Supreme Court of Ohio Clerk of Court - Filed May 29, 2018 - Case No. 2016-1006

NO. 2016-1006

IN THE SUPREME COURT OF OHIO

CAPITAL CASE, APPEAL FROM
THE CUYAHOGA COUNTY COURT OF COMMON PLEAS
NO. CR-13-579539

STATE OF OHIO

Plaintiff-Appellee,

-vs-

MICHAEL MADISON

Defendant-Appellant

MERIT BRIEF OF APPELLEE STATE OF OHIO

CAPITAL CASE – NO EXECUTION DATE SET

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STATEMENT OF THE CASE AND FACTS

Michael Madison is a serial killer who murdered three women inside his apartment in East Cleveland, Ohio between 2012 and 2013. Madison lured each victim – Shetisha Sheeley, Angela Deskins, and Shirellda Terry – to his apartment, strangled them to death, and wrapped their bodies in multiple layers of garbage bags before disposing of them near his apartment. Madison also mutilated Shirellda Terry's genital area with a blunt instrument while she was still alive. Madison later confessed to killing Sheeley and to moving Terry's body out of his apartment. In a recorded statement to police, he bragged about his hatred of women and said that he hoped that the murders would send a message to the community. In this Court, Madison does not dispute the overwhelming evidence of his guilt in any of the three aggravated murders or in any of the aggravating circumstances. This Court should reject each of Madison's propositions of law and affirm his convictions and all three of his death sentences.

A. Madison, who lived in an apartment in East Cleveland, developed an intense hatred of women that motivated him to commit the murders.

Michael Madison, 35, lived in an apartment at 1397 Hayden Avenue, Apartment #2, in East Cleveland, Ohio. Tr. 410; 4188. His apartment was on the second floor of the building, above a business called East Cleveland Cable. Tr. 4099. He went by the nickname "Ivan." Tr. 4111; 4140. He sold marijuana for a living. Tr. 4115. He was also a convicted sex offender, having pleaded guilty to the attempted rape of a woman named Felicia Lamar in 2001. Tr. 7149. Madison shared a detached garage space, known as bay 1, with Kym Henderson, who lived next door to Madison in Apartment #1. Tr. 4099; 4102; 4121.

Originally, Madison lived in the apartment with Tenia Plummer, the mother of his two children. At some point, Madison and Plummer had a falling out, and separated on bad terms. Tr. 4215. The children lived with Plummer and occasionally visited Madison at his apartment. Tr. 4217.

After this breakup, Madison began to exhibit extreme anger towards women. Shaeaun Childs, who worked at East Cleveland Cable, overheard Madison talking to Plummer on his phone on the sidewalk outside. Madison was talking very loudly, saying, "I'm going to kill that [b****][.]" Tr. 4153. Asia Stovall, one of Madison's neighbors, overheard Madison arguing with Plummer over the phone. When he hung up, she heard him say, "I could kill her." Tr. 4196. Quiana Baker, a female acquaintance of Madison's, testified that she spoke to Madison after he left the funeral of a friend of his. Madison said, "[t]hese hoes be acting crazy, acting like they don't want to f*** with a real n**** and they make you want to * * * Anthony Sowell – a b****." Tr. 4535. Anthony Sowell is a serial killer on death row for strangling 11 women to death and burying their bodies in and around his home in Cleveland. *See State v. Sowell*, 148 Ohio St.3d 554, 2016-Ohio-8025, 71 N.E.3d 1034. Eugenia Thomas, another of Madison's female acquaintances, testified that Madison "talked about hitting women and tying them up." Tr. 5953. He also told Thomas that he "wanted to kill his baby mama." Tr. 5959.

B. Shetisha Sheeley.

Shetisha Sheely, 28, lived alone in an apartment on Kipling Avenue in Cleveland. Tr. 4077-78. She did not keep in regular contact with her family, but did attend birthdays for her family members every year. Tr. 4089. Her sister Samerra Sheeley received a voicemail from Shetisha in September of 2012. Tr. 4086. After that, she never heard from Shetisha

again. *Id.* In December of 2012, Shetisha's brother Dontell was murdered. Tr. 4079. Shetisha did not attend Dontell's funeral. Tr. 4089. At that point, her family knew something was wrong. *Id.* They did not, however, report her missing. Tr. 4090.

Brittney Darby, Madison's girlfriend, testified that around the time of Sheeley's disappearance in September of 2012, she saw Madison with injured knuckles. Tr. 5530. Madison told Darby that he got into an argument with another girlfriend, Shawnta Mahone, and punched a wall. *Id.* Darby also saw Madison with a scratch on his face. Tr. 5489.

Kym Henderson, Madison's neighbor with whom he shared bay 1, testified that one night in 2012 – she could not be sure when - Madison became angry with Henderson when she left the garage door to bay 1 open. He told her to keep the garage door closed. Tr. 4126.

C. Angela Deskins.

Angela Deskins, 38, worked off-and-on at her father's demolition company. Tr. 4050-51. Her father supplemented her income by giving her money every Friday. Tr. 4051. In May of 2013, Deskins' father contacted her sister Khristina Deskins, saying that he was concerned because Deskins had not been coming to the demolition yard recently and was not answering her phone. Tr. 4055. Deskins' family reported her missing. Tr. 4056. They put up missing person fliers all over East Cleveland. Tr. 4057.

Todd Mosby was a close friend of Angela Deskins. Tr. 4596. He lost contact with her in May of 2013. Tr. 4600. Paris Valles, a friend of Deskins, dropped Deskins off with Madison on two occasions, although he did not know at the time who Madison was. Tr. 5450-53. The second time, he saw Madison make an aggressive or "hostile" gesture towards Deskins, "like, hurry up, get over here[.]" Tr. 5456-57. Deskins hurried over to Madison. Tr. 5457. Valles never saw or talked to her again. Tr. 5458.

East Cleveland Police Chief Michael Cardilli obtained Madison's cell phone records from Revol Wireless. Tr. 5360. Those phone records revealed 15 phone calls from Deskins to Madison and 4 phone calls from Madison to Deskins over a three-week period in May of 2013. Tr. 5430. The last of those calls occurred 1:25 a.m. on May 25 and lasted only 14 seconds. Tr. 5433.

D. Shirellda Terry.

Shirellda Terry was an 18-year-old high school student. Tr. 3986-88. She lived with her mother Belinda, her stepfather Derrick Minor, and her sister Britney, at East 159th Street and Euclid Avenue in Cleveland. Tr. 3988. In the summer of 2013, she took a job doing cleaning and clerical work at East Clark Elementary School, working 7:30 to 4:00. Tr. 3989-90. Because Shirellda did not drive, Minor drove her to work each day. Tr. 3993. She would then walk home, a distance of approximately two miles. *Id.* Shirellda did not have a cell phone, but she did have an iPod that she could use to send text messages. Tr. 3996; 4027.

Terry did not have a boyfriend at the time. Tr. 4013; 4028. Minor testified that if Terry was seeing someone, that person would have had to meet Terry's family first. Tr. 4014.

The phone records from Revol Wireless for Madison's cell phone revealed that Madison first texted Terry on July 3, 2013, at 3:17 p.m. Tr. 5361. Madison texted, "Hey. What you up to?" Tr. 5362. Terry responded, "Is this the guy I just talked to on Rosedale?" *Id.* Madison responded, "yes." Tr. 5364. Terry asked what his name was. *Id.* Madison responded, "Ivan – nice to meet you." Tr. 5365. Around this time, Terry told her sister Britney that she met a man named "Ivan." Tr. 4028.

Over the next week, Madison texted back and forth with Terry. Madison told Terry that he was 25 years old. Tr. 5368. Madison was actually 35. *Id.* He told her he did not have

any children. Tr. 5376. Madison actually had two children by Tenia Plummer. Tr. 4181. He also told her that he worked on houses for a living, doing carpeting, painting, roofing, and drywall. Tr. 5377. Madison actually sold marijuana for a living. Tr. 4115.

On July 9 – the day before Terry disappeared – Madison texted her, "When can I see you?" Tr. 5379. Terry responded, "What time are you free tomorrow?" *Id.* Madison replied, "When you get off is cool." *Id.* Later that night, Terry asked Madison where they were going to meet the next day. Tr. 5380. Madison texted her, "You can come to my place." Tr. 5381. Terry responded, "We can hang out, but I'm not going to your house. I don't trust you like that yet." *Id.* Madison responded, "Okay." *Id.*

On July 10, 2013, Minor dropped Terry off for work at Clark Elementary at 7:30 a.m. *Id.* It was raining very hard that day. Tr. 3998. At 1:37 p.m., Terry texted Madison, "Do you want to hang out now? I got off early." Tr. 5385. Madison asked if Terry was heading towards Hayden Avenue. *Id.* Terry responded, "Yeah. I'm on 152 and St. Clair right now." *Id.* This was the last communication Terry sent from her phone. Tr. 5386.

Madison took Terry to his apartment, where he raped and murdered her. Following Terry's last text message, Madison did not send any text messages or make any calls using his cell phone for nearly 90 minutes, from 2:27 p.m. to 3:56 p.m. Tr. 5424. There was also a second gap of 3 1/2 hours, from 6:38 p.m. to 11:03 p.m., in which Madison did not use his cell phone. Tr. 5416.

Terry did not come home from work that night. Her family became worried and started driving around the neighborhood looking for her. Tr. 3999. They reported her missing to both the Cleveland and East Cleveland Police Departments. Tr. 4001. They began

passing out fliers with Terry's picture, name, and date of birth, throughout the neighborhood. Tr. 4004-05; 4037.

Madison's girlfriend Shawnta Mahone went over to Madison's apartment around 9:00 at night on July 10. Madison answered the door, but refused to let her inside. Tr. 4879. She saw fresh and deep scratches all over Madison's face and back. Tr. 4878-80. Those scratches were not there the day before. Tr. 4881. Madison told her that a girl scratched his face in an argument. Tr. 4879. Around midnight one night that week, Asia Stovall, Madison's neighbor in Apartment #3, heard a series of loud thumps, "like somebody was dragging something down the stairs." Tr. 4200.

E. The discovery of the bodies and Madison's arrest.

On Monday, July 15, Shaeaun Childs, a service technician with East Cleveland Cable, noticed a bad smell in the building. Tr. 4142. Childs immediately thought that it smelled like something had died. Tr. 4143. Madison's neighbor Kym Henderson also noticed the smell coming from outside. Tr. 4112. On Wednesday, July 17, Childs noticed the smell outside near the garage behind Madison's building, and inside bay 3. Tr. 4143. On Thursday, July 18, Childs went into bay 2 to dispose of some cable boxes. Tr. 4146. By that time, the smell was so powerful that he nearly vomited. Tr. 4147. He also noticed hundreds of flies coming through holes in the wall from bay 1, the garage that Madison rented. Tr. 4147; 4149; 4184.

On Friday, July 19, the smell was so bad that Childs' supervisor could not park his car in the garage. Tr. 4148. Childs decided to call the police. Tr. 4148-49. Police responded to the garage behind Madison's apartment, but found that it was locked. Tr. 4176. Mikki Stovall-Brown, a receptionist at East Cleveland Cable, called Madison by phone. Tr. 4174;

4151. She told him that the police needed to get into his garage. Tr. 4177. Madison paused for a moment and said that he was not there. Tr. 4151; 4177. He then hung up. Tr. 4177.

Sgt. Jeffrey Williams with the East Cleveland Police Department responded to the garage and spoke with Shaeaun Childs about the smell. Tr. 4279-80. By that time, the smell permeated the entire area, and was immediately noticeable when Sgt. Williams arrived. Tr. 4280-82. Childs let Sgt. Williams inside bay 2, where they observed flies coming through holes in the wall from bay 1. Tr. 4283. Sgt. Williams attempted to call Madison, but did not receive an answer. Tr. 4285.

Eventually, the officers broke the lock off the door of the garage. Tr. 4287. They found a car parked inside, and to the left of the car, a large black plastic bag sitting on top of a comforter between the car and the wall of the garage. Tr. 4288-89. Officer Vashon Williams pulled the bag out of the garage. Tr. 4288. Using a knife, he cut the bag open to see what was inside, cutting through six layers of garbage bags and a seventh layer of a material he could not identify. Tr. 4290. Inside, he discovered the body of Shirellda Terry. Tr. 4291-93.

Madison's neighbor Kurley Johnson called Madison and told him that the police had found a body in his garage, and that he needed to come back to talk to them. Tr. 4265. Madison said that he would be there shortly. Tr. 4265. A short time later, Johnson saw Madison sitting in the passenger seat of a small white car that drove past the apartment. Tr. 4265-66. Johnson pointed Madison out and said, "[T]here he is, there, in the car." Tr. 4267.

Madison hid at his mother's house on Chickasaw Avenue. Tr. 4378. Later that day, the SWAT team surrounded the house. Tr. 4376. Madison did not respond to requests by the SWAT team to come out of the house. Tr. 4420. Eventually, the SWAT team breached

the door with an armored vehicle. Tr. 4389; 4423. At that point, Madison came outside and surrendered to police. *Id.*

The next day, investigators returned to the scene of Madison's apartment and garage. Tr. 5325. While canvassing the area, they noticed a pile of debris in the brush just north of the garage in the back of Madison's apartment building. Tr. 5325-26. Underneath the debris, they found an industrial strength garbage bag. Tr. 5326. Inside the bag, they discovered the body of Shetisha Sheeley. Tr. 5338. BCI investigators also found a newly-purchased shovel in the trunk of Madison's car in the garage. Tr. 4630.

Sheeley's body was found wrapped inside six layers of black plastic trash bags, and a white bedsheet as the innermost layer of wrappings. Tr. 4993. Madison had positioned each trash bag so that the opening faced towards the bottom of the bag that covered it, so that if anything leaked out of the first bag, it would leak into the second bag. Tr. 4994. He tied the bags together with duct tape. Tr. 4994-95. Madison folded Sheeley's body in half and bound her feet to her head using duct tape, wrapping the tape around her ankles. Tr. 5002.

Sheeley had a massive three by three inch contusion/bruise on the left side of her face around her eye and left cheek. Tr. 5123. Her body was too badly decomposed for the coroner to determine an exact cause of death beyond classifying it as "homicidal violence by unspecified means." Tr. 5124.

Following the discovery of Sheeley's body, police sent out search parties to search the surrounding area. Tr. 5341. Later that day, police entered an abandoned house on East 139th Street. *Id.* They found a third garbage bag directly underneath the basement window containing the body of Angela Deskins. Tr. 4710; 5150.

Angela Deskins' body was found wrapped inside a blue comforter, a white bedsheet, and four layers of black plastic trash bags. Tr. 5018. Madison admitted during his interview with police that the blue comforter was his: "Yeah, I have that. That was in my room. I used it back in the winter to put it over the double doors." *See* State's Ex. 302-A, July 26 [sic] interview, p. 23. [1] Her body was bent in half at the waist, and her head was bound to her ankles using a black electrical cord. Tr. 5018; 5020; 5149. Madison had stuffed the yellow plastic end of the cord into her mouth. Tr. 5023. She had a tan or white cloth belt tied around her neck as a ligature. Tr. 5023; 5143. Her cause of death was ligature strangulation. Tr. 5165. The coroner also testified that it would take three to five minutes of constant pressure to strangle someone to death. Tr. 5155.

Investigators found human blood on the carpet of the north closet in Madison's apartment. Tr. 5195-96. DNA testing on that swabs taken from that bloody carpet, Item 26.1A, revealed Angela Deskins' DNA. Tr. 5697. The proportion of the population that could not be excluded from that particular mixture was 1 in every 254,900,000,000 unrelated individuals. Tr. 5698. Inside that closet, investigators also found white incense powder. Tr. 4766. Madison admitted during his interview that he burned incense in his apartment to cover up the smell of the bodies. *See* State's Ex. 302-A, July 20 interview, p. 154.

Shirellda Terry's body was also bent in half at the waist. Tr. 4921-22. Madison tied a tan cloth belt around her neck, and also wrapped the belt around both of her ankles. *Id.* Her body was stuffed inside seven layers of black plastic trash bags, a blue paisley-print bedsheet,

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[1] This Court will notice that the cover page for one of the sections of the transcript of Madison's interview is labeled "DVD RECORDED STATEMENT OF MICHAEL MADISON ON 7/26/13." This is an error by the independent stenographer. In actuality, this portion of the transcript is a continuation of Madison's interview with police on July 21, 2013.

and a pink comforter. Tr. 4965; 4968; 4968. She had furrow marks on her neck from where Madison used the belt as a ligature to strangle her. Tr. 5077. Madison also mutilated Terry's vaginal area while she was still alive with an unknown instrument, possibly a knife, resulting in a 4 1/2 inch long laceration to her body. Tr. 5082-85; 5099. Her cause of death was ligature strangulation, with anovaginal mutilation. Tr. 5101-02.

Terry's DNA was found on fingernail clippings in an ashtray on a dresser in Madison's apartment (1 in 45,540,000). Tr. 5247; 5691-93. Her DNA was also on Item 29.1.1, swabs taken from a pair of red and black glasses in the apartment (1 in 92,680,000,000,000,000,000), Tr. 5700-01, and on Item 29.2.1, swabs taken from a pair of brown glasses inside the apartment (1 in 18,530), Tr. 5701.

Additionally, police found Terry's purse inside the closet of Madison's apartment. Tr. 4759; State's Ex. 130. At trial, Terry's biological father Van identified the purse as belonging to Terry. Tr. 6015. Terry's DNA was found on Item 21.1, a comb taken from inside the purse (1 in 34,540,000,000,000,000), Tr. 5695. Terry's DNA was also found on the lanyard inside the purse (1 in 15,090,000,000,000,000,000), Tr. 5695.

Madison admitted that he bought the garbage bags at a store called Silverman's. *See* State's Ex. 302-A, July 20 interview, p. 174. William Plummer, the father of Tenia Plummer, worked security at Silverman's. Tr. 5780. He testified that on July 18, 2013, he saw Madison at Silverman's with a woman. *Id.* The woman purchased a box of large black contractor trash bags while Madison waited outside. Tr. 5784. She and Madison then left together. Tr. 5785. Inside Madison's apartment, investigators found an opened box of black contractor trash bags. Tr. 4762; 6113. These bags were "indistinguishable" from five of the seven bags found wrapped around Shirellda Terry's body. Tr. 5218-19. These were the five outermost bags –

the last five that Madison placed around her body. Tr. 5225. There were 15 bags still in the box. Tr. 5233; 6113-14. From this, the State theorized that Madison originally wrapped Terry's body in only two layers of bags. When that proved not to be enough, Madison went to Silverman's on July 18 and bought a new box of garbage bags. Madison opened that box and used five more bags from that box to conceal Terry's body further. Tr. 6257.

F. Madison's interviews with police.

Over the next four days, from July 19 through July 22, police conducted a series of interviews of Madison at the East Cleveland Police Department. The videos of those interviews are part of the record before this Court as State's Exhibit 301. Also before this Court as part of the record is a transcript of Madison's interviews prepared by independent court reporters retained by the defense, State's Ex. 302.

During trial, the State redacted a number of portions of Madison's interviews at the agreement of both parties, periodically stopping the video and skipping ahead to omit potentially prejudicial or inflammatory matters or comments during the guilt phase (such as Madison's prior criminal record). State's Ex. 302-A is a redacted version of that transcript that shows what portions of the video actually played at trial.

During those interviews, Madison bragged to police that "this s*** is definitely going to shake the city up." *See* State's Ex. 302-A, July 19 interview, p. 14. Madison returned to this theme several times, telling the officers that this case would "take you all to new heights in your career," and that "even if I don't cooperate, it's still going to, you know, shake the streets up." *See* July 20 interview, p. 34; 38. He said, "I will get my chance for my message to be heard, and I hope my message get across." *See* July 19, 2013 interview, p. 60. He told the detectives "that we were going to make history, or this is historic[.]" *Id.*, p. 62. He asked

them, "Mind blowing, huh? I know you're all looking at me like this mother***er, what's wrong with him." *Id.*, p. 18-19.

Madison confessed to the murder of Shetisha Sheeley. Madison said that he paid Sheeley $10.00 for sex in his apartment. *See* State's Ex. 302-A, July 21 interview, p. 3. He went to sleep. *Id.* He woke up some time later and found Sheeley going through his things. *Id.* He grabbed her from behind and began choking her. *Id.*

> "You know, when I confronted her about it and she's like, you know, f*** you, n**** and whatever. And like, my intention was just to grab her and, you know what I'm saying, just push her out. And then she started, you know, fighting back and, you know, whatever. And I just, you know, tried to restrain her. I, you know, had her in a chokehold. The more she started fighting she was (inaudible), and the next thing I know, I just -- just letting her go."

July 22 interview, p. 41-42. When he was finished, he put her body on the bed and left. July 20 interview, p. 3. Later, he "tied her up and put her in the bag and put her in the garage. She sat in the garage for a long time." July 21 interview, p. 4. Sheeley's body was in the garage for "[m]aybe a couple months." *Id.* at 14. Eventually, he put the bag containing Sheeley's body behind the garage near a fence. *Id.* He admitted that he bought the shovel found in the trunk of his car after he killed Sheeley. *Id.*, p. 35. He was going to use the shovel to bury her, but never did. *Id.* at 47. Madison said that he worried that "somebody might stumble upon her, like, my heart racing." July 22 interview, p. 50. But he did not move Sheeley's body – "I guess you could say you wouldn't be clear as to what to do[.]" *Id.* at 56.

Madison initially denied any knowledge of Angela Deskins. *See* State's Ex. 302-A, interview on July 20, 2013, p. 108. On July 21, however, he admitted that Deskins came to his apartment and that he paid her fifty dollars for sex. *See* State's Ex. 302-A, interview on July 21, 2013, p. 20. He claimed that he remembered her leaving afterwards. *Id.*

With regard to Shirellda Terry, Madison stated that he met Terry at a gas station on Noble Road. July 21 interview, p. 39. She told him she did not have a cellphone. *Id*. Madison gave her his number. At some point, he ran into her again on Hayden Avenue. *Id.* He remembered that it was raining that day. *Id.* He asked her if she wanted to come inside his apartment to dry off. *Id.* at 40. She agreed. *Id.* Madison claimed that, "as time went on she started being, you know, a little obnoxious. She took my cigar from me, smashed it out * * *." *Id.* at 41. Madison wanted Terry to leave, but she could not because her clothes were wet. *Id.* Madison said that he became "a little irritated and I left again and drunk some more and went back[.]" Madison said that by the time he returned at the apartment, Terry "was wasted." *Id.* She tried to "flirt" with him. *Id.* "And I just remember waking up to her body, checking her pulse. There was none." *Id.*

Madison admitted that he "put [Terry's] body in the garage." July 20 interview, p. 145; *see also* July 21 interview, p. 42 ("I do remember, you know, pulling her out of there some time in the evening and putting her in the garage"). He identified her as "Shirellda." July 21 interview, p. 43. He explained: "The only way you can get a person in the bag is if you bend them over and, you know, slide them in there." *Id*., p. 13. He said that he waited until nighttime to move her body from his apartment to the garage. July 21 interview, p. 36. He said, "no trash I've ever dealt with in my lifetime was ever that heavy." July 10 interview, p. 158. He was not sure if police would find his semen in Terry's body. *Id.*, p. 155.

Throughout his interviews, Madison repeatedly indicated that he had a strong hatred for women, and several times, linked that hatred to the murders:

- "I hope this serves as a way for these females to stop trying to f*** guys over, you know what I'm saying?" July 19 interview, p. 86.

- "[I]t's going to serve at some point, s***'s going to change, it's going to be some type of shakeup." July 19 interview, p. 86.

- "[T]he tough guy that put the cuffs on me probably ain't never won a fight in his life, probably be getting dogged around and pretty much controlled by his wife and girlfriend…" July 19 interview, p. 59.

- "[W]hatever comes of it, I hope it puts, I hope it puts the black man in a better position out here, that's all I really hope[.]" July 19 interview, p. 87.

- His children's mother, Tenia Plummer, was "about as evil as they come. You know, I'm a real, like I'm a real compassionate dude when it come to certain things." July 20 interview, p. 41.

- "[A] man's manhood should never be compromised when it comes to a female who's never been a man." July 20 interview, p. 42.

- "[S]he's very disrespectful, like no man, no man should have to endure that from a female that's mother to his kids, no man should[.]" July 19 interview, p. 50.

- "Well, you watch these movies, see things, where all the war going and the wars and fighting usually be over females." July 20 interview, p. 63.

- "I just don't understand how you can love someone, and like, you know, as a man, you know, you're not a b****, you go to work every day, you put you're a** on the line, but, you know, you cater to her and her feelings, all for it to end with her taking your s***." July 20 interview, p. 64.

- "I haven't had issues, I haven't had issues from males. My issues come from like, you know, baby mama, mother, females in general." July 20 interview, p. 124.

- "[W]ith any female, it was never enough. So I kind of, I guess kind of lost my compassion somewhere along the way[.]" July 20 interview, p. 207.

- "S*** always seems to come back to money and material possessions with these females." July 21 interview, p. 16.

- SGT. RUTH: "You said that females was always-" MICHAEL MADISON: "God's gift. Must be thoughts in their mind that they're God's gift to, you know, man." July 21 interview, p. 28.

- "I'm 30-something years old and following rules set by a female." July 26 [sic] interview, p. 7.

- "Once I had a vision, and it's gonna be a war. It's gonna be held against females." July 26 [sic] interview, p. 4.

- "I was still going through s*** dealing with females. Like I'm not gay, but I just started to really not like females." July 26 [sic] interview, 16.

Beginning on the second day of the interviews, Madison also repeatedly attempted to blame substance abuse for his inability to remember things:

- "I've had, you know, nights where I've been drinking * * * come to a point where just, you know, like kind of be there but not really fully, you know, coherent[.]" July 20 interview, p. 77.

- He was "wasted out of my mind * * * I can't really recollect much[.]" July 20 interview, p. 88.

- "[A] lot of drinking, a lot of drugging, a lot of drinking and drugging this last year." July 20 interview, p. 92.

- "It's like drunken nights, we get whole days of drinking, just drinking, like going to buy beer like eight, nine in the morning, so it was like drinking heavy, you know what I'm saying, mixed with the weed * * *." July 20 interview, p. 112.

- "I'm not a monster in my sober mind, but mixing in alcohol and drugs * * * Doctor Jekyll and Mr. Hyde I guess." July 20 interview, p. 120.

- "[C]ertain times in nights or days or whatever, I really don't recollect much, you know what I'm saying, just some pretty hard drugs in the last year." July 20 interview, p. 150.

G. Madison's interlocutory appeal challenging the trial court's order for a mental examination by the State's expert.

Prior to trial, Madison's defense attorneys obtained two expert psychologists to evaluate him in preparation for the mitigation phase – Dr. Daniel A. Davis, a forensic psychologist, and Dr. James Karpawich, a clinical psychologist. *State v. Madison*, 8th Dist.

Cuyahoga No. 101478, 2015-Ohio-4365, ¶ 3. During pretrial discovery, the defense provided copies of Dr. Davis and Dr. Karpawich's reports to the State. Dr. Davis' report included all of the following conclusions regarding Madison's mental state:

> "* A substantial body of research documents the negative impact of the effects of abuse and trauma upon the developing brain. It is well documented in the research literature that exposure to trauma can have profound negative effects upon the developing child. These effects are physical and chemical in nature that result in subsequent psychological dysfunction. Specifically, exposure to violence, verbal and physical abuse results in an imbalance in an important chemical, cortisol, in the brain that results in damage to structures of the brain such as the hippocampus that is responsible for the control of memory, emotions, and attention. Exposure to abuse has also been shown to affect the limbic system (the emotional seat of the brain) especially the amygdala, an area of the brain critically involved in moods, emotions such as anger and fear and emotional learning.
>
> * Thus, the extreme trauma and abuse experienced by Mr. Madison resulted in a neurobiologically determined pathway placing him at much greater risk for psychological, behavioral and substance abuse problems.
>
> * [Madison's] instability as a youth as well as potentially his family history, suggests the potential of a possible underlying mood disorder, likely Posttraumatic Stress Disorder or at a minimum, a need for a psychiatric consultation.
>
> * In Mr. Madison's case, it is highly likely that his early victimization resulted in severe behavioral symptoms that are frequently associated with Posttraumatic Stress Disorder in males.
>
> * Youth who come from markedly abusive and dysfunctional environments do not have the chance to learn appropriate social coping skills, skills to regulate emotions, skills to control impulses and skills to relate in positive, socially appropriate ways.
>
> * As an adult, [Madison] presented with substance abuse, behavioral instability as well as antisocial behaviors."

Id.

In response to these reports, on May 22, 2014, the State filed a *Motion to Have Defendant Submit to a Psychological Evaluation*. The State explained that it was seeking to

have its own expert, Dr. Steven Pitt, evaluate Madison "to rebut any evidence that the defense might present during the second phase of the trial. We would not use it in the case in chief." Tr. 430. Defense counsel objected to the evaluation, arguing that it had no intention of putting Madison's mental state at issue at trial. Tr. 431. Significantly, however, the defense conceded that they intended to introduce expert testimony from Drs. Davis and Karpawich in the sentencing phase regarding the effect of childhood trauma on Madison's brain. Tr. 441. Following that concession, the trial court stated:

> THE COURT: All right. This is my ruling. You may not use it during the guilt/non-guilt phase. You can only use it in mitigation. The State will be able to have an examination of the defendant. However, it is limited only to brain damage and issues like that. There may be no questioning about the facts and circumstances of this particular case.

Tr. 443-44. The trial court also issued a written entry, stating: "State may not inquire into the facts and circumstances of the case. Examination only relates to the brain damage of defendant." See Journal Entry filed 6/3/2014.

That same day, Madison filed an interlocutory notice of appeal in Eighth District Court of Appeals, along with an *Emergency Motion to Stay* the trial court's order for the evaluation. The State moved to dismiss the appeal, arguing that the trial court's order was not a final, appealable order pursuant to R.C. 2505.02(B). On June 4, 2014, the Eighth District granted Madison's motion for an indefinite stay of the examination and denied the State's motion to dismiss the appeal, finding that the trial court's order granted or denied a provisional remedy involving the discovery of privileged matter, determined the matter, and prevented a judgment in favor of Madison on that issue, and was therefore a final, appealable order under R.C. 2505.02(B)(4).

The State filed a writ of prohibition in this Court in Case No. 2014-1091 to prevent the Eighth District from allowing Madison to pursue his appeal on an interlocutory basis prior to trial. This Court granted Respondent the Eighth District's motion to dismiss the State's writ, thereby allowing Madison's interlocutory appeal to proceed. *State ex rel. McGinty v. Eighth Dist. Court of Appeals*, 140 Ohio St.3d 1519, 2014-Ohio-5251, 20 N.E.3d 728.

The Eighth District unanimously affirmed the trial court's order. *See State v. Madison*, 8th Dist. Cuyahoga No. 101478, 2015-Ohio-4365. The court of appeals found that "Civ.R. 35(A) allows a trial court to order a party to submit to a mental examination when the mental condition of the party is in controversy." *Id.*, ¶ 13. The court found that Madison had placed his mental condition in controversy: "Madison intends to introduce the expert testimony to illustrate how the physical abuse and neglect he experienced as a child resulted in damage – both physical and chemical – to his brain." *Id.*, ¶ 10. The court of appeals found that "Dr. Davis's report raises nine potential issues regarding Madison's mental state." *Id.*, ¶ 18. All of this was potentially relevant to determine the existence of mitigating evidence.

The appellate court cited to the United States Supreme Court's recent decision in *Kansas v. Cheever*, 571 U.S. 87, 601, 134 S. Ct. 596, 187 L.Ed.2d 519 (2013): "When a defendant presents evidence through a psychological expert who has examined him, the government likewise is permitted to use the only effective means of challenging that evidence: testimony from an expert who has also examined him." The appellate court further found that "[t]he only way to rebut Madison's expert testimony is through expert testimony." *Madison*, ¶ 21, citing *State v. Goff*, 128 Ohio St.3d 169, 2010-Ohio-6317, 942 N.E.2d 1075, ¶ 46 ("It is unfair and improper to allow a defendant to introduce favorable psychological

testimony and then prevent the prosecution from resorting to the most effective and in most instances the only means of rebuttal: other psychological testimony") (citations omitted).

