 34 – Best Western registration record; Tr. 1348-53, 1330-33.) Summer Rowley identified Ralph Geiger's signature on the registration record. (State's Ex. 34 – Best Western registration record; Tr. 1331-32.) According to the guest registration record, Geiger checked in at the Caldwell Best Western August 8, 2011, at 8:00 pm, and checked out the next day at 6:22 am. (Tr. 1348-53.) The guest registration record also displayed a photocopy of Ralph Geiger's Ohio driver's license. (State's Ex. 34 – photocopy of Geiger's Ohio license.)

2) Several months later, Scott Davis appears from the woods, wounded, at the Shockling residence.

Several months after Ralph Geiger disappeared, on the night of November 6, 2011, in a rural area outside of Caldwell, Ohio, Jeffrey Schockling was at home watching television. (Tr. 1425-26.) Hearing the doorbell ring, and responding, Schockling encountered a frantic man seeking help. (Tr. 1427-28.) The man identified himself as Scott Davis. (*Id*.) According to Schockling, Davis was pale and had a bloody wound on his arm. (Tr. 1427-28.) Schockling called 911. (Ex. 7B – 911 call.) Davis told Schockling that he came to Ohio for a job building fences. (Tr. 1434-35.) Davis also said his truck and trailer were parked in Caldwell, and he was concerned they had been stolen. (Tr. 1435.) Davis then said "I got all the documentation sitting on my dashboard, all the e-mails and everything." (Tr. 1436-37.) Davis then exclaimed "I knew I was in trouble when I heard the click." (Tr. 1436-37.)

3) Davis explains how he found a farm-hand job on Craigslist and sought employment.

When the Noble County Sheriff Stephen Hannum arrived at the Schockling residence, he took a statement from Davis and took photos of Davis' injuries. (St. Ex. 2B thru 6B; Tr. 1484-1486.) Davis explained that he was a self-employed landscaper, living in South Carolina, who wanted to relocate back to Ohio to take care of his mother. Searching Craigslist for a job, Davis saw a posting for "a job working for a cattle farm." According to the advertisement, the farm was 688 acres, was furnished with a trailer, and paid $300.00 a week. Davis responded to the advertisement. (State's Ex. 1; Tr. 1447-48.) A person named "Jack," who used the email address of rohandannaher@gmail.com, requested a copy of Davis' driver's license to conduct a background check. Davis emailed his driver's license information. (State Ex. 9B; Tr. 1450-52.) On October 26, Davis sent an e-mail, which read "Hey Jack, I thought I would drop a quick note to see if you got may background check yet… Thanks Scott." (State Ex. 10B.) Shortly

thereafter, Davis received an e-mail from rohandannaher@gmail.com, which read "You passed okay. I got the call from the courthouse Tuesday. I will call you after six p.m. EST and discuss things." (Ex. 10B – email; Tr. 1454-55.)

4) Davis travels to Ohio to meet "Jack."

Later, Davis received a phone call from Jack, informing Davis that he got the job. (Tr. 1455.) Jack advised Davis that his truck and equipment would be "plus" for the job. (*Id*.) Davis packed his things into a truck and trailer, and departed South Carolina on a Saturday morning. (St. Ex. 24-29 – photos of Davis property; 1458-61.) That night, when Davis stopped for the night in West Virginia, Davis spoke to Jack over the phone and made arrangements to meet at Shoney's restaurant the next morning in Marietta, Ohio. (Tr. 1462-63.) Sunday morning, Davis called Jack from Shoney's parking lot. (Tr. 1464.) Per video surveillance, at 9:41 a.m., Davis sat down with Jack and a young man for breakfast. (Ex. 2; Tr. 1466-68.) According to Davis, it appeared that Jack had just shaved and "missed a whole bunch[.]" (Tr. 1467.) Davis also noticed that Jack had a tattoo on his left arm. (Tr. 1468-70.) Jack introduced the "taller, blonde hair, young" man as his nephew. (Tr. 1664.) At trial, Davis identified the nephew as Brogan Rafferty. (State Ex. 16B; Tr. 1491-92.) At trial, Davis identified Beasley as the person called "Jack" who met him at Shoney's. Davis also identified the tattoo on Beasley's left arm. (Tr. 1469-1470.)

5) Jack, his nephew, and Davis head out to the cattle farm.

After breakfast, after parking his truck and trailer, Davis got into the rear passenger back seat of a white car driven by Jack's nephew. (State Ex. 5 – photo of Rafferty's Buick; Tr. 1471-72.) Jack was seated in the front passenger seat. They drove back roads to a rural farm area. (State Ex. 10, 11, 12, 18 and 19 – photos of rural roads; Tr. 1472-74.) Jack instructed his

nephew, "Drop me off where we got the deer last week." (State Ex. 20 & 21; 1475-76.) Jack and Davis exited the car and walked into the woods. (Tr. 1476.)

6) Inside the woods, Jack shoots Davis.

Davis followed Jack as they walked alongside a creek. (Tr. 1476.) Well inside the woods, Jack said "Forget this, let's turn around and take the roadway there." (Tr. 1477.) Davis and Jack proceeded to turn around. According to Davis, at that point, Jack was directly behind him. Davis then heard Jack utter a curse word and then heard a click. (1477-78.) Davis "spun around" and saw Jack pointing a gun directly at his head. (Tr. 1478.) Davis explained the gun fired and a bullet struck him in the right elbow. (Tr. 1482.) Astonished, Davis asked "what are you doing?" As Davis turned and ran through the woods, Beasley shot three more times. (Tr. 1478-80, 1514-1518.) Running through the woods, Davis lost his hat.[1] (Ex. 22 & 23 – photo of Davis' hat; Tr. 1480-82.) Shot and bleeding, Davis hid in the woods for seven hours. (Tr. 1481-82.) Davis eventually walked out the woods and came upon the Shockling home, where he contacted police. (Tr. 1482-83.)

7) Noble County Sheriff investigates the Hood family.

After taking his statement, Sheriff Hannum was admittedly skeptical about Davis' story. (Tr. 1485-1488; 1535.) Hannum knew of no large cattle farm in Noble County. (*Id*.) Furthermore, the shooting took place close to the residence of Jerry Hood Sr. (a/k/a "Country"), a person he suspected of illegal drug activity. (Tr. 1536-37.) Sheriff Hannum suspected that Davis could have been involved in a drug deal gone bad with Jerry Hood, which resulted in a shooting. (Tr. 1551.) After interviewing Davis, Sheriff Hannum drove to a local diner (the Ashton Inn) and interviewed Lois Hood, Jerry's wife. (Tr. 1541.) To his surprise, Sheriff

[1] This was a special hat to Davis because his father had given it to him. (Tr. 1480-81.)

Hannum learned that her husband, a few weeks before, had fallen and suffered a severe head injury, and was currently disabled. (Tr. 1542; 1400-01, 3090.) Sheriff Hannum then asked Lois to call her son, Jerry Hood Jr. (a/k/a "County"). (Tr. 1542.) Speaking directly to Jerry Jr. on the phone, Hannum learned that Jerry Jr. still had his long beard which was inconsistent with Davis' description of the shooter – "Jack." (Tr. 1543, 1413, 3104.)

According to Sheriff Hannum, a few weeks before the shooting, as a courtesy, the U.S. Marshall's Service notified his office that they were conducting surveillance of the Hood farm looking for a person named Beasley. (Tr. 1565-66; 2525-2527.) Beasley was a known associate of the Brother's motorcycle gang and it was reported that he might be found at the Hood farm. (*Id*.)

8) Beasley had known the Hood family for years.

At trial, Lois Hood testified that she and her husband owned a 120 acre farm in Noble County. (Tr. 1398.) She also testified that she knew Beasley because "he was a friend of my husband and married my sister." (Tr. 1399.) She said they had known Beasley for "ten years or more." (*Id*.) Lois recalled that Beasley had visited her family farm "three or four" times. (Tr. 1399-1400.) After Jerry Sr.'s accident, around October of 2011, Beasley went to Akron General Hospital to visit "twice," while her husband Jerry Sr. was in I.C.U. and surgery. (Tr. 1402.) At the hospital, Beasley gave her a phone number to reach him: (330) 256-7629. (Tr. 1406.) Around this same time, on two occasions, Beasley and a young man came to the Ashton Inn, where she worked, and ordered food. (Tr. 1403.)

9) Investigators review surveillance from Shoney's.

On the night of November 6, 2011, Noble County Det. Mackie, received a phone call from Sheriff Hannum about the Davis shooting. (Tr. 2502.) Det. Mackie obtained surveillance

video from Shoney's restaurant in Marietta, Ohio. (State's Ex. 2 – video surveillance; Tr. 2508.) The video footage was file stamped: November 6, 2011, at 9:41 AM. (Ex. 2; Tr. 2507-08.) At trial, Det. Mackie identified Beasley and Rafferty as the persons in the video. (Tr. 2508.) When shown the video, Lois Hood denied that any persons depicted were her son, Jerry Jr. (Tr. 1418.)

10) Deputy Mackie, and BCI, search the rural farm in Noble County.

On November 8, 2011, based on Davis' statement, Det. Mackie and BCI agent Burke traveled to the Don Warner Rd. area to search for Davis' lost hat. (State Ex. 37-43 – photos; Tr. 1759.) They found the hat in a stream about 25 feet from Don Warner Rd. (State's Ex. 22, 23, & 42 – photos of hat; Tr. 2512-13.) The hat bore the slogan "Live to Ride." (State's Ex. 93 – photo of hat; Tr. 1765-66.) At that juncture, Det. Mackie contacted the F.B.I. field office in Cambridge. (Tr. 2512-13.)

11) After reading about the Davis shooting, Debra Bruce contacts Ohio authorities about her missing brother.

Five days after the Davis shooting, on November 11, 2011, Det. Mackie received a phone call from Debra Bruce (who resided in Maine) who was concerned about her missing twin brother, David (a resident of Virginia). (Tr. 1726-28, 2513.) According to Debra, her brother, David Pauley, had been living in Norfolk, Virginia. (Tr. 1728.) Even though she and her brother spoke regularly, she had not seen nor heard from David since October 22, 2011. (Tr. 1727, 1736, 2514.) According to Debra, David was currently unemployed. (Tr. 1730.) Debra explained that David was "excited" because he had recently found a job on the internet as a farmhand after responding to a Craigslist job posting. (*Id*.) Debra learned the job was on a 668-acre farm and paid $300 a week. (Tr. 1731.) Debra said David packed up his truck, and a rented trailer, and travelled to Ohio. Her older brother, Richard Pauley, had given David money for a U-Haul trailer and she had paid for David's hotel room in Parkersburg, West Virginia for the night of Oct. 22,

2011. (Tr. 1732-34.) That night, David told her he was meeting with his new boss the following morning. (Tr. 1735.) Three days later, after not hearing from David, Debra "knew something was wrong" and eventually contacted the West Virginia authorities and filed a missing persons report. (Tr. 1736-38.) A few days later, after reading about the Davis shooting on the internet, Debra called the Noble County Sheriff's Office. (Tr. 1739-40.) Thereafter, Debra sent Det. Mackie emails where her brother David had communicated with "Jack," similar to those provided by Davis. (Tr. 2513.) Over the next several days, she was contacted and interviewed by the F.B.I. (Tr. 1727-43.)

12) David Pauley's body is found near the location where Scott Davis' hat was recovered.

Based on the internet investigation and the phone call from Debra Bruce, on Monday, November 14, 2011, a team of BCI agents, local authorities, and the FBI went back to the shooting scene near Don Warner Rd. (Tr. 1770-71.) Investigators soon discovered three hand-dug holes. (St. Ex. 46, 47, 48, 49; Tr. 1773-1775.) One hole, which resembled a grave, was a couple of feet deep, more than two feet wide, and eighty inches long. (State Ex. 46 & 47 – photos of empty grave; Tr. 1772.) This hole was one hundred and seventy-five feet from Don Warner Rd. (*Id*.) The other two holes were "rocky with minimal depth and [omit] size." (Tr. 1774.) Scott Davis' hat was recovered from approximately the same location. (Tr. 1765-66.)

The following day, investigators returned with cadaver dogs and searched a ridge line area. (Tr. 1776-77.) Investigators found a 10 ft. x 10 ft. area of disturbed soil. After cadaver dogs alerted to the site, an excavation ensued. (Tr. 1778-79.) Investigators unearthed human remains that were later identified as David Pauley. (Ex. 50, 51, 52, 62 – photos of Pauley grave; Tr. 1780-86.) Pauley's grave was located one-quarter mile from the three open holes. A large black cord necklace with a cross was recovered from the body. (State's Ex. 63 – autopsy photo;

Ex. 31B – necklace; Tr. 1785-86.) Debra Bruce identified the leather and silver necklace as belonging to her brother. (Ex. 31B – necklace; Tr. 1743.) An autopsy revealed that Pauley died from a gunshot to the back of the head. (Ex. 65 – x-ray; Ex. 278 – Pauley autopsy report; Tr. 1787-88, 2793, 2803-06.) Medical testimony showed that Pauley had been deceased and buried about "two to three week(s), but it could have been longer[.]" (Tr. 2797.) Authorities were also able to identify Pauley's body through fingerprint analysis. (Tr. 2808.)

13) The FBI contacts Craigslist and Time Warner, and requests information relative to farm-hand advertisements.

The FBI then pursued information from Craigslist and Time Warner. FBI agent Corey Collins, assigned to cyber-crimes, contacted Craigslist requesting information related to two Craigslist online classified advertisements. (Ex. 17B; Tr. 1602-16.) Craigslist is an "online classified ad system" where a person can create an advertisement posting (listing their phone number or email address) where others can see the advertisement and reply if they are interested. (Tr. 1607.) One job listing had been posted to viewers in the Akron/Canton area (ad # 2641310840) and the other listing had been posted to viewers in the Cleveland area (ad # 2641310840) (Tr. 1611.) Both advertisements were posted by the same poster, whose email address was rohandannaher@gmail.com, and IP address was 76.289.59.26. Craigslist found and provided two additional job listing ads with the same email address, rohandannaher@gmail.com, and the same IP address (76.189.59.26). (State Ex. 17B – Craigslist emergency request response; Tr. 1616-24.) An IP address is the computer or internet connection that actually made the post. (Tr. 1621.) In other words, an IP address "is kind of like a unique identifier, like phone number or unique ID for an internet account that accessed Craigslist and made that post at that date and time[…]" and are unique to "a particular address." (Tr. 1622.)

14) The IP address, the advertisements, and rohandannaher@gmail.com are linked to 2685 Shelburn Ave. in Akron.

FBI agent Collins determined that IP address 76.189.59.26 used internet provider Time Warner. (Tr. 1624.) Responding to FBI inquiries regarding the IP address, Time Warner notified authorities that the subscriber for this particular IP address was Joe Bias, 2685 Shelburn Ave., Akron, Ohio. (Ex. 20B – Time Warner emergency request response; Tr. 1625-29.) Agent Collins testified that Craigslist advertisement (#2638420563) was created October 7, 2011 and had a listed telephone of (330) 256-7629 for the ad creator. (Ex. 17B; Tr. 1629-1630.) This was the same phone number Beasley gave Lois Hood at the hospital. (Tr. 1406.)

Records showed an email address of scottstp1@aol.com responded to rohandannaher@gmail.com on October 9, 2011 at 12:38 PM. (Tr. 1631-36.) In regards to advertisement #2640525866, the email DeWalt@embarqmail.com responded to rohandannaher@gmail.com on October 10, 2011 at 6:17 AM; and dave1160@zoominternet.net responded to rohandannaher@gmail.com on October 10, 2011 at 7:04 PM, 7:11 PM, and 7:13 PM. (Tr. 1633-1636.) Another advertisement (#2641310840) was created on October 9, 2011 at 5:33 PM by rohandannaher@gmail.com. Email rpauley46@cox.net responded to rohandannaher@gmail.com on October 9, 2011 at 7:19 PM; and email timkern44@gmail.com responded to rohandannaher@gmail.com on October 10, 2011 at 6:44 AM. (Tr. 1636-39.) In regards to advertisement #2638420563, email brown49ford@yahoo.com responded to rohandannaher@gmail.com; and email DeWalt@embarqmail.com responded to rohandannaher@gmail.com on October 10, 2011 at 10:04 PM. (*Id*.)

Because the Craigslist response (Ex. 17B) did not supply the text of the emails, Agent Collins contacted Google. (Ex. 19B – Google search warrant response; Tr. 1639.) Google provided the text of emails to and from rohandannaher@gmail.com. (Ex. 25B – Rohandannaher

Gmail search warrant compliance book dated 10/4/11; 26B – Rohandannaher Gmail search warrant compliance book dated 10/12/11; Tr. 1641-45.) On November 12, 2011, Google reported that rohandannaher@gmail.com account was created on October 5, 2011, from IP address 76.189.59.26 and was deleted on November 12, 2011. (Ex. 19B.) Thus, the Craigslist advertisements were created from IP address 76.189.59.26, which was the same IP address that rohandannaher@gmail.com was created. (Ex. 17B & 19B; Tr. 1688-89.) Both the IP address (76.189.59.26) and email address (rohandannaher@gmail.com) were linked to the 2585 Shelburne Ave. address. (Tr. 1625-1629.)

The FBI obtained numerous emails to and from the email account rohandannaher@gmail.com responding to the Craigslist advertisement and seeking employment as a farmhand. (State's Ex. 25B & 26B – email messages provided by Google) These included, but were limited to, George Brown, using brown49ford@yahoo.com, who responded to Craigslist advertisement expressing an interest in the cattle farm caretaker job on October 7. (State's Ex. 18B – Brown email; Tr. 1643-45.) Scott Davis, using scottstp1@aol.com, also responded on October 9 to Craigslist advertisement noting "IM SELLING MY LAWNMAINTAINCE @ LANDSCAPING CO. @MOVING TO OHIO SO I CAN BE CLOSER TO MY MOTHER." (State's Ex. 22B – Scott Davis email; Tr. 1643-45.) That same day, David Pauley, using rpauley46@cox.net, sent an email response showing interest in the advertisement. (State's Ex. 25B – David Pauley email using his brother's account; Tr. 1654-56.) The following day, Dan DeWalt, using DeWalt@embarqmail.com, responded to the Craigslist advertisement and stated "I have a lot of tools and [omit] other item, generator, push mowers[,] air compressor, motorcycle, and an f350 dually flatbed truck[.]" (State's Ex. 23B – Dan DeWalt email; Tr. 1648-49.) That same day, David LeBlond, using dave1160@zoominternet.net,

responded by to the advertisement by noting his "experience in taking care of a farm and cattle." (State's Ex. 27B – David LeBlond email; Tr. 1649-51.) Tim Kern also responded that day, using timkern44@gmail.com, and provided personal information that "I am single… and have 3 wonderful sons…" (State's Ex. 24B – Tim Kern email; Tr. 1651-54.)

Investigators also determined that apart from Craigslist postings using the email address rohandannaher@gmail.com, there were similar advertisement and postings for a farm caretaker position to an internet service called Backpage.com using the email address wassalovpoplivitch@hotmail.com. (State's Ex. 110B – posting and emails on Backpage.com; Tr. 2717-21.) According to BCI Agent Mark Kollar, emails regarding the job posting were abundant and active on the wassalovpoplivitch@hotmail.com account up until Beasley's arrest. (Tr. 2719-21.)

15) Emails / applicants responding to the Craigslist "farm hand" advertisement are linked to Beasley.

After Daniel DeWalt received a response from his email, arrangements were made by telephone for a face-to-face interview. (Tr. 1695.) The potential employer identified himself as "Jack," and DeWalt was instructed to meet him at the Chapel Hill mall food court. (*Id*.) Jack said he would be wearing a red and blue hat, with an American logo. (State's Ex. 30B – American hat; Tr. 1696.) At the meeting, Jack told DeWalt his uncle recently inherited a farm near Caldwell, Ohio. (Tr. 1696-97.) Jack told DeWalt that there were plans to build a pole barn and bring in farm equipment, and they needed someone right away. (Tr. 1697.) Jack then questioned DeWalt about his dual-axle pickup truck, and also jotted down information from DeWalt driver's license. (Tr. 1697-98.) The following day, Jack went to DeWalt's home to inspect the equipment DeWalt intended to bring to the job. (Tr. 1698-99.) Jack told DeWalt that

his uncle may be interested in buying DeWalt's truck and other vehicles. A couple days later, Jack called DeWalt and told him he had the job. (Tr. 1695-1701.)

In preparation for his new job, DeWalt rented a U-Haul trailer and loaded it. (Tr. 1700.) Jack told DeWalt that the farm trailer was not quite ready, but he was willing to put DeWalt up in a hotel and place his property in storage. (*Id*.) DeWalt told Jack that he intended to bring his .25 caliber pistol. (Tr. 1701.) Jack instructed DeWalt not to bring any weapons, because only he was allowed to carry a weapon. (Tr. 1701-02.) DeWalt became suspicious when Jack said he wanted to immediately take possession and repair his vehicles, but would not pay for them until after DeWalt arrived at the farm. (Tr. 1702.) A dispute arose when DeWalt questioned Jack about taking possession of the vehicles before purchase. (Tr. 1703.) Taking offense, Jack told DeWalt he would have to speak to his uncle to see if the job offer was still good. (Tr. 1703-04.)

Suspicious, DeWalt checked online records to verify information Jack had relayed about the farm. (Tr. 1703-04.) DeWalt searched for property owned by "Gaylord" because Jack had said his uncle's name was "Bob Gaylord." (Tr. 1704.) DeWalt could not find any on-line information to confirm what Jack had told him. DeWalt called Jack and said "this ain't adding up." (*Id*.) In an e-mail dated October 15, 2011, Jack informed DeWalt the caretaker offer "didn't work out," and further instructed "that land is addressed on a lane called country lane and is in my uncles name which is Hood, I was given the wrong address[.]" (State's Ex. 29B – e-mail; Tr. 1704-07.) DeWalt identified Beasley as the person he knew as "Jack Gaylord" who interviewed him for the farm caretaker position. (Tr. 1707.)

George Brown also responded to the farmhand listing on Craigslist. (State's Ex. 18B – Brown email; Tr. 1717-19.) Like DeWalt, arrangements were soon made with "Jack" for a face-to-face interview at Chapel Hill food court. (Tr. 1720.) Brown was told to look for a man

wearing an American flag hat. (State's Ex. 30B – American hat; Tr. 1721.) Brown met a man at the food court, wearing such a hat, who identified himself as "Jack." (Tr. 1721.) During the interview, Brown told Jack that he was into martial arts and had work experience in security. (Tr. 1722.) Jack abruptly ended the interview. (Tr. 1723.) After the interview, Brown never heard anything further about the job. (*Id*.) Brown identified Beasley as the person he met regarding the farm hand job. (Tr. 1723-24.)

Likewise, David LeBlond responded to the Craigslist advertisement regarding "farm work." (Tr. 1709-10.) Arrangements were made by telephone for LeBlond to meet a man identifying himself as "Richard Bogner" at the Chapel Hill mall. (Tr. 1711.) LeBlond met a man and interviewed for the job. (Tr. 1712.) After the meeting, LeBlond heard nothing further about the job. (*Id*.) LeBlond identified Beasley as the person calling himself "Richard Bogner" who interviewed him about the farm hand position. (Tr. 1713.)

16) Beasley resides at 2585 Shelburn Ave in Akron.

The FBI then connected Beasley, known as Ralph Geiger, to his landlord, Joe Bias, owner of a home located at 2585 Shelburn Ave. in Akron, Ohio and subscriber to the IP address for the @rohandannaher email address. (Tr. 1915.) In August of 2011, Bias advertised basement living space in his home on Craigslist, and rented it to a man who identified himself as Ralph Geiger. (Tr. 1916-21.) The person posing as Mr. Geiger produced a driver's license in the name of "Ralph Geiger." (Tr. 1919.) At that time, Bias jotted down a note containing the name and social security number that he had been given by the person posing as Ralph Geiger. (Tr. 1936.) Later, investigators recovered that note where he jotted down "Ralph Geiger" and the social security number provided. (State's Ex. 104B - note; Tr. 2721-23.)

The person posing as Ralph Geiger went by the nickname "Dutch." (Tr. 1921.) Bias gave Dutch permission to use his computer in the kitchen and provided him with a password to his home internet service. (Ex. 100 – kitchen table computer; Tr. 1922-24.) Bias explained that because the kitchen computer was the fastest, Dutch would periodically sit at the kitchen table and use that particular computer. (Ex. 100 – kitchen table computer; Tr. 1922-25.) Later, Bias sold Dutch one of his laptop computers to use in the basement living space. (Tr. 1924-26.) In lieu of payment, Dutch asked Bias to take payment in the form of personal property. According to Bias, "Ralph Geiger… had a truckload of stuff. Some ammo cases with like bolts and nuts in it. I liked the ammo cases, so I bought some of those, some Christmas lights, he had a couple of train sets, just various stuff." (Tr. 1928-31.) Dutch told Bias he bought the stuff from a guy who was losing a storage unit. (Tr. 1937-38.) Bias also sold a Ford Ranger pickup truck to Dutch. (Tr. 1926-27.) Bias relayed that Dutch had the truck painted blue. (Tr. 1926-28.) According to Bias, Dutch Geiger lived in his home for a month and a half and moved out in early November. (Tr. 1925.)

On November 17, 2011, the FBI came to Bias' home and showed Bias a photo that he identified as the tenant who called himself "Ralph Geiger." (Tr. 1930-1932.) Bias denied ever setting up or using the email address rohandannaer@gmail.com. (Tr. 1932-33.) At trial, Bias identified Beasley as the tenant he knew as Ralph Geiger. (Tr. 1933-34.)

17) Beasley (a/k/a Dutch) moves to 456 Gridley Ave.

After moving out of the 2585 Shelburn Ave. residence, Beasley moved to 456 Gridley Ave. In late October, Penny Kaufman, a homeowner / tenant, responded to a Craigslist posting titled "A quiet man need(s) quiet space to live." (State's Ex. 21B; Tr. 2111-14.) Kaufman's responded "I've got a room up for rent. my name is Penny and you can call or text me at [omit] if

you want to know more." (State's Ex. 21B – Kaufman response; Tr. 1662-63.) A few days later, Kaufman received a telephone call from a man calling himself "Ralph Geiger." (Tr. 2114-15.) This Craigslist advertisement (#2633326272) was directly linked to the rohandnnaher@gmail.com email address. (Tr. 1663.)

Kaufman eventually rented a second floor room to a man identifying himself as Ralph Geiger, who also produced identification in that name. (Tr. 2114, 2119.) Her house was located at 456 Gridley Ave. (Tr. 2109.) Beasley, who was posing as Ralph Geiger and known by the nickname "Dutch," moved into the Gridley residence on November 1, 2011. (Tr. 2116.) A few days later, Dutch told Kaufman that he bought and sold storage units, and said that he purchased a storage unit in southeastern Ohio that included a Harley motorcycle and flat screen television. (Tr. 2117-18, 2121.) Dutch asked if he could store items in her basement. (Tr. 2121.) Later, Dutch told her the deal fell through, and he was robbed at gunpoint. (Tr. 2122-23.) Dutch told her the gun initially misfired, and after a struggle, one of the robbers was shot in the arm. (Tr. 2126-2129.) Dutch told a co-tenant, Richard Romine, that as he and the person who supposedly would attempt to rob him were looking under the hood of his car in southern Ohio, when he heard "click, click, click." According to Dutch, he turned and knocked the gun out of the assailant's hand, the gun hit a rock and fired, and a bullet hit the assailant. (Tr. 2167-69, 2174.) Thereafter, Kaufman gave police a set of keys and map of southeastern Ohio that belonged to Beasley. (State's Ex. 368; Tr. 2126-29.) At trial, Kaufman identified Beasley as her ex-tenant she knew as Ralph Geiger. (Tr. 2119.)

18) To avoid arrest, Beasley asks Grebelsky to call him "Ralph Geiger."

Ralph Geiger's identity was assumed by Beasley. At Beasley's request, Joyce Grebelsky, a long-time friend, began referring to Beasley as "Ralph Geiger." (Tr. 2301.) Grebelsky had

attended the same church as Beasley – "The Chapel." (Tr. 2297-99.) Grebelsky testified that Beasley told her he took on the new identity because he wanted to be a different person and avoid going back to jail. (*Id*.) Beasley showed her an identification card in the name "Ralph Geiger." (Tr. p. 2301-02.) Through Beasley, Grebelsky knew Brogan Rafferty who often attended church with Beasley. (Tr. 2300-01.) Grebelsky owned a house and resided at "2119 Cramer Ave." in Akron. (Tr. 2296.)

19) Grebelsky drives Beasley to southern Ohio to pick up his leather coat.

Grebelsky recalled that Beasley called her in distress. Beasley told her that he had been robbed of $3,000 dollars. He told her that a gun had been placed at his head, and misfired. Beasley persuaded Grebelsky to drive him to southern Ohio, in the middle of the night, to retrieve a leather coat he had lost. Grebelsky and Beasley drove that night on the highway past Cambridge, where he directed her to a secluded wooded area "way up a dirt road." He then had her stop the car, and he exited. Shortly thereafter, Beasley returned with the coat and said "I thank God I found my coat." (Tr. 2308-12.)

20) Beasley (a/k/a Dutch) is arrested on Gridley Ave.

After searching Bias's home and interviewing him on November 16, 2011, FBI agents determined they were looking for Beasley. (Tr. 2000-01.) Bias' computer laptop, which was located on the kitchen table and he allowed the tenants to use, was seized. Bias explained that he had no connection with the e-mail address rohandannaher@gmail.com, and had no knowledge of a farm in southeastern Ohio or posting advertisements on Craigslist recruiting farm-hands. (Tr. 1932-33.) At the request of police, Bias called Beasley. Bias kept Beasley on the phone long enough so that FBI agents, using cell-phone tracking technology, determined that Beasley was located on Gridley Avenue. (Tr. 1937, 2001-05.) Thereafter, agents found Beasley on Gridley

Ave. and arrested him. The FBI obtained warrant and searched Beasley's room on 456 Gridley Avenue.[2] (Tr. 2139.) Agents found NASCAR scrap book / memorabilia (State's Ex. 99), an ammo box with shotgun shells, and a green Coleman cooler containing the model train set (State's Ex. 105). Agents also found a letter from PNC Bank, documents from St. Thomas Hospital, and pill bottles – most of these items listed Ralph Geiger's name on them. (State's Ex. 179 – documents relating to Ralph Geiger; Ex. 37B, 38B, 180, 181, 182, & 183 – pill bottles showing the name "Richard Beasley" filled on 7/14, 7/15; and pill bottles in the name of "Ralph Geiger" filled on 9/20, & 9/27; Tr. 2149-56.) At his arrest, Beasley was wearing – and police confiscated – a red American logo hat and a black leather jacket. (State's Ex. 98B – black leather jacket; Ex. 30B – red American logo hat; Tr. 2777.)

21) Police arrest Brogan Rafferty and search his home.

On that same day, the FBI executed a search warrant on the residence of Brogan Rafferty located in Stow, Ohio. (State's Ex. 201-212 – photos of home; Tr. 2178-2202.) Agents seized the car routinely used by Rafferty – a white Buick LeSabre. (State's Ex. 4-9 – photos of Buick; Tr. 1997-2007.) A television set and digging shovel were recovered from Rafferty's white Buick. (State's Ex. 138 – television set; Ex. 43B – shovel; Tr. 2285-91.) Rafferty's computer and metal ammo box were recovered from his bedroom. (State's Ex. 218 – metal ammo box; Ex. 217 – computer; Tr. 2202-13.) Police also recovered Rafferty's cell phone. (State's Ex. 99B –

[2] Items seized from Beasley's room at the Gridley residence as follows: State's Ex. 99, which was a collection of NASCAR trading cards, Tr. 2142 – 2144; State's Ex. 178, and ammo box containing shotgun shells, Tr. 2144; State's Ex. 107, a red plastic storage box, Tr. 2146; State Ex. 105, a large green Coleman cooler, containing a model train set and books about trains, Tr. 2147; State's Ex. 179, a quantity of documents relating to the name "Ralph Geiger," Tr. 2148 – 2149; State's Ex. 180, 181, 182, and 183, which were pill bottles both showing the name of "Ralph Geiger," filled on September 20 and 27, 2011. Tr. 2149 – 2152; State's Ex. 37B, a pill bottle showing the name Richard Beasley that was filled on July 14, 2011; State's Ex. 38 B, a pill bottle showing the name of Richard Beasley that was filled on July 15, 2011. State's Ex. 30 B, a red baseball hat with American flag logo, Tr. 2155 - 2156. State's ex. 39B, which was an itemized inventory of the property seized from Beasley's room at the Gridley Street residence, including a Motorola cell phone and an LG cell phone. Tr. 2156 – 2160.

Rafferty cellphone; Tr. 2533-35.) Furthermore, a briefcase was recovered from Brogan's bedroom. The briefcase contained a .22 caliber pistol. (State's Ex. 101 – briefcase; Ex. 250, 251 – photo of contents in briefcase; Ex. 220 – photo of pistol; Tr. 2179-93.) The gun was an Iver Johnson .22 caliber semi-automatic pistol, serial number A370310, and was traced back to Smitty's Gun Shop where it had been dropped off for repairs on November 11, 2011. The ATF form showed that the customer who had brought the gun in for repairs was "Ralph Geiger" who listed his address as "2114 Cramer Ave., Akron."[3] (State's Ex. 59B – ATF logbook; Tr. 2400-11.) The repair tag attached to the gun listed the telephone contact number as 330-245-8961. (State's Ex. 60B – gun tag; Tr. 2411-15.) The Hewlett-Packard desktop computer recovered from Rafferty's room was analyzed and it was determined that the "Brogan Rafferty" account on Facebook was friends with the "Richard Beasley" Facebook account. (State's Ex. 217 – Rafferty computer; Tr. 2450-56.) A Facebook photo of Beasley and Rafferty together was also recovered. (State's Ex. 246 – Rafferty and Beasley photo; Tr. 2456.)

22) Tina Kern contacts the F.B.I. about her missing ex-husband, Tim Kern.

Several days after Beasley's and Rafferty's arrests, on November 21, 2011, the FBI was contacted by Tina Kern about her missing ex-husband, Tim Kern. Tina reported that her ex-husband, whose habit was to contact her and their children on a daily basis, had no contact with them since November 13 when he reported for work as a farm hand in southern Ohio. (Tr. 1965, 1975-76.) Tina said that Tim was unemployed and often used her home computer to search for job opportunities. (Tr. 1968-70.) Tina also explained that she learned that Tim got a job as a farm hand. (Tr. 1970-74.) Tina testified that after Tim left, she found the emails on her computer where Tim sought and received the job as a farm hand. (Ex. 24B – Tim Kern's emails; 1976-77.)

[3] "2114 Cramer Ave., Akron, Ohio" is the address of Joyce Grebelsky, a known associate of Beasley. (Tr. 2294-95.)

According to Tina, a condition of employment was that Tim title the car into his new employer's name, a task with which she assisted Tim. (Tr. 1971-72.)

On November 9, Nicolas, their teenage son, drove Tim to an interview at the Waffle House restaurant (Tr. 1982-94.) Nicolas explained that Tim was looking for a man in a red hat with an American flag named "Ron." Later, Nicolas said his Dad was leaving for the job the following Sunday. (Tr. 1982-94.)

On night before his departure, November 12, Tim drove over to Tina's house with his car packed full. Tina identified a Buick Limited as the one owned and driven by her ex-husband. (State's Ex. 118, 119, & 120 – photos of Tim Kern's Buick Limited.) That night, Tina gave Tim a used television. (Ex. 198 – photo of Kern's television; Tr. 1976-78.) Later, following the arrest of Beasley and Rafferty, this same television set was recovered from the trunk of Rafferty's car. (State's Ex. 138; Tr. 2287-88.)

Finally, Tina testified it was brought to her attention that Tim's car was parked in the parking lot of a local pizza parlor. Tina passed this information on the authorities. (Tr. 1978-79.)

23) Authorities obtain video surveillance from Italo's Pizza, where Kern met with a "heavy set white male."

