NO. 2019-1482
IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF COMMON PLEAS FOR CUYAHOGA COUNTY, OHIO
NO. CR 614021
Death Penalty Case- No Execution Date Scheduled

STATE OF OHIO,
Plaintiff-Appellee

-vs-

CHRISTOPHER WHITAKER,
Defendant-Appellant

MERIT BRIEF OF APPELLEE, STATE OF OHIO

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STATEMENT OF THE CASE AND FACTS

Christopher Whitaker was convicted and sentenced to death of the rape, kidnapping, torture, and murder of a 14-year-old girl. Given the evidence against him, Whitaker did not contest his guilt. He was tried by a jury of his peers. He received a fair trial. Each of his 21 propositions of law lack merit, should be overruled, and his convictions affirmed.

A. A.D. goes missing on January 26, 2017

In January 2017, A.D.[1] lived in the Mount Pleasant area of Cleveland with her mother, her mother's boyfriend, and her brother. By all accounts, A.D. was a "bubbly" and happy" 14-year-old girl. Tr. 1831; State's Exhibit 200 (picture of A.D.). According to A.D.'s mother, D.C., A.D. was not a "typical teenager;" she acted "younger than her age" and "played with baby dolls." Tr. 1831-1832; State's Exhibit 201 (picture of D.C.). A.D. was 115 pounds and 4'11" tall. Tr. 2361.

A.D. "struggled in school" and was placed in an Intensive Educational Program (IEP) because of developmental delays. Tr. 1831, 1849. At the time of the offense, A.D. attended E Prep Academy located at 9201 Crane Ave. in Cleveland. Tr. 1831, 1851. Now in seventh grade, A.D. had to take two public transportation buses to get to school each day. Tr. 1834. A.D. had to be out of the house by 6:25am to catch the first of her two buses. Tr. 1836. The first bus, number 14, took A.D. down to where she would transfer to the number 10 bus to go to E Prep.

On January 26, 2017, A.D. was running a bit late for her first bus. A.D. put on her school uniform which consisted of tan pants, a white shirt, a tie, and a sweater. Tr. 1839. A.D. also had on a coat and her backpack. D.C. ran after her to make sure he daughter safely made it onto

[1] Initials are used in place of the victim's name as she was a minor and the victim of a sexual assault.

the bus. She yelled out, and A.D. "came back" and gave her mother a final hug and kiss. Tr. 1838. Video surveillance from the Cleveland RTA bus shows A.D. putting in her fare at 6:41am. Tr. 1841; State's Exhibit 202. That was the last time D.C. saw her daughter alive.

J.P., a friend of A.D.'s, also took the number 14 bus that morning. Tr. 1877. He and A.D. talked about school until A.D. got off to transfer buses. Tr. 1880-1881.

On a typical day, A.D. would arrive home from school between 3:30 and 3:45pm. Tr. 1843. But A.D. never arrived. Around 4:00pm, D.C. called the school thinking that A.D. might have stayed late. It was then that she learned from the school that A.D. had never arrived. Tr. 1843. Knowing her daughter would not skip school, D.C. became worried and called the police. Tr. 1844, 1865. D.C. gave police information about her daughter's physical description, clothing, and cellphone information. Tr. 1845-46.

Armed with information from D.C., the Cleveland Police Department, Ohio BCI, FBI, and E Prep faculty began an extensive search effort to locate A.D. Tr. 1858-1861, 1866, 1871, 1910. Officers obtained and/or reviewed surveillance video from RTA and nearby businesses in an attempt to follow A.D.'s path. Tr. 1903-1905, 1931. Video surveillance showed A.D. get off the bus, cross the street at E. 93rd and Easton, and travel northbound on E. 93rd St. Tr. 2045, 2048. The video also showed a man, later identified as Whitaker, pacing around the area starting at 4:36am. Tr. 2046, 2049, 2063-71. Video captured A.D. walk up towards Whitaker, stop, and then step away from him. Tr. 2049, 2051, 2076, 2601. Whitaker followed A.D. north on E. 93rd St. At 7:19am, video captured two individuals walk across the field at E. 93rd and Fuller, which is the last time A.D. is believed to have been seen alive on video. Tr. 2051-52, 2054. A witness, Kenneth Chambers, came forward and testified that he saw a man grab A.D. around Fuller. Tr. 2221.

B. A.D. is found on January 29, 2017

Navigating through snow, officers finally found A.D. in 9412 Fuller Ave. Her body was located in a bedroom off of the dining room. Officers kicked the door in to gain entrance. Tr. 2007, 2014. A.D. was "upside down. Legs as if someone just threw her up against the wall. Her hair was everywhere." Tr. 1994. Officer Britten, a 24-year-veteran of the Cleveland Police Department, couldn't bring himself to look at A.D.'s face after hearing his partners describe her injuries Tr. 1994-95. Officer Hodges noted that A.D. was nude except for one sock, had "holes in her head," and it looked like something "was done to her eye [.]" Tr. 2007.

The home was dark and freezing. Tr. 1993-94. The scene was preserved and processed. State's Exhibits 672-695; 400-564 (crime scene photographs). Officers photographed and preserved bloody boot prints found in the home. Tr. 1945. The dining room had a large quantity of blood, including what appeared to be a drag mark. Tr. 1947-48, 1994, 2129, 2134, 2337. A bench seat contained a bag, tools, and more blood. Tr. 1951, 2007; State's Exhibits 467-75. Boot prints were taken from every officer who went into the home. Tr. 1956, 2158, State's Exhibits 650-671.

Detective Clemons, a 20-year veteran with the Cleveland Police Department, processed the crime scene. Tr. 2078. He had to bring in portable lighting to be able to photograph the evidence. Tr. 2084. Detective Clemons documented blood splatter on the dining room floor. Tr. 2103. The jurors were shown the tools located in the dining room that Whitaker used to kill A.D. Tr. 2109. Several of the tools-particularly a cordless drill, nut driver, and utility knife-had suspected blood on them. Tr. 2114, 2123. The tools corresponded to A.D.'s injuries. Tr. 2153, 2278. A plaid tie and teal training bra, consistent with A.D.'s clothing, were located with suspected blood on them. Tr. 2125-26, 2138-39. Her black sweater, which had been torn or

cut in half, was also located. Tr. 2136-37, 2287. A ripped condom wrapper was located on the floor of the living room. Tr. 2140-41. Detectives observed a blood smear on the back wall of the closet where A.D. was found. Tr. 2147.

Dr. Dolinak, a pathologist with the Cuyahoga County Medical Examiner's Office, arrived on scene. A.D.'s body was transported to the Medical Examiner's office for an autopsy. Dr. David Dolinak found that A.D. suffered a tremendous amount of injuries: she had puncture wounds consistent with a drill and a screwdriver, some of which entered her brain; she had multiple stab and incised wounds to her neck, one of which completely severed her carotid artery; her right eye was partially forced out of its socket as a result of pressure to her head; her jaw was broken, possibly from being stomped. Tr. 2368, 2370, 2373, 2378-79, 2407-08. A.D. also had defensive wounds, indicating that she tried to protect herself. Tr. 2431-37. Sperm was located in A.D.'s vagina and labia. Tr. 2453. Dr. Dolinak found that, due to bleeding and microscopic evidence, A.D. was alive while she was being tortured. Tr. 2452-53.

The home where A.D. was found was owned by Lavontay McKenzie. Tr. 2192. Mr. McKenzie, who works in Solon, Ohio, purchased the home from his father in 2016. Tr. 2192. Before the murder, Mr. McKenzie had planned to remodel it and turn it into a group home. Tr. 2192. He had already started the process by removing carpeting, cleaning, and getting rid of some tile. Tr. 2193. Although Mr. McKenzie had not been at the home for approximately three months before the homicide, he took steps to secure the premises in his absence. Tr. 2194. Mr. McKenzie did not give anyone consent to enter the home. Tr. 2200.

C. Christopher Whitaker is identified as the killer

The Cleveland Police Department submitted a substantial amount of evidence to the Cuyahoga County Regional Forensic Science Laboratory. At the same time, the Medical

Examiner's Office performed an autopsy on A.D. A.D. was found to have sperm in her vagina and labia. The sperm was DNA tested and a match was made with Christopher Whitaker. Armed with this information, Whitaker was arrested on February 2, 2017. He was read his *Miranda* rights and submitted to interviews. Tr. 2607; State's Exhibits 52, 53. Whitaker's boots were collected and photographed. Tr. 2234-35, 2239, State's Exhibits 322, 325, 326. Whitaker initially denied being in the area or knowing A.D., but eventually confessed little-by-little after being confronted with the evidence against him. State's Exhibits 52, 53.

Analyst Lisa Przepyszny, with the Trace Evidence Department of the Cuyahoga County Regional Forensic Science Laboratory, was responsible for inspecting and swabbing the items submitted by the Cleveland Police Department. Tr. 2260; State's Exhibit 127. After extensive testing, Ms. Przepyszny opined that Whitaker's boots shared an association to bloody boot prints found at the crime scene. Tr. 2325-26. Notably, the tread elements were also similar to a "geometric pattern" found on the left side of A.D.'s face. Tr. 2342. Ms. Przepyszny sent swabs to the DNA department for further analysis.

DNA testing confirmed Whitaker's identity as the killer. "In the absence of an identical twin" Whitaker's sperm was located in A.D.'s vagina and labia. Tr. 2482, 2487; State's Exhibit 129. Y-STR DNA testing showed Whitaker's DNA was also on A.D.'s fingernails, thigh, labia, vagina, and ankles. Tr. 2512-18; State's Exhibit 128.