The court of appeals thus held that:

> "to allow Madison to present expert evidence of his mental condition without allowing the state to investigate Madison's claims and present a case in rebuttal is not fair and 'would undermine the adversarial process, allowing a defendant to provide the jury * * * a one-sided and potentially inaccurate view,' unfairly tipping the weight of the evidence in his favor."

Madison, ¶ 22, quoting *Cheever* at 94. The court of appeals further found that the trial court's order was carefully limited to protect Madison's Fifth Amendment rights by (1) limiting the scope of the evaluation to "the evidence Madison presents concerning his brain damage and mental condition" and (2) prohibiting the State's expert from asking Madison about the facts of the murders. *Id.*, ¶¶ 23-24.

Madison filed a notice of appeal in this Court in Case No. 2015-1734, along with a memorandum in support of jurisdiction and a motion for an immediate stay of the execution of the court of appeals' judgment. This Court denied Madison's motion for a stay. *State v. Madison*, 144 Ohio St.3d 1425, 2015-Ohio-5225, 42 N.E.3d 762. Dr. Pitt then completed his evaluation. Following that, this Court declined jurisdiction over Madison's attempted appeal. *State v. Madison*, 144 Ohio St.3d 1505, 2016-Ohio-652, 45 N.E.3d 1050.

H. Madison's indictment, trial, and sentence.

On April 4, 2016, Madison's case proceeded to trial on the following 14-count indictment:

Count 1	aggravated murder	2903.01(A)	Shetisha Sheeley
Count 2	aggravated murder	2903.01(B)	Shetisha Sheeley
Count 3	kidnapping	2905.01(A)(3)	Shetisha Sheeley

Count 4	aggravated murder	2903.01(A)	Angela Deskins
Count 5	aggravated murder	2903.01(B)	Angela Deskins
Count 6	kidnapping	2905.01(A)(3)	Angela Deskins
Count 7	aggravated murder	2903.01(A)	Shirellda Terry
Count 8	aggravated murder	2903.01(B)	Shirellda Terry
Count 9	kidnapping	2905.01(A)(3)	Shirellda Terry
Count 10	rape	2907.02(A)(2)	Shirellda Terry
Count 11	having weapons while under disability	2923.13(A)(2)	n/a
Count 12	gross abuse of a corpse	2927.01(B)	Shetisa Sheeley
Count 13	gross abuse of a corpse	2927.01(B)	Angela Deskins
Count 14	gross abuse of a corpse	2927.01(B)	Shirellda Terry

Counts 1-8, 10, and 12-14, each contained a one-year firearm specification under R.C. 2941.141(A). Counts 1-10 each contained a notice of prior conviction under R.C. 2929.13(F)(6), a repeat violent offender specification under R.C. 2941.149(A), a sexual motivation specification under R.C. 2941.147(A), and a sexually violent predator specification under R.C. 2941.148(A). Counts 11-14 each contained a forfeiture specification under R.C. 2941.1417(A) regarding a firearm recovered from Madison's apartment.

The two counts of aggravated murder for Shetisha Sheeley and the two counts of aggravated murder for Angela Deskins all carried two death-penalty specifications: a course of conduct specification under R.C. 2929.04(A)(5), and a felony murder (kidnapping) specification under R.C. 2929.04(A)(7). The two counts of aggravated murder for Shirellda Terry also carried a third death-penalty specification: a felony murder (rape) specification under R.C. 2929.04(A)(7).

Madison elected to waive his right to a jury trial only as to count 11 (having weapons while under disability), and all of the repeat violent offender specifications and sexually violent predator specifications. Tr. 615, 630. At the conclusion of the guilt phase, the jury found Madison guilty of all counts and specifications except for all of the one-year firearm specifications. The trial court found Madison guilty of count 11 and all of the sexually violent predator specifications.

The case then proceeded to the sentencing phase. Madison called two expert psychologists – Dr. Daniel Davis and Dr. Mark Cunningham. Dr. Davis and Dr. Cunningham's primary function was essentially to serve as conduits for providing various hearsay testimony to the jury from Madison or his family members. The State did not object to this.

Dr. Daniel Davis, a forensic psychologist, testified that he met with Madison three times in the county jail. Tr. 6584. He also reviewed social records, medical records, and records from the Cuyahoga County Department of Children and Family Services. Tr. 6586. Dr. Davis testified that Madison described his upbringing in "extremely negative terms. He said that he was physically abused, that he was emotionally neglected, that he felt psychological[ly] abandoned. Much of this centering on issues that he had with his mother." Tr. 5687-88. Madison told Dr. Davis that as a child, he was beaten by his mother's boyfriend and lost hearing in one ear. Tr. 6589.

Madison felt that the men in his mother's life were abusive towards him, and he was angry at his mother for failing to protect him. Tr. 6593. They would beat him with extension cords, brushes, and switches. Tr. 6597. He described his mother as emotionally unavailable, and said that he felt rejected by her. Tr. 6596. Madison's father was never involved in his life, and Madison was angry about that fact. Tr. 6597. He had poor grades in school, though

he did not suffer from any learning disabilities. Tr. 6598-99. Dr. Davis saw no indications that Madison had any mental disease or defect. Tr. 6592.

Dr. Davis also testified that while in high school, Madison was adjudicated delinquent of misdemeanor gross sexual imposition for touching a female classmate's breast. Tr. 6593. Madison also had a theft case as a juvenile, for which he was placed on probation. Tr. 6599.

Dr. Davis also reviewed the Children and Family Services records from Madison's family. Those records indicated that on several occasions, his mother placed him in a hot bath, hit him with an extension cord, and stuffed food down his throat. Tr. 6601. Dr. Davis testified at length to abuse suffered by Madison's brother. He extrapolated that Madison himself probably suffered the same kind of abuse: "One would tend to believe that if this is how one child is treated, that there is a reasonable possibility that the other child had been treated that way." Tr. 6608.

James Aiken, a former prison warden, testified as to Madison's probable prison classification and potential future danger as an incarcerated inmate. Tr. 6762; 6772. In Aiken's opinion, the Department of Rehabilitation and Corrections could "adequately manage" Madison. Tr. 6869. He believed there was an "extremely low" probability that Madison would pose a danger to other inmates or to himself. Tr. 6869-70. He also admitted: "I don't have a crystal ball." Tr. 6906. He further testified that while incarcerated, Madison had various rule violations such as cussing, calling people bad names, and not following orders. Tr. 6875. On one occasion, Madison injured a guard by wedging a sharpened pencil up into a chair, injuring the officer when he sat on it. *Id.*

Finally, Dr. Mark Cunningham testified as an expert in the field of forensic psychology. Tr. 6832. Dr. Cunningham explained that his purpose "was to illuminate what resources

[Madison] brought to the choices and decisions that he had. In other words, what factors were in his background that might be compromising or damaging in nature." Tr. 6839. He continued, "While we all get a choice, we don't get the same choice. You make choices based on the - the efficiency and effectiveness of your nervous system." Tr. 6840. Dr. Cunningham testified that his purpose was to answer the question, "What factors diminished his control?" Tr. 6848.

Dr. Cunningham identified various neuropsychological risk factors that impacted Madison's development. These included the existence of an undefined "disturbance" that "[w]ouldn't have to be a disorder, a formally diagnosed disorder[,]" Tr. 6926; fetal alcohol exposure, Tr. 6927; head injury, Tr. 6927; hypoxia, Tr. 6927; anoxia, Tr. 6927; substance abuse, Tr. 6951; a hereditary predisposition to personality disturbance, Tr. 7007; a lack of positive role models, Tr. 6983; and physical and sexual abuse, Tr. 6938.

In reviewing Madison's criminal record, Dr. Cunningham learned that in 2001, Madison pleaded guilty to the attempted rape and kidnapping of a woman named Felicia Lamar. Tr. 7041-42. Madison served four years in prison. Tr. 7149.

Dr. Cunningham concluded that as a result of exposure to these risk factors as a child, Madison's ability to make choices as an adult was compromised to the point that it was too late to change his behavior. Dr. Cunningham testified: "By the time we get out to the kid being 14, 15, 16, 17, by the time he is in the criminal justice system or begins to act out sexually * * * we are way late in the game." Tr. 6984. He compared Madison's ability to make choices to concrete, which had "hardened" by the time Madison became a teenager. Tr. 6984. He continued: "We are way deep in the game in terms of the concrete being hard. Even if he had sought treatment at age 17 * * * we are way late." Tr. 7178. Elsewhere, Dr. Cunningham

compared Madison to a three-year-old child who was struck by a car and has his spinal cord severed, who "is never going to walk again." Tr. 7178.

In rebuttal, the State called its own expert psychologist, Dr. Steven Pitt. Dr. Pitt agreed that the Children and Family Services records showed that "Madison was exposed – or did have exposure to some unfortunate childhood physical abuse incidents around the time he was 3[.]" Tr. 7382. Specifically, there were two such incidents discussed in the reports. In the first, Madison's mother put him into a bath full of hot water, and hit him with an extension cord when he screamed. Tr. 7383. In the second, Madison's mother's boyfriend beat him, causing him to become nauseous and go to the hospital. *Id.* Outside of those incidents, however, there were no other documented instances of abuse in the Children and Family Services records. Tr. 7384.

Dr. Pitt reviewed Madison's written journal. On January 10, 2013, Madison wrote, "I am feeling much better about life now." Tr. 7399. Dr. Pitt thought this was significant because "we know that Shetisha Sheeley was killed before January 10, 2013, and we know that Angela Deskins and Shirellda Terry were killed after January 10, 2013." *Id.* Dr. Pitt found this "very disturbing." Tr. 7400.

Dr. Pitt interviewed Madison on two occasions for a little more than six hours total. Tr. 7385. The State introduced only about 25 minutes of that interview at trial. Tr. 7438. Dr. Pitt video and audio recorded all of those interviews. He explained:

> "[F]or years, at least 15 or more years now, I have been a huge proponent of video and audio recording forensic psychiatric evaluations. And the reason is * * * that by video recording the evaluation, it leaves no doubt as to who said what, preserves the integrity of the interview, holds me up to scrutiny, holds whoever I'm evaluating up to scrutiny, and there's no question about what got lost in translation, what got lost with note taking. It's just the best way to preserve the integrity of an evaluation[.]"

Tr. 7411-12. He also noted that Dr. Cunningham had previously written that "he supports the value and utility of video and audio recording his examinations." Tr. 7412.

Dr. Pitt began the interview by explaining to Madison that he was "retained by the prosecution" and that "the interview was not confidential." Tr. 7412-13. Initially, Madison was "a little bit resistant to talking to" Dr. Pitt. Tr. 7414. Eventually, however, Madison agreed to participate in the evaluation. *Id.* Dr. Pitt testified that Madison was "reluctant and didn't want to share with me the history of physical abuse." Tr. 7419. He told Dr. Pitt that he had never been the victim of sexual abuse. Tr. 7432; 7459. In fact, Madison "described his childhood as pretty upbeat [.]" Tr. 7420. Madison also did not think that he had a bad temper. Tr. 7434.

Dr. Pitt agreed with Dr. Davis that Madison did not have any mental diseases or defects. Tr. 7440. He diagnosed Madison with antisocial personality disorder. Tr. 7441. Contrary to Madison's claims during his interview with police, the level of alcohol and drug usage that Madison described to Dr. Pitt was too low to cause blackouts or any kind of psychiatric problems. Tr. 7430.

Dr. Pitt found a number of instances in which Madison was capable of being deceptive, or changing his personality to fit a given situation. He thought that Madison was "pretty street smart, pretty savvy, pretty adept at pivoting when he needs to. But also someone who has a knack for being less than truthful." Tr. 7403. For example, Dr. Pitt cited to one point in Madison's interview with police in which a female police officer came into the room and offered Madison some coffee. Tr. 7455. Dr. Pitt noted that Madison's demeanor suddenly became "affable and charming and delightful and he's chatting her up like it's nobody's business." *Id.* Dr. Pitt found that "one of the other themes that comes across with Mr.

Madison and his behavior is that he denigrates women. He is not particularly respectful to women. He is somewhat of a misogynist." Tr. 7407.

Ultimately, Dr. Pitt agreed with Drs. Davis and Cunningham that Madison had significant dysfunction in his childhood. Tr. 7462. He testified, however, that "on a continuum, there are people frankly that have been * * * treated far worse than him[.]" *Id.* On a scale of 1 to 10, from worst to best, out of all the criminal defendants for whom he had conducted forensic evaluations, Dr. Pitt estimated that Madison's childhood was around a 2.5 or a 3. Tr. 7463-64. Although he agreed with Dr. Cunningham that there was some correlation between a dysfunctional childhood and crimes of violence committed as an adult, he disagreed that correlation equaled causation. Tr. 7466. He did not believe that the concrete was dry by the time Madison was a teenager:

> "You can't take -- you can't reverse engineer information. You can't take Michael Madison and go back in time and say boom, boom, boom; therefore, it goes that this would have -- this is -- these are the reasons for this behavior. Because if that were true and the die is cast at 17 or 18, which is what essentially Dr. Cunningham is saying * * * [t]hat theoretically he should have been able to predict this, and we know we can't do that. Lots of people grow up with much worse upbringings than Michael Madison and go on to do great things."

Tr. 7465. Dr. Pitt concluded that "just because he had some difficulties in his upbringing, that did not limit the range of choices or the range of options that were available to him." Tr. 7468-69.

Following the conclusion of the second phase, the jury unanimously recommended a death sentence. The trial court merged both counts of aggravated murder for each victim: counts 1 and 2, 4 and 5, and 7 and 8. Tr. 7755. The State elected to proceed on the counts of aggravated murder with prior calculation and design: count 1, 4, and 7. Tr. 7756. The trial

court sentenced Madison to death on all three counts. Tr. 7766. The trial court also imposed prison sentences on the non-capital offenses as follows:

- 11 years in prison on count 3 (the kidnapping of Shetisha Sheeley),
- 11 years in prison on count 6 (the kidnapping of Angela Deskins),
- 11 years in prison on count 9 (the kidnapping of Shirellda Terry),
- 11 years in prison on count 10 (the rape of Shirellda Terry),
- 3 years in prison on count 10 (having a weapon while under disability),
- 1 year in prison on count 12 (gross abuse of the corpse of Shetisha Sheeley),
- 1 year in prison on count 13 (gross abuse of the corpse of Angela Deskins),
- 1 year in prison on count 14 (gross abuse of the corpse of Shirellda Terry),

The trial court did not impose any additional prison time on the repeat violent offender specifications. The trial court further ordered that all of Madison's sentences would run consecutive to one another. Tr. 7790.

Madison now appeals to this Court, raising 20 propositions of law.

LAW AND ARGUMENT

***Response to Proposition of Law I*: A trial court enjoys broad discretion in the control of voir dire. The trial court does not abuse that discretion by setting reasonable limitations on the parties' questioning to prevent incomplete, inaccurate, or irrelevant questions.**

In his first proposition of law, Madison argues that the trial court prohibited him from fully inquiring into the jurors' potential bias in favor of capital punishment. He is incorrect. Instead, the trial court prohibited defense counsel from asking legally incorrect questions and indoctrinating the jury. Madison's first proposition of law should be denied.

A. Standard of review.

The length and scope of voir dire fall within the trial court's discretion and vary depending on the circumstance of a given case. *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶ 40. Accordingly, this Court will not find prejudicial error in how the trial court qualified venirepersons "as fair and impartial jurors" unless the appellant can show "a clear abuse of discretion." *Id.*, *citing State v. Cornwell*, 86 Ohio St. 3d 560, 565, 715 N.E.2d 1144 (1999). A trial court does not abuse its discretion unless it acts arbitrarily, unreasonably, or unconscionably. *Id.*, *citing State v. Adams*, 62 Ohio St. 2d 151, 404 N.E.2d 144 (1980).

The parties' right to question jurors during voir dire is limited to a "reasonable examination of such jurors" by the parties. R.C. 2945.27. The reason for this limitation is to reduce the needless consumption of time by preventing the unwarranted harassment and indoctrination of jurors during voir dire. "When we remember how in some jurisdictions days and weeks are consumed in qualifying the twelve men in the jury box for the trial of some murder case, the importance of keeping the *voir dire* examination within proper limits is most manifest." *State v. Ellis*, 98 Ohio St. 21, 24, 120 N.E. 218 (1918).

> "While R.C. 2945.27 requires that the trial court allow reasonable examination of prospective jurors by counsel for the defense and prosecution, the trial court reserves the right and responsibility to control the proceedings of a criminal trial pursuant to R.C. 2945.03, and must limit the trial to relevant and material matters with a view toward the expeditious and effective ascertainment of truth."

State v. Durr, 58 Ohio St.3d 86, 89, 568 N.E.2d 674 (1991) (internal citation omitted).

This Court has accorded considerable deference to the trial court's decisions in how they limit the number, type, and scope of questions asked during voir dire. "Restrictions on voir dire have generally been upheld. Absent a clear abuse of discretion, prejudicial error

cannot be assigned to the examination of the venire." *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 28. No such abuse of discretion occurred in this case.

B. Law and analysis.

The trial court did not abuse its discretion when it prohibited defense counsel from asking legally inaccurate and/or misleading questions. The Due Process Clause requires fair and impartial jurors "to the extent commanded by the sixth amendment." *Morgan v. Illinois*, 504 U.S. 719, 727, 112 S. Ct. 2222, 119 L.Ed.2d 492 (1992). While voir dire exists to protect that right, nothing permits a defendant to confuse the jury or try to persuade jurors to commit to vote a certain way. "*Morgan* does not require that a capital defendant be allowed to determine at *voir dire* what a prospective juror's sentencing decision will be if presented with a specific state of evidence or circumstances." *Richmond v. Polk*, 375 F.3d 309, 310 (4th Cir. 2004) (involving limitations similar to the instant case). Madison was not prevented from inquiring about whether the prospective jurors held any bias, and his first proposition should be overruled.

1. The trial court permitted questions probative of whether the prospective jurors would automatically vote for the death penalty.

Madison first argues that the trial court impermissibly limited his voir dire under *Morgan*. Madison reads more into *Morgan* than the Supreme Court actually held in that case was required in voir dire. *Morgan* allows a defendant to explore whether a prospective juror would, even prior to the State's case, be predisposed to impose the death penalty. *Morgan* at 736. This is because a juror who refuses to consider mitigation is unwilling or unable to follow the law.

Madison interprets *Morgan* to mean that he should have been permitted to inform the jurors that he was accused to killing three women, "murdered in serial fashion, after

kidnapping each of them and raping one of them, all with sexual motivation and having already been convicted of a sex offense, and then contorting each of their dead bodies so they could fit in garbage bags and be disposed of like trash." *Appellant's Brief*, pg. 70. The jury was aware of this. Prior to the beginning of jury selection, each member of the venire completed a 33-page written questionnaire containing 106 questions. On Page 8 of that questionnaire, there was a section labeled "**QUESTIONS REGARDING PRE-TRIAL INFORMATION ABOUT THIS CASE**[.]" Underneath that heading, the following information appeared:

> "This case involves the murder of three women, Shirellda H. Terry, age 18, Shetisha D. Sheeley, age 28, and Angela Deskins, age 38, whose decomposing bodies were discovered in garbage bags areas around Hayden Rd. in East Cleveland around July 19, 2013. Ms. Deskin's remains indicate that she was strangled. Ms. Terry's remains indicate she also was strangled and sexually mutilated. Ms. Sheeley's remains indicate she was beaten to death. (homicidal violence). Michael Madison is accused of these three murders, in addition to kidnapping the women and abusing their corpses."

Additionally, Question #35 also asked, "Would you be more likely to impose the death penalty in a case involving more than one victim? Why or why not?" And the trial court read the indictment to the jury prior to voir dire so they were familiar with the charges. Tr. 770. The trial court thus did inform the jury of the critical facts of the case.

Madison relies on this Court's decision in *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 61, in which this Court held that "in a death-penalty case involving the murder of a young child the defendant is entitled, upon request, to have the prospective jurors informed of that fact and to ask questions that seek to reveal bias. The trial court retains its discretion as to the form and number of questions on the subject, including whether to question the prospective jurors individually or collectively." Even if this Court were to expand *Jackson* to include the facts of Madison's case, the trial court ensured that the jury was aware of the salient facts "likely to inflame the passions of jurors."

Id., ¶ 60. And, in addition to the questionnaires, Madison asked each challenged juror if they would vote for death under the facts presented.

Consistent with *Jackson*, Madison was therefore able to present the jury with the critical facts necessary to determine the extent of any possible bias. But he was not entitled to "predispose jurors to react a certain way to certain evidence." *Missouri v. Clark*, 981 S.W.2d 143, 147 (Mo.1998). The trial court's limitations were reasonable and designed to ensure that the parties only asked the jurors relevant questions consistent with *Morgan*.

2. The trial court did not rely on or limit the parties to generic "follow the law" questions during voir dire.

Madison next argues that the trial court "relied upon or permitted improper 'follow the law' questions" with dozens of prospective jurors. *Appellant's Brief*, p. 74. Madison again misinterprets the Supreme Court's holding in *Morgan*, which does not prohibit "follow the law" questions. "*Morgan* contains no prohibition against such questioning; rather, it requires that, in evaluating a prospective juror's ability to be impartial, more detailed questioning of prospective jurors beyond such simple questions must be allowed." *State v. Garza*, 216 Ariz. 56, 163 P.3d 1006, ¶ 25. Here, the trial court inquired and permitted inquiry consistent with *Morgan* to determine if the jurors were predisposed to vote for the death penalty without considering mitigation.

Madison's argument is based on a faulty premise; namely, that *Morgan* allows counsel to ask emotionally-laden, highly fact specific, legally inaccurate questions. In *Bedford v. Collins*, 567 F.3d 225, 232 (6th Cir. 2009), the Sixth Circuit found that prohibiting questions about prospective jurors' views of the specific case was a proper way to prevent counsel from previewing their case through voir dire. The trial court in *Bedford* "drew the line at questions that sought to elicit the jurors' views on Bedford's specific case[.]" *Id.* at 232. The

Sixth Circuit found that this "reflect[ed] a reasonable effort to enable adequate exploration of juror biases (on the one had) while preventing counsel from extracting commitments from individual jurors as to the way they would vote (on the other)." *Id.* at 233.

In *Hodges v. Colson*, 727 F.3d 517, 527 (6th Cir.2013), the Sixth Circuit reaffirmed *Bedford*, holding that "voir dire questions about how a potential juror would vote if given specific examples of aggravating or mitigating evidence are not constitutionally compelled under *Morgan*." The Sixth Circuit further held:

> "When defense counsel asks questions about the specific aggravating and/or mitigating factors actually at issue in a case, defense counsel is no longer attempting to identify members of the venire who would *always* vote for the death penalty; rather, defense counsel is attempting to preview how prospective jurors will vote given the specific facts of the individual case, and *Morgan* does not require a trial court to allow such previews."

Id. at 529. *See also Richmond v. Polk*, 375 F.3d at 330.

Like *Hodges*, *Bedford*, *Richmond*, and many other cases, the trial court limited the parties' questioning to the relevant issue: would the prospective jurors always vote for death, or would they consider mitigation and engage in a weighing process. The trial court repeatedly asked jurors if they could weigh aggravating circumstances and mitigating factors and, if the State failed to meet its burden, could they impose a life sentence. And, as will be discussed in the second proposition of law, none of the challenged jurors mentioned in Madison's brief demonstrated a bias such that they should have been removed for cause.

3. **The trial court properly prohibited questions about mercy, which were irrelevant to the limited purpose of the voir dire and which were designed to have the jurors consider non-statutory mitigating factors.**

Madison argues that the trial court impermissibly prohibited questions that were designed to tell the jury that they could make moral decisions and consider mercy. Madison

also claims he was prohibited or limited from telling jurors that one juror could prevent the death penalty. While Madison actually did ask these questions to a number of jurors, any limitation was proper as these questions outside the scope of voir dire.

This Court has repeatedly rejected the idea that the jury should consider mercy in a capital case. "Mercy, like bias, prejudice, or sympathy is irrelevant to the duty of the jurors." *State v. Lorraine*, 66 Ohio St.3d 414, 418, 613 N.E.2d 212 (1993); *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶ 143.

Nor was the trial court required to advise or permit discussion of specific mitigating factors. "We have repeatedly held that a trial court is under no obligation to allow counsel to question prospective jurors about specific mitigating factors." *State v. Pickens*, 141 Ohio St.3d 462, 2014-Ohio-5445, 25 N.E.3d 1023, ¶ 60. *See also State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶ 80 (trial court properly precluded defense attorneys from questioning prospective jurors about a willingness to consider mental retardation as a mitigating factor because "[p]arties in a capital case are not entitled to ask about specific mitigating factors during voir dire"); *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶ 36 ("*Morgan v. Illinois* does not require judges to allow individual voir dire on separate mitigating factors") (citations omitted); *State v. Jones*, 91 Ohio St.3d 335, 338, 744 N.E.2d 1163 (2001) ("During voir dire, a trial court is under no obligation to discuss, or to permit the attorneys to discuss, specific mitigating factors"); *State v. Bedford*, 39 Ohio St.3d 122, 129, 529 N.E.2d 913 (1988) (trial court did not abuse its discretion by refusing to "permit defense counsel to inquire of prospective jurors whether they would find as mitigating factors Bedford's alcohol abuse and his father's murder").

This Court has previously explained why specific mitigating factors should not be injected into the voir dire phase:

> "Lundgren argues that the potential jurors could not meaningfully say whether they would properly consider and weigh the statutory mitigating factors without knowing what the factors were. However, weighing aggravating circumstances against mitigating factors is a complex process. Jurors weigh mitigating factors together, not singly, and do so collectively as a jury in the context of a penalty hearing. Realistically, jurors cannot be asked to weigh specific factors until they have heard all the evidence and been fully instructed on the applicable law. Moreover, 'evidence of an offender's history, background and character' that is not found to be mitigating 'need be given little or no weight against the aggravating circumstances.' *State v. Stumpf* (1987), 32 Ohio St.3d 95, 512 N.E.2d 598, paragraph two of the syllabus. We find that the trial court exercised appropriate discretion in not allowing jurors to be asked if they would consider specifically named mitigating factors."

State v. Lundgren, 73 Ohio St.3d 474, 481, 653 N.E.2d 304 (1995).

The function of capital voir dire is not to indoctrinate a jury with specific mitigation or to persuade the jurors to vote a certain way. The purpose of voir dire is to seat a fair and impartial jury. The trial court placed reasonable limitations on the voir dire in this case to keep the parties' questions within the limited scope of determining which jurors were constitutionally incapable of sitting in a death penalty case. The fact that Madison disagrees with that scope does not mean a constitutional violation occurred.

4. The trial court was not required to define aggravating circumstances or mitigating factors at the voir dire stage.

Finally, Madison claims that the trial court erred when it failed to define the terms "aggravating circumstances" and "mitigating factors." This argument is meritless. "At the early stage of a trial, the trial court is not required to completely instruct the jury, for example, by defining mitigation." *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 202; *see also State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d

1121, ¶ 131 ("Short cites no authority for the proposition that the trial court was obliged to define 'mitigating factors' during voir dire").

C. Conclusion

The trial court placed reasonable limitations on the voir dire in order to prevent its perversion into something it was never intended to be. Madison's trial counsel chose to ask incomplete and often irrelevant questions, which the trial court properly stopped. Madison's first proposition of law should be overruled.

<u>Response to Proposition of Law II</u>: The trial court properly denied challenges for cause to prospective jurors who were not substantially impaired in their ability to follow the law.

In his second proposition of law, Madison challenges the trial court's denial of his motions to excuse for cause nine members of the venire based on their view on capital punishment. A review of the record shows that each of the nine jurors indicated that they could fairly consider the mitigating evidence and all potential life sentences. Despite pro hac vice defense counsel's repeated attempts to ask improper questions and to misstate the law, the trial court correctly determined that none of these jurors was substantially impaired in their ability to follow the law.

A. The Constitution only requires the jury the actually sits in the defendant's case to be impartial.

First, the United States Constitution does not recognize a claim that a defendant had to use a peremptory challenge to remove a biased juror, as long as the seated jury is ultimately impartial. The Due Process Clauses requires that each juror be fair and impartial "to the extent commanded by the sixth amendment." *Morgan v. Illinois*, 504 U.S. at 727, 112 S. Ct. 2222, 119 L.Ed.2d 492. "So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth

Amendment was violated." *Ross v. Oklahoma*, 487 U.S. 81, 88, 108 S. Ct. 2273, 101 L.Ed.2d 80 (1988).

The Sixth Amendment is satisfied if "no biased juror is actually seated at trial." *United States v. Skilling*, 561 U.S. 358, 425, 130 S. Ct. 2896, 177 L.Ed.2d 619 (2010) (Alito, J., concurring). In other words, "if no biased jury is actually seated, there is no violation of the defendant's right to an impartial jury." *Id*. "If the jury that sits and returns a verdict is impartial, a defendant has received what the Sixth Amendment requires." *Id.*; *see also United State v. Martinez-Salazar*, 528 U.S. 304, 315-16, 120 S. Ct. 774, 145 L.Ed.2d 792 (2006) (the "principle reason for peremptories" is to "help secure the constitutional guarantee of trial by an impartial jury."). In *Martinez-Salazar*, the Supreme Court held that "a defendant's exercise of a preemptory challenge * * * is not denied or impaired when the defendant chooses to use a preemptory to remove a juror who should have been excused for cause." *Id*. at 317. Thus, "a defendant's exercise of a preemptory challenge to a cure a trial court's error in denying a challenge for cause, without more, does not violate the constitutional right to an impartial jury." *State v. Hickman*, 205 Ariz. 192, 195, 68 P.3d 418, 421 (Ariz. S. Ct. 2003).

As a matter of Ohio law, this Court has recognized that "where the defense exhausts its peremptory challenges before the full jury is seated, the erroneous denial of a challenge for cause in a criminal case may be prejudicial." *State v. Cornwell*, 86 Ohio St.3d at 564, 715 N.E.2d 1144. Even in that case, however, Madison is required to show prejudice to gain relief. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 87. "[D]eference must be paid to the trial judge who sees and hears the jurors." *State v. Tyler*, 50 Ohio St.3d 24, 30, 553 N.E.2d 576 (1990), *citing Wainwright v. Witt*, 469 U.S. 412, 426, 105 S. Ct. 844, 83 L.Ed.2d 841 (1985). "A trial court's ruling on a challenge for cause will not be disturbed on

appeal unless it is manifestly arbitrary and unsupported by substantial testimony, so as to constitute an abuse of discretion." *Id.*, *citing State v. Wilson*, 29 Ohio St.2d 203, 211, 280 N.E.2d 915 (1972). Madison does not meet his burden; the nine challenged jurors - Nos. 5, 11, 12, 29, 31, 34, 37, 40, and 43 - each stated an ability to put their personal beliefs aside and should not have been removed for cause.

Within Madison's second proposition of law, he repeatedly argues that he was not allowed to ask "*Morgan*" questions. "[T]he scope of voir dire falls within the trial court's sound discretion and varies depending on the circumstances of a given case." *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 48. The fundamental flaw in Madison's argument is his misinterpretation of *Morgan*. That problem was compounded by trial counsel's refusal to ask potential jurors if they would impose the death penalty *after considering mitigation*. Trial counsel instead preferred to ask jurors how they would vote if the defense did not present any mitigation. By confusing the issue, and the prospective jurors, Madison points to select portions of the transcripts to claim bias. His arguments are neither legally nor factually supported.

B. Juror No. 5.

Madison claims that Juror No. 5 would automatically vote for death. To the contrary, however, Juror No. 5 wrote that she believed that the death penalty "should be imposed in most, but not all, murder cases." Questionnaire, Juror 5, pg. 15. When questioned, even by defense counsel, Juror No. 5 agreed that she would consider mitigation and that she could fairly consider life sentencing options. Tr. 962-63; 983-84. Like many of the other challenged jurors, Madison points to a portion of the transcript to claim Juror No. 5 was an automatic vote. Just a few pages later, Juror No. 5 clarified what she meant:

THE COURT: Overruled. Ma'am, if I may, you know, you said two different things, and I just want to—we're trying to make a record as you know, and so I want to clarify your point. When you spoke to me, you said you would weigh those circumstances and factors and consider all the possible sentences; and then a moment ago you spoke to Mr. Lane and you indicated that based on the synopsis of the case, the little short story in the questionnaire, that you would impose the death penalty. Are you telling me that you would not consider those other factors—those other possible sentences?

JUROR NUMBER 5: I think what I was referring—when he was saying that all of the things that, you know, would be charged, then I would think that the death penalty would be in order, but I would still mitigate—I would still go through the process to come to a fair decision in my heart.