After Tim's disappearance, Tim's car was found parked at a local pizza restaurant – Italo's Pizza. (Tr. 1978-1979.) Tim's Buick Limited was recovered from the parking lot. (Ex. 118, 119, 120 – photo of Kern's Buick Limited; Tr. 2356-59.) Inside the car, investigators recovered a handwritten note referencing a Craigslist ad number. (Tr. 2356-59.) Surveillance videos from Italo's Pizza showed a white car pulling into the parking spot next to Kern's car, and two occupants exiting the car and walking around the lot. (Ex. 187A & B; Tr. 2359-64.) At 6:06 am, on Sunday morning, two people could be seen standing next to a third person. (Tr. 2359.) After interviewing the Kern family, investigators next obtained a surveillance video from Waffle

House, where Kern's interview took place several days prior to his departure. (Tr. 1982-94.) The video showed at 10:17 AM a "heavy set white male" (wearing a black leather coat) sat down in a booth. At 10:54, Tim Kern sat down at the same booth. At 11:14 AM, the heavy set white male got up to answer a phone call. (Ex. 50B, 51B, 52B; Tr. 2364-69.)

24) Joyce Grebelsky contacts the FBI about a letter she received from Beasley in jail.

On November 25, ten days after Beasley had been arrested and confined in the Summit County jail, Joyce Grebelsky contacted the F.B.I. regarding a letter she received from the Summit County Jail and postmarked the day after Beasley's arrest. After waiting a couple of days, Grebelsky contacted the FBI and gave them the letter. (State's Ex. 185 – Beasley letter to Grebelsky; Tr. 2313-15.) The letter was from Beasley advising her "not [to] tell anyone about this [or] even hint on a phone[.]" (*Id.*) In the letter, Beasley instructed her to sell a pickup truck, keep $100 of the proceeds, and "put the rest on my books." (*Id*.) Beasley also instructed her to go "at night" to the house on Gridley Ave., retrieve laptops from hidden locations, and then take them apart and trash them. (*Id*.) Beasley wrote that he would call her from jail to inquire whether she accomplished the task, providing code words for her to use indicating success or failure in the endeavor. (*Id*; Tr. 2314-19.) Code words "rainy day" and "sunny day" were to be used to describe whether she was successful in destroying the items. (Tr. 2314-19.) In the letter, Beasley concluded "[t]hings are rough, they are talking big time in prison, please help, you are all I got, my life is in your hands[.]" (State Ex. 185 – Beasley jail letter; Tr. 2313.)

25) Beasley's letter to Grebelsky lead police back to Gridley Avenue where they discover evidence linking Beasley to the murders.

After receiving Beasley's letter to Joyce Grebelsky, FBI agents went back to Gridley Avenue. Following Beasley's written instructions, Special Agent Jack Vickery discovered a black wallet, two laptop computers, and a computer case in the back yard. (State's Ex. 186, 188,

189; Tr. 2369, 2373-74.) The wallet contained Ralph Geiger's driver's license, social security card, and other personal items. (State's Ex. 186 – Geiger wallet with an identification card). The two laptop computers that Beasley sought to destroy were an Acer laptop computer (Ex. 188) and a Dell laptop computer (Ex. 189). The two computers were analyzed by B.C.I computer forensic analyst Allen Buxton. (State's Ex. 61B, 62B, 63B, 64B – BCI reports.)

Analysis of the Dell laptop (Ex. 189) revealed the owner name of "Rick," and had been last used on November 15, 2011. (Tr. 2432.) In the internet explorer history files, Buxton discovered a reference to an advertisement for a handyman job in southeastern Ohio, which stated:

> Must do general handyman work on 5 blds on a hunting preserve, mow with tractor, plow snow with farm truck, paint and pound nails when needed, also you are there to keep the place secure as it is secluded, you get a nice 12X15 trailer to live in for free and cash biweekly, also hunting and fishing rights. when you respond include name, brief work history, age, driver's lic status, marital status, any record of arrests and personal references as well as phone# for contact, you will be given background check and if you have no serious convictions you will be considered-this job requires relocation with in Ohio. This could be the job of a lifetime for someone who likes seclusion and privacy, if you cannot handle being a mile from nearest neighbor this is not the job for you.

(State's Ex. 66B – advertisement; State's Ex. 65B – website visit list.) Buxton determined this advertisement (Ex. 66B recovered from Ex. 189 laptop), using the email address wassalovpoplivitch@hotmail.com, was placed on Craigslist through the Dell laptop computer (State's Ex. 189) on November 1, 2011. (Tr. 2431-42.) Buxton further testified that if the website gmail.com was visited by a user of the Dell laptop, the rohanndannaher@gmail.com email account would automatically open up. (State's Ex. 89 – Dell laptop; Ex. 67B – data recovered from Dell laptop; Tr. 2442-45.)

According to Buxton, the Acer laptop computer (Ex. 188) had a prior account under the name "Rick P" had been deleted, but the account had remained intact on the hard drive. (Tr.

2446-48.) The hard drive contained 14 documents authored by the name "Rick Pauley," two of which were titled "Living the Christian Life" and "Testimony of Rick Pauley."[4] (State's Ex. 68B – document "Living Christian Life" referencing "Rick Pauley" recovered from Acer laptop; Ex. 69B – document "Testimony of Rick Pauley" recovered from Acer laptop; Tr. 2449-50.) Furthermore, the website Hotmail.com had been accessed by this computer under the email address wassalovpoplivitch@hotmail.com. (State's Ex. 70B – date recovered from Acer laptop; Tr. 2449-50.)

26) Ralph Geiger's body is found in Noble County.

About a week after Beasley's arrest, on November 25, 2011, investigators returned to the rural crime scene area in Noble County. (Ex. 69, 70, 71; Tr. 1790-92.) Using a soil probe, investigators probed the ground until they recognized gasses released from the ground as being human decomposition. (Tr. 1796-98; Ex. 76.) The location of this site was 175 feet off Don Warner Rd. and 150 feet from where Scott Davis's hat was found. (*Id*.) The grave was excavated and a body was recovered. (Ex. 77, 78, 80, 84, 85, 87; Tr. 1799-1801.) The body had a gunshot wound to the back of the head. (Ex. 89 – x-ray; Tr. 1800, 2814, 2819.) The body was transported to the Licking County coroner for an autopsy. (State Ex. 286 – Geiger autopsy report; Tr. 2811-12.) According to Dr. Lee, Geiger's body was severely decomposed and showed indications that he had been dead "two or three months[.]" (Tr. 2812, 2815.) Using dental records, and locating a metal surgical plate in his lower neck, the body was later determined to be Ralph Geiger. (Tr. 2810-11.)

[4] Ricky Pauley is the older brother of David Pauley (a victim).

27) Beasley uses Ralph Geiger's identity after he goes missing in August.

On the day investigators believed Geiger was murdered, a checking account with PNC Bank was opened under the name "Ralph Geiger." (Tr. 2731-32.) The home address listed on the account belonged to Beasley's associate, Joyce Grebelsky. (State's Ex. 116B – PNC bank statement; Tr. 2733.) Grebelsky testified that she allowed Beasley to put her as a reference for a job application at Waltco Lift Corp. where he referred to himself as "Ralph Geiger." (Ex. 15B – job application; Tr. 2302-04.) A check, dated October 3, 2011, was written to Joyce Grebelsky in the amount of $300.00 signed "Ralph Geiger." (Def. Ex. E; Tr. 2732, 2340-42.)

Deposits were made from payroll checks issued to "Ralph Geiger" by an Akron temporary employment agency. (Tr. 2732-33.) As to the Akron temporary employment agency that issued the checks, an employment application in the name of "Ralph Geiger" had been submitted on August 31, 2011. (Ex. 108B – application; Tr. 2735.) The social security number provided on the application belonged to the deceased Ralph Geiger. (*Id*.) The name listed on the application as a contact was Beasley's associate – Joyce Grebelsky. (Tr. 2736.) The application also listed "Lee College" in Texas, which investigators learned Beasley actually attended years before. (Tr. 2736-39.)

The temporary agency placed "Ralph Geiger" with Waltco Inc. (State's Ex. 106B / 15B – application for employment; Tr. 2738.) These records listed "2114 Cramer Ave." as Ralph Geiger's home address, which is the residence of Joyce Grebelsky. (State's Ex. 106B; Ex. 15B; Tr. 2736-39.) The application actually listed Joyce Grebelsky as a contact person. (Ex. 108B – application.) Prior experience listed "J&G Machine Shop" in Akron, which had no ties to the deceased Ralph Geiger, but did have ties to Beasley. (State's Ex. 108B; Tr. 2739-42.) A warehouse worker Alex Hartke testified that he had been employed on the second shift at Waltco

Lift Corp. and was paired with a new employee who called himself Ralph Geiger. (Tr. 1392-93.) Hartke worked alongside this person until the end of October, 2011, for approximately two and half months, when the person stopped showing up for work. (Tr. *Id*.) Hartke identified Beasley as the person who worked alongside of him at Waltco, posing as Ralph Geiger. (Tr. 1395.)

Dr. Michelle Moreno, a physician at Akron Community Health Clinic, testified she treated a person posing as Ralph Geiger twice in September of 2011. (Tr. 1371.) Dr. Moreno testified that a photograph taken by the clinic showed the person posing as Ralph Geiger. (State's Ex. 1B – Beasley photo; Tr. 1372-73.) According to Dr. Moreno, the patient was seeking pain medication allegedly caused by a previous accident. (Tr. 1373.) Medical records from Akron Community Health Clinic showed that Ralph Geiger listed Grebelsky's home address – "2114 Cramer Ave." (State's Ex. 11B & 12B – medical records; Tr. 1379.)

Furthermore, ATF form, dated November 8, 2011, from Smitty's Gun shop showed that the customer who had brought the Iver Johnson .22 in for repairs signed the form "Ralph Geiger" and listed his address as "2114 Cramer Ave., Akron." (State's Ex. 59B – ATF logbook; Tr. 2400-11.)

28) The bodies of Pauley and Geiger, and empty grave intended for Davis, are in close proximity.

Investigators then determined that all of the graves and the Davis shooting were in close proximity. Deputy Mackie found Davis' hat in a stream 25 feet off Don Warner Rd. (State's Ex. 22, 42 – photo of hat in stream; Tr. 2512-13.) Searching the same area, investigators found a hand-dug grave approximately 175 feet from Don Warner Rd. (State's Ex. 46, 47, 48 & 49 – photos of empty grave; Tr. 1773-76.) David Pauley's grave, found on a ridge line, was located approximately one-quarter mile from the empty grave. (State's Ex. 50, 51, 52 – photos of Pauley's partially excavated grave; Tr. 1776-86.) Ralph Geiger's grave was located 175 feet

from Don Warner Rd., and 80 feet from the open grave. (State's Ex. 77, 78, 79, 80, 83, 84, 85, 87 – photos of Geiger's grave; Tr. 1796-1801.) Geiger's grave was estimated to be one-eighth of a mile from Pauley's grave. (Tr. 2513-18.) The open grave was less than eight feet from Geiger's grave site. (Tr. 1790, 1806.) Scott Davis's hat was recovered approximately 150 feet from Geiger's grave site. (Tr. 1805-06.) An aerial photograph of the crime scenes along Don Warner Road demonstrate the close proximity of Geiger and Pauley's grave sites, the open graves, and the approximate location of where Davis was shot. (State's Ex. 112B; Tr. 1789-90, 2370-71.)

29) Donald Walters tells the F.B.I. about a recent associate – Ralph "Dutch" Geiger.

While pursuing their investigation of Beasley, the F.B.I. interviewed Donald Walters on December 2, 2011, regarding his relationship with Beasley. (Tr. 1870.) Walters testified that he was introduced to "Dutch" in August of 2011. (Tr. 1829.) After they initially met, because he ran a body shop, Dutch asked Walters to replace a water pump on his F150 pickup truck. (Tr. 1831-32.) When they went to Auto Zone for parts, Dutch produced an identification card with the last name "Geiger." (Tr. 1832-33.) Walters informed Dutch that his wife's maiden name was "Geiger." (*Id*.) Walters then joked that Dutch could be possibly related to his wife. (Tr. 1833-34.) At trial, Walters identified Beasley as the person he knew as "Dutch Geiger." (Tr. 1834-35.)

30) At Beasley's request, Walters paints his trucks.

After Walters replaced the water pump on the F 150, Dutch asked Walters to paint his truck. Walters painted the white F 150 black. (1835-36.) Later, Dutch asked Walters to paint a Ford Ranger blue. When Walters asked why, Dutch told him he did not like the color. Walters proceeded to paint the Ford Ranger blue. (Tr. 1835-36.) According to Walters, Dutch often drove either the 150 Ford pickup (painted black) or the Ford Ranger (painted blue). (Tr. 1868-71.)

31) Beasley (a/k/a Dutch) tells Walters he purchases storage units and needs a place to store his newly acquired stuff.

Later, Dutch told Walters that he might be purchasing a storage unit – like the show "Storage Wars." (Tr. 1837.) A few days later, on October 23, 2011, one day after Debra Bruce last spoke to her twin, David Pauley, Dutch called Walters in the middle of the afternoon, and reported he got a storage unit and was on his way to Walter's home to store the property. (Tr. 1837-38.) Dutch reported that he had a U-Haul full of property. (Tr. 1838-39.) Walters agreed to store the property. Dutch told Walters that he was currently on the highway "somewhere out south of Canton" and would be at Walter's house in an "hour-and-a-half." (Tr. 1839-40.) From phone records, Walters identified telephone calls made to his house on October 26, 2011 (tele. # 330-245-8961) as being the calls made from Dutch to him relating to his conversation with Dutch about bringing the storage unit property to his house. (State's Ex. 34 – phone records; Tr. 1840-43.) Walter identified his telephone number as 330-786-7626. (Tr. 1841.) Later that afternoon, Dutch arrived at Walter's home with a blue Dodge pickup truck and attached U-Haul trailer. (State's Ex. 116-117 – photos of Pauley truck; Tr. 1843-45.) Minutes later, a young man, whom he identified as Brogan Rafferty, arrived driving a white Buick LeMans. Dutch introduced the young man as his nephew. (*Id*.)

32) Beasley (a/k/a Dutch) and Brogan Rafferty unload Pauley's property at Walter's home.

Dutch and his nephew proceeded to unload the U-Haul trailer. (Tr. 1846.) As they unpacked, Walter's observed Rafferty rummaging through the stuff "wow, look at this, oh, wow, look at this[.]" (*Id*.) According to Walters, the trailer was "filled to the tilt." (*Id*.) Dutch told Walter's that he was going to sell the items at the Hartville Flea Market. (Tr. 1847.) Walters noticed a laptop computer in the front of the truck. (Tr. 1848.) After the items were unloaded and stored in Walter's garage, Dutch told Walter he would come back in the morning to take the

trailer back to the U-Haul. (*Id*.) Dutch and Rafferty drove away in the white Buick LeMans. (*Id*.) That night, the truck and trailer were parked in Walter's driveway. (*Id*.) The following day, Dutch and Rafferty returned and sorted the property. (Tr. 1849.) For providing storage space, Dutch gave Walters Christmas decorations. (*Id*.) Dutch drove away with two loads of property in the Blue Ford Ranger to sell at the Hartville flea market. (Tr. 1849-50.) According to Walters, anything that Dutch did not take was left at his house. (Tr. 1850.)

While they were sorting the items, Walters observed personal family photographs and a wallet with identification. (Tr. 1851.) Dutch noted the person looked like Walters and offered to give him the identification card. Walters declined. (Tr. 1851-52.) When Walters asked Dutch why a person would leave intimate items behind in a storage unit, Dutch reported the owner had "ripped off" the Mafia. (Tr. 1852-53.) When Walters questioned that response, Dutch said the guy turned gay and wanted to start a new life. (Tr. 1853-54.) Walters also testified that Dutch took the laptop computer with him. (Tr. 1853.)

Later, Walters accompanied Dutch to his apartment on Gridley Ave. (Tr. 1854.) Walters helped Dutch put a new door on his rented room. (Tr. 1855.) Dutch told Walters that he was possibly purchasing another storage unit, and asked if Walters knew anyone who needed lawn equipment, a trailer, and motorcycle. (*Id*.) Dutch informed Walters that this stuff would be transported in a U-Haul trailer. (*Id*.) Later, Dutch told Walters that this particular storage unit purchase "went bad on him[.]" (Tr. 1856.) Dutch told Walters that he bought the unit, but "some guys there wanted it real bad" due to the motorcycle. (*Id*.) Per Dutch, he eventually sold the unit to these guys and they "drove down some old country road." (*Id*.) Dutch told Walters the guys "pulled over and acted like (they were) broken down[.]" (*Id*.) According to Dutch, when he went to check on them, "the guy pulled a gun but it misfired." (*Id*.) Dutch told Walters that he

wrestled with the guy who misfired at him and injured him, but was unable to get the landscaping items or motorcycle. (Tr. 1857.)

33) Beasley returns a U-Haul to the Akron location.

After unloading property at Walters's home, Beasley returned the U-Haul in Akron. Cara Conley, an employee for U-Haul Moving & Storage in Akron, testified that on October 24, 2011, two individuals returned a U-Haul trailer. Conley recalled this return because her network showed that it was originally scheduled to be returned to Marietta, not Akron. (Tr. 1953-54.) According to Conley, this was particularly strange given the U-Haul was picked up in Virginia (where Pauley resided) and then bypassed the Marietta location (in southern Ohio) and made the drop in Akron. (Tr. 1954.) Conley testified that one man did all the talking, and the other did not make eye contact with her. Conley identified Beasley as the talkative man who returned the U-Haul. (Tr. 1957.)

34) The property unloaded at Walter's home belongs to David Pauley.

In early December, 2011, the FBI seized property given to Walters by Dutch, who claimed the property had come from an abandoned storage unit. (State's Ex. 121 & 122.) Walters identified all of the property from the U-Haul trailer left behind at Walter's home. (State's Ex. 122, 128, 129, 130, 131, 132, & 134; Tr. 1874-77.) Walters also identified property he personally observed being unloaded, and taken by Dutch for the flea market.[5] Many of these

[5] Walters identified State's Ex. 121and 122 as photo of his house that was decorated with the Christmas lights Dutch had given him. Walters identified State's Ex. 127, which was a Virginia Motor Vehicle Registration in the name of David Pauley, as being one of the documents he saw in the personal papers of the pickup truck that Dutch had dropped off at Walter's house. Tr. 1874. Walters identified State's Ex. 105, which was a large green cooler full of model train items, as being one of the property that Dutch took away with him from Walters' house. Tr. 1877 – 1878. Walters identified State's Ex. 102, which was a large gray plastic container that was full of canned goods, as well as State's Ex. 99, which was NASCAR memorabilia, as items that Dutch took away with him from Walter's house. Tr. 1878 – 1880. Walters also identified State's Ex. 128, 129, 130, 131, 132, and 134 as photographs of property items that Dutch had left behind. Tr. 1874 – 1877. Walters identified State's Ex. 122 as a photograph of the garage containing the property that Dutch had left behind. Tr. 1871 – 1874

same items testified about by Walters were identified by Debra Bruce as property belonging to her twin brother, David Pauley: Christmas lights (Ex. 102), NASCAR scrap book / memorabilia (Ex. 99), and a green cooler containing a model train set (Ex. 105).[6] On November 16, 2011, F.B.I. searched Beasley's residence at 456 Gridley St. and seized the NASCAR scrap book / memorabilia (Ex. 99) and a Green Coleman cooler containing the model train set (Ex. 105).

35) Beasley (a/k/a Dutch) sells Pauley's Dodge truck for a grand.

According to Walters, Dutch sold the Dodge pickup truck for $1,000 to his neighbor, Larry Baker. Dutch gave Walter's $100 as a finder's fee. (Tr. 1858-59.) Walters identified State's Ex. 127, which was a Virginia motor vehicle registration in the name of David Pauley, as being the documents he saw in the personal papers of the pickup truck that Dutch dropped off at Walter's house. (Tr. 1847.) The Dodge truck was later identified by Debra Bruce as belonging to her brother, David Pauley. (State's Ex. 116 & 117 – photo. of Dodge truck; Tr. 1743, 2018-22.)

36) Other Pauley property is linked to Beasley.

In exchange for a laptop computer, tenant Ralph Geiger (Beasley) asked Joe Bias to take payment in the form of items he claimed to have obtained from a defaulted storage unit. (Tr. 1928-30, 37-38.) According to Bias, Beasley "had a truckload of stuff. Some ammo cases with bolts and nuts in it. I liked the ammo cases, so I bought some of those, some Christmas lights, he

[6] Bruce identified the following items as belonging to her brother: State's Ex. 105, David's cooler with David's model train collection inside, Tr. 1744; State's Ex. 102, blue Christmas lights, Tr. 1745; State's Ex. 99, NASCAR-themed scrap book, Tr. 1746; State's Ex. 109, Virginia vehicle registration for David's utility trailer, Tr. 1746; State's Ex. 108, photo album, Tr. 1747; State's Ex. 115, David personal papers and effects, Tr. 1748; State's Ex. 32B, storage container with David's personal property, Tr. 1748; State's Ex. 104, storage container with David's personal property, Tr. 1748; State's Ex. 107, storage container with David's Christmas lights and personal property, Tr. 1749; State's Ex. 178, ammo box marked in David's handwriting containing David's personal property, Tr. 1750; State's Ex. 33B, boxes with David's handwriting containing David's personal property, Tr. 1751; State's Ex. 135, David's Halloween decorations, Tr. 1752; State's Ex. 102, David's Christmas decorations, Tr. 1752 - 1753.

had a couple of train sets, just various stuff." Bias identified a red plastic container, which had "20.00 OBO" written on it. (Tr. 1928-30.) Pursuant to a warrant, police found and seized a red plastic tote storage container from the search of Beasley's 456 Gridley St. residence. (State's Ex. 107; Tr. 2146.) Debra Bruce, Pauley's sister, identified that same red plastic tote storage container as belonging to her brother. (Tr. 107; Tr. 1749.)

37) Beasley (a/k/a Dutch) tries to get Walters to scrap Tim Kern's Buick Limited.

After storing these items at Walters's home, Dutch asked Walters to look at car he claimed to have recently purchased. (Tr. 1859-60.) Dutch picked Walters up in his blue Ford Ranger truck. (Tr. 1861.) According to Walters, Dutch drove to a sandwich shop in Canton, and pulled up to a Buick Limited parked in the lot. (State's Ex. 118, 119, & 120 – photos of Buick Limited; Tr. 1859-60, 1863-64.) This same Buick Limited was identified by Tina Kern as belonging to her husband, Tim Kern. (Tr. 1974-75.) Walters popped the hood, and Dutch tried to start it. (Tr. 1860.) Walters informed Dutch the engine was useless and the car had only scrap value. (*Id*.) When he opened to glove box, Walters noticed the last name "Kern" on the registration papers. (Tr. 1862.) Dutch agreed to scrap the car, but wanted Walters to use his identification to do it. (Tr. 1864.) When Walters asked why, Dutch told him he did not want to use his own identification because he had an outstanding warrant. (Tr. 1865-66.) Dutch gave Walters the title to the Buick, which Walters admittedly lost. The following week, Dutch kept calling him "over and over," and leaving messages about scrapping the car. (State's Ex. 35 – recording of six voicemail messages; Tr. 1866-67.) Dutch also told Walters that he had farm in Noble County, and asked him if he "wanted to ride out there after he scrapped the car and take a look at the farm." (Tr. 1867.) Walters declined the invitation. (*Id*.) Walters ignored the calls and avoided Dutch and did not see him again until trial. (Tr. 1867-68.)

38) Incriminating evidence found in Beasley's blue Ford Ranger links him to all the victims and the Craigslist advertisement.

Investigators discovered other significant items in Beasley's truck. Joe Bias sold a Ford Ranger pickup truck to his tenant he knew as "Ralph Geiger," whom Bias later identified as Beasley. (Tr. 1926-28.) Beasley had Donald Walters paint this Ford Ranger blue. (Tr. 1835-37, Tr. 1926-28.) Walters saw Beasley take two loads of property from the U-Haul trailer driving the blue Ford Ranger pickup truck. (Tr. 1846-51.) Walters also testified that Beasley drove the blue Ford Ranger, with him as a passenger, when he had Walter's look over the mechanical condition of Tim Kern's Buick Limited. (Tr. 1860-68.) Later, Bias was approached by Joyce Grebelsky requesting the title so she could sell it. (Tr. 2304-08, 2323-34; 2007-2012.) After interviewing Grebelsky, investigators located Beasley's Ford Ranger. (Tr. 2012-15.) In Beasley's Ford Ranger, police recovered (a) an employment application for another person, showing the party recommending the employment was "Dutch," which was the nickname Beasley went by; (b) a payment plan for medical billing by Dr. Moreno from Akron Community health in the name of Ralph Geiger, for services rendered on September 27, 2011; (c) a Gold Bond Savers Trading Stamp book, showing the name of David Pauley and his address in Norfolk, VA; (d) a menu from Italo's Pizza restaurant, which was where victim Tim Kern's car was recovered; (e) a crumpled piece of yellow notebook paper with writing that tracked the Craigslist advertisement for the farm hand job, saying specifically "Three hundred cash weekly, caretaker job on 520 acres with two stocked ponds, free bedroom trailer with utilities paid, yearly bonus, hunting and fishing rights. You must mow with tractor, plow snow, paint, et cetera." (Tr. 2012 – 2018.) At trial, Grebelsky identified title documents where a duplicate title was issued November 19, 2011, to Ford Ranger pickup truck in her name. (Def. Ex. F.) The original title was issued to

Grebelsky on October 28, 2011. (*Id*.) Grebelsky testified that Beasley persuaded her to falsely place that particular information on the title documents. (Tr. 2323-34.)

39) Tim Kern's body is found in wooded area behind Rolling Acres mall in Summit County.

About four days after Tina Kern contacted law enforcement about her missing ex-husband, agents found his body. On November 25, 2011, crime scene agents were dispatched to a wooded area behind Rolling Acre Mall, located in Akron, Ohio. They were instructed to find a clandestine grave. Investigators came upon a particular brush pile in an unusual configuration. (State's Ex. 141, 142, 143 – photos of brush pile area; Tr. 2037-39.) A cadaver dog signaled the odor of human decomposition. (State's Ex. 149, 152, 153 – photos; Tr. 2040-43.) Upon further inspection, BCI agent George Staley, and others, determined the area to be the gravesite of victim Tim Kern. (2044.) Police began a gravesite excavation. (State's Ex. 157, 158, 162, 163, 165, 166, 169 – photos of excavation; Tr. 2040-2050.) The body recovered was transported to for an autopsy. (Tr. 2071-2108.)

The coroner, Dr. Lisa Kohler, removed dentures that listed "Tim Kern" on the bottom from the victim's mouth. (Tr. 2052.) Dr. Kohler testified that Tim Kern had five gunshot wounds to the head; two to the left back of head, one behind the right ear, one in the right temple, and one in the right eyelid. (Tr. 2079-84.) Four spent bullets were recovered from Kern's autopsy. (State's Ex. 255 – bullets; Tr. 2090.) The death was ruled a homicide and cause of death was listed as gunshot wounds to the head. (Tr. 2091-92.) The four .22 caliber bullets recovered from Tim Kern's head were found to be consistent with having been fired from the Iver Johnson semi-automatic pistol recovered from Brogan Rafferty's bedroom. (State's Ex. 255 – bullets; Ex. 220 – Iver Johnson .22 pistol; Tr. 2238-45.) The Iver Johnson .22 semi-automatic pistol had eight grooves and a right hand twist, and all four .22 caliber bullets recovered from

Kern showed that they were fired from a gun with eight grooves and a right hand twist. However, due to deformation of the expended bullets, BCI technician Jonathan Gardner was unable to match the bullets to a particular gun. (Tr. 2239-45.) This is the same Iver Johnson .22 that a person posing as Ralph Geiger had repaired by Smitty's Gun Shop. (Ex. 59B - ATF form; Tr. 2400-11.)

40) Cellphone records link Beasley to all three murders and the Davis shooting.

Investigators linked the victims to Beasley through cellphone records. Prepaid cellphones can be purchased at retail locations without any process to identify the user. The phones come loaded with set number of minutes of talk time, and additional talk time can be purchased under an unverified name and address. One particular prepaid cell phone was used to make calls to two different victims and three associates of Beasley: David Pauley (victim), Scott Davis (victim), Brogan Rafferty (accomplice), Donald Walters (associate), and Joseph Bias (landlord). Another prepaid cell phone made phone calls to Tim Kern (victim) and Smitty's Gun Shop, where the gun used to kill Tim was repaired. Another prepaid cell phone made calls to Ralph Geiger (victim), Brogan Rafferty (accomplice), Joe Bias (landlord), and Donald Walters (friend).

41) Prepaid cellphones link Beasley to Ralph Geiger's murder.

Cell phone records showed that one pre-paid cell phone number, 330-289-4914, during the time frame of August 7 to August 12, 2011, was associated with the disappearance of Ralph Geiger on the morning of August 9, 2011. During this time period in August 2011, the "**4914**" prepaid cell phone made calls to Brogan Rafferty, Ralph Geiger, Joseph Bias, and Donald Walters. (State's Ex. 94B - phone records; State's Ex. 85B – report of cell phone data related to Geiger murder; Tr. 2557-61.)

The "**4914**" prepaid phone connected with Ralph Geiger's phone at 6:12 p.m. on August 7, 2011 in a call lasting seventy-four seconds. The location of the "**4914**" phone was placed by GPS coordinates from a cell tower adjacent to Interstate 76 in Akron. (State's Ex. 85B; Tr. 2562-64.) This is the same time that Ralph Geiger moved out of the homeless shelter in Akron, and went missing.

The "**4914**" prepaid phone connected with Brogan Rafferty's phone at 12:42 p.m. on August 7, 2011, in a call that lasted one minute twenty-five seconds. (State's Ex. 85B; Tr. 2564-65.) On August 8, 2011, the "**4914**" prepaid cell phone made eight calls to the Rafferty phone. The last phone call was at 5:50 p.m. The next call between those two phones was at 8:42 p.m. on August 9, 2011. All of the "**4914**" prepaid cell phone calls placed to Rafferty's phone from on August 8 thru August 9 came from cell phone towers located in Akron. (Tr. 2565-66.)

GPS coordinates showed the cell phone associated to Brogan Rafferty moving southbound on Interstate 77 north of Cambridge, Ohio, between 7:17 p.m. and 7:19 p.m. on August 8, 2011. On August 9, 2011, at 10:33 a.m., the Rafferty phone was placed by GPS coordinates on Interstate 77 west of Caldwell, Ohio. A series of six phone calls, between 11:31 p.m. on August 8, 2011, and 12:41 a.m. on August 9, 2011, made from the "**4914**" prepaid phone were placed by GPS coordinates at a cell tower located near Noble Correctional Institution, which is two miles west of Caldwell, Ohio. On August 8, 2011, Ralph Geiger was registered to a room at the Caldwell Best Western. Furthermore, Ralph Geiger's body was recovered near Don Warner Rd., which is approximately 15 miles from Caldwell, Ohio. (Tr. 2570-71.)

The "**4914**" prepaid phone made calls to Joe Bias on August 11, 2011, at 9:00 a.m. (State's Ex. 85B.) The cell phones were placed by GPS coordinates at the same cell tower located on the north side of Akron. The "**4914**" prepaid cell phone connected with Joe Bias'

phone on August 12, 2011, where the "**4914**" cellphone was placed by GPS coordinates at a cell tower in southeastern Akron. The "**4914**" prepaid cellphone connected with Donald Walter's phone on August 8, 2011 and again on August 11, 2011, where the GPS coordinates of the "**4914**" prepaid cell phone were at cell towers in Akron. (Tr. 2570-71.)

42) Prepaid cellphones link Beasley to David Pauley's murder.

Cell phone records showed that two pre-paid cell phone numbers, 330-289-1804 and 330-289-8961, during the time frame of October 21, 2011 to October 23, 2011, were associated with the disappearance of David Pauley. During this period, the relevant prepaid cell phones "**1804**" and "**8961**" made calls to phones associated with Brogan Rafferty, David Pauley, and Donald Walters. (State's Ex. 94B - phone records; State's Ex. 86B, 87B, 88B – reports of cell phone data related to Pauley murder; Tr. 2571-84.)

The "**8961**" prepaid cell phone made connections to Beasley's landlord, Joseph Bias. (State's Ex. 87B – cell phone report; Tr. 2583-84.) That same "**8961**" prepaid phone was listed as the contact number for the Iver Johnson semi-automatic pistol repaired at Smitty's Gun Shop. (State's Ex. 60B – gun repair tag; Tr. 2581.) The "**8961**" prepaid cell phone made two connections with Smitty's Gun Shop. (State's Ex. 88B – cell phone report; Tr. 2582-83.) Furthermore, the "**8961**" prepaid cellphone made connections with phones connected to Donald Walters and Brogan Rafferty. (State's Ex. 85B; Tr. 2576-78.)

The "**1804**" prepaid cell phone made connections with David Pauley's cell phone on October 21st, again on October 22nd, and twice on October 23, 2011. (State's Ex. 86B; Tr. 2571-2573.) The October 23rd call from the "**1804**" prepaid cell phone to David Pauley was placed by GPS coordinates at a cell tower adjacent to Interstate 77, a few miles south of Caldwell, Ohio and north of Marietta, Ohio. At the same date and time, the cell phone of David Pauley was

placed by GPS coordinates at a cell tower adjacent to Interstate 77 near Parkersburg, West Virginia (north of Marietta, Ohio). (State's Ex. 86B, Figure 2; Tr. 2576.) At 9:59 a.m., the "**1804**" prepaid cellphone was placed by GPS coordinates at a cell tower in Marietta, Ohio. (State's Ex. 86B, Figure 2; Tr. 2574-76.)

Brogan Rafferty's cell phone was placed by GPS coordinates near a cell tower adjacent to Interstate 77 just west of Caldwell, Ohio, at three different times on October 23, 2011: 9:31 a.m., 12:24 p.m.; and 12:25 p.m. (State's Ex. 86B, Figure 2, Sect. H; Tr. 2576.) On the same day, at 12:47 p.m., Rafferty's cell phone was placed by GPS coordinates near a cell tower adjacent to Interstate 77, just south of Cambridge and north of Caldwell, north of its previous position. (State's Ex. 86B, Figure 2; Tr. 2577.)

On October 23, 2011, the "**8961**" prepaid cell phone made connections with Donald Walters. At 1:09 p.m., the "**8961**" prepaid cell phone was placed by GPS coordinates at a cell tower adjacent to Interstate 77 just north of Cambridge. (State's Ex. 86B, Figure 1, Sect. D.) At this same time and date, Donald Walters' cell phone was placed by GPS coordinates at a cell tower in Akron, Ohio. (State's Ex. 86B, Figure 1, Sect. E.) That same day, the "**8961**" prepaid cell phone made two more connections to Donald Walters cell phone at 1:38 p.m. and 1:39 p.m., respectively. At this same date and time, Donald Walters' cellphone was placed by GPS coordinates at a cell tower in Akron. (State's Ex. 86B, Figure 1, Sect. E.) The "**8961**" prepaid cell phone calls at 1:38 p.m. and 1:39 p.m. was placed by GPS coordinates at a cell tower adjacent to Interstate 77 just south of Canton, Ohio (north of the previous position.) (State's Ex. 86B, Figure 1; Tr. 2577-2581.) According to Walters, these were the phone calls between Beasley and Donald Walters made shortly before Beasley and Rafferty showed up with a U-Haul full of Pauley's property. (State's Ex. 34B; Tr. 1840-43.)

43) Prepaid cellphones link Beasley to Scott Davis' shooting.

Cell phone records showed that two pre-paid cell phone numbers, 330-289-1804 and 330-289-8961, during the time frame of October 27, 2011 to November 5, 2011, were associated with the shooting of Scott Davis. During this period, the relevant prepaid cell phones "**1804**" and "**8961**" made calls to phones associated with Brogan Rafferty, Scott Davis, and Donald Walters. (State's Ex. 94B - phone records; State's Ex. 89B – report of cell phone data related to Davis shooting; Tr. 2584.)