Additional witnesses placed Whitaker in the area. On January 26, 2017, Associate Pastor David Brewton of the Golgatha Church was unloading a truck for his church's food pantry when Whitaker arrived. Tr. 2530. Around 10am, Whitaker made his way to the church looking for a man named Lavette Hambrick. Tr. 2530. Hambrick was helping Mr. Brewton unload the truck. Mr. Brewton offered to give Hambrick and Whitaker $20 each for helping to

unload the truck. Tr. 2535. Both men said they could be found on Fuller to collect the money.

Alton Sanders, a resident of the area where A.D. was killed, was familiar with Whitaker. He testified that Whitaker was in the Fuller area around the time of A.D.'s disappearance. Mr. Sanders testified that after A.D. went missing, Whitaker said he was going to pay someone $20 to take him out of the area, and asked to use Mr. Sanders's phone. Tr. 2210. Whitaker called his mother and girlfriend. Tr. 2210. That was the last time Mr. Sanders saw him.

D. Christopher Whitaker was indicted for the death of A.D.

On February 13, 2017, a Cuyahoga County Grand Jury indicted Whitaker with the following:

> **Count 1**- Aggravated Murder, R.C. 2903.01(B), while committing or attempting to commit rape. Count 1 included three felony murder specifications, R.C. 2929.04(A)(7), for committing the offense while committing or attempting to commit rape (specification 1), kidnapping (specification 2), and aggravated burglary (specification 3).
>
> **Count 2**- Aggravated Murder, R.C. 2903.01(B), while committing or attempting to commit kidnapping. Count 2 included three felony murder specifications, R.C. 2929.04(A)(7), for committing the offense while committing or attempting to commit rape (specification 1), kidnapping (specification 2), and aggravated burglary (specification 3).
>
> **Count 3**- Aggravated Murder, R.C. 2903.01(B), while committing or attempting to commit aggravated burglary. Count 3 included three felony murder specifications, R.C. 2929.04(A)(7), for committing the offense while committing or attempting to commit rape (specification 1), kidnapping (specification 2), and aggravated burglary (specification 3).
>
> **Count 4**- Aggravated Murder, R.C. 2903.01(A). Count 4 included three felony murder specifications, R.C. 2929.04(A)(7), for committing the offense while committing or attempting to commit rape (specification 1), kidnapping (specification 2), and aggravated burglary (specification 3).
>
> **Count 5**- Rape, R.C. 2907.02(A)(2). Count 5 included a sexually violent predator specification, a notice of prior conviction, and a repeat violent offender specification.
>
> **Count 6**- Kidnapping. R.C. 2905.01(A)(3). Count 6 included a sexual motivation

specification, a sexually violent predator specification, a notice of prior conviction, and a repeat violent offender specification.

Count 7- Kidnapping, R.C. 2905.01(A)(4). Count 7 included a sexual motivation specification, a sexually violent predator specification, a notice of prior conviction, and a repeat violent offender specification.

Count 8- Aggravated Burglary, R.C. 2911.11(A)(1). Count 8 included a notice of prior conviction and a repeat violent offender specification.

Count 9- Tampering with Evidence, R.C. 2921.12(A)(1).

Count 10- Abuse of a Corpse, R.C. 2927.01(B).

Whitaker entered a plea of not guilty. He was appointed two highly experienced capital defense attorneys- Thomas Shaughnessy and Fernando Mack.

E. Whitaker exercised his right to a jury trial

A jury trial commenced on January 22, 2018. Given the evidence against him, including his confession, Whitaker did not contest his guilt in front of the jury. He did, however, move for acquittal under Crim.R. 29, which was denied. On February 13, 2018, the jury found Whitaker guilty of all charges and the specifications before them.

The case then moved to the second phase of trial. Consistent with this Court's precedent, the state proceeded only with Count 4. Whitaker retained Dr. Kaplan as a psychological expert and Mr. Aiken as a prison specialist. Whitaker also gave an unsworn statement to the jury. The state retained Dr. West, and presented her in rebuttal to Dr. Kaplan.

The jury, having heard and considered all appropriate evidence, recommended that Whitaker be sentenced to death.

F. Whitaker was sentenced to death

The trial court adopted the jury's recommendation following an independent review.

Whitaker was sentenced to the following:

Count	Offense	R.C. Section	Level	Sentences
1	Aggravated Murder	2903.01(A)	UF	Merged with Count 4
2	Aggravated Murder	2903.01(B)	UF	Merged with Count 4
3	Aggravated Murder	2903.01(B)	UF	Merged with Count 4
4	Aggravated Murder	2903.01(A)	UF	Death
5	Rape	2907.02(A)(2)	F-1	11 years
6	Kidnapping	2905.01(A)(3)	F-1	11 years
7	Kidnapping	2905.01(A)(4)	F-1	11 years
8	Aggravated Burglary	2911.11(A)(1)	F-1	11 years
9	Tampering with Evidence	2921.12(A)(1)	F-3	3 years
10	Gross Abuse of a Corpse	2927.01(B)	F-5	1 year

Whitaker now appeals, raising 21 propositions of law. Each should be rejected as meritless.

LAW AND ARGUMENT

Appellant's First Proposition of Law: When the defense concedes liability at the culpability phase of the trial, it is prejudicial misconduct for the state to present extensive, detailed, and horrific evidence regarding the details of the crimes at issue.

In his first proposition of law, Whitaker argues that the state committed prosecutorial misconduct when it presented evidence of his guilt. Whitaker claims it was unnecessary for the state to do so because Whitaker "conceded guilt." Appellant's Br., pg. 8. The irony is not lost on the undersigned that Whitaker's second, third, fifth, sixth, and seventh propositions of law claim that the state failed to satisfy is burden of proof and persuasion on some counts. So which way is it? Did Whitaker concede his guilt, or did the state fail to prove it? As he notes,

Whitaker did not enter a guilty plea, so the state was required to prove every element of the charged offenses beyond a reasonable doubt.

i. Standard of Review

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

Where, as here, Whitaker failed to object to most of what he calls misconduct, the claim is only reviewed for plain error. *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, ¶40. "Under the plain-error doctrine, reversible error occurs only if 'but for the error, the outcome of the trial clearly would have been otherwise.'" *Id*. (*citing State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, paragraph two of the syllabus).

ii. Law and Argument

In the most general sense, Whitaker claims that the state presented improper victim impact evidence. Whitaker lodged few objections at trial, and therefore has waived all but plain error to most-if not all-of this claim.

"Victim impact evidence includes evidence relating to the victim's personal characteristics and the impact that the crimes had on the victim's family." *State v. Graham*, Slip Op. No. 2020-Ohio-6700, ¶113 (*citing State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 259; *Payne v. Tennessee*, 501 U.S. 808, 817, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)). The evidence that Whitaker casts as "victim impact" evidence included testimony about the search for A.D., testimony and photographs of A.D.'s injuries, and photographs of the lay witnesses. None of that evidence is properly cast as victim impact evidence.

This Court has repeatedly held that evidence "relating to the facts attendant to the offense***is clearly admissible during the guilt phase." *State v. Myers*, 97 Ohio St.3d 335, 354, 2002-Ohio-6658, ¶108 (*citing State v. Fautenberry*, 72 Ohio St.3d 435, 440 (1995)). Similar to this case, Myers challenged the admission of photographs of the victim's family and photographs of the victim holding her daughter. This Court held that the photographs were admissible, and that they were not the "type of victim impact evidence where a member of the victim's family testifies at the close of the sentencing phase." *Id*. at ¶109. The evidence Whitaker complains of is not "victim impact" evidence; it was evidence.

In *Graham*, the lead opinion listed five factors relevant to determining whether victim impact evidence was "overly emotional": (1) the length of the victim-impact testimony, (2) whether witnesses, jurors, and audience members showed physical signs of emotion during the testimony, (3) the detail and depth of the victim-impact testimony with regard to the

murder victim, (4) whether the victim-impact witness used emotionally charged language, (5) the number of victim-impact witnesses. *Graham, supra,* at ¶126. Again, the evidence that Whitaker challenges was used to identify witnesses, *see State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶57, and for the state to meet its burden of proof. There is no indication that the brief testimony about A.D., or the picture board of witnesses, prejudiced Whitaker. As Whitaker states, A.D. was "raped, killed, and viciously tortured." Appellant's Br., pg. 6. The overwhelming evidence in this case negates any possible prejudice.

iii. Conclusion

Whitaker's first proposition of law lacks merit and must be overruled.

> **Appellant's Second Proposition of Law:** A conviction for aggravated burglary in violation of R.C. 2911.11(A) is based on insufficient evidence when the only evidence that the structure is "occupied" or that "another person other than an accomplice of the offender is present" is that the offender forces a person with no association to the structure into the structure in order to victimize her.

In his second proposition of law, Whitaker argues that his aggravated burglary conviction is not supported by sufficient evidence. His argument lacks merit.

i. Standard of Review

Sufficiency is a term of art meaning, "the legal standard applied to determine whether a case is legally sufficient to support the jury verdict as a matter of law." *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). Sufficiency of evidence is determined as a question of law. *State v. Robinson*, 162 Ohio St. 486, 124 N.E.2d 541 (1955). When reviewing sufficiency of evidence, an appellate court's function is to examine the evidence admitted at trial and determine whether, "in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 at 278 (1991) (*citing Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct.

2781, 61 L.Ed.2d 560 (1979)).

ii. Law and Argument

Whitaker argues that his conviction for aggravated burglary in Count 8, his conviction in count 3 (aggravated murder with the predicate of aggravated burglary), and the felony murder specification based on aggravated burglary are not supported by sufficient evidence. Count 3 was merged, so it is unnecessary for this Court to review Whitaker's challenge to that count. *See State v. Croom*, 7th Dist. (Mahoning) No. 12 MA 54, 2013-Ohio-5682, ¶60 (*citing State v. Powell*, 49 Ohio St.3d 255, 263, 552 N.E.2d 191 (1990)).