THE COURT: And you would weigh both of them?

JUROR NUMBER 5: Sure, I would.

MR. LANE: And if you found that the state didn't prove it beyond a reasonable doubt that the aggravating outweigh the mitigating—

JUROR NO. 5: It would have to be proven –

***

MR. LANE: But in any event, I just want to make sure you would consider those mitigating factors –

JUROR NUMBER 5: Yes, I would.

MR. LANE: -- during any penalty phase if we should get there. And that you would decide for yourself after deliberating with your fellow jurors what is appropriate, whether it is life with parole at 25, life with parole at 30, life without parole, or the death penalty.

JUROR NUMBER 5: If he was proven guilty beyond—that this is what happened, that there was no question, there were no mitigating factors, I would impose the death penalty.

Tr. 989-91.

The record shows that Juror No. 5 was not an "automatic" vote for the death penalty. She stated that she would follow the law, consider mitigation, and impose death only if appropriate, such as if "there were no mitigating factors." Tr. 991. A juror should only be

removed for cause based on her views on capital punishment if "the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *See Wainwright v. Witt*, 469 U.S. at 424, 105 S. Ct. 844, 83 L.Ed.2d 841. There is nothing in the record to show that Juror No. 5 had such a limitation. *See State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 100 (for cause challenge properly denied where the juror's "follow-up responses demonstrated her willingness to follow the law, evaluate mitigating factors, and consider a lesser sentence under appropriate circumstances").

Madison argues that he was precluded from asking "*Morgan*" questions. In *Morgan*, the United States Supreme Court held that a defendant was "entitled, upon his request, to inquiry concerning those jurors who, even prior to the State's case in chief, had predetermined the terminating issue of his trial, that being weather to impose the death penalty." 504 U.S. at 736. This is because a refusal to consider mitigation "reflects directly on that individual's inability to follow the law." *Id*. at 735. Madison was not prevented from asking those questions. Trial counsel repeatedly asked variations of the same question to Juror No. 5 and continued to receive an answer that she would not automatically impose a death sentence. Juror No. 5 never stated or indicated that mitigating evidence would be irrelevant to her decision, which is the touchstone concern of *Morgan*. Madison's creative interpretation of the transcript aside, the trial court properly declined to excuse Juror No. 5 for cause.

C. Juror No. 11.

Like Juror No. 5, Juror No. 11 was not an "automatic" vote for the death penalty. In his questionnaire, Juror No. 11 claimed a belief that the death penalty, other than for the

murder of a police officer, was appropriate in some murder cases, but not in others. *See* Questionnaire, Juror No. 11, pg. 14. Juror No. 11 stated that he would consider and weigh mitigation. Tr. 1101. And, while being questioned by defense counsel, Juror No. 11 stated that he was "not predisposed to the death penalty, if that's what you're asking." Tr. 1105. He also stated that he was consider the life sentencing options. Tr. 1115, 1117. The record does not support Madison's interpretation of Juror No. 11's position.

And, like Juror No. 5, Madison was not prevented from asking questions about Juror No. 11's ability to consider mitigation. Madison claims he should have been able to ask how much consideration Juror No. 11 would give mitigation, but that is an improper question. *Jackson*, ¶ 52 ("it is improper for counsel to seek a commitment from prospective jurors on whether they would find specific evidence mitigating"); *State v. Lundgren*, 73 Ohio St.3d at 481, 653 N.E.2d 304 (trial court properly prohibited defense counsel from ask whether jurors would consider specifically identified mitigating factors). Madison's argument lacks merit, and his challenge for cause to Juror No. 11 was properly denied.

D. Juror No. 12.

Madison next challenges Juror No. 12, claiming that his removal should have been "consensual." Madison bases this on the fact that Juror No. 12 checked the box in his questionnaire indicating the death penalty should be imposed in all cases where someone was convicted of murder. Tr. 1129. Under questioning, however, Juror No. 12 changed his answer. He explained, "that was my feeling at the time when I did it." Tr. 1135. He clarified that he changed his position after hearing more explanation: "I could again, you know, when presented the facts." *Id.*

Juror No. 12 stated numerous times that he would consider all of the mitigation, that he would consider all of the sentencing options, and that he could not make up his mind as to what sentence was appropriate until he heard all of the evidence. Tr. 1135-37; 1146-47; 1154. Under questioning from defense counsel, Juror No. 12 stated that his opinion as to whether the death penalty was appropriate in a given cases depended on the "facts. You got to see facts." Tr. 1171. He explained that if "somebody is mentally challenged or something and something went on * * * I might change my opinion." Tr. 1171. He stated, "I would need facts presented to me, and at that point I would have to make my opinion at that time." Tr. 1177. A trial court "does not abuse its discretion in denying a challenge for cause if a juror, even one predisposed in favor of imposing death, states that he or she will follow the law and the court's instructions." *Jackson*, ¶ 40.

Madison also claims that he was prohibited from explaining what mitigation factors were. He was not entitled to do so. *Bryan*, ¶ 202 ("[a]t the early stage of a trial, the trial court is not required to completely instruct the jury, for example, by defining mitigation."). Juror No. 12 agreed that he would consider mitigation. And while Juror No. 12's questionnaire indicated that he favored the death penalty, his answers changed based on further information about the law. *See Bryan*, ¶ 100; *State v. Treesh*, 90 Ohio St.3d 460, 469, 739 N.E.2d 749 (2001) (juror's predisposition in favor of imposing death penalty did not require challenge where the juror later stated that she would follow the law and the court's instructions). Madison's challenge for cause was properly denied.

E. Juror No. 29.

Madison argues that Juror No. 29 should have been removed for cause because of a pending divorce and because he was biased in favor of the death penalty. With respect to the

pending divorce, this claim is not cognizable on appeal. "[A] juror's discharge 'on grounds of personal excuse' is a matter 'between the court and the jurors, and with which the parties can not, of right, interfere." *State v. Murphy*, 91 Ohio St.3d 516, 525, 747 N.E.2d 765 (2001), quoting *Bond v. State*, 23 Ohio St. 349, 355 (1872). "A party has no right to have any particular juror on the panel." *Id.* When the trial court asked if he could give the trial his full attention, Juror No. 29 responded that he would do his best. Tr. 1543.

Juror No. 29 wrote in his questionnaire that the death penalty was "appropriate in some cases, inappropriate in other cases[.]" Tr. 1546. He also wrote, "In some cases it's all right." Tr. 1566. He stated that he would consider mitigation and consider life sentence options. Tr. 1545-47; 1552. As previously discussed, the fact that Juror No. 29's views were clarified after instructions about the law does not disqualify him as a juror. *Bryan, supra*. Madison's challenge for cause was properly denied.

F. Juror No. 31.

Madison claims that Juror No. 31 should have been removed for cause because she was in favor of the death penalty "in some heinous cases." Tr. 1630. Juror No. 31 stated that she would consider mitigation and life sentence options. Tr. 1618-19. She said that she had not made up her mind. Tr. 1620, 1626. She also agreed that she could disregard any prior knowledge about the facts. Tr. 1627. The trial court was within its discretion to accept Juror No. 31's answers and deny Madison's challenge to her for cause.

Madison claims he should have been permitted additional inquiry about the facts of the offense. However, the Court read the indictment to the jurors at the beginning of voir dire. Tr. 770. The written questionnaires also specifically asked about the appropriate sentence when there were multiple victims. *See* Questionnaires, Question #35. As a result,

this case is unlike *Jackson*, ¶ 49, because the jurors were not "totally ignorant of the facts and issues involved[.]" It was within the trial court's discretion to determine the form and number of questions on the subject, which the trial court properly authorized here through the questionnaires and voir dire. *Id.*, ¶ 61. The trial court did not prevent Madison from conducting a constitutionally adequate voir dire.

G. Juror No. 34.

Madison argues that Juror No. 34 should have been removed for cause based solely on the answers in his written questionnaire answers alone. This is incorrect; a juror's answers under questioning may establish that the jury is not challengeable for cause. *See Bryan*, ¶ 100; *State v. Treesh*, 90 Ohio St.3d at 469, 739 N.E.2d 749. Madison then points to a portion of the transcript from defense counsel's questioning of Juror No. 34 that he believes shows juror bias. Defense counsel, however, asked the wrong question. Defense counsel asked Juror No. 34 if, based on the situation presented, the death penalty would be the only appropriate penalty without considering mitigation. Tr. 1755. The correct question is if, in the same situation, Juror No. 34 would not have *considered* any mitigation, and would not have signed a verdict imposing a life sentence under any circumstances. Defense counsel asked the same erroneous question to nearly every juror, but an affirmative response to a poor question does not show juror bias. Outside of that, Juror No. 34 stated that he would weigh the aggravating circumstances and mitigating factors. Tr. 1762. Madison's challenge for cause was properly denied.

H. Juror No. 37.

Madison argues that Juror No. 37 should have been removed for cause because of his views on capital punishment. Juror No. 37 said the death penalty is appropriate in most, but

not all, murder cases. He agreed that he would be able to weigh aggravating circumstances against mitigating factors and consider life sentence options. Tr. 1838-41. He stated that imposing a death sentence "would not be a comfortable thing to do, but yes, I would be able to do it." Tr. 1845. He agreed that the death penalty is not the only appropriate penalty. Tr. 1851-52. And, even after defense counsel told Juror No. 37 about Madison's prior conviction for a sex offense, he agreed that a death sentence should not be imposed without weighing the mitigating factors. Tr. 1906-07. Given his responses, the trial court properly denied Madison's challenge for cause.

I. Juror No. 40.

Madison argues that Juror No. 40 should have been removed for cause because he was unable to devote his full attention to the case and because of his views on the death penalty. With respect to his ability to pay attention, Juror No. 40 told the court that he would give the case his full attention. Tr. 1994-95. With respect to his views on the death penalty, Juror No. 40 wrote that it can be necessary for some crimes. Tr. 1997. He said that he had no preconceived idea of an appropriate verdict. Tr. 2001. Juror No. 40 expressed a willingness to consider mitigation and life sentencing options and said that he would not automatically vote for the death penalty. Tr. 2007-08.

Madison points to the transcript where defense counsel asked Juror No. 40 the same faulty question that he asked of Juror No. 34. However, when properly asked to clarify if he would indeed consider mitigation, Juror No. 40 said yes, he would consider it, and that the death penalty was not absolute. Tr. 2014. The record shows that Juror No. 40 was able to fairly consider mitigation and that he would not automatically impose the death penalty, and Madison's challenge for cause was properly denied.

J. Juror No. 43.

Madison last challenges Juror No. 43 because of the juror's difficulty in reading and writing English and because of his views on the death penalty. The state moved to excuse Juror No. 43 for cause as a result of his difficulty with reading and writing, but the defense objected. Tr. 2064-65. And, with respect to his views on capital punishment, Juror No. 43 stated that he believed prison was enough punishment and that he was *opposed* to the death penalty. Tr. 2086. Madison's argument lacks merit, and the trial court properly denied his challenge for cause.

K. Conclusion.

Madison was entitled to, and received, an impartial jury, so his federal claim must fail. Further, none of the challenged jurors should have been removed for cause, so his state claim must also fail. Madison's second proposition of law is without merit and should be overruled.

***Response to Proposition of Law III*: The trial court correctly excused prospective Juror Nos. 18, 38, and 45 for cause where all three jurors indicated numerous times that they were substantially impaired in their ability to consider and impose the death penalty.**

In his third proposition of law, Madison challenges the trial court's decision to grant the State's motions to remove three members of the venire for cause: Juror Nos. 18, 38, and 45. Madison argues that the trial court abused its discretion by finding that these three jurors were substantially impaired in their ability to consider and impose the death penalty. The record contradicts Madison's claim, and contains more than substantial testimony supporting the trial court's decision in each instance.

A. The legal standard for challenges for cause requires the trial court to excuse any juror whose views on capital punishment would prevent or substantially impair that juror's ability to follow the law.

"[T]he constitutional standard for determining when a prospective juror may be excluded for cause based upon his or her views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112, ¶ 131, citing *Wainwright v. Witt*, 469 U.S. at 424, 105 S. Ct. 844, 83 L.Ed.2d 841. Because determinations of juror bias largely depend on the trial judge's assessment of the potential jurors' demeanor and credibility, "deference must be paid to the trial judge who sees and hears the juror." *Witt* at 426. The trial court's ruling on a challenge for cause will be upheld on appeal unless it is so unsupported by substantial testimony that the court's ruling constitutes an abuse of discretion. *State v. Wilson*, 29 Ohio St.2d 203, 211, 280 N.E.2d 915 (1972).

B. Juror No. 18.

Juror No. 18 wrote in her questionnaire that the death penalty should never be imposed in any murder case. Tr. 1392. She wrote: "There's always a possibility of executing the wrong person. If the defendant admits to it, they should get life in prison." Tr. 1393. In response to question #34, which asked if she would be more likely to impose the death penalty in a case involving more than one victim, Juror No. 18 wrote: "No. I would never agree to impose the death penalty." Tr. 1394. In response to question #36, which asked what would be important for her to know in deciding whether to sentence someone to death, she wrote: "I would not agree to sentence anyone to death." *Id.* She continued: "We do not have the right to take someone's life." *Id.*

Those answers remained consistent when the parties questioned Juror No. 18 during voir dire. The trial court asked Juror No. 18 if there was any circumstance where she could

impose a death sentence. Juror No. 18 responded, "No." Tr. 1395. The trial court asked Juror No. 18 if she could follow the law in considering a sentence of death. Juror No. 18 responded, "I could not morally ever feel right about doing that." *Id.*

At that point, the defense indicated that it had no objection to excusing Juror No. 18 for cause. *Id.* The State, however, decided to ask Juror No. 18 again if she could ever impose the death penalty. Tr. 1397. Juror No. 18 again responded, "I could never agree to put somebody to death." *Id.* She further stated, "I could not attach my name to putting someone to death." Tr. 1398. Following those questions, defense counsel attempted to rehabilitate Juror No. 18 by asking if she could consider both aggravating and mitigation. Juror No. 18 responded that she could, but "I still wouldn't impose the death penalty." Tr. 1401. The trial court excused Juror No. 18 for cause. Tr. 1402. Defense counsel then changed course and objected to Juror No. 18's excusal. *Id.* The trial court correctly overruled that challenge, as Juror No. 18 was clearly substantially impaired in her ability to follow the law.

C. Juror No. 38.

Juror No. 38 wrote in her questionnaire, "I do not believe in the death penalty. I do not see where it deters crime." Tr. 1932. She checked the box under question #34 indicating that the death penalty "[s]hould never be imposed in any murder case." *Id.* She explained, "I believe in just[ice] for victims, but I do not believe the death penalty is the answer." *Id.* In response to question #34, which asked if she would be more likely to impose the death penalty in a case involving more than one victim, Juror No. 38 wrote: "It is extremely difficult to think of multiple murders being committed, but the death penalty is not the answer." Tr. 1933. She also wrote, "I have apprehension about convicting the wrong person." Tr. 1933.

When the trial court asked Juror No. 38 if she could sign her name to a verdict imposing the death penalty, Juror No. 38 responded, "No." Tr. 1934. The trial court explained that the law would require her to impose the death penalty if the State proved that the aggravating circumstances outweighed the mitigating factors, and again asked Juror No. 38 if she could ever sign a verdict imposing the death penalty. Tr. 1394-95. Juror No. 38 answered "No" a second time. Tr. 1935. The trial court noted that Juror No. 38 answered "quickly and firmly." *Id.* Juror No. 38 agreed. *Id.* She said that she could not set aside her views and follow the law. *Id.* The State continued to probe along those same lines, asking Juror No. 38 if she could "set those [opinions] aside and sign your name to a verdict form for death?" Tr. 1938. Juror No. 38 again answered, "No." *Id.*

Defense counsel attempted to rehabilitate Juror No. 38 by telling her, "The law doesn't talk about signing a verdict form, the law talks about will you consider any aggravation that they put in and any mitigation the defense puts in." Tr. 1939. This attempt to minimize the importance of the verdict form was an incorrect statement of law.

> "During voir dire, the prosecutor asked some prospective jurors whether they would be able to sign a death verdict if the accused were to be convicted as charged and if the aggravating circumstances were found to outweigh the mitigating factors. Such questioning was proper because the relevant inquiry during voir dire in a capital case is whether the juror's beliefs would prevent or substantially impair his or her performance of duties as a juror in accordance with the instructions and the oath."

State v. Davis, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 76. "Clearly, a juror who is incapable of signing a death verdict demonstrates substantial impairment in his ability to fulfill his duties." *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶ 34. *See also State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, ¶ 142 ("Prospective juror Nos. 55 and 233 both said that they could not sign a death verdict. It was

proper to excuse them under R.C. 2945.25(O) because they could not perform their duties as jurors"); *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 81 ("Here, the trial court did not abuse its discretion. Bross stated that he could not follow the law during the penalty phase and could not sign a death penalty verdict. Thus, Bross was properly excused").

Based on this misunderstanding, defense counsel never asked Juror No. 38 if she could impose the death penalty. Tr. 1938-49. Instead, defense counsel got Juror No. 38 to agree that she could weigh both the aggravating circumstances and mitigating factors, largely by telling her "it is entirely up to your personal moral judgment what weight you want to give the mitigation put on by the defense or the aggravation put on by the prosecutor[.]" Tr. 1939. After defense counsel sat down, the trial court sought to clarify by asking Juror No. 38 directly, "Ma'am, could you sign a verdict imposing the death penalty?" Tr. 1949. Juror No. 38 responded, "No." *Id.* The trial court asked, "Under any circumstance?" Tr. 1949-50. Juror No. 38 responded, "Under no circumstances." Tr. 1950.

Defense counsel objected to the removal of Juror No. 38 for cause, saying, "The test in Ohio is not can you sign a death verdict according to this court; * * * all they have to do is be able to consider mitigation and once they say they can consider mitigation, then they can pass muster." Tr. 1951. As explained above, this was incorrect; a juror who states that he or she cannot sign a verdict form imposing the death penalty is substantially impaired in their ability to follow the law. Juror No. 38 was just such a juror.

The trial court did not preclude defense counsel from asking the same question as to whether the jurors could sign a verdict imposing a life sentence. The trial court itself asked that question on many occasions. Tr. 1417; 1684; 1718; 1780. The difference was that when

the trial court or the parties asked if the jurors could sign a verdict imposing the death penalty, they did so without qualifications, asking if the jurors could ever impose death in any case. When defense counsel asked if the jurors could impose a life sentence, however, counsel frequently qualified that question by including the most heinous facts of Madison's particular case. For example:

> "If he killed three women and he's guilty of what they say he's guilty of, and he raped and mutilated and he did it three different times with no legal justification or excuse, in your heart of hearts is there any way on Earth that you could bring yourself to give him a sentence that would put him eligible to be back out on the streets in 25 years, in your heart of hearts?"

Tr. 925. This question improperly sought a commitment from the jurors as to how they would vote in a particular set of facts. "When a defendant seeks to ask a juror to speculate or precommit to how that juror might vote based on any particular facts, the question strays beyond the purpose and protection of *Morgan.*" *United States v. McVeigh*, 153 F.3d 1166, 1207 (10th Cir.1998). *Morgan* does not allow the parties to ask such case-specific questions. *See Hodges v. Colson*, 727 F.3d at 528-29 ("*Morgan* simply does not require a trial court to permit defense counsel to ask prospective jurors how they would vote assuming the existence of particular mitigating or aggravating circumstances, which is essentially what defense counsel sought to do here").

It was on that basis that the trial court consistently sustained objections to defense's counsel's attempt to ask the jurors to commit to a particular vote in a particular case under a particular set of facts. By contrast, the question that the trial court asked Juror No. 38 ("if the state proves to you beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors, could you sign your name to a verdict imposing the death penalty?") sought no such commitment. It did not include any case-specific facts or ask the

jurors how they would vote in any particular case. It simply asked the jurors whether they could ever impose the death penalty. That was a proper and necessary question. Juror No. 38's repeated answers that she could not do so showed that she was substantially impaired.

D. Juror No. 45.

Juror No. 45 wrote in his questionnaire about the death penalty: "Typically I don't believe in it. Humans shouldn't decide the fate of others' lives. God should. However, in some extreme cases it may be necessary." Tr. 2214. He continued that the death penalty was "[a]ppropriate in some murder cases and inappropriate in other murder cases." *Id.* He did not know at that point whether he could sign a verdict imposing the death penalty. Tr. 2215. He was not willing to commit to follow the law without hearing all of the evidence first. Tr. 2231-32; 2241. He did, however, say, "I would have to rely more on my conscience more than on the law in this particular case." Tr. 2234.

The State challenged Juror No. 45, noting that he had not answered the question of whether he would be willing to follow the law regarding the death penalty. Tr. 2255-56. The trial court indicated that it would not ask Juror No. 45 any further questions at that point. Tr. 2256. The State noted that it intended to return to the subject during general voir dire, because it believed Juror No. 45 would not answer the question. *Id.*

In general voir dire, the State asked Juror No. 45 a general question as to whether he could follow the law as a juror. Tr. 3852. Juror No. 45 answered, "For the first portion of the trial, yes." *Id.* He continued, "I have some reservations on the second, the sentencing." *Id.* The State questioned Juror No. 45 generally as to whether he could follow the law. Juror No. 13 stated, "Again, to determine what is a crime in the first portion of the – I don't have an issue with that." Tr. 3854. Eventually, he stated:

> "JUROR NO. 13: I'm going to try to answer it this way. If X, Y, Z states a certain sentence has to happen, then X, Y, Z was proven, I would still have to rely on my conscience that I have developed through my life to make a determination, versus the law.
>
> MR. McGINTY: Great. You are telling me you won't follow the law if it doesn't agree with your conscience, moral values or religion?
>
> JUROR NO. 13: Correct."

Tr. 3855.

At a sidebar, Juror No. 45 continued to indicate that he could not commit to following the law regarding the death penalty: "I can't answer that yet. I don't know how else to put it. I don't think I can answer that question yet." Tr. 3881. He continued: "after I hear everything there's a possibility that I may say yes to the possibility. There's a possibility I won't. I would rely more on my conscience of which way I went than whether or not the current law told me I had to or told me I didn't." Tr. 3882. After several more attempts by the parties to question him, the trial court finally asked if he would "follow the law regardless of your personal objections to the death penalty?" Tr. 3885. Juror No. 45 finally answered, "No. Because in my heart * * * [t]here may still be something in my conscience that says I should not follow the law." *Id.* Following that clarification, the trial court excused Juror No. 45.

Despite the effort that it took to pin down Juror No. 45, the trial court was within its discretion to find that his answers – especially his last answer – showed that he was substantially impaired. Juror No. 45 never, at any point, said that he could impose the death penalty. He stated several times that his personal morality would impact his decision to the point that he would follow his morality above the law. There was more than "substantial testimony" to support the trial court's finding that Juror No. 45 was substantially impaired. *State v. Wilson*, 29 Ohio St.2d at 211, 280 N.E.2d 915. The fact that Juror No. 45 equivocated

in many of his answers does not render the trial court's finding that he was substantially impaired an abuse of discretion. "Under the circumstances, ambiguities can be resolved in the state's favor[.]" *State v. Combs*, 62 Ohio St. 3d 278, 285-286, 581 N.E.2d 1071 (1991).

E. Conclusion.

Based on the foregoing, the trial court was within its broad discretion to excuse Juror Nos. 18, 38, and 45 for cause. The record demonstrates that each juror was substantially impaired in his or her ability to follow the law and impose the death penalty. Madison's third proposition is without merit and should be overruled.

***<u>Response to Proposition of Law IV</u>*: *The practice of Witherspooning jurors and excusing for cause those jurors who are substantially impaired in their ability to impose does not violate the Sixth Amendment right to fair-cross section of the community under Lockhart v. McCree*.**

In his fourth proposition of law, Madison argues that the trial court impermissibly excused jurors for cause who were opposed to the death penalty on religious grounds, thereby violating his Sixth Amendment right to a venire that reflected a fair cross-section of the community, as well as the Religious Freedom Restoration Act of 1993 (RFRA). As Madison's trial counsel acknowledged on the record, the United States Supreme Court rejected this argument in *Lockhart v. McCree*, 476 U.S. 162, 173-177, 106 S. Ct. 1758, 90 L.Ed.2d 137 (1986). This Court should follow *Lockhart*, as well as its own precedents in this area, and rejected Madison's fourth proposition.

A. *Lockhart v. McCree* sanctions the *Witherspoon* process of excusing for cause those jurors whose beliefs regarding the death penalty would prevent or substantially impair their ability to follow the law.

The Sixth Amendment requires a venire to reflect a fair cross-section of the community at large. *See Glasser v. United States*, 315 U.S. 60, 85-86, 62 S. Ct. 457, 86 L.Ed.2d 680 (1942). The essence of a fair-cross-section claim is the systematic exclusion of a

"distinctive group" in the community, such as blacks, women, or Mexican-Americans, for reasons unrelated to the ability of members of that group to serve as jurors. *See Lockhart* at 173-177.

In *Lockhart*, the Supreme Court held that the "death qualification" voir dire process – in which the trial court excuses for cause those jurors whose views on the death penalty would substantially impair their ability to be fair and impartial in a capital case – does not result in the systematic exclusion of any "distinctive group." "[G]roups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as jurors, such as the '*Witherspoon*-excludables' at issue here, are not 'distinctive groups' for fair-cross-section purposes." *Id.* at 174. The voir dire process "is carefully designed to serve the State's concededly legitimate interest in obtaining a single jury that can properly find and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial." *Id.* at 175. Unlike jurors excluded on the basis of race, sex, or heritage, "'*Witherspoon*-excludables' are singled out for exclusion in capital cases on the basis of an attribute that is within the individual's control." *Id.* at 176.

Moreover, not all jurors who oppose the death penalty on religious grounds are subject to removal for cause. *Id.* It is only those members of the venire who indicate that their beliefs regarding the death penalty "would prevent or substantially impair" their ability to follow the law who may be removed for cause. *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112, ¶ 131, citing *Wainwright v. Witt*, 469 U.S. at 424, 105 S. Ct. 844, 83 L.Ed.2d 841. And "the removal for cause of '*Witherspoon*-excludables' in capital cases does not prevent them from serving as jurors in other criminal cases, and thus leads to no substantial deprivation of their basic rights of citizenship." *Lockhart* at 176.

Based on *Lockhart*, "[t]his court has previously rejected challenges to the constitutionality of death-qualifying a jury." *State v. Grant*, 67 Ohio St.3d 465, 476, 620 N.E.2d 50 (1993), citing *State v. Landrum*, 53 Ohio St.3d 107, 119, 559 N.E.2d 710 (1990); *State v. Jenkins*, 15 Ohio St.3d 164, 473 N.E.2d 264 (1984), paragraph two of the syllabus ("To death qualify a jury prior to the guilt phase of a bifurcated capital prosecution does not deny a capital defendant a trial by an impartial jury"). This Court has also recognized that a juror's "strongly held religious beliefs" are a valid reason for the exercise of a peremptory challenge. *State v. Gowdy*, 88 Ohio St.3d 387, 394, 727 N.E.2d 579 (2000). "Religion is often the foundation for an individual's moral values, so religious beliefs can be an important consideration for both sides in seating an impartial jury." *Id.*

B. The RFRA does not apply to the states, and even if it did, ensuring that a jury is able to follow the law is a compelling government interest.

Madison's argument that the death-qualification process violates the Religious Freedom Restoration Act (RFRA) also fails. The RFRA "suspends generally applicable federal laws that 'substantially burden a person's exercise of religion' unless the laws are 'the least restrictive means of furthering [a] compelling government interest." *United States v. Antione*, 318 F.3d 919, 920 (9th Cir.2003), quoting 42 U.S.C. 2000bb-1(a)-(b). The United States Supreme Court found the RFRA unconstitutional as applied to state laws in *City of Boerne v. Flores*, 521 U.S. 507, 532-536, 117 S. Ct. 2157, 138 L.Ed.2d 624 (1997). As a result, the RFRA does not apply to jury selection in a capital case in state court.

Even if the RFRA did apply to the states, ensuring that "a juror is able to follow the law and apply the facts in an impartial way * * * *is* a compelling government interest." *United States v. Mitchell*, 502 F.3d 931, 954 (9th Cir.2007) (emphasis in original). "And the rule excluding jurors who are unable to do so is the least restrictive means to achieve that end;

jurors are not excluded simply because they are opposed to the death penalty on religious grounds, but only if they are unable to set those views aside and apply the law impartially." *Id*. The voir dire process would thus survive RFRA scrutiny, even if such scrutiny applied.

C. Each of the 11 jurors Madison identifies was substantially impaired in their ability to follow the law and impose the death penalty.

Madison identifies 11 jurors whom he claims the trial court improperly removed for cause because they had firmly held religious beliefs against capital punishment. For each of these jurors, Madison did not object to their excusal for cause at trial, and in most cases, actually agreed to it. Madison instead made a continuing objection to the entire death-qualification process as interpreted by the United States Supreme Court in *Lockhart*, arguing that it excluded religiously scrupled jurors. As the record demonstrates, each juror was substantially impaired in his or her ability to follow the law with respect to the death penalty.

Juror No. 2 answered "Yes" in her questionnaire in response to the question, "Do you have any religious beliefs, moral feelings, or philosophical principles that would affect your decision on whether the death penalty should be or should not be imposed as punishment for the crime of murder?" Tr. 833-834. She wrote: "Church. It should be up to God as to when a person dies." Tr. 834. Both parties agreed to excuse Juror No. 2 for cause. Tr. 807; 832-834.

Juror No. 18 wrote that the death penalty should never be imposed in any murder case. Tr. 1392. She continued, "I would never agree to impose the death penalty." Tr. 1394. In response to question 36, she wrote: "I would not agree to sentence anyone to death." *Id.* She explained, "I could not morally ever feel right about doing that[,]" and "I could never agree to put somebody to death." Tr. 1395; 1397. She further stated that she could not follow

the law and "attach my name to putting someone to death." Tr. 1398. Defense counsel indicated they had no objection to her removal for cause. Tr. 1395.

Juror No. 19 wrote in her questionnaire that the death penalty should never be imposed in any murder case. Tr. 1404. She explained: "All life is sacred, and even if murder was committed, we cannot * * * [t]urn around and kill someone." *Id.* She also stated, "Regardless of the number of victims, the death penalty should not be imposed." Tr. 1403. Defense counsel agreed to excuse Juror No. 19 for cause, while making a continuing objection to the Supreme Court's decision in *Lockhart*, sanctioning the death-qualification process. Tr. 1405-06.

Juror No. 54 wrote in her questionnaire that the death penalty should never be imposed in any murder case. Tr. 2503. She wrote that "[t]he number [of victims] would not matter. I still would not want to impose the death penalty on someone else." Tr. 2504. Under questioning by the trial court, she stated that she could never impose a death sentence. Tr. 2506. The trial court noted that she "answered those questions very quickly, you made them with some amount of resolve, would you agree with that?" *Id.* Juror No. 54 agreed. She further stated that she could never sign a verdict imposing the death penalty in any circumstances. Tr. 2507-08. She explicitly refused to take an oath to follow the law if that meant imposing a death sentence, stating, "I couldn't sentence somebody to death." Tr. 2511. She was absolutely positive of this. Tr. 2514. The defense objected solely on the grounds of their continuing objection to *Lockhart*. Tr. 2517.

Juror No. 58 wrote in her questionnaire, "I am Catholic and believe in preserving life and have a conservative view on this. I don't know that I could be responsible for putting someone to death[.]" Tr. 2646. She checked the box indicating that the death penalty

"[s]hould never be imposed in any murder case." *Id.* Under questioning, she stated, "I'd have to talk to a priest first before I do this." Tr. 2650. When the trial court pressed her as to whether she could impose a death sentence, she asked, "Is it okay to say no?" Tr. 2651. When the trial court responded that it was, she said, "No. I don't think I would - " before trailing off. *Id.* She later said that she would not take an oath to follow the law. Tr. 2664. The defense reiterated their continuing objection to the death-qualification process. Tr. 2665-66.

Juror No. 63 checked the box in his questionnaire indicating that the death penalty should never be imposed in any murder case. Tr. 2755. He explained, "In thinking about it, I would not impose the death penalty." *Id.* He reiterated that answer several times. Tr. 2757-58. The defense conceded that "if his answers stand as they are now, that you have a legitimate challenge for cause[.]" Tr. 2760. Under further questioning, Juror No. 63 indicated that he could not follow the law and impose death if the State met its burden. Tr. 2766-67. He continued to adhere to that position under questioning from the defense. Tr. 2670. The defense reiterated its general, continuing objection. Tr. 2671.