In this time period, up until November 5, 2011, the "**1804**" prepaid cellphone made eight connections with Scott Davis' cell phone. (State's Ex. 89A, Sect. A.) On November 6, 2011, the date of the shooting, the "**1804**" prepaid cellphone made two connections with Scott Davis' cellphone: 9:18 a.m. and 9:36 a.m. (State's Ex. 89A; Sect. A.) GPS coordinates placed the 9:18 a.m. "**1804**" cellphone call near a cell tower adjacent to Interstate 77 south of Caldwell and then it passed to another cell tower adjacent to Interstate 77, several miles south of the initial cell tower. (State's Ex. 89B, Figure 1, Sect. A.) GPS coordinates placed the 9:36 a.m. "**1804**" cellphone call to a cell tower in Marietta, Ohio. (State's Ex. 89B, Figure 1, Sect. A.) On the day of the shooting, in a series of six calls beginning at 8:13 a.m. and ending at 9:36 a.m., Scott Davis' cell phone is placed by GPS coordinates at a cell tower adjacent to Interstate 77, south of the Ohio River. (State's Ex. 89B, Figure 1, Sect. D.)[7] These phone calls corroborate the video surveillance where Scott Davis met "Jack" and his nephew at the Shoney's in Marietta, Ohio.

From November 4, 2011, to November 7, 2011, the "**8961**" prepaid cellphone made nine connections with Donald Walter's cellphone. (State's Ex. 89B, Sect. C.) During that same time period, the "**8961**" prepaid cellphone made twelve connections with Brogan Rafferty's cell

[7] On the day after the shooting, GPS coordinates showed that Scott Davis' cell phone made two brief connections with prepaid cellphone "1804." (State's Ex. 89B.) These phone calls were made at the request of law enforcement.

phone. (State's Ex. 89B, Sect. B.) On November 5, 2011, Rafferty's cell phone was placed by GPS coordinates travelling northbound on Interstate 77 in Noble County between 4:21 p.m. to 4:29 p.m. (State's Ex. 89B, Figure 2; Tr. 2587-88.) On the morning of November 6, the day of the shooting, the "**8961**" prepaid cellphone called Brogan Rafferty at 5:42 a.m. Thereafter, the Rafferty cellphone called the "**8961**" prepaid cellphone at 5:45 a.m. (State's Ex. 89B, Sect. B.) At these times, the GPS coordinates placed the Rafferty cellphone in Akron, Ohio. (Tr. 2588-89.)

44) Prepaid cellphones link Beasley to Tim Kern's murder.

Cell phone records showed that two pre-paid cell phone numbers, 330-289-5353 and 330-289-8961, during the time frame of November 8, 2011, to November 13, 2011, were associated with the disappearance and murder of Tim Kern. During this period, the relevant prepaid cell phones "**5353**" and "**8961**" made calls to phones associated with Brogan Rafferty and Tim Kern. (State's Ex. 94B - phone records; State's Ex. 90B, 91B, 92B, 93B – report of cell phone data related to Kern shooting; Tr. 2592-2603.) During this time period, Tim Kern's cell phone made thirteen connections with a "**5353**" cell phone that was registered to "Jack Bell." (Tr. 2592-93.)

Specifically, GPS coordinates showed that on November 9, 2011, at 11:15 a.m., the "**5353**" cell phone made a call which lasted 1 minute, 41 seconds. (Tr. 2593.) This call originated near a cell phone tower along Interstate 77 in Akron that provides coverage to the Waffle House on Arlington Rd. (Tr. 2593.) This was the same Waffle House where Nicolas Kern dropped his Dad off for his interview for the farmhand position, and a surveillance camera captured a "heavy set white male" making a phone call at the exact time. (Ex. 50B, 51B, 52B; Tr. 2364-69.) Moreover, on November 8, 2011, the "**5353**" cellphone registered to "Jack Bell" also made a connection to Smitty's Gun Shop in a call that lasted two minutes and thirty seconds. (State's Ex. 91B; Tr. 2597-98.)

The "**8961**" prepaid cellphone made fifteen connections with Brogan Rafferty's cell phone from November 8, 2011, to November 13, 2011. (State's Ex. 90B, Sect. B.) On November 13, 2011, the "8961" prepaid cellphone initiated a call to the Rafferty cellphone 5:23 a.m. on the day investigators believe Kern was murdered. (Tr. 2493-95.) All of these calls originated in the Akron area. (Tr. 2596.) Furthermore, the Rafferty cellphone made a connection to the "**8961**" prepaid cellphone at 12:21 p.m. that originated near cell tower located on 916 E. Crosier St. in Akron. In addition, the Rafferty cellphone made a connection to the "**8961**" prepaid cellphone at 7:01 p.m. which originated near a cell tower located at 800 W. Waterloo St. in Akron. (State's Ex. 90B, Figure 1, Sect. E.) On November 12, 2011, the "**5353**" cellphone registered to "Jack Bell" made a phone call at 12:54 p.m. that GPS coordinates show originated near a cell tower in proximity to the Rolling Acres Mall where Tim Kern's body was recovered. (State's Ex. 90B, Figure 1, Sect. D; Tr. 2596-97.) The "**5353**" cell phone had minutes added under the name "Jack Bell" using the address 1 South Main St. in Akron. Upon investigation, the downtown office address building had no ties to anyone named "Jack Bell." (Tr. 2707-17.)

45) Prepaid cellphones link Beasley to the Craigslist advertisement.

Between October 2, 2011, to October 25, 2011, the "**7629**" prepaid cellphone, which was listed as the "authorized user phone" for the Craigslist advertisements placed by the email address rohandannaher@gmail.com (See. State's Ex. 17), made twenty-four connections with Brogan Rafferty's cell phone, fifteen times with Donald Walter's cellphone, and twenty-two times with Joyce Grebelsky's cellphone. (State's Ex. 92B; Tr. 2599-2602.) This was the same phone number Beasley gave Lois Hood when he visited Jerry Hood Sr. at the hospital. (Tr. 1406.)

46) Prepaid cellphones link Beasley to his associates (Bias, Grebelsky, Walters), his victims (Geiger, Pauley, Kern, and Davis), and his accomplice (Rafferty).

The "**1804**" prepaid cell phone made phone calls to both David Pauley (victim) and Scott Davis (victim). The "**5353**" cell phone made phone calls to Tim Kern (victim) and Smitty's Gun Shop, where the gun used to kill Tim was repaired. The ATF form was signed by "Ralph Geiger," an admitted alias of Beasley, and listed Grebelsky's address. The "**4914**" prepaid cell phone made calls to Ralph Geiger (victim), Brogan Rafferty (accomplice), Joe Bias (landlord), and Donald Walters (friend). None of the prepaid phones were recovered by police. At the time of his arrest, Beasley had three separate prepaid cell phones found not relevant to this case. (Tr. 2707-17.)

SUMMARY

5353 cell phone	-	Tim Kern's cell phone	(Nov. 8-Nov.13)
		Smitty's Gun Shop	(Nov. 8.)
1804 prepaid cell phone	-	David Pauley's cell phone	(Oct. 21-Oct. 23)
		Scott Davis' cell phone	(Oct. 27-Nov.8)
4914 prepaid cell phone	-	Brogan Rafferty's cell phone	(Aug 7-Aug 9)
		Ralph Geiger's cell phone	(Aug.7)
		Joe Bias' telephone	(Aug. 11-Aug. 12)
		Donald Walter's cell phone	(Aug. 8-Aug. 11)
7629 prepaid cell phone	-	Brogan Rafferty cell phone	(Oct. 4-Oct. 18)
		Donald Walter's cell phone	(Oct. 5-Oct. 14)
		Joyce Grebelsky's cell phone	(Oct. 5-Oct. 25)
8961 prepaid cellphone	-	Brogan Rafferty's cellphone	(Oct. 21-Nov. 16)
		Joe Bias' telephone	(Nov. 15-Nov. 16)
		Donald Walter's cellphone	(Oct. 21-Nov. 16)
		Smitty's Gun Shop	(Nov. 10-Nov. 11)

47) The jury rejects Beasley's implausible testimony.

a. Beasley briefly tells the jury about his history, which includes his parole status in Texas.

According to Beasley, he grew up in Texas and attended Lee College for a semester. (Tr. 2880.) After moving to Ohio as an adult, Beasley said he worked at Waltco as a machinist and a hydraulic assembly technician. (Tr. 2882.) Beasley worked at Waltco until he was involved in an accident. (Tr. 2882.) Per Beasley, since that accident, he takes medications for pain. (Tr. 2884.)

Beasley testified about a previous conviction of burglary in Texas, for which he spent four years in prison. (Tr. 2889.) After prison, he was placed on parole. (Tr. 2890.) According to Beasley, he resumed his parole and probation in Akron, Ohio. (Tr. 2892.) He originally reported once a month. (Tr. 2892-93.) Beasley insisted that Texas informed him he did not have to report. (Tr. 2893.) According to Beasley, he has not reported to a parole officer in years. (Tr. 2894.) In January of 2010, Beasley was contacted by a Texas parole officer. (Tr. 2894.) According to Beasley, the Texas parole officer told him he had to start reporting and "insinuated heavily that I was going to be violated." (Tr. 2894.)

b. Beasley admits, in order to avoid going back to jail in Texas, he took on Ralph Geiger's identity.

At that point, Beasley admittedly decided to "become a different person, go on the lam so to speak." (Tr. 2895.) To avoid going back to Texas, Beasley made a conscious decision to change his identity. (Tr. 2895.) According to Beasley, he then reached out to a "friend of mine," Ralph Geiger, and asked to use his identity. (Tr. 2896.) Beasley alleged he knew Ralph Geiger from Brother's Motorcycle Club. (Tr. 2896.) According to Beasley, Ralph Geiger freely gave him his driver's license and social security card. (Tr. 2897.) Beasley told the jury that neither he nor Ralph Geiger ever thought about potential pitfalls about two people using the same identities.

(Tr. 2897.) According to Beasley, "we really hadn't discussed it, but later on (Geiger) went on down to the farm." (Tr. 2898.) Beasley also alleged Ralph Geiger knew Jerry Hood through the "motorcycle connection." (Tr. 2898.) After assuming Ralph Geiger's identity, Beasley admits he told Joyce Grebelsky (a friend) about this identity switch. (Tr. 2898.) To avoid medical issues, Beasley told Ralph Geiger that "he would need medical care" and so Geiger provided him "some copies of some medical paperwork of his so I would have a history, like medical history…" (Tr. 2899.) Per Beasley, Ralph Geiger freely gave Beasley his medical records in January, 2011. (Tr. 2899.) In the summer of 2011, after having received Ralph Geiger's identification, Beasley remembers running into Geiger "once or twice" at Jerry Hood's farm in Noble County. (Tr. 2905-06.) According to Beasley, Geiger allegedly told him "he had a project down there he had been working on." (Tr. 2906.)

c. Beasley admits to residing at Shelburn Ave. and Gridley Ave.

Beasley admitted that he rented a room from Joe Bias on Shelburn Ave. for "about two months." (Tr. 2907.) Beasley testified that he lived in the basement. (Tr. 2914.) According to Beasley, Jerry Hood Jr. would allegedly come to Shelburne Ave. and "sleep on the couch one or two nights a week sometimes." (Tr. 2914.) Beasley further admitted that he moved in Penny Kaufman's home on Gridley Ave. on "the first day of November." (Tr. 2907.)

d. Beasley admits to knowing the Hoods and Raffertys through motorcycle clubs.

Beasley testified to meeting Jerry Hood "through mutual friends" back in the early nineties. (Tr. 2909.) Beasley said Jerry Sr. was the president of the Brother's Motorcycle Club. (Tr. 2909.) Through Jerry Sr., he knew Lois and Jerry Jr. (Tr. 2909.) According to Beasley, Brother's Motorcycle Club is "a violent organization." (Tr. 2910.) Beasley testified he also acquainted with Mike Rafferty, who was the president of the North Coast Motorcycle Club. (Tr.

2910.) According to Beasley, that organization is also violent. (Tr. 2910.) Through Mike, Beasley said met Brogan Rafferty. (Tr. 2911-12.) Although he only saw Mike occasionally, Beasley saw Brogan "quite a bit." (Tr. 2912.) According to Beasley, because Jerry Sr. was at Akron General Medical Center, Jerry Jr. was "pretty much living in Akron" at this time. (Tr. 2915.)

e. Beasley admits to being involved with posting the farm-hand advertisements on Craigslist.

Beasley told the jury that he and Jerry Jr. collaborated on posting a Craigslist advertisement for a farm hand position to help maintain the farm in Caldwell, Ohio. (Tr. 2915-16.) Due to Jerry Sr.'s condition, Jerry Jr. and his mom needed someone to watch the farm. (Tr. 2916.) According to Beasley, he and Jerry Jr. collectively decided to post an advertisement on Craigslist. (Tr. 2916.) Beasley admitted to using Joe Bias' computer to post this advertisement. (Tr. 2916.) According to Beasley, he assisted Jerry Jr. with this endeavor because "if anybody figures that I'm not Ralph Geiger," or if Texas revoked his probation, the farm was somewhere he could hide out. (Tr. 2917.) Beasley testified that a decision was mutually agreed upon that Beasley would do the interviews because Jerry Jr. "has got a beard that is about two feet long" and is not very articulate. (Tr. 2917.) After interviewing potential candidates, Beasley said he would give the "conclusions" derived from the interviews to Jerry Jr. (Tr. 2918.) Beasley testified that Jerry Jr. "handled most of the computer stuff, and I did some interviews." (Tr. 2925.) According to Beasley, he had no involvement in the hiring decisions. (Tr. 2918.)

f. Beasley admits to interviewing applicants about the farm-hand position.

Beasley said he interviewed fifteen people for the farm-hand position. (Tr. 2919.) When questioned about the interviews at the Chapel Hill food court, Beasley admitted that he used the alias "Jack" during the interviews. (Tr. 2919-20.) Beasley admittedly testified that he

purposefully chose not to use the identity "Ralph Geiger" during the interviews because just in case there was publicity about his parole violation, he did not want anyone seeing his photo and reporting the name Ralph Geiger to police. In other words, he was "comfortable and secure living under the name Ralph Geiger" and did not want that identity unnecessarily compromised. (Tr. 2919-20.)

g. Beasley admits to interviewing Scott Davis about the farm-hand position, hiring him, meeting up with him at Shoney's, and then taking him to the farm.

According to Beasley, the only applicant he actually went to the farm with was Scott Davis. (Tr. 2921.) Beasley testified that Jerry Jr. allegedly told him he wanted to hire Davis, and due to his father's failing health, asked him to "follow up on this." (Tr. 2921.) According to Beasley, "Jerry Hood Jr. … was insistent that I handle the whole Scott Davis thing because he was occupied with his dad." (Tr. 2924.) According to Beasley, Davis was the only candidate "I did pretty much all the follow-up with" and exchanged emails with. (Tr. 2921.) Beasley said he took Brogan Rafferty with him to meet Davis. (Tr. 2922.) Beasley admitted he met with Davis at Shoney's in Marietta. (Tr. 2922-23.) Beasley further admitted that it was him, Brogan Rafferty, and Scott Davis in Shoney's surveillance photo. (Tr. 2923.) After leaving Shoney's, and parking Davis' vehicle, Beasley admitted that he, Brogan Rafferty, and Scott Davis got in the same car. (Tr. 2925.) Beasley testified that he was in the front seat, Brogan Rafferty was driving, and Davis was in the back seat. (Tr. 2926.) According to Beasley, Davis was "undecided" about the job. (Tr. 2926.) When they left the farm, Beasley recalled that Brogan Rafferty "instead of making a right to go directly to town, (he) made a right." (Tr. 2926.) Beasley testified that when Rafferty was driving on a gravel road, his car started dragging "read bad," and Rafferty let them out so he could turn the car around. (Tr. 2927.)

h. Beasley claims that Davis tried to kill him.

After Rafferty drove down the road to turn around, Davis allegedly pulled a gun and pointed it at Beasley's head. (Tr. 2928.) According to Beasley, Davis then said "Brother, you are a weak link." (Tr. 2928.) Due to his years of involvement with motorcycle clubs, Beasley said he knew this meant "I was a rat, an informant." (Tr. 2928.) Beasley testified "a weak link is used to describe somebody who [omit] is a snitch[.]" (Tr. 2928.) Beasley the told the jury he was an informant who provided information to Akron police about motorcycle gangs. (Tr. 2929.) Beasley named Officer Allan Jones and Lt. Keith Meadows as his contacts. (Tr. 2929.) According to Beasley, he recalled once being spotted on the seventh floor of the police station by Kimberly Burd, an associate of the motorcycle clubs. (Tr. 2932.)

After calling Beasley "weak link," Davis' gun misfired three times. (Tr. 2932.) Beasley said he ran into the woods and Davis chased him. (Tr. 2932.) Eventually, Davis tackled him and "got on top of me" and they began "wrestling over the gun." (Tr. 2933.) Beasley said the gun misfired, fired, and then misfired again. (Tr. 2933.) Beasley testified the gun was an "old" revolver. (Tr. 2933.) At that point, Beasley turned to Davis and said "that is your six." Beasley then told the jury "if (Davis) was going to kill me, had had to do it with his hands." (Tr. 2933.) According to Beasley, he thought Davis must have shot himself in the arm during the struggle. (Tr. 2933.) Beasley admitted that he told Joyce Grebelsky, Rick Romine, and Penny Kaufman about this incident. (Tr. 2934.)

i. Beasley tries to tie Scott Davis, Brogan Rafferty, Donald Walters, Jerry Hood Jr., and Joyce Grebelsky together into some overly complicated and elaborate conspiracy.

Beasley testified that he met Donald Walters through a mutual friend. (Tr. 2934.) According to Beasley, he introduced Donald Walters to Brogan Rafferty and Jerry Hood Jr. (Tr.

2935.) Beasley testified that several times he visited Walters at his house while Jerry Hood Jr. was there. (Tr. 2936.) Beasley also insisted that Walters and Jerry Jr. borrowed his 1996 Ford Ranger "numerous times." (Tr. 2936.) According to Beasley, Joyce Grebelsky borrowed his 1996 Ford Ranger for "a few weeks," and Rafferty, Walters, and Jerry Jr. borrowed his truck to go to Caldwell "a number of times." (Tr. 2937.) Beasley allegedly recalled that they borrowed his truck on a Sunday, and rented a U-Haul to take a motorcycle down to the farm. (Tr. 2938.) Beasley also recalled that he once went to Walter's house to have his brakes fixed and went with him to return of U-Haul. (Tr. 2938-39.) According to Beasley, he and Walters would go to yard sales and buy "general flea market merchandise." (Tr. 2940.) Because Walters owed him money, Walters gave Beasley "some stuff in lieu" of money. (Tr. 2940.) According to Beasley, Walters gave him "totes and tools, some fishing stuff… train stuff…" (Tr. 2940.) Beasley said Walters kept most of the train stuff because he allegedly had a buyer. (*Id*.)

j. Even though Davis allegedly tried to kill him, Beasley admits interviewing Tim Kern about the farm-hand position.

Beasley recalled meeting Tim Kern sometime after he was allegedly assaulted by Davis. (Tr. 2942.) According to Beasley, he first met Tim Kern on September 9th at Waffle House. (Tr. 2942.) According to Beasley, "Brogan left the phone in my truck, and this guy called on phone asking about the job, and I … agreed to meet with him." (Tr. 2942.) Beasley admitted "I was going to be the fly in the ointment because obviously since Hood had sent somebody to blow my brains out, I figured I screwed up the job thing." (Tr. 2943.) At Waffle House, Beasley said he warned Tim Kern not go down to the farm, but Tim said he had "problems with jobs and money and disappointing people, and he was going to take the job no matter what." (Tr. 2943.) According to Beasley, "I had no reason to believe" Tim Kern would be in danger. (Tr. 2943.) Beasley admitted that he made a phone call while meeting with Tim Kern at Waffle House as

displayed on the surveillance tape. However, Beasley had no recollection of the conversation. (Tr. 2944.)

Beasley admitted that he often used pre-paid phones. (Tr. 2944.) In reference to the "5353" prepaid phone he used at Waffle House while meeting with Tim Kern, Beasley said "Brogan left it in my vehicle, and that is how I ended up getting the call from Kern. And [Brogan] got it back either that day or the next[.]" (Tr. 2945.) According to Beasley, "I always had a phone in my truck… (and) I let those guys use my truck quite a bit[.]" (Tr. 2946.)

k. On cross-examination, Beasley denies hiding incriminating evidence in the backyard at Gridley Ave.

Beasley denied hiding two laptop computers, and Ralph Geiger's wallet, in the back yard at Gridley Ave. (Tr. 2947.) Beasley testified that although he once had possession of the two laptops, he eventually gave them to Brogan Rafferty. (Tr. 2947.) Beasley admitted the wallet was his. However, he explained that he last saw the wallet in the glove box of the 96 Ford Ranger. (Tr. 2948.) He admitted that the wallet contained Ralph Geiger's identification. (Tr. 2948.) On day of the arrest, Beasley thought he was being arrested for the Texas warrant. (Tr. 2948.)

l. On cross-examination, Beasley again admits to being involved with the posting farm-hand advertisements on Craigslist and conducting interviews thereafter.

On cross-examination, Beasley admitted to adopting the name "Ralph Geiger" when he lived at both Shelburne Ave. and Gridley Ave. (Tr. 2951-52.) Beasley admitted to knowing Joe Bias, Penny Kaufman, Rick Romine, Donald Walters, and Joyce Grebelsky. (Tr. 2952.) Beasley admitted to going by the name "Jack." (Tr. 2952.) Beasley admitted his nickname, since childhood, was "Dutch." (Tr. 2952.) Beasley admitted to placing an advertisement on Craigslist that Davis answered. (Tr. 2953.) However, according to Beasley, Jerry Hood Jr. did most of the

computer work. (Tr. 2953.) When the initial advertisement was typed and placed on Craigslist, Beasley claimed he believed this to be a legitimate advertisement. (Tr. 2954.)

m. On cross-examination, Beasley admits to luring Scott Davis to southern Ohio.

Beasley admitted to typing the emails to Davis. (Tr. 2955.) In one particular email, Beasley was questioned about asking about Davis' medication and whether his girlfriend was making the trip. (Tr. 2955.) Beasley admitted the email mentioned the farm had "expensive farm equipment." (Tr. 2955.) Beasley admitted the email mentioned that his "kids" go to the farm occasionally. (Tr. 2956.) However, Beasley insisted "kids" meant "nieces and nephews." (Tr. 2956.) Beasley admitted to picking Shoney's as the place meet Davis. (Tr. 2958.) Beasley also admitted to dying his hair, and not using his real name, when he met Davis. (Tr. 2958.)

n. On cross-examination, Beasley admits that his initial statements to police are different than his testimony.

When police initially interviewed him about this Shoney's meeting, and questioned about the last time he had been to Noble County, Beasley initially responded "I can't even remember to tell you the truth" even though he admittedly had been with Davis in Noble County ten days earlier. (Tr. 2960.) With regards to this line of questioning, Beasley admitted to lying to police. (Tr. 2960.) When confronted with the Shoney's surveillance photo, Beasley admitted he lied when he told investigators that "he was never there[.]" (Tr. 2961.) When asked why he lied, and denied being at Shoneys, Beasley answered "I just didn't want to give up any information that I didn't have to give up until I knew what was going on[.]" (Tr. 2961.) Beasley did not recall whether he ever told the police, when questioned about the meeting Shoney's, about Davis allegedly trying to shoot him. (Tr. 2962.)

o. On cross-examination, Beasley insists that Penny Kaufman misunderstood him.

When asked questions about statements he made to Penny Kaufman, Beasley explained that he told her was buying goods one might find in a storage unit. According to Beasley, Kaufman had been watching too much television and allegedly misunderstood him. (Tr. 2964.) Beasley denied ever telling Kaufman that he was getting a Harley Davidson motorcycle. (Tr. 2964.) Beasley insisted he told her he was getting Harley pants. (Tr. 2965.) Beasley admitted telling her that he anticipated getting lawn equipment. (Tr. 2964.) Beasley also denied telling Kaufman and Romine that he was robbed, rather he said he told them he was assaulted. (Tr. 2965.) Beasley also admitted that he had Joyce Grebelsky drive him in the middle of the night down to the Hood farm to collect his leather coat. (Tr. 2966-67.)

p. On cross-examination, Beasley cannot keep his facts straight on the whereabouts of Brogan Rafferty after Davis allegedly tries to kill him.

Beasley testified that he believed Jerry Jr., and Davis had set him up to be killed that day. (Tr. 2967.) According to Beasley, at that time, he did not know Brogan Rafferty was involved. (Tr. 2968.) Beasley testified that Brogan Rafferty dropped him off and he thought they were going to kill him, too. (Tr. 2968.) When asked when he next saw Brogan, Beasley testified "I can't even remember. It is all a blur. He borrowed my truck a day or two later." (Tr. 2968.) When questioned further about when he next saw Brogan after the shooting, Beasley again said "I don't even remember, a day or two later." (Tr. 2968.) Then, when asked about how he got back to Akron from Caldwell, Beasley replied "[w]e drove back in his car." (Tr. 2968.) Beasley then explained while he was sitting in the woods "heaving and out of breath," Brogan came back asked what happened. (Tr. 2969.)

Beasley then testified that Davis had the gun, Davis somehow got shot during a struggle, and then Davis ran off while he stayed at the same location because "I was not in much condition to do much moving at that point." (Tr. 2969.)

q. On cross-examination, Beasley admits that he was determined not to go back to prison in Texas.

Beasley admitted that he was wanted in Texas for a parole violation. (Tr. 2969-70.) Beasley admitted that he was wanted in Ohio and Texas on or about August 2, 2011 as a "whereabouts unknown violator." (Tr. 2970) Beasley admitted he was determined not to go back to jail. (Tr. 2971.) Beasley denied luring Ralph Geiger to Noble County. (Tr. 2971.) When asked about the coincidence of Ralph Geiger being buried dead with bullet in his head a hundred feet from his altercation with Scott Davis, Beasley responded "Jerry Hood is the coincidence." (Tr. 2971.) When asked whether he benefitted from the death of Ralph Geiger due to obtaining his identification, Beasley replied "[a]mong others." (Tr. 2973.)

r. On cross-examination, Beasley has no recollection of a colonoscopy while visiting a clinic in January.

When questioned about the allegedly visiting the clinic as Ralph Geiger in January of 2011, Beasley claimed only that he met with a women and a picture was taken. (Tr. 2976.) When questioned about a colonoscopy that day, Beasley claimed he had no recollection of that. (Tr. 2976.)

s. On cross-examination, Beasley admits to interviewing DeWalt and Brown for the farm-hand position, but allegedly has no recollection of LeBlond.

Beasley recalled meeting Dan DeWalt. (Tr. 2978.) Beasley also recalled looking at DeWalt's SUV. (Tr. 2979.) According to Beasley, DeWalt "flipped out" when asked to have his truck looked at by a mechanic. (Tr. 2979.) Beasley said DeWalt was lying about Beasley prohibiting him from bringing a gun. (Tr. 2980.) Beasley admitted to using the name "Jack"

when dealing with DeWalt, but had no recollection using "Gaylord." (Tr. 2980.) Beasley admitted that he discontinued the interview with George Brown when he mentioned law enforcement connections. According to Beasley, the Hoods "didn't want anybody around that was connected with law enforcement[.]" (Tr. 2980.) Beasley had no recollection of David LeBlond. (Tr. 2981.)

t. On cross-examination, Beasley had no good answer for admittedly using the "1804" prepaid cell phone to call Scott Davis, but having nothing to do with calls being made from that same phone to David Pauley.

Using a map (State's Ex. 89B), the prosecutor was able to show Beasley where he used the "1804" prepaid cell phone to make calls to Davis at 9:18 a.m. and 9:36 a.m. near Shoney's in Marietta on the day of the shooting. (Tr. 2983.) However, Beasley denied ever speaking with David Pauley. (Tr. 2984.) However, the prosecutor showed that the "1804" prepaid phone he used to admittedly talk to Davis, was previously used to contact David Pauley. (Tr. 2984.) In response, Beasley explained "[t]hat is the phone that was in my truck most of the time. They probably had my truck that day. Just because the phone was there, don't mean I was there." (Tr. 2984.)

u. On cross-examination, Beasley again refers to an alleged conspiracy between Scott Davis, Brogan Rafferty, Jerry Hood Jr., and Donald Walters.

Beasley testified, at the time, he had "no idea" Brogan Rafferty was involved even though his father was the president of one of the motorcycle gangs that allegedly requested the hit. (Tr. 2985.) According to Beasley, Donny Walters, Brogan Rafferty, and Jerry Hood came to his house and borrowed his truck on the morning of October 23rd. (Tr. 2986.) When asked about Donny Walters testifying about Beasley allegedly buying a storage unit, Beasley replied "Donny Walters obviously was involved in the murders." (Tr. 2987.) When asked about Penny Kaufman

also testifying about Beasley telling a similar "storage auction story" to her, Beasley said "[y]ou are mixing things up." (Tr. 2987.)

v. On cross-examination, Beasley has no good explanation for interviewing Tim Kern about a farm-hand position after Davis allegedly tries to kill him.

Beasley claimed, after the altercation with Davis in the woods, he believed Jerry Jr. and Davis had tried to kill him. (Tr. 2984.) In fact, Beasley claimed he was "in fear for (his) life." (Tr. 2984.) However, Beasley admitted to meeting Tim Kern at Waffle House on November 9th. (Tr. 2988.) In fact, Beasley admitted that that was him sitting with Tim Kern in the video. (Tr. 2988.)

w. Beasley admits to having access to, and using, both the "5353" and "8961" prepaid cellphones.

Beasley also admitted to using a "5353" prepaid cell phone at that time, but said "Brogan left that phone in my truck." (Tr. 2988.) Beasley admitted to calling and speaking with Tim Kern on the "5353" prepaid cellphone. (Tr. 2989.)

Beasley also admitted to calling Walters and leaving messages on his answering machine. (Tr. 2989.) Beasley admitted the "8961" prepaid cellphone was used to call Walter's answering machine. (Tr. 2990.) When asked how to explain how the "8961" same phone used to call Brogan Rafferty on the morning of the Davis shooting on November 6th, on the morning of October 23rd when Pauley is killed, and the morning of November 13th before Tim Kern gets killed, Beasley replied "I might have made two of those calls." (Tr. 2990.) When showed the gun tag from Smitty's Gun Shop, and shown the "8961" prepaid cell phone was listed, Beasley retorted "That's the telephone. I had access to, yes, along with several other people… Brogan Rafferty and along with Jerry Hood and Donny Walters as far as that goes. Anybody that had my truck had that phone." (Tr. 2992.)

Later on cross, Beasley admitted to speaking with Tim Kern on the "5353" prepaid phone "[o]nce or twice," and using the "8961" prepaid phone "on a regular basis." (Tr. 2999.) However, Beasley then inserted "[a]long with several other people… I had access to it." (Tr. 2999.)

x. On cross-examination, Beasley denies writing the jail letter to Joyce Grebelsky.

Beasley denied any authorship of the letter written to Joyce "Grebowsky" and sent from the Summit County jail while he was incarcerated there. (State Ex. 185 – letter from jail; Tr. 2992-93.) Beasley acknowledged the letter misspelled Grebelsky's name. (Id.) Beasley further admitted that he never spelled her name correctly. (Tr. 2993.) In fact, he admitted he did not spell her name correctly on the Waltco application. (State's Ex. 14B; Tr. 2993.) Beasley denied writing the gun tag from Smitty's Gun Shop even though it listed Joyce Grebelsky's "2114 Cramer" address he often used. (Tr. 2995.)

y. On cross-examination, although Beasley admits to leaving messages on Walter's answering machine about towing a car; he allegedly is not talking about Tim Kern's Buick Limited parked at Italo's Pizza.

As to the phone calls he left on Donny Walter's answering machine, Beasley admitted that he made numerous calls about trying to tow a vehicle. (Tr. 2996.) However, he denied he was trying to tow Tim Kern's car, but rather, a Ford Taurus parked at the apartment complex at the corner of Cramer and Canton Rd. (Tr. 2996.) Beasley insisted Walters was "untruthful" when he testified about Beasley's request that he tow Tim Kern's car parked at Italo's Pizza. (Tr. 2998.)

48) Jerry Hood Jr. disputes Beasley's unsupported accusations.

During rebuttal, Jerry Hood Jr. testified his family owned a farm, off on Country Lane (near Rado Ridge), in Noble County. (Tr. 3086.) Jerry Jr. informed the jury that the family land

ceased being an operational farm in the nineties when they sold the cattle. (Tr. 3087.) According to Jerry Jr., the property is currently "grown up pretty heavy with weeds and shrubs." (Tr. 3088.)

Jerry Jr. testified that both he and his father are members of the Brother's motorcycle club. (Tr. 3088.) Jerry Jr. said his family has been associated with that club his whole life, and since returning from the Marine corp., he maintained a weekly connection with the club. (Tr. 3088-90.) According to Jerry Jr., he knew Beasley through his father, Jerry Sr. (Tr. 3091.) According to Jerry Jr., when he was younger he saw Beasley "every weekend." (Tr. 3092.) However, more recently, Joe Jr. only recalled Beasley visiting the family farm once in 2010. (Tr. 3092.) Jerry Jr. confirmed to the jury that his father, in September of 2011, was seriously injured in fall and was at the Akron General Hospital for "a month or two." (Tr. 3090, 3093.) During this stay, Beasley visited his father three or four times. (Tr. 3093.) Jerry Jr. recalled giving Beasley he and his mother's phone numbers at the hospital. (State's Ex. 179 – note w/ phone numbers; Tr. 3093-94.) While his father was in the hospital, Jerry Jr. testified that he either stayed with his grandmother or aunt. (Tr. 3095.)

Hood said he never stayed with Beasley and did not know Joe Bias or Donald Walters (much less stay at their homes.) (*Id*.) Jerry Jr. testified that the Brother's motorcycle club were "a kind of small, tight knit group" and denied knowing anyone named Ralph Geiger, or that Geiger hung out at the Brother's motorcycle club or had any association with the club. (Tr. 3096-97.) Jerry Jr. also denied asking Beasley to look after the family farm, help him hire someone to watch over the farm, or place advertisements on Craigslist seeking farm-hand help. (Tr. 3098.) Jerry Jr. insisted "I have valuables down there[,]" and he did not want "strangers down there[.]" (Tr. 3097.) In fact, Jerry Jr. said he asked Donny Warner, a friend, to keep an eye on the farm. (*Id*.)

Jerry Jr. denied knowing, or having met, Tim Kern. (Tr. 3098.) He denied knowing, or having met, David Pauley. (Tr. 3099.) He denied knowing, or having met, Scott Davis. (Tr. 3100.) He also denied ever borrowing Beasley's truck or his cell phone. (Tr. 2099-3100.) As to his alleged involvement with the Craigslist advertisements, Jerry Jr. said he was "computer illiterate" and insisted he did not "even know how to check e-mail." (Tr. 3101.)

49) Beasley's booking photo taken February 9, 2011, bears little resemblance to the photo taken of Beasley posing as Ralph Geiger at the Akron Medical Clinic.

During the cross-examination of Dr. Moreno, she acknowledged that she did not take the photo and had no information regarding any supposed visit by Ralph Geiger on January 28, 2011. (*Id*.) On rebuttal, the prosecution offered a booking photo taken of Beasley on February 9, 2011. (State's Ex. 122B, 123B, & 124B – Beasley booking photos; Tr. 3174-81.) Due to hair coloring and grooming, the photograph in State's Ex. 1B bears little resemblance to a booking photos taken of Beasley on February 9, 2011 –photographs taken of Beasley a little over a week after he allegedly visited the Akron Clinic posing as Ralph Geiger. (State's Ex. 122B, 123B, & 124B – Beasley booking photos; See also, State's Ex. 1B – Akron Medical Clinic photo.)

LAW AND ARGUMENT

Response To Prop. 1: Where The Record Contains Facts That Fairly Support The Imposition Of Consecutive Sentences, And The Imposition Of Court Costs Is Mandatory, Beasley's Contention Of Error Elevates Form Over Substance And Should Be Rejected.