Ohio Revised Code 2911.11(A)(1) states:

> **(A)** No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:
> **(1)** The offender inflicts, or attempts or threatens to inflict physical harm on another;

Whitaker claims that the state failed to prove that 9412 Fuller Avenue was an "occupied structure" and failed to prove that another person was present. The term "occupied structure" is also statutorily defined.

Ohio Revised Code 2901.01(C) defines "occupied structure" as:

> **(C)** "Occupied structure" means any house, building, outbuilding, watercraft, aircraft, railroad car, truck, trailer, tent, or other structure, vehicle, or shelter, or any portion thereof, to which any of the following applies:
> **(1)** It is maintained as a permanent or temporary dwelling, even though it is temporarily unoccupied and whether or not any person is actually present.
> **(2)** At the time, it is occupied as the permanent or temporary habitation of any person, whether or not any person is actually present.
> **(3)** At the time, it is specially adapted for the overnight accommodation of any person, whether or not any person is actually present.
> **(4)** At the time, any person is present or likely to be present in it.

The state presented testimony from the homeowner of 9412 Fuller Ave. to prove that

the premises was an "occupied structure." Lavontay McKenzie purchased the home from his father in 2016. Tr. 2192. He planned to remodel it and turn it into a group home. Tr. 2192. Mr. McKenzie had started the remodeling process by removing carpeting, cleaning, and getting rid of some tile. Tr. 2193. Although he had not been in the home for several months before the murder, Mr. McKenzie testified about the steps that he took to secure the home. Tr. 2194.

This Court recently had an opportunity to review R.C. 2901.01(C) in the context of a winterized trailer. See *State v. Fazenbaker*, Slip Op. No. 2020-Ohio-6731. Relevant here, the Court found that "[b]ecause the trailer was designed for the specific purpose of providing a temporary dwelling, including overnight accommodation, and because winterizing the trailer did not change its purpose or render it physically incapable of being occupied, it remained a structure capable of being occupied despite conditions that indicated that the owners did not want it to be occupied at the time." *Id*. at ¶13. The analogous point exists with Mr. McKenzie's home.

Although Mr. McKenzie had not been in the home for several months before the murder, his absence is not dispositive. As the Twelfth District has stated, "[i]n analyzing whether a building is an 'occupied structure" under R.C. 2909.01(C)(1)… 'the relevant inquiry focuses on the nature for which the building is used, not the length of a temporary absence.'" *State v. Gerde*, 12th Dist. No. CA2016-11-077, 2017-Ohio-7464, ¶19 (citing *State v. Jackson*, 12th Dist. Butler Nos. CA2005-02-033 and CA2005-03-051, 2006-Ohio-1147, ¶ 34). Gerde argued that his burglary conviction should be reversed because the state failed to prove the home was an occupied structure. The court held homes going through extensive renovations-even when a tenant or owner are not living there-are considered occupied structures. *Id*. at ¶21 (*citing State v. Braden*, 12th Dist. Preble CA2013-12-012, 2014-Ohio-

3385, ¶ 18; *State v. Johnson*, 188 Ohio App.3d 438, 2010-Ohio-3345, ¶ 18, 935 N.E.2d 895 (2d Dist.); *State v. Woodruff*, 6th Dist. Lucas No. L-04-1125, 2005-Ohio-3368, ¶ 7-8). The tenants in *Gerde* moved out two months prior to the incident, and the homeowner, like Mr.McKenzie, testified that he either planned to use the home himself or rent it out following renovations.

It is clear based on Mr. McKenzie's testimony that the home was an occupied structure under R.C. 2901.01(C)(1). *See State v. Goss*, 8th Dist. No. 97348, 2012-Ohio-1951 (premises was boarded up and heat was shut off, but premises was checked on); *State v. Green*, 18 Ohio App.3d 69, 480 N.E.2d 1128 (10th Dist., 1984) (homeowner moved out 3 months before burglary but returned regularly to remove items and make repairs*); State v. Turner*, 8th Dist. No. 86916, 2006-Ohio-4098 (foreclosed home where homeowner left months prior to the burglary, but home was being looked after by property manager). And, as Whitaker concedes, A.D. was present in the home. Appellant's Br. pg. 13.

The state presented sufficient evidence to prove that Whitaker committed aggravated burglary.

iii. Conclusion

Whitaker's second proposition of law lacks merit and must be overruled. His conviction for aggravated burglary, and the related specification, are supported by sufficient evidence.

> **Appellant's Third Proposition of Law**: A conviction for aggravated burglary in violation of R.C. 2911.11(A) is not supported by the manifest weight of the evidence and therefore violates a defendant's right to a fair trial and due process and must be reversed when the only evidence that the structure is "occupied" or that "another person other than an accomplice of the offender is present" is that the offender forces a person with no association to the structure into the structure in order to victimize her.

In his third proposition of law, Whitaker claims that his conviction for aggravated

burglary is not supported by the manifest weight of the evidence. He is incorrect.

i. Standard of Review

There is a distinction between a claim based on the sufficiency of evidence, and one based on manifest weight. *State v. Ford*, 8th Dist. No. 88236, 2007-Ohio-2645, ¶ 50. Sufficiency is a question of law, while manifest weight is a question of fact. *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). In evaluating the manifest weight of the evidence, a court sits as the thirteenth juror and reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether, in resolving conflicts of evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Id*. at 387. The discretionary power to grant a new trial should only be exercised in the exceptional case in which evidence weighs heavily against the conviction. *Id*. A reviewing court will not reverse a verdict if the trier of fact could reasonably conclude from substantial evidence that the prosecution proved the offense beyond a reasonable doubt. *State v. Eley*, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978), *superseded by state constitutional amendment on other grounds in State v. Smith*, 80 Ohio St.3d 89.

ii. Law and Argument

In his third proposition of law, Whitaker essentially copies and pastes the argument he made in support of his second proposition of law. Whitaker does not make any argument as to why or how the state failed to meet its burden of persuasion.

The Eighth District has adopted several factors to be used when determining whether a judgement is against the manifest weight of the evidence: (1) knowledge that even a reviewing court is not required to accept the incredible as true; (2) whether evidence is

uncontradicted; (3) whether a witness was impeached; (4) attention to what was not proved; (5) the certainty of the evidence; (6) the reliability of the evidence; (7) the extent to which a witness may have a personal interest to advance or defend their testimony; and (8) the extent to which the evidence is vague, uncertain, conflicting or fragmentary. *State v. Hanni*, 8th Dist. No. 91014, 2009-Ohio-139, ¶28. Mr. McKenzie's testimony was uncontradicted, credible, and clear. Whitaker does not lodge any real challenge to the credibility of the evidence the state submitted in support of the aggravated burglary count. In fact, Whitaker confessed to the offenses and admitted his guilt at trial.

iii. Conclusion

Whitaker's third proposition of law lacks merit and must be overruled.

> **Appellant's Fourth Proposition of Law:** If the grand jury charges a capital defendant in separate counts with separate kidnapping offenses for the same event, a felony murder specification of kidnapping without specifying which of the kidnapping offenses it alleges violates the right to a grand jury indictment.

In his fourth proposition of law, Whitaker argues that the weighing process was skewed because "a failure of the grand jury led to the second aggravating circumstance receiving double weight." Appellant's Br. pg. 23. He is incorrect. Further, Whitaker did not make any objection at trial to alleged defects in his indictment.

As previously discussed, Whitaker was charged in a ten-count indictment. Counts 1-4 charged Whitaker with aggravated murder, and each count contained three felony-murder specifications, one each for rape, kidnapping, and aggravated burglary. Whitaker was also indicted with kidnapping under two different subsections: 2905.01(A)(3) and 2905.01(A)(4). The jury found Whitaker guilty of the charges and specifications. And, prior to the penalty phase, the state elected to proceed on Count 4, so there was only one set of specifications

before them. Tr. 2870-71.

Whitaker argues that the felony-murder specification of kidnapping was double weighted because he was indicted with two counts of kidnapping at trial. Whitaker claims that the "grand jury should have specified just what kidnapping offense it intended by the kidnapping felony murder specification it attached to each aggravated murder count." Appellant's Br. pg. 24. But the indictment tracks the language of the criminal statute. *State v. Sowell*, 148 Ohio St.3d 554, 71 N.E.3d 1034, 2016-Ohio-8025, ¶127. The "purposes of an indictment are to give an accused adequate notice of the charge, and enable an accused to protect himself or herself from any future prosecutions for the same incident.'" *Id*. at ¶127 (citing *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, ¶ 7, 853 N.E.2d 1162). Whitaker received that.

In *State v. Roe*, 10th Dist. No. 86AP-59, 1987 Ohio App. Lexis 8490, the Tenth District Court of Appeals rejected a similar argument. The *Roe* court found that the kidnapping specification, which tracked the language of the statute, was sufficient to give Roe notice of the charges against him. While Roe, like Whitaker, argued that the language of the specifications failed to specify which type of kidnapping he committed, the court denied his claim finding the specifications sufficient under this Court's decision in *State v. Schaeffer*, 96 Ohio St. 215 (1917).

Importantly, the jury was only asked to weigh one set of specifications. Mindful of this Court's prior holdings about merging multiple specifications, the state only proceeded with Count 4. *Sowell* at ¶104. No double weighing occurred either on the part of the jury on the trial court. The court was clear that only Count 4 was considered in the weighing analysis. See *State v. Brewer*, 2nd Dist. No. 87-CA-67, 1988 Ohio App. Lexis 3492 (after careful review, nothing in the opinion of the three-judge panel gave double weight to each of the death penalty

specifications simply because Brewer was found guilty of both felony murder and murder with prior calculation and design).