Juror No. 64 was excused for cause, without questioning, at the agreement of both parties. Tr. 2797-98. The defense again made their continuing objection to the death-qualification process. *Id.*

Juror No. 70 initially equivocated in her written questionnaire, checking the box indicating that the death penalty was "[a]ppropriate in some murder cases, inappropriate in other murder cases." Tr. 2943. Under questioning, however, she said that she did not approve of the death penalty, and that "I call that murder." Tr. 2944-45. When the trial court asked her why she had written in her questionnaire that the death penalty was appropriate in some cases, she responded, "I shouldn't have, no." Tr. 2946. She explained, "Because it's

taking another person's life * * * I don't think that's my right or anybody else's right." *Id.* She stated numerous times that she could not sign a verdict imposing the death penalty. Tr. 2949-50; 2957. She contradicted herself a number of times, but ultimately, said she would not sign a verdict form imposing the death penalty. Tr. 2963. The defense agreed that Juror No. 70 was "unable to or substantially impaired in her ability to follow the law; therefore, I agree that she is challengeable for cause." Tr. 2964.

Juror No. 78 was excused for cause at the agreement of both parties, without questioning, subject to the defense's overall continuing objection. Tr. 3120.

Juror No. 85 stated that she would find it "very difficult" to impose the death penalty. Tr. 3298. Under questioning by the State, she said that she did not know if she could sign her name to a verdict form imposing death. Tr. 3307. Eventually, she answered, "Probably not." Tr. 3309. Defense counsel refused to join the State's motion to excuse Juror No. 85 for cause, but admitted that "under the current state of the law I don't have any real argument I could make to the contrary." Tr. 3318. Juror No. 85 also had significant hardship issues involving her elderly mother. 3288-3291.

Juror No. 91 wrote in her questionnaire, "I feel strongly against it [the death penalty], both morally and ethically. I feel that deciding to take someone's life is not right. I feel like I would carry guilt with me if I was involved in deciding a person's fate, no matter the circumstances." Tr. 3438. She checked the box indicating that the death penalty should never be imposed in any murder case. *Id.* She further wrote, "I feel strongly that it is something that I should not decide, for religious, moral, and ethical reasons. I do not believe it is something that another person can decide, no matter the circumstances." Tr. 3439. The defense had no objection to the removal of Juror No. 91 for cause.

The common thread between each of these jurors was not their religious beliefs, but rather, the fact that each of them said that they could not follow the law. At that point, each member of the venire was "substantially impaired" in the performance of his or her duties as a potential juror. *Wainwright v. Witt*, 469 U.S. at 434, 105 S. Ct. 844, 83 L.Ed.2d 841. Madison's fourth proposition of law is without merit and should be overruled.

***Response to Proposition of Law V:* The prosecutor did not commit misconduct by objecting to improper defense questions.**

In his fifth proposition of law, Madison argues that the prosecutor(s) committed misconduct during voir dire by "assert[ing] multiple groundless objections * * *." *Appellant's Brief*, p. 139. As evidence, Madison points to the same arguments he raised in his first and second propositions of law. Madison has failed to show that he was deprived of a fair trial, and his fifth proposition of law should be overruled.

A. Standard of Review.

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

B. Law and analysis.

Madison claims several instances of prosecutorial misconduct during voir dire, none of which warrant relief.

First, Madison claims the prosecutor improperly told the jury that they could not consider mercy. This was a correct statement of law. *State v. Lorraine*, 66 Ohio St.3d at 417, 613 N.E.2d 212.

Second, Madison claims that the prosecutor disparaged defense counsel, sometimes in front of the jury. It is improper, and professionally unethical, for a prosecutor, or any attorney, to attack, or make any attempt to disparage the character of, opposing counsel in front of the jury. *Smith* at 14. In his brief, Madison refers to a long list of places in the record in which he claims that the State "characterized defendant's positions as 'silly,' or 'frivolous,' or 'obnoxious.'" *Appellant's Brief*, p. 141. Only one of these statements, however, was made in front of the jury. All of the other comments were made outside the presence of the jury. *See* Tr. 748, 798, 896-97, 947, 1004, 1008, 1196, 1198, 1333, 1335-42, 1701, 1741, 2166-67, 2171-72, 2173, 2289, 2731, 2796, 2801, 3018-19, 3069, 3402-03, 3612, 3834.

Arguments between attorneys outside the presence of jurors could not possibly prejudice a defendant's substantial rights. *See State v. Jackson*, 10th Dist. Franklin App. No. 02AP-867, 2003-Ohio-6183, ¶ 60 ("[m]ore importantly, appellant could not have been prejudiced by this comment because it took place during a sidebar and the jury could not have heard the prosecutor's comment."). A juror cannot be prejudiced by a comment the jury does not hear.

The only incident that Madison cites to that did occur in the presence of a juror came during the voir dire of Juror No. 15, Aaron Jones. Tr. 1287-90. There, the prosecutor sought to rehabilitate Juror No. 15 after defense counsel asked if he believed death was the only appropriate penalty for a defendant who committed an aggravated murder where "he thought about it in advance, wanted to do it, went out and did it, and it was in the course of

a kidnapping and a rape[.]" Tr. 1252. Defense counsel further told Juror No. 15 that "there were multiple victims, okay?" Tr. 1252-53.

The prosecutor, questioning Juror No. 15 again, asked, "[Y]ou heard from the defense attorney who told you these horrible things about his client, right?" Tr. 1287. The prosecutor asked, "Do you understand there's been no evidence in this case whatsoever?" Tr. 1287-88. Juror No. 15 agreed. *Id.* The prosecutor continued, "And he didn't tell you anything about mitigation, did he, the mitigation evidence?" Tr. 1288. Juror No. 15 agreed that defense counsel had not. The prosecutor then stated, "He's trying to insinuate from the questions that you wouldn't be a fair juror. Are you going to be a fair juror?" Tr. 1290. The trial court sustained a defense objection to this question. *Id.* All of this was a legitimate attempt by the prosecution to rehabilitate Juror No. 15 by reframing the questions defense counsel had asked to emphasize the fact that the juror had not yet heard any mitigating evidence, and that favoring the death penalty did not mean he could not be fair.

Most importantly here, the trial court later excused Juror No. 15 for cause after the State withdrew its objection to Madison's challenge. Tr. 2864-69. Juror No. 15 thus never participated in deliberations, nor did Madison have to use a peremptory challenge to remove him. Given that no other jurors were present during this exchange, and that Juror No. 15 was eventually excused for cause, Madison cannot show prejudice. *See United States v. Olano*, 507 U.S. 725, 739, 113 S. Ct. 1770, 123 L.Ed.2d 508 (1993) (to establish a showing of a biased juror, the defendant must show that the biased juror "either participated in the jury's deliberations or 'chilled' deliberation by the regular jurors").

Third, Madison argues that the prosecutor improperly objected to counsel's attempt to ask *Morgan* questions. But, as previously discussed, defense counsel sought to expand

Morgan, not follow it. The prosecutor's objection to Madison's attempt to ask impermissible questions was not improper.

Fourth, Madison argues that the prosecutor tried to damage Madison's relationship with his counsel. During the questioning of Juror No. 37, defense counsel asked, "just your opinion, if you were to find out that that guilty murderer we were talking about before had a prior conviction for a sexual assault –[.]" Tr. 1871. The trial court sustained an objection from the State to this question. *Id.* The State expressed concern that defense counsel was opening the door to Madison's prior conviction. Tr. 1872-73. The trial court noted that this was the first time defense counsel had asked that particular question. Tr. 1874. The trial court inquired if Madison was aware that defense counsel intended to bring up his prior conviction for attempted rape in voir dire. Tr. 1884-85. Defense counsel acknowledged that they had not spoken to Madison about it before bringing it up in front of the juror. *Id.* The trial court decided to allow defense counsel to ask about Madison's prior record if they chose to do so. Tr. 1901-03.

The State's objection was a prudent effort to protect the record against a future claim of ineffective assistance. It was highly damaging to Madison for his own attorneys to inform prospective jurors that Madison had a prior conviction for a sexual assault - evidence that was not admissible (and indeed, was not admitted) during the guilt phase. It was also inaccurate and imprecise; Madison's actual conviction was for attempted rape and kidnapping, not sexual assault. Tr. 7041-42. The State, in an abundance of caution, asked the trial court to inquire of Madison if he was willing to waive any prejudice that might result from counsel's decision to do so. But counsel objected to the trial court even asking that

question. Tr. 1904. As it turned out, the State's concern was well-founded, as defense counsel had not in fact discussed the issue with Madison ahead of time.

The State has an interest in finality, and it is understandable that the prosecutor would want to make a record to prevent potential error from the admission of Madison's prior conviction. While ad hominem attacks are inappropriate, "there is a distinct difference between an ad hominem argument and an attack directed to the merits of an idea." *Henderson v. Lafler*, E.D. Mich. No. 07-14071, 2010 U.S. Dist. LEXIS 104728, *16 (Sep. 30, 2010). This was not an ad hominem attack, and the prosecutor's arguments were not designed to impede Madison's attorney-client relationship. Rather, they were meant as an effort to ensure a sustainable conviction.

C. Conclusion.

Reviewing the prosecutor's comments in the context of the entire record, it cannot be said that Madison was deprived of a fair trial. Madison's sole citation to an incident before the jury was not misconduct. To the extent that any improper comments were made, Madison cannot show prejudice because they were outside the presence of the jury. Madison's fifth proposition is without merit and should be overruled.

***Response to Proposition of Law VI*: The trial court did not err by admitting portions of the video of the defendant's interviews with police where the police questioned him about his own statements regarding the level of his alcohol and drug usage, how many victims there were, and remorse or cooperation.**

In his sixth proposition of law, Madison argues that the trial court erred by admitting various unredacted portions of his recorded statements to police in which the detectives gave various opinions about the case.

A. Madison invited any error by agreeing to the redactions of the video.

First, the parties agreed to redact certain portions of the video. Those redactions are found in State's Ex. 302-A. Because defense counsel agreed to those redactions, any error arising from admission of the remaining portions of the video to which Madison did not object would be invited error. Under the doctrine of invited error, "[a] party cannot take advantage of an error he invited or induced." *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81, ¶ 64. "Pursuant to this doctrine, a party cannot claim that a trial court erred by accepting the party's own stipulation." *State v. McClendon*, 10th Dist. Franklin No. 11AP-354, 2011-Ohio-6235, ¶ 37. Madison concedes that he "failed to object to most of" the instances cited in his Sixth proposition. *Appellant's Brief*, p. 147.

B. Madison's claims of excessive alcohol and drug abuse.

Madison first argues that the trial court erred by admitting portions of the video in which the detectives stated that Madison was not being truthful with them about his inability to remember certain things because of his drinking and drug usage. Madison does not raise a hearsay objection or argue that the statements violated his right to confront witnesses. Rather, Madison argues that this Court should view these statements as akin to an officer testifying as to another witness' credibility, which is generally impermissible under *State v. Boston*, 46 Ohio St.3d 108, 128, 545 N.E.2d 1220 (1989).

"[T]here is a difference between an investigating officer giving an opinion as testimony before a jury, and an investigating officer giving an opinion during the interrogation of a suspect." *Odeh v. State*, 82 So. 3d 915, 920, 2011 Fla. App. LEXIS 11005 (July 13, 2011). "[A]n interrogating detective's statements to a suspect, when placed in their proper context, could be understood by a rational jury to be interrogation techniques used by law enforcement officers to secure confessions." *Id.* Such statements by an investigating

officer are "not the types of statements that carry any special aura of reliability." *Dubria v. Smith*, 224 F.3d 995, 1001 (9th Cir.2000) (detective's statements of disbelief of the defendant's story were admissible at trial).

Here, "the purpose of including the detectives' statements in the portions of the interrogation video played for the jury was to provide context for appellant's statements and admissions during the interrogation." *State v. Neil*, 10th Dist. Franklin Nos. 14AO-981 and 15AO-594, 2016-Ohio-4762, ¶ 76; *see also State v. Rice*, 11th Dist. Ashtabula No. 2009-A-0034, 2010-Ohio-1638, ¶ 23 ("the statements made by the detectives were not intended to improperly interject medical 'expert testimony' as to the cause of death as Mr. Rice contends. Rather, the statements were an interrogation technique employed to elicit a response from Mr. Rice"). The detectives' statements were also admissible to explain Madison's subsequent conduct in changing his story about the level of his alcohol and drug usage.

These statements of opinion were not opinion *testimony*, which was what *Boston* prohibits. They were statements made by police officers in the back-and-forth context of an interview intended to prompt Madison to be more forthcoming with them. "The jury would certainly understand this to be the police position and would give to it no more weight than they would the fact appellant was charged by the prosecutor with murder or that the prosecutor clearly also disbelieved appellant." *Dubria* at 1001, n. 2. The trial court also instructed the jurors that "these detectives are not experts in alcohol dependence." Tr. 5283.

Even if the admission of the detectives' statements was error, it was harmless error. *See State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 143 (finding harmless error where the detectives told a witness that the defendant abused the victim, severely beat the mothers of his daughters, and abused other women); *State v. Davis*, 116

Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 123 (finding harmless error where a detective, in explaining his investigation, testified that he believed the defendant was being dishonest).

Madison conceded his responsibility for the killings at trial, and does not dispute his guilt on any of the counts and specifications before this Court. In fact, Madison essentially concedes that this would be harmless error in his brief, stating that "the redaction of the objectionable material would have had absolutely no impact on the context of the remaining interrogation." *Appellant's Brief*, p. 163. Any statements about Madison's alcohol or drug usage could not have been outcome-determinative in light of the overwhelming evidence of Madison's guilt.

Moreover, the jury heard independent evidence of the detectives' assertions at trial. Madison's girlfriend Brittney Darby testified that Madison rarely ever drank alcohol – "maybe a few times a month." Tr. 5643. Dr. Davis testified that Madison denied having a drinking problem, and also denied ever having alcoholic blackouts, delirium tremens, or physical symptoms of alcohol withdrawal. Tr. 6678. Madison told Dr. Davis that he was cutting back on marijuana usage at the time of arrest, and that the only thing he was addicted to was Black & Mild cigars. Tr. 6678-79. Dets. Diaz and Sowa noted that Madison was not exhibiting any signs of alcohol withdrawal a full three days after his arrest. *See* State's Ex. 302-A, interview on July 20, 2013, p. 63-64. Madison told Dr. Pitt that he was drinking only one beer a day. *See* State's Ex. 1103. Dr. Pitt testified that Madison's level of drinking and drug usage was not sufficient to cause blackouts or memory loss. Tr. 7430. The detectives' assertions that they disbelieved Madison's claims of alcohol or drug-induced blackouts were thus cumulative to the other evidence the jury heard from multiple sources at trial, including Madison himself.

C. The possibility of additional victims.

Second, Madison argues that the State should have redacted his interviews to remove those portions in which the detectives asked Madison how many victims there were. Once again, no error occurred. Police did not discover the bodies of Shetisha Sheeley and Angela Deskins' until the second day, July 20, 2013. The discovery of two additional bodies, found in a brush pile on the northeast corner of the garage and inside the basement of another home nearby, necessitated that the police question Madison to determine whether there were any additional, undiscovered bodies.

Madison was purposely evasive as to how many victims he had killed. When Commander Cardilli asked Madison how many more bodies police would find, Madison responded, "No telling, ain't no telling; ain't no telling." *See* State's Ex. 302-A, interview on July 20, 2013, p. 198. At another point, he stated, "If there's three, I'm pretty sure there's more." *Id.* at 223. He stated that "in math, like two bodies, one body, it's not greater or equal. I mean, it's pretty much equal, one body is enough, one body is enough to, you know, pretty much do away with you as far as society." *Id*. at 150. He continued that "one is pretty much equal to two, three, four, five * * *." *Id.* at 151. These responses necessitated questioning from the officers as to whether Madison knew the location of any additional bodies.

Moreover, any questioning by the detectives during the interviews about the possibility of more victims could not possibly have resulted in prejudice, given that the State never argued at trial that Madison may have killed more than three victims. Although Madison claims that the State suggested at trial that there might be additional victims, Madison fails to provide any citation to any point in the trial record at which this occurred.

D. Remorse and cooperation.

Finally, Madison argues that the video of his interviews with police should have been redacted to remove any discussion of whether Madison had remorse for his crimes or cooperated with police. Madison cites no legal authority for the proposition that detectives are forbidden to discuss the subject of remorse or cooperation with a suspect during an interview, or that any such discussion should be inadmissible at trial. In addition to the above analysis, the detectives' questions to Madison about his remorse and cooperation were relevant and admissible for two reasons: (1) to prompt Madison to confess to the murders, and (2) to elicit a response from him that would be indicative of his mental state, his motive, or his consciousness of guilt.

Madison appears to argue that any discussion of remorse was improper because it was Madison's sole prerogative whether to raise the issue of remorse at trial. This is incorrect for two reasons. First, it was Madison himself – not the police – who first brought up the subject of remorse during his interview. During his interview on July 19, Madison stated, "I don't, I don't really – like I have, I have no feeling, like I have no feeling, I have no – I just – I'm numb right now." *See* State's Ex. 302-A, interview on July 19, 2013, p. 62. It was in response to that statement that Sgt. Gardner stated, "Mike, you have to have feeling, you have to have remorse." *Id.* Madison responded, "No, I don't even feel like, I don't even feel like I did anything wrong." *Id.* Those statements, and all that followed on the same subject, were admissible to show Madison's consciousness of guilt, his motive, and his mental state.

Second, as this Court has recognized, Ohio law actually *requires* a capital jury to consider the issue of remorse regardless of whether the defendant chooses to introduce evidence of remorse. R.C. 2929.04(B) provides that during the mitigation phase:

> "the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature

> and circumstances of the offense, the history, character, and background of the offender, and all of the following factors[.]"

The General Assembly's use of the word "shall," a mandatory term, "creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35, 118 S. Ct. 956, 140 L.Ed.2d 62 (1998).

R.C. 2929.04(B) thus requires a jury to consider (1) the nature and circumstances of the offense, and (2) the history, character, and background of the offender, regardless of any factors the defense chooses to raise. "We have said that the sentencer *must* consider the nature and circumstances of the offense, whether they have mitigating impact or not and whether the defense raises them or not." *State v. Hancock*, 108 Ohio St. 3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 127 (emphasis in original). By the same rationale, the jury must consider and weigh evidence of a defendant's "history, character, and background" to determine whether they have mitigating impact, whether the defendant raises them or not.

A defendant's "lack of remorse reflects upon his character." *State v. Lundgren*, 73 Ohio St.3d at 493, 653 N.E.2d 304. Remorse, where it does exist, is entitled to some weight in mitigation. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 274 ("Hale's expression of remorse is entitled to minimal weight at best"). But where remorse does not exist, it is entitled to no weight, and this Court has repeatedly held that prosecutors may point this out, regardless of whether the defendant raises remorse as an issue. *See State v. Loza*, 71 Ohio St.3d 61, 82, 641 N.E.2d 1082 (1994) (prosecutor's comment that the defendant "did not express any regrets over the deaths and that he would commit the offenses again under the same circumstances" was properly related to the defendant's "history, character, and background" under R.C. 2929.04(B)); *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 135 (trial court's reference to the defendant's

lack of remorse was proper where “the court was simply noting the absence of a possible mitigating factor”). It is thus entirely proper – and actually, required under *Lundgren* – for the jury to consider the issue of remorse to determine whether it is mitigating.

What the prosecution cannot do is attempt to convert the lack of remorse into an aggravating circumstance. The State never did so in this case. In fact, the State went out of its way to highlight this limitation in closing argument. The State explicitly told the jury that it could not weigh or consider anything other than the aggravating circumstances in the indictment as a reason to impose death during the second phase:

> “Now, as I mentioned earlier, you think of it like a scale. You're placing evidence on two different sides of that scale, and it is our burden to you to prove that that aggravation outweighs the mitigation in this case. You'll notice that there is a very bold line between those two things. It is important that you keep those two kinds of evidence separate in this case because they are different kinds of evidence. What we introduce over here stays on this [aggravating circumstances] side, and what they introduce or what anyone introduces over here stays on this [mitigating factors] side. It cannot be applied over here. You keep those two things separate and you decide * * * whether we proved that the aggravation outweighs the mitigation.
>
> Respect that line between the middle of those things so what goes on either side of that scale in this case, what was the evidence that you heard? It was the specifications that you decided in the first phase, the course of conduct specification, and the various felony murder specifications. That's what goes on the aggravation side, and **that's the only thing that goes on the aggravation side**.”

Tr. 7597 (emphasis added).

Madison’s sixth proposition is without merit and should be overruled.

<u>Response to Proposition of Law VII</u>: The trial court properly allowed the State to introduce relevant and admissible evidence during the guilt phase.

In his seventh proposition of law, Madison challenges the trial court’s admission of four areas of testimony during the guilt phase of his trial. This Court will not reverse a trial

court's ruling on evidentiary issues absent an abuse of discretion. *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 97.

A. Madison's lack of knowledge or awareness of the number of victims.

Madison first argues that the trial court erred by admitting portions of the video in which Madison claimed that he did not know how many people he killed. This argument is addressed under Madison's sixth proposition of law, subsection C, supra. In sum, Madison was purposely evasive as to how many victims he killed, stating at one point, "If there's three, I'm pretty sure there's more." *See* State's Ex. 302-A, interview on July 20, 2013, p. 223. Police did not discover Sheeley and Deskins' bodies until July 20. Madison's evasive non-denial about how many people he killed was relevant to show his consciousness of guilt. Once again, this could not have resulted in prejudice because the State never argued at trial that there might be additional victims beyond those charged in the indictment.

B. The testimony of Quiana Baker.

At trial, the State introduced evidence showing that Madison compared himself to notorious serial killer Anthony Sowell and invoked Sowell's name in describing what he wanted to do to women. Specifically, Quiana Baker, a female acquaintance of Madison's, spoke to Madison after he left a funeral. Madison told Baker, "These hoes be acting crazy, acting like they don't want to f*** with a real n**** and they make you want to * * * Anthony Sowell – a b****." Tr. 4535. As this Court is aware, Anthony Sowell is a serial killer on death row for strangling 11 women to death and burying their bodies in and around his home on the east side of Cleveland between 2007 and 2009. *See State v. Sowell*, 148 Ohio St.3d 554, 2016-Ohio-8025, 71 N.E.3d 1034.

In Madison's interviews, Madison also invoked Sowell's name:

> "[E]verybody has some type of skeleton in their closet, and whether it be a pastor or chief of police, like, you know, there wasn't anyone. Skeletons can be as big as the name, like chief of police, his skeletons can be just as big as, say Anthony Sowell, all the way down to the little girl just leaving daycare[.]"

See State's Ex. 302-A, July 19 interview, p. 41. Madison asked, "When it's all said and done, where does this, how would this affect, you know, society, our society, you know, the Castro guy, and the Sowell –[.]" July 20 interview, p. 71.

Prior to trial, on October 17, 2014, Madison's defense counsel filed a motion in limine seeking to prevent "employees of the Cuyahoga County Prosecutor's Office from comparing Defendant to Anthony Sowell" at trial. Tr. 574. The State indicated that it had no objection to that request. Tr. 574-575. The trial court thus granted the motion. Tr. 575. The State made clear, however, that Sowell's name would come up in testimony about things Madison himself had said. Tr. 802. The State thus agreed that while it would not compare Madison to Sowell, Madison's own words doing so were relevant and admissible evidence. The State scrupulously adhered to that limitation throughout trial, never comparing Madison to Sowell at any point. The State also redacted all of the portions of Madison's interview in which the detectives – rather than Madison – compared Madison to Sowell. *See* State's Ex. 302, July 20 interview, p. 94-95, 181, 183, 185; July 26 [sic] interview, p. 82; July 22 interview, p. 68, 88.

Immediately prior to Quiana Baker's testimony at trial, the defense asked the trial court to preclude Baker from testifying that Madison invoked Sowell's name in a conversation with her about his frustrations towards women Tr. 4525. The State responded that although it would not compare Madison to Sowell, Madison's *own* statement comparing himself to Sowell was admissible as an admission by a party-opponent under Evid.R. 801(D)(2)(a). Tr. 4525-26. The State also noted that Madison's reference to Sowell "forecasts intent on this defendant's part." Tr. 4526. The trial court permitted Baker to

testify that Madison "said he was aggravated with the way women treating him and they make him want to Anthony Sowell – a B word." Tr. 4535.

Madison's invocation of Sowell's name was highly relevant to his prior calculation and design to commit all three murders in this case. It directly refuted the defense's claim in opening statements that "the deaths of Miss Sheeley, Deskins, and Terry * * * were not the result of any advanced planning by Mr. Madison. They were simply the result * * * of a spontaneous eruption of violence[.]" Tr. 3969; 3972. It also corroborated the State's theory of motive, showing that Madison killed all three victims out of an intense hatred of women. Tr. 6196-6198. The evidence was admissible for all of those purposes.

C. The testimony of Eugenia Thomas.

For much the same reasons, the trial court also properly admitted the testimony of Eugenia Thomas. Thomas testified that Madison called her one day from the mall, said that he was "watching the b****es[,]" and "talked about hitting women and tying them up." Tr. 5953. Madison also told Thomas that "he wanted to kill his baby mama." Tr. 5959.

This was directly relevant to the sexual motivation specifications in the indictment, which required the State to prove that Madison committed the murders with "a purpose to gratify the sexual needs or desires of the offender." R.C. 2971.01(J). Madison exercised his right to a jury trial as to those specifications, requiring the State to introduce evidence to support that charge. Thomas' testimony that Madison fantasized about hitting women and tying them was up was also (1) substantive evidence of Madison's identity as the killer, given that all of the victims were bound and that Shetisha Sheeley suffered a contusion to the face, (2) supported the State's theory that Madison kidnapped each victim, restraining them by

force, (3) showed the existence of prior calculation and design to commit the murders, and (4) showed Madison's motive to commit the murders.

D. Video of Madison's conversation with Det. Yashila Crowell and his statements to himself in the interview room.

Madison claims that the trial court committed "obvious error" by allowing the State to introduce a portion of the video in which Madison spoke to Det. Yashila Crowell when she entered the interrogation room. *Appellant's Brief*, p. 170. Madison claims that Det. Crowell "was not identified on the recording, but the prosecutor identified her in closing argument as ECPD Detective Yashila Crowell." *Id.* But Crowell actually testified in the guilt phase. Tr. 5754-5770. By the time closing arguments occurred, the jury had already seen her testify and knew what she looked like. It was not error for the prosecutor to refer by name to a witness the jury had already seen testify.

The introduction of the portion of the video containing Madison's conversation with Crowell was also proper. In that conversation, Madison smiled at Crowell and told her to "[b]e good," essentially flirting with her. Dr. Pitt, in turn, relied on this portion of the video in his testimony that Madison was capable of being very charming. Tr. 6455. Dr. Pitt noted that while Madison had been evasive with the male officers, when Det. Crowell entered the interview room, Madison suddenly be became "affable and charming and delightful and he's chatting her up like it's nobody's business." Tr. 7455. This was central to the State's theory of the case. The State argued at trial that Madison lured all three victims into his apartment and then murdered them once inside. The evidence of Madison's interaction with Det. Crowell showed that Madison was deceptive, that he could be charming, and that he was able to change his demeanor at a moment's notice to fit a given situation.

This evidence was also inconsistent with Dr. Cunningham's testimony that Madison's ability to make choices were so compromised by his upbringing that the concrete had "hardened" by the time he became a teenager, and that he was like a three-year-old child who could never walk again after being hit by a car. Tr. 6984; 7178. It contradicted Dr. Cunningham's testimony that Madison was "fundamentally impaired in his abilities to relate to others, form attachments and friendships * * *." Tr. 7141. If Madison was able to change his behavior at a moment's notice, this tended to show that he was not impaired in his ability to do so.

Madison also challenges the admission of statements he made to himself while alone in the interview room. The fact that Madison was not being questioned at the time does not somehow make those statements inadmissible, and Madison cites no authority to support his insinuation that they should be. Madison had no reasonable expectation of privacy in a police interview room. *See State v. Williams*, 11th Dist. Trumbull No. 2012-T-0053, 2013-Ohio-5076, ¶ 32 ("The majority of our cases conclude there is no reasonable expectation of privacy in conversations that occur in police stations, including interrogation rooms"); *State v. Clemons*, 7th Dist. Belmont No. 10 BE 7, 2011-Ohio-1177, ¶ 75 ("Permitting police to record statements made by individuals left in a police interrogation room after their arrest 'does not intrude upon privacy and freedom to such an extent that it could be regarded as inconsistent with the aims of a free and open society") (internal quotations omitted).

Madison's statements to himself were also relevant to show Madison's ability to change his demeanor. Just as with Madison's conversation with Det. Crowell, his sudden explosive rage when police left the room showed that Madison was capable of changing his behavior on a dime. It cast doubt on the truthfulness of Madison's statements and demeanor

towards the police while they were in the room with him. It also showed that Madison had an explosive temper, which was relevant to the circumstances of how the murders occurred.

Finally, any error in the admission of any evidence under any of the four categories Madison identifies here was harmless. Madison explains to this Court why that is so:

> "the State already had the DNA evidence, the items in Madison's apartment, the text messages, the five garbage bags used on Shirellda Terry's body that were 'indistinguishable' from the 15 bags remaining in the 20-quantity box in Madison's apartment, *and* Madison's 17-plus-hour interrogation from which references to 'Sowell' had been redacted * * *."

Appellant's Brief, p. 168. In light of what all parties now agree was overwhelming evidence of Madison's guilt, Madison's seventh proposition is without merit and should be overruled.

> ***Response to Proposition of Law VIII: The prosecution may refer to a defendant as a "serial killer" where the charges in the indictment allege that the defendant killed three or more victims as part of a course-of-conduct, with significant common characteristics between the killings.***

In his eighth proposition of law, Madison argues that the trial court erred by allowing the State to refer to him as a "serial killer." Madison cites no authority for the proposition that the prosecution is not permitted to refer to the defendant as a "serial killer" in a case in which the defendant is charged with multiple murders. From the State's research, there appears to be little authority on point. *But see Booth-El v. Nuth*, 140 F. Supp. 2d 495, 537-538 (D.Md.2001) (defense counsel was not ineffective for failing to object to prosecution's reference to the defendant as a "serial killer" because "the remark was accurate").

The State's use of the term "serial killer" in this case was accurate. "Serial killings" are defined as "a series of three or more killings, not less than one of which was committed within the United States, having common characteristics such as to suggest the reasonable probability that the crimes were committed by the same actor or actors." 28 U.S.C. 540B(b)(2); *see also* Douglas et al., *Crime Classification Manual* 13 (2d ed. 2006) ("Serial

murders are involved in three or more separate events with an emotional cooling-off period between homicides").

The indictment alleged that Madison killed three victims on separate dates. Each count of aggravated murder in the indictment also included course-of-conduct specifications under R.C. 2929.04(A)(5). Those specifications required the State to prove "some factual link between the aggravated murder with which the defendant is charged and the other murders or attempted murders that are alleged to make up the course of conduct." *State v. Sapp*, 105 Ohio St.3d 104, 2004-Ohio-7008, 822 N.E.2d 1239, ¶ 52. The jury found Madison guilty of all of those counts and specifications. The State thus proved at trial that Madison killed three victims on separate dates. The State's reference to Madison as a "serial killer" was a fair and accurate comment on the evidence that the State introduced at trial.

Madison acknowledges that the murders had a "serial aspect" in his brief. *See Appellant's* Brief, p. 63. A prosecutor is entitled to "wide latitude in summation as to what the evidence has shown and what reasonable inferences may be drawn therefrom." *State v. Stephens*, 24 Ohio St.2d 76, 82, 263 N.E.2d 773 (1970).

This Court has previously found a prosecutor's reference to a defendant as a "serial killer" to be harmless error. *See State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 204. *See also Broom v. Mitchell*, 441 F.3d 392, 412, n. 31 (6th Cir.2006) (finding harmless error where the prosecutor stated that the defendant "kills in the community, and it's going to go on and on and on," suggesting that he was a "serial killer"). Significantly, however, both *McKelton* and *Broom* were cases in which the defendant was facing the death penalty for only one aggravated murder (the defendant in *McKelton* being convicted of non-capital murder for the killing of a second victim). In this case, the jury found Madison guilty

of three aggravated murders, each with a course-of-conduct specification. The term "serial killer" was appropriate under the facts of this case. And even if it was not, any such error was certainly harmless in light of the overwhelming evidence of Madison's guilt and the aggravating circumstances. Madison's eighth proposition should be overruled.