Requesting a remand for resentencing, Beasley alleges the trial court erred by not making the required findings of fact at the sentencing hearing before imposing consecutive sentences for non-capital offenses. (Beasley brief, p. 17.) Beasley also takes issue with the trial court ordering him to pay court costs because she failed to address the matter in open court. (Beasley brief, p. 19.)

The Trial Court Properly Imposed Consecutive Sentences for the Firearm Specifications

Ohio Revised Code Section 2929.14(B)(1)(a) requires the imposition of a three-year prison term upon conviction of a specification that charges the offender "with having a firearm on or about the offender's person or under the offender's control while committing the felony and displaying the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using it to facilitate the offense." While the statute also states that the sentence on only one specification may be imposed when the felonies are committed as part of the same act or transaction, this rule is modified by section 2929.14(B)(1)(g), which requires the imposition of at least two of the firearm specifications in this case. That section states:

> If an offender is convicted of or pleads guilty to two or more felonies, if one or more of those felonies are aggravated murder, murder, attempted aggravated murder, attempted murder, aggravated robbery, felonious assault, or rape, and if the offender is convicted of or pleads guilty to a specification of the type described under division (B)(1)(a) of this section in connection with two or more of the felonies, the sentencing court shall impose on the offender the prison term specified under division (B)(1)(a) of this section for each of the two most serious specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications. 2929.14(B)(1)(g).

The Second, Eighth, Ninth, Tenth, and Twelfth Districts have recognized that this rule requires the imposition of the two most serious gun specifications when a defendant is sentenced to more than one felony and one of the felonies is listed in that section, and allows the trial court to impose sentences on three or more specifications. *State v. Beatty-Jones*, 2011-Ohio-3719, ¶ 14-16; *State v. Vanderhorst*, Eighth Dist. No. 97242, 2013-Ohio-1785, ¶ 10-11; *State v. Bushner*, 2012-Ohio-5996, ¶ 29-31; *State v. Carson*, 2012-Ohio-4501, ¶ 10-11; *State v. Isreal*, 2012-Ohio-4876, ¶ 71-74. The sentence for a firearm specification is mandatory. R.C. 2941.145. A

firearm-specification prison term must be served consecutively to any other mandatory prison term and consecutively to, and prior to, all other sentences. R.C. 2929.14(C)(1)(a)

In this case, the trial court was required to impose at least two of the most serious firearm specifications on Beasley because Beasley was sentenced to multiple felonies, including multiple felonies listed in R.C. 2929.14(B)(1)(g). The trial court was also required to impose the firearm specifications consecutive to each other and consecutive to, and prior to, all other sentences. R.C. 2929.14(C)(1)(a). The trial court correctly complied with these mandates. The trial court also, in its sound discretion, chose to impose sentences on more than two of the specifications. There is no demonstration that the trial court abused its discretion in imposing such a sentence. As the trial court noted, Beasley was not permitted to own weapons, had previously served federal prison time on a weapons offense, and used the illegally-possessed weapons to kill three people and shoot another. Sent. Tr. 22-23. The imposition of four firearms specifications was appropriate.

The Trial Court Properly Imposed Consecutive Sentences for Non-Capital Offenses

The statutory language of R.C. 2929(C)(4) is clear that trial courts are only required to make statutory findings, as opposed to providing reasons, when imposing consecutive sentences. Under the statutory language, consecutive sentences may be ordered if the court finds it "necessary to protect the public from future crime or to punish the offenders and that consecutive sentences are not disproportionate to the seriousness of the offender conduct and to the danger the offender poses to the public." Thereafter, if the trial court finds "any" of the following three factors to be present, consecutive sentencing is justified under R.C. 2929.14(C)(4):

> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, 2929.18 of the Revised Code, or was under the post-release control for a prior offense.

> (b) At least two of the multiple offense were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single person term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

In addition to imposing the consecutive sentencing requirements found in R.C. 2929.14(C)(4), H.B. 86 also provided that the standard of review for consecutive sentencing "is not whether the sentencing court abused its discretion." R.C. 2953.08(G)(2). Instead, the appellate court may take action "if it clearly and convincingly finds either of the following: (a) That the record does not support the sentencing court's findings under division *** (C)(4) of 2929.14 ***; (b) That the sentence is otherwise contrary to law." R.C. 2953.08(G)(2); *State v. Bonnell*, 140 Ohio St.3d 209, 217, ¶28 (2014).

In *State v. Bonnell*, this Court held that, "a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry," and that the failure to do either makes the imposition of consecutive sentences contrary to law. *Id.* at ¶37. But, this Court reiterated that there are no magic words, the trial court does not have to explain its reasons, and "as long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld." *Id.* at ¶29. Although courts speak through their entries, "[a] trial court's inadvertent failure to incorporate the statutory findings in the sentencing entry after properly making those findings at the sentencing hearing does not render the sentence contrary to law." *Id.* at ¶30.

In *Bonnell*, the defendant pleaded guilty to three counts of burglary, each a felony of the third degree, and one count of tampering with coin machines, a felony of the fifth-degree. *Id.* at

¶8. At sentencing, after commenting on the defendant's lengthy criminal history, the trial court imposed 30 months in prison for each burglary, and 11 months for tampering with coin machines. *Id.* at ¶9. The trial judge ordered that the sentences be served consecutively for an aggregate of eight years and five months. *Id.* at ¶9. The trial court did not incorporate the 2929.14(C)(4) findings into its sentencing entry, but this Court did not summarily reverse the sentence; instead, it engaged in a review of the record to determine whether the findings had otherwise been addressed on the record since the purpose of making the findings is to "afford[] notice to the offender and to defense counsel." *Id.* at ¶29. This Court explained:

> We can discern from the trial court's statement that Bonnell had "shown very little respect for society and the rules of society" that it found a need to protect the public from future crime or to punish Bonnell. We also can conclude that the court found that Bonnell's "atrocious" record related to a history of criminal conduct that demonstrated the need for consecutive sentences to protect the public from future crime.

Id. at ¶33. But the trial court had not addressed the proportionality of the sentences to the seriousness of the defendant's conduct and the danger he posed to the public, "which in this case involved an aggregate sentence of eight years and five months in prison for taking $117 in change from vending machines." *Id.* at ¶34.

In this case, although the trial court did not incorporate the proportionality finding in its sentencing entry, this Court can determine that, in imposing consecutive sentences, the trial court considered whether consecutive sentences were proportionate given the seriousness of Beasley's conduct and danger that Beasley posed to the public, and the record supports the trial court's determination that consecutive sentences were appropriate. However, as this Court suggested in *Bonnell*, this omission in the sentencing entry can be remedied with a *nunc pro tunc* order.

At the sentencing hearing, Beasley did not object to the trial court's imposition of consecutive sentences, although he did object to the trial court's determination that certain

offenses were not allied. Sent. Tr. 25. The trial court, which imposed its sentences without the benefit of *Bonnell* to guide it, noted that Beasley was "at large or awaiting trial" when he committed his offenses and "that consecutive sentences are necessary to protect the public," and incorporated these two findings in its sentencing entry. Sent. Tr. 23. The trial court also explained to Beasley that it was imposing consecutive sentences for counts 19, 20, 21, and 22 – each a charge of having weapons under disability, because "each one of those weapons you were not supposed to have was involved in murder, and also specifically noting based upon the evidence in the trial from the mitigation report that you were, in fact, in prison on a prior weapons case in federal prison." Sent. Tr. 22. From these comments, this Court can discern that the trial court felt consecutive sentences were proportionate given the seriousness of Beasley's conduct and the danger he posed since he used weapons he was not permitted to possess because of a prior federal weapons conviction to commit murders. *See Bonnell* at ¶33. The trial court's consideration of the seriousness of Beasley's conduct is unquestionable since the trial court, at the same hearing, imposed three death sentences. Sent. Tr. 7-8. Unlike *Bonnell*, which involved a non-violent offender and had stolen just over $100, Beasley's crimes were violent and led to the death of three men.

Conclusion

The State asks that this Court affirm the trial court's imposition of consecutive sentences. If this Court finds that it cannot conclude that the trial court made the mandated statutory findings, the State requests that this Court remand the matter to the trial court for the limited purpose of resentencing Beasley as to those counts for which consecutive sentences for non-capital charges were not properly imposed. In other words, this remand should not impact the trial court's imposition of death sentences. Beasley also raises a claim that the trial court failed

to properly inform him that he was obligated to pay court costs, relying on this Court's authority in *State v. Joseph*, 125 Ohio St.3d 76, ¶22-23 (2010). If this Court determines that a remand is necessary in light of *Bonnell*, the State suggests that it include an order that Beasley be allowed to move for waiver of the payment of court costs at that time.

Response to Proposition Of Law 2: Beasley's Claim Of Biased Jury Due To Pretrial Publicity, Where Prejudice Is To Be Presumed, Fails For A Complete Lack Of Evidence Before The Trial Court, And Any Claim Of Actual Bias Of A Seated Juror Is Waived For Failure To Exercise Two Remaining Peremptory Challenges, In View That Only Two Prospective Jurors Expressed A Bias Due To Pretrial Publicity But Were Excused For Cause.

The record reveals that only two of approximately one hundred jurors who participated in the question-and-answer process for jury selection expressed a bias due to pretrial publicity, and both were sua sponte excused by the trial court. A third juror who was ambivalent about her opinion of guilt due to pretrial publicity was excused for a totally different reason, being that her employer limited compensation to five days only, where the trial was anticipated to last for weeks. Accordingly, the record below reveals scant and slight impact on the jury pool due to pretrial publicity, thus taking Beasley's case out of the "rare" and "extreme" cases that would require a change of venue even before any effort to seat a jury through the voir dire process.

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

During the voir dire process, Beasley did not challenge any prospective juror for cause due to alleged actual bias from pretrial publicity, nor did Beasley move for change of venue during the voir dire process. Furthermore, where Beasley had two peremptory challenges

remaining, any claim of actual juror bias due to pretrial publicity would be waived. Under these circumstances, and because it is not clear whether Beasley even advances a claim of actual juror bias due to pretrial publicity before this Court, any hypothetical claim of actual juror bias would not be well founded.

A. Factual and Procedural Background

Although three of the murders occurred just outside rural Caldwell, Ohio, prosecutor's indicted and tried Beasley in the populous city of Akron, Ohio, where one of the murders occurred.

Shortly after their appointment, Beasley's initial counsel, Brian Pierce and Rhonda Kotnik, filed "Defendant's Motion For Change of Venue," which was numbered "Defendant's Motion No. 32." See R. 135. In reliance on *Irwin v. Dowd*, 366 U.S. 171 (1961), *Sheppard v. Maxwell*, 384 U.S. 333 (1966), and *Rideau v. Louisiana*, 373 U.S. 723 (1963), Beasley alleged "The community of this County has been saturated with stories concerning this case, and eventually, concerning Defendant, his criminal record, and his indictment for this crime." R. 135, Defendant's Motion For Change of Venue, pgs. 2-3. In contending pretrial publicity was so pervasive that prejudice to Beasley should be presumed, Beasley informed the trial court that "Defense counsel is in the process of obtaining a comprehensive list of Articles (sic) which have appeared in local newspapers, which, standing alone, is an adequate basis to presume prejudice and impartiality (sic) among this County's prospective jurors." Beasley additionally informed the trial court that "Defendant's counsel will try to obtain this information [being "data descriptive of the broadcast media's saturation coverage of this story in this County"] and, if available, submit it to the Court to further support this motion." R. 135, Defendant's Motion For Change of Venue, pgs. 3-4.

The State opposed on grounds the motion for change of venue was premature. R. 181, State's Memorandum Contra Defendant's Motion For Change Of Venue. Citing to *State v. Lynch*, 98 Ohio St. 3d 514, 519 (2003), *State v. White*, 82 Ohio St. 3d 16, 21 (1998), and *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), the State contended that despite alleged extensive pretrial publicity, the trial court had discretion to determine whether an impartial jury could be seated. The State further contended this Court has instructed that before granting a change of venue, the trial court should make a good faith effort to seat a jury. See R. 181, State's Memorandum Contra Defendant's Motion For Change Of Venue.

Beasley's motion for change of venue did not contain any records, documents, or evidence of pretrial publicity. Beasley did not thereafter supplement the record with evidence of pretrial publicity. Consequently, Beasley did not present any evidence as to pretrial publicity, and the sole support for his motion was uncorroborated and unsubstantiated allegations contained entirely within defendant's motion #32 for change of venue.

About six weeks after Beasley retained new counsel, being James Burdon and Lawrence Whitney, the trial court ruled it "will hold the matter [defendant's Motion #32 for change of venue] in abeyance until voir dire. The Motion shall be reconsidered in the event the voir dire process suggests an inability to seat an impartial jury." R. 265, Journal Entry Regarding Defendant's Motion For Change Of Venue.

Beasley's new counsel, Burdon and Whitney, had given specific attention to the matter, shown where the trial court noted that "On September 17, 2012, the Defendant retained new counsel, who were given leave until October 26, 2012 to adopt or withdraw pending Motions and/or to file additional Motions. The matter came on for hearing on November 9, 2012. The

Defendant adopted the original Motion [for change of venue]." R. 265, Journal Entry Regarding Defendant's Motion For Change Of Venue.

The first step in jury selection occurred at the Akron Civic Theater, where the trial court received completed jury questionnaires from two hundred and thirty prospective jurors. Prospective jurors were notified of the time to report at the courthouse for individual questioning. Tr. 22 – 42.

The voir dire process took three and a half days to complete. Prospective jurors were sequestered and individually questioned by the trial court on the issues of pretrial publicity and the death penalty, and counsel for each side were afforded an opportunity to individually question each prospective juror on these same topics. At the end of the questioning, non-qualified jurors were individually excused for cause; either *sua sponte* by the trial court, or upon request by counsel. Jurors who met qualifications on the topics of pretrial publicity and the death penalty were later questioned on general matters, this time with counsel for each side conducting the questioning, with limited inquiry by the trial court. Tr. 42 – 1224.

During the voir dire process, Beasley did not move for a change of venue. Moreover, Beasley did not move to strike any jurors for cause on grounds of actual bias due to pretrial publicity. To the contrary, as to the two prospective jurors who expressed an opinion of guilt due to pre-trial publicity, the trial court excused those individuals *sua sponte*. See Tr. 200 – 205, (prospective juror Henderson); Tr. 299 – 301, (prospective juror Reymann). A third prospective juror, who was ambiguous about the effect on her from pretrial publicity, was excused for cause due to her employer's policy to limit compensation during jury service to a maximum of five days (prospective juror Haas). See Tr. 88 – 105, 1069, 1213 – 1214.

At the conclusion of general voir dire, counsel for each side exercised peremptory challenges. The State exercised two of six peremptory challenges, and the defense exercised four of six peremptory challenges. Tr. 1225 – 1236. See Crim R. 24 (D) (… each party may peremptorily challenge … six prospective jurors in a capital case.)

Once the jury was seated, the trial court denied defendant's motion 32 for change of venue, stating "Whereas a jury has been seated and sworn in this case, the Defendant's Motion for a Change of Venue is DENIED." R. 488, Order Denying Defendant's Motion Number 32 For Change Of Venue.

B. Presumed Prejudice In Contrast With Actual Bias

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

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

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

Finally, a claim of actual bias due to pretrial publicity is waived if the defendant has failed to exhaust his peremptory challenges. Under these circumstances, this Court would conduct a "plain error" review of the actual bias claim where the defendant retained one or more peremptory challenges, despite claiming that one or more of the seated jurors had an actual bias due to pretrial publicity. *Trimble*, P61.

C. Presumed Prejudice Claim Fails For Lack Of Evidence

Where there is a complete lack of evidence to support a presumed prejudice claim, Beasley has fallen far short of a "clear and manifest" showing needed to prevail. To begin with, Beasley did not present any evidence at all to support the bare assertions of pervasive publicity contained in defendant's motion number 32 for change of venue. Moreover, defendant's motion

number 32 referred to the volume, not the content, of the pretrial publicity, yet even then failed to provide hard data or concrete and specific measurements of the volume of pretrial publicity. In this respect, even the few unsubstantiated allegations in defendant's motion number 32 for change of venue lacked the particular types of information necessary to evaluate the merit of a presumed prejudice claim.

Under these circumstances, the trial court was well within bounds to abey defendant's motion number 32 for change of venue until the effort to seat a jury was underway. Given the lack of evidence to support the scant and vague allegations in defendant's motion number 32 for change of venue, the abeyance determination was a fair outcome as well, since Beasley had ample time to produce evidence as to the volume and content of pretrial publicity if he intended to pursue that relief. Where Beasley chose not to present any evidence to support his presumed prejudice claim, the trial court's denial of the change of venue motion was necessarily prudent and proper. The denial was proper due to lack of any proof at all, let alone the failure to present a "clear and manifest" showing that "pretrial publicity is so damaging that prejudice must be conclusively presumed even without a showing of actual bias." *Mammone,* P 56. See R. 488, Order Denying Defendant's Motion Number 32 For Change Of Venue.

Beyond the obvious propriety of denying relief where no evidence was presented as to the content or volume of pretrial publicity, this Court has determined that in reference to a presumed prejudice claim the volume of pretrial publicity, standing alone, does not require a change of venue. See *State v. Gross,* 97 Ohio St. 3d 121, P29 (2002). ("We have recently reiterated that the rule does not require a change of venue merely because of extensive pretrial publicity.") Furthermore, where the content of pretrial publicity was "factual, not sensational," this Court has declined to give significance to the volume of pretrial publicity, standing alone,

even where "extensive" publicity involved the trial of a co-defendant. *State v. Landrum*, 53 Ohio St. 3d 107, 116 (1990). However, these guidelines have no pertinence to this case, where Beasley failed to present any evidence as to the volume or content of the pretrial publicity. In other words, because there is no evidence at all about the volume or content of pretrial publicity, any discussion about the law pertinent to a presumed prejudice claim would be a pure academic exercise, not grounded in real events in Beasley's case.

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

In his brief to this Court, Beasley presents an unsubstantiated assertion that pretrial publicity was disseminated by "blogs, online chat rooms, links and twitter feeds…." Beasley's Merit Brief, p. 22. No such evidence was presented below, and this Court should not permit a bare allegation in Beasley's merit brief to absolve him from a wholesale failure of proof in respect to the presumed prejudice claim that he presented to the trial court. Moreover, Beasley's unsubstantiated assertion to this Court still does not address the volume and content of pretrial publicity, which may properly be the subject of an arguably viable presumed prejudice claim. In other words, a mere allegation that pretrial publicity was supposedly pervasive is not directly pertinent, where it is rather the particular volume and the specific content of pretrial publicity that are the factors that must be assessed in a presumed prejudice claim. *Mammone*, P59.

The case of *Skilling v. United States*, 561 U.S. 358 (2010) illustrates the propriety of the denial of a presumed prejudice claim that lacks any evidentiary support. In support of a claim

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

In this case, Beasley failed to offer any evidence against which the *Skilling* test could be applied, and the few words of unsubstantiated allegations in his brief to this Court does not cure the failure of proof below. Under these circumstances, the trial court properly denied Beasley's motion number 32 for change of venue, and this Court should so conclude.

D. Actual Bias Claim Is Waived And Contradicted By The Record

As an initial matter, it is not clear that Beasley advances a claim of actual bias due to pretrial publicity. In his brief to this Court, Beasley does not use the phrase "actual bias," nor does Beasley refer to any particular juror, whether seated or not. Moreover, before the trial court Beasley did not claim actual juror bias due to pretrial publicity, nor did Beasley seek to excuse any prospective juror for cause due to actual bias from pretrial publicity. Under these circumstances, either Beasley does not claim actual juror bias due to pretrial publicity, or the actual bias claim is so veiled and muted that it should be denied for failure to fairly present the claim for adjudication.

Nevertheless, even assuming Beasley presents an actual bias claim to this Court, it would be waived for failure to exhaust peremptory challenges. *Trimble*, P61. The record shows the jury was seated with Beasley having exercised four of six peremptory challenges, obviously retaining two peremptory challenges to excuse any prospective juror for any reason. Tr. 1225 – 1236. See Crim R. 24 (D) (… each party may peremptorily challenge … six prospective jurors in a capital case.) Given this waiver for failure to exercise all peremptory challenges, any further evaluation by this Court would be done under the plain error review standard. *Mammone*, P78.

If this Court would conduct a plain error review of a hypothetical actual bias claim, the court need not examine any of the seated jurors, including alternates, since none of them expressed any consternation over pretrial publicity. As to the two prospective jurors who arguably expressed a bias due to pretrial publicity, they were both sua sponte dismissed by the trial court. See Tr. 200 – 205, (prospective juror Henderson); Tr. 299 – 301, (prospective juror Reymann). Under these circumstances, there is no error whatsoever in the seating of Beasley's jury, and this Court should so conclude.

Response to Proposition of Law 3: A Brief and Singular Reference To The Biblical Origin Of A Common Metaphor, Followed By Curative Instruction, Does Not Amount To Prosecutorial Misconduct, Nor Did The Prosecutor Misrepresent The Subordinate Role Of The Law Enforcement Witness Who Aided In Beasley's Arrest.

Of the two instances raised by Beasley as prosecutorial misconduct in his Proposition of Law 3, the full record associated with each instance shows no misconduct occurred.

First, the prosecutor's brief and singular reference in the opening statement to the biblical origin of the common metaphor "wolf in sheep's clothing," followed immediately by a sustained objection and a curative instruction to ignore the biblical reference, shows any supposed error was cured. *State v. Pickens*, 2014 WL 7116258, P120 (2014). ("The trial court sustained a defense objection to this argument and ordered the remarks stricken. Any errors were also

corrected by the trial court's instruction that the arguments of counsel were not evidence and that the jury was the sole judge of the facts.")

Second, Beasley inaccurately inflates the significance to the State's case of FBI Agent Wickerham, who merely described his own actions in aiding Beasley's arrest. Consequently, there was no prosecutorial misconduct that would taint the determination by the trial court that the acquaintance between Juror No. 5 and Wickerham would not disqualify Juror No. 5, especially where Juror No. 5 disavowed any predisposition to believe or disbelieve Wickerham. Tr. 2066 – 2070. Moreover, the issue of the sincerity of the prosecutor's representation of the subordinate role of FBI agent Wickerham is not properly presented to this Court, due to lack of contemporaneous trial objection. *State v. Hancock,* 108 Ohio St. 3d 57, P88 (2006). ("Hancock complains of other instances of guilt-phase prosecutorial misconduct. However, he failed to object to these at trial. We do not find that any of these misconduct claims amounted to plain error. They are therefore waived by Hancock's failure to object.")

A. Factual and Procedural Background

Relative to the alleged misconduct in the State's opening statement, the record shows in the brief moments before the supposed improper statement, the assistant prosecutor put her remarks in an appropriate context by stating "As the Judge said, what I'm about to say and what the defense will say following me is not evidence." Tr. 1269. Seconds later, the assistant prosecutor referred to the common metaphor a "wolf in sheep's clothing," and opined that "we probably used it at some point in our lives." Tr. 1269. Beginning to explain the biblical origin for that common metaphor, the assistant prosecutor was cut off by an artful and dignified objection by Beasley's counsel, which led immediately to a sidebar conference out of the hearing of the jury. Tr. 1270 The entire supposed improper statement, being less than one complete sentence, is

"As it turns out, the phrase originates from a sermon by Jesus reporting to Christians who --." Tr. 1270.

At sidebar, the defense objection was sustained, with the trial court stating "All right, I will sustain the objection nevertheless to the biblical reference. But I will overrule it with regard to everything else. You [assistant prosecutor] are only going that far and moving on." Tr. 1271. The trial court went on to say that a curative instruction would be given. Tr. 1273. Back on the bench, the trial court instructed the jury as follows:

> She [the assistant prosecutor] moved that one [a Power Point display] off. Pull that off, please. Ladies and gentlemen, there have been some -- you have seen some things up on the screen, there is not going to be any reference to that right now. You are instructed to disregard anything that you saw or read. And, once again, what you are hearing now is not evidence in this case, but I am still instructing you to disregard it. Tr. 1274.

Following this admonition, there was no further mention by either side of the metaphor "wolf in sheep's clothing," and no further mention of the biblical origin of that metaphor.

Relative to Beasley's bare allegation of prosecutorial misconduct as it relates to Juror No. 5 and State's witness FBI agent Todd Wickerham, the issue first arose when Juror No. 5 brought the matter to the attention of the trial court. In chambers, with counsel present, Juror No. 5 explained he had learned only days before that Todd Wickerham, the father of his daughter's close friend, was an FBI agent. When during his testimony FBI agent Daugherty mentioned the involvement of FBI Agent Todd Wickerham, Juror No. 5 realized his acquaintance and brought the matter to the attention of the trial court. Juror No. 5 also explained in chambers that he had known agent Wickerham for about a month and a half. Responding to questions from the trial court and defense counsel, Juror No. 5 explained his familiarity with FBI agent Wickerham would not unfairly influence any assessment of Wickerham's testimony. Tr. 2065 – 2069.

After reviewing their files, defense counsel Burdon informed the trial court that Juror No. 5 would not be placed in a position of "having to judge the credibility between agent Wickerham [--] and another civilian witness for the defense." Tr. 2068 – 2069. The prosecutors echoed this assessment, explaining to the trial court that agent Wickerham would be testifying as to non-disputed matters. Tr. 2068 -2069.

During his testimony, agent Wickerham explained that a cell phone number used by Beasley was tracked to a neighborhood in Akron, where he and others effected Beasley's arrest. There was no testimony from agent Wickerham about any interaction between himself and Beasley, verbal or otherwise. Tr. 2765 – 2779.

At no time did Beasley object to the service of Juror No. 5, or move the trial court to revisit the matter of the relationship between Juror No. 5 and FBI agent Wickerham.

B. Any Error Regarding The Brief and Singular Reference To The Biblical Origin Of A Common Metaphor Was Cured By A Defense Objection And Curative Instruction.

It is well-settled that this Court evaluates claims of prosecutorial misconduct in context of the case as a whole. An alleged improper comment is not evaluated under a simplistic assessment of merely whether the challenged comment was proper or improper. Instead, the alleged improper comment does not amount to error unless the entire trial has been rendered unfair. This expansive and broad-ranging evaluation was recently explained by this Court in *State v. Thompson*, 2014 WL 5483952, P162 (2014):

> To evaluate allegations of prosecutorial misconduct, we 'must determine (1) whether the prosecutor's conduct was improper and (2) if so, whether it prejudicially effected [the defendant's] substantial rights.' *State v. LaMar,* 95 Ohio St.3d 181, P121 (2002). Because prosecutorial misconduct implicates due-process concerns, '[t]he touchstone of the analysis 'is the fairness of the trial, not the culpability of the prosecutor.' 'State *v. Jones,* 135 Ohio St.3d 10, P200 (2012), quoting *Smith v. Phillips,* 455 U.S.

> 209, 219, (1982). We 'will not deem a trial unfair if, in the context of the entire trial, it appears clear beyond a reasonable doubt that the jury would have found the defendant guilty even' absent the misconduct. *LaMar* at P 121.

Furthermore, this Court recently explained that there would be no prejudice emanating from an alleged improper remark, where a defense objection was sustained and a curative instruction given. *State v. Pickens*, 2014 WL 7116258, P120 (2014). ("Even assuming that the prosecutor's remarks were improper, these comments were not prejudicial. The trial court sustained a defense objection to this argument and ordered the remarks stricken. Any errors were also corrected by the trial court's instruction that the arguments of counsel were not evidence and that the jury was the sole judge of the facts.") In other words, the potential for prejudice is greatly reduced, where by a sustained objection plus a curative instruction, the supposed error was immediately redressed. *State v. Hale*, 119 Ohio St. 3d 118, P162 (2008), ("An appellant cannot predicate error on objections the trial court sustained."); *State v. Thompson*, 2014 WL 5483952, P177 (2014) ("Thompson 'cannot predicate error [on a claim of prosecutorial misconduct] on objections the trial court sustained.'")

Applying these principles to Proposition of Law 3, it is evident Beasley lacks a viable claim of prosecutorial misconduct. First, as to the brief and singular reference to the biblical origin of the common metaphor "wolf in sheep's clothing," Beasley's objection was sustained, and a curative instruction was given, such that there would be no prejudice. *Pickens*, P120; Hale, P162; *Thompson, P177*. In other words, Beasley was able to cure the supposed defect at the trial level, which, even under an assumption the comment was improper, ameliorated any hypothetical prejudice.

Second, due to a prompt defense objection, the complete explanation of the biblical origin of the common metaphor was never given, such that the biblical reference itself was

fragmented and undeveloped. Consequently, there was no concrete and clear message to the jury to shirk its duty to independently assess the evidence in favor of some biblical admonition. Moreover, there is no reason to believe the jury disregarded the trial court's instruction to ignore the comment. *State v. Garner*, 74 Ohio St. 3d 49, 59 (1995). ("A jury is presumed to follow the instructions, including curative instructions, given it by a trial judge.")

Third, the likelihood of any supposed prejudice was reduced to a vanishing point where the biblical reference was singular, never to be repeated at any further stage of the trial. *State v. Carter*, 89 Ohio St. 3d 593, 603 (2000), ("The comments during closing argument were isolated and tempered by other comments to the jury indicating that it was up to them to make the final determinations as to the facts."); *State v. Hill*, 75 Ohio St. 3d 195, 204 (1996), ("Isolated comments by a prosecutor are not to be taken out of context and given their most damaging meaning.")

Under these circumstances, where any supposed error was cured by a sustained objection and a curative instruction, the comment itself was fragmented and undeveloped, and the challenged comment was solitary and isolated, Beasley has failed to show a viable claim of prosecutorial misconduct, and this Court should reject Proposition of Law Number 3.

C. Where FBI Agent Wickerham Testified As To His Own Personal Actions In Effecting Beasley's Arrest, Beasley's Claim Of Prosecutorial Misconduct For Alleged Misrepresentation Regarding Wickerham's Prospective Testimony Lacks Support In The Record.

In alleging prosecutorial misconduct relative to the subject matter of FBI agent Wickerham's prospective testimony, Beasley fails to mention it was the assessment of his own counsel that Juror No. 5 would not be placed in a position of "having to judge the credibility between agent Wickerham [--] and another civilian witness for the defense." Tr. 2068 – 2069. Because agent Wickerham's testimony was based on his own personal knowledge of his own

personal actions in effective Beasley's arrest, Beasley's trial counsel were eminently correct in observing there would be no need as a result of agent Wickerham's testimony for the jury to assess the veracity of competing versions of the same event.

In other words, since no other witness for the State or the defense would take issue with the specific and particular actions personally taken by agent Wickerham to effect Beasley's arrest, there was no need for Juror No. 5, or any juror, to resolve an important factual dispute over what agent Wickerham did or did not do. For example, whether or not agent Wickerham was truthful in his testimony that a cell phone number obtained from Beasley's former landlord, Joe Bias, was thereafter used to physically locate Beasley to effect his arrest, is of no moment to any element of any charge against Beasley. Tr. 2765-2779. In a similar vein, there was never a dispute a baseball cap (State's Ex. 30B) and a leather coat (State's Ex. 90B) belonged to Beasley, so the identification of these items by agent Wickerham as being worn by Beasley at the time of his arrest did not render agent Wickerham's credibility as an issue to be resolved by the jury. Tr. 2776 – 2778.

Under these circumstances, Beasley's claim of prosecutorial misconduct for misrepresenting the nature of agent Wickerham's prospective testimony fails for being directly contradicted by the trial record. Moreover, any claim of prosecutorial misconduct on this ground has been waived, where trial defense counsel never took an objection to the trial court as Beasley's appellate counsel now argues to this Court. *State v. Hancock,* 108 Ohio St. 3d 57, P88 (2006). ("Hancock complains of other instances of guilt-phase prosecutorial misconduct. However, he failed to object to these at trial. We do not find that any of these misconduct claims amounted to plain error. They are therefore waived by Hancock's failure to object.")

There being no merit to Beasley's Proposition of Law Number 3, this Court should find it not well taken.

Response To Proposition Of Law No. 4: The Juror Bias Claim Has Been Waived For Failure To Object Below, And Plain Error Is Not Present Where Juror No. 5 Gave No Reason To Believe His Acquaintance With A State's Witness Would Give Rise To Any Bias

Beasley's claim of juror bias fails on the facts and the law. As to the facts, Juror No. 5 gave no indication his acquaintance with a State's witness, FBI agent Todd Wickerham, impaired his impartiality. As to the law, Beasley did not challenge below Juror 5 for bias, thus waiving any error to this Court. Nor is plain error present, where, once again, Juror No. 5 gave no indication his acquaintance with a State's witness, FBI agent Todd Wickerham, impaired his impartiality.

A. Factual and Procedural History

This matter first arose following the testimony of the twenty-second State's witness, being FBI agent Michael Daugherty. Pertinent to this claim of error, agent Daugherty testified he engaged in various case activities at the direction of his supervisor, being FBI agent Todd Wickerham. Tr. 1997 - 1998, 2002 – 2006, 2019.

Over the lunch break, Juror No. 5 informed a court employee that he may know FBI agent Wickerham. Before resuming testimony, the trial court convened a hearing in chambers, where the issue was addressed. Tr. 2065 – 2071.

Juror No. 5 explained that in the past month and a half, through his daughter's basketball league, he had become acquainted with one of the dads named Todd. He and Todd, along with their daughters, had played an informal "dads and daughters" basketball game the previous Saturday. After that game, Juror No. 5 learned that Todd was an FBI agent. It wasn't until Juror No. 5 learned through the testimony of FBI agent Daugherty that Todd Wickerham had

involvement with the Beasley case. At that point, Juror No. 5 brought the matter to the attention of a court employee, which led to the chambers conference. Upon inquiry, the trial court learned that FBI agent Wickerham would be testifying as a State's witness. Tr. 2064 – 2067.

Through questioning by Beasley's counsel, Juror No. 5 explained he had not discussed the case with agent Wickerham, and did not feel obligated to Wickerham one way or the other about the outcome of the case. Tr. 2067 – 2068.

At that point, the trial court asked "You know him, is his testimony going to be more credible to you or can you treat him like any of the other witnesses and evaluate it, you know, person to person? Juror No. 5 responded "I don't know. I can't answer that question until I hear his testimony, to tell you the truth." Tr. 2068 – 2069.

Defense counsel announced they had determined that the nature of FBI agent Wickerham's prospective testimony was such that, as summarized by the trial court, "this is not a situation where [Juror No. 5] is going to be weighing credibility?" Defense counsel replied "No." Tr. 2069 – 2070.

After excusing Juror No. 5, the trial court asked defense counsel if they wanted Juror No. 5 excused. Both defense counsel replied "No." Tr. 2070.

The trial proceeded with testimony of State's witnesses, including FBI agent Todd Wickerham. During his testimony, Wickerham explained his own personal conduct and actions that culminated in the arrest of Beasley on the street nearby to the residence on Gridley St. Tr. 2759 – 2786. Other than to identify the baseball cap and leather jacket Beasley was wearing at his arrest, Wickerham did not testify about any statements of or conduct by Beasley. Tr. 2765 – 2779. In fact, agent Wickerham did not testify about any topic that wasn't previously covered by other witnesses. Tr. 1566-83, 1997-2007, 2524-27.

At no point did defense counsel take issue with Juror No. 5 maintaining his seat on the jury.

B. Failure To Object To Juror No. 5 Remaining Seated Constitutes A Waiver Of The Claim Stated In Proposition Of Law No. 4

The record below demonstrates that after having been afforded an opportunity to inquire during the in-chambers conference to address the acquaintance between Juror No. 5 and State's witness Wickerham, Beasley expressly declined to request that Juror No. 5 be excused. Under these circumstances, any error as to the service of Juror No. 5 as it relates to his acquaintance with agent Wickerham has been waived. *State v. Mammone*, 139 Ohio St. 3d 467, P78 (2014). ("[A] defendant who does not present a challenge for cause 'waive[s] any alleged error in regard to [that] prospective juror.' [citations omitted]. Under those circumstances, plain-error review applies. [citation omitted]." Due to waiver below, Beasley's Proposition of Law No. 4 should be denied.

C. The Record Fails To Support A "Close And Ongoing" Relationship Between Juror No. 5 And Agent Wickerham, And Lacks Any Evidence Of Actual Bias.

