IN THE SUPREME COURT OF OHIO

STATE OF OHIO, *Plaintiff-Appellee*, vs. **MATTHEW NICHOLSON**, *Defendant-Appellant*.	**CASE NO. 2019-1787** On Appeal from the Cuyahoga County Court of Common Pleas, Cleveland, Ohio Case No. CR-18-634069-A

MERIT BRIEF OF DEFENDANT-APPELLANT MATTHEW NICHOLSON [VOLUME I OF II]

(This is a Capital Case. An Execution Date Has Not Been Set)

Jonathan T. Tyack (0066329) (COUNSEL OF RECORD)
Holly B. Cline (0096806)
The Tyack Law Firm Co., LPA
536 South High Street
Columbus, Ohio 43215
Telephone: (614) 221-1341
Email: jon@tyacklaw.com
Email: holly@tyacklaw.com

COUNSEL FOR DEFENDANT-APPELLANT MATTHEW NICHOLSON

Michael C. O'Malley (0059592)
Cuyahoga County Prosecuting Attorney
Brandon A. Piteo (0090854) (COUNSEL OF RECORD)
Cuyahoga County Assistant Prosecuting Attorney
Daniel T. Van (0084614)
Cuyahoga County Assistant Prosecuting Attorney
The Justice Center, Courts Tower
1200 Ontario Street, 9th Floor
Cleveland, Ohio 44113
Telephone: (216) 443-3189
Email: bpiteo@prosecutor.cuyahogacounty.us
Email: dvan@prosecutor.cuyahogacounty.us

COUNSEL FOR PLAINTIFF-APPELLEE THE STATE OF OHIO

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The transcript in this case contains twenty-four (24) volumes, consisting of 5,196 total pages. The pagination of the volumes is consecutive; that is, page 1 is contained in Volume 1, and page 5196 is contained in Volume 24.

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STATEMENT OF THE CASE

Defendant-Appellant Matthew Nicholson was arrested on September 6, 2018 after an argument between Nicholson and his live-in girlfriend, America Polanco, ultimately resulted in the death of America's two children, Giselle Lopez (age 19) and M.L. (age 17), on September 5, 2018. (Tr. 87; R.2, Indictment).

Mr. Nicholson was initially indicted on September 7, 2018 in Cuyahoga County Court of Common Pleas Case No. CR-18-632450-A with two counts of aggravated murder and other offenses arising out of the September 5, 2018 incident. (*See* Tr. 15-16). No death specifications were indicted in that case. (*See* Tr. 15-16). Some limited pretrial proceedings occurred under Case No. 632450 (*See* Tr. 15-18).

After further review of this case, the State decided to seek the death penalty against Mr. Nicholson. Thus, Mr. Nicholson was re-indicted on October 30, 2018 under a new case number, Cuyahoga County Case No. 18-CR-634069-A. (*See* Tr. 23-24; R.2, Indictment). Because Judge Timothy McCormick had been randomly assigned to preside over Case No. 632450, the new capital case was transferred back to Judge McCormick's docket. (Tr. 23). The charges in the first case number, 632450, were nolled on February 1, 2019, and this matter proceeded to conclusion under the new case number, 634069.

The capital indictment in Case No. 634069 included the following **eight counts**:

Count	Offense	Statute	Victim Alleged
1	Aggravated Murder	R.C. 2903.01(A)	M.L.
2	Aggravated Murder	R.C. 2903.01(A)	Giselle Lopez
3	Attempted Murder	R.C. 2923.02, R.C. 2903.02(A)	America Polanco
4	Murder	R.C. 2903.02(B)	Giselle Lopez
5	Murder	R.C. 2903.02(B)	M.L.
6	Felonious Assault	R.C. 2903.11(A)(1)	M.L
7	Felonious Assault	R.C. 2903.11(A)(1)	Giselle Lopez
8	Attempted Felonious Assault	R.C. 2923.02, R.C. 2901.11(A)(1)	America Polanco

Each of the two aggravated murder counts included a death-specification for a course of conduct involving multiple murders pursuant to R.C. 2929.04(A)(5). (R.2, Indictment). Mr. Nicholson was also charged with two firearm specifications for each of the eight counts—sixteen (16) firearm specifications in total—under R.C. 2941.141(A) and R.C. 2941.145(A). (R.2, Indictment).

Mr. Nicholson pleaded not guilty to all charges at his November 2, 2018 arraignment on the capital case. (R.3, Journal Entry). During arraignment, Mr. Nicholson was declared indigent, and private attorneys Fernando Mack (lead) and Nancy Jamieson were assigned as Mr. Nicholson's trial counsel. (Tr. 23-24; R.3, Journal Entry).

Extensive pretrial proceedings, motions, and discovery occurred over the next several months. At the September 5, 2019 pretrial hearing., the trial court heard oral arguments on defendant's motion to exclude "other acts" evidence under Evid.R. 404(B) and announced its rulings on most of the pretrial motions that were filed. (Tr. 54-81). The final pretrial hearing was held on September 10, 2019. (Tr. 82-89).

Death Qualification Individual Voir Dire

On September 13, 2019, one hundred and fifty (150) prospective jurors appeared in court to complete the 22-page juror questionnaire (consisting of 72 questions) that had been prepared by the State. (*See, e.g.*, Tr. 90-97, 141). Copies of all completed questionnaires are part of the record before this Court. The potential jurors were assigned to smaller panels of venirepersons and instructed to return for death qualification voir dire during either a morning or afternoon session on a particular day the following week. (Tr. 93-94).