<u>Response to Proposition of Law IX</u>: Mercy is not a mitigating factor.

In his ninth proposition of law, Madison argues that the trial court erred by denying his request for an instruction that the jury could consider mercy during the sentencing phase, and by allowing the State to inform the jury that mercy was not a mitigating factor. The trial court, and the State, were correct in doing so.

"[M]ercy is not a mitigating factor." *State v. O'Neal*, 87 Ohio St.3d 402, 416, 721 N.E.2d 73 (2000). This is because "[m]ercy, like bias, prejudice, and sympathy, is irrelevant to the duty of the jurors." *State v. Lorraine*, 66 Ohio St.3d 414, 418, 613 N.E.2d 212 (1993).

The United States Supreme Court has prohibited considerations of "sympathy" at sentencing, finding that such a prohibition "serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors, which, we think, would be far more likely to turn the jury against a capital defendant than for him." *California v. Brown*, 479 U.S. 538, 543, 107 S. Ct. 837, 93 L.Ed.2d 934 (1987). This rule also "fosters the Eighth Amendment's 'need for reliability * * *'" and "ensures the availability of meaningful judicial review [.]" *Id*. Permitting the jury to consider mercy, by contrast, "would violate the well-established principle that the death penalty must not be administered in an arbitrary, capricious or unpredictable manner." *Lorraine* at 417. "The arbitrary result which may occur from a jury's consideration of mercy is the exact reason the General Assembly established the procedure now used in Ohio." *Id*.

Madison cites *Kansas v. Carr*, --- U.S. ---, 136 S. Ct. 633, 193 L.Ed.2d 535 (2016), arguing that the Supreme Court in *Carr* approved of mercy as a mitigating factor. This Court rejected this characterization of *Carr* in *State v. Wilks*, Slip Opinion No. 2018-Ohio-1562, ¶¶ 180-182 (finding that the prosecution correctly told the jury that their sentencing determination was an "evidence-based" decision). This Court noted that the Supreme Court in *Carr* actually held "that instructions on the burden of proof for mercy are neither useful nor required." *Id.*, ¶ 181. As a result, "[n]othing in *Carr* supports appellant's argument that the prosecutor misstated the law." *Id.*, ¶ 182. Madison's ninth proposition is without merit and should be overruled.

<u>Response to Proposition of Law X</u>: The trial court did not err by allowing the defense expert psychologist to testify extensively about the defendant's history, character, and background, but precluding him from testifying that the defendant's mitigating evidence made him less "morally culpable" for the crimes in the indictment.

In his tenth proposition of law, Madison argues that the trial court improperly limited the scope of Dr. Cunningham's testimony as to Madison's "moral culpability" during the sentencing phase. This Court has previously recognized that "moral culpability" is not relevant to the concept of mitigation. Dr. Cunningham's testimony, purporting to tutor the jury on Madison's "moral culpability," was replete with legal conclusions and instances in which Dr. Cunningham attempted to instruct the jurors as to how they should weigh the mitigating evidence in this case. The trial court correctly curbed that testimony, allowing Dr. Cunningham to testify extensively about Madison's history, character, and background, but preventing him from offering legal conclusions or discussing concepts the defense had already agreed they would not place at issue. Even so, Dr. Cunningham testified extensively

to the jury about a comprehensive range of subjects over 337 pages of direct examination. The trial court did not abuse its discretion by somehow overly limiting that testimony.

A. A capital defendant does not have an unlimited right to present mitigating evidence.

In *Lockett v. Ohio*, 438 U.S. 586, 98 S .Ct. 2954, 57 L.Ed. 2d 973 (1978), a plurality of the United States Supreme Court held that the Eighth Amendment requires that the sentencer "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (emphasis in original). The Court also noted, however, that "[n]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Id.* at 604, fn. 12. As a result, the defense in a capital case does not have "*carte blanche* to introduce any and all evidence that it wishes.'" *United States v. Purkey*, 428 F.3d 738, 756 (8th Cir.2005).

The Supreme Court has relied on footnote 12 of *Lockett* to hold that courts may exclude certain evidence from capital sentencing hearings as irrelevant. *See Oregon v. Guzek*, 546 U.S. 517, 523, 126 S. Ct. 1226, 163 L.E.2d 1112 (2006) (defendant has no right to present new evidence of his innocence at the sentencing hearing); *Blystone v. Pennsylvania*, 494 U.S. 299, 306-307, 110 S. Ct. 1078, 108 L.Ed.2d 255 (1990) (defendant has no right to jury instruction encouraging jury to weigh lack of severity of aggravating factors as a mitigating circumstance).

Likewise, this Court has also relied on footnote 12 of *Lockett* to uphold limitations on what evidence a defendant may present during the second phase. *See State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 245 (trial court properly excluded

testimony from the victim's family members recommending the defendant receive a life sentence); *State v. Williams*, 73 Ohio St.3d 153, 163, 652 N.E.2d 721 (1995) (trial court properly prohibited defense counsel from commenting on the defendant's emotional reaction to the reading of the guilty verdict in the first phase); *State v. Esparza*, 39 Ohio St.3d 8, 11, 529 N.E.2d 192 (1988) (trial court properly prohibited the defendant from introducing a letter he wrote to his former foster family prior to trial).

B. "Moral culpability" is irrelevant to mitigation.

The most significant problem with Dr. Cunningham's testimony was that it was centered around the concept of "moral culpability" – a concept this Court has repeatedly said is not related to mitigation. "[M]itigating factors under R.C. 2929.04(B) **are not related to a defendant's culpability** but, rather, are those factors that are relevant to the issue of whether an offender convicted under R.C. 2903.01 should be sentenced to death." *State v. Holloway*, 38 Ohio St. 3d 239, 242, 527 N.E.2d 831 (1988) (emphasis added). "Mitigation is not about blame or culpability, but rather about punishment." *State v. Bey*, 85 Ohio St. 3d 487, 489, 709 N.E.2d 484 (1999) (trial court erred by instructing the jury that mitigating factors "may be considered by you as extenuating or reducing the degree of the defendant's blame [or] punishment").

Because mitigation is not about moral culpability, this Court has held that a prosecutor's statement that "the issue was whether the mitigating evidence lessened [the defendant's] 'moral culpability' * * * was erroneous." *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 201, citing *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 116 (prosecutor's question whether the defendant's mitigating evidence

"lessen[ed] his moral culpability or diminish[ed] the appropriateness of the death sentence * * * strayed from the definition of 'mitigating evidence'").

Dr. Cunningham's report consistently referenced his opinion as to the "moral culpability" of Michael Madison. There is, however, no scientific definition of "moral culpability." There is no statutory definition of "moral culpability." Dr. Cunningham did not provide such a definition in his report. Indeed, moral culpability is not a scientific field at all – it is not subject to any form of procedure, test, or experiment, nor is it derived from widely accepted knowledge, facts, or principles. In short, there is no such thing as an expert in "moral culpability."

A defendant's "moral culpability" is therefore not a proper subject of expert testimony. It is not a matter "beyond the knowledge or experience possessed by lay persons[.]" Evid.R. 702(A). It does not "dispel[] a misconception common among lay persons[.]" *Id.* And Dr. Cunningham was not "qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony[.]" Evid.R. 702(B). Dr. Cunningham was a psychologist. He knew nothing more about "moral culpability" than any other witness in this case. "Moral culpability" is a moral, theological, or philosophical judgment, that is not related to the field of psychology. Dr. Cunningham could testify as to the psychological effects of the risk factors in Madison's life (i.e. people are more likely to commit crime later in life if they have a tough childhood), but he could not then draw a conclusion that this made Madison less morally culpable. That is the line that the trial court drew.

C. Dr. Cunningham's intended testimony as to "moral culpability" would have impermissibly instructed the jury as to legal conclusions.

Dr. Cunningham's report contained numerous instances in which he attempted to instruct the jury about the role that a defendant's "moral culpability" plays in mitigation under various decisions by the United States Supreme Court. For example, Dr. Cunningham stated in this report:

> "Moral culpability is a concept at the heart of mitigation (*Burger v. Kemp*, 1987), citing *Woodson v. North Carolina* (1976) (see also other SCOTUS decisions, e.g., *Coker v. Georgia*, 1977; *Lockett v. Ohio*, 1978; *California v. Brown*, 1987; *Franklin v. Lynaugh*, 1988; *Penry v. Lynaugh*, 1989; *South Carolina v. Gather*, 1989; *Payne v. Tennessee*, 1991; *Graham v. Collins*, 1993; *Penry v. Rembert*, 2001; *Atkins v. Virginia*, 2002; *Wiggins v. Smith*, 2003; *Roper v. Simmons*, 2005; *Abdul-Kabir v. Quarterman*, 2007)."

See Dr. Cunningham's Report, p. 4. Dr. Cunningham continued:

> "This concept of moral culpability is central to the rationale of *Wiggins v. Smith*, *Atkins v. Virginia*, and *Roper v. Simmons* – i.e., background factors, mental retardation and/or youthfulness all impact on the level of moral culpability of a capital defendant, and the associated death eligibility and deathworthiness of that defendant. The formative or limiting impact from any source of developmental damage or impairment is relevant in the weighing of moral culpability."

Id., p. 5. It was the trial court's responsibility to instruct the jury on the law. The trial court correctly precluded Dr. Cunningham from venturing into legal conclusions in his testimony.

Even where a witness is "qualified as an expert" to testify, and that expert's opinion is based upon reliable data and methodology, Evid.R. 702 still requires the trial court to determine whether the expert's testimony will "assist the trier of fact in understanding the evidence or a fact in issue[.]" *State v. Boston*, 46 Ohio St. 3d at 118, 545 N.E.2d 1220, 1231. Dr. Cunningham's testimony as to "moral culpability," and his interpretations of case law, failed this test. Dr. Cunningham intended to conduct his own weighing of the aggravating circumstances and mitigating factors from the witness stand, and then instruct the jury that

they should adopt his weighing, with the stamp of "expert testimony" attached to his opinion. Such testimony would have done nothing more than tell the jury what verdict to reach.

"An expert witness is not permitted to give an opinion relating to the law, and a trial court that allows such an opinion abuses its discretion." *Witzman v. Adam*, 2d Dist. Montgomery No. 23352, 2011-Ohio-379, ¶ 62, citing *Kraynak v. Youngstown City School Dist. Bd. of Edn*., 118 Ohio St.3d 400, 2008-Ohio-2618, 889 N.E.2d 528, ¶ 21 (a trial court abuses its discretion when it allows an expert witness to interpret for the jury what a statute requires); *Reynolds v. City of Oakwood*, 38 Ohio App.3d 125, 130, 528 N.E.2d 578 (2d Dist.1987) (saying that a witness may not instruct the jury on what the applicable law is in a particular circumstance). "An expert's interpretation of the law should not be permitted, as that is within the sole province of the court." *Wagenheim v. Alexander Grant & Co*., 19 Ohio App. 3d 7, 38, 482 N.E.2d 955 (10th Dist.1983).

"Generally, the use of expert testimony is not permitted if it will usurp either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it." *United States v. Duncan*, 42 F.3d 97, 101 (2d Cir. 1994) (citation and quotations omitted). "[I]t is not for the witnesses to instruct the jury as to applicable principles of law, but for the judge." *United States v. Zipkin*, 729 F.2d 384, 387 (6th Cir.1984). "Such testimony does not assist the trier of fact, but rather undertakes to tell the jury what result to reach, and attempts to substitute the expert's judgment for the jury's[.]" *Nimely v. City of N.Y.*, 414 F.3d 381, 398 (2d Cir. 2005) (internal citations and quotations omitted).

The weight to be given to each aggravating circumstance and mitigating factor was exclusively the province of the jury. No witness, expert or otherwise, could tell the jurors

how much weight to give any piece of evidence in this case. An expert certainly could not do so by citing case law to make his opinion seem as if it was a legally sanctioned fact. Dr. Cunningham intended to do just that by telling the jury that the State's aggravating circumstances should be given less weight because of Madison's upbringing. Dr. Cunningham could testify about what happened in that upbringing, but he could not tell the jury how much weight they should give it or instruct the jury as to the law.

D. The trial court adhered to these principles in correctly limiting the scope of Dr. Cunningham's testimony regarding "moral culpability."

During the sentencing phase, defense counsel stated that they were not pursuing any argument that Madison had a mental disease or defect that caused him to lack the substantial capacity to either appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Tr. 6558, 6592, 6853; *see also* R.C. 2929.04(B)(3). Nevertheless, Dr. Cunningham, in his testimony, repeatedly told to the jury that various factors beyond Madison's control negatively impacted his mental state to the point that Madison's free will was compromised. This was, as the trial court correctly noted, a backdoor diminished capacity defense. Tr. 6958.

On direct examination, Dr. Cunningham gave a powerpoint presentation to the jury. Tr. 6842-43. He began by showing the jury a sliding scale, with the word "choice" in the middle, and "damaging or impairing factors" pushing the left side of the scale upward. On the right side of the scale, Dr. Cunningham placed the phrase "moral culpability," with an arrow pointing downward. Dr. Cunningham told the jury that "[t]he greater the damaging and impairing factors, the steeper the angle of the choice, the lower the quality of decisional resources they could bring to bear." Tr. 6848.

At that point, the State objected to Dr. Cunningham's presentation on the grounds that it purported to tell the jury how much weight to assign to the mitigating factors. Tr. 6848-58. The parties convened outside the presence of the jury. The trial court, referring to Dr. Cunningham's testimony about factors that "diminished his control," asked, "Aren't you arguing diminished capacity?" Tr. 6852. The defense responded that they were not, because they acknowledged that Madison knew the difference between right and wrong. Tr. 6853. The trial court decided to allow Dr. Cunningham's testimony. Tr. 6861.

Eventually, the trial court sustained an objection by the State to Dr. Cunningham's continued testimony about Madison's lack of "choice." Tr. 6941. The trial court found that "by continually putting up choices, it gives this jury the impression that the defendant does not have a choice. I let you do it initially to show that these factors lead to bad choices. But we're past that and need to move on." Tr. 6958. The trial court further noticed that the defense was "trying to kind of back-door in that diminished capacity [defense], which I think is inappropriate." Tr. 6958.

The trial court then voir dired Dr. Cunningham outside the presence of the jury as to what he meant by "wiring." Dr. Cunningham explained that this meant "any factor having a neurodevelopmental significance[,]" such as brain damage, chronic stress, ADHD, and child or teen alcohol or drug abuse. Tr. 6965-66. Once again, the trial court overruled the State's objection and allowed Dr. Cunningham to testify, recognizing that this was "just another way of saying his family upbringing." Tr. 6975.

Despite the trial court's ruling, Dr. Cunningham suggested at several points that Madison's choices to commit the murders were, in fact, a foregone conclusion. Dr. Cunningham testified: "By the time we get out to the kid being 14, 15, 16, 17, by the time he

is in the criminal justice system or begins to act out sexually, as he did with Olivia Penn, are - we are way late in the game." Tr. 6984. He compared Madison's ability to make choices to concrete, which had "hardened" by the time Madison became a teenager. Tr. 6984. He continued: "We are way deep in the game in terms of the concrete being hard. Even if he had sought treatment at age 17 * * * we are way late." Tr. 7178. Elsewhere, Dr. Cunningham compared Madison to a three-year-old child who was struck by a car and has his spinal cord severed, who "is never going to walk again." Tr. 7178.

All of this testimony was intended to suggest to the jury that Madison was not as morally culpable as other people because he did not have the same level of choice. It was, as the trial court noted, a backdoor diminished capacity defense. But the trial court admitted all of this testimony regardless. Madison therefore cannot now claim that Dr. Cunningham was unable to inform the jury as to his findings, his conclusions, or the basis for his opinions in this case. The trial court allowed Dr. Cunningham great leeway in his testimony. The trial court simply would not allow him to testify about the concept of "moral culpability." The trial court was correct in doing so.

E. The trial court allowed Dr. Cunningham to substantially testify regarding adverse developmental factors and heredity.

Madison identifies two other areas in which he claims the trial court restricted his testimony: (2) evidence about the scientific connection between adverse developmental factors and choice, and (3) certain adverse development factors and research about them. A review of Dr. Cunningham's 337-page direct examination reveals that Dr. Cunningham testified extensively, and repetitively, about both subjects. Dr. Cunningham went item-by-item through each adverse developmental factor he considered in this case. Tr. 6909-31;

6944-52; 6979-86; 6996-7007. The State made clear that it did not object to Dr. Cunningham discussing those adverse developmental factors. Tr. 6955.

Dr. Cunningham also testified extensively as to the hereditary aspect of both alcoholism and personality disorders. Tr. 6917-21. He explained that "the most powerful risk factor for alcohol and drug abuse or dependence is heredity." Tr. 6918. He explained that this was purely biological, and that a person's chances of being an alcoholic were four or five times greater if that person had a first degree relative who was an alcoholic. *Id.* He testified that this came from "peer-reviewed literature, scientific peer-reviewed studies that have examined this." Tr. 6919. He then displayed a chart of Madison's family history, with every individual with alcohol and drug abuse problems colored in yellow. Tr. 7019.

With respect to personality disorders, Dr. Cunningham also testified that "it's scientifically accepted in the scientific community that as we talk about the etiology or the cause of disorders that hereditary factors are identified." Tr. 6920. He continued: "The peer review research identifies that the personality characteristics of a number of different disorders and continuums of disorders have a hereditary element to them." Tr. 6922. He testified specifically as to the effect of hypoxia and anoxia, explaining that "[h]ypoxia means oxygen deprivation to the brain, and anoxia means oxygen cutoff to the brain." Tr. 6928; 7058-59.

The record thus shows that Dr. Cunningham testified at length about the very issues that Madison now claims the trial court did not allow. Eventually, the trial court began to sustain objections to additional testimony on the grounds that it was cumulative. The trial court was within its discretion to do so. *See* Evid.R. 403(A) (a trial court has discretion to

exclude otherwise relevant evidence "if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence").

Much of the evidence Madison identifies as being excluded here consists of a number of demonstrative powerpoint slides, for which the trial court never made a specific ruling. Defense counsel proffered groups of those slides during breaks in the testimony. Those slides were not evidence in and of themselves; they were simply intended to visually supplement Dr. Cunningham's testimony. As such, they were cumulative to that testimony, which was lengthy, comprehensive, and well-developed.

Finally, as explained above, this was an overwhelming case for the death penalty. Madison brutally murdered three innocent women and then disposed of their bodies around his apartment. He showed no remorse at any point and refused to even give an unsworn statement at trial. He was not seriously mentally ill. There was little or no evidence that he was sexually abused as a child. In light of the overwhelming evidence, and the considerable leeway that Dr. Cunningham was afforded at trial, the dozens of cumulative, demonstrative slides that the defense proffered could not have affected the outcome. Madison's tenth assignment of error is without merit and should be overruled.

***Response to Proposition of Law XI*: Where a criminal defendant voluntarily initiates a psychological evaluation, and introduces evidence from that evaluation in his trial, the State is entitled to a reciprocal evaluation of the defendant by its own expert.**

In his eleventh, twelfth, and thirteenth propositions of law, Madison raises three claims regarding the psychiatric evaluation of him completed by the State's expert, Dr. Steven Pitt. Madison's eleventh proposition challenges the constitutionality of the trial court's order allowing Dr. Pitt to evaluate Madison under the Fifth Amendment. His twelfth proposition argues that he had a Sixth Amendment right to have counsel present with him

during that evaluation. And his thirteenth proposition argues that Dr. Pitt's actual evaluation exceeded the scope of the trial court's order granting that evaluation. Madison blends these arguments together in each of these three propositions. For clarity, and to avoid repetition, the State will respond to each argument in the order of propositions described above.

Madison's eleventh proposition challenges the trial court's order that he submit to a psychiatric evaluation by the State's expert, Dr. Steven Pitt. This is the same order that the court of appeals affirmed in Madison's interlocutory appeal, *see State v. Madison*, 8th Dist. Cuyahoga No. 101478, 2015-Ohio-4365, and over which this Court declined jurisdiction once already prior to trial. Madison now brings the same argument as part of his appeal of right. This Court should affirm the well-reasoned opinion of the court of appeals below.

A. Civ.R. 35(A) allows a trial court to order any party to submit to a mental examination when the mental condition of the party is in controversy.

Civ.R. 35(A) governs orders for mental or physical examinations. It provides:

> "**Order for examination.** When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit himself to a physical or mental examination or to produce for such examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made."

"[T]he plain language of Crim.R. 57(B) permits a trial court in a criminal case to look to the Rules of Civil Procedure for guidance when no applicable Rule of Criminal Procedure exists." *State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶ 10. Madison does not dispute that Civ.R. 35(A) granted the trial court the authority to order him to submit to a mental examination. Instead, he challenges that order on constitutional grounds.

B. Madison placed his mental condition in controversy.

A party's mental condition is "in controversy" when it is "directly involved in some material element of the cause of action or defense." *In re Guardianship of Johnson*, 35 Ohio App.3d 41, 44, 519 N.E.2d 655 (10th Dist.1987), quoting *Paul v. Paul*, 366 So.2d 853 (Fla.App. 1979). The "in controversy" requirement is met when the mental health of the parties is a relevant factor in the case. *Brossia v. Brossia*, 65 Ohio App.3d 211, 215, 583 N.E.2d 978 (6th Dist.1989).

As the court of appeals found, Dr. Davis' expert report "contains several conclusions about Madison's mental condition – conclusions that Madison intends to introduce as mitigating evidence" at trial. *State v. Madison*, 8th Dist. Cuyahoga No. 101478, 2015-Ohio-4365, ¶ 17. These included all of the following:

> "* Exposure to childhood trauma had physical and chemical effects on Madison's brain that result in subsequent psychological dysfunction.
>
> * Exposure to violence, verbal and physical abuse results in an imbalance in an important chemical, cortisol, in the brain that results in damage to structures of the brain such as the hippocampus that is responsible for the control of memory, emotions, and attention.
>
> * Exposure to abuse has also been shown to affect the limbic system (the emotional seat of the brain) especially the amygdala, an area of the brain critically involved in moods, emotions such as anger and fear and emotional learning.
>
> * Exposure to abuse during critical times can result in damage to structures such as the frontal lobes that are critical for executive functions, such as attention, working memory, motivation, and behavioral inhibition.
>
> * The supposed damage to Madison's frontal lobes results in an inability to plan and anticipate outcomes, to be flexible, to self-monitor and show good judgment and be aware of one's self and one's impact upon others.
>
> * Thus, the extreme trauma and abuse experienced by Mr. Madison resulted in a neurobiologically determined pathway placing him at much greater risk for psychological, behavioral and substance abuse problems. [Madison's] instability as a youth as well as potentially his family history, suggests the

> potential of a possible underlying mood disorder, likely Posttraumatic Stress Disorder or at a minimum, a need for a psychiatric consultation.
>
> * In Mr. Madison's case, it is highly likely that his early victimization resulted in severe behavioral symptoms that are frequently associated with Posttraumatic Stress Disorder in males.
>
> * Youth who come from markedly abusive and dysfunctional environments do not have the chance to learn appropriate social coping skills, skills to regulate emotions, skills to control impulses and skills to relate in positive, socially appropriate ways.
>
> * As an adult, [Madison] presented with substance abuse, behavioral instability as well as antisocial behaviors."

Id. The court of appeals did not discuss Dr. Cunningham's report because, at the time, Dr. Cunningham had not yet written it.

Both Dr. Davis and Dr. Cunningham continued to place Madison's mental state in controversy during their testimony. For example, Dr. Davis' testimony essentially mirrored all of the findings in his report:

- Madison told Dr. Davis that he felt "emotionally neglected" and "psychological[ly] abandoned." Tr. 6587-88.
- Madison had a psychological evaluation done in 1994 and was found "not to have a learning disability[,]" but did have "severe behavioral issues." Tr. 6599.
- Madison's cognitive development, including the negative ways in which Madison's upbringing affected the development and formation of his brain. Tr. 6611-18.
- Risk factors that caused Madison to develop antisocial behavior. Tr. 6618-20; 6627-28.

- Neurodevelopmental risk factors that resulted in a neurobiologically determined pathway placing Madison at much greater risk for psychological, behavioral and substance abuse problems. Tr. 6622-23.
- The effect of childhood trauma on the developing brain. Tr. 6632-34.

Additionally, Dr. Cunningham testified to all of the following:

- The "wiring" of Madison's brain. Tr. 6917.
- "[T]he effect of toxic or damaging * * * neurodevelopmental factors, essentially the wiring, nervous system related[.]" Tr. 6909.
- The "personality characteristics of a number of different disorders and continuums of disorders have a hereditary element to them." Tr. 6922.
- Madison may have had "a disturbance" that "[w]ouldn't have to be a disorder, a formally diagnosed disorder." Tr. 6926.
- There was a "hereditary predisposition to personality disturbance." Tr. 7007.
- The effect of "[n]eurodevelopmental factors" such as "fetal alcohol exposure, head injury, hypoxia or anoxia from being choked." Tr. 6927; Tr. 7054-57. He explained that "[h]ypoxia means oxygen deprivation to the brain, and anoxia means oxygen cutoff to the brain." Tr. 6928; 7058-59.
- The "psychologically damaging or impairing factors that would serve to increase the likelihood of bad choices, to reduce the decisional resources that [Madison] brings to bear." Tr. 6930.
- Factors that the FBI Behavioral Science Unit found to be common in the childhoods of serial sexual homicide offenders, and which of those factors applied to Madison. Tr. 6935-38; 6945-51.

- The effect of “psychologically injuring or traumatizing or neglecting or abusing or exposing to corrupted influences the next generation who then grow up to be damaged people psychologically, injured and damaged people, who as they go about their lives exhibit that.” Tr. 6925.
- He noted that “there’s at least a hypothesis in this case that Mr. Madison’s escalating substance abuse has a contributing factor * * * to his involvement in crime or violence.” Tr. 6951.
- The “trauma and stress” Madison experienced in childhood “results in changes in the electrical activity and chemistry and even anatomy of the brain. * * * So research findings that are psychopsysiologic effects, neurohormonal chemical accounts and also neuroanatomical effects from that exposure to chronic stress.” Tr. 7061-62.
- “[N]eglect is more psychologically damaging that being actively physically abused.” Tr. 7097.
- “Long-term effects of sexual trauma on males include mood disorder like depression, somatic disturbances, psychical complaints, self-esteem deficits, difficulty maintaining intimate, emotional, sexual relationship[s], problems with sexual adjustment * * *.” Tr. 7140.
- Madison was “fundamentally impaired in his abilities to relate to others, form attachments and friendships, understand the emotional experience of others * * *.” Tr. 7141.
- “These events that he has experienced growing up, that psychologically damaged him, the effect of that is that here in the present, that this is somebody whose sexuality is disturbed, whose sense of social reciprocity is disturbed, whose capacities to take

> responsibility for himself or to organize his -- and marshal his resources in a productive way that would even give him much life satisfaction out here in the community, all of those things are impaired." Tr. 7174-75.

All of this testimony placed Madison's mental state at issue in this case. That evidence was directly relevant to Ohio's death penalty sentencing statute that required the jury to consider "any other factors that are relevant" to the imposition of death under R.C. 2929.04(B)(7).

C. Where a defendant introduces expert testimony that places his mental state at issue, he may be compelled to submit to a psychiatric evaluation.

The constitutional law regarding the State's right to its own expert evaluation of a criminal defendant is uncontroversial. It is well-settled that when a defendant introduces psychiatric evidence that places his state of mind directly at issue at trial, he may be compelled to submit to a psychiatric evaluation. *See Buchanan v. Kentucky*, 483 U.S. 402, 422-424, 107 S. Ct. 2906, 97 L.Ed.2d 336 (1987). Conversely, it is also undisputed that "when a criminal defendant 'neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence,' his compelled statements to a psychiatrist cannot be used against him." *Kansas v. Cheever*, 571 U.S. 87, 93, 134 S. Ct. 596, 187 L.Ed.2d 519 (2013), quoting *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866, 68 L.Ed.2d 359 (1981).

The reason for this bright-line distinction is that the choice to be a witness or not is a binary one. A defendant who chooses to be a witness cannot refuse cross-examination. "The immunity from giving testimony is one which the defendant may waive by offering himself as a witness." *Raffel v. United States*, 271 U.S. 494, 496, 46 S. Ct. 566, 70 L.Ed. 1054 (1926). "His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing." *Id.*, at 497.

"The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do." *Id.*, at 499.

In *Estelle v. Smith*, the United States Supreme Court held that a defendant's voluntary participation in a mental examination was a testimonial act. *Estelle* at 463. Examination by a State's expert is thus analogous to cross-examination. It is part of the package that the defendant must accept when he chooses to become a witness by retaining his own expert, participating in an examination, giving statements to that expert, and offering testimony of those statements at trial. Just as in the case of a defendant who chooses to testify at trial, the defendant has "cast aside the cloak of immunity" with regard to his testimony. *Raffel* at 497.

In this case, Michael Madison chose to be a witness, and was not compelled to be one, when he submitted to mental examinations by his own experts and introduced those experts' testimony at trial. The testimonial nature of those acts was starkly clear in this case, where the defense essentially used the testimony of Dr. Davis and Dr. Cunningham to introduce into evidence vast amounts of hearsay statements that Madison made to them during their evaluations. Having chosen to become a witness in his own case, Madison could not then assert a Fifth Amendment privilege against questioning on those same issues.

Once Madison introduced Dr. Davis and Dr. Cunningham's expert psychological testimony at trial, he opened the door to rebuttal of that testimony by the State. "A party has an unconditional right to present rebuttal testimony on matters which are first addressed in an opponent's case-in-chief and should not be brought in the rebutting party's case-in-chief." *Phung v. Waste Management*, 71 Ohio St.3d 408, 410, 644 N.E.2d 286 (1994). As the court of appeals found, to allow a defendant to "present expert evidence of his mental condition without allowing the state to investigate [the defendant's] claims and present a case in

rebuttal is not fair and 'would undermine the adversarial process, allowing a defendant to provide the jury * * * a one-sided and potentially inaccurate view,' unfairly tipping the weight of the evidence in his favor." *State v. Madison*, 8th Dist. Cuyahoga No. 101478, 2015-Ohio-4365, ¶ 22, quoting *Cheever* at 601. "[A]ny burden imposed on the defense by this result is justified by the State's overwhelming difficulty in responding to the defense psychiatric testimony without its own psychiatric examination of the accused and by the need to prevent fraudulent mental defenses." *Battie v. Estelle*, 655 F.2d 692, 702 (5th Cir.1981). The introduction of Dr. Pitt's testimony based on the court-ordered examination therefore did not violate the Fifth Amendment.

D. The State's right to a reciprocal evaluation extends to any "mental status" evidence, including mitigation.

The core of Madison's argument is his attempt to distinguish *Cheever* on the grounds that testimony by a defense expert as to the defendant's mental state does not entitle the State to its own evaluation of the defendant where such evidence is presented solely for purposes of mitigation. Madison's proposed distinction has no basis in case law. In *Buchanan*, the Supreme Court held that a compelled psychological examination was consistent with the Fifth Amendment when the defendant introduced evidence of his mental state to support a claim of "extreme emotional disturbance." *Buchanan* at 424. The Supreme Court placed no emphasis on the nature of the defense involved. Rather, the Court's holding was based on the defendant's introduction of evidence. The underlying rationale of *Buchanan* is one of fair access to evidence, not an arbitrary distinction between types of psychological evidence introduced.

The Supreme Court in *Buchanan* made no attempt to discuss whether Buchanan's defense was a mental disease or defect. The Court instead referred to it broadly as a "'mental

status' defense," with no indication that there was any distinction between offering such evidence at the guilt phase and offering it at the mitigation phase. *Id.* at 423. The dispositive fact was that the defendant in *Buchanan* introduced psychological evidence. "In such circumstances, with petitioner not taking the stand, the Commonwealth could not respond to this defense unless it presented other psychological evidence." *Id.* at 423. The unfairness of only one side having access to a full mental examination, which necessarily includes the participation and statements of the defendant, does not depend on the classification of the defense the defendant chooses to assert.