It is quite telling that those who actually witnessed Juror No. 5 disclose his prior acquaintance with agent Wickerham – the prosecutors, the defense attorneys, and the judge – had no objections, nor reservations, about his impartiality. "Reviewing courts," must be "properly resistant to second-guessing the trial judge's estimation of a juror's impartiality" because a cold appellate record fails to "capture fully… the prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty." *Skilling v. United States*, 130 S.Ct. 2896, 2918 (2010). In other words, "[t]he judgment as to 'whether a venireman is biased ... is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province.'" *Uttecht v. Brown*, 551 U.S. 1, 7 (2007).

The record fails to demonstrate a "close and ongoing" relationship between Juror No. 5 and agent Wickerham. [8] Moreover, the record simply fails to show that Juror No. 5, due to prior dealings with agent Wickerham, was actually biased.

"There is no constitutional prohibition against jurors simply knowing the parties involved or having knowledge of the case." *State v. Hale*, 119 Ohio St.3d 118, 150 (2008). The record fails to demonstrate that Juror No. 5 had a "close and ongoing" relationship with agent Wickerham. *Id*. Rather, the record only shows that Juror No. 5 was merely acquainted with him. *Id*. *citing*, *Miller v. Francis*, 269 F.3d 609, 617 (6th Cir. 2001). Merely being acquainted with someone involved in the case does not necessarily undermine a juror's assurance of impartiality. *McQueen v. Scroggy,* 99 F.3d 1302, 1320 (6th Cir. 1996) ("The Constitution does not require ignorant or uninformed jurors; it requires impartial jurors."); *State v. Sharrow*, 949 A.2d 428, 432 (Vt. S.Ct. 2008) ("[k]nowing a witness does not automatically require removal.") Nor is plain error present, where the trial court acted in accordance with Beasley's expressed directive to allow Juror No. 5 to remain seated, in view of a complete lack of evidence that Juror No. 5 was biased as a result of his acquaintance with State's witness Wickerham.

In *State v. Treesh*, a case where a juror had previously been a student of the prosecuting attorney, this Court held "[i]t is unlikely that a challenge for cause, if made, would have succeeded … [given the juror] testified that her past affiliation with [the prosecutor's] paralegal

[8] "[P]resumed or implied, as opposed to actual, bias provides that, in certain 'extreme' or 'exceptional' cases, courts should employ a conclusive presumption that a juror is biased." *Treesh v. Bagley*, 612 F.3d 424, 437 (6th Cir. 2010). Examples given are "that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J. concurring.) However, "[t]he Supreme Court has never held explicitly that courts may infer or presume bias." *U.S. v. Frost*, 125 F.3d 346, 380 (6th Cir. 1997). In fact, "Courts that reviewed [Smith v. Phillips, 455 U.S. 209 (1982)], including this circuit, have suggested that the majority's treatment of the issue of implied juror bias calls into question the continued vitality of the doctrine." *Johnson v. Luoma*, 425 F.3d 318, 326 (6th Cir. 2005).

course would not impair her ability to render a fair and impartial verdict." 90 Ohio St.3d 460, 490 (2001); *See also, Treesh v. Bagley*, 612 F.3d 424, 438 (6th Cir. 2010) ("Considering [the juror's] ability to promise to be impartial and the lack of evidence in the record indicating she was actually biased, we agree with the Ohio Supreme Court's conclusion that a challenge for cause… would have most likely been unsuccessful.")

Even though the record fails to support a "close and ongoing" relationship between Juror No. 5 and agent Wickerham, Beasley insists Juror No. 5's statement "I think I could be fair" creates some presumption that he was biased. (Beasley Brief, p. 36.) However, the burden lies with Beasley to demonstrate that Juror No. 5 was actually biased. *State v. Mundt*, 115 Ohio St.3d 22, 31 (2007). "Actual bias is 'bias in fact' and focuses on the record at voir dire." *Johnson v. Luoma*, 425 F.3d 318, 326 (6th Cir. 2005). Nothing in the record suggests that Juror No. 5, due to his prior dealings with agent Wickerham, could not be fair and impartial. Thus, the record precludes Beasley from overcoming his burden of showing that Juror No. 5 was actually biased.

Beasley attempts to avoid his burden by suggesting because Juror No. 5 allegedly never actually denied being biased, then his alleged bias must somehow be presumed. However, "[m]any, if not most, jurors respond to questions about their ability to be fair and impartial… [by] couch(ing) their responses to questions concerning bias in terms of 'I think.'" *Miller*, 269 F.3d at 618. Because Juror testimony is often "ambiguous and at times contradictory[,]" the Supreme Court has instructed "[j]urors thus cannot be expected invariably to express themselves carefully or even consistently." *Patton v. Yount*, 467 U.S. 1025, 1038 (1984). Accordingly, the common nature of the words "I think" should not be "necessarily [omit] construed as equivocation." *Miller*, 269 F.3d at 618.

Accordingly, this Court should conclude Beasley's Proposition of Law No. 4 lacks merit, and furthermore conclude that there is no plain error in respect to the matter of the acquaintance between Juror No. 5 and State's witness Wickerham.

Response To Proposition Of Law No. 5: Where Beasley Never Moved The Trial Court For A Mistrial, The Alleged Error Has Been Waived, And Plain Error Is Not Present Since Beasley's Criminal Past Was A Component Of His Trial Defense Strategy

A. Beasley Did Not Move For A Mistrial But Rather Entered An Objection Only To Agent Wickerham's Testimony

Since Beasley did not move the trial court for a mistrial, the premise of Beasley's Proposition of Law No. 5 that the trial court overruled a motion for mistrial is false. Rather, Beasley objected to testimony from FBI Special Agent Todd Wickerham, who testified his ability to locate Beasley was in part due assistance from the Akron Police Department, who "had a lot of background and history on Mr. Beasley and his previous criminal activity." Tr. 2767 – 2768. Beasley's objection to agent Wickerham's testimony was not followed with any other request for relief, nor did Beasley move for a mistrial.

The matter was resolved at sidebar by agreement of the parties, with the State's assistant prosecutor conferring privately with agent Wickerham about the parameters of his subsequent testimony. Agent Wickerham's testimony resumed without further admonition or curative instruction, since no such request was made by Beasley. Tr. 2768 – 2771.

During the sidebar conversation, and in admonishing the State to ensure that agent Wickerham's subsequent testimony was appropriately confined, the trial court made an impromptu comment that "I'm not going to go this far and give him a mistrial." Tr. 2769. The context of the impromptu comment was that the trial was well into the third week and the State was questioning its forty-first witness. The impromptu comment bore no relation to any motion for mistrial, since Beasley had stated an objection to agent Wickerham's testimony only. Tr.

2767 – 2768. Other than the objection to agent Wickerham's testimony, Beasley did not move for any additional relief, nor did Beasley move for a mistrial. To the contrary, Beasley agreed with the resolution that the State's counsel would confer privately with agent Wickerham about the parameters of his subsequent testimony. As to this resolution, defense attorney Whitney said "I would rather do it that way." Tr. 2769.

Under these circumstances, Beasley's Proposition Of Law No. 5 fails due to waiver, where Beasley did not move the trial court to declare a mistrial. *State v. Carter*, 89 Ohio St. 3d 593, 598 (2000) ("An appellate court need not consider an error that was not called to the attention of the trial court at a time when such error could have been avoided or corrected by the trial court. [citation omitted.] As a result, such error is waived absent plain error.")

B. Plain Error Is Not Present Where Beasley Himself Introduced Evidence And Argument About His Previous Criminal Activity

Nor is plain error present, where agent Wickerham's singular and unembellished reference to Beasley's "previous criminal activity" was consistent with what Beasley himself told the jury in the defense opening statement.

In developing in his opening statement the defense theme that Jerry Hood was responsible for all the wrongdoing, Beasley told the jury that "The bad thing about Jerry Hood is that he has a long criminal history." The very next words were that "This defendant is no angel, and he [Jerry Hood] knew that, and he [Beasley] still befriended him and still did things for him." Tr. 1312 – 1313.

Beasley went on in his opening statement to emphasis his own personal unsavory past. In explaining his version of why the government targeted Beasley for prosecution, defense counsel Burdon told the jury

> And the reason is because, as I said, kind of a colloquialism earlier, that he [Beasley] is not a saint. He did a lot of things wrong in his life, he has done a lot of things wrong here, just like many of us. That includes present and prolonged associations with what we generally call bikers. Bikers are not people who just ride motorcycles like you see going up and down city streets. Bikers in this terminology are violent people who are dangerous. And Jerry Hood was one of those, as were many of the people that Richard Beasley associated with. Tr. 1315 – 1316.

Although Beasley did not use the exact phrase "previous criminal activity" to describe his past, Beasley used the phrase "long criminal history" to describe his associate Jerry Hood, followed immediately with the phrase "This defendant is no angel…." to describe himself. In going on to describe his own personal "present and prolonged association with what we generally call bikers," who Beasley told the jury were "violent people who are dangerous," Beasley cast himself as an outlaw.

After hearing from Beasley himself about his "present and prolonged association" with "violent people who are dangerous," the jury would have heard agent Wickerham's clinical reference to Beasley's "previous criminal activity" as being parallel to Beasley's own description of himself from his opening statement.

It is well settled that "Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise." *State v. Moreland,* 50 Ohio St.3d 58, 62 (1990). Where agent Wickerham's singular and unembellished reference to Beasley's "prior criminal activity" is consistent with Beasley's own description of himself, it simply can't be said Beasley would have been acquitted but for the jury hearing these three words from agent Wickerham's testimony.

The absence of plain error becomes more evident when the entire trial, including Beasley's defense case, is examined. In laying the groundwork for the defense theory that victim

Ralph Geiger willingly handed over his wallet and driver's license to Beasley, Beasley testified he told Geiger that he, Beasley, wanted to conceal his own identity to avoid arrest on an outstanding warrant. Tr. 2896 – 2899.

Earlier, Beasley testified about the specifics of his criminal past that gave rise to arrest warrant. Relative to his criminal record, Beasley testified that he was convicted for "daytime burglary" in Texas when he was in his early 20's and spent 4 years in prison. Beasley testified that following his release from Texas prison, he was placed on parole. Beasley's parole was transferred to Ohio when he returned to Akron in 1989. Beasley testified that he was also convicted of a federal charge for possession of a firearm by a felon, for which he spent time in a federal prison until he was released in 2004. Beasley testified that following his release from federal prison, his parole from Texas was still in force. Tr. 2889 – 2894.

Beasley testified that in January 2011, he was contacted by his parole officer from Texas. Beasley testified that the Texas parole officer told him that he, Beasley, would have to resume regular reporting. Beasley testified that the Texas parole officer implied that he, Beasley, would probably be declared a parole violator. Tr. 2894 – 2896.

Beasley testified that he did not want to return to prison in Texas, so he decided to take steps to change his identity. Beasley testified that he knew Ralph Geiger, who spent time at the clubhouse of the Brother's Motorcycle Club, although Geiger was not a member. Beasley testified that the Ralph Geiger to whom Beasley referred was the same person whose picture had been displayed in the courtroom. Beasley spoke to his friend Geiger about his, Beasley's, intention to change his identity. Beasley testified that Ralph Geiger volunteered to allow Beasley to assume his, Geiger's, identity. Beasley testified that Geiger gave Beasley his, Geiger's, driver's license and social security card. Beasley testified that he hadn't thought about possible

difficulties with two persons having the same identity because soon after, Ralph Geiger "went down to Jerry Hood's farm." Beasley testified that Ralph Geiger knew Jerry Hood through the Brother's Motorcycle Club. Beasley testified that he told his friend, Joyce Grebelsky, that he, Beasley, was going to assume the identity of Ralph Geiger. Tr. 2896 – 2899.

Beasley's unabashed testimony about his own previous criminal activity, plus two stints in prison, was intended to justify his spurious identity of Ralph Geiger, where he admitted he took on a false identity to evade arrest on an outstanding warrant from Texas. In this regard, Beasley's criminal past was an important part of his defense case, since claiming that Ralph Geiger was a willing helper in Beasley's change of identity permitted Beasley to argue to the jury that his spurious identity of Ralph Geiger was not circumstantial evidence that he killed Ralph Geiger. According to Beasley, he had no motive to kill Geiger since he had already assumed Geiger's identity by the time Geiger left Akron on August 8, 2011. Tr. 3373 – 3374.

Where the record shows Beasley's criminal past was well-known to the jury, primarily due to Beasley's own testimony and argument, plain error is not present in a hypothetical failure to declare a mistrial following agent Wickerham's singular and unembellished mention of Beasley's "previous criminal activity." *State v. Moreland*, 50 Ohio St.3d 58, 62 (1990). ("Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise.")

Response to Proposition of Law No. 6: Where Testimony Regarding Out-of-Court Statements Is Presented Without Objection and Is Admissible Under the Rules of Evidence, the Trial Court Does Not Err in Permitting Admission of that Testimony

Response to Claim A: Beasley Waived Review of the Alleged Errors Regarding Testimony of Law Enforcement Officers Because He Did Not Object And The Trial Court Properly Allowed Law Enforcement Officers to Testify Regarding Their Investigative Efforts

Beasley did not object to any portion of the testimony of Sheriff Hannum, Tr. 1526-49; Parole Officer Jeff Jones, Tr. 1566-93; Agent Corey Collins, Tr. 1601-64; or Agent Michael Daugherty, Tr. 1994-2021. An objection was made during Agent Todd Wickerham's testimony, but that objection was related to the introduction of Beasley's criminal history, not hearsay. Tr. 2767; *and see* Evid. R. 103 (party must state ground for objection with specificity); and *State v. Tibbetts*, 92 Ohio St.3d 146, 160-61 (2001). ("Because he failed to object at trial on the specific ground raised here, Tibbetts has forfeited the issue, limiting us to a plain-error analysis"). Only one objection was made during Agent Jack Vickery's testimony, but that objection related to Agent Vickery describing the video because "[t]he screen speaks for itself," not hearsay. Tr. 2362. As to these witnesses, Beasley never made a specific and sufficient objection to the testimony so that the trial court could evaluate and, if necessary, correct the alleged error.

An alleged error must be brought to the attention of the trial court, during the course of the trial, to be considered on appeal. In *State v. Williams*, 51 Ohio St. 2d 112, 117-18 (1977) this Court explained that:

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

State v. Driscoll, 106 Ohio St. 33, 39 (1922). Litigants have a duty of vigilance and must bring the trial court's attention to errors "then and there" to allow the court to correct the error or note the objections. *Lester v. Leuck*, 142 Ohio St. 91, 92 (1943). Neither party will be allowed

"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." *Id.* at 92-93, *quoting State v. Kollar*, 93 Ohio St. 89, 91 (1915). A defendant waives review of all but plain error on appeal when he fails to bring an error to the court's attention at a time when it could have been corrected. *State v. Johnson*, 112 Ohio St.3d 210, ¶31; See also Crim. R. 52(B). Plain error can be found when the error is "obvious", *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002), and it is clear that "but for the error" the trial's outcome would have been different, *see State v. Long*, 53 Ohio St.2d 91 (1978), at paragraph two of the syllabus. "Notice of plain error under Crim. R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id.* at paragraph three of the syllabus.

A continuing objection is sufficient to preserve an error for review in some, but not all, circumstances. *See Brady v. Stafford*, 115 Ohio St.67 (1926); *State v. Henness*, 79 Ohio St.3d 53, 59 (1997). Where "a sufficient and specific objection to the admission of testimony concerning a conversation" is made and overruled, the objection will suffice to preserve error as to "testimony of the same class is offered as to the same conversation." *Brady* at paragraph two of the syllabus. But where "the specific circumstances surrounding each * * * communication" must be analyzed to determine whether the statement is admissible, a specific objection must be made so the trial court can examine the circumstances of each statement. *Henness* at 59.

In this case, as in *Henness*, Beasley asserts that his "continuing objection" to hearsay offered by one witness as to one conversation was sufficient to preserve any and all allegations of hearsay for review. But determining whether hearsay is admissible requires examining the circumstances of each statement to determine whether the statement is hearsay and whether it is

subject to an exception, just as determining the existence of the marital privilege requires examining the circumstances of each statement. *See Henness* at 59. A continuing objection noted in the course of one witness's testimony about a conversation does not serve as an objection to other testimony about different conversations or offered by a different witness. In those circumstances where Beasley did not object to any portion of the witness's testimony, his assigned errors are reviewed only for plain error. The same rule applies where Beasley's continuing objection did not relate to the portion of testimony about which he now complains, since a continuing objection to different testimony did not provide the trial court with notice of the alleged error and opportunity to address it.

Beasley asserts that the recent decision in *State v. Ricks* now requires that a trial court conduct an examination of law enforcement testimony, sua sponte, to determine the admissibility of any out-of-court statements offered therein, but his reading of that case is overly broad and would lead to an untenable result. First, Beasley ignores that the defendant in *Ricks* objected to the statements at trial so the trial court had an opportunity to address the alleged error. *State v. Ricks*, 136 Ohio St.3d 356, ¶12 (2013). Second, Beasley's reading of *Ricks* would lead to an untenable result – the trial court would be required to regularly stop testimony and remove the jury from the courtroom in order to hear each piece of testimony that would be offered, weigh its probative value versus the dangers of offering it, determine whether a limiting instruction should be offered, and then determine the appropriate instruction, all *without any objection from defense counsel*. Such a process would directly contravene this Court's repeated admonitions that trial counsel has a duty to raise potential errors to the trial court's attention. Third, Beasley's reading disregards that trial lawyers make strategic decisions about when to object, what to object to, and what jury instructions to request. There is no indication in *Ricks* that this Court intended to

fundamentally change the role of the courts and counsel during a trial. Because Beasley never raised a hearsay objection to the testimony of these law enforcement officers, he has waived any alleged errors, and is not entitled to relief unless he can demonstrate that plain error occurred.

Plain error is not present in this case. The statements by law enforcement officers were not hearsay because they were offered, and admissible, to explain the investigative steps taken, and not to prove the truth of the matter asserted. *State v. Thomas*, 61 Ohio St.2d 223, 232 (1980). "It is well established that extrajudicial statements made by an out-of-court declarant are properly admissible to explain the actions of a witness to whom the statement was directed." *Id.* Hearsay is defined in the Ohio Rules of Evidence as: "[A] statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). The Supreme Court of Ohio has explained: "To constitute hearsay, two elements are needed. First, there must be an out-of-court statement. Second, the statement must be offered to prove the truth of the matter asserted. If either element is not present, the statement is not 'hearsay.'" *State v. Maurer*, 15 Ohio St. 3d 239, 262 (1984). In *Maurer*, the Supreme Court of Ohio explained, "testimony which explains the actions of a witness to whom a statement was directed, such as to explain the witness' activities, is not hearsay. Likewise, it is non-hearsay if an out-of-court statement is offered to prove a statement was made and not for its truth; to show a state of mind; or to explain an act in question." *Id.*, 15 Ohio St. 3d at 262. The Court further explained: "If a statement is offered for some purpose other than to prove the truth of the matter asserted, admissibility should be governed by the standards of relevancy and prejudice." *Id.* at 263.

Response to Claim A1: Sheriff Hannum's Testimony Was Admissible

Sheriff Hannum testified without objection. Tr. 1526-49. Even if objections had been raised, they would have been overruled because the testimony was admissible. Sheriff Hannum's testimony only explained why his investigation continued despite the fact that Mr. Hood and his son matched the description of Mr. Davis' attackers.

Beasley asserts that the trial court erred by allowing the introduction of Sheriff Hannum's testimony regarding Scott Davis' description of two men at pages 1539 and 1540 of the transcript. (Appellant's Brief, p. 46). In that portion of his testimony, Sheriff Hannum explains that Mr. Davis' description "somewhat matched the description of Jerry Hood and his son", and briefly recalls the description. Tr. 1539-40. The testimony explains Sheriff Hannum's next investigative action – speaking with Jerry Hood's wife, from whom he learned that Mr. Hood was in the hospital. Tr. 1541-42. It also explains why he called Mr. Hood's son. Tr. 1542. This testimony was not offered to prove that Jerry Hood was in the hospital or that his son had not shaved off his beard, and so was not offered for the truth of the matter asserted. This testimony explained what steps Sheriff Hannum took in the investigation and why he continued to look for another suspect. Likewise, Sheriff Hannum's testimony that the United States Marshals Service was looking for someone named Beasley on Mr. Hood's property (which he said matched the description of property provided by Scott Davis) explains why Sheriff Hannum secured Mr. Davis' property and turned the investigation over to a detective. Tr. 1546-48. None of this testimony linked Beasley to a crime. Sheriff Hannum's testimony only explained why his investigation continued despite the fact that Mr. Hood and his son matched the description of Mr.

Davis' attackers. Because this testimony was not hearsay, plain error did not occur when it was admitted.

Response to Claim A2: Parole Officer Jones's Testimony Was Admissible

Parole Officer Jones testified without objection from Beasley. Tr. 1566-93. Even if objections had been raised, they would have been overruled because the testimony was admissible. PO Jones's testimony explained the steps he took to find Beasley.

Explaining how he first became aware of Beasley, Parole Officer (PO) Jones testified that PO Rogers told him about the case before they went to look for Beasley, but did not disclose the contents of his conversation PO Rogers beyond PO Rogers's description of the case as "a good one." Tr. 1571. The mere mention of a conversation with another person does not constitute hearsay since it contains no assertions offered by an out-of-court declarant. PO Jones also testified about a description of Beasley that Beasley's mother provided and about Beasley's ex-wife's identification of Beasley in a still photo. Tr. 1574, 1579. Beasley's mother provided a new description of Beasley: she stated that he shaved his beard, just had a mustache, and dyed his hair darker. Tr. 1574. That new description explained why PO Jones thought the person in the still photo might be Beasley and showed the photograph to his ex-wife, who identified him. Tr. 1579-80. Scott Davis also testified that the person in that photograph was Beasley, and Beasley confirmed the identification during his testimony. Tr. 1468 – 1471; 2922-23. PO Jones's testimony explained the steps he took to find Beasley. Because this testimony was not hearsay, plain error did not occur when it was admitted.

Response to Claim A3: Agent Collins's Testimony Was Admissible

Agent Collins testified without objection from Beasley. Tr. 1601-64. Even if objections had been raised, they would have been overruled because the testimony was admissible. Agent

Collins's testimony explained why the investigation continued after learning that the Craigslist ads had been posted from Joe Bais's residence and how the investigators eliminated Mr. Bais as a suspect. Because Mr. Bais denied posting the ads, Agent Collins continued his investigation and used other information to determine who else used the computer. Tr. 1658. Mr. Bais also testified at the trial, denied posting the ads, and identified the Defendant as his renter. Tr. 1916-50. Because Mr. Bais asserted that he rented out a room in his house, Agent Collins found an email about a room for rent in Akron to be significant. Tr. 1662-63. The Defendant was later arrested at the Akron home associated with that email. Tr. 1663-65. Agents Daugherty, Vickery, and Wickerham (members of the team that effectuated the arrest) also testified about it. Tr. 1997 – 2007, 2354-54, 2765-79. Because Agent Collins's testimony explained his investigative steps, it was not hearsay and plain error did not occur when it was admitted.

Response to Claim A4: Agent Daugherty's Testimony Was Admissible

Agent Daugherty testified without objection from Beasley. Tr. 1994-2021. Even if objections had been raised, they would have been overruled because the testimony was admissible. Agent Daugherty's testimony regarding what he was advised of provided context to his testimony and explained the steps he took to locate the Defendant. This testimony explained why Agent Daugherty was looking for the Defendant and Mr. Rafferty, why he was interested in the phone conversation his supervisor had, and why he was interested in the results of a cell phone search. Tr. 1998-2006. Agent Daugherty also explained how the investigators gained possession of David Pauley's car from Larry Baker. Tr. 2018-2020. In addition to being admissible as an explanation of Agent Daugherty's decision to tow and search the car, this testimony particularly highlights the importance of preserving the roles of the parties that this Court has established – the trial judge as neutral arbiter and the attorneys as advocates who point

out errors. Even if this testimony were objectionable, the defense likely made a tactical decision not to object since they used it in closing argument to cast suspicion on Mr. Walters. Tr. 3396-3401. Because Agent Daugherty's testimony explained his investigative steps, it was not hearsay and plain error did not occur when it was admitted.

Response to Claim A5: Agent Wickerham's Testimony Was Admissible

Agent Wickerham testified without a hearsay objection from Beasley. Tr. 2759 – 2786. The only objection Beasley made was related to the introduction of Beasley's criminal history, which was not a hearsay objection. Tr. 2767. Even if objections had been raised, they would have been overruled because the testimony was admissible. Agent Wickerham, who supervised Agents Collins and Vickery, testified about the steps he directed his team to take and why they took them. Tr. 2579-86. Agent Wickerham testified that he learned where Beasley, who was known as Dutch, lived because of his conversations with Mr. Bais and Mr. Bais's girlfriend, Samantha Binnegar. Tr. 2770-71. No objection was made to Agent Wickerham's use of the word "we" during his testimony, and that usage was appropriate given that Agent Wickerham described steps he took alongside his agents. If there was any confusion over Agent Wickerham's involvement in the actions he described, the time for an objection to be raised or a question to be asked was during the trial. Agent Wickerham's testimony was appropriate and admissible. Furthermore, Beasley has not demonstrated that the result of the trial would likely have been different since other agents testified as to their involvement in the same actions. Because Agent Wickerham's testimony was admissible to explain his investigative steps, it was not hearsay and plain error did not occur when it was admitted.

Response to Claim A6: Agent Vickery's Testimony Was Admissible

Agent Vickery testified without a hearsay objection from Beasley. Tr. 2348 – 2397. The only objection Beasley made was related to Agent Vickery describing the video because "[t]he screen speaks for itself," which was not a hearsay objection. Tr. 2362. Even if objections had been raised, they would have been overruled because the testimony was admissible. Agent Vickery's testimony explained how he chose pictures for the lineup he showed Mr. Davis and why he pulled surveillance footage from certain locations. Agent Vickery explained that he spoke to Mr. Davis, who testified at trial, at the hospital where Mr. Davis was being treated. Tr. 2349-51. Later, based on Mr. Davis's statements and Agent Vickery's participation in the execution of a warrant, Agent Vickery created a photograph lineup, which he showed to Mr. Davis. Tr. 2352-53. No error occurred because Agent Vickery's testimony explained his actions. Mr. Davis did not select a picture from the array containing the Defendant's photograph, and Beasley has not explained how testimony that Mr. Davis did not choose Beasley from a lineup changed the result of this case. Tr. 2352. Agent Vickery also testified about the steps he took to investigate the death of Tim Kern. In the course of his explanation, Agent Vickery testified about his conversations with Nicholas Kern, who also testified, to explain why he traveled to specific locations and pursued certain footage. Tr. 2356-69. Because this testimony explained Agent Vickery's actions, it was not hearsay and plain error did not occur when it was admitted.

Response to Claim B: A Limiting Instruction Regarding the Admission of the Foregoing Testimony Was Not Requested and Would Not Have Been Appropriate

Jury instructions are to be complete, accurate, and pertinent. OJI 101.69. "The fewer instructions the better." *Id.* Jury instructions that introduce extraneous matters of law, provide contradictory instructions, mislead the jury, or "divert[] their minds from the points in dispute"

are erroneous and may be prejudicial. *Id.* In this case, the hearsay statements that Beasley complains of were also introduced as direct testimony from the declarant. It was admissible without limitation. The type of instruction Beasley proposes would have been confusing and contradictory, since, to be completely accurate, the instruction would also have to include an explanation that the evidence was admissible without limitation when elicited from one witness, but limited when it came from another witness would have only confused the jury. It was not plain error to omit a limiting instruction and would have been erroneous to read such an instruction.

Under Criminal Rule 30, the parties are required to object to "the giving or failure to give any instructions * * * before the jury retires to consider its verdict." Crim. R. 30(B). Otherwise, the error may not be assigned on appeal and is subject to plain error review. Because Beasley did not request a limiting instruction as to the law enforcement testimony about which he now complains, he must demonstrate how the lack of instruction "caused a different trial result or created a manifest miscarriage of justice." *State v. Stallings*, 89 Ohio St.3d 280, 292 (2000). Beasley now asserts that a limiting instruction should have been read to the jury to explain that the law enforcement testimony was offered to explain their conduct. Such an instruction would not have created a different trial result and did not create a manifest miscarriage of justice since the testimony at issue was limited and much of the same testimony was elicited directly from the declarant during the trial.

Response to Claim C: Guy Smith's Testimony Was Not Objected to and Was Admissible as a Hearsay Exception

Beasley did not object to any part of Guy Smith's testimony. Tr. 2400-10. He has waived review of any alleged errors regarding that testimony and plain error is not present. Guy Smith's testimony related to the business records maintained by Smitty's Gun Shop, which was

owned by Mr. Smith's father. His testimony regarding these records established that they were admissible pursuant to Evid. R. 803(6) as records of regularly conducted activity. Evid. R. 803(6). Mr. Smith testified that he worked at the gun shop with his father. Tr. 2401. Every time a gun was brought into the shop, it was logged in to a book, by Mr. Smith or his father, and tagged. Tr. 2402, 2406. The customer filled out a portion of the tag and Mr. Smith or his father filled out the rest. Tr. 2408. Mr. Smith was familiar with the logbook and the tags and had access to them. Tr. 2402-03. Mr. Smith's testimony established that the logbook and tag were records "of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, * * * kept in the course of a regularly conducted business activity, and * * * it was the regular practice of that business activity" to make those records. Evid. R. 803(6). Even if Beasley had objected to Mr. Smith's testimony, it would have been admissible, so no plain error occurred.

Response to Claim D: Debra Bruce's Testimony About Detective Mackie's Question Was Not Objected to and Was Admissible Because It Was Not Hearsay

Likewise, although Beasley objected to Debra Bruce's testimony regarding conversations with her brother, David Pauley, no objection was made to her testimony regarding her conversation with Detective Mackie or to her testimony that Detective Mackie asked her if Mr. Pauley wore a bracelet. Tr. 1742. Beasley's continuing objection to testimony regarding a conversation with her brother did not serve as an objection to her testimony regarding a different conversation with a different person. Even if the continuing objection had adequately preserved this issue for appeal, the trial court correctly permitted Ms. Bruce to testify concerning the question. As this Court explained, "[a]n 'assertion' for hearsay purposes 'simply means *to say that something is so, e.g.*, that an event happened or that a condition existed.' (Emphasis sic.)" *State v. Carter*, 72 Ohio St.3d 545, 549 (1995), quoting 2 McCormick on Evidence (4th

Ed.1992) 98, Section 246. Because questions cannot be proved true or false, they are not assertions and are not hearsay. *Carter*, 72 Ohio St.3d at paragraph two of the syllabus (1995).

Even if Beasley had objected to Ms. Bruce's testimony regarding the question posed by Detective Mackie, the testimony was admissible, so no plain error occurred.

Response to Claim E: The Trial Court Correctly Admitted Testimony About Scott Davis's Excited Utterances

The trial court has broad discretion to determine the admission and exclusion of evidence. Before disturbing the decision to admit or exclude evidence, the appellate court must find that the trial court abused its discretion and that the defendant was materially prejudiced by that abuse. *State v. Hymore*, 9 Ohio St.2d 122, 128 (1967); *see also State v. Martin*, 19 Ohio St.3d 122, 129 (1985); and *State v. Robb*, 88 Ohio St.3d 59, 68 (2000).

Beasley twice objected to Jeffrey Shockling's testimony regarding Scott Davis's statements to him. Tr. 1432, 1434. The court initially sustained the objection because there was insufficient foundation. Tr. 1432. After the State laid a foundation that established Mr. Davis's statements to Mr. Shockling were excited utterances, the trial court overruled the objection. Tr. 1434. The trial court's decision was not an abuse of its discretion.

Excited utterances are not excluded by the hearsay rule, even if the declarant is available to testify. Evid. R. 803. Evidence Rule 803(2) defines an excited utterance as, "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." To admit a statement pursuant to this hearsay exception, the proponent must establish that (1) there was a startling event; (2) the statement related to that event; (3) the statement was made while the declarant was under the stress of that event; and (4) the declarant personally observed that event. *State v. Taylor*, 66 Ohio St.3d 295, 300-301 (1993).

Mr. Shockling's testimony concerned Mr. Davis's excited utterances. There was certainly a startling event – Mr. Davis was shot in the elbow. He ran and hid in the woods, fearing for his safety and unable to get help. When Mr. Davis arrived at Mr. Shockling's house, he was still under the stress of that event. Mr. Shockling testified that Mr. Davis was holding his arm and covered in blood. Tr. 1427. Mr. Davis was pale, shaking, and "in extreme pain." Tr. 1427-30. Mr. Shockling described Mr. Davis as "very nervous" and said his face was almost white; he was scared, fidgety, would not sit down, and kept asking for water. Tr. 1434. Mr. Davis rambled and repeated himself, even though Mr. Shockling did not ask him questions. Tr. 1435. Mr. Davis personally observed that event, as he was the victim of the shooting, and his statements related directly to that event. Mr. Davis told Mr. Shockling how the shooting occurred, how he came to be shot, and how he made it to safety. Tr. 1434-36. Mr. Davis stated that he knew he was in trouble when he heard a click, and he repeatedly stated that "they" were going to rob him. Tr. 1435-46. Mr. Davis told Mr. Shockling that he hid in the woods, but could not get cell phone reception. Tr. 1436. When it became dark, he had to do something and stopped at the house because he felt safe. Tr. 1436. Mr. Davis said he had applied for a job building fences and had parked his car at a store. Tr. 1435. He had e-mail documentation on the dashboard of the car. Tr. 1436. Mr. Shockling stated that Mr. Davis was nervous throughout this conversation. Tr. 1436. Mr. Davis had not seen, or spoken to, anyone in the interim.

While timing of the statement is a factor in evaluating this exception, it is not controlling. *State v. Duncan*, 53 Ohio St.2d 215, 219-20 (1978). As the Fifth District Court of Appeals explained, "[t]he controlling factor is whether the declaration was made under such circumstances as would reasonably show that it resulted from impulse rather than reason and reflection." *State v. Smith*, 34 Ohio App. 3d 180, 190 (5th Dist. 1986). Courts in other

jurisdictions have found statements made hours after the event to be excited utterances where the declarant was still "under the stress of excitement caused by the event" despite a delay in time, and considering the physical and mental condition of the declarant. *Haggins v. Warden, Fort Pillow State Farm*, 715 F.2d 1050, 1058 (6th Cir. 1983); *and see Iowa v. Stafford*, 23 N.W.2d 832 (Iowa 1946) (twelve-hour delay); *Mills v. Texas*, 626 S.W. 2d 583, 585 (Texas 1981) (six- to eight-hour delay); *United States v. Scarpa*, 913 F.2d 993, 1017 (D.C. Cir. 1990) (six-hour delay); *Gross v. Greer*, 773 F.2d 116, 120 (7th Cir. 1985) (twelve-hour delay).

Mr. Davis's statements to Mr. Shockling were excited utterances and were properly admitted by the trial court.

Response to Claim F: The Trial Court Correctly Admitted Testimony Regarding the Victims' Statements About Their Then Existing Mental, Emotional, or Physical Condition

As with excited utterances, a statement is not excluded by the hearsay rule, even if the declarant is available to testify, if it is "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed." Evid.R. 803(3). This Court has held that statements of a murder victim's intent are admissible under this rule. *See State v. Tibbetts*, 92 Ohio St.3d 146, 158 (2001) (statements that victim intended to separate from defendant were admissible); *State v. Leonard*, 104 Ohio St. 3d 54, ¶¶ 100-101 (2004) (victim's statement that she intended to end her relationship with defendant were admissible); *State v. Apanovitch*, 33 Ohio St.3d 19, 21 (1987) (victim's statement that he feared the person painting his house were admissible); *State v. Davis*, 62 Ohio St.3d 326, 343 (1991) (co-defendant's statement that he would "get even" with victim was admissible)

A number of statements were properly admitted pursuant to this exception. Summer Rowley's testimony that Ralph Geiger said he was going to work on a farm in Southern Ohio and that his boss was going to pick him up was admissible pursuant to this exception because it recounted Mr. Geiger's then-existing intent. Tr. 1326-29. Likewise, Debra Bruce's statements regarding her conversations with her twin brother, David Pauley, were admissible pursuant to this exception. Mr. Pauley told Ms. Bruce about the job he was applying for, about getting the job, and about his plans for travel to the job. Tr. 1730-35. All of these statements were admissible pursuant to this exception because they recounted Mr. Pauley's intent. Ms. Bruce recalled that Mr. Pauley called her from the Red Roof Inn, needing a credit card guarantee. Tr. 1734. Mr. Pauley's statement that he was at the hotel was admissible pursuant to the same exception, and was also admissible to explain Ms. Bruce's decision to have a guarantee faxed to the hotel.