Death qualification voir dire commenced on September 16, 2019. (*See* Tr. 98-364) and continued for five additional days: September 17, 2019 (s*ee* Tr. 379-759); September 18, 2019 (*see* Tr. 774-1181); September 19, 2019 (*see* Tr. 1196-1491); September 20, 2019 (*see* Tr. 1506-

1906); September 23, 2019 (*see* Tr. 1921-2242). In total, twelve panels of potential jurors were voir dired for death qualification in this case over the course of six days. (*See* Tr. 98-2242).

Of the 150 prospective jurors summonsed in this case, only 58 prospective jurors (i.e., 39%) were determined to be "death qualified" by the trial court and were not otherwise excused by the court prior to general voir dire.

General Voir Dire

General voir dire of the death qualified jurors took place on September 25, 2019. (Tr. 2257-2493). The fifty-eight (58) prospective jurors who returned for general voir dire were assigned a new juror number (Nos. 1-58) at that time.[1] The State and defense counsel exercised all peremptory challenges they were allowed for the jury and alternates. The following twelve jurors and four alternate jurors were ultimately selected for service in Mr. Nicholson's case:

Assigned Prospective Juror No. for Death Qualification Individual Voir Dire	Assigned Prospective Juror No. for General Voir Dire	Final Juror No. Assigned	Juror's Initials	Gender, Race, Age
5 (Tr. 161-180)	**3** (Tr. 2273-2274)	**3**	__.V.	Female, Black, 61
9 (Tr. 191-211)	**4** (Tr. 2274-2275)	**4**	L.M.	Female, White, 43
16 (Tr. 265-283, 305)	**5** (Tr. 2275-2276)	**5**	R.C.	Male, White, 72
26 (Tr. 385-400)	**9** (Tr. 2283-2285)	**9**	J.F.	Female, White, 26
35 (Tr. 551-573)	**16** (Tr. 2387-2400)	**12**	B.C.	Female, White, 55
40 (Tr. 618-635)	**17** (Tr. 2400-2410)	**6**	S.M.	Female, White, 60
43 (Tr. 648-668)	**18** (Tr. 2411-2417)	**11**	K.L.	Female, White, 59
46 (Tr. 693-710)	**19** (Tr. 2418-2424)	**1**	M.K.	Female, White, 49
48 (Tr. 714-735)	**20** (Tr. 2425-2434)	**10**	N.B.	Male, White, 75
49 (Tr. 736-759)	**21** (Tr. 2434-2436)	**8**	D.T.	Female, White, 51
53 (Tr. 829-851)	**24** (Tr. 2442-2449)	**7**	M.A.	Female, Black, 61
61 (Tr. 913-938)	**27** (Tr. 2456-2466)	**2**	L.H.	Female, White, 64
Alternate Jurors				
68 (Tr. 1073-1094)	**31** (Tr. 2478-2484)	**A1**	A.B.	Female, White, 40
72 (Tr. 1102-1120)	**32** (Tr. 2484-2486)	**A2**	M.B.	Female, Black, 45
78 (1244-1264)	**35** (Tr. 2489-2491)	**A3**	C.G.	Female, Black, 58
87 (1285-1316)	**36** (Tr. 2491-2492)	**A4**	M.M.	Male, Black, 58

[1] For clarity, jurors will be referenced herein as follows: Final Juror No. (Death Qualification Prospective Juror No.).

Culpability Phase of Jury Trial

Before opening statements were given by counsel, a jury view of the home where the September 5, 2018 incident occurred was conducted at the State's request on September 26, 2019. (Tr. 2496-2499; R.351, State's Motion for Jury View; R.362, Journal Entry). Defense counsel waived Mr. Nicholson's appearance in court and at the jury view that day. (Tr. 2496).

For the jury view, Judge McCormick took four groups of four jurors through the home, "point[ing] out the areas where counsel wants to draw attention to." (Tr. 2496). Although the record does not state that counsel waived the presence of the court reporter at the jury view, there is no transcript of what was said at the jury view in the record. (*See* Tr. 2496-2499). Thus, there is no way to ascertain what areas of the home were shown to the jurors, what was said during the four jury viewings, whether all four groups were shown the same areas, or anything else that took place while the jurors were taken through the home that day. (*See* Tr. 2496-2499). At the conclusion of the jury view, the trial court reported on the record that there were "no incidents, no objections, just [on] how [the jury view] was handled," to which counsel agreed. (Tr. 2499). Court was adjourned that day and jurors were instructed to return on September 30, 2019 for opening statements. (*See* Tr. 2499)

Opening statements were delivered on the morning of September 30, 2019 by the State (Tr. 2503-17) and defense counsel (Tr. 2518-2524). The State began presenting its case-in-chief later that morning, calling thirty-eight (38) witnesses over the span of seven (7) days. (Tr. 2528-3984).

On October 8, 2019, the State rested. (Tr. 3984). That same day, the admission of the State's exhibits and defense counsel's objections were addressed. (Tr. 3984-4004; R.410, Journal Entry). Defense counsel moved for a judgment of acquittal under Criminal Rule 29, which was denied. (Tr. 4004-4010; R.410, Journal Entry).

On October 9, 2019, Mr. Nicholson was the only witness who testified in defendant's case-in-chief during the culpability phase of trial. (Tr. 4015-4209). At the conclusion of Mr. Nicholson's testimony, the defense rested. (Tr. 4209; R.412, Journal Entry). Later that same day, the admission of the State's cross-examination exhibits and defense counsel's objections were addressed. (Tr. 4209-4212). The State called Lt. Todd Vargo as a rebuttal witness. (Tr. 4213-4225). The trial court again addressed the admission of the State's exhibits and defense counsel's objections. (Tr. 4226).

On October 9, 2019, defense counsel renewed its motion for judgment of acquittal, which was again denied. (Tr. 4227-4228; R.412, Journal Entry). The State moved to dismiss the one- and three-year firearm specifications attached to Count 3, which was the