"Mental status" evidence includes evidence offered for the first time at mitigation. In his brief, Madison relies heavily upon the fact that he did not offer evidence under the R.C. 2929.04(B)(3) subcategory to show that he suffered from a mental disease or defect. But the Supreme Court in *Cheever* explicitly rejected that argument, recognizing that "'mental status' is a broader term than 'mental disease or defect[.]'" *Cheever* at 96. Because "mental status" is broader than R.C. 2929.04(B)(3), it also included evidence of Madison's mental state that he presented as "any other factors that are relevant" to the imposition of death under R.C. 2929.04(B)(7). In this case, that evidence consisted of the effect of childhood trauma on the development of Madison's brain.

There is no precedent – and Madison identifies none – that "mental status" evidence is limited to the guilt phase. Federal courts to have considered the issue have in fact held the opposite: a defendant who intends to presents expert psychiatric testimony in mitigation subjects himself to a compelled evaluation by the State. For example, the Supreme Court in *Estelle* allowed the prosecution to prove future dangerousness – relevant only to the imposition of death under Texas law – through a compelled evaluation "where a defendant

intends to introduce psychiatric evidence at the penalty phase." *Estelle* at 472. And the Court held in *Cheever* that this rule was not limited to affirmative defenses. *Cheever* at 601. *See also United States v. Wilson*, E.D.N.Y. No. 04-CR-1016, 2013 U.S. Dist. LEXIS 47032, *11 (April 1, 2013) ("A mitigation case that eventually includes these types of evidence may very well waive Wilson's Fifth Amendment privilege against self-incrimination"); *United States v. Mikos*, N.D. Ill. No. 02 CR 137-1, 2004 U.S. Dist. LEXIS 18649, *6 (Sep. 14, 2004) ("to the extent that Defendant asserts an insanity defense and/or raises mitigation issues, Defendant and his counsel are aware of the fact that issues relating to the rebuttal of such theories will be well within the scope of any examination conducted by the Government's expert").

"Whether a defendant has waived his Fifth Amendment right is not claim-specific; it is based on principles of fundamental fairness." *Wilson* at *11. By drawing an illusory distinction between guilt-phase defenses and mitigation-phase evidence, Madison is attempting to make his Fifth Amendment privilege claim-specific. He cannot do so. The mitigation phase is every bit as much a part of the capital trial as the guilt phase. *See State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, ¶ 189. The underlying need for fairness remains the same.

E. Allowing the State to rebut expert testimony that Madison introduced regarding his mental state was consistent with both the Fifth and Eighth Amendments.

This Court should also reject Madison's argument that the trial court's order forced him into an unconstitutional choice between his Fifth Amendment privilege against self-incrimination and his Eighth Amendment right to present mitigation. "[T]he Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.'" *Jenkins v. Anderson*, 447 U.S. 231, 236,

100 S. Ct. 2124, 65 L.Ed.2d 86 (1980), quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 30, 93 S. Ct. 1977, 36 L.Ed.2d 714 (1973). For example, a defendant who chooses to testify in his own defense gives up his privilege against self-incrimination. A defendant who requests a continuance to better prepare temporarily gives up his right to a speedy trial. A defendant who pleads guilty to avoid a harsher sentence gives up his right to a trial by jury. These are not Hobson's choices; they are simple fairness.

> "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. *McMann v. Richardson*, 397 U.S., at 769. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose."

McGautha v. California, 402 U.S. 183, 213, 91 S. Ct. 1454, 28 L.Ed.2d 711 (1971).

In *Cheever*, the Supreme Court held that the admission of the State's rebuttal testimony from its own expert psychologist "harmonizes with the principle that when a defendant chooses to testify in a criminal case, the Fifth Amendment does not allow him to refuse to answer related questions on cross-examination." *Kansas v. Cheever*, 571 U.S. at 94, 134 S. Ct. 596, 601, 187 L.Ed.2d 519. There was no tension between Madison's constitutional rights in this case that was not inherent in every decision Madison made at trial.

When a defendant claims that he has been unconstitutionally forced to choose between two constitutional rights, "[t]he threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved." *Id.* Here, the trial court's decision to follow *Buchanan* and *Cheever* and allow the State a reciprocal evaluation of Madison was consistent with both the policies behind both the Fifth and Eighth Amendments.

The policies behind the Fifth Amendment include, among other things, "our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load[.]'" *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 55, 84 S. Ct. 1594, 12 L.Ed.2d 678 (1964), quoting 8 Wigmore, Evidence (McNaughton rev., 1961), 317. That principle is not offended by allowing the State a fair opportunity to rebut the evidence the defendant himself has chosen to inject into the trial. A defendant "has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts." *Fitzpatrick v. United States*, 178 U.S. 304, 315, 20 S. Ct. 944, 44 L.Ed. 1078 (1900).

The policy behind the Eighth Amendment, meanwhile, is "to assure that the State's power to punish is 'exercised within the limits of civilized standards.'" *Woodson v. North Carolina*, 428 U.S. 280, 288, 96 S. Ct. 2978, 49 L.Ed.2d 944 (1976), quoting *Trop v. Dulles*, 356 U.S. 86, 78 S. Ct. 590, 2 L.Ed.2d 630 (1958). This purpose is not compromised when a defendant chooses to seek out a psychiatric evaluation for the specific purpose of introducing evidence of his mental state, knowing that the State might obtain an equal bite at the apple. It is widely-accepted that a defendant who chooses to raise an issue at trial opens the door to rebuttal testimony by the State on that very issue. "[I]t is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons[.]" *McGautha* at 215.

The State's right to present any rebuttal evidence in mitigation *at all* could potentially dissuade a defendant from presenting mitigating evidence to open that door in the first place.

Whatever evidence the defendant presents, the State can always then rebut with new evidence. Madison's argument here attempts to elevate a truism into a travesty.

> "Defendants may, in any and all circumstances, exercise their Constitutionally-guaranteed rights. However, exercise of these rights does not provide an unrestrained free for all for death penalty defendants. If a defendant elects, with the advice of counsel, to put his mental status into issue in the penalty phase, then he has waived his right to refrain from self-incrimination arising from a mental health examination, and there is no Fifth Amendment implication. If a defendant elects to present mitigation testimony addressing his mental status, then the government is free to rebut such testimony."

United States v. Vest, 905 F. Supp. 651, 653 (W.D. Mo. 1995).

If the State is prohibited from introducing any rebuttal evidence that might have the effect of chilling a defendant's willingness to present mitigating evidence, the State would be unable to introduce any evidence at all. Madison is demanding the unconditional silence and surrender of the State during the mitigation phase of a death penalty trial. He does so out of a desire to prohibit the jury from hearing any contrary opinion – a fear that a competing marketplace of fact and evidence will topple the house of cards that he presented in mitigation. The Constitution does not demand such a one-sided free-for-all during the sentencing phase, and this Court should not countenance such a result.

F. The only effective means by which the State could rebut Madison's expert testimony was through an evaluation by its own expert.

Only an expert witness could adequately rebut the testimony of Madison's experts regarding his mental state. "When a defendant presents evidence through a psychological expert who has examined him, the government likewise is permitted to use **the only effective means** of challenging that evidence: testimony from an expert who has also examined him." *Kansas v. Cheever*, 571 U.S. at 94, 134 S. Ct. 596, 601, 187 L.Ed.2d 519. "Ordinarily the only effective rebuttal of psychiatric opinion testimony is contradictory

opinion testimony; and for that purpose * * * the basic tool of psychiatric study remains the personal interview[.]" *Id.*, quoting *United States v. Byers*, 740 F.2d 1104, 1114 (D.C. Cir.1984).

Allowing only Madison to present the jury with the testimony of experts who have evaluated him would have unfairly tipped the scales in Madison's favor on any factual disputes in the mitigation phase. Such an imbalance would provide only Madison's evidence with the stamp of "expert testimony" and the inherent credibility such testimony carries. "[I]t is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts." *State v. Kromah*, 401 S.C. 340, 357, 737 S.E.2d 490 (2013). No other witness could effectively rebut the testimony of Drs. Davis and Cunningham. "Testimony emanating from the depth and scope of specialized knowledge is very impressive to a jury. The same testimony from another source can have less effect." *Ake v. Oklahoma*, 470 U.S. 68, 81, fn. 7, 105 S. Ct. 1087, 84 L.Ed.2d 53 (1985), quoting F. Bailey & H. Rothblatt, Investigation and Preparation of Criminal Cases § 175 (1970).

To deny the State the right to present rebuttal testimony in this context would "undermine the adversarial process, allowing a defendant to provide the jury, through an expert operating as proxy, with a one-sided and potentially inaccurate view of his mental state at the time of the alleged crime." *Cheever* at 94. To prevent such a one-sided presentation, "jurors should not be barred from hearing the views of the State's psychiatrists along with opposing views of the defendant's doctors." *Barefoot v. Estelle*, 463 U.S. 880, 898-899, 103 S. Ct. 3383, 77 L.Ed.2d 1090 (1983). "[T]he psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them." *Ake* at 81-82.

G. Dr. Pitt's testimony as to various aspects of Madison's character was directly relevant to rebut the testimony of Drs. Davis and Cunningham about the presence of various risk factors in Madison's life.

Madison also argues that the evaluation in this case exceeded the scope of the State's right to present rebuttal testimony because Dr. Pitt testified to various aspects of Madison's "character." This argument is addressed in greater detail in response to Madison's fourteenth proposition below, in which Madison argues that Dr. Pitt's testimony exceeded the scope of the trial court's order. There are two problems with this argument.

First, the testimony of Dr. Davis and Dr. Cunningham testified to dozens of aspects of Madison's history, character, and background in the context of the risk factors present for criminal behavior. In his brief, Madison attempts to subdivide the issue of his upbringing from that of his mental state. But that is not how Dr. Davis and Dr. Cunningham presented those issues at trial. According to their testimony, Madison's upbringing affected how his brain developed. That, in turn, led him to make the choices that he made in this case.

To rebut that testimony, Dr. Pitt focused on the same aspects of Madison's life – his substance abuse, whether or not he was physically or sexually abused and to what extent, whether he had positive role models, his relationship with mother, his feelings about women, his childhood, etc. Dr. Pitt concluded that these risk factors were not enough to explain why Madison did the things that he did. In some cases, such as alcoholism or sexual abuse, Dr. Pitt disagreed that the risk factors existed at all. If the cause did not exist, the effect that Madison's experts claimed could not possibly have been a result of that cause. Madison, having introduced evidence of all of these risk factors during the sentencing phase, cannot now claim that Dr. Pitt exceeded the scope of rebuttal by testifying as to those same factors.

Second, as explained below in more detail below in response to Madison's fourteenth proposition, Ohio law requires all capital juries to consider whether there is anything mitigating about a defendant's character. R.C. 2929.04(B) provides that during the mitigation phase, the jury "shall consider, and weigh against the aggravating circumstances * * * the nature and circumstances of the offense [and] the history, character, and background of the offender * * *." This statute requires the jury to weigh the defendant's character to determine only whether it is mitigating, regardless of whether the defendant introduces evidence of his character or not. Dr. Pitt's testimony about various aspects of Madison's character was thus properly admissible under R.C. 2929.04(B) because it addressed whether there was anything mitigating about Madison's character. At no time did the State ask the jury to weigh Madison's character as an aggravating circumstance.

H. Because Madison refused a mental examination under 2929.03(D)(1), he cannot now claim the protection of that statute.

Finally, Madison refers this Court to R.C. 2929.03(D)(1), which allows a defendant to request a pre-sentence investigation report and a mental examination prior to the beginning of the sentencing phase. R.C. 2929.03(D)(1) further provides that "[a] pre-sentence investigation or mental examination shall not be made except upon request of the defendant." Madison argues that this statute "suggests that the General Assembly wanted the capital defendant to be able to control whether he would undergo a mental evaluation and whether the court and the State would see the expert's conclusions." *Appellant's Brief*, p. 206. Madison's reliance upon R.C. 2929.03(D)(1), the application of which he rejected in the trial court, is misplaced.

R.C. 2929.03(D)(1) is not applicable in this context because it assumes that the defendant has not already received a mental examination prior to the beginning of the

sentencing phase by his own expert. Here, Madison did request a mental examination. But defense counsel expressly refused to send Madison to the court psychiatric clinic, arguing that doing so would be "ineffective assistance of counsel because then the information is disseminated to everybody." Tr. 432. Instead, the trial court granted Madison's request for funding to procure his own experts for purposes of conducting a mental health evaluation.

Madison thus did have the choice as to whether to undergo a mental evaluation. He chose to do so. The issue in this case is whether, having chosen to become a witness by participating in his own experts' evaluations, he could then invoke the Fifth Amendment to refuse to be evaluated by the State's experts. As *Raffel*, *Estelle*, *Buchanan*, and *Cheever* demonstrate, Madison had no right to such a one-sided right to present evidence in the sentencing phase. Madison's eleventh proposition is without merit and should be overruled.

***Response to Proposition of Law XII*: A defendant does not have a Sixth Amendment right to have counsel present during a psychological evaluation, as the evaluation is not a "critical stage" of the proceedings.**

In his twelfth proposition of law, Madison argues that if Dr. Pitt's interview were allowed to occur, he had a Sixth Amendment right to have counsel present during that interview. Dr. Pitt's evaluation, however, was not a critical stage of the proceedings. Madison thus had no right to have counsel present during Dr. Pitt's evaluation. Moreover, the United States Supreme Court has expressly held that attorneys should not be present for psychological evaluations conducted in criminal cases.

The Sixth Amendment guarantees every defendant the right to counsel during "critical stages" of criminal proceedings. *United States v. Wade*, 388 U.S. 218, 228, 87 S. Ct. 1926, 18 L.Ed.2d 1149 (1967). To constitute a "critical stage" of the proceedings, "the accused must find himself 'confronted, just as at trial, by the procedural system, or by his

expert adversary, or by both.'" *United States v. Byers*, 740 F.2d at 1117-1118, quoting *United States v. Ash*, 413 U.S. 300, 321, 93 S. Ct. 2568, 37 L.Ed.2d 619 (1973).

Neither of those two circumstances were true of Dr. Pitt's psychiatric evaluation. "[A]t the psychiatric interview itself, [the defendant] was not confronted by the procedural system; he had no decisions in the nature of legal strategy or tactics to make[.]" *Byers* at 1118. Nor did Dr. Pitt – an independent psychiatrist who had testified for both the prosecution and the defense in prior cases – represent Madison's expert adversary. "An examining psychiatrist is not an adversary, much less a professional one. Nor is he an expert in the relevant sense – that is, expert in 'the intricacies of substantive and procedural criminal law." *Id.* at 1119, quoting *Kirby v. Illinois*, 406 U.S. 682, 689, 92 S. Ct. 1877, 32 L.Ed.2d 411 (1972).

> "The doctors designated * * * to make the examination are not partisans of the prosecution, though their fee is paid by the state, any more than is assigned counsel for the defense beholden to the prosecution merely because he is, as here, compensated by the state. Each is given a purely professional job to do-counsel to represent the defendant to the best of his ability, the designated psychiatrists impartially to examine into and report upon the mental condition of the accused."

McGarty v. O'Brien, 188 F.2d 151, 155 (1st Cir. 1951).

A defendant does not have the right to counsel during post-indictment events in his criminal case that do not qualify as "critical stages" of the proceedings. This is true even if those events are intended to produce evidence to use against him at trial. For example, a defendant does not have a Sixth Amendment right to have his attorney present during the taking of a handwriting exemplar. *Gilbert v. California*, 388 U.S. 263, 267, 87 S. Ct. 1951, 18 L.Ed.2d 1178 (1967). A defendant does not have the right to have an attorney present during the showing of a photo lineup to witnesses post-indictment. *Ash* at 321. A defendant does

not have the right to have his attorney present during a blood draw. *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L.Ed.2d 908 (1966). And a defendant does not have the right to have an attorney present during the collection of a buccal swab for DNA testing. *United States v. Lewis*, 483 F.3d 871, 874 (8th Cir.2007).

As one Ohio appellate court has already held, a psychiatric evaluation is a scientific and medical procedure, akin to each of the above:

> "This examination of defendant in the absence of his attorney was a mere preparatory step in the gathering of the prosecution's evidence and was not different from various other preparatory steps, such as the systemized or scientific analyzing of the accused's fingerprints, blood, clothing, hair, and the like. The denial of the right to have counsel present at such analyses does not violate the Sixth Amendment, since they were not critical stages -- inasmuch as there was a minimal risk that counsel's absence at such stages might derogate from a defendant's right to a fair trial."

State v. Wilson, 26 Ohio App. 2d 23, 28, 268 N.E.2d 814 (4th Dist.1971).

In *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct 1866, 68 L.Ed.2d 369 (1981), the Supreme Court held that the prosecution violated a defendant's Sixth Amendment right to counsel by subjecting the defendant to a psychiatric examination to determine competency to stand trial without first notifying defense counsel in advance that the examination would consider his future dangerousness. The Supreme Court found that the defendant "was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed." *Id.* at 471.

In a footnote, however, the Court specifically disavowed any implication of a "constitutional right to have counsel actually present during the examination." *Id.* at 470, fn. 14. The Court also cited approvingly to the court of appeals' opinion that **"an attorney present during the psychiatric interview could contribute little and might seriously disrupt the examination."** *Id.*, quoting *Smith v. Estelle*, 602 F.2d 694, 708 (5th Cir.1979)

(emphasis added). "It is clear from the context of this statement in *Estelle* * * * that the Court was disavowing any Sixth Amendment right during the psychiatric interview. The line it drew was one between the right to counsel *before* the interview and the right to counsel *during* the interview[.]" *Byers* at 1119, fn. 16 (emphasis in original).

Following the Supreme Court's decision in *Estelle*, federal courts have routinely and uniformly held that there is no right to have an attorney present during a mental health evaluation. *See Crawford v. Epps*, 531 Fed.Appx. 511, 517 (5th Cir.2013) ("As this court has previously recognized, there is no Sixth Amendment right to have an attorney present during a psychiatric evaluation"); *Taylor v. Ahlin*, S.D. Cal. No. 10cv1122-LAB, 2011 U.S. Dist. LEXIS 138422, *50 (Aug.12, 2011) ("there is no federal right to counsel during mental health evaluations"); *Pizzuto v. Hardison*, D. Idaho No. 05-CV-00516-S-BLW, 2010 U.S. Dist. LEXIS 15324, *5 (Feb. 20, 2010) ("As an initial matter, Petitioner does not have a constitutional right to have his counsel or another representative by physically present during a psychological evaluation"); *United States v. Mikos*, N.D. Ill. No. 02 CR 137-1, 2004 U.S. Dist. LEXIS 18649, *14 (Sep. 16, 2004) ("the presence of defense counsel at Defendant's psychiatric examination by a Government expert is not required by the Sixth Amendment"); *Re v. Snyder*, 293 F.3d 678, 682 (3d Cir.2002) ("Re's counsel did not have a right, under the Sixth Amendment, to be present and observe the 1984 Dietz examination"); *Godfrey v. Francis*, 613 F.Supp. 747, 756 (N.D.Ga.1985) ("The Court is not aware of any decisions holding that an individual has the constitutional right to have his attorney present at the psychiatric examination"); *United States v. Baird*, 414 F.2d 700, 711 (2d Cir.1969) ("the examination did not constitute the kind of critical stage in the proceedings at which the assistance of counsel was needed or at which counsel could make a useful contribution").

State supreme courts have held the same. *See Commonwealth v. Johnston*, 467 Mass. 674, 687, 7 N.E.3d 424 (2014) ("A defendant does not have a Sixth Amendment right to have his lawyer present during the court-ordered psychiatric interview"); *Cain v. Abramson*, 220 S.W.3d 276, 281, 2007 Ky. LEXIS 9 (2007) ("we find that the psychiatric evaluation, ordered by the court upon notice by Cain of his intent to assert mental illness as a defense to the crimes he is charged with committing, is not a 'critical stage' in the procedural system giving rise to a constitutional necessity for the presence of counsel"); *Estrada v. State*, 143 Idaho 558, 562, 149 P.3d 833 (2006) ("This Court's finding that a Sixth Amendment right to *assistance* of counsel in the critical stage of a psychosexual evaluation inquiring to a defendant's future dangerousness, does not necessarily require the *presence* of counsel during the exam") (emphasis in original); *Thornson v. State*, 895 So.2d 85, 124, 2004 Miss. LEXIS 1350 (2004) ("this Court now adopts the rule found in *Estelle v. Smith* that there is no constitutional right for counsel to be present during a mental evaluation"); *State v. Davis*, 349 N.C. 1, 20, 506 S.E.2d 455 (1998) ("we hold that defendant had no constitutional right to have counsel present during his competency evaluation"); *State v. Martin*, 950 S.W.2d 20, 27, 1997 Tenn. LEXIS 315 (1997) ("we conclude that the Sixth Amendment of the U.S. Constitution and article I, § 9 of the Tennessee Constitution do not require the presence of counsel during a court-ordered mental examination"); *State v. Schackart*, 175 Ariz. 494, 501, 858 P.2d 639 (1993) ("we agree with the majority of courts addressing the issue that a defendant has no such constitutional right [to have counsel present during the examination]"); *People v. Larsen*, 74 Ill.2d 348, 355, 385 N.E.2d 679 (1979) ("The great majority of courts that have considered the question * * * have held that there is no right to have counsel present at the examination"); *People v. Martin*, 386 Mich. 407, 429, 192 N.W.2d 215 (1971) ("Counsel need

not be permitted to be present if, in the opinion of the psychiatrist, counsel's presence would tend to thwart or interfere with the examination").

As a result, Madison did not have the right to counsel during Dr. Pitt's evaluation. That evaluation was not a critical stage of the proceedings at which Madison was confronted by either the procedural system or by the prosecution. Under *Estelle*, "[a]lthough the decision to undergo [a] psychiatric evaluation is a critical stage, the interview itself is not." *Commonwealth v. Trapp*, 423 Mass. 356, 359, 668 N.E.2d 327 (1996) (citation omitted). Madison had a Sixth Amendment right to his attorneys' help and guidance *before* the evaluation in preparation, and he received that counsel. But he was not entitled to have his attorneys physically present *during* the evaluation itself.

Nor did Ohio law entitle Madison any special or heightened right to have counsel present that would distinguish this case from all of the cases cited above. Civ.R. 35(A) did not grant Madison any right to have an attorney present during the valuation. To the contrary, Civ.R. 35(A) vested the trial court with the authority to "specify the time, place, manner, conditions, and scope of the examination and the persons by whom it is to be made." The trial court specified in this case that the evaluation was limited to Dr. Pitt and Madison himself to protect the integrity of the questioning. A trial court's order for an evaluation under Civ.R. 35(A) will not be reversed absent an abuse of discretion. *Bowsher v. Bowsher*, 4th Dist. Pickaway No. 91 CA 19, 1992 Ohio App. LEXIS 3544, *12 (June 30, 1992).

Moreover, the trial court's decision was not only legally correct, but was also necessary to protect the integrity of the evaluation. "[T]here are valid diagnostic reasons for refusing to permit counsel to be present during a psychiatric exam." *People v. Mahaffey*, 166 Ill.2d 1, 20, 651 N.E.2d 1055 (1995).

> The 'procedural system' of the law, which is one justification for the presence of counsel and which, by the same token, the presence of counsel brings in its train, is evidently antithetical to psychiatric examination, a process informal and unstructured by design. Even if counsel were uncharacteristically to sit silent and interpose no procedural objections or suggestions, one can scarcely imagine a successful psychiatric examination in which the subject's eyes move back and forth between the doctor and his attorney. Nor would it help if the attorney were listening form outside the room, for the subject's attention would still wander where his eyes could not. And the attorney's presence in such a purely observational capacity, without ability to advise, suggest or object, would have no relationship to the Sixth Amendment's 'Assistance of Counsel.'

United States v. Byers, 740 F.2d at 1120. A psychiatric examination is an "intimate and personal" experience, one in which "the presence of a third party, in a legal and non-medical capacity, would severely limit the efficacy of the examination[.]" *United States v. Albright*, 388 F.2d 719, 726 (4th Cir. 1968) ("a defendant has no federal or state constitutional right to have his attorney present during a psychiatric examination conducted at the instance of the prosecutor"). The trial court's decision to deny Madison's attorneys the right to sit in on the evaluation was the scientifically sound approach to a medical procedure defense counsel knew nothing about and had no role in which to play. Madison had no right to interfere with that process through the unwarranted intrusion of his attorneys on an expert medical evaluation.

Finally, if this Court were to find any error here, such error would be subject to harmless error analysis. In *Satterwhite v. Texas*, 486 U.S. 249, 108 S. Ct. 1792, 100 L.Ed.2d 284 (1988), the Supreme Court applied a harmless error analysis to a psychiatric evaluation of a defendant who was denied any chance to consult with an attorney beforehand. The Court in *Satterwhite* found that automatic reversal was only warranted in "cases in which the deprivation of the right to counsel affected – and contaminated – the entire criminal proceeding." *Id.* at 257. Because the Sixth Amendment violation in *Satterwhite* was "limited

to the admission into evidence of [the psychiatrist's] testimony," the deprivation of counsel did not "contaminate the entire criminal proceeding," and hence automatic reversal was not warranted absent a showing of prejudice. *Id.*

Madison has not demonstrated how the absence of his attorneys from his interview with Dr. Pitt contaminated the entire criminal proceeding. Dr. Pitt did not ask Madison about the facts and circumstances of any of his offenses. Nor did Madison volunteer any incriminating information that the State could have used against him in the guilt phase. As a result, Madison has failed to show that any error in this regard – even if one did occur – resulted in prejudice. Madison's twelfth proposition should be overruled.

<u>Response to Proposition of Law XIII</u>: The trial court did not err by allowing the State's expert to testify as to various aspects of the defendant's history, character, and background, where the defendant placed his mental state, upbringing, criminal record, and character, all at issue.

In his thirteenth proposition of law, Madison argues that Dr. Pitt's testimony exceeded the scope of the limitations the trial court placed on his evaluation. Madison provides no citations to any place in the record where Dr. Pitt allegedly exceeded those limitations, nor does he identify what specific testimony he is talking about here. A review of the record reveals that Dr. Pitt adhered to the trial court's order regarding the scope of the interview, and did not inquire into the facts and circumstances of the murders.

The trial court's order stated that Dr. Pitt's evaluation was "limited only to brain damage and issues like that. There may be no questioning about the facts and circumstances of this particular case." Tr. 444. The Eighth District, in deciding Madison's interlocutory appeal of this issue, found that Madison "admitted at the trial court hearing that he intends to present expert testimony of his mental condition as mitigating evidence to avoid the death penalty should the case proceed to the trial phase. Therefore, Madison has made his mental

condition a relevant factor in determining whether a death sentence is appropriate." *State v. Madison*, 8th Dist. Cuyahoga No. 101478, 2015-Ohio-4365, ¶ 16. The court listed nine potential issues that Madison admitted he intended to raise regarding his mental state during the mitigation phase. *Id.*, ¶ 17. These included the effect on Madison's mental state of exposure to childhood trauma, violence, verbal and physical abuse, and of the abusive and dysfunctional environment in which he was raised. *Id.* The Eighth District found that each of these claims placed Madison's mental condition in controversy. *Id.*, ¶ 18. The court thus held that "the state is entitled to its own evaluation solely for the purposes of rebutting the evidence Madison presents concerning his brain damage *and mental condition*." *Id.*, ¶ 24 (emphasis added). This necessarily included all of these issues.

When the defense moved at trial to limit Dr. Pitt's testimony solely to the issue of brain damage, the trial court cited to the Eighth District's opinion, and clarified that Dr. Pitt could testify "in rebuttal of those things brought up by other doctors on behalf of the defense." Tr. 7394. The State agreed, saying, "I think when the court spoke about brain damage and issues like that, it was distinguishing issues of his mental condition from facts and circumstances of the case. We're not going to ask Dr. Pitt about facts and circumstances of the case. We're going to ask him specifically about issues that have been raised by the defense." Tr. 7395. The trial court then allowed Dr. Pitt to testify. The trial court had the discretion to clarify the meaning and the scope of its own order.

The testimony of Dr. Davis and Dr. Cunningham opened the door to a wide array of issues regarding Madison's mental state, upbringing, criminal record, and character. The State had an "unconditional right to present rebuttal testimony on matters which are first addressed in an opponent's case-in-chief and should not be brought in the rebutting party's

case-in-chief." *Phung v. Waste Management*, 71 Ohio St.3d at 410, 644 N.E.2d 286. This included the right to "rebut mitigation evidence offered by the defendant where the prosecutor has a good faith basis for believing that such evidence is false." *State v. DePew*, 38 Ohio St.3d 275, 285, 528 N.E.2d 542 (1988). Moreover, as explained below in response to Madison's fourteenth proposition, all of the evidence of Madison's character was admissible under R.C. 2929.04(B). Madison's thirteenth proposition is without merit and should be overruled.

<u>Response to Proposition of Law XIV</u>: R.C. 2929.04(B) requires the jury to weigh the defendant's character against the aggravating circumstances, regardless of whether the defendant argues that his character is mitigating.

In his fourteenth proposition of law, Madison argues that the trial court erred by admitting various evidence regarding his character during the sentencing phase. For this, Madison relies upon this Court's decision in *State v. DePew*, 38 Ohio St.3d at 289, 528 N.E.2d 542, in which this Court held that "[i]f the defendant chooses to refrain from raising some or all of the factors available to him [under R.C. 2929.04(B)], those factors not raised may not be referred to or commented upon by the prosecution." Madison misreads this holding of *DePew*, which applies only to the statutorily-enumerated mitigating factors found in R.C. 2929.04(B)(1)-(7). Madison is not alone in this regard; *DePew* has become a source of great confusion among trial courts in Ohio in capital cases.

Ohio law requires all capital juries to consider whether there is anything mitigating about a defendant's character. R.C. 2929.04(B) provides that during the mitigation phase, the jury "shall consider, and weigh against the aggravating circumstances * * * the nature and circumstances of the offense [and] the history, character, and background of the offender * * *." "'Shall' means must." *Wilson v. Lawrence*, 150 Ohio St.3d 368, 2017-Ohio-Ohio-1410, 81

N.E.3d 1242, ¶ 13. "[W]e repeatedly have recognized that use of the term 'shall' in a statute connotes a mandatory obligation unless other language evidence a clear and unequivocal intent to the contrary." *Id.* There is no such other language in R.C. 2929.04(B). As a result, that statute creates a mandatory requirement that the jury weigh the defendant's character against the aggravating circumstances.

The State agrees with Madison that, because of the way this statute is written, the sentencer may only weigh the defendant's character as a mitigating factor. But that evidence *must* be weighed to determine whether it is mitigating. This is true regardless of whether the defendant introduces evidence of his character or not.

"[U]nder R.C. 2929.04(B), the jury must consider the nature and circumstances of the offense and the offender's history, character, and background, whether the defense raises these issues or not. Therefore, it is proper for a prosecutor to discuss them." *State v. Davis*, 76 Ohio St.3d 107, 120, 666 N.E.2d 1099 (1996). *See also State v. Hancock*, 108 Ohio St. 3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 127 ("We have said that the sentencer *must* consider the nature and circumstances of the offense, whether they have mitigating impact or not and whether the defense raises them or not") (emphasis in original); *State v. Williams*, 79 Ohio St.3d 1, 18, 679 N.E.2d 646 (1997) ("We must consider the nature and circumstances of the offense and the appellant's history, character, and background").

The requirement under R.C. 2929.04(B) that the jury consider the defendant's "history, character, and background" includes the defendant's criminal record. "[T]his court has recognized that a defendant's prior crimes are directly relevant to his 'history, character, and background,' R.C. 2929.04(B), which a sentencing jury must consider." *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88, ¶ 50, citing *State v. Waddy*, 63 Ohio St.3d

424, 428-429, 588 N.E.2d 819 (1992) ("Waddy assumes that the Wilson, Jackson, and Milligan crimes are irrelevant to whether he should be executed for murdering Mason. His assumption is erroneous. Waddy's record of criminal behavior is directly relevant to his 'history, character and background,' R.C. 2929.04(B), which a sentencing jury must consider").