Mr. Geiger's statements to Dwight Johnson were permissible pursuant to the same exception. Mr. Johnson testified that he worked at the shelter Mr. Geiger lived in and spoke with Mr. Geiger each week. Tr. 1337-38. Mr. Geiger told Mr. Johnson that he would be leaving the shelter to work at a farm in Dover, Ohio. Tr. 1340-41, St. Ex. 98. This testimony was admissible pursuant to 803(3) because it was Mr. Geiger's statement of his intent to leave the shelter and move to Dover.

Under the same exception, Tim Kern's statements to Tina and Nicholas Kern were introduced. Without objection, Tina testified that her ex-husband, Tim Kern, had talked to her often about trying to find a new, more stable job; had used her computer to look for a job on job boards and Craigslist; and told her that he had been offered a position on a farm. Tr. 1968-69. The trial court properly overruled Beasley's objection to Tina Kern testifying as to Tim Kern's

conversations since those conversations related to Tim Kern's intent and plan to obtain the job. Tr. 1970. Ms. Kern testified that Tim was going to an interview. Tr. 1970. After the interview, Tim contacted her and told her that he intended to title his car in his employer's name. Tr. 1971. Ms. Kern also testified regarding Tim's plan for getting to his job – to meet with his employer and be driven by them. Tr. 1975. Ms. Kern also testified that Tim asked her if he could take an old television of hers. Tr. 1972. That testimony was not hearsay since a question is not an assertion and, therefore, not hearsay. *Carter*, 72 Ohio St.3d at paragraph two of the syllabus.

Without objection, Nicholas Kern, Tim Kern's son, testified that his father was looking for a better job through Craigslist and had obtained an interview. Tr. 1985-86. Tim asked Nicholas to drive him to the job interview, and Nicholas did so. Tr. 1986. They drove to a Waffle House off of Interstate 77. Tr. 1987. Tim told Nicholas he was looking for a red truck, which they saw, and that he was going inside to look for a man with a red hat with an American flag on it. Tr. 1987-88. Beasley objected to the conversation at this point and the trial court noted a "continuing objection to anything Mr. Kern told Nicholas." Tr. 1988. Nicholas testified that he and his father looked for someone by the name of "Ron" who matched the description. Tr. 1988-89. Nicholas's testimony that Tim was looking for a man named "Ron" was admissible pursuant to the 803(3) exception because it was a statement of Tim's intent to find the man in a red hat named "Ron." Nicholas testified that his father had been hired and was going to be picked up by his new employer. Tr. 1990-91. Nicholas also testified that Tim intended to contact Nicholas again when he could. Tr. 1993. As with Tim's statements to Ms. Kern, Tim's statements to Nicholas were admissible as statements of his plan to begin working, how he would get to the job site, and his intent to contact his son when possible. This testimony was admissible pursuant to 803(3) because it showed Tim Kern's plans and intent.

Response to Claim G: Beasley Has Not Identified Any Portions of the Transcript Where the Alleged *Crawford* Violations Occurred

Beasley's reading of *Crawford* is broader than the case law supports. As the Supreme Court stated in that decision, "not all hearsay implicates the Sixth Amendment's core concerns." *Crawford v. Washington*, 541 U.S. 36, 51 (2004). The Confrontation Clause gives a defendant a right to confront the witnesses against him. U.S. Const. Amend. IV. The Court only prohibited the use of out-of-court, testimonial statements by non-testifying witnesses are only admissible upon a showing of unavailability and prior opportunity to cross examine the declarant. *Id.* at 68. In other words, this Clause is only implicated if a testimonial statement is offered for the truth of the matter asserted and the declarant "is unavailable to testify at trial and the defense has not had an opportunity to cross-examine" the statement. *State v. Stahl*, 111 Ohio St.3d 186, 198 (2006). A statement is testimonial for Confrontation Clause purposes if it is made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 52. As this Court explained, in determining if a statement is testimonial, "courts should focus on the expectation of the declarant at the time of making the statement." *Stahl*, 111 Ohio St.3d at ¶ 36. The United States Supreme Court's decisions since *Crawford* "seem to explain the meaning of the word by stating that testimonial statements are those made for 'a primary purpose of creating an out-of-court substitute for trial testimony.'" *State v. Maxwell*, 139 Ohio St.3d 12, ¶40 (2014), *quoting*, *Michigan v. Bryant*, 562 U.S. 344 (2011). A statement made for any other purpose is not a testimonial statement and does not implicate Confrontation Clause concerns.

Determining whether a statement is testimonial requires analyzing the primary purpose of the declarant. But Beasley has not cited any portion of the record to support his argument that the admission of testimony violated the Confrontation Clause, and specifically the holding of

Crawford. He has therefore failed to establish that any violation of the Confrontation Clause occurred and this argument should be rejected. *See State v. Neyland*, 139 Ohio St.3d 353, ¶255 (2014); *State v. Powell*, 132 Ohio St.3d 233, ¶ 197 (2012). It is an appellant's burden to show error "by reference to matters in the record." *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199 (1980) (per curiam); citing *State v. Skaggs*, 53 Ohio St.2d 162 (1978). This Court "cannot search the record for error that is not in some wise adverted to in the brief of the complaining party." *Uncapher v. Baltimore & O.R. Co.*, 127 Ohio St. 351, 356 (1933); *see also Hawley v. Ritley*, 35 Ohio St.3d 157, 159 (1988) (*per curiam*); and *State v. Watson*, 126 Ohio App.3d 316, 321 (12th Dist. 1998). Furthermore, Beasley's failure to explain which statements allegedly violate the Confrontation Clause creates a risk that an appellate court, hunting for support of this argument, will decide the case on an issue that neither side briefed. *See State v. Tate*, 2014-Ohio-3667, ¶12. The risk is particularly acute in cases such as this, with numerous witnesses and voluminous transcripts. Beasley's blanket assertion that the admission of hearsay violated the Constitution and the Rules of Evidence in some manner does not provide this Court, or the State, with sufficient notice to respond to this alleged error.

This proposition of law is without merit. The trial court's judgment should be affirmed.

Response To Prop. 7: Where None Of Beasley's Claims Show Deficient Performance, And Beasley's Prejudice Analysis Ignores The Adverse Impact Of His Own Testimony, Beasley's Claims Of Ineffective Assistance Of Counsel Should Be Rejected On The Performance Prong And The Prejudice Prong Of The *Strickland* Test

These claim are governed by *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the United States Supreme Court held in order to show counsel was ineffective, a defendant must meet a two-prong test. The defendant must show (1) deficient performance and (2) prejudice. *Id.* at 697. The Sixth Amendment guarantees reasonable competence, not perfect litigation. *Baze v. Parker*, 371 F.3d 310 (6th Cir. 2004). According to the United States Supreme

Court, the "Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." *Bobby v. Van Hook*, 130 S.Ct. 13, 17 (2009). The Supreme Court recently held "counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,' and that the burden to 'show that counsel's performance was deficient' rests squarely on the defendant." *Burt v. Titlow*, 134 S.Ct. 10, 17 (2013). "Petitioner bears the burden of overcoming the presumption that the challenged action *might* be considered sound trial strategy." *Carter v. Mitchell*, 443 F.3d 517 (6th Cir. 2006). Moreover, a court must not only give trial counsel the benefit of the doubt, but must also affirmatively entertain the wide range of possible reasons counsel did what they did. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1407 (2011). Even debatable trial tactics do not constitute ineffective assistance of counsel. *State v. Clayton*, 62 Ohio St.2d 45 (1980).

In order to succeed, Beasley must also demonstrate that his attorney's alleged deficiencies caused him prejudice. It is not enough for Beasley to merely allege that the errors had "some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 694. Instead, Beasley must demonstrate a "reasonable probability" that, but for his counsel's deficient errors, the resulting sentence would have been different. *Id.* There is an insufficient showing of "prejudice" where "one is left with pure speculation on whether the outcome of the trial… could have been any different." *Baze v. Parker*, 371 F.3d 310 (6th Cir. 2004)

Of the eleven subclaims whereby Beasley claims his trial defense counsel committed unprofessional errors, all of them fail to show deficient performance. Apart from Beasley's failure to show deficient performance, Beasley's effort to show prejudice by merely repeating the allegations of four of his subclaims completely fails to address the appropriate standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Beasley's failure to address the appropriate

standard by which to assess prejudice, in conjunction with the insurmountable hurdle to a showing of prejudice caused by the adverse impact of Beasley's own testimony, means that Beasley's eleven subclaims fail on the performance prong as well as the prejudice prong. *State v. Madrigal*, 87 Ohio St. 3d 378, 388 – 389 (2000). Responses to each of the subclaims, as well as a response to Beasley's assertion of prejudice, are set forth below.

Response To Prop. 7, Claim A: Where Counsel May Properly Waive A Defendant's Right To Be Present At Various Trial Proceedings, Beasley's Claim That His Counsel Were Ineffective For Waiving His Presence On His Behalf Fails On The Performance Prong

Beasley's claim that his trial counsel were ineffective for waiving his presence at various trial proceedings is grounded in a false legal premise that "Trial counsel cannot waive a defendant's right of presence at his trial." Beasley Merit Brief, pg. 56. To the contrary, this Court held in *State v. Brinkley*, 105 Ohio St. 3d 231, P122 (2005) that on behalf of the defendant, trial counsel may waive a defendant's presence. ("[T]rial court 'need not get an express 'on the record' waiver from the defendant for every trial conference which a defendant may have a right to attend.'" - citing to *United States v. Gagnon*, 470 U.S. 522, 528 (1985)). Accord, *State v. Frazier*, 115 Ohio St. 3d 139, P 142 (2007). ("During a subsequent pretrial hearing, the defense counsel waived Frazier's presence on March 17. Even though the waiver was after the fact, counsel could have waived Frazier's presence during these in-chambers discussions.")

It is of no import to Beasley's claim of ineffective assistance of counsel that various appellate courts, under unique facts before them, have concluded the trial court should have obtained an express waiver of presence from the defendant himself, and could not rely on the representation of trial counsel alone to properly effect that waiver. See, for example, *United States v. Gordon*, 829 F. 2d 119, 124-126 (D.C. Cir. 1987). Beasley's Merit Brief, pg. 56. Instead, Beasley's claim of ineffective assistance fails because he is legally wrong in his

assertion that trial counsel can never, under any circumstances, waive the defendant's presence on the defendant's behalf. *State v. Brinkley*, 105 Ohio St. 3d 231, P122 (2005).

The times of absence cited in Beasley's Merit Brief show an appropriate inquiry by the trial court, and a waiver of presence stated on the record by Beasley's defense counsel. See, for example, Tr. 23 – 24 (Showing inquiry by the trial court and trial counsel's waiver of Beasley's presence during a hearing regarding requests to be excused from jury service due to work or health limitations.) Moreover, none of the times of absence were at "critical stages" of the proceedings, nor does Beasley make that claim. Instead, the absences noted by Beasley were brief in duration, and at times where Beasley's input was not necessary. See, for example, Tr. 1595 – 1599 (chambers conference about an ill alternate juror), and Tr. 2830 (discussion about admission of State's exhibits.)

Beasley's Prop. 7 Claim A fails on the performance prong, where trial counsel would be entirely justified in following the law as stated in *State v. Brinkley*, 105 Ohio St. 3d 231, P122 (2005) that on behalf of the defendant, trial counsel may waive a defendant's presence. In other words, Beasley's trial counsel were prudent, rather than ineffective, in following the rule of *Brinkley* that they could, on behalf of their client, effect a waiver of his presence. Under these circumstances, Beasley's IAC claim denominated as Prop. 7, Claim A, fails on the performance prong and should be denied. *State v. Madrigal*, 87 Ohio St. 3d 378, 388 – 389 (2000). ("To obtain a reversal of a conviction on the basis of ineffective assistance of counsel, the defendant must prove (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding. *Strickland v. Washington* (1984), 466 U.S. 668, 687–688, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693.")

Beasley fails on the prejudice prong because it is beyond speculation to assume that had Beasley personally waived his own presence, he would have been acquitted.

Response To Prop. 7, Claim B: Where The Law Permits A Trial Court To Preside Over The Separate Trials Of Co-Defendants, Beasley's Counsel Were Not Ineffective For Not Seeking Recusal Of Beasley's Trial Judge Merely Because She Presided Over Co-Defendant Rafferty's Prior Trial

Where this Court has already expressly rejected the legal proposition that Judge Callahan was precluded from presiding over Beasley's post-conviction proceedings because she presided over the prior trial of Beasley's defendant Brogan Rafferty, Beasley's Prop. 7, Claim B should be rejected as well. *In re Callahan*, 2014 Ohio 3175. ("'What a judge learns in his [or her] judicial capacity—whether by way of guilty pleas of codefendants or alleged coconspirators, or by way of pretrial proceedings, or both—is a proper basis for judicial observations, and the use of such information is not the kind of matter that results in disqualification.'") – quoting from *State v. D'Ambrosio*, 67 Ohio St. 3d 185, 188 (1993)

Rejection of Beasley's Prop. 7 Claim B based on *In re Callahan* is appropriate, since the substance of Beasley's allegation of judicial bias in his Merit Brief is the same as that raised in *In re Callahan.* In both instances, Beasley inexplicably alleged Judge Callahan was confused about the lack of evidence regarding a charge of gun theft in his case because of her clear recall of the evidence supporting the same charge that was presented in co-defendant Rafferty's trial. To the contrary, the episode referenced by Beasley shows in Judge Callahan accurate recall and clarity of thought. As to the same allegation of confusion alleged by Beasley in his Merit Brief, this Court has already concluded in respect to Beasley's post- conviction proceedings that "[T]he judge's comments do not prove she was confused about the evidence [in Rafferty's trial versus Beasley's trial]" *In re Callahan,* P8.

Beasley's Prop. 7 Claim B fails on the performance prong, where trial counsel would be entirely justified in following the law as stated in *State v. D'Ambrosio*, 67 Ohio St. 3d 185, 188 (1993) that there are no grounds for recusal merely because the trial judge presided over the earlier trial of a co-defendant. In other words, Beasley's trial counsel were prudent, rather than ineffective, in following the rule of *D'Ambrosio* that they were not obligated to seek recusal of Judge Callahan merely because she had presided over the earlier trial of co-defendant Brogan Rafferty. Under these circumstances, Beasley's IAC claim Prop. 7 Claim B fails on the performance prong and should be denied. *State v. Madrigal*, 87 Ohio St. 3d 378, 388 – 389 (2000).

This outcome of the denial of Prop. 7, Claim B would not change simply because Beasley can successfully show the federal district habeas court in the case of *D'Ambrosio v. Bagley*, 2006 WL 1169926 allowed, through a grant of a Certificate of Appealability, the denial of a similar claim to be reviewed by the Sixth Circuit Court of Appeals. Beasley's Merit Brief pg. 59. Upon plenary review, the Sixth Circuit rejected the claim that the Ohio courts should have found D'Ambrosio's trial counsel ineffective for failure to seek recusal of the trial judge because he had presided over the prior trial of D'Ambrosio's co-defendant. *D'Ambrosio v. Bagley*, 527 F. 3d 489, f.n.6 (6th Cir. 2008) ("Third, the Ohio Supreme Court's conclusion that counsel for D'Ambrosio was not constitutionally ineffective for failing to ask for the recusal of one of the trial judges was not an unreasonable application of federal law because the Ohio Supreme Court reasonably concluded that D'Ambrosio suffered no prejudice by the fact that the judge in question presided over Keenan's trial and approved Espinoza's plea agreement.") Consequently, where the Sixth Circuit rejected the claim on its merits, the willingness of the federal district

habeas court to allow the particular claim to proceed for further appeal is of no legal significance to the case at bar.

Beasley cannot show prejudice because it is pure conjecture to assume that had Judge Callahan recused herself, he would have been acquitted.

Response To Prop. 7, Claim C 1: For The Reasons Stated In The Response To Prop. 4, Trial Counsel Were Not Ineffective For Not Seeking To Excuse Juror No. 5 For Cause, Where Juror No. 5 Gave No Reason To Believe His Acquaintance With A State's Witness Would Give Rise To Any Bias

For the reasons expressed in the response to Prop. No. 4, due to the lack of evidence of bias as to Juror No. 5, trial counsel were not under a professional responsibility to seek to excuse Juror No. 5. Where there was a lack of evidence of bias, Beasley's trial counsel acted within the bounds of their professional responsibility to abstain from a baseless recusal motion as to Juror No. 5. *State v. Treesh*, 90 Ohio St.3d 460, 490 (2001). Furthermore, because Beasley cannot show that Juror No. 5 was biased, he cannot show prejudice. *Id*. Accordingly, Beasley's Prop. 7 Claim C 1 fails on the performance prong, and this Court should so rule. *State v. Madrigal*, 87 Ohio St. 3d 378, 388 – 389 (2000).

Response To Prop. 7, Claim C 2: Where It Is A Correct Statement Of Law That A Mitigation Phase Would Take Place Only If A Guilty Verdict Was Rendered In Respect To A Capital Specification, Trial Counsel Were Not Ineffective For Failing To Object To Legally Correct Voir Dire Inquiry

Beasley is plainly wrong in the legal premise on which his Prop. 7 Claim C 2 is based, and accordingly is plainly wrong in alleging his trial counsel were ineffective for failure to object to legally correct voir dire inquiry.

The voir dire inquiry that Beasley erroneously contends was improper is exemplified where the trial court states to a prospective juror that "In order to get to that second phase, you would have had to have found the defendant guilty of aggravated murder and aggravating

circumstances." Tr. 112. The remaining portions of the voir dire record to which Beasley cites in his Prop. 7 Claim C 2 are of similar tenor. Beasley Merit Brief, pg. 64 – 65. What is noteworthy in this statement is a generic reference to the "second phase," and the absence of any reference to specific penalties as it would relate to specific charges and specifications in Beasley's case.

Beasley's erroneous contention that the foregoing statement is improper is based on a misreading of ORC 2929.03(B). This statutory provision requires that if a capital jury determines guilt of the principal charge, it must be instructed to go on to determine, as a separate matter, whether the capital specification has been proven beyond a reasonable doubt. The instruction to separately determine proof of the capital specification "***shall not mention the penalty*** that may be the consequence of a guilty or not guilty verdict on any charge or specification." (Emphasis added) O.R.C. 2929.03(B)

The plain language of this statutory provision is intended to isolate the assessment by the jury of the level of proof of the particular capital specifications from the particular sentencing choices of life options or death. Contrary to Beasley's interpretation, this statutory provision does not prohibit any reference to the procedural reality that determination of guilt and determination of penalty are separate processes.

Without the support of any legal authority, Beasley erroneously interprets the "shall not mention" clause in O.R.C. 2929.03(B) as an absolute prohibition from discussing during voir dire the bifurcation of the capital case between the guilt phase and the sentencing phase. Where the jury does not automatically participate in a sentencing phase based solely on a guilty verdict to the principal charge, it is consistent with the statutory scheme to inform prospective jurors that "In order to get to that second phase, you would have had to have found the defendant guilty of aggravated murder and aggravating circumstances." Tr. 112. Given there is no designation of a

particular penalty that is tied to "a guilty or not guilty verdict on any charge or specification," statements like these to prospective jurors do not breach the intent behind O.R.C 2929.03(B).

Where the claim of ineffective assistance of counsel as stated in Prop. 7, Claim C 2 is premised on an incorrect interpretation of O.R.C. 2929.03(B), this claim fails at the starting gate. Trial counsel could not be properly charged with ineffective assistance for failure to object to legally proper voir dire inquiry. Under these circumstances, the claim of ineffective assistance of counsel as stated in Prop. 7 Claim C 2 fails on the performance prong, and this Court should so conclude. *State v. Madrigal*, 87 Ohio St. 3d 378, 388 – 389 (2000).

Similar reasoning applies to Beasley's erroneous contention that the trial judge was required to instruct prospective jurors during the voir dire process that the "beyond a reasonable doubt standard" applied to certain penalty phase determinations, such that it was supposedly ineffective for trial counsel to fail to object. This particular subclaim is exemplified where the trial court informed a prospective juror "You also would hear evidence of mitigating factors, and the law would require that you balance the two. The law would then require that if you found that the aggravating circumstances outweigh the mitigating factors that you shall impose the death penalty." Tr. 382 – 383.

In this inquiry, the purpose of the trial court is to determine whether a prospective juror could abide by a particular process. This determination during voir dire proceedings is far removed from final instructions to seated jurors that "The death penalty can only be imposed in Ohio if the prosecutor proves beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors." Beasley Merit Brief, p. 65. The law does not require prospective jurors during the voir dire process to be instructed as if they were seated jurors preparing to deliberate in the sentencing phase, nor does Beasley cite to this Court any case law

to support his erroneous view. In other words, there is no requirement that before death qualification voir dire could begin, prospective jurors must be given final penalty phase instructions. Nor is there any real danger that a seated juror would disregard final penalty phase instructions to apply a "beyond a reasonable doubt" standard in favor of incorrect assumptions gleaned during back-and-forth questioning during the voir dire process, which in this case was three weeks prior to final penalty phase deliberations.

Under these circumstances, trial counsel could not be properly charged with ineffective assistance for failure to object to legally proper voir dire inquiry. Accordingly, this particular subclaim of ineffective assistance of counsel as stated in Prop. 7 Claim C 2 fails on the performance prong, and this Court should so conclude. *State v. Madrigal*, 87 Ohio St. 3d 378, 388 – 389 (2000).

Response To Prop. 7, Claim C 3: Where Trial Counsel Were Not Entitled To Voir Dire Jurors On Specific Mitigating Factors Personal To Beasley's Background, And Trial Counsel Conducted Adequate Voir Dire On Pretrial Publicity Following Similar Inquiry By The Trial Court And The Prosecutor, Beasley's Claims Of Ineffective Assistance Fails On The Performance Prong

Beasley's trial counsel were veteran defense litigators who would be well aware of the long-settled rule that a trial court is under no obligation to permit the attorneys to discuss specific mitigating factors. *State v. Jones*, 91 Ohio St. 3d 335, at 338 (2001). ("During voir dire, a trial court is under no obligation to discuss, or to permit the attorneys to discuss, specific mitigating factors. [citations omitted.] Realistically, jurors cannot be asked to weigh specific factors until they have heard all the evidence and been fully instructed on the applicable law.")

Given this long-settled rule that attorneys are not entitled to voir dire prospective jurors on specific mitigating factors, Beasley's claim of ineffective assistance of counsel that is premised on supposed failure to voir dire prospective jurors on specific mitigating factors fails

on the performance prong. In other words, Beasley's attorneys would not be ineffective for declining to engage in improper voir dire inquiry, and this Court should so conclude. *State v. Madrigal*, 87 Ohio St. 3d 378, 388 – 389 (2000)

In respect to Beasley's claim his trial counsel were ineffective for not engaging in a more probing and confrontational voir dire on the topic of pretrial publicity, Beasley ignores the process that would have provided his counsel with considerable insight well before any inquiry they might personally conduct. Before any inquiry Beasley's counsel would have personally conducted, Beasley's counsel would have had the benefit of insight gained from review of juror questionnaires, insight gained from direct verbal inquiry by the trial court, and insight gained from any direct verbal inquiry by the prosecutors. In other words, as to any prospective juror, Beasley's counsel would have had considerable insight on the topic of pretrial publicity, even if they did not personally ask a single question. Under these circumstances, Beasley's bare reference to a few prospective jurors who were not interrogated by his counsel on the issue of pretrial publicity fails to show deficient performance by his counsel, who had other sources by which to assess the impact of pretrial publicity as to each and every prospective juror.

Nor is there a standard of practice whereby defense counsel are obligated to doggedly interrogate every prospective juror, and to revisit every line of inquiry already covered by the trial court or the prosecutor. To the contrary, the standard of practice is the opposite, where trial counsel are entitled to rely on the multitude of sources of information on the views of prospective jurors apart from their own personal inquiry. *State v. Davis*, 116 Ohio St. 3d 404, P47 (2008). ("Trial counsel questioned the prospective jurors about pretrial publicity after the trial court and the prosecutor had finished examining them about the same matter. Trial counsel's questioning about pretrial publicity was brief. However, trial counsel were not deficient, because

counsel 'need not repeat questions about topics already covered by group voir dire, opposing counsel, or the judge.'" [citation omitted.])

Each of the jurors referenced by Beasley had completed a questionnaire that included the topic of pretrial publicity, and each were interrogated by the trial court on the topic of pretrial publicity. Beasley Merit Brief, pg. 66. What this means is that it would be inaccurate to imply trial counsel had no basis, absent personal interrogation of a prospective juror, on which to assess a prospective juror on the issue of pretrial publicity, given at least two sources of information independent of personal interrogation.

Moreover, Beasley mischaracterizes the responses of juror Kathryn Wieland on the topic of pretrial publicity. Beasley references only part of the voir dire of juror Kathryn Wieland (prospective juror 22, renumbered to prospective juror 17, and renumbered to seated juror 9) but fails to mention the entire sequence of interrogation where Wieland finished with the answer "Absolutely" when the trial court asked her "So you feel like you could come in here with a blank slate." Tr. 289. When examined as a whole, there is no indication that trial counsel would be professionally obligated to revisit the line of inquiry conducted and completed by the trial court as to juror Wieland.

Beasley's claim of ineffective assistance of counsel as to voir dire inquiry fails on the performance prong and this Court should so conclude. *State v. Madrigal*, 87 Ohio St. 3d 378, 388 – 389 (2000).

Response To Prop. 7 Claim D 1 a: Where Trial Defense Counsel's Objection To The State's Opening Argument Was Sustained, And The Trial Court Immediately Issued A Curative Instruction On That Matter, Trial Counsel Were Not Ineffective For Not Insisting On A More Robust Curative Instruction

This claim of ineffective assistance of counsel is a continuation of Beasley's Prop. 3 that alleges a claim prosecutorial misconduct in respect to an opening statement comment to which

his counsel objected and the trial court gave a curative instruction. Among other reasons as stated in the response to Proposition 3, no error is present as to Prop. 7, Claim D 1 for the simple and basic reason that trial defense counsel's objection was sustained and a curative instruction was given. *State v. Pickens*, 2014 WL 7116258, P120 (2014). ("Even assuming that the prosecutor's remarks were improper, these comments were not prejudicial. The trial court sustained a defense objection to this argument and ordered the remarks stricken. Any errors were also corrected by the trial court's instruction that the arguments of counsel were not evidence and that the jury was the sole judge of the facts.")

Under these circumstances, where Beasley's trial defense counsel obtained the relief they sought for what they perceived to be an error by the prosecution, it should seem incongruous to also conclude they were ineffective for not obtaining a hypothetical better result. Counsel are not constitutionally ineffective for failure to achieve the best possible outcome. *Premo v. Moore*, 131 S. Ct. 733, 740 (2011) ("The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom.")

To the contrary, counsel are constitutionally ineffective only if their conduct falls below a minimum standard of care. In the determination whether counsel are constitutionally ineffective, the question is not whether counsel could have done better. Instead, the question is whether "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Harrington v. Richter*, 131 S. Ct. 770, 787 (2010).

Both cases to which Beasley cites are founded on a wholesale failure to act by defense counsel, where the courts determined that ineffectiveness was shown in the failure to take any action at all. Beasley's Merit Brief, p. 67 – 68. Neither case cited by Beasley stands for the

proposition that counsel are obligated, when they do take action, to achieve the best of all possible outcomes. Consequently, the cases of *People v. Salgado*, 635 N.E.2d 1367, 1374 – 1375 (Ill. App. 1994) and *White v. McAninch*, 235 F. 3d 988, 997 (6th Cir. 2000) lend no support to Beasley's claim.

Beasley's claim of ineffective assistance of counsel as stated in Prop. 7 Claim D 1 a fails as a matter of law, since it is premised on an incorrect legal standard. As such, this claim fails on the performance prong, in that counsel are not obligated to achieve the best possible outcome. Accordingly, this Court should conclude that Beasley's Prop. 7 Claim D 1 a fails on the performance prong. *State v. Madrigal*, 87 Ohio St. 3d 378, 388 – 389 (2000). As to this subclaim, Beasley cannot show prejudice given "the best possible outcome" would not have resulted in an acquittal.

Response To Prop. 7, Claim D 1 b: Counsel Are Not Required To Object To Admissible Evidence

This claim of ineffective assistance of counsel is a continuation of Beasley's Prop. 6 that alleges plain error in the admission of testimony that Beasley erroneously characterizes as hearsay. Inasmuch as Beasley states this claim without analysis or explanation, the State would refer the Court to the Response To Proposition 6 as a full and complete refutation of any instance of ineffective assistance of counsel as alleged in Prop. 7, Claim D 1 b.

In this subclaim, Beasley points to his counsel's failure to object to certain "hearsay" evidence as evidence of their ineffective assistance, but, as discussed above, this evidence was relevant and admissible either as non-hearsay or pursuant to a hearsay exception. Counsel "need not raise meritless issues or even arguably meritorious issues for that matter." *State v. Jones*, 91 Ohio St.3d 335, 354 (2001).

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

Beasley's counsel strategically used objections to permit the introduction of testimony that they planned to use in support of their defense theory. An attorney need not object to each and every instance of inadmissible testimony where they make a reasonable calculation of the impact of that testimony. For example, Beasley's counsel did not object to some testimony regarding surveillance of the Hood property and efforts to locate Beasley pursuant to a warrant. This was evidently a strategic decision because, as discussed below, Beasley used his status as a fugitive to support his defense theory and elicited testimony from PO Jones regarding that status. (Tr. 1585-86, 1590-91). Furthermore, during the defense case-in-chief, Beasley testified about his criminal record and fugitive status. (Tr. 2889-96.) Likewise, counsel used Agent Daugherty's testimony about Larry Baker's statements to case suspicion on another witness. (Tr. 3396-3401.) It was neither incompetent nor prejudicial for his counsel to allow this testimony to be elicited during the State's direct exam.

Response To Prop. 7, Claim D 1 c: Where A Key Component Of The Defense Theory Was That Beasley Assumed Ralph Geiger's Identity To Avoid Arrest On The Warrant From Texas, Counsel Acted Strategically In Having Supportive Evidence Elicited During The State's Case

It is disingenuous for Beasley to allege ineffective assistance of counsel relative to testimony during the State's case about surveillance by law enforcement of the Hood property to locate the fugitive Beasley, where Beasley's status as a fugitive from justice was a key component of the defense case. Moreover, Beasley himself elicited testimony during the State's case-in-chief about his status as a fugitive from justice.

Through trial defense counsel, and during the State's case-in-chief, Beasley elicited testimony from Parole Office Jeffrey Jones that, as to Beasley, the "offender violation report" was filed on January 21, 2011. Tr. 1585. Beasley elicited additional testimony from Parole Office Jones that "I was talking to [Akron Police Officer] Meadows, about, you know, what Mr. Beasley -- as far as Mr. Beasley being involved in – in the Brothers [Motorcycle Club] and then also with Jerry Hood." Tr. 1586.

Once again, through trial defense counsel, and during the State's case-in-chief, Beasley posed a series of questions to Parole Officer Jones that successfully elicited specific information about the surveillance of the Hood property. Tr. 1590 – 1591.

It should appear to this Court these questions were not inadvertent, but rather part of trial strategy, where Beasley does not allege that elicitation of this testimony by his own defense counsel was wrongful or ineffective. Instead, in Prop. 7 D 1 c, Beasley claims counsel were ineffective in failing to object to similar testimony by Noble County Sheriff Hannum and Noble County Deputy Sheriff Mackie. Although Sheriff Hannum was the State's witness just before Parole Office Jeffrey Jones, a total of twenty-three State's witnesses testified after Parole Officer Jones and before Deputy Mackie. Where Beasley himself elicited testimony about the

surveillance of the Hood property from Parole Officer Jones, it would be contradictory and inconsistent for his counsel to object to similar testimony from Detective Mackie that occurred long after the testimony of similar tenor that Beasley himself elicited from Parole Officer Jones.

It should additionally suggest to this Court the absence of objections to Sheriff Hannum and Deputy Mackie's testimony was strategic, and not ineffective, where Beasley himself testified at length and in detail about his status as a fugitive from the law. Tr. 2889 – 2896. Where Beasley does not claim ineffective assistance of counsel in respect to his own lengthy testimony about his status as a fugitive from the law, this Court would be entitled to conclude that development of facts to establish Beasley as a fugitive from the law was a strategic objective of the defense theory of the case.

In order to explain why he was posing as Ralph Geiger, Beasley began his testimony by detailing his criminal record. Beasley testified that he was convicted for "daytime burglary" in Texas when he was in his early 20's and spent 4 years in prison. Beasley testified that following his release from Texas prison, he was placed on parole. Beasley explained his parole was transferred to Ohio when he returned to Akron in 1989. Beasley testified that he was also convicted of a federal charge for possession of a firearm by a felon, for which he spent time in a federal prison until he was released in 2004. Beasley testified that following his release from federal prison, his parole from Texas was still in force. Tr. 2889 – 2894.

Beasley went on to testify that in January 2011, he was contacted by his parole officer from Texas. Beasley testified that the Texas parole officer told him that he, Beasley, would have to resume regular reporting. Beasley testified that the Texas parole officer implied that he, Beasley, would probably be declared a parole violator. Tr. 2894 – 2896.

Beasley testified that he did not want to return to prison in Texas, so he decided to take steps to change his identity. Beasley testified that he knew Ralph Geiger, who Beasley said spent time at the clubhouse of the Brother's Motorcycle Club, although Geiger was not a member. Beasley testified that the Ralph Geiger to whom Beasley referred was the same person whose picture had been displayed in the courtroom. According to Beasley, he spoke to his friend Geiger about his, Beasley's, intention to change his identity. According to Beasley, Ralph Geiger volunteered to allow Beasley to assume his, Geiger's, identity. According to Beasley, Geiger gave Beasley his, Geiger's, driver's license and social security card. Beasley testified that he hadn't thought about possible difficulties with two persons having the same identity because soon after, according to Beasley, Ralph Geiger "went down to Jerry Hood's farm." According to Beasley, Ralph Geiger knew Jerry Hood through the Brother's Motorcycle Club. Beasley testified that he told his friend, Joyce Grebelsky, that he, Beasley, was going to assume the identity of Ralph Geiger. Tr. 2896 – 2899.

The Court should note the foregoing testimony was elicited from Beasley himself on direct examination. In addition, this direct examination testimony from Beasley himself was far more detailed than what would have been disclosed under Ohio Evid. Rule 609, Impeachment by evidence of conviction of crime. Under these circumstances, this extensive and detailed testimony by Beasley about his criminal past was not intended to ameliorate the impact of hypothetical impeachment by the State under Ohio Evid. R. 609. Instead, the level of detail as to his own prior criminal acts and criminal associations should stand as confirmation the development of facts to establish Beasley as a fugitive from the law was a strategic objective of the defense theory of the case.

Where the development of facts to establish Beasley as a fugitive from the law was a strategic objective of the defense theory of the case, Beasley's Prop. 7, Claim D 1 c, alleging ineffective assistance of counsel to object to testimony about the hunt for Beasley as a fugitive from justice is disingenuous and fails on the performance prong, and this Court should so conclude. *State v. Madrigal*, 87 Ohio St. 3d 378, 388 – 389 (2000).

Moreover, due to the overwhelming circumstantial evidence guilt, Beasley cannot show prejudice.