Whitaker has not presented any law to support his claim that the language of the felony-murder specifications had to be altered. This Court should overrule Whitaker's fourth proposition of law.

> **Appellant's Fifth Proposition of Law:** A capital defendant is denied his right to effective assistance of counsel when his attorneys do not make a motion for judgment of acquittal or ask the jury to find him not guilty of an offense and death specification that the evidence does not support and neither asks the judge to dismiss another death specification which is unconstitutionally vague or to narrow its focus so that the jury-and later the court-will not give it double weight as if it were two specifications.

In his fifth proposition of law, Whitaker claims that his trial counsel were ineffective for failing to "challenge the aggravated burglary count or the felony murder specifications based on it. Nor did they raise any issue with the regard to the felony murder specifications based on kidnapping-neither seeking to have them limited to one or the other kidnapping offense or to have them dismissed altogether." Appellant's Br. pg. 26.

i. Standard of Review

A claim of ineffective assistance of counsel requires a defendant to satisfy a two-prong test. The defendant must demonstrate (1) "that counsel's performance was deficient," and that (2) "the deficient performance prejudiced the defense so serious[ly] as to deprive the defendant of a fair trial." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). To determine whether counsel was ineffective, *Strickland* requires courts to "[apply] a heavy measure of deference to counsel's judgments." *Id.* at 691. To establish prejudice under the second prong of *Strickland*, a defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability" is a probability "sufficient to

undermine confidence in the outcome." *Id*. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112, 131 S. Ct. 770, 791, 178 L.Ed.2d 624 (2011).

ii. Law and Argument

Whitaker makes two arguments within this proposition of law.

First, he argues that his trial counsel failed to "challenge the aggravated burglary count or the felony murder specifications based on it." Appellant's Br. pg. 26. But counsel did challenge the state's proof. Trial counsel moved for acquittal based on Crim.R. 29 and asked the trial court to "dismiss all charges at this point." Tr. 2724. Whitaker also renewed his Crim.R. 29 motion at the close of the defense case. Tr. 2731. And, for the reasons discussed in response to the second proposition of law, Whitaker's Crim.R. 29 motion was properly denied. Therefore, counsel could not be found ineffective for failing to "challenge the aggravated burglary count or the felony murder specifications based on it." Appellant's Br. pg. 26.

Second, Whitaker argues that trial counsel should have moved to limit or dismiss the felony murder specifications based on kidnapping. As explained in response to Whitaker's fourth proposition of law, the felony-murder specification for kidnapping tracked the language of the statute and provided Whitaker with sufficient notice of the charges against him. Whitaker never claimed a lack of notice, instead admitting that he raped, kidnapped, and killed A.D.

iii. Conclusion

Whitaker's fifth proposition of law lacks merit and must be overruled.

Appellant's Sixth Proposition of Law: A conviction for gross abuse of a corpse in violation of R.C. 2929.01(B) is based on insufficient evidence, violates due process, and must be reversed when the only apparent evidence that the corpse was abused is that

the defendant did not notify the authorities where it was located.

In his sixth proposition of law, Whitaker his conviction for abuse of a corpse was not supported by sufficient evidence. He is incorrect.

i. Standard of Review

Sufficiency is a term of art meaning, "the legal standard applied to determine whether a case is legally sufficient to support the jury verdict as a matter of law." *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). Sufficiency of evidence is determined as a question of law. *State v. Robinson*, 162 Ohio St. 486, 124 N.E.2d 541 (1955). When reviewing sufficiency of evidence, an appellate court's function is to examine the evidence admitted at trial and determine whether, "in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 at 278 (1991) (*citing Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

ii. Law and Argument

Whitaker was convicted of abuse of a corpse pursuant to R.C. 2927.01(B) which states that "no person, except as authorized by law, shall treat a human corpse in a way that would outrage reasonable community sensibilities." Whitaker appears to argue that the only thing he did to support this charge was "not come forward to tell he authorities where he left" A.D.'s body. Appellant's Br. pg. 33. That is not true.

Whitaker kidnapped, raped, and tortured A.D. As Whitaker states, testimony from the medical examiner indicates that A.D. was alive for most of the injuries she sustained. Tr. 2453. Testimony also shows that Whitaker dragged A.D.'s body into a bedroom. A.D. was found in front of the open bedroom closet. The closet itself had a blood smear in it, indicating that

"something that had blood on it made contact with the closet wall." Tr. 2586-88. The bedroom door was closed, and officers kicked the door in to enter.

The Second District Court of Appeals has found that "gross abuse of a corpse can apparently be found in any attempt to conceal a body." *State v. Nobles*, 106 Ohio App.3d 246, 267 (2nd Dist., 1995). R.C. 2927.01(B) "clearly proscribes a broad range of conduct provided that it is so inappropriate and insensitive as to outrage community standards. The statute does not require that the corpse be physically abused." *State v. Condon*, 152 Ohio App.3d 629, 2003-Ohio-2335, ¶52. In *Condon*, the First District Court of Appeals affirmed Condon's conviction for gross abuse of a corpse for taking unauthorized pictures of multiple corpses at the morgue for his own purposes. In *State v. Warfel*, 9th Dist. No. 16CA0062-M, 2017-Ohio-5766, the Ninth District Court of Appeals rejected Warfel's argument that the state needed to present proof of an "affirmative act" to sustain a conviction. Warfel left his daughter's body in a crib for weeks after her death, until her body was accidentally discovered.

Contrary to Whitaker's argument, the state did not have to prove some "affirmative act" to prove that he committed a violation of R.C. 2927.01(B). Even if it did, the evidence shows that Whitaker took affirmative steps to hide A.D.'s body. He wasn't convicted because he failed to notify authorities, he was convicted because he treated A.D.'s body in an outrageous manner.

iii. Conclusion

Whitaker's sixth proposition of law lacks merit and must be overruled.

> **Appellant's Seventh Proposition of Law:** A conviction for gross abuse of a corpse in violation of R.C. 2929.01(B) is not supported by the manifest weight of the evidence and therefore violates a defendant's right to a fair trial and due process and must be reversed when the only apparent evidence that the corpse was abused is that the defendant did not notify the authorities of where it was located.

In his seventh proposition of law, Whitaker claims that his conviction for abuse of a corpse is not supported by the manifest weight of the evidence. He is incorrect.

i. Standard of Review

There is a distinction between a claim based on the sufficiency of evidence, and one based on manifest weight. *State v. Ford*, 8th Dist. No. 88236, 2007-Ohio-2645, ¶ 50. Sufficiency is a question of law, while manifest weight is a question of fact. *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). In evaluating the manifest weight of the evidence, a court sits as the thirteenth juror and reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether, in resolving conflicts of evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Id*. at 387. The discretionary power to grant a new trial should only be exercised in the exceptional case in which evidence weighs heavily against the conviction. *Id*. A reviewing court will not reverse a verdict if the trier of fact could reasonably conclude from substantial evidence that the prosecution proved the offense beyond a reasonable doubt. *State v. Eley*, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978), *superseded by state constitutional amendment on other grounds in State v. Smith*, 80 Ohio St.3d 89.

ii. Law and Argument

In his seventh proposition of law, Whitaker essentially copies and pastes the argument he made in support of his sixth proposition of law. Whitaker does not make any argument as to why or how the state failed to meet its burden of persuasion.

The Eighth District has adopted several factors to be used when determining whether

a judgement is against the manifest weight of the evidence: (1) knowledge that even a reviewing court is not required to accept the incredible as true; (2) whether evidence is uncontradicted; (3) whether a witness was impeached; (4) attention to what was not proved; (5) the certainty of the evidence; (6) the reliability of the evidence; (7) the extent to which a witness may have a personal interest to advance or defend their testimony; and (8) the extent to which the evidence is vague, uncertain, conflicting or fragmentary. *State v. Hanni*, 8th Dist. No. 91014, 2009-Ohio-139, ¶28. The uncontradicted testimony showed that Whitaker dragged A.D.'s body into the bedroom, there was blood smear in the closet indicative of something making contact with the closet all, and the bedroom door was closed. As discussed in response to Whitaker's sixth proposition of law, these acts sufficiently prove abuse of a corpse. Whitaker, who admitted to the crimes, treated A.D.'s body in a horrific and outrageous manner, and his conviction for abuse of a corpse should be affirmed.

iii. Conclusion

Whitaker's seventh proposition of law lacks merit and must be overruled

> **Appellant's Eighth Proposition of Law:** The accused in a capital case may investigate, develop, and introduce, as mitigating evidence in the sentencing phase, expert testimony explaining the accused's personal and childhood history without exposing himself to a compelled examination by the State's expert, and any evidence from any such improperly compelled examination may not be used against the accused, all as required by the Fifth, Sixth, Eight, and Fourteenth Amendments to the U.S. Constitution, and Article I, Sections 5, 9, 10, and 16 of the Ohio Constitution.

In his eighth proposition of law, Whitaker asks this Court to revisit its recent decision in *State v. Madison*, 160 Ohio St.3d 232, 155 N.E.3d 867, 2020-Ohio-3735. *Madison*, which is directly on point, was correctly decided.

Michael Madison was capitally indicted for the murder of three women. Like Whitaker, he sought to introduce expert testimony during the penalty phase of the proceedings about

how "his background and childhood experiences affected the physical structure of his brain, limited his ability to make choices, and exposed him to a high risk of negative life outcomes." *Madison, supra*, at ¶113. And, like in this case, the state's motion to have Madison submit to a psychological evaluation by a state expert was granted. This Court rejected Madison's arguments that "(1) implicit within Ohio's death-penalty statute, R.C. 2929.03(D)(1), is a broad policy prohibiting the use of such examinations, (2) the compelled examination in this case violated the Fifth Amendment because he did not place his mental state in issue, (3) ordering the examination unconstitutionally forced him to choose between his Fifth Amendment right against self-incrimination and his Eighth Amendment right to present mitigating evidence, (4) his Sixth Amendment right to counsel was violated because his counsel lacked adequate advance notice of the examination's scope, and (5) his right to counsel was violated because counsel was not present for the examination." *Id*. at ¶110. Whitaker disagrees with the outcome in *Madison*, but that does not make him correct.