In *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637, ¶ 136, this Court found no prosecutorial misconduct where the prosecutor said of the defendant: "He's just a bad person who does bad, evil things." This Court found that "this characterization was part of the prosecutor's argument that the psychological evidence was not mitigating and that appellant was not delusional or 'sick' when he killed the victims. The jury must consider the defendant's character under R.C. 2929.04(B), and the prosecutor can argue the merits of the case." *Id.*

> "It is ludicrous to assert, as appellant does here, that the jury is to be carefully fed only that information which reflects favorably upon appellant. As they share in the trial court's function, the jurors require access to the wide range of information which the function requires. Thus, as pointed out by the court of appeals, the jury is statutorily required to consider (1) the aggravating circumstances proven at trial, (2) the nature and circumstances of the offense, (3) the history, character and background of the defendant, (4) all the mitigating factors listed in R.C. 2929.04(B) including 'any other factor,' (5) the presentence investigation report requested by defendant, and (6) the mental examination report requested by defendant. Moreover, once lawfully inserted into the sentencing considerations, such information is subject to fair comment by both parties."

State v. Greer, 39 Ohio St. 3d 236, 253, 530 N.E.2d 382 (1988).

It is therefore irrelevant whether Madison offered any evidence about his character in mitigation. R.C. 2929.04(B) required the jury to consider whether his character was mitigating, and to weigh his character against the aggravating circumstances. All of the

testimony and evidence Madison refers to under this proposition showed that Madison's character deserved no weight in mitigation, and was properly admitted for that purpose.

The only circumstance in which an error can occur in this context is if the State argues the jury should weigh either "the nature and circumstances of the offense" or "the history, character, and background of the offender" as aggravating circumstances. *See State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 90 (prosecutor improperly argued that the nature and circumstances of the offense were aggravating circumstances). To establish error here, Madison would thus need to identify a place in the record where the State improperly asked the jury to weigh a non-statutory aggravating circumstance. Madison does not do so.

A review of the record reveals that the State was careful to explain to the jury that it could only weigh the aggravating circumstances in the indictment in favor of a death sentence. The State began its closing statement by telling the jury that "[n]ot all of that evidence [from the first phase] is part of your weighing decision in this case." Tr. 7595. The State gave as an example the dishonesty of the defendant: "whether the defendant is an honest guy or not is not something that you weigh in this case." *Id.* The State placed a line on the screen between aggravating circumstances on one side and mitigating factors on the other, saying, "it is very important that you keep those two kinds of evidence separate in this case because they are different kinds of evidence. What we introduce over here [the aggravating circumstances] stays on this side, and what they introduce or what anyone introduces over her [the mitigating factors] stays on this side. It cannot be applied over here." Tr. 7596-97; 7609.

For the foregoing reasons, testimony about a defendant's character is relevant and admissible in the sentencing phase because R.C. 2929.04(B) requires a jury to weigh the defendant's character to determine if it is mitigating. The jury properly did so in this case. Absent any indication that the jury weighed that poor character as an aggravating circumstance – such as an express invitation by the prosecution that they do so – Madison cannot demonstrate that any error occurred. And finally, even if he could, any such error would again be harmless in light of the overwhelming evidence of his guilt. Madison's fourteenth proposition is without merit and should be overruled.

<u>Response to Proposition of Law XV</u>: The State did not commit prosecutorial misconduct during either the guilt phase or the sentencing phase of trial.

In his fifteenth proposition of law, Madison raises various claims of prosecutorial misconduct. The test for prosecutorial misconduct is whether the prosecutor's remarks were improper and, if so, whether they prejudicially affected the accused's substantial rights. *See State v. Smith,* 14 Ohio St.3d at 14, 470 N.E.2d 883. The touchstone of that analysis "is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips,* 455 U.S. at 219, 102 S. Ct. 940, 71 L.Ed.2d 78. Prosecutorial misconduct constitutes reversible error only in "'rare instances.'" *State v. Keenan*, 66 Ohio St.3d at 405, 613 N.E.2d 203, quoting *State v. DePew*, 38 Ohio St.3d at 288, 528 N.E.2d 542.

A. Victim-impact testimony.

Madison first argues that the prosecution committed misconduct by presenting victim-impact evidence during the guilt phase. Madison cites two instances in the record where he claims this occurred. First, Madison cites the testimony of Shirellda Terry's stepfather Derrick Minor. Tr. 3988-90. On direct examination, the State asked Minor where Shirellda was going to school, whether she was a good student, whether she drove a car,

where she worked the summer she disappeared, her hours there, her age, and how she got to work. Tr. 3988-90. Minor also testified that Shirellda did not have a boyfriend, and that if she did, he would be required to meet Shirellda's parents. Tr. 4013. The purpose of these questions was to establish Terry's routine, as well as her route to and from work each day, and to establish why Terry's family became concerned so quickly after she went missing. The State also needed to establish that Terry was not seeing Madison as a boyfriend.

Second, Madison cites the testimony of Shirellda Terry's sister Britney Terry. Tr. 4024-26. On direct examination, the State asked Britney Terry whether Shirellda went to church, whether she participated in praise dancing, and to describe her relationship with Shirellda. At that point, defense counsel objected. Tr. 4025. At sidebar, the trial court told the parties, "I've allowed some, I've sustained some. To some extent [it] goes to why they were looking for her or why they were concerned because of the nature of the relationship and the close contact with the things they did." *Id.* The court continued, "I think you've established enough of why she would be concerned if she didn't show up on a particular occasion because it's out of her habit." *Id.* At that point, the State moved on, and there were no further objections on similar grounds.

This testimony was not "victim-impact evidence" as the Supreme Court has defined the term. Victim-impact is "evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family." *Payne v. Tennessee*, 501 U.S. 808, 817, 111 S. Ct. 2597, 115 L.Ed.2d 720 (1991). "Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities. * * * In the majority of cases, and in this case, victim impact evidence serves entirely legitimate

purposes." *Payne* at 825. In *Payne*, the Supreme Court allowed the admission of victim-impact evidence in a capital trial, finding that it was "an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant * * * but nothing may be said that bears upon the character of, or the harm imposed, upon the victims." *Id.* at 826.

The testimony of Derrick Minor and Britney Terry did not relate to the "emotional impact of the crimes on the victim's family." *Id.* at 817. Rather, the testimony was relevant to establish the facts and circumstances of Shirellda Terry's murder – where she worked, her route to and from work each day, and the close relationship she had with her family. That close relationship in turn explained why Terry's family became concerned and began looking for her so quickly after she disappeared.

Additionally, both Derrick Minor and Britney Terry testified that Shirellda did not have a boyfriend at the time, and that if she did, he would be required to meet her family. Tr. 4013; 4028. The State's theory of the case was that Madison lured Terry to his apartment on the day she disappeared by deception. Her family's testimony established her immaturity and vulnerability as an 18-year-old victim. This was relevant to establish the kidnapping by deception counts of the indictment related to Terry (count 3), as well as the felony-murder kidnapping specifications attached to the aggravated murder counts involving Terry (counts 1 and 2). It also corroborated Terry's text message to Madison refusing to come to his apartment because she did not trust him. Tr. 5381.

"Victim-impact evidence that relates *only* to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family is generally inadmissible at the trial phase[.]" *State v. Clinton*, Slip Opinion No. 2017-Ohio-9423, ¶ 126 (internal citation and

quotation omitted) (emphasis added), citing *Payne* at 817. To be admissible, victim-impact evidence must also "relat[e] to the facts attendant to the offense[.]" *State v. Fautenberry*, 72 Ohio St.3d 434, 435, 650 N.E.2d 878 (1995). "[E]vidence which depicts both the circumstances surrounding the commission of the murder and also the impact of the murder on the victim's family may be admissible during both the guilt and the sentencing phases." *Id*. at 440. This Court has thus held that victim-impact evidence is admissible where it relates to: (1) the circumstances of the murder, (2) the existence of the statutory aggravating circumstances, or (3) the nature and circumstances of the aggravating circumstances, if the evidence is introduced to rebut the defendant's mitigating evidence. *See State v. White,* 85 Ohio St.3d 433, 446, 709 N.E.2d 140 (1999).

This Court has previously upheld the admission of victim-impact testimony from a victim's mother that was "was not overly emotional or directed to the penalty to be imposed." *State v. Hartman*, 93 Ohio St. 3d 274, 292, 754 N.E.2d 1150 (2001) (victim's mother briefly discussed the victim's early life, her education, her close-knit family, and the victim's contact with her family after she moved to Ohio). Here, none of the testimony was overly emotional or directed to the penalty the jury should impose. Rather, all of the challenged testimony was relevant to establish the circumstances of Shirellda Terry's murder. The State needed to establish who Shirellda Terry was, where she worked, how she met Madison, whether she was dating him, and how it was that Madison convinced Terry to come to his apartment. The testimony of her family members was essential to establishing all of those facts about her murder. No prosecutorial misconduct occurred.

B. Redactions to the video and the admission of evidence during the guilt phase.

Madison argues that the State improperly introduced irrelevant and inflammatory evidence – specifically, the three areas he claims should have been redacted from the video of his interrogation (Madison's sixth proposition) and four categories of evidence he claims should not have been admitted during the guilt phase (Madison's seventh proposition). The State incorporates its response regarding each category of evidence from those propositions. No misconduct occurred where the admission of all of that evidence was proper.

C. References to Madison as a "serial killer" and to Anthony Sowell.

Madison argues that the prosecution committed misconduct by referring to Madison as a "serial killer." This argument is addressed above in response to Madison's eighth proposition. The State's use of the term "serial killer" was proper because it accurately reflected the charges the jury found Madison guilty of committing. Even if it was not, it was harmless error given the overwhelming evidence.

The prosecutor cross-examined Dr. Davis about Madison's motivations to commit the murders. During that questioning, the prosecutor referred to the murders by saying that Madison was "convicted of killing them in a grotesque manner." Tr. 6658. The trial court sustained a defense objection to this question and instructed the State to "stick to the aggravating circumstances." *Id.* The prosecutor's use of the word "grotesque" was harmless given the trial court's instruction.

The prosecutor asked Dr. Davis if he looked at any of the autopsy photos. Tr. 6670. This was a proper question. It sought to establish what materials Dr. Davis reviewed prior to his testimony. The prosecutor did not display the photographs or describe them in any way. Nevertheless, the trial court sustained the objection. *Id.*

The prosecutor cross-examined Dr. Cunningham about various stress factors that Dr. Cunningham believed contributed to the murders. At one point, the prosecutor asked Dr. Cunningham if he was "familiar with the statement of the defendant that came up in testimony that he would like to Sowell – quote – Sowell a b****?" Tr. 7221. The trial court overruled a defense objection to this question. *Id.* Madison's own invocation of Sowell's name was relevant to the State's theory of his true motivation to commit the murders – his hatred of women. It also contradicted Dr. Cunningham's testimony that the causes of Madison's behavior were largely beyond his control.

D. Cross-examination of Dr. Cunningham and closing arguments.

Madison claims that the State improperly attempted to discredit Dr. Cunningham by referring to him as a "professional testifier in these cases[.]" Tr. 6647. The trial court sustained an objection by the defense to this question. Later, the prosecution asked Dr. Cunningham a series of questions intended to probe for potential bias, and to challenge the scientific validity of his conclusions regarding Madison's ability to make choices. All of this was proper cross-examination intended to challenge Dr. Cunningham's testimony. Artful cross-examination and pointed disagreement does not equate to denigration of a witness.

This Court has recognized that "isolated comments by a prosecutor are not to be taken out of context and given their most damaging meaning." *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88, ¶ 94, citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 647, 94 S. Ct. 1868, 40 L.Ed.2d 431 (1974) ("a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through a lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations"). Rather, this Court must review an argument in its entirety to determine

whether prejudicial error exists. *Noling*, ¶ 94. Here, the prosecution questioned Dr. Cunningham as to the validity of his methodology and conclusions. The State made it clear that it disagreed with Dr. Cunningham, but presented his testimony and conclusions fairly in its closing argument. Tr. 7615-23. No misconduct occurred.

E. Repeated objections that interfered with the presentation of mitigation.

Madison claims that the State interfered with his presentation of mitigating evidence during Dr. Cunningham's testimony by making repeated objections. The admissibility of Dr. Cunningham's intended testimony about "moral culpability" is addressed above under Madison's tenth proposition of law. A prosecutor does not commit misconduct by making repeated objections during trial where "there was a valid basis for each of the objections." *State v. Stinson*, 21 Ohio App.3d 14, 17, 486 N.E.2d 831 (9th Dist.1984); *see also State. v. Mulvey*, 7th Dist. Belmont No. 08 NE 31, 2009-Ohio-6756, ¶ 44 ("there is no rule prohibiting counsel from interrupting another party's arguments with valid objections"). The State's objections were valid in this case where this Court's precedents established that "moral culpability" was not a valid measure of mitigating evidence. Furthermore, Madison has not established any prejudice resulting from these interruptions.

F. The State commenting on the defense's failure to call certain witnesses.

Madison argues that the prosecution commented on the defense's failure to call Madison's mother Diane and the mother of his children, Tenia Plummer, as witnesses during the sentencing phase. This Court has held that the State may comment upon the failure of the defense to call any witness except for the defendant himself:

> "Bies complains first that the prosecutor, over defense objection, improperly appealed to the jurors sense of morality when he commented that Biess mother did not testify during the mitigation hearing. However, prosecutorial

> comment pertaining to the fact that a witness, other than the accused, did not testify, is not improper."

State v. Bies, 74 Ohio St. 3d 320, 326, 658 N.E.2d 754 (1996). *See also State v. Petro*, 148 Ohio St. 473, 498, 76 N.E.2d 355 (1948) ("The fact that one of the parties fails to call a witness who has some knowledge of the matter under investigation may be commented upon"); *State v. Williams*, 23 Ohio St.3d 16, 20, 490 N.E.2d 906 (1986) ("The prosecution is not prevented from commenting upon the failure of the defense to offer evidence in support of its case"). "Such comments do not imply that the burden of proof has shifted to the defense, nor do they necessarily constitute a penalty on the defendant's exercise of his Fifth Amendment right to remain silent." *State v. Collins*, 89 Ohio St.3d 524, 527-528, 733 N.E.2d 1118 (2000).

Madison also argues that the State commented on Madison's right to remain by questioning Drs. Davis and Cunningham as to why they did not ask him about his crimes. Madison, however, waived his right to remain silent by voluntarily agreeing to participate in Dr. Davis and Dr. Cunningham's evaluations, thereby becoming a witness in his own case. "[H]aving once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing." *Raffel v. United States*, 271 U.S. at 497, 46 S. Ct. 566, 70 L.Ed. 1054. The testimony of Drs. Davis and Cunningham was rife with hearsay statements from Madison himself that the defense elicited through those experts, without objection from the State. As conduits of hearsay testimony from Madison to the jury, Drs. Davis and Cunningham stepped into the shoes of Madison (the declarant) and could be impeached on cross-examination as if Madison himself was testifying. *See* Evid.R. 806(A). The State was thus permitted to ask Madison's experts why they did or did not ask Madison certain questions in their evaluations.

G. Madison's use of an iPad during trial.

During trial, Madison was given an iPad to use while sitting at the trial table. Tr. 6320-21. Near the end of the guilt phase, and outside the presence of the jury, the State made a record of the fact that it could see Madison using the iPad to browse the internet, looking at articles, photographs, and sporting events. Tr. 6320. The trial court agreed that it noticed this as well during trial. Tr. 632. The State asked the trial court to prohibit Madison from using the iPad to access the internet while in court. Tr. 6322. The trial court denied the State's motion and allowed Madison to continue to use the iPad during trial. Tr. 6324.

Madison continued to use the iPad to browse the internet during the sentencing phase. During the cross-examination of Dr. Cunningham, the prosecution asked Dr. Cunningham if he could see Madison "here on the iPad looking at pictures of ladies here and other objects[.]" Tr. 7223. The trial court sustained a defense objection to this question and instructed the jury to disregard it. Tr. 7223.

This was not misconduct. The State made a contemporaneous record of the fact that it could see Madison using the iPad to look at photographs on the internet during testimony. The trial court agreed. The State further made a record of the fact that "the jury is watching him, and he spends the whole morning searching, he's not paying attention. I suspect this to be some kind of act by the defendant to act detached or crazy or something." Tr. 6321. Again, the trial court agreed. Tr. 6324.

The trial court overruled the defense request for a mistrial based on Madison's Fifth Amendment right to remain silent. The trial court stated, "He can look at his iPad. I haven't stopped him. But that doesn't mean it can't be mentioned or noted. * * * There's no suggestion of burden of proof by mentioning that he is looking at an iPad." Tr. 7266-67. A defendant's behavior during trial in the courtroom is not protected by the Fifth Amendment

and may be commented on by the prosecution. *State v. Barry*, 183 Wn.2d 297, 309, 352 P.3d 161 (2015); *see also Bates v. Lee*, 308 F.3d 411, 421 (4th Cir.2002) ("This court has found that prosecutorial comments about the lack of remorse demonstrated by a defendant's demeanor during trial do not violate a defendant's Fifth Amendment right not to testify").

The trial court instructed the jury to disregard the prosecutor's question about the iPad. Tr. 7223. And at the defense's request, the trial court gave the following curative instruction: "I also want to point out to you that the defendant has no burden of proof, and the defendant is permitted to look at the iPad during the course of this trial." Tr. 7272. A jury is presumed to follow its instructions. *State v. Garner*, 74 Ohio St.3d 49, 59, 656 N.E.2d 623 (1995). The prosecution moved on, and the subject did not come up again. This was not prosecutorial misconduct, and even if it was, it could not have resulted in prejudice given the overwhelming evidence of Madison's guilt.

H. Madison's letters to Steven Kessler.

Madison argues that the State improperly elicited testimony about a letter from Michael Madison while in jail awaiting trial to a man named Steven Kessler. During cross-examination of Dr. Cunningham, the State asked about a letter to Kessler that Dr. Cunningham reviewed, dated September 19, 2013, in which Madison discussed his case. Madison wrote that he believed he was being "F'd around as if he had been found guilty already." Tr. 7289. He wrote that his mother and brother "done crossed me." *Id.* He also wrote, "Family will and have F'd me over the hardest in my life." *Id.* He also wrote:

> "I caught this case, better than I've ever done as an adult. That's what makes this kind of even harder to deal with. I had a lot of females. I love to F the ladies. That was my hobby. They out there finding out about each other since I've been in here."

Tr. 7290. At that point, the trial court sustained an objection by the defense and instructed the prosecution to move on. *Id.* The next portion of this letter that Dr. Cunningham did not read to the jury was as follows:

> "I think some believe I did it and some don't. Who knows? My thing is if any one of them think and realize that they are alive why would they let it cross their mind that I did."

See Dr. Pitt report at pp. 35-36. Madison also thanked Kessler for sending sexual pictures of women to him in jail. Tr. 7289.

Dr. Pitt later testified that he found Madison's letter to Kessler significant because Madison "laments his circumstances, talks about how people have let him down, laments the – he's disappointed and upset with the media coverage and the news coverage and how it's slanted and distorted." Tr. 7404. This was relevant to show Madison's lack of character, specifically, his lack of remorse for the crimes. Additionally, Dr. Pitt found the letter significant because on September 12, 2013 (the week before), Madison had written to Shawnta Mahone professing his love for her. Tr. 7401-02. Dr. Pitt noted that Madison "to his credit," admitting that "he was a serial philanderer. He was constantly out chasing women, being with women. And this is just another example of a character issue. Here he is telling Shawnta Mahone one thing; he is telling this guy something else." Tr. 7405.

As explained above in response to Madison's fourteenth proposition, testimony about Madison's character was admissible under R.C. 2929.04(B), which required the jury to consider whether Madison's character was at all mitigating. Madison's letter to Kessler also corroborated the State's argument that Madison was capable of being highly deceptive, which was relevant to all of the kidnapping counts and capital specifications.

I. Details of Madison's prior offense.

Madison argues that the State improperly introduced evidence of his prior criminal record. But it was the defense who opened the door to Madison's prior conviction in opening statement in the second phase, telling the jurors that "[i]n 2001 to 2005 he was in prison for attempted rape and drug abuse." Tr. 6567. Moreover, as explained above in response to Madison's fourteenth proposition, "this court has recognized that a defendant's prior crimes are directly relevant to his 'history, character, and background,' R.C. 2929.04(B), which a sentencing jury must consider." *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88, ¶ 50. At no point did the prosecution argue that the jury should weigh Madison's criminal record as an aggravating circumstance.

J. Madison being "fully responsible" for his crimes.

Madison argues that the prosecution improperly sought to elicit testimony that Madison was "fully responsible" for his conduct. Madison does not provide any page citation at which this occurred. A review of the transcript shows that the prosecution only used the phrase "fully responsible" once, during its cross-examination of Dr. Davis. Tr. 6677. This was a proper question that sought to delineate the extent to which Dr. Davis was claiming that Madison's upbringing affected the development of his brain. Additionally, the trial court sustained a defense objection to this question and instructed the jury to disregard it. Tr. 6677. A jury is presumed to follow its instructions. *State v. Garner*, 74 Ohio St.3d at 59, 656 N.E.2d 623.

Madison also claims that the prosecution improperly elicited testimony that Madison did not suffer from "diminished capacity" and did not suffer from a mental disease or defect, a mitigating factor under R.C. 2929.04(B)(3). Again, however, Madison does not provide this

Court with any page citations where the prosecution argued diminished capacity or referenced R.C. 2929.04(B)(3) in front of the jury.

It was the defense who first elicited testimony on this subject, asking Dr. Davis on direct examination, "Did you see any indication there was any mental disease or defect?" Tr. 6592. Dr. Davis responded, "No[,]" and proceeded to explain what a mental disease or defect was to the jury. *Id.* The State only asked Dr. Pitt if he agreed with Dr. Davis' conclusion in that regard. Tr. 7440. Dr. Pitt said that he did. *Id*. Dr. Pitt also testified on cross-examination that "I didn't refer to his diminished capacity[,]" that he did not restrict his evaluation to the R.C. 2929.03(B)(3) question, and that he commented on anything else he felt was important. Tr. 7491; 7440-41; 7489-92. Given that the defense opened the door to this subject, and the extremely limited nature of testimony about it, no misconduct occurred.

K. Scope of Dr. Pitt's testimony.

Madison argues that the prosecutor committed misconduct by presenting testimony from Dr. Pitt that was beyond the scope of the trial court's original order. This argument is addressed under Madison's thirteenth proposition above.

L. Dr. Pitt's testimony about Madison's choices.

Madison argues that the prosecutor elicited testimony from Dr. Pitt about Madison's choices to commit the crimes in this case. It is not clear from Madison's brief why this was misconduct, apart from an assertion that this was "inflammatory[.]" *Appellant's Brief*, p. 228. Dr. Cunningham opened the door to the subject of Madison's ability to make choices by comparing those choices to concrete that had "hardened" by the time Madison became a teenager. Tr. 6984; 7178. Dr. Cunningham also compared Madison to a three-year-old child who was struck by a car and has his spinal cord severed, who "is never going to walk again."

Tr. 7178. Dr. Pitt's testimony was relevant and admissible to rebut those characterizations of Madison's state of mind at the time of the crimes. Once again, the State was careful to avoid any argument that the nature and circumstances of the crime were aggravating circumstances or could be weighed in the sentencing phase. Tr. 7597.

M. Madison's lack of remorse.

Madison argues that the prosecutor improperly commented on Madison's lack of remorse. As explained above in response to Madison's sixth and fourteenth propositions, R.C. 2929.04(B) requires a capital jury to consider the "history, character, and background" of the defendant, regardless of whether the defense raises those issues as mitigating factors. A defendant's "lack of remorse reflects upon his character." *State v. Lundgren*, 73 Ohio St.3d at 493, 653 N.E.2d 304. The prosecution was thus entitled to comment on Madison's lack of remorse to argue that the jury should give no weight to Madison's character in mitigation.

N. Mercy and the nature and circumstances of the offense.

Finally, Madison argues that the prosecutor told the jury they could not consider mercy during closing argument in the sentencing phase. The prosecutor was correct in doing so. As explained above in response to Madison's ninth proposition, mercy is not a mitigating factor, and may not be considered by the jury in their sentencing phase deliberations. "Because sympathy is 'irrelevant to the jury of the jurors, the prosecutor's request was literally correct. Accordingly, the prosecutor's request to the jurors during voir dire to follow the law and disregard sympathy cannot be the basis for a claim of prosecutorial misconduct." *State v. Treesh*, 90 Ohio St.3d at 465, 739 N.E.2d 749 (citation omitted); *State v. Lorraine*, 66 Ohio St.3d at 418, 613 N.E.2d 212 ("Mercy, like bias, prejudice, and sympathy, is irrelevant to the duty of the jurors").

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

> "R.C. 2929.04(B) *requires* the jury, trial court, or three-judge panel to '*consider*, and weigh against the aggravating circumstances proved beyond a reasonable doubt, *the nature and circumstances of the offense* * * *.' (Emphasis added.) In a particular case, the nature and circumstances of the offense may have a mitigating impact, or they may not. Either way, they must be considered."

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

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

Madison also argues that the prosecutor improperly offered his opinion on how the jury should weigh the aggravating circumstances and mitigating factors. "Prosecutors can urge the merits of their cause and legitimately argue that defense mitigation evidence is worthy of little or no weight." *State v. Wilson*, 74 Ohio St.3d at 399, 659 N.E.2d 292. Moreover, "counsel for both parties are afforded wide latitude during closing argument." *State v. Brown*, 38 Ohio St.3d 305, 317, 528 N.E.2d 523 (1988).

Madison's fifteenth is without merit and should be overruled.

<u>Response to Proposition of Law XVI</u>: Trial counsel was not ineffective.

In his sixteenth proposition of law, Madison argues that his trial counsel was ineffective for various failures to object. Madison uses this proposition as a failsafe for his sixth, seventh, fourteenth and fifteenth propositions, arguing that "for any instances to which defense counsel is deemed to have failed to object or failed to have made a proper objection, counsel's failure in that respect is deficient performance[.]" *Appellant's Brief*, p. 235. As explained above under each respective proposition, no error occurred in any instance, and thus counsel was not deficient for declining to object.

This Court has recognized that "failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel." *State. v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, ¶ 139. "Because 'objections tend to disrupt the flow of a trial, [and] are considered technical and bothersome by the fact-finder,' competent counsel may reasonably hesitate to object in the jury's presence." *State v. Campbell*, 69 Ohio St.3d 38, 53, 630 N.E.2d 339 (1994), quoting Jacobs, Ohio Evidence (1989), at iii-iv. "Moreover, experienced trial counsel learn that objections to each potentially objectionable event could actually act to their party's detriment. * * * In light of this, any single failure to object usually cannot be said to have been error unless the evidence is so prejudicial * * * that failure to object essentially defaults the case to the state." *Johnson*, ¶ 139, quoting *Lundgren v. Mitchell*, 440 F.3d 754, 774 (6th Cir.2006).

The record shows that Madison's counsel made numerous objections throughout the trial, including on many of the areas he references in this proposition. Madison does not

explain how any decision by counsel to refrain from making further objections could have resulted in prejudice in light of the overwhelming evidence against him.

Madison highlights his counsel's failure to object when the prosecution commented on their decision not to call Madison's mother as a witness. *See Appellant's Brief*, p. 235. Such an objection would have been groundless because the State is permitted to comment upon the failure of the defense to call any witness except for the defendant himself. *See State v. Bies*, 74 Ohio St. 3d at 326, 658 N.E.2d 754; *State v. Petro*, 148 Ohio St. at 498, 76 N.E.2d 355; *State v. Williams*, 23 Ohio St.3d at 20, 490 N.E.2d 906; *State v. Collins*, 89 Ohio St.3d at 527-528, 733 N.E.2d 1118.

Madison's sixteenth is without merit and should be overruled.

***<u>Response to Proposition of Law XVII</u>*: The trial court properly weighed all of Madison's mitigating evidence in its sentencing opinion, consistently with the precedents of this Court.**

In his seventeenth proposition of law, Madison contends that the trial court violated the Eighth Amendment by giving either insufficient weight or no weight at all to his mitigating evidence. Madison contends that *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L.Ed.2d 1 (1982) require the sentencer in a capital case to assign some weight to any relevant mitigating evidence. Madison is incorrect. The weight, if any, to be given to mitigating factors is within the sound discretion of the jury or the trial court.

A. The sentencer in a capital case is always free to decide that mitigating evidence deserves no weight.

"*Eddings* does not require a court to give any particular weight to relevant mitigating evidence." *State v. Davis*, 139 Ohio St.3d 122, 2014-Ohio-1615, 9 N.E.3d 1031, ¶ 59. Under *Eddings*, a sentencing court "may not give [mitigating evidence] no weight by excluding such

evidence from [its] consideration." *Eddings* at 114-115. "But *Eddings* does not preclude a court from considering mitigating evidence and determining that it deserves no weight." *Davis*, ¶ 59. *Eddings* "expressly refused to dictate what weight or importance to assign to particular mitigating factors." *State v. Brewer*, 48 Ohio St.3d 50, 56, 549 N.E.2d 491 (1990), citing *Eddings* at 114-115 and 117.

The Eighth Amendment "requires the sentencer to listen" to relevant mitigating evidence. *Eddings* at 115, fn. 10. It does not, however, "require the sentencer to reach any particular conclusion about the weight of that evidence." *Davis*, ¶ 60. "Thus, the United States Supreme Court has described as 'settled' the proposition that 'the Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer.'" *Id.*, quoting *Harris v. Alabama*, 513 U.S. 504, 512, 115 S. Ct. 1031, 130 L.E.2d 1004 (1995).

In his brief, Madison relies upon a single line from *Porter v. McCollum*, 558 U.S. 30, 42, 130 S. Ct. 447, 175 L.Ed.2d 398 (2009), in which the Supreme Court found that the "Florida Supreme Court either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing." As this Court has previously noted, however, "*Porter* did not involve a claim that the sentencing court had given insufficient weight to, and thus failed to consider, mitigating evidence. *Porter* involved a claim that defense counsel had rendered ineffective assistance by failing to investigate, discover, and present relevant mitigating evidence." *Davis*, ¶ 63. The Supreme Court in *Porter* found that the state court erred by unreasonably discounting mitigating evidence presented in a postconviction hearing, that was not presented at trial, in the context of the prejudice analysis of an ineffective assistance claim. "Thus, *Porter* does not stand for the proposition that the Eighth

Amendment forbids a sentencer to 'discount' mitigating evidence introduced at the penalty phase of the trial." *Id*., ¶ 65. And as the State will demonstrate below, the trial court did not "discount" or refuse to consider any of the mitigating evidence Madison presented.

B. Madison's relationships with his children.

Madison complains that the trial court gave "no weight" to his relationships with his children. *Appellant's* Brief, p. 238. Neither of Madison's children testified at trial. The mother of Madison's children, Tenia Plummer, did not testify. Madison did not give an unsworn statement describing his relationship with them. In his interview with police, however, Madison said that he was not close with his children because they lived with their mother, with whom he had a hostile relationship. Madison stated: "My kids, they are – those kids are null and void, and that's just off the strength of this, and the kids are null and void, not because of this case, the kids are null and void just off of they mother and they mother alone." *See* State's Ex. 302-A, interview on July 20, 2013, p. 33. Madison also admitted that he did not even know where his children lived. *Id.*, p. 15.

The trial court stated in its sentencing opinion that there "was minimal testimony concerning defendant's interaction with his children during either phase." Sentencing Opinion, p. 6. The trial court was within its discretion to assign this factor no weight where the defense presented minimal testimony or evidence regarding Madison's children at trial.

C. Adaptability to prison.

Madison argues that the trial court failed to give sufficient weigh to his good behavior in prison in the past and his ability to adapt to prison in the future. The trial court discussed this factor in its opinion, noting that "James Aiken, a prison expert with considerable experience in Corrections * * * indicated that the defendant's risk of danger to himself,

inmates and staff are extremely low based on an assessment of numerous factors." Sentencing Opinion, p. 7. The trial court also noted that "Mr. Aiken further testified the defendant would most likely adapt well to prison and could in some way lead a productive life." *Id.* The trial court chose to afford this factor "minimal weight." *Id.*

This Court has previously held that evidence that a defendant adjusts well to prison is entitled only to "slight mitigating weight * * *." *State v. Smith*, 80 Ohio St.3d 89, 121, 684 N.E.2d 668 (1997). See also *State v. Hale*, 119 Ohio St. 3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 275 ("Hale's prospect of successfully adapting to prison is not a compelling mitigating factor, but it does carry some weight"). The trial court was thus within its discretion to afford minimal weight to Madison's ability to adapt to prison.