Response To Prop. 7, Claim D 1 d: Where Beasley's Criminal Past Was A Component Of His Defense Trial Strategy, Counsel Were Not Obligated To Move For Mistrial As To A Bland And Generic Single Reference To "His Previous Criminal Activity," Especially Where Counsel's Objection Was Sustained And A Curative Instruction Given

For the reasons expressed in Response to Prop. 5, wherein the same snippet of testimony, stating the single phrase "his [Beasley's] previous criminal activity," was wrongly claimed to be grounds for a mistrial, it is not ineffective for defense counsel rest on their objection and curative instruction and decline to move for mistrial. Moreover, when compared to the bland and generic testimony from Agent Wickerham that is the subject of this subclaim, Beasley himself testified in far greater detail about his unsavory criminal past. Under these circumstances, counsel were not obligated to act with duplicity in moving for mistrial as to a snippet of testimony in the State's case, where it was a goal of the defense case to develop the same subject matter in much greater detail.

Where the development of facts to establish Beasley as a fugitive from the law was a strategic objective of the defense theory of the case, Beasley's Prop. 7, Claim D 1 d, alleging ineffective assistance of counsel for failing move for a mistrial as to the phrase "his previous criminal activity" is disingenuous and fails on the performance prong, and this Court should so conclude. *State v. Madrigal*, 87 Ohio St. 3d 378, 388 – 389 (2000).

Moreover, due to the overwhelming circumstantial evidence of guilt, Beasley cannot show prejudice.

Response To Prop. 7, Claim D 1 e: Where Testimony from A Properly Qualified Handwriting Expert Is Admissible, It Is Not Ineffective For Defense Counsel To Decline To Seek Exclusion Of Handwriting Analysis *Per Se*

Beasley ironically compliments his counsel for effective cross-examination of the State's handwriting expert for making "serious inroads into the credibility of the witness," then inconsistently castigates his counsel for not effecting a sea-change in Ohio law to exclude handwriting analysis *per se* from the courtroom. Beasley Merit Brief, pg. 75. Moreover, Beasley does not fault his counsel for "not objecting" to the declaration of the State's witness as "an expert in handwriting identification." Tr. 3117. Nor would there have been a good faith basis to lodge such an objection, where the State's witness had been declared an expert in the field of handwriting analysis in "over a hundred" other cases. Tr. 3116. Accordingly, Prop. 7 Claim D 1 e holds the contradictory premise that counsel properly recognized the expertise of a State's witness in an accepted field of forensic science, yet were supposedly constitutionally deficient for not effecting a fundamental modification of Ohio law to exclude handwriting analysis from the field of forensic science.

It is well established that counsel are not ineffective for failing to achieve a best case scenario outcome. Rather, counsel are ineffective only if the defendant can prove an act of incompetence below a minimum level of performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984) ("[T]he defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.") Under these circumstances, Beasley's Prop. 7, Claim D 1 e fails at the starting gate for holding counsel to an impractical and unrealistic

standard of vanguard advocacy, rather than the correct legal standard spelled out in *Strickland v. Washington*.

Beasley fails to cite a single case, state or federal, where handwriting analysis *per se* has been excluded from the courtroom. Moreover, Beasley's citation to the well-known study by the National Research Council contradicts the notion that handwriting analysis *per se* should be excluded from courtroom, where that body stated "the committee agrees that there may be some value in handwriting analysis." Beasley Merit Brief, pg. 75. Where the field of handwriting analysis has continued unabated as an accepted field of forensic science, the well-known *Strickland* standard would not hold counsel ineffective for failing to annul and invalidate an accepted field of forensic science.

Where Beasley's Prop. 7, Claim D 1 e is premised on an incorrectly high legal standard in respect to counsel's level of performance, the claim fails on the performance prong, and this Court should so conclude. *State v. Madrigal*, 87 Ohio St. 3d 378, 388 – 389 (2000).

Moreover, due to the overwhelming circumstantial evidence of guilt, Beasley cannot show prejudice.

Response To Prop. 7, Claim D 2: Where Beasley Fails to Articulate How Counsel Were Deficient In Conducting Or Deferring Cross-Examination, And Where The Extent And Scope Of Cross-Examination Fall Within The Ambit Of Trial Strategy, Beasley's Claim Of Ineffective Cross-Examination Fails

With nothing more than a bare page reference, Beasley states his claim of ineffective assistance of counsel for failure to cross-examine seven of the State's forty-two witnesses. Beasley Merit Brief, p. 76. Beasley's failure to articulate how counsel was deficient in deferring cross-examination amounts to a failure of the claim. *State v. Frazier*, 115 Ohio St. 3d 139, P 220 (2007). ("Frazier fails to state the questions that his counsel should have asked these witnesses.

Moreover, whether further questioning would have unearthed any useful information is speculative.")

Nor is plain error present. One of the seven witnesses, the manager of the Best Western motel in Caldwell, Ohio, Karen McGilton, was subjected to cross-examination. Tr. 1353 – 1357. Accordingly, Beasley is simply wrong in his bare-bones contention that seven of forty-two State's witnesses were not subjected to cross-examination. Instead, the accurate count would be six, being homeless shelter employee Dwight Johnson (Tr. 1333), Alex Hartke, the co-worker of Beasley posing as Ralph Geiger (Tr. 1396), job applicant Daniel DeWalt (Tr. 1708), job applicant David LeBlond (Tr. 1713), job applicant George Brown (Tr. 1724), and victim David Pauley's sister, Debra Bruce (Tr. 1753).

Three of the six witnesses, being Daniel DeWalt, David LeBlond, and George Brown, were respondents to the Craigslist job advertisements. Each of them identified Beasley as the person with whom they interviewed. DeWalt - Tr. 1707 – 1709; LeBlond, Tr. 1712 – 1714; and Brown, Tr. 1724 – 1726. During the defense case, Beasley admitted to conducting a job interview with DeWalt (Tr. 2980) and Brown (Tr. 2981 – 2982) Given these basic facts, it could be seen as reasonable trial strategy to defer cross-examination of these three job applicant witnesses on grounds the subject matter of their testimony was not in dispute. Especially in view of Beasley's failure to articulate any reasons why the deferral of cross-examination of these three job applicant witnesses was ineffective, this Court should accept the reasonable explanation that counsel need not cross examine these job applicant witnesses whose testimony was not in dispute.

The upshot of co-worker Hartke's testimony was that Beasley was posing as Ralph Geiger. Tr. 1390 1397. The testimony by Hartke was not in dispute since this masquerade; i.e.

Beasley posing as Geiger, was a central tenet of Beasley's defense case, albeit with the spin that Geiger, according to Beasley, voluntarily and willingly surrendered his identity to Beasley. In other words, Beasley posing as Ralph Geiger in the fall of 2011 was a component of the defense theory of the case, so testimony from co-worker Hartke that was consistent with the defense theory would reasonably lead to either a light cross-examination, or no cross-examination at all. Once again, especially in view of Beasley's failure to articulate any reasons why the deferral of cross-examination of Beasley's co-worker Hartke was ineffective, this Court should accept the reasonable explanation that counsel need not cross examine Beasley's co-worker Hartke whose testimony was not in dispute.

Relative to deferring cross-examination as to homeless shelter worker Dwight Johnson and victim David Pauley's sister, Debra Bruce, neither witness offered any testimony either about Beasley himself or about any particular circumstance of any crime. In other words, both the homeless shelter worker and the victim's sister offered background testimony only that did not implicate any person in any crime, let alone Beasley. Under these circumstances, defense counsel need not cross-examine these witnesses who did not purport to implicate Beasley, or any other person, as the perpetrator of any crime. Especially in view of Beasley's failure to articulate any reasons why the deferral of cross-examination of the homeless shelter worker and victim David Pauley's sister was ineffective, this Court should accept the reasonable explanation that counsel need not cross examine the homeless shelter worker and victim's sister who offered background testimony only.

A similar failure to articulate how defense counsel was deficient is found relative to Beasley's bare allegation that defense counsel's cross-examination "only served to bolster [State's witness] credibility." Beasley Merit Brief, pg. 77. Without analysis or explanation,

Beasley merely cites to a total of 39 pages of transcript in respect to a total of 10 State's witnesses. Beasley Merit Brief, p. 77. Beasley's failure to articulate how counsel was deficient in conducting cross-examination amounts to a failure of the claim. *State v. Leonard*, 104 Ohio St. 3d 54, P 146 ("Leonard claims that there were several inconsistencies in the testimony of Gries and Minges and that more effective cross-examinations could have bolstered the defense's argument that Flick had consented to having sex with Leonard. But Leonard does not explain what the alleged inconsistencies are or how they could have shown that Flick had consented.") *Cf. United States v. Zannino*, 895 F. 2d 1, 17 (1st Cir. 1990) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones. As we recently said in a closely analogous context: 'Judges are not expected to be mind readers.'") Accordingly, Beasley's Prop. 7, Claim D 2 should be denied for failure to address, let alone uphold, Beasley's burden to prove deficient performance. *State v. Madrigal*, 87 Ohio St. 3d 378, 388 – 389 (2000).

Nor is plain error present. This Court has held that "The extent and scope of cross-examination clearly falls within the ambit of trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel." *State v. Leonard*, 104 Ohio St. 3d 54, P 146 (2004) In other words, whether, in hindsight, questions on cross-examination could have been framed differently or eliminated altogether is itself subject to debate and not a basis on which to find ineffective assistance of counsel.

Of the ten witnesses alleged to have merely repeated their testimony on cross-examination, six are forensic technicians offering testimony about crime scenes, DNA and cell phone data capture. As to these forensic technicians, if there be a cross-examination at all, it would be hard to fathom questions that would not seek to explain, clarify or limit their prior

technical testimony. In other words, cross-examination of forensic technicians would necessarily involve a repetition of their testimony, such that acting in accordance with that format for questioning is not ineffective. Similar considerations would apply to two of the witnesses who were FBI agents involved in the apprehension of Beasley. Any cross examination would necessarily relate to their prior testimony.

One of the witnesses alleged to have merely repeated her testimony on cross-examination was Penny Kaufmann, one of Beasley's former landlords. The page reference designated by Beasley in his Merit Brief relates to benign testimony about how Beasley became her tenant. Beasley Merit Brief, pg. 77, reference to "2111 – 2113." This testimony is mundane, and why Beasley designated it as an example of ineffective cross examination is not evident.

Finally, there is a two page reference to victim Scott Davis' testimony, where defense counsel appears to be laying groundwork for the story later to be told by Beasley during the defense case that Scott Davis was the aggressor in the shooting. Beasley Merit Brief, pg. 77, reference to "1513 – 1514." This cross-examination of Scott Davis would necessarily explore the minutia of the shooting and, given Beasley's anticipated self-defense testimony, would not be ineffective. In other words, where Beasley's defense as to the Scott Davis crimes was self-defense, it should be expected that the cross-examination of Scott Davis would probe for inconsistencies or contradictions in Davis' version of the events. Consequently, Beasley's bare allegation that defense counsel was ineffective as to the Scott Davis cross-examination for supposedly allowing repetition of direct testimony fails to state a viable claim.

The cross-examinations alleged by Beasley to be ineffective are, to the contrary, well within the parameters of effective representation. Under these circumstances, Beasley's claims of ineffective assistance of counsel that fail for inadequate development on appeal also fail on plain

error review because defense counsel is not ineffective as to the cross-examinations in question. *State v. Madrigal*, 87 Ohio St. 3d 378, 388 – 389 (2000).

Beasley's final assertion of ineffective cross-examination fares no better. Without explanation why a single sentence of cross-examination was ineffective relative to his case, Beasley merely asserts that the prosecutor would not be entitled to ask the same question posed by defense counsel. Citing to *Doyle v. Ohio*, 426 U.S. 610, 611 (1976), Beasley asserts the prosecutor could not elicit from the interrogating officer that questioning ceased when Beasley "exercised his right to counsel." Beasley Merit Brief, pg. 76. Even assuming Beasley's oversimplification of the matter is taken as a complete and accurate statement of law that would not mean elicitation of the same matter by defense counsel is ineffective. To the contrary, by having the police officer agree that police are obligated to stop questioning when the suspect asks for a lawyer, the cross-examination could be seen to supply a plausible and adequate explanation to dispel any implication Beasley stopped answering questions because he had something to hide. Under these circumstances, the Beasley's bare assertion that defense counsel asked a question that would not be commonly asked by the prosecution fails to state a viable claim of ineffective assistance of counsel. *State v. Madrigal*, 87 Ohio St. 3d 378, 388 – 389 (2000).

Furthermore, because Beasley fails to point to questions that should have been asked, which, if asked, would have resulted in an acquittal, he cannot show prejudice.

Response To Prop. 7, Claim E: Beasley's Assertion Of Prejudice Is A Mere Repetition Of Four Of His Subclaims Of Ineffective Assistance Of Counsel, And Where None Of Those Claims Are Viable, Beasley Fails To Meet His Burden To Show Prejudice

Beasley's assertion of prejudice is wholly inadequate where it amounts to no more than a reiteration of four particular subclaims of ineffective assistance of counsel, being Prop. 7, Claim

B (affidavit of prejudice not filed against Judge Callahan), Prop. 7, Claim D 1 b (no objection to so-called hearsay testimony), Prop 7, Claim D 1 c (no objection to Hood property surveillance testimony), and Prop. 7, Claim D 1 e (failure to exclude handwriting analysis from the field of forensic science).

Beasley's mere reiteration of four of his subclaims of ineffective assistance of counsel fails to address the prejudice prong of a *Strickland* claim, that requires "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). In other words, mere repetition of the allegation, for example, that counsel should have sought to recuse Judge Callahan because she presided over co-defendant Rafferty's trial fails to address the prejudice prong of the Strickland test, let alone carry the defendant's burden to show prejudice.

To the extent Beasley challenges his death sentence, "[T]he question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, at 695. Nowhere in his assertion of prejudice does Beasley address this standard. Beasley's failure to address the appropriate prejudice inquiry means his claims of ineffective assistance of counsel fail as well.

Even though the State is not obligated under the *Strickland* test to demonstrate the absence of prejudice, there would seem to be good reason why Beasley ignores the applicable test in his ineffectual and inadequate assertion of prejudice. Apart from there being no viable claims of ineffective assistance of counsel, the impact as to the jury determination of his guilt of Beasley's own testimony amounts to an insurmountable hurdle for the demonstration of

prejudice. By his own testimony, Beasley claimed a close connection with the victim Tim Kern such that the balance of the circumstantial evidence would readily point to him as the perpetrator. In other words, the monumentally adverse impact on the issue of guilt arising from the prevarications and deceitfulness of Beasley's testimony decisively forecloses any finding of prejudice under the *Strickland* test.

By his own testimony, Beasley claimed a close connection with the victim Ralph Geiger such that the balance of the circumstantial evidence would readily point to Beasley as the perpetrator. By his own testimony, Beasley claimed a close connection with the personal property of victim David Pauley such that the balance of the circumstantial evidence would readily point to Beasley as the perpetrator. By his own testimony, Beasley claimed a close connection with victim Scott Davis such that the balance of the direct and circumstantial evidence would readily point to Beasley as the perpetrator. These three cases are also tied to geographic evidence that placed Beasley and the three Noble County victims in the same remote area such that the jury would be entitled to infer purposeful and nefarious conduct by Beasley. Finally, the map sent by Beasley to his friend Joyce Grebelsky, directing her to the exact location of hidden property belonging to victims Geiger and Pauley, point to Beasley as the perpetrator.

Beyond Beasley's own concessions and admissions during his testimony, the connections between Beasley and the victims was additionally supported with an abundance of unassailable forensic evidence that either directly, or by fair inference, placed Beasley in physical proximity of each the victims at the time they were assaulted.

These evidentiary matters, in view that Beasley's mere reiteration four subclaims of ineffective assistance fails to address the prejudice prong of the *Strickland* test, should lead this Court to conclude that Beasley has failed to meet the prejudice prong. Having failed to show

deficient performance as well, Beasley's claims of ineffective assistance of counsel should be denied. *State v. Dillon,* 74 Ohio St. 3d 166, 171 (1995) ("A 'colorable claim' of ineffective assistance of counsel necessarily includes presenting some evidence of both prongs of *Strickland.*"

Response To Prop. 8: Where Following An Express Invitation To Allocute Before Capital Sentencing Beasley Twice Declined To Do So, The Trial Court Fully Complied With Ohio Crim. R. 32(A)(1) Such That Beasley's Assertion Of Error As To Restricted Capital Allocution Fails On The Facts

Where Beasley twice declined the trial court's invitation to speak before capital sentencing, Beasley's assertion that the trial court denied or restricted his right to capital allocution under Ohio Crim R. 32(A)(1) and *State v. Campbell*, 90 Ohio St. 3d 320, 325 – 326 (2000) is patently false.

In respect to allocution before capital sentencing, the record shows the following exchange between the trial court and Beasley.

> THE COURT: Mr. Beasley, you are afforded the right of allocution, or to make a statement, if you wish to do so. Do you wish to make a statement, sir.
>
> MR. BEASLEY: Can I make my statement after the victim's speak? I would like to hear what they say so I can address them in a sensitive manner. I don't want to say anything that would upset them.
>
> THE COURT: Do you wish to address the Court with regard to your sentence? If so –
>
> MR. BEASLEY: No, ma'am.
>
> THE COURT: -- this is the time to do so.
>
> MR. BEASLEY: No, ma'am. I do not.
>
> THE COURT: Are you certain?
>
> MR. BEASLEY: Yes.

Sentencing Hearing, Tr. 7 – 8.

The record shows that, relative to capital sentencing, Beasley unambiguously declined to address the trial court with respect to capital sentencing after an express invitation to do so. Under these circumstances, Beasley's Proposition of Law 8 that alleges the trial court restricted his capital allocution fails on its facts and this Court should so conclude. *State v. Osie*, 140 Ohio St. 3d 131, P180 (2011). ("At that [capital sentencing] hearing, the trial court asked Osie whether he wished to say anything, and Osie said that he did not. The court gave Osie everything he was entitled to under Crim. R. 32(A)(1).")

In respect to non-capital sentencing, which is not the subject of Beasley's Proposition of Law Number 8, the trial court unequivocally afforded Beasley an opportunity for allocution. As to non-capital allocution, the record reveals the following exchange between Beasley and the trial court.

> THE COURT: Anything else from the defense?
>
> MR. BEASLEY: I will make a statement.
>
> THE COURT: There are other charges for which I need to sentence you, so you may make a statement, yes. Why don't you just go ahead and sit down, sir. You can remain seated.
>
> Mr. BEASLEY: Can I make a statement?
>
> THE COURT: Yes, you may.
>
> MR. BEASLEY: Since the day I was arrested, I have prayed every day for the families of those who were lost. Your loss has been horrible, and I know you are full of pain, I can only imagine. And I'm very sorry that you had to go through all of this. I want to make sure that you understand that as heartbroken as I am about your loss, and I say her today officially and for the record, I have killed nobody, and that's a fact. You have one witness who perjured himself saying he knew nothing about computers, but on appeals we'll have military records to show every word out of his

> mouth was a lie, and the only reason he lied is because I was telling you the truth.
>
> THE COURT: Mr. Beasley, if you want to address me about sentencing on the remaining charges, you may. I am not going to sit here and retry this case with you.
>
> MR. BEASLEY: Okay, fair enough. All I'm saying is that the – there will be appeals and this case will be reversed and there will be a retrial, and I will be found innocent. But to the families, I'm sorry you had to go through this. And it is a horrible thing, a terrible thing, it is heartbreaking and it breaks my heart. I will continue to pray for you. If you have any questions, feel free to write me or even visit me, I will answer your questions. That is it.
>
> Sentencing Hearing, Tr. 20 – 22.

In respect to allocution for the non-capital sentencing, the trial court was well within bounds to admonish Beasley to address his remarks, not to the victims, but rather to the trial court, and further that rehashing evidence of guilt was not an appropriate subject for allocution. *Cf. State v. Hoffman*, 2004 WL 2848938 (Sixth District, Lanzinger, J.) ("A trial court can limit a defendant's allocution if it concerns extraneous matters unrelated to the sentence and is not about mitigation. As Judge Brogan stated in *[State v.] Smith* [1995 WL 655943], 'the right of allocution does not provide an accused with the opportunity to vent his spleen with some superfluous diatribe.'"

The record shows that as to non-capital sentencing, Beasley completed his remarks of his own accord. In other words, even though the trial court admonished Beasley to keep his remarks appropriately focused, Beasley himself ended his remarks, as opposed to being cut off by a direction from the trial court to silence himself. Under these circumstances, even as to the non-capital allocution that is not the subject of Beasley's Proposition of Law Number 8, there is no error or impropriety.

Where the record directly contradicts the factual premise that the trial court denied Beasley an opportunity for allocution as to capital sentencing, this Court should determine Beasley's Proposition of Law Number 8 is not well taken.

Response To Prop. 9: This Court Has Repeatedly Rejected the Constitutional Challenges Beasley Presents

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

Beasley contends that Ohio's death penalty is unconstitutional. (Beasley brief, p. 86-94.) In particular, in claim 9(A), Beasley claims that Ohio death penalty is fraught with arbitrary and unequal treatment and too much discretion is given to prosecutors during the indictment stage (p. 86.); In claim 9(B), Beasley claims Ohio's death penalty statutory scheme invites arbitrary and capricious jury decisions (p. 87.); In claim 9(C), Beasley claims Ohio's death penalty statutory scheme and Ohio Crim. R. 11(c)(3) unconstitutionally encourages guilty pleas (p. 89.); In claim 9(D), Beasley claims Ohio scheme is unconstitutional because it requires that PSI reports, and mental evaluations, be submitted to the jury or judge once requested by a capital defendant. *See*, O.R.C. 2929.03(D)(1) (p. 89.); In claim 9(E), Beasley claims Ohio death penalty statute is unconstitutional because the aggravating factors are overly vague (p. 90.); In claim 9(F), Beasley claims that because Ohio's death penalty statute does not require juries to find mitigating factors when they give life sentences, it gives insufficient credence to proportionality review (p. 90.); Finally, in claim 9(G), Beasley claims that Ohio death penalty statutes violate International Law. In particular, the International Convention on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination

(ICERD), the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT), and the Universal Declaration of Human Rights. (Beasley brief, p. 93.)

9(A). Discretionary Stages in Ohio's Capital Punishment Scheme are fully constitutional.

This Court has repeatedly rejected arguments that "Ohio death penalty statutory scheme violates constitutional prohibitions against arbitrary and unequal punishment." *State v. Jackson*, 2014-Ohio-3707, ¶ 268 (2014); *State v. Ferguson*, 108 Ohio St.3d 451, 464 (2006). Beasley further contends that Ohio's capital punishment scheme allows for uncontrolled discretion of prosecutors in indictment decisions. In *Gregg v. Georgia*, 428 U.S. 153, 199 (1976), the Supreme Court approved the existence of "discretionary stages" in capital proceedings, including prosecutorial discretion whether to prosecute and/or to plea bargain. The fact that prosecutors in Ohio exercise discretion—in deciding whether or not to present a capital case for indictment—is fully constitutional. In Ohio, prosecutors are elected officials and fully responsible to the electorate. Without a specific allegation of an improper motive, Beasley's claim fails.

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

As to Beasley's claim that Ohio death penalty statute invites arbitrary and capricious jury decisions, this Court has repeatedly rejected such arguments. *State v. Mammone*, 139 Ohio St.3d 467, 506 (2014); *State v. Jenkins*, 15 Ohio St.3d 164, 171-173 (1984). Ohio death penalty statute "embodies the two basic components the Supreme Court has held a capital sentencing scheme must have in order to be constitutional: it 'perform[s] a narrowing function with respect to the class of persons eligible for the death penalty,' and it also 'ensure[s] that capital sentencing decisions rest upon an individualized inquiry.'" *United States v. Taylor*, 646 F.Supp.2d 1237, 1241 (D. New Mex. 2008), *citing*, *Jones v. United States*, 527 U.S. 373, 376-79 (1999).

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

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

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

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

"When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court" O.R.C. 2929.03(D)(1).

In the present case, the trial court appointed Beasley an "independent" licensed psychologist, Dr. John Fabian, who assisted Beasley during mitigation. (Def. Mot. 4.) Moreover, Beasley waived a presentence report. (3/20/2013 Hrg. p. 4.) Therefore, it is highly questionable whether Beasley has the standing to question this statute.

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

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

This Court has held that Ohio's statutory "aggravating circumstances" were not "unconstitutionally vague[.]." *State v. McNeill*, 83 Ohio St.3d 438, 453 (1998); *State v. Gumm*, 73 Ohio St.3d 413, 416 -423 (1995).

9(F). Proportionality review is not mandated by the Constitution.

It is well settled that "proportionality review in Ohio includes only cases 'in which the death penalty has been imposed.'" *State v. Robb*, 88 Ohio St.3d 59, 86 (2000). This Court has continuously denied challenges to the constitutionality of Ohio death penalty proportionality review under O.R.C. 2929.05. *State v. Lamar*, 95 Ohio St.3d 181, 186 (2002); *State v. Smith*, 80 Ohio St.3d 89, 118 (1997); *State v. Steffen*, 31 Ohio St.3d 111 (1987). Despite binding precedent, Beasley contends that Ohio's death penalty is constitutionally deficient because it does not require the jury to explain its reasons for adjudging a *life* sentence, thereby failing to provide a meaningful basis for distinguishing between life and death sentences. However, the Supreme Court of the United States has upheld a state statutory scheme that did not enunciate

specific factors to consider or a specific method of balancing the competing considerations. *Franklin v. Lynaugh*, 487 U.S. 164, 172-173 (1988); *Zant v. Stephens*, 462 U.S. 862, 875 (1983). Accordingly, it is objectively reasonable to conclude that the constitution does not require a jury to explain its reasons for adjudging a life sentence. *See Buell*, 274 F.3d at 368 (rejecting claim that Ohio's statute is unconstitutional because it does not require jury to identify mitigating factors when life sentence is imposed).

Furthermore, proportionality review is not constitutionally required. *Pulley v. Harris*, 465 U.S. 37, 44-51 (1984); *Walton v. Arizona*, 497 U.S. 639 (1990); *Lewis v. Jeffers*, 497 U.S. 764, 779 (1990); *McQueen v. Scroggy*, 99 F.3d 1302 (6th Cir. 1996); *Getsy v. Mitchell*, 495 F.3d 295, 305-306 (6th Cir. 2007) (en banc). Since proportionality review is not constitutionally required, states are accorded great latitude in defining the pool of cases used for comparison. *See Lindsey v. Smith*, 820 F.2d 1137, 1154 (11th Cir. 1987). Ohio has defined the pool of cases to be used in its proportionality review in a rational manner. As such, no constitutional provision is implicated by this process.

9(G). Ohio's death penalty statutes do not violate International Law; the International Convention on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT), or the Universal Declaration of Human Rights (DHR).

As a general matter, international law does not prohibit capital punishment in Ohio. *State v. Issa*, 93 Ohio St.3d 49, 69 (2001); *See also, Buell v. Mitchell*, 274 F.3d at 370-376, ("whether customary international law prevents a State from carrying out the death penalty, when the State otherwise is acting in full compliance with the Constitution, is a question that is reserved to the executive and legislative branches of the United States government, as it their constitutional role to determine the extent of this country's international obligations and how best to carry them

out.") In *Medellin v. Texas*, 554 U.S. 759 (2008), the Supreme Court held that all treaties are international commitments, but unless Congress conveys its intention to make the treaty self-executing or pass an implementing statute then it will not be enforceable by domestic courts. *Medellin*, 554 U.S. at 505. The Court distinguished self-executing treaties from regular treaties. *Id.* According to the Court, a self-executing treaty is specifically enforceable without the aid of supplemental legislation. *Id.* However, a treaty will only be deemed self-executing if there are stipulations in the treaty that make it clear that it was intended to be specifically enforceable by domestic courts. *Id.*at 506. Without the clear intent of self-execution, a treaty is only an obligation of the political branches, and not specifically enforceable by domestic courts. *Id.* The Court also held that the Executive Branch has no authority under the Constitution to convert a non-self-executing treaty into a self-executing treaty. *Id*. at 525. Although a President can make a treaty, he or she is powerless to make it enforceable by domestic courts unless the Congress consents. *Id*. at 526, *citing*, U.S. Cons. Art. II, § 2. The Supreme Court concluded "[t]he responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress." *Id*.

This Court has held that Ohio's death penalty scheme does not violate the ICCPR, the ICERD, the CAT, or the DHR. *State v. Kirkland*, 140 Ohio St.3d 73, 89 (2014); *State v. Short*, 129 Ohio St.3d 360, 381 (2011). Moreover "[b]ecause the United States declared, when signing the ICCPR, that the treaty would not be self-executing, see 138 Cong. Rec. S4781, S4784, its provisions cannot be enforced in the United States courts absent enabling legislation." *Commonwealth v. Judge*, 916 A.2d 511, 523 (Pa S.Ct. 2007). Furthermore, the ICERD is not self-executing and therefore cannot be enforced by domestic courts within the United States. *Johnson v. Quander*, 370 F.Supp.2d 79, 100-101 (D.C. 2005). Likewise, "[T]he United States

ratified the (CAT) Covenant on the express understanding that it did not create obligations enforceable in American courts." *Baird v. State*, 831 N.E.2d 109, 115 (Ind. S.Ct. 2005). Lastly "the United States ratified the (Universal Declaration of Human Rights) on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the (domestic) courts." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004) (finding the DHR was not self-executing.)

It is highly questionable, under the Tenth Amendment, whether Congress has the authority under any enumerated power (commerce clause or treaty clause) to prohibit the states from imposing capital punishment. *United States v. Lopez*, 514 U.S. 549, 609 (2000); *United States v. Harris*, 106 U.S. 629 (1883). However, to avoid a constitutional issue under Art. II's Treaty powers, the Supreme Court recently held that Congress could not abridge a State's inherent powers under the Tenth Amendment, unless Congress's language was obvious and specific when a treaty was ratified or enabled. *Bond v. United States*, 134 S.Ct. 2077, 2087 (2014). According to *Bond*, "'it is incumbent upon … courts to be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers.'" *Id.* at 2089, *citing*, *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) ("Application of the plain statement rule thus may avoid a potential constitutional problem.")

Because the enforcement of state law judgments in an inherent power of the State under its police powers, to prevail, Beasley must show that one of the treaties he cites is not only self-executing but Congress specifically prohibited capital punishment when it ratified or enabled the treaty. This he cannot do. The Supreme Court recognized that Constitution must leave room for "the 'essential attributes of sovereign power,' . . . necessarily reserved by the States to safeguard the welfare of their citizens[.]" *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1,

50 (1977). "Perhaps the clearest example of traditional state authority is the punishment of local criminal activity." *Id., citing, United States v. Morrison*, 529 U.S. 598, 618 (2000). The State of Ohio has a compelling interest in ensuring that state court judgments, including those that impose capital sentences, are enforced in a timely fashion. *Hill v. McDonough*, 547 U.S. 573, 583–584 (2006) (Both the State and the victims of crime "have an important interest in the timely enforcement of a sentence.") Moreover, the Supreme Court has recognized an "enduring respect" for the "finality of convictions that have survived direct review within the state court system." *Calderon v. Thompson*, 523 U.S. 538, 555 (1998). More particularly, the death penalty serves a compelling state interest. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

Due to federalism and Tenth Amendment concerns, because neither the President, nor the Senate, have ratified a self-executing treaty that expressly and specifically prohibits capital punishment, Beasley's claims of international law violations must fail. *Bond*, 134 S.Ct. at 2090.

Response To Prop. 10: Where Beasley Ignores Abundant Evidence Of Guilt, And Erroneously Criticizes The State's Theory Of The Case That Is Not Evidence, Beasley's Claim That His Conviction Is Against The Manifest Weight Of The Evidence Fails To Show Grounds For Relief

In his tenth proposition of law, Beasley unsuccessfully asks this Court to reweigh the evidence offered at trial and find that Beasley's guilty verdict is against the manifest weight of the evidence as to murder of Ralph Geiger, the murder of David Pauley, the attempted murder of Scott Davis, and the murder of Tim Kern. In this brief, Beasley makes it clear that he his asserting a manifest-weight-of-the-evidence claim and not sufficiency-of-the-evidence claim. (Beasley Brief, p. 99.) According to Beasley,"[i]n assessing a manifest weight of the evidence, this Court must examine the entire record… [t]his inquiry is separate from the examination for the sufficiency of the evidence." (*Id*.)

A sufficiency-of-the-evidence claim is rooted in the due process clause, but a manifest-weight-of-the-evidence claim is grounded solely in state law and does not implicate the federal constitution. *Tibbs v. Florida*, 457 U.S. 31, 45-46 (1982). "A claim that a conviction is against the manifest weight of the evidence is a claim under Ohio law; no provision of the United States Constitution forbids a conviction against the manifest weight of the evidence." *Tucker v. Warden*, 2009 WL 2983061, at * 2 (USDC SDO Sep. 14, 2009); *See also, Morris v. Hudson*, 2007 WL 4276665, at * 2-3 (USDC NDO Nov. 30, 2007).

Unlike a manifest error which is grounded in Ohio law, "[a] claim of insufficient evidence invokes a *due process* concern and raises the question whether the evidence is legally sufficient to support the verdict as a matter of law." *State v. Hunter*, 131 Ohio St.3d 67, 84 (2011) (emphasis added.); *See also, Jackson v. Virginia*, 443 U.S. 307 (1979). Explaining this substantial distinction, this Court opined the differences "between sufficiency of the evidence and manifest weight of the evidence" are significant because they are "clearly different legal concepts" that "differ both qualitatively and quantitatively." *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). In the *Thompkins* decision, this Court explained **"**that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief." *State v. Wilson*, 113 Ohio St.3d 382, 387 (2007), *citing*, *Thompkins*, 78 Ohio St.3d at 386–387. In other words, "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the fact finder's resolution of the conflicting testimony." *Id*; *See also*, *Tibbs*, 457 U.S. at 42 (retrial not barred when the first trial ended in a deadlock jury or where an appellate court disagrees about jury's weighing of evidence.) This Court explained:

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

Thompkins, *supra*, at 387. (emphasis added.) Accordingly, an appellate court should order a new trial "only in the exceptional case in which the evidence weighs heavily against the conviction." *Id*. To sustain a manifest-weight challenge, a defendant must show "the jury lost its way and created a manifest miscarriage of justice in finding" the defendant guilty. *State v. Scott*, 101 Ohio St.3d 31, 38 (2004). According to Section 3(B)(3), Article IV, of the Ohio Constitution, an appellate court may reverse a jury determination based on manifest weight of the evidence and remand for a new trial if it acts unanimously. *State v. Miller*, 96 Ohio St.3d 384, 391 (2002). Requiring a concurrence of all judges preserves the sanctity of the jury system. *Thompkins* at 309.

Although this Court's case law allows for a manifest weight of the evidence review, this awesome responsibility must not be taken lightly. "A fundamental premise of our constitutional trial system is that 'the jury is the lie detector.'" *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973). Beasley asks this Court to ignore these rules, reject evidence relied upon by the jury in reaching its guilty verdicts, and simply accept Beasley's versions of events. However, this Court should refrain from second guessing credibility determinations made by a jury, based solely on the review of a cold record, without the benefit of actually observing the demeanor of a single witness or the defendant, who took the stand. Resolving weight and credibility of witnesses usually falls squarely within the province of the jury, and this province "has long been held to be the part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and practical knowledge of men and the ways of men." *Aetna Life Ins.*

Co. v. Ward, 140 U.S. 76, 88 (1891). Hence, this Court has instructed "[t]he weight to be given evidence and the credibility of witnesses are jury issues." *State v. Jamison*, 49 Ohio St.3d 182, 189 (1990). Normally, "[i]t is the minds of the jurors and not the minds of the judges of an appellate court that are to be convinced." *Id*., *citing*, *State v. Petro*, 148 Ohio St. 473, 501 (1947). In *Thompkins*, this Court noted, even when conducting a manifest weight of the evidence review, it is critical to "preserve the jury's role with respect to the issues surrounding the credibility of witnesses." *Thompkins*, *supra*. at 389.