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. Whitaker argues

that Civ.R. 35(A) does not apply in criminal proceedings. However, when deciding Madison's interlocutory appeal, the Eighth District Court of Appeals found that "Ohio courts…have generally been guided by Civ.R. 35(A) in criminal cases." *State v. Madison*, 8th Dist. No. 101478, 2015-Ohio-4365, ¶12.

Whitaker's reliance on *State v. Ross*, 128 Ohio St.3d 283, 293-94, 945 N.E.2d 992, 2010-Ohio-6282, is misplaced. *Ross* involved a reconsideration of the denial of a Crim.R. 29 motion for acquittal made outside the time limits imposed by the rule. Unlike the examination requested in this case, the *Ross* court found that "Crim.R. 29, viewed in conjunction with Crim.R. 45(B), sufficiently specifies the procedure for motions for acquittal so that Crim.R. 57(B) does not permit resort to the Rules of Civil Procedure to fill the gap." *Ross* at ¶43. "For Crim.R. 57(B) to 'authorize resort to the rules of civil procedure for a particular matter in a criminal case, there must be "no procedure * * * specifically prescribed by [criminal procedural] rule.'" *Id.* Whitaker argues that discovery should be limited to Crim.R. 16, but the rule "neither permits nor excludes demands for psychological examinations […]." *State v. Shoop*, 87 Ohio App.3d 462, 469 (3rd Dist. 1993).

The trial court did not err when it granted the state's motion to have Whitaker submit to a psychological examination. As this Court found in *Madison*, "the mental examination to which Madison objects was not done pursuant to R.C. 2929.03(D)(1) but rather to allow the state to provide rebuttal evidence." *Madison* at ¶112. It was proper for the court to look to the civil rules where no procedure was specifically prescribed by the criminal rules.

B. Whitaker 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).

Whitaker, like Madison, seeks to narrow the definition and claims that he did not present evidence of a "mental health diagnosis." Appellant's Br. pg. 37. However, there is no support for Whitaker's proposed narrowing. See *Kansas v. Cheever*, 571 U.S. 87, 96, 134 S.Ct. 596, 187 L.Ed.2d 519 (2013)(The term "'metal status is a broader term than 'mental disease or defect[.] Mental-status defenses include those based on psychological expert evidence as to a defendant's *mens rea*, mental capacity to commit the crime, or ability to premeditate. Defendants need not assert a 'mental disease or defect' in order to assert a defense based on 'mental status.'"). And, as he puts in his brief, Dr. Kaplan made multiple findings and claimed Whitaker lacked "capacity to control [his emotions] and conform his behavior according to the requirements of the law," had stressors that "affected his psychological development and capacity to regulate his behavior," and that he was under the influence of cocaine "which impaired his ability to control his impulses and conform his behavior to the requirements of the law." Appellant's Br. pg. 39-40. All of this placed Whitaker'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. 402422-424, 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.

Applying the above cases, this Court held that "in a capital case, when the defendant demonstrates an intention to use expert testimony from a mental examination in the penalty phase, the Fifth Amendment permits the trial court to order that the defendant submit to a mental examination by an expert of the state's choosing. Further, when the defense uses expert testimony from a mental examination in the penalty phase, the state may rebut that evidence by presenting expert testimony derived from the court-ordered mental examination." *Madison, supra*, at ¶120.

In this case, Christopher Whitaker 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. Having chosen to become a witness in his own case, Whitaker could not then assert a Fifth Amendment privilege against questioning on those same issues.

Once Whitaker introduced Dr. Kaplan'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. West'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 Whitaker'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, Whitaker 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 and drug abuse on Whitaker's ability to "regulate" and "conform his behavior according to the requirements of the law." Appellant's Br. pg. 39.

There is no precedent – and Whitaker 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, Whitaker 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 Whitaker introduced regarding his mental state was consistent with both the Fifth and Eighth Amendments.

This Court should, like it did in *Madison*, also reject Whitaker'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. See *Madison, supra*, at ¶121-26 (rejecting an identical claim). "[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 94134 S. Ct. 596, 601, 187 L.Ed.2d 519. There was no tension between Whitaker's constitutional rights in this case that was not inherent in every decision Whitaker 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 Whitaker 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. Whitaker'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. Whitaker 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 Whitaker's expert testimony was through an evaluation by its own expert.

Only an expert witness could adequately rebut the testimony of Whitaker's expert 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 Whitaker to present the jury with the testimony of experts who have evaluated him would have unfairly tipped the scales in Whitaker's favor on any factual disputes in the mitigation phase. Such an imbalance would provide only Whitaker'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 Dr. Kaplan. "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. R.C. 2929.03(D)(1) and R.C. 2945.371(A) do not control a trial court's ability to allow a mental examination by a state's expert as rebuttal evidence.

Finally, Whitaker points to R.C. 2945.371(A) to argue that the Ohio General Assembly has limited the situations where a criminal defendant can be forced to undergo a psychological examination. In *State v. Goff*, 128 Ohio St.3d 169, 942 N.E.2d 1075, 2010-Ohio-6317, this Court held that a trial court has the authority to order a compelled psychiatric evaluation of a criminal defendant where the defendant "opens the door to limited examination by the state's expert […]." *Id*. at ¶58. Similarly, 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. As this Court found:

> "The problem with this argument is that the mental examination to which Madison objects was not done pursuant to R.C. 2929.03(D)(1) but rather to allow the state to provide rebuttal evidence. The prohibition in R.C. 2929.03(D)(1) applies only to presentence investigations and medical examinations done pursuant to that section. We find nothing in R.C. 2929.03(D)(1) that bars a trial court from ordering a psychiatric examination of a defendant for the purpose of rebutting psychiatric evidence that the defendant intends to introduce. And we decline Madison's invitation to craft a statutory prohibition based on speculation about legislative intent."
>
> *Madison, supra*, at ¶112.

Whitaker 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, Whitaker had no right to such a one-sided right to present evidence in

the sentencing phase. Whitaker's eighth proposition is without merit and should be overruled.

> **Appellant's Ninth Proposition of Law:** When a trial court compels a capital defendant to submit to a psychiatric examination by a State psychological evaluation so that the State can develop evidence to rebut the defense mitigation case, the defendant's right to counsel is denied if the court forbids defendant's counsel to be present during that compelled examination, and any testimony about that examination is therefore inadmissible, all as required under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 5, 9, 10, and 16 of the Ohio Constitution.

In his ninth proposition of law, Whitaker claims that he was denied his right to have counsel present when he was forced to undergo an examination by the state's expert, Dr. West. Although Whitaker, through counsel, objected to the examination in general, he did not make a Sixth Amendment argument that he was deprived his right to counsel. Tr. 2246-53. 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). In *Madison*, this Court held that the Sixth Amendment "right to counsel requires that defense counsel be given prior notice of the nature and scope of a state-sponsored psychiatric examination." *Madison, supra*, at ¶127 (citing *Powell v. Texas*, 492 U.S. 680, 681, 109 S.Ct. 3146, 106 L.Ed.2d 551 (1989); *Estelle*, 451 U.S. at 471, 101 S.Ct. 1866, 68 L.Ed.2d 359; *Powell v. Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 77 L.Ed. 158 (1932)). Whitaker received just that. His argument is not lack of notice, but that counsel should have been allowed to be present during the

examination.

"[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. "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, Whitaker did not have the right to counsel during Dr. West's evaluation. That evaluation was not a critical stage of the proceedings at which Whitaker 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). Whitaker 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 Whitaker 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 Whitaker 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." And, 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"). **Whitaker did not request that his counsel sit in on the evaluation, but even if they had, the trial court would have been right to deny the request.** Whitaker 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.*

Whitaker has not demonstrated how the absence of his attorneys from his interview with Dr. West contaminated the entire criminal proceeding. As a result, Whitaker has failed to show that any error in this regard – even if one did occur – resulted in prejudice. Whitaker's ninth proposition should be overruled.

> **Appellant's Tenth Proposition of Law:** The jury in the penalty phase of a capital trial may not be told that it has to weigh against mitigation both the aggravating circumstances and "what was done" while those circumstances were occurring.

In his tenth proposition of law, Whitaker claims that the state improperly urged the jury to consider "the nature and circumstances of the offense…on the side of aggravation." Appellant's Br. pg. 59. He is incorrect.

Whitaker is correct that R.C. 2929.04(B) directs a jury to weigh the "nature of circumstances of the offense" against the aggravating circumstances. However, R.C. 2929.03(D)(1) directs the jury to consider "any report prepared pursuant to this division and furnished to it and ***any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing*** or to any factors in mitigation of the imposition of the sentence of death, ***shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing***, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition

of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender." (Emphasis Added). In *State v. Gumm*, 73 Ohio St.3d 413, 416-423, 653 N.E.2d 253 (1995), this Court held that the "nature and circumstances of the aggravating circumstances" referred to in R.C. 2929.03(D)(1) are separate and distinct from the "nature and circumstances of the offense" referred to in 2929.04(B). See, also, *State v. McNeill*, 83 Ohio St.3d 438, 453, 700 N.E.2d 596 (1998); *State v. Wogenstahl*, 75 Ohio St. 3d 344, 352-355, 662 N.E.2d 311, 318-321 (1996); *State v. Hill*, 75 Ohio St. 3d 195, 199-201, 661 N.E.2d 1068, 1075-1076 (1996). As this Court recently explained, "the jury shall consider any evidence relevant to those aggravating circumstances, including evidence about their nature and circumstances. *State v. Froman*, Slip Op. No. 2020-Ohio-4523, ¶124. "The prosecutor may comment on any 'testimony or evidence relevant to the nature and circumstances of the aggravating circumstances specified in the indictment of which the defendant was found guilty.'" *Id*. at ¶125 (*citing Gumm, supra*).