D. Madison's substance abuse.

Madison references the trial court's decision to afford his substance abuse "very slight weight" only once in his brief. *See Appellant's Brief*, p. 238, citing Sentencing Opinion, p. 8. He does not explain why the trial court erred in this regard. This Court has held that voluntary substance abuse is a weak mitigating factor entitled to very little weight under Ohio law. *See State v. Davis*, 139 Ohio St.3d 122, 2014-Ohio-1615, 9 N.E.3d 1031, ¶ 109 ("this court has held that voluntary intoxication deserves little weight in mitigation"); *State v. Goff*, 82 Ohio St.3d 123, 143, 694 N.E.2d 916 (1998) ("we give little weight to appellant's voluntary substance abuse"). The trial court noted that "no reliable evidence was introduced that the defendant was under the influence of either alcohol or any illicit substance at the time of" the murders. Sentencing Opinion, p. 7. The trial court was within its discretion to give Madison's highly-disputed level of voluntary substance abuse very slight weight.

E. Madison's background and upbringing.

The trial court extensively discussed Madison's upbringing in its sentencing opinion. The court acknowledged that "[t]he toxic culture of defendant's upbringing is undeniable." Sentencing Opinion, p. 8. The court noted that the "record is replete with instances of emotional and physical abuse of the defendant by his own mother and her various partners and love interests[,]" and that Madison was "abandoned by his father." *Id.* The court found that Madison's "family has been riddled with substance abuse; physical, emotional and perhaps sexual abuse; unstable living conditions; and lack of caring and empathy." *Id.* In light of that analysis, Madison cannot demonstrate that the trial court "exclude[ed] such evidence from [its] consideration" in violation of the Eighth Amendment. *Eddings v. Oklahoma*, 455 U.S. at 114-115, 102 S. Ct. 869, 71 L.Ed.2d 1.

Madison's dysfunctional upbringing was "entitled to some weight, but we have seldom accorded strong weight to a defendant's childhood." *State v. Murphy*, 91 Ohio St.3d at 547, 747 N.E.2d 765; *see also State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 265 ("Hale spent significant portions of his childhood in an unstable environment. But we have seldom given decisive weight to this factor"); *State v. Richey*, 64 Ohio St.3d 353, 370, 595 N.E.2d 915 (1992) ("At times, we have assigned little or no weight to evidence of personality disorders or family background; hence, the trial court did not err when declining to give those factors any weight"). The trial court was within its discretion to find that Madison's dysfunctional upbringing was entitled to "greater weight than the other factors, but it is not given great weight." Sentencing Opinion, p. 9.

In its opinion, the trial court wrote: "Dr. Cunningham testified that all of the negative experiences of [Madison's] childhood caused a foregone trajectory leading up to the murders." Sentencing Opinion, p. 8. Madison challenges this characterization of Dr. Cunningham's

testimony, arguing that "[t]he defense did not suggest that Madison's background *excused* his crimes, nor suggest that these crimes were 'inevitable' (or 'foregone') for one with his background[.]" *See Appellant's Brief*, p. 242 (emphasis in original). This is consistent with what the trial court wrote in its opinion: "Dr. Cunningham further testified that this in no way excuses his conduct but rather explains his actions." Sentencing Opinion, p. 8. There is thus no meaningful distinction between the trial court's characterization of Dr. Cunningham's testimony and Madison's.

F. Conclusion.

The weight to be given mitigating factors "is necessarily an individual decision by the fact finder." *Richey* at 369-370. "It is subject to correction by means of independent appellate reweighing and is not a matter of law." *State v. Davis*, 139 Ohio St.3d 122, 2014-Ohio-1615, 9 N.E.3d 1031, ¶ 62. In this case, the trial court exhaustively considered all of the evidence presented and found that the mitigating evidence added up to little compared to the overwhelming weight of the aggravating circumstances. It was the trial court's province to weigh that evidence as it did. In each instance, the trial court's weighing process mirrored this Court's own independent weighing of mitigating factors presented in prior capital cases. Madison's seventeenth proposition is without merit and should be overruled.

<u>Response to Proposition of Law XVIII</u>: Cumulative error is not present in this case.

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

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

As shown above, there were no errors committed in this case. And even if there were, errors "cannot become prejudicial by sheer weight of numbers." *State v. Hill*, 75 Ohio St.3d 195, 212, 661 N.E.2d 1068 (1996). In light of the overwhelming evidence of Madison's guilt, the cumulative effect of any errors did not deprive him of a fair trial. Madison's eighteenth assignment of error is without merit and should be overruled.

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

In his nineteenth proposition of law, Madison raises various constitutional challenges to Ohio's capital sentencing statute and to the imposition of the death penalty in Ohio. This Court should summarily reject each of these arguments.

A. The death penalty is not cruel and unusual punishment.

Madison first argues that the death penalty, by any means of execution, and against any defendant, constitutes cruel and unusual punishment in violation of the Eighth Amendment. This Court has summarily rejected this argument many times. *See State v. Reynolds*, 80 Ohio St.3d 670, 685, 687 N.E.2d 1358 (1998); *State v. Jenkins*, 15 Ohio St.3d 164, 473 N.E.2d 264, paragraph one of the syllabus ("Ohio's statutory framework for imposition of capital punishment * * * does not violate the Eighth and Fourteenth Amendments to the United States Constitution or any provision of the Ohio Constitution").

B. R.C. 2929.03 does not deny or burden a capital defendant's right to a jury trial.

Madison next argues that Ohio's capital sentencing statute, R.C. 2929.03, is unconstitutional under *Hurst v. Florida*, 577 U.S. ___, 136 S. Ct. 616, 193 L.Ed.2d 504 (2016),

because it violates his Sixth Amendment right to a trial by jury by requiring the judge to impose the actual sentence. This Court unanimously rejected this argument in *State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319, ¶¶ 58-59, and again in *State v. Mason*, Slip Opinion No. 2018-Ohio-1462. This Court should do so again here.

Madison argues that Crim.R. 11(C)(3), is unconstitutional because it "needlessly penalizes the assertion of a constitutional right." *United States v. Jackson*, 390 U.S. 570, 583, 88 S. Ct. 1209, 20 L.E.2d 138 (1968). Under Crim.R. 11(C)(3), if a capital defendant waives a jury trial and enters a guilty plea, a trial court may dismiss capital specifications "in the interests of justice." But there is no analogous rule that allows the court to do so in cases in which the defendant exercises his right to a jury trial. Madison claims that this distinction impermissibly burdens a capital defendants' exercise of their right to a trial by jury.

This Court has "rejected similar attacks on Crim.R. 11(C)(3)." *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 51, citing *State v. Dickerson*, 45 Ohio St.3d 206, 214, 543 N.E.2d 1250 (1989) ("All of these arguments attacking the constitutionality of Crim.R. 11(C)(3) have been rejected by this court in *State v. Buell*"); *State v. Buell*, 22 Ohio St.3d 124, 138, 489 N.E.2d 795 (1986) ("Since, in Ohio, a sentence of death is possible whether a defendant pleads to the offense or is found guilty after a trial, Crim.R. 11(C)(3) does not violate *Jackson*").

C. Ohio does not impose the death penalty in an arbitrary and unequal manner.

Madison first argues that Ohio imposes the death penalty in a racially discriminatory manner. For this, Madison relies upon statistics compiled by the Death Penalty Information Center's website. This Court has recognized, however, that "mere statistics do not establish that the administration of capital punishment" is unconstitutional. *State v. Steffen*, 31 Ohio

St.3d 111, 124, 509 N.E.2d 383 (1987). "To sustain his claim, defendant must show that racial considerations affected the sentencing process *in his case*." *Id.* (emphasis in original). "There can be no finding that the death penalty is imposed in a discriminatory fashion absent a demonstration of specific discriminatory intent." *State v. Zuern*, 32 Ohio St.3d 56, 512 N.E.2d 585 (1987), at syllabus.

"The general rule [is] that in cases involving discretionary judgments 'essential to the criminal justice process,' statistical evidence of racial disparity is insufficient to infer that prosecutors in a particular case acted with a discriminatory purpose." *United States v. Olvis*, 97 F.3d 739, 746 (4th Cir.1996), quoting *McCleskey v. Kemp*, 481 U.S. 279, 297, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987). "The state has no duty to explain such a statistical disparity." *State v. Keene*, 81 Ohio St. 3d 646, 652, 693 N.E.2d 246 (1998). Madison does not allege racial discrimination in his case. And the statistics of other cases that he offers are insufficient to sustain a challenge to Ohio's death penalty statute.

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

D. Ohio's capital sentencing statute is reliable.

Madison claims that Ohio law is unconstitutional because it does not require the State to prove either the absence of any mitigating factors or that death is the only appropriate penalty. But the Constitution does not require the State to prove these things. The United States Supreme Court has held that states may constitutionally place the burden of proving

mitigating factors on the defendant. *See Kansas v. Marsh*, 548 U.S. 163, 173-174, 126 S. Ct. 2516, 165 L.Ed.2d 429 (2006). The only constitutional requirement is that the State must prove the existence of the aggravating circumstances by proof beyond a reasonable doubt:

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

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

Madison argues that Ohio's procedure is "arbitrary" because it requires "only that the sentencing body be convinced beyond a reasonable doubt that the aggravating circumstances were marginally greater than the mitigating factors." *Appellant's Brief*, p. 250. In essence, Madison asks this Court to require a standard of proof greater than beyond a reasonable doubt. But the Constitution only requires the prosecution to prove the *existence* of one or more aggravating circumstances beyond a reasonable doubt. The Constitution does not require a state to place any other burdens on either party at a capital sentencing proceeding. "[W]e have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required." *Franklin v. Lynaugh*, 487 U.S. 164, 179, 108 S. Ct. 2320, 101 L.E.2d 155 (1988). Rather, the "State enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed." *Marsh* at 174.

Madison argues that Ohio's statute fails to precisely define "mitigation," and that juries have too much discretion in weighing aggravating circumstances against mitigating factors. *See Appellant's Brief*, p. 250. Once again, however, the Constitution does not require

any particularly definition of "mitigation," nor does it require any specific weighing process. Once a capital case proceeds to the sentencing phase, "the State is not confined to submitting specific propositional questions to the jury and may indeed allow the jury unbridled discretion." *Buchanan v. Angelone*, 522 U.S. 269, 276, 118 S. Ct. 757, 139 L.E.2d 702 (1998), *citing Tuilaepa v. California*, 512 U.S. 967, 114 S. Ct. 2630, 129 L.Ed.2d 750 (1994).

E. Ohio's capital sentencing statute does not induce ineffective assistance of counsel or deny the defendant an impartial jury.

Madison argues that Ohio's death penalty scheme is unconstitutional because it requires the same jury that determines guilt to also make the sentencing recommendation in the second phase. This Court rejected this argument in *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 111, citing *State v. Mapes*, 19 Ohio St.3d 108, 116-117, 484 N.E.2d 140 (1985); *see also State v. Jenkins*, 15 Ohio St.3d at 173, fn. 11, 473 N.E.2d 264 (the Supreme Court "has yet to even remotely suggest that the Constitution requires a new jury be selected for the sentencing phase").

F. Ohio's statute provides for individualized sentencing.

Madison argues that Ohio's capital sentencing statutes are unconstitutional because they require proof of the aggravating circumstances during the guilt phase. Those aggravating circumstances, however, are proven by much of the same evidence used to establish the defendant's guilt of the underlying criminal counts in the indictment. That overlap is constitutionally permissible. In *Lowenfield v. Phelps*, 484 U.S. 231, 108 S. Ct. 546, 98 L.Ed.2d 568 (1988), the United States Supreme Court held that the elements of an aggravating circumstance may be identical to an elements of the underlying capital crime. The Supreme Court held that:

> "the 'narrowing function' was performed by the jury at the guilt phase * * *. The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm."

Id. at 246.

This Court has held the same. *See State v. Henderson*, 39 Ohio St.3d 24, 28-29, 528 N.E.2d 1237 (1988) (duplication of felony murder conviction and felony murder aggravating circumstance is constitutional because the narrowing function was performed by the jury during the guilt phase); *State v. Jenkins*, 15 Ohio St.3d at 174, 473 N.E.2d 264 ("any duplication is the result of the General Assembly having set forth in detail when a murder in the course of a felony rises to the level of a capital offense, thus, in effect, narrowing the class of homicides in Ohio for which the death penalty becomes available as a sentencing option").

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

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

H. Ohio's statute does not require a mandatory death sentence; rather, it narrows and channels the sentencer's discretion to a weighing process.

Madison contends that Ohio's death penalty statute is impermissibly mandatory because it requires the jury to recommend death if the aggravating circumstances outweigh mitigating factors beyond a reasonable doubt, without considering mercy. This is not a "mandatory" death penalty statute. In *Woodson v. North Carolina*, 428 U.S. at 293, 96 S. Ct. 2978, 49 L.Ed.2d 944, the Supreme Court defined the term "mandatory" in this context to refer to a statute in which "a death sentence was the automatic consequence of a guilty verdict." Ohio's statutory scheme never, under any circumstances, requires the automatic imposition of the death penalty upon a conviction for any crime.

Ohio's statute requires the jury to recommend the death penalty only if the jury finds beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors. The United States Supreme Court upheld the constitutionality of a similar Pennsylvania statute that also required imposition of the death penalty if aggravating circumstances outweighed mitigating factors in *Blystone v. Pennsylvania*, 494 U.S. at 306-307, 110 S. Ct. 1078, 108 L.Ed.2d 255. And this Court has relied upon *Blystone* to reject similar challenges to Ohio's statute. *See State v. Seiber*, 56 Ohio St.3d 4, 19, 564 N.E.2d 408 (1990); *State v. Jells*, 53 Ohio St.3d 22, 36, 559 N.E.2d 464 (1990).

Moreover, as explained above, "mercy is not a mitigating factor." *State v. O'Neal*, 87 Ohio St.3d at 416, 721 N.E.2d 73.

I. Ohio's "beyond a reasonable doubt" standard is constitutional.

Madison argues that Ohio's "beyond a reasonable doubt" standard in R.C. 2929.03 is insufficient, and that the Constitution instead demands a standard of "beyond all doubt." This Court has repeatedly rejected this claim. *See State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 211 ("We also reject Davis's claim that the burden of proof in capital

cases must be proof beyond all doubt"); *State v. Clemons*, 82 Ohio St.3d 438, 448, 696 N.E.2d 1009 (1998) ("Defendant proposes that we adopt a standard requiring proof 'beyond all doubt' as to whether death is an appropriate punishment. However, we have repeatedly rejected this same argument").

Madison argues that Ohio's definition of reasonable doubt is unconstitutional. This Court, however, has also rejected this argument. *See State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 173 ("We have repeatedly affirmed the constitutionality of the reasonable-doubt standard set forth in former R.C. 2901.05(D), now in 2901.05(E)"); *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶ 61 ("The definition of 'reasonable doubt' set forth in R.C. 2901.05(D) correctly conveys the concept of reasonable doubt and is not an unconstitutional dilution of the state's requirement to prove guilt beyond a reasonable doubt"). The Sixth Circuit has also upheld the constitutionality of Ohio's definition of reasonable doubt. *See Thomas v. Arn*, 704 F.2d 865, 869 (6th Cir. 1982).

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

105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶ 160 ("Brinkley argues that residual doubt should be a mitigating factor. But we summarily reject that argument").

J. Ohio's death penalty statutes do not violate international law.

Finally, Madison argues that Ohio's statutory scheme violates the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).

Initially, the Sixth Circuit has held that all of these international treaties are not judicially-enforceable.

> "[T]he determination of 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 is their constitutional role to determine the extent of this county's international obligations and how best to carry them out."

Buell v. Mitchell, 274 F.3d 337, 376 (6th Cir.2001). Any reaction by the United States to a violation of international law is thus a question for the executive and legislative branches. As a result, even if Madison were correct in his interpretations of the ICCPR, the ICERD, and the CAT, he could not rely upon judicial enforcement of those treaties to invalidate his death sentence. And as shown below, Madison is not correct in his interpretations of those treaties.

The ICCPR "does not require its member countries to abolish the death penalty." *Buell* at 371. In fact, the ICCPR "specifically recognizes the existence of the death penalty[,]" reserving it for "the most serious crimes in accordance with the law in force at the time of the commission of the crime[.]" *Id.*, quoting ICCPR, 999 U.N.T.S. 171, 174. When the United States ratified the ICCPR in 1992, it specifically reserved the right "to impose capital punishment on any person * * * duly convicted under existing or future laws permitting the

imposition of capital punishment[.]" *Id.*, quoting 138 Cong. Rec. S-4781-01, S4783 (1992). This Court has rejected previous claims regarding the ICCPR. *See State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 119; *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 138;

This Court also rejected claims regarding the ICERD (International Convention on the Elimination of All Forms of Racial Discrimination) in *Kirkland*, ¶ 120: "[W]e have repeatedly held that Ohio's death-penalty procedures are not unconstitutional or imposed in a racially discriminatory manner." *Id.* The existence of the ICERD does not "differ in any significant way from the constitutional arguments * * * already addressed, e.g., that equal protection and arbitrariness would be evaluated differently under international law than they are under the United States or Ohio Constitutions." *Id.*

Finally, Madison's claims under the United Nations Convention Against Torture (CAT) also fail. The CAT is implemented in this country by 8 C.F.R. § 208.18. It prohibits torture, and defines torture as:

> "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as * * * punishing him or her for an act he or she or a third person has committed * * * when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

8 C.F.R. § 208.18(a)(1). Significantly for purposes of the Ohio's use of the death penalty, however, torture does not include "pain or suffering arising only from, inherent in or incidental to lawful sanctions." 8 C.F.R. § 208.18(a)(3). "Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty[.]" *Id.* Thus, by its own language, the CAT does not prohibit the death penalty.

Based upon the foregoing case law, Ohio's capital sentencing statutes are constitutional, despite any alleged conflict with international law and specific treaties. This Court should summarily reject all of these claims, as it has done many times before. *See State v. Cepec*, 149 Ohio St.3d 438, 2016-Ohio-8076, 75 N.E.3d 1185, ¶ 126 ("this court has similarly held that Ohio's death-penalty statutes do not violate international law or treaties"); *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 331 ("McKelton also argues that Ohio's death-penalty statutes violate international law and treaties. We summarily reject these various claims").

K. Conclusion.

For all of the foregoing reasons, Ohio's capital sentencing statute is and remains constitutional against all of Madison's well-worn objections. Madison's nineteenth proposition is without merit and should be overruled.

<u>Response to Proposition of Law XX</u>: The trial court's failure to address the issue of court costs at sentencing was harmless error because R.C. 2947.23(C) now allows defendants to file a motion in the trial court seeking to waive their costs at any time.

In his twentieth and final proposition of law, Madison argues that the trial court erred by imposing court costs in its sentencing entry without mentioning them during the sentencing hearing. Madison cites *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, ¶ 23, in which this Court previously held that it was error for a trial court to impose costs in its sentencing entry when it did not mention those costs in open court at the sentencing hearing. Such an error necessitated a remand to the trial court "for the limited purpose of allowing [the defendant] to move for a waiver of the payment of court costs." *Id.*

The underlying rationale for this Court's decision in *Joseph* was that, at the time, R.C. 2947.23 did not provide trial courts continuing jurisdiction to rule on a motion to waive costs

made after the time of sentencing. Rather, a defendant at that time had to move to waive costs "at the time of sentencing." *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 24. "Otherwise, the issue is waived and costs are res judicata." *Id.*, ¶ 23.

"However, *Joseph* is no longer good law." *State v. Beasley*, Slip Opinion No. 2018-Ohio-493, ¶ 263. In 2012, the General Assembly enacted House Bill 247, which amended R.C. 2947.23 by adding subdivision (C): "The court retains jurisdiction to waive, suspend, or modify the payment of the costs of prosecution * * * at the time of sentencing or at any time thereafter." As a result, defendants such as Madison who are sentenced after the effective date of H.B. 247 are not been denied the opportunity to claim indigency and seek a waiver of costs if the trial court fails to mention costs at the time of sentencing. Madison therefore "does not need this court to remand this case in order for him to file a motion to waive costs." *Beasley*, ¶ 265. Madison can simply file a motion in the trial court to waive costs at any time. Madison's twentieth and final proposition is without merit and should be overruled.

CONCLUSION

Based on all of the foregoing, the State of Ohio respectfully asks this Honorable Court to affirm Defendant-Appellant Michael Madison's convictions and death sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing *Merit Brief of Appellee the State of Ohio* was served by email this 29th day of May, 2018 to Timothy F. Sweeney (tim@timsweeneylaw.com) and John B. Gibbons (jgibbons4@sbcglobal.net), counsel for Defendant-Appellant Michael Madison.

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NO. 2016-1006

IN THE SUPREME COURT OF OHIO

CAPITAL CASE, APPEAL FROM
THE CUYAHOGA COUNTY COURT OF COMMON PLEAS
NO. CR-13-579539

STATE OF OHIO

Plaintiff-Appellee,

-vs-

MICHAEL MADISON

Defendant-Appellant

APPENDIX TO MERIT BRIEF OF APPELLEE STATE OF OHIO

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2903.01 Aggravated murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, trespass in a habitation when a person is present or likely to be present, terrorism, or escape.

(C) No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense.

(D) No person who is under detention as a result of having been found guilty of or having pleaded guilty to a felony or who breaks that detention shall purposely cause the death of another.

(E) No person shall purposely cause the death of a law enforcement officer whom the offender knows or has reasonable cause to know is a law enforcement officer when either of the following applies:

(1) The victim, at the time of the commission of the offense, is engaged in the victim's duties.

(2) It is the offender's specific purpose to kill a law enforcement officer.

(F) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(G) As used in this section:

(1) "Detention" has the same meaning as in section 2921.01 of the Revised Code.

(2) "Law enforcement officer" has the same meaning as in section 2911.01 of the Revised Code.

Amended by 129th General AssemblyFile No.29, HB 86, §1, eff. 9/30/2011.

Effective Date: 05-15-2002 .

2945.27 Challenges for cause to be made before jury sworn.

The judge of the trial court shall examine the prospective jurors under oath or upon affirmation as to their qualifications to serve as fair and impartial jurors, but he shall permit reasonable examination of such jurors by the prosecuting attorney and by the defendant or his counsel.

Effective Date: 09-09-1957.

2947.23 Costs and jury fees - community service to pay judgment.

(A)

(1)

(a) In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution, including any costs under section 2947.231 of the Revised Code, and render a judgment against the defendant for such costs. If the judge or magistrate imposes a community control sanction or other nonresidential sanction, the judge or magistrate, when imposing the sanction, shall notify the defendant of both of the following:

(i) If the defendant fails to pay that judgment or fails to timely make payments towards that judgment under a payment schedule approved by the court, the court may order the defendant to perform community service until the judgment is paid or until the court is satisfied that the defendant is in compliance with the approved payment schedule.

(ii) If the court orders the defendant to perform the community service, the defendant will receive credit upon the judgment at the specified hourly credit rate per hour of community service performed, and each hour of community service performed will reduce the judgment by that amount.

(b) The failure of a judge or magistrate to notify the defendant pursuant to division (A)(1)(a) of this section does not negate or limit the authority of the court to order the defendant to perform community service if the defendant fails to pay the judgment described in that division or to timely make payments toward that judgment under an approved payment plan.

(2) The following shall apply in all criminal cases:

(a) If a jury has been sworn at the trial of a case, the fees of the jurors shall be included in the costs, which shall be paid to the public treasury from which the jurors were paid.

(b) If a jury has not been sworn at the trial of a case because of a defendant's failure to appear without good cause or because the defendant entered a plea of guilty or no contest less than twenty-four hours before the scheduled commencement of the trial, the costs incurred in summoning jurors for that particular trial may be included in the costs of prosecution. If the costs incurred in summoning jurors are assessed against the defendant, those costs shall be paid to the public treasury from which the jurors were paid.

(B) If a judge or magistrate has reason to believe that a defendant has failed to pay the judgment described in division (A) of this section or has failed to timely make payments towards that judgment under a payment schedule approved by the judge or magistrate, the judge or magistrate shall hold a hearing to determine whether to order the offender to perform community service for that failure. The judge or magistrate shall notify both the defendant and the prosecuting attorney of the place, time, and date of the hearing and shall give each an opportunity to present evidence. If, after the hearing, the judge or magistrate determines that the defendant has failed to pay the judgment or to timely make payments under the payment schedule and that imposition of community service for the failure is appropriate, the judge or magistrate may order the offender to perform community service until the judgment is paid or until the judge or magistrate is satisfied that the offender is in compliance with the approved payment schedule. If the judge or magistrate orders the defendant to perform community

service under this division, the defendant shall receive credit upon the judgment at the specified hourly credit rate per hour of community service performed, and each hour of community service performed shall reduce the judgment by that amount. Except for the credit and reduction provided in this division, ordering an offender to perform community service under this division does not lessen the amount of the judgment and does not preclude the state from taking any other action to execute the judgment.

(C) The court retains jurisdiction to waive, suspend, or modify the payment of the costs of prosecution, including any costs under section 2947.231 of the Revised Code, at the time of sentencing or at any time thereafter.

(D) As used in this section:

(1) "Case" means a prosecution of all of the charges that result from the same act, transaction, or series of acts or transactions and that are given the same case type designator and case number under Rule 43 of the Rules of Superintendence for the Courts of Ohio or any successor to that rule.

(2) "Specified hourly credit rate" means an hourly credit rate set by the judge or magistrate, which shall not be less than the wage rate that is specified in 26 U.S.C.A. 206(a)(1) under the federal Fair Labor Standards Act of 1938, that then is in effect, and that an employer subject to that provision must pay per hour to each of the employer's employees who is subject to that provision.

Amended by 130th General Assembly File No. TBD, SB 143, §1, eff. 9/19/2014.

Amended by 129th General AssemblyFile No.169, HB 247, §1, eff. 3/22/2013.

Amended by 129th General AssemblyFile No.131, SB 337, §1, eff. 9/28/2012.

Amended by 129th General AssemblyFile No.81, HB 268, §1, eff. 5/22/2012.

Effective Date: 03-24-2003; 05-18-2005; 2008 HB283 09-12-2008.

2971.01 Sentencing of sexually violent predator definitions.

As used in this chapter:

(A) "Mandatory prison term" has the same meaning as in section 2929.01 of the Revised Code.

(B) "Designated homicide, assault, or kidnapping offense" means any of the following:

(1) A violation of section 2903.01, 2903.02, 2903.11, or 2905.01 of the Revised Code or a violation of division (A) of section 2903.04 of the Revised Code;

(2) An attempt to commit or complicity in committing a violation listed in division (B)(1) of this section, if the attempt or complicity is a felony.

(C) "Examiner" has the same meaning as in section 2945.371 of the Revised Code.

(D) "Peace officer" has the same meaning as in section 2935.01 of the Revised Code.

(E) "Prosecuting attorney" means the prosecuting attorney who prosecuted the case of the offender in question or the successor in office to that prosecuting attorney.

(F) "Sexually oriented offense" and "child-victim oriented offense" have the same meanings as in section 2950.01 of the Revised Code.

(G) "Sexually violent offense" means any of the following:

(1) A violent sex offense;

(2) A designated homicide, assault, or kidnapping offense that the offender commits with a sexual motivation.

(H)

(1) "Sexually violent predator" means a person who, on or after January 1, 1997, commits a sexually violent offense and is likely to engage in the future in one or more sexually violent offenses.

(2) For purposes of division (H)(1) of this section, any of the following factors may be considered as evidence tending to indicate that there is a likelihood that the person will engage in the future in one or more sexually violent offenses:

(a) The person has been convicted two or more times, in separate criminal actions, of a sexually oriented offense or a child-victim oriented offense. For purposes of this division, convictions that result from or are connected with the same act or result from offenses committed at the same time are one conviction, and a conviction set aside pursuant to law is not a conviction.

(b) The person has a documented history from childhood, into the juvenile developmental years, that exhibits sexually deviant behavior.

(c) Available information or evidence suggests that the person chronically commits offenses with a sexual motivation.

(d) The person has committed one or more offenses in which the person has tortured or engaged in ritualistic acts with one or more victims.

(e) The person has committed one or more offenses in which one or more victims were physically harmed to the degree that the particular victim's life was in jeopardy.

(f) Any other relevant evidence.

(I) "Sexually violent predator specification" means a specification, as described in section 2941.148 of the Revised Code, that charges that a person charged with a violent sex offense, or a person charged with a designated homicide, assault, or kidnapping offense and a sexual motivation specification, is a sexually violent predator.

(J) "Sexual motivation" means a purpose to gratify the sexual needs or desires of the offender.

(K) "Sexual motivation specification" means a specification, as described in section 2941.147 of the Revised Code, that charges that a person charged with a designated homicide, assault, or kidnapping offense committed the offense with a sexual motivation.

(L) "Violent sex offense" means any of the following:

(1) A violation of section 2907.02, 2907.03, or 2907.12 or of division (A)(4) or (B) of section 2907.05 of the Revised Code;

(2) A felony violation of a former law of this state that is substantially equivalent to a violation listed in division (L)(1) of this section or of an existing or former law of the United States or of another state that is substantially equivalent to a violation listed in division (L)(1) of this section;

(3) An attempt to commit or complicity in committing a violation listed in division (L)(1) or (2) of this section if the attempt or complicity is a felony.

Effective Date: 07-31-2003; 04-29-2005; 2007 SB10 01-01-2008 .

RULE 35. Physical and Mental Examination of Persons

(A) Order for examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit himself to a physical or mental examination or to produce for such examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(B) Examiner's report.

(1) If requested by the party against whom an order is made under Rule 35(A) or the person examined, the party causing the examination to be made shall deliver to such party or person a copy of the detailed written report submitted by the examiner to the party causing the examination to be made. The report shall set out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery, the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or, thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party to require delivery of a report on such terms as are just. If an examiner fails or refuses to make a report, the court on motion may order, at the expense of the party causing the examination, the taking of the deposition of the examiner if his testimony is to be offered at trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

(3) This subdivision, 35(B), applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise.

[Effective: July 1, 1970.]

RULE 11. Pleas, Rights Upon Plea

(A) Pleas. A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant's attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) Effect of guilty or no contest pleas. With reference to the offense or offenses to which the plea is entered:

(1) The plea of guilty is a complete admission of the defendant's guilt.

(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under Crim.R. 32.

(C) Pleas of guilty and no contest in felony cases.

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim.R. 44 by appointed counsel, waives this right.

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting a plea of guilty or no contest the court shall so advise the defendant and determine that the defendant understands the consequences of the plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications that are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

(D) Misdemeanor cases involving serious offenses. In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim.R. 44 by appointed counsel, waives this right.

(E) Misdemeanor cases involving petty offenses. In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such pleas without first informing the defendant of the effect of the plea of guilty, no contest, and not guilty.

The counsel provisions of Crim.R. 44(B) and (C) apply to division (E) of this rule.

(F) Negotiated plea in felony cases. When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court.

(G) Refusal of court to accept plea. If the court refuses to accept a plea of guilty or no contest, the court shall enter a plea of not guilty on behalf of the defendant. In such cases neither plea shall be admissible in evidence nor be the subject of comment by the prosecuting attorney or court.

(H) Defense of insanity. The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial.

[Effective: July 1, 1973; amended effective July 1, 1976; July 1, 1980; July 1, 1998.]

Staff Note (September 1, 2012)

Courts and litigants are advised that the Revised Code contains additional requirements, not contained in Crim.R. 11, for advising certain defendants at a plea of guilty or no contest of other possible consequences in specified circumstances. See, e.g., Sections 2943.031 (possible immigration consequences), 2943.032 (possible extension of prison term), and 2943.033 (possible firearm restriction) of the Ohio Revised Code. Other plea requirements not contained in Crim.R. 11 may also apply. See, e.g., Section 2937.07 (requiring explanation of circumstances in certain misdemeanor cases) of the Ohio Revised Code.

RULE 57. Rule of Court; Procedure Not Otherwise Specified

(A) Rule of court. (1) The expression "rule of court" as used in these rules means a rule promulgated by the Supreme Court or a rule concerning local practice adopted by another court that is not inconsistent with the rules promulgated by the Supreme Court and is filed with the Supreme Court.

(2) Local rules shall be adopted only after the court gives appropriate notice and an opportunity for comment. If the court determines that there is an immediate need for a rule, the court may adopt the rule without prior notice and opportunity for comment, but promptly shall afford notice and opportunity for comment.

(B) Procedure not otherwise specified. If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists.

[Effective: July 1, 1973; amended effective July 1, 1994.]