Beasley's Erroneously Attacks The "State's Theory Of The Case," Which Is Not Evidence

Beasley's attack on the "State's theory" regarding the evidence is flawed because the State's theory is not evidence. This is evident where the jury was specifically instructed that the party's arguments; i. e. "theories," were not evidence and were not to be considered as evidence. (Tr. 3199.) The jury is presumed to have followed the trial court's instructions. *State v. Ahmed*, 103 Ohio St.3d 27, 42 (2004).

Attacking the "State's theory," Beasley argues this Court must presume that he and Rafferty "possess more than a modicum of intelligence." According to Beasley, "for the State's theory to prevail" both he and Brogan Rafferty "had to lack common sense and intelligence." Beasley insists "[n]o one with the intelligence necessary to enact the sophisticated alleged plan of placing listings on Craigslist and creating various email addresses and telephone numbers… would have believed that all that work was worth the effort entailed, when the result of these labors would be to rob homeless, destitute individuals with little or no property or money." (Beasley brief, p. 100-101.) Apparently, Beasley takes issue with the State's theory because it allegedly presumes that he lacks both economic foresight and sound business judgment.

There is no question that the motivations behind Beasley and Rafferty's acts are so callous and depraved so as to momentarily befuddle and stun the average law-abiding citizen. That being said, the evidence showed that Beasley killed Ralph Geiger to assume his identity so he could avoid going back to jail in Texas. Using advertisements on Craigslist, Beasley and Rafferty then lured David Pauley to a farm in Caldwell and killed him near the spot where they had buried Ralph Geiger. Using the same Craigslist advertisements, Beasley and Rafferty lured Scott Davis to the same location. By sheer luck, the gun malfunctioned and Davis was able to escape. Undeterred by Davis' escape, using the same Craigslist advertisement, Beasley and Rafferty lured Tim Kern to the woods behind a mall in Akron and shot him. There is no question that common sense among reasonable persons may have a hard time grasping the sheer depravity of such conduct, but the degree of such depravity certainly does not call into question the veracity of the evidence.

Beasley insists that state's theory is unsound, and should be rejected, because the "business venture" – Craigslist advertisement used to lure unsuspecting homeless men down on their luck to a remote area to kill them and take their property – lacks any economic viability. According to Beasley, his involvement in these murders was not likely because he and Rafferty were not "motivated to make a four hour trip to steal inconsequential property such as Christmas tree lights and toy trains." (Beasley Brief, p. 101.) There is no dispute that Beasley's crimes were certainly bankrupt on many different levels – both economic and moral – but the premise of his argument is irrelevant and factually misleading. Although Beasley received property that may have only had sentimental value to his victims, Beasley was also able to steal Pauley's Dodge truck and laptop computer. (Tr. 1857-59.) Moreover, had his gun not misfired, Beasley may have well ended up with Davis' truck, lawn equipment, and Harley motorcycle. (Tr. 1458-

61.) Furthermore, Beasley's sheer and apparent greed for DeWalt's truck and SUV vehicle (vehicles Beasley personally went to inspect) caused DeWalt to ask too many questions which in turn led Beasley to withdraw his bogus job offer as a farmhand. (Tr. 1695-1701.) That Beasley's diabolical scheme will likely never be endorsed by any reputable venture capitalist does not render it so implausible so as to say "the jury lost its way" by determining that the evidence showed Beasley killed these men.

To draw attention away from the Beasley's contrived and implausible version of what happened, Beasley spends an inordinate amount of time attempting to punch holes in the State's theory. However, the theory offered to the jury by Beasley, who testified under oath, was both incredible and overly dramatic. Beasley's theory at trial was that Ralph Geiger, an alleged friend, freely gave him his driver's license and social security card before heading down to the farm. Beasley's theory was that Scott Davis was a hit man who Jerry Hood Jr. hired to kill him because Beasley was an admitted snitch for the Akron Police Department (the snitch part was true). Beasley's theory was that, even though Jerry Hood Jr. allegedly tried to kill him, Beasley decided, due to his good nature, to interview Tim Kern about the farmhand position anyway, but apparently never bothered to mention his own recent near-fatal encounter on the farm Kern was seeking employment to manage. (Tr. 2877-2949.)

The jury rejected Beasley's incredible and implausible versions, and moreover was entitled to discount Beasley's testimony and consider these unbelievable statements as evidence of Beasley's guilt. "[A] defendant's implausible explanation may constitute positive evidence in support of a jury verdict." *U.S. v. Bennett*, 848 F.2d 1134, 1139 (11th Cir.1988).

An Eyewitness To His Own Attempted Murder, The Testimony Of Scott Davis Is Powerful Evidence Of Beasley's Guilt

Beasley erroneously claims the jury lost its way when it accepted Scott Davis' testimony over Beasley's and convicted him of the attempted murder of Scott Davis. Beasley's argument is totally premised on Scott Davis being unable, while in a hospital bed, to identify Beasley in a photo lineup as the person he saw in the woods and who shot him. (Beasley Brief, p. 107.) However, at trial, without hesitation, Davis identified Beasley as the person he met at Shoney's, who took him out to farm, and who then tried to kill him. (Tr. 1460-80.) At trial, Davis was confronted with this discrepancy and explained that he was in a lot of pain when initially questioned by police, was on pain medication, and generally was not in good position to assist the officers who interviewed him. (Tr. 1489-94.) The jury assessed these matters and evidently gave little, if any, weight to Davis' inability to identify Beasley's photo in the hospital setting.

In his brief, Beasley insists that that this Court reject, and cast aside, the jury's obvious acceptance of Davis' version of events because Davis "was unable to identify Beasley" at the hospital. However, contrary to Beasley's most recent arguments, Beasley's identity as "Jack" – the person who had an altercation with Davis in the woods – is not in dispute. At trial, Beasley freely admitted he was "Jack." (Tr. 2919-20.) Beasley testified that in regard to the photograph from Shoney's restaurant (State's Ex. 2), that "[a]bsolutely, that was me" and "[a]bsolutely, that was Brogan." (Tr. 2925.) Beasley also admitted that he, Davis, and Brogan Rafferty drove out to the farm together. (Tr. 2926-28.) Finally, he admitted that an altercation between he and Davis ensued at the farm. (Tr. 2829-30.) In other words, Davis' identification of Beasley as the person who identified himself as "Jack," who met him at Shoney's, and took him to the farm where an altercation ensued, was never a disputed issue at trial. Beasley is trying to retry this case on

appeal, while proffering a whole different version of events than the one he offered at trial. Unfortunately for Beasley, the law does not allow for such gamesmanship.

There is no factual dispute that Beasley and Davis were in the woods near Caldwell together when a shooting took place. (Tr. 2829-34.) Until now, Beasley has never contested the fact that an altercation between Davis and him ensued that morning. As such, it is irrelevant whether Davis was unable to pick Beasley out of a lineup as the individual he had an altercation in the woods on the morning of November 6 because Beasley affirmed the altercation with Davis at trial. It was part of his defense that Jerry Hood Jr., Donald Walters, Scott Davis, and Brogan Rafferty got together and devised a plan to kill him for performing his civic duty by becoming a confidential informant for the Akron Police Department by providing information about the Brothers Motorcycle Gang. (Tr. 2930-35, 2987-89.)

"[A] statement by a defendant, if disbelieved by the jury, may be considered as substantive evidence of the defendant's guilt." *United States v. Brown*, 53 F.3d 312, 314 (11th Cir. 1995). Beasley testified that after eating breakfast with Rafferty and Davis at Shoney's, they parked Davis' truck, and drove out the farm in the same car. (Tr. 2925-30.) According to Beasley, when they were leaving the farm after a visit, Rafferty's car began to drag. (Tr. 2927-29.) Rafferty then suddenly, as if planned, dropped Beasley and Davis off in order to turn around. (Tr. 2928.)

At this juncture, Beasley let his dramatic tendencies get the better of him. According to Beasley, Davis pointed a gun at him and said "Brother, you are the weak link." (Tr. 2928.) At that point, according to Beasley, he knew that Jerry Hood Jr. somehow knew that he was a snitch. (Tr. 2929-30.) Beasley testified that the gun misfired three times. (Tr. 2933-34.) When he began to run, Davis allegedly tackled him and they began to wrestle. (*Id*.) During the struggle,

the gun misfired once more, then apparently fired[9], and then misfired again. (Tr. 2932-33.) Beasley testified that he then turned to Davis and said "that is your six." Beasley told the jury that "if [Davis] was going to kill me, he had to do it with his hands." (Tr. 2933.) Beasley told the jury that Davis was the "hit man" that Jerry Jr. must have hired to kill him for being a snitch – and insinuated that Brogan Rafferty and Donald Walters were somehow in on it. (Tr. 2935-40.) Beasley's version of the altercation between he and Davis resembled a "spaghetti western," as opposed to the truth, and the jury did not "lose their way" by rejecting it.

On cross-examination, things got a bit fuzzy when Beasley testified that Davis had the gun, somehow shot himself during the struggle, and then ran off with his own gun while Beasley stayed at the same location because "I was not in much condition to do much moving at that point." (Tr. 2969.) Also, on cross, Beasley had a hard time making his mind up as to whether he met back up with Brogan Rafferty after the altercation at the farm or whether he saw him a couple days later back in Akron. (Tr. 2968.) "[W]hen a defendant chooses to testify, he runs the risk that if disbelieved the jury might conclude the opposite of his testimony is true." *United States v. Williams*, 390 F.3d 1319, 1325 (11th Cir. 2004).

An Abundance Of Incriminating Circumstantial Evidence Links Beasley To The Murder Of David Pauley

After reading about the Davis incident on the internet, Debra Bruce became concerned and called the Noble County Sheriff's Office. (Tr. 1739-40.) Like Davis, her brother had answered an advertisement on Craigslist about a farmhand job. (*Id*.) By his own admission, Beasley helped set up the Craigslist advertisement while living at Sheldon Ave. (Tr. 2914-18.) In October of 2011, David Pauley told his sister, Debra Bruce, that he found job on the internet about being a farmhand on large farm in Ohio. (Tr. 1730.) Debra paid for David to stay at a

[9] The gun had to fire at least once because Davis did suffer a gunshot wound to the arm.

hotel in Parkersburg, West Virginia and their brother, paid for the U-Haul David used to transport his personal belongings to Ohio. (Tr. 1732-34.) Debra last heard from David on October 22, 2011, when he called her from the Parkersburg hotel saying he was meeting his employer the next day. (1735.)

David Pauley's body was recovered in the woods on a remote property in Noble County, Ohio – a remote wooded area that Beasley was familiar with due to his connections with the Hood family. (Tr. 1780-86, 2905-07.) Pauley's grave was discovered in close proximity to where Beasley shot Scott Davis, where police discovered an empty grave, and where Ralph Geiger's body was found. (Tr. 1773-1789.) Like Geiger, Pauley's death was caused by a gunshot wound to the back of the head. (Tr. 1787, 2814.) The jury was entitled to consider these facts, not as unconnected coincidental events, but rather as persuasive evidence establishing Beasley as the perpetrator of these crimes.

An abundance of commonalities linked Beasley to the crimes against Geiger, Pauley, Davis, and Kern. The evidence showed that Beasley used Craigslist to post advertisements seeking a farmhand to take care of a large farm in Ohio. In emails, Beasley used the alias "Jack." (Tr. 1602-91.) The Craigslist job postings were traced back to a Shelburne Ave. residence where Beasley was staying from August of 2011 to October 31, 2011. (Tr. 1915-33.) The evidence showed that Beasley screened email responses, made email contacts with applicants, and personally interviewed selected applicants. (Tr. 1695-1724.) Scott Davis, David Pauley, and Tim Kern applied for this posting by email. (State's Ex. 22B, 24B, & 25B.) Daniel DeWalt, George Smith, and David LeBlond also applied to the Craigslist posting, and identified Beasley as the person who interviewed them. (Tr. 1695-1724.) Scott Davis, who accompanied Beasley into the woods near Pauley's gravesite, managed to escape from Beasley with a gunshot

wound to the elbow after hearing a gun misfire behind him. (Tr. 1455-83.) Beasley admitted to this altercation with Davis, but claimed Davis was the aggressor. (Tr. 2933.) A pre-dug grave was discovered near the area where Davis was shot and dropped his hat, and in close proximity to Pauley's grave. (1774-1790.)

As to the aggravated robbery specification, the evidence showed that Pauley drove his 1985 Dodge Ram truck with a U-Haul trailer to Ohio on October 22, 2011. (Tr. 1731-34.) On October 23, Beasley drove Pauley's truck and U-Haul trailer to the home of Donald Walters in Akron, where he, Brogan Rafferty, and Walters unloaded it. (Tr. 1837-40.) Carla Conley, an employee of the U-Haul location in Akron where the Pauley trailer was returned, identified Beasley as the "talkative" person who returned the trailer. (Tr. 1954 – 58.) Furthermore, police confiscated several items of David Pauley's property at Beasley's apartment on Gridley Ave. (State's Ex. 107 – red plastic tote; State's Ex. 99 – NASCAR memorabilia; State's Ex. 105 – green Coleman cooler carrying train sets). (Tr. 2142-60.) Later, Debra Bruce identified several items as property belonging to her brother: Christmas lights (Ex. 102), NASCAR memorabilia (Ex. 99), and a green cooler containing train sets (Ex. 105). (Tr. 1744-53.)

Also, after Beasley sent a letter from jail to Joyce Grebelsky, police found a laptop computer in the back yard of Gridley Ave. containing writings of David Pauley's brother, Rick Pauley. (State's Ex. 185; Tr. 2313-15, 2448-2450.) This is the same laptop computer that Donald Walters noticed in the front cab of Pauley's Dodge Ram truck. (Tr. 1848.) Beasley also sold Pauley's Dodge Ram truck for $1000 and gave Walters a finding fee. (Tr.1858-59.)

As to the kidnapping specification, the evidence showed that Pauley (residing in Virginia) responded to a Craigslist advertisement for a farmhand position posted by Beasley on a computer located at an Akron home where he resided. Using the Craigslist advertisement, and

giving Pauley the false belief he had secured a job in Ohio, Beasley lured Pauley to remote area where he shot and killed him. (1727-1743.)

As to the "murder while under detention" specification, the evidence showed that Beasley was classified a "violator-at-large, whereabouts unknown" as of August 2, 2011. (State's Ex. 105 B; Tr. 1566-93; 2744-46.) After Beasley failed to appear for court, a capias was issued for him on September 6, 2011. (Tr. 2744-46.) Furthermore, Beasley testified he knew he was wanted by the State of Texas for a parole violation. (Tr. 2894-96.)

To distance himself from the Pauley murder, Beasley spends a considerable amount of his brief questioning Donny Walters' testimony about Beasley and Rafferty showing up at this house in Pauley's truck and U-Haul. (Beasley brief, p. 104.) However, the cell phone records corroborated Walters' testimony. Cell phone records showed that pre-paid cell phone number "8961" made calls to Donald Walters during the time frame of October 21 to October 23, 2011. (Tr. 2571.) On October 23, 2011, at 1:09 p.m., the "8961" prepaid cell phone was placed by GPS coordinates at a cell tower adjacent to Interstate 77 just north of Cambridge, Ohio. (State's Ex. 86B, Figure 1, Sect. D.) At this same time and date, Donald Walters' cell phone was placed by GPS coordinates at a cell tower in Akron, Ohio. (State's Ex. 86B, Figure 1, Sect. E.) That same day, the "8961" prepaid cell phone made two more connections to Donald Walters' cell phone, at 1:38 p.m. and 1:39 p.m. (Tr. 2577-81.) At the time of those connections, Donald Walters' cellphone was placed by GPS coordinates at a cell tower in Akron. (State's Ex. 86B, Figure 1, Sect. E.) The "8961" prepaid cell phone was placed by GPS coordinates at a cell tower adjacent to Interstate 77 just south of Canton, Ohio (north of the previous position) at 1:38 p.m. and 1:39 p.m. (State's Ex. 86B, Figure 1; Tr. 2577-2581.)

According to Walters, these were the phone calls between Beasley and Donald Walters made shortly before Beasley and Rafferty showed up at his house with a U-Haul full of Pauley's property. (Tr. 1840-43.) Beasley had told Walters that he planned to purchase storage unit. (Tr. 1837.) Walters testified that, on October 23rd, Beasley called him stating he had purchased storage unit, was on his way to Walters' house, and was currently on the highway "somewhere out south of Canton," and would be at Walters' house in an "hour-and-a-half." (Tr. 1839-40.) From phone records, Walters identified telephone calls made to his house on that same day as being the calls made from Beasley (tele # 330-245-8961) to him about bringing the storage unit property to his house. (State's Ex. 34 – phone records; Tr. 1840-43.) Walters identified his telephone number as 330-786-7626. (Tr. 1841.) At trial, Beasley admitted he had access and used the "8961" prepaid cellphone "on a regular basis[.]" (Tr. 2999.) In fact, Beasley used the "8961" to place several calls to Walters' answering machine. (Tr. 2990.)

The "1804" prepaid cell phone Beasley used to call Scott Davis, was also used to call David Pauley. (Tr. 2574-76; Tr. 2584-85.) In fact, the "1804" prepaid cellphone made connections with Scott Davis' cell phone on November 6 – the date of the Davis shooting. (State's Ex. 89A, Sect. A; Tr. 2584-91.) Just hours before the Davis shooting, the "1804" prepaid cellphone made connections with Scott Davis' cellphone at 9:18 AM and 9:36 AM – close in time to when Beasley met Davis at Shoney's restaurant. (State's Ex. 89A; Sect. A; Tr. 2584-91.)

That same "1804" prepaid cell phone had previously made connections with David Pauley's cell phone on October 21st, on October 22nd, and twice on October 23, 2011. (State's Ex. 86B; Tr. 2571-73.) The October 23rd call from the "1804" prepaid cell phone to David Pauley was placed by GPS coordinates at a cell tower adjacent to Interstate 77, a few miles south

of Caldwell, Ohio and north of Marietta, Ohio. (Tr. 2573-74.) At the same date and time, David Pauley's cell phone received that call and was placed by GPS coordinates at a cell tower adjacent to Interstate 77 near Parkersburg, West Virginia (south of Marietta, Ohio). (State's Ex. 86B, Figure 2; Tr. 2576.) At 9:59 a.m., the "1804" prepaid cellphone was placed by GPS coordinates at a cell tower in Marietta, Ohio. (State's Ex. 86B, Figure 2; Tr. 2573-76.)

Beasley murdered Ralph Geiger to avoid going back to prison in Texas.

At trial, Beasley admitted that he needed a new identity to avoid going back to prison in Texas. (Tr. 2895.) There is no dispute that, sometime in August, Beasley adopted the name "Ralph Geiger" as his own identity. (Tr. 2898-90.) In fact, Donny Walters only knew Beasley as Ralph Geiger. (Tr. 1832-35.) Moreover, Beasley rented an apartment on Shelburn Ave., and identified himself to his landlord, Joe Bias, as Ralph Geiger. (1916-21.) Beasley also identified himself to landlord Penny Kaufman, at the Gridley Avenue address, as Ralph Geiger. (Tr. 2114-2119.) Around this same time, Beasley told his old friend Joyce Grebelsky to call him Ralph Geiger. (Tr. 2296-97.) Beasley got a job at Waltco Inc. as Ralph Geiger, and co-workers called him Ralph Geiger. (Tr. 2737-39.) In September of 2011, Beasley obtained pain medication under the name of Ralph Geiger. (Tr. 1371-79.)

Ralph Geiger was last seen at the Haven of Rest on August 8, 2011. (Tr. 1341-44.) Geiger told his friend Summer Rowley, as well as Dwight Johnson, an employee of the homeless shelter, that he was taking a job in southern Ohio. (1323-44.) That same day, Geiger checked in at the Best Western Hotel in Caldwell, Ohio, in a room where three people were supposed to stay. (Tr. 1348-53.) Geiger was not seen again. (Tr. 1344.) Cell phone records showed that the "4914" prepaid cell phone, which made calls to Brogan Rafferty, Ralph Geiger, Joseph Bias, and Donald Walters, made a series of calls on August 8 (11:31 PM) and August 9 (12:41 AM), which

were placed by GPS coordinates at a cell tower located near Noble Correctional Institution – two miles west of Caldwell, Ohio. (Tr. 2570-71.) During this same period of time, this same "4914" prepaid cell phone made several calls to Brogan Rafferty's cell phone. (Tr. 2565-66.)

From September to mid-November of 2011, Beasley admittedly used Geiger's identification to open a bank account, get a job, and seek pain medication. (Tr. 2974, 2978-79.) Beasley also used Geiger's identification in filling out ATF form when repairing a gun. (Tr. 2406-07.)While Geiger lay dead and buried, Beasley insisted that he had Ralph Geiger's permission to start a new life using Geiger's name and personal information. (Tr. 2896-2906.)

In November, Geiger's body was recovered in a remote wood area in close proximity to where Beasley shot Davis. (Tr. 1790-92; 2512-13.) In this same area, Davis' hat was recovered and an empty grave was found about eight feet away from where Geiger was buried. (Tr. 1790, 1805.) Geiger died from a gunshot wound to the back of head. (Tr. 2814-19.)

After Geiger disappeared, the evidence showed that Beasley utilized Craigslist to post a series of advertisements seeking a farm hand to take care of a large cattle farm in Noble County, Ohio. (Tr. 1602-91.) Beasley admitted to placing these advertisements. (Tr. 2914-17.) Beasley screened responses, made email contacts with applicants, and conducted interviews. (Tr. 2916-19.) David Pauley, Scott Davis, and Timothy Kern, were contacted about the farm hand position, and accepted those positions. (State's Ex. 22B, 24B, & 25B.)

David Pauley's body was found in close proximity to Ralph Geiger's grave. (Tr. 1776-1786.) Like Geiger, Pauley died from a gunshot wound to the back of the head. (Tr. 1787-88.) Both graves were found near a pre-dug grave found in close proximity to where Beasley had taken Davis and shot him. (Tr. 1776-89.)

As to the aggravated robbery specification, Geiger's body was discovered unclothed, and Beasley admitted to taking and using Geiger's photo identification card and social security card. (Tr. 2895-2906.) Geiger's wallet was also discovered in the back yard of a house on Gridley Avenue, where Beasley rented a room using Geiger's name. (Tr. 2369-74.) The police discovered the wallet after Beasley sent a jail letter to Joyce Grebelsky, asking her to destroy this evidence, which she instead voluntarily turned over to the FBI. (Tr. 2313-19.)

As to the kidnapping specification, the evidence showed that Geiger was staying at the Haven of Rest shelter and left there believing that he secured a job in southern Ohio. (Tr. 1325-1344.) On August 8, Geiger travelled to a Caldwell Best Western to start his new job. (Tr. 1341-44, 1331-32.) Beasley claimed he knew Geiger was heading south to Caldwell to work on Jerry Hood Jr.'s farm. (Tr. 2898.) Beasley claimed Geiger gave his identification and medical records to Beasley before he left. (2898-2906.) Beasley also claimed he saw Geiger several times when visiting the Hood farm. (Tr. 2905-06.)

As to the "murder while under detention" specification, the evidence showed Beasley was classified a "violator-at-large, whereabouts unknown" on August 2, 2011. (State's Ex. 105 B; Tr. 1566-93; 2744-46.) After Beasley failed to appear for court, a capias was issued for him on September 6, 2011. (Tr. 2744-46.) Furthermore, Beasley testified he knew he was wanted by the State of Texas for a parole violation. (Tr. 2894-96.)

The jury was well within reason to reject Beasley's testimony that Ralph Geiger allegedly gave Beasley his driver's license and social security card. (Tr. 2897.) The jury easily could have rejected Beasley's implausible explanation that neither he nor Ralph Geiger considered the "potential pitfalls" of two people using the same identities. (Tr. 2897.) In fact, the jury likely rejected Beasley's incredible explanation that "we really hadn't discussed it, but later on [Geiger]

went on down to the farm." (Tr. 2898.) In fact, the jury would be entitled to find Beasley's testimony that Ralph Geiger freely gave Beasley his medical records to be downright goofy. (Tr. 2899.) "[T]he trier of fact may reject a theory of innocence based upon testimony which lacks credibility." *State* v. *Cousin*, 5 Ohio App. 3d 32, 37 (3rd Dist. 1982).

Beasley argues he had no "discernable motivation" to kill Geiger. (Beasley brief, p. 101.) Once again, Beasley admitted that he needed a new identity to avoid going back to prison in Texas. (Tr. 2895.) That is Beasley's "discernable motivation" for killing Geiger. At trial, Beasley testified when interviewing persons for the farm hand position, he purposefully did not use the "Ralph Geiger" identity because he "was comfortable and secure living (with) the name of Ralph Geiger[.]" (Tr. 2919-20.) The evidence showed that Ralph Geiger's identity was Beasley's long term solution to his Texas warrant problem. (Tr. 2919-20.)

Beasley claims "[g]iven the easy availability of take or stolen identifications, Beasley and Rafferty would not have needed to develop… an elaborate and violent plan to obtain (Geiger's) identification." (Beasley brief, p. 101-102.) Pointing to activities of high school and college students, Beasley insists that he did not need to kill someone to get a fake identification card. (*Id*.) However, Beasley needed the Geiger identification card and social security information for a little more than just purchasing beer. With Geiger's identification, Beasley was able to open a bank account at PNC bank, get a job at Waltco, and seek medical treatment. (Tr. 2732, 2739, 2902.) In fact, in State's Ex. 1 (photo), it is apparent Beasley went to great lengths (hair coloring and grooming) to resemble Ralph Geiger's photo identification card. (*Compare*, State's Ex. 1 - Beasley clinic photo; and State's Ex. 122B-124B – Beasley booking photos from February 9, 2011.)

Beasley further alleges, with only bare argument, that Defendant's Ex. A proves he could not have killed Ralph Geiger. According to Beasley, he is innocent because he used Geiger's identification on January 28, 2011 – seven months before Geiger's death. (Beasley brief, p. 102.) Defense Ex. A is a "bill statement," dated March 14, 2012, sent to "Ralph Geiger" at Grebelsky's address. (Def. Ex. A – bill.) In other words, the document itself was generated long after Geiger's body was recovered and merely refers to an event that took place months before Geiger's disappearance. It lists two of Ralph Geiger's clinic visits of 1/28/2011 and 9/20/11. (Def. Ex. A – bill.) This bill does not indicate, in any form or fashion, that Beasley was posing as Ralph Geiger at the January 28, 2011 visit. Instead, the record is a mere accounting entry, as opposed to a record of treatment. Furthermore, the clinic photo (State's Ex. 1B) that was identified by Dr. Moreno as being the person she saw and treated twice in September of 2011, was likely taken at that time, because the clinic photo bore little resemblance to the certified booking photos taken of Beasley on February 9, 2011, (State's Ex. 122 B, 123B, 124B); that date being a little over a week after the January 28th date on which Beasley claimed to have visited the Akron clinic posing as Ralph Geiger. Given the radically different appearance of Beasley when he booked in the Summit County jail on February 9, 2011, the jury would be entitled to disbelieve Beasley's claim he appeared with a short and dark beard at the Akron clinic on January 28, 2011. During a search of the Gridley Ave. apartment, police confiscated pill bottles in Beasley's name (issued before Geiger disappeared) and pill bottles in Geiger's name (issued after Geiger disappeared). (State's Ex. 37B & 38B – pill bottles displaying "Richard Beasley" filled on 7/14/11 and 7/15/11; State's Ex. 180, 181, 182, & 183 – pill bottles displaying "Ralph Geiger" filled on 9/20/11 and 9/27/11; Tr. 2149-56.) This evidence would

circumstantially suggest that Beasley was being medically treated in his own name as July 2011, further undermining the claim that he was posing as Ralph Geiger on January 28, 2011.

The evidence shows that Beasley murdered Tim Kern even after the Davis shooting went awry

Like Davis and Pauley, Kern sent email responses to a Craigslist job posting about a farmhand position in southern Ohio. (State's Ex. 24B.) Also like Davis and Pauley, Beasley had communicated with person name "Jack" about the job. (*Id*.) Over a period of three months, Beasley utilized Craigslist to post advertisements about a farmhand position to take care of a large farm in southern Ohio. (Tr. 1602-91.) According to Tina Kern, Tim's ex-wife, Tim often used her computer to find jobs and he used her computer when responding to the Craigslist postings. (Tr. 1976-77.) Authorities traced the emails back to a residence where Beasley had access to the kitchen computer. (1916-26.) Beasley screened responses to the advertisement, contacted the applicants, and conducted interviews. (Tr. 1695-1724.) At trial, Beasley admitted to interviewing applicants Scott Davis, Tim Kern, Daniel DeWalt, and George Brown. (Tr. 2976-81.) And Beasley admitted to interviewing Tim Kern at Waffle House after Scott Davis allegedly tried to shoot him. (Tr. 2942-44.) Beasley implausibly claimed he did not bother telling Tim Kern about the Davis shooting because he did not feel Kern was in danger. (Tr. 2943.)

Nicholas Kern, Tim's son, drove Tim to an interview at Waffle House. (Tr. 1982-94.) At trial, Beasley admitted he was the person meeting with Kern in the Waffle House surveillance footage. (State's Ex. 50B, 51B, 52B; Tr. 2944.) Beasley further admitted he made a phone call at 11:14 AM, seen on the footage, with the "5353" prepaid cell phone. (Tr. 2944.) According to Nicholas, he and his father were looking for a man in red hat with an American logo (the same description given to DeWalt, Smith, and LeBlond who met with Beasley). (Tr. 1982-94, 2976-

81.) When Beasley was arrested, he was found with a red hat fitting this description. (State's Ex 30B; Tr. 2777.)

The night before Tim Kern left, Tina Kern gave him a television that police later recovered from Brogan Rafferty's residence. (State's Ex. 198; Tr. 1976-78, 2284-91.) On the day Tim Kern disappeared, a vehicle matching the description of Brogan Rafferty's white Buick LeSabre pulled into the Italo's Pizza restaurant parking lot. (State's Ex. 187A & B; Tr. 2359-64.) Video showed a man with a build like Beasley's walking from the white vehicle into the pizza shop and back. (*Id*.) Tim Kern's Buick Limited was recovered from the parking lot of Italo's Pizza. (Tr. 1978-79.) Later, Beasley took Donald Walters to examine Kern's car. (Tr. 1859-68.) The .22 caliber pistol, to be repaired at Smitty's Gun shop, was delivered by a person who signed "Ralph Geiger" on the ATF form, and listed Beasley's "8961" prepaid cell phone on the ticket. (Tr. 2400-15.) This pistol was consistent with the gun used to shoot Tim Kern. (Tr. 2243 – 2245.) These facts circumstantially suggest Beasley himself took the gun in for repair. That same gun, the Ivers Johnson .22 caliber pistol, was recovered in the bedroom of Brogan Rafferty. (Tr. 2179-93.)

On November 13, 2011, Tim Kern texted his son at 5:52 a.m. stating he would miss him but "in the long run this [new job] will be better." (State's Ex. 79B; Tr. 2479.) That was the last time Tim Kern was seen or heard from by his family. Tim Kern's body was eventually discovered in a makeshift grave behind Rolling Acre Mall. (Tr. 2044-2052.) From November 8 to November 13, prepaid cell phones "5353" and "8961" made calls to phones belonging to Tim Kern and Brogan Rafferty. (Tr. 2592-2598.) At trial, Beasley admitted to using the "5353" prepaid cell phone to call Tim Kern and to having access to the "8961" prepaid cell phone. (Tr. 2988-2992.)

The "8961" prepaid cell phone made fifteen calls to Brogan Rafferty's cellphone during this period. (State's Ex. 90B, Sect. B.) The "8961" prepaid cell phone called Rafferty three times, all in Akron, the day Kern disappeared. (Tr. 2493-95.) On November 12, the "5353" prepaid cellphone, registered to "Jack Bell," made a phone call at 12:54 PM that originated near a cell tower in proximity to the Rolling Acres Mall, where Kern's body was found. (State's Ex. 90B, Figure 1, Sect. D; Tr. 2596-97.) The police could not identify anyone named "Jack Bell" associated with the address given on the "5353" phone application. (Tr. 2707.)

As to the aggravated robbery specification, the evidence showed Beasley (posing as Ralph Geiger) had Donald Walters look at a Buick Limited. (Tr. 1860.) This was the same Buick Limited identified by Tina Kern as belonging to her ex-husband, Tim. (Tr. 1973-75.) Walters told Beasley the engine was useless and the car had scrap value only. (Tr. 1860.) Tina Kern testified that a condition of Tim Kern's new job was the transfer of title of his Buick Limited to his new employer. (Tr. 1972-72.) When he opened the glove box, Walters noticed the name "Kern" on the registration papers. (Tr. 1862.) Beasley attempted to persuade Walters to use his identification when the scrapping the car because Beasley said he had outstanding warrant. (Tr. 1865-66.) Beasley repeatedly called Walters about scrapping Kern's car and left several messages on Walters' voicemail. (State's Ex. 35 – recording of voice messages; Tr. 1866-67.) The recorded messages to Walters' phone were made by the "8961" prepaid cellphone, to which Beasley admitted having access. (State's Ex. 35; Tr. 2996-2998.) Beasley claimed the messages on Walters' phone related to a Ford Taurus, not Kern's Buick Limited. (Tr. 2996.) Once again, the jury was entitled to disbelieve Beasley's testimony on this issue.

As to the kidnapping specification, the evidence showed that Kern was living in his car. After responding to the Craigslist post at his ex-wife's house and being interviewed by Beasley

at Waffle House, Kern accepted the position as a farmhand in southern Ohio. (State's Ex. 24B; 1968-72.) Because his car was falling apart, Kern agreed to give it to his new employer and catch a ride to southern Ohio. (1971-72.) On November 13, Kern drove to Italo's Pizza to meet his new employer for a ride. (State's Ex. 187A & B; Tr. 2359-64.) Kern was not seen again. Later, Kern's body was discovered behind Rolling Acre Mall in Akron, where Kern's only personal transportation remained, parked at Italo's Pizza. (State's Ex. 118; Tr. 2356; 2071-2108.)

As to the "murder while under detention" specification, the evidence showed Beasley was classified a "violator-at-large, whereabouts unknown" on August 2, 2011. (State's Ex. 105 B; Tr. 1566-93; 2744-46.) After Beasley failed to appear for court, a capias was issued for him on September 6, 2011. (Tr. 2744-46.) Furthermore, Beasley testified he knew he was wanted by the State of Texas for a parole violation. (Tr. 2894-96.)

In support of his claim that the manifest weight of the evidence favors an acquittal, Beasley points to the fact that the .22 Iver Johnson gun used to kill Tim Kern was found in Brogan Rafferty's bedroom. (Beasley brief, p. 108; Tr. 2214.) This fact does not help Beasley. In fact, the jury specifically found that Beasley did not actually kill Tim Kern, but rather acted with prior calculation and design as to the death of Tim Kern. That finding was supported by the fact that Beasley, with Brogan Rafferty's assistance, lured Tim Kern with Craigslist postings and interviewed him even after shooting Davis, shows that Beasley acted with prior calculation and design in murdering Kern. *State v. Palmer*, 80 Ohio St.3d 543, 567 (1997) ("[w]here evidence adduced at trial reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and design is justified.")

Where the direct and circumstantial evidence strongly support the crimes for which Beasley was convicted, this Court should find Proposition 10 not well taken.

Response To Prop. 11: Where The Record Shows Beasley Received A Fair Trial, And There Are No Instances Of Trial Court Error, Beasley has Failed To Show Grounds For Application Of The Doctrine Of Cumulative Error

Having failed to show error by the trial court, harmless or otherwise, Beasley has failed to show grounds for the application of the doctrine of cumulative error. *State v. Pickens,* 2014 Ohio 5445, P230 – P231. (The doctrine of cumulative error is not applicable. Pickens received a fair trial. Moreover, none of the errors committed in this case, whether considered individually or cumulatively, resulted in prejudice.") Accordingly, this Court should conclude that Beasley's Proposition of Law Number 11 is not well taken.

CONCLUSION

For the reasons expressed, this Court should conclude that none of Beasley's assignments of error are well taken, and furthermore that the death sentences imposed on Beasley are appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Amended Merit Brief of Appellee State of Ohio has been delivered by e-mail to Tyson Fleming, Counsel of Record, and to Daniel Paul Jones and Randall Lee Porter, co-counsel, on this 9th day of February, 2015.

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