The two statements that Whitaker focuses on were clearly made in reference to the statutory aggravating circumstances. The first comment, "…and what was done to [A.D.] during those three crime specifications…", referenced the specification itself. This is permissible under *Wogenstahl*. *Wogenstahl, supra*, at 355 (it is "perfectly acceptable for the prosecution at the penalty phase of a capital murder trial to argue that the specifications of aggravating circumstances set forth in R.C. 2929.04(A)(1) through (8) that the defendant was found guilty of committing outweigh the evidence in mitigation of the death sentence. Further, it is perfectly acceptable for the state to present arguments concerning the nature and circumstances of the offense."). What *Wogenstahl* prohibits is "for the state to argue or suggest that the nature and circumstances of the offense are 'aggravating circumstances.'" *Id*. But that is not what happened here.

The second comment that Whitaker complains of was: "[h]ow much weight, when you sit there with your eyes closed, does that slow cutting on her neck get? Eight times across her neck. The smaller ones right below the neck. The stab wounds in her back. How much weight does that get?" Tr. 3248. Again, this comment did not argue or suggest that the nature and circumstances of the offense were aggravating circumstances. The torture that Whitaker committed against A.D. *was* one of the statutory aggravated circumstance specifications. *See Froman, supra*, at ¶125 ("Here, one of the aggravating circumstances included in the indictment for which Froman was found guilty was that he committed aggravated murder while kidnapping Thomas, R.C. 2929.04(A)(7). We conclude that the prosecutor's argument was focused on the nature and circumstances of the aggravating circumstance and was proper. (citation omitted)).

Whitaker's tenth proposition of law lacks merit and should be overruled. The state's comments during penalty phase arguments were appropriate under R.C. 2929.03(D)(1) and established law. Should this Court find error, any error was clearly harmless as the trial court properly instructed the jury on aggravating circumstances and what they could consider in the weighing process. Tr. 3252-68.

> **Appellant's Eleventh Proposition of Law:** A capital defendant's pre-trial offer to plead guilty, accept a sentence of life without the possibility of parole, and waive all appellate and post-conviction rights is proper mitigation evidence because jurors may find it an indication of some acceptance of responsibility for his actions.

In his eleventh proposition of law, Whitaker argues that he should have been allowed to tell the jury that he offered to enter a guilty plea in exchange for a life sentence. The trial court properly prohibited this evidence. And, even so, defense counsel was able to repeatedly tell the jury that Whitaker wanted to take responsibility for his actions and told

counsel "not to defend him." Tr. 3235. Whitaker's proposition of law lacks merit.

In *State v. Webb*, 70 Ohio St.3d 325, 336 (1994), this Court held that an offer to plea guilty in exchange for a life sentence is not "mitigating under the Eighth Amendment, since a plea offer 'does not relate to the defendant's character, prior record, or to the circumstances of the offense * * *.'" *Id*. (*citing Davis v. State*, 255 Ga. 598, 614 (1986)). This Court has reaffirmed this holding on multiple occasions. *See State v. Dixon*, 101 Ohio St.3d 328, 2004-Ohio-1585, ¶69; *State v. Sowell*, 148 Ohio St.3d 554, 2016-Ohio-8025, ¶130.

The logic behind this Court's decision is sound. In *Owens v. Guida*, 549 F.3d 399 (6th Cir. 2008), the court found that the inmates offer to enter a conditional plea showed that "she was less interested in accepting responsibility and more interested in avoiding the electric chair, a motivation that is much less persuasive as a mitigating factor." *Id*. at 420. Similarly, Whitaker was only interested in entering a plea to avoid a death sentence. His offer was never accepted, and it is not "relevant to the issue of whether the defendant should be sentenced to death." *Dixon, supra*, at ¶69.

Whitaker's eleventh proposition of law lacks merit and should be overruled.

> **Appellant's Twelfth Proposition of Law:** A trial court commits error when it refuses to instruct the jury in the penalty phase of a death penalty case that mercy may be a mitigating factor.

In his twelfth proposition of law, Whitaker argues that the jury should have been instructed that it could consider mercy as a mitigating factor. The United States Supreme Court has prohibited considerations of "sympathy", finding that such a prohibition "serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors, which, we think, would be far more likely to turn the jury against a capital defendant than for him." *California v. Brown*, 479 U.S. 538,

543, 107 S. Ct. 837, 93 L.Ed.2d 934 (1987). This rule also "fosters the Eighth Amendment's 'need for reliability * * *'" and "ensures the availability of meaningful judicial review [.]" *Id.*

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

> The instruction to the jury in the penalty phase of a capital prosecution to exclude consideration of bias, sympathy or prejudice is intended to insure that the sentencing decision is based upon a consideration of the reviewable guidelines fixed by statute as opposed to the individual juror's personal biases or sympathies.

State v. Jenkins, 15 Ohio St.3d 164, 15 Ohio B. 311, 473 N.E.2d 264 (1984), paragraph three of the syllabus.

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

Whitaker's twelfth proposition of law lacks merit and must be overruled.

> **Appellant's Thirteenth Proposition of Law:** A death sentence must be vacated and the case remanded for a new sentencing proceeding when the jury's and sentencing court's weighing of aggravating circumstances against mitigating factors was improperly and incurably titled toward aggravation.

In his thirteenth proposition of law, Whitaker argues that the jury and trial court "got it wrong" when a death sentence was imposed. He then asks this Court, under R.C. 2929.05(A), to engage in reweighing and vacate his death sentence. Whitaker's death sentence is necessary and appropriate.

The trial court and the jury both adhered to R.C. 2929.03(D). Whitaker claims that the trial court and jury both improperly considered the felony-murder specification of aggravated burglary-which he argues he is innocent of-and double weighed the felony-murder specification of kidnapping. As discussed in response to earlier propositions of law, Whitaker is incorrect.

A court is not required "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). There is simply no indication in the record that the trial court or the jury engaged in improper weighing. While Whitaker does not like the verdict and sentence, his disagreement is insufficient to warrant relief.

The weight to be given mitigating factors "is necessarily an individual decision by the fact finder." *State v. Richey*, 64 Ohio St.3d 353, 369-70, 595 N.E.2d 915 (1992). "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. Finally, should this Court find error, this Court's independent reassessment is an adequate cure. See *Madison, supra*, at ¶222; *State v. Dixon*, 101 Ohio St.3d 328, 2004-Ohio-1585, 805 N.E.2d 1042, ¶84.

When this Court engages in its own independent review, it is clear from the record that the aggravating circumstances far outweigh the limited mitigation that Whitaker presented. Whitaker's thirteenth proposition of law should be overruled.

> **Appellant's Fourteenth Proposition of Law:** A capital defendant is denied his right to effective assistance of counsel when his attorneys fail to raise or preserve arguably meritorious claims.

In his fourteenth proposition of law, Whitaker makes what appears to be a type of placeholder argument. He states that "should this Court determine that any of the issues raised in the above propositions of law were not fully and properly preserved for review, Mr. Whitaker will have been denied the effective assistance of counsel[…]." Appellant's Br. pg. 82. But Whitaker makes no specific argument of what trial counsel allegedly failed to do. Because Whitaker does not make any specific argument, the state will not go searching for one. All of the propositions of law that Whitaker has raised in this petition are meritless,

whether they were preserved or not, and his fourteenth proposition of law is no exception.

> **Appellant's Fifteenth Proposition of Law:** A trial court may not, consistent with a fair trial and sentencing proceedings and due process in accordance with R.C. 2929.14(C)(4) impose consecutive sentences on a person who is serving or being sentenced to a term that provides he will die in prison.

In his fifteenth proposition of law, Whitaker argues that the trial court could not impose consecutive sentences on a person who is serving or being sentenced to a term that provides he will die in prison. This Court has previously overruled this proposition of law, finding that it is moot. It should again do so here.

A. This proposition has repeatedly been overruled as moot.

This Court has previously "rejected this argument in *State v. Lynch*, 98 Ohio St.3d 514, 2003 Ohio 2284, 787 N.E.2d 1185, P142. See, also, *State v. Moore* (1998), 81 Ohio St.3d 22, 38, 1998 Ohio 441, 689 N.E.2d 1; *State v. Campbell* (1994), 69 Ohio St.3d 38, 52, 1994 Ohio 492, 630 N.E.2d 339. As noted in these cases, the prison sentence is rendered moot by the execution of the defendant's death sentence." *State v. Scott*, 101 Ohio St.3d 31, 2004-Ohio-10, 800 N.E.2d 1133, ¶ 50. This case is not distinct from the previous cases where this Court has decided this issue is rendered moot. Here too, as in the several earlier cases where this proposition of law was raised, the prison sentence will be rendered moot by Whitaker's death sentence.

B. The necessary findings for consecutive sentences were made.

"In order to impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry, but it has no obligation to state reasons to support its findings." *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659,

syllabus. When the appropriate findings are made, "an appellate court may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence." *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 23.

Whitaker does not dispute that the necessary findings were made. Indeed, the trial court made all of the necessary findings. Tr. 1041-50. Whitaker instead asks this Court to make a determination that after imposing death sentences, consecutive sentences cannot be imposed. This request requires sentencing courts to determine that a sentence for one crime may decide the sentence for another. But, Ohio does not have a "sentencing package." Instead, this Court has held that a "sentence is the sanction or combination of sanctions imposed for each separate, individual offense." *State v. Saxon*, 109 Ohio St.3d 176, 846 N.E.2d 824, 2006-Ohio-1245. Whitaker requests that all of the offenses be lumped together to consider rather than sentenced individually. This Court should deny his request.

C. Conclusion.

For the foregoing reason, Whitaker's fifteenth proposition of law is moot and should be overruled.

> **Appellant's Sixteenth Proposition of Law:** Cumulative errors may deprive a criminal defendant and criminal appellant of a fair trial and due process and subject him to cruel and unusual punishment in violation of his rights under the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Ohio Constitution.

In his sixteenth proposition of law, Whitaker 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). Whitaker has failed to demonstrate significant errors in this case, and the cumulative effect of any errors did not deprive him of a fair trial. Whitaker's sixteenth assignment of error is without merit and should be overruled.

> **Appellant's Seventeenth Proposition of Law:** A capital indictment which does not include a determination by the Grand Jury that there is probable cause to find that the statutory aggravating circumstance or circumstances in the offense outweigh the mitigating factors cannot be used to obtain a death sentence.

In his Seventeenth Proposition of Law, Whitaker argues that his indictment was insufficient because it did not include a finding by the grand jury that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. Whitaker argues that such a finding is required under *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428 (2002) and *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004). Whitaker's attempt to expand Ring and Blakely should be denied. See *U.S. v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) ("[a]s other courts have recognized, the requisite weighing constitutes a process, not a fact to be found. *** The outcome of the weighing process is not an objective truth that is susceptible to (further) proof by either party."); *U.S. v. Fields*, 483 F.3d 313 (5th Cir. 2007)(finding that *Ring* does not apply to the jury's weighing decision).

This Court heard and rejected an identical argument in *State v. Sowell*, 148 Ohio St.3d

554, 71 N.E.3d 1034, 2016-Ohio-8025, ¶124. This Court noted that the "purposes of an indictment are to give an accused adequate notice of the charge, and enable an accused to protect himself or herself from any future prosecutions for the same incident.'" *Id*. at ¶127 (citing *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, ¶ 7, 853 N.E.2d 1162). And, "[a]n indictment that tracks the language of the charged offense and identifies a predicate offense by reference to the statute number need not also include each element of a predicate offense." *Id*. As in *Sowell*, Whitaker's indictment tracked the language of the statutes. Whitaker hasn't alleged that he was not provided adequate notice of the charges against him. To the contrary, he admitted his guilt during trial.

Like *Sowell*, this Court should overrule Whitaker's seventeenth proposition of law.

> **Appellant's Eighteenth Proposition of Law:** Ohio's death penalty statute and rules violate the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 10, and 16 of the Ohio Constitution, the right to a jury trial as set forth by the United States Supreme Court in *Apprendi v. New Jersey* and its progeny because they do not permit a capital defendant who chooses to accept responsibility for his crime to plead guilty and have a sentencing determination made by a jury and because they "needlessly penalize[] the assertion of a constitutional right" *United States v. Jackson*.

In his Eighteenth Proposition of Law, Whitaker argues that his constitutional rights were violated because he could not plead guilty and maintain a jury for the penalty phase. Specifically, Whitaker claims that R.C. 2929.03(D)(2), R.C. 2945.06, and Crim.R. 11(C)(3) are unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny. This exact proposition of law was raised and rejected in *State v. Sowell*, 148 Ohio St.3d 554, 71 N.E.3d 1034, 2016-Ohio-8025, ¶149. This Court found that Sowell did not plead guilty so he lacked "standing to raise the issue of what he would have been entitled to had he elected to plead guilty." *Id*. See also *State v. Ketterer*, 111 Ohio St.3d 70, 855 N.E.2d 48, 2006-Ohio-

5283; *State ex rel. Mason v. Griffin,* 104 Ohio St.3d 279, 819 N.E.2d 644, 2004-Ohio-6384 (granting a Writ of Prohibition against a trial court judge who attempted to create a hybrid procedure that would allow for a jury only at the sentencing phase). This Court went on to note that it has, on multiple occasions, rejected similar challenges to Crim.R. 11(C)(3). *Id*. at ¶150 (citing *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, ¶ 51, 837 N.E.2d 315; *State v. Dickerson*, 45 Ohio St.3d 206, 214, 543 N.E.2d 1250 (1989); *State v. Buell*, 22 Ohio St.3d 124, 138, 22 Ohio B. 203, 489 N.E.2d 795 (1986)).

Whitaker did not enter a guilty plea, so he lacks standing to raise this challenge, and his proposition of law should be overruled.

> **Appellant's Nineteenth Proposition of Law:** The universe of cases to be examined for the proportionality review required by R.C. 2929.05(A) must include at a minimum all cases in which a grand jury indictment included a death specification under R.C. 2929.04(A) in order to comport with the clear language of the statute and with due process, the right to meaningful appeal, and the right to avoid cruel and unusual punishment, as those rights are protected by the Constitutions of the United States and the State of Ohio.

In his Nineteenth Proposition of Law, Whitaker argues that R.C. 2929.05(A) unconstitutionally limits the proportionality review that Ohio courts must conduct in death penalty cases by not requiring them to consider all capitally-indicted cases that did not result in a death sentence. This Court has repeatedly and summarily rejected Whitaker's argument and should do so again here. See *State v. Sowell*, 148 Ohio St.3d 554, 71 N.E.3d 1034, 2016-Ohio-8025, ¶151. Proportionality review is not constitutionally required and should not be expanded in the manner Whitaker suggests.

a. There is no constitutional right to comparative proportionality review.

The Eighth Amendment does not require a court to compare a death sentence in the case before it with other penalties imposed in similar cases. *Pulley v. Harris*, 465 U.S. 37, 50-

51, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). A reviewing court is only required to conduct "an abstract evaluation of the appropriateness of a sentence for a particular crime." *Id*. Where the statutory scheme "adequately channel[s] the sentencer's discretion, such proportionality review is not required." *McCleskey v. Kemp*, 481 U.S. at 306, 107 S. Ct. 1756, 95 L.Ed.2d 262 (1987). The court's focus must remain on the defendant's culpability because "we insist on 'individualized consideration as a constitutional requirement for imposing the death sentence,' which means that we must focus on 'relevant facts of the character and record of the individual offender.'" *Edmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

b. This Court has routinely found R.C. 2929.05(A) to be constitutional in death penalty cases.

Although not mandated by the United States Constitution, R.C. 2929.05(A) requires an appellate court to determine whether a death sentence is excessive or disproportionate to the penalty imposed in similar cases. In *State v. Steffen*, 31 Ohio St.3d at 124, 509 N.E.2d 383, this Court held that proportionality review is limited to the pool of cases where the death penalty was actually imposed. This Court also clarified that "proportionality review in this court will be limited to a review of cases we have already announced. No reviewing court need consider any case where the death penalty was sought but not obtained or where the death sentence could have been sought but was not." *Id.* A defendant cannot "prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty." *McCleskey v. Kemp*, 481 U.S. at 306, 107 S. Ct. 1756, 95 L.Ed.2d 262 (1987) (emphasis in original).

Whitaker's desire to expand proportionality review is wrought with problems. As this Court has recognized, death penalty convictions "are necessarily so qualitatively different

from all others that a comparison with non-capital offenses would be a profitless exercise." *Steffen* at 123. The reasons that a death sentence may not be imposed are too numerous to count, and the comparison is "unrealistic since the reviewing court could not possess the requisite familiarity with the particular circumstances of such cases so essential to a determination of appropriateness." *Id*.

Consistent with *Sowell*, *State v. Trimble*, 122 Ohio St.3d 297, 911 N.E.2d 242, 2009-Ohio-2961, ¶281, and *State v. Were*, 118 Ohio St.3d 448, 890 N.E.2d 263, 2008-Ohio-2762, ¶259, should reject Whitaker's challenge and overruled his Nineteenth Proposition of Law.

> **Appellant's Twentieth Proposition of Law:** Ohio's death penalty law violates the Sixth Amendment to the United States Constitution because it requires a judge to make factual findings before a death sentence may be imposed while a jury does no more than offer a "mere recommendation."

In his Twentieth Proposition of Law, Whitaker claims that Ohio's capital sentencing scheme violates the Sixth Amendment of the United States Constitution because it requires the trial court to make factual findings before a death sentence can be imposed. Whitaker primarily relies on *Hurst v. Florida*, 577 U.S. 92, 136 S.Ct. 616, 193 L.Ed. 2d 504 (2016). He is incorrect. This Court has, on a number of occasions, held that *Hurst* does not apply to Ohio's capital sentencing scheme. *State v. Belton*, 149 Ohio St.3d 165, 74 N.E.3d 319, 2016-Ohio-1581, ¶58-59; *State v. Mason*, 153 Ohio St.3d 476, 108 N.E.3d 56, 2018-Ohio-1462, ¶19-21.

Whitaker misconstrues the phrase in *Hurst* that a "jury's mere recommendation is not enough." *Hurst* at 619. As this Court has found, Ohio's death penalty scheme is unlike Florida's. In Ohio, a trial court cannot sentence a defendant to death in the absence of the unanimous recommendation of the jury. That is, the trial court cannot impose a greater

sentence, it can only decide to impose a recommended death sentence or a lesser sentence. *State v. Powell,* 6th Dist. No. L-18-1194, 2019-Ohio-4286, ¶60-62. And, the weighing that occurs in the sentencing phase "is not a fact-finding process subject to the Sixth Amendment." *Mason, supra*, at ¶29.

Consistent with this Court's decision in *Belton*, *Mason*, *State v. Tench*, 156 Ohio St.3d 85, 123 N.E.3d 955, 2018-Ohio-5205, ¶279, and *State v. Goff*, 154 Ohio St.3d 218, 113 N.E.3d 490, 2018-Ohio-3763, ¶35, this Court should overrule Whitaker's twentieth proposition of law.

> **Appellant's Twenty-First Proposition of Law:** Ohio's death penalty law violates the United States Constitution and international law.

In his final proposition of law, Whitaker argues that Ohio's death penalty violates Ohio and international law. This Court should summarily reject each of these arguments.

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

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

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

justice system which must be constitutionally rejected." *Jenkins* at 170, quoting *Gregg* at 226. Whitaker offers no facts supporting his argument, and this Court should again reject it.

Whtiaker'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.

B. Ohio's system is not racially discriminatory.

Whitaker next argues that Ohio imposes the death penalty in a racially discriminatory manner. For this, Whitaker relies upon statistics compiled by the Office of the Ohio Public Defender's website, among other reports. 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). Whitaker 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.

C. Ohio's capital sentencing statute is reliable.

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

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

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

Whitaker argues that Ohio's procedure is "arbitrary." In essence, Whitaker 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.

Whitaker argues that "the aggravating circumstances are vague." Appellant's Br. pg. 112. Once again, however, the Constitution does not require any particular definition, 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).

D. Ohio's capital sentencing provisions doe not burden a defendant's right to a jury.

Whitaker argues that Crim.R. 11(C)(3), is unconstitutional because it "imposes an impermissible risk of death on capital defendants who choose to exercise their right to a jury trial." Appellant's Br. pg. 113. 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.

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*"). It should do so again here.

E. 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.

Whitaker 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"). It should do so again.

F. R.C. 2929.04(A)(7) is constitutionally valid.

Whitaker next argues that Ohio's death penalty scheme is unconstitutional under *Zant v. Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), for failing to genuinely narrow the class of individuals eligible for the death penalty. "This issue has been decided by this court in *State v. Henderson* (1988), 39 Ohio St.3d 24, 528 N.E.2d 1237, paragraph two of the syllabus; *State v. Broom* (1988), 40 Ohio St.3d 277, 291, 533 N.E.2d 682, 697; and *State v. Barnes* (1986), 25 Ohio St.3d 203, 207, 25 OBR 266, 269, 495 N.E.2d 922, 925, certiorari denied (1987), 480 U.S. 926, 107 S.Ct. 1388, 94 L.Ed.2d 701." *State v. Frazier*, 61 Ohio St.3d 247, 257, 574 N.E.2d 483 (1991). Having repeatedly affirmed the constitutionality of this statute under *Zant*, this Court should again find that this proposition is without merit.

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

R.C. 2929.03(D)(1) provides that at the sentencing phase, the trier-of-fact "shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing[.]" Whitaker claims that this statute is unconstitutionally vague because it gives "the sentencer unfettered discretion to weigh a statutory mitigating factor as an aggravator." Appellant's Br. pg. 117. Whitaker contends the language in R.C. 2929.03(D)(1) captures the mitigating factors found in R.C. 2929.04(B), which include "the nature and circumstances of the offense," improperly making them part and parcel of the aggravating circumstances.

This Court rejected Whitaker's argument in *State v. McNeill*, 83 Ohio St.3d 438, 453, 700 N.E.2d 596 (1998):

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

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

The key here is that R.C. 2929.03(D)(1) refers to "the nature and circumstances of the aggravating circumstances[,]" not to the nature and circumstances of the underlying *offense*.

The jury or panel certainly can weigh the nature and circumstances of the aggravating circumstances as aggravating factors. Whitaker's argument lacks merit and should be denied.

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

Whitaker next contends that Ohio's death penalty scheme is unconstitutional because it fails to provide for adequate proportionality review. Whitaker faults Ohio's trial courts for failing to report data about capital indictments as required under R.C. 2929.021. *Id.* The Eighth District Court of Appeals recently rejected this claim, finding that the defendant "failed to demonstrate that the alleged inadequacies in the reporting system prejudiced the proportionality review conducted by the Supreme Court[.]" *State v. Hale*, 8th Dist. Cuyahoga No. 103654, 2016-Ohio-5837, ¶ 48. The purpose of R.C. 2929.021's reporting requirement is merely "to provide the reviewing courts with some basis for reviewing the proportionality of the imposition of the death sentence in comparison with sentences entered in similar cases." *State v. Jenkins*, 15 Ohio St.3d at 209, 473 N.E.2d 264. The data compiled by the Clerk of Courts for the Supreme Court of Ohio is considerable, and is more than enough to fulfill that task.

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

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

Whitaker also claims that Ohio's "appropriateness" review is deficient because R.C. 2929.05(A) requires Ohio appellate courts to review the "appropriateness" of each death sentence separately from whether the aggravating circumstances outweigh the mitigating factors. Appellant's Br. pg. 120. R.C. 2929.05(A) does require this, but that review is incorporated as part of this Court's proportionality review:

> The 'appropriateness' of any death sentence must be determined under the overall principle that the death sentence is, in the judgment of the Ohio General Assembly, speaking for the people of Ohio, an appropriate sentence in certain particularized circumstances and that the Ohio statutory framework for imposing it in a way that considers all aggravating circumstances and mitigating factors relevant to the offense and the offender meets all constitutional requirements. *State v. Steffen, supra*. The principal considerations required by statute are whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases. *Id.*

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

By independently reviewing the proportionality of each death sentence, this Court fulfills its statutory mandate under R.C. 2929.05(A) to separately review the "appropriateness" of the sentence. This Court has, on several occasions, reversed a death

sentence using its independent sentence review under R.C. 2929.05(A). *See State v. Johnson*, 144 Ohio St.3d 518, 2015-Ohio-4903, 45 N.E.3d 208, ¶¶ 98-141 (death sentence vacated); *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶¶ 67-106 (death sentence vacated). This Court's review is not cursory, and Whitaker's challenge lacks merit.

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

Finally, Whitaker 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 Whitaker 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, Whitaker 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.

Whitaker further claims that Ohio's statutory scheme is in violation of international equal protection and due process are unsupported. The considerations he lists are provided under Ohio's statutory scheme. Similarly, as demonstrated above, there is no arbitrary execution under Ohio's statutory scheme.

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.*

Whitaker'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.

Whitaker's arguments relate to the reservations and limitations imposed by the United States Senate are ineffectual for two reasons. First, though, it is not only through the senate's reservations and conditions that international law fails to restrict or render capital punishment unconstitutional. As explained above, Ohio's capital sentencing statutes are constitutional and do not conflict with international law. Second, the Supreme Court did not speak to the power of the senate in the case cited by Whitaker, but was speaking with great specificity to the power of the president. *Clinton v. City of New York*, 524 U.S. 417, 440, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998). ("Our first President understood the text of the Presentment Clause as requiring that he either 'approve all the parts of a Bill, or reject it in toto.' What has emerged in these cases from the President's exercise of his statutory cancellation powers, however, are truncated versions of two bills that passed both Houses of Congress"). This decision speaks to the power of the president and Whitaker's attempt to use it as an argument in limitation of the Senate's powers with regard to lawmaking is inappropriate.

Whitaker also attempts to rely on *Clinton* in support of his argument against the Senate's ability to indicate that the ICCPR is not self-executing. This argument fails for the

same reasons that the earlier attempt to rely on *Clinton* does; it speaks to the power of the president, specifically.

Finally, Whitaker's arguments related to customary international law do not impugn the Ohio capital sentencing statutes, which safeguard the same issues. His argument here relies on success in arguments he has already raised, such as racial discrimination in enforcement and arbitrary deprivation of life. Failing to demonstrate those issues domestically, Whitaker fails to demonstrate conflict with international customs which are protected by the Ohio's capital sentencing statutes.

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").

J. Conclusion.

For all of the foregoing reasons, Ohio's capital sentencing statute is and remains constitutional against all of Whitaker's objections. Whitaker's final proposition of law lacks merit and should be overruled.

CONCLUSION

This Court should overrule all of Whitaker's propositions of law and affirm his death sentence. Whitaker's guilt was established beyond a reasonable doubt, the proceedings against him were fair, and his sentence is appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Appellee has been filed electronically with this Court and sent by regular U.S. mail and/or electronic service this 4th day of January 2021 to

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State v. Whitaker, OSC No. 2019-1482

Appendix

ORC Ann. 2921.12

Current through File 60 of the 133rd (2019-2020) General Assembly.

Page's Ohio Revised Code Annotated > Title 29: Crimes — Procedure (Chs. 2901 — 2981) > Chapter 2921: Offenses Against Justice and Public Administration (§§ 2921.01 — 2921.52) > Perjury (§§ 2921.11 — 2921.18)

§ *2921.12* Tampering with evidence.

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

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

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

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

History

134 v H 511. Eff 1-1-74.

End of Document

ORC Ann. 2927.01

Current through File 60 of the 133rd (2019-2020) General Assembly.

Page's Ohio Revised Code Annotated > Title 29: Crimes — Procedure (Chs. 2901 — 2981) > Chapter 2927: Miscellaneous Offenses (§§ 2927.01 — 2927.27)

§ *2927.01* Abuse of a corpse.

(A) No person, except as authorized by law, shall treat a human corpse in a way that the person knows would outrage reasonable family sensibilities.

(B) No person, except as authorized by law, shall treat a human corpse in a way that would outrage reasonable community sensibilities.

(C) Whoever violates division (A) of this section is guilty of abuse of a corpse, a misdemeanor of the second degree. Whoever violates division (B) of this section is guilty of gross abuse of a corpse, a felony of the fifth degree.

History

134 v H 511 (Eff 1-1-74); 137 v H 741 (Eff 10-9-78); 146 v S 2. Eff 7-1-96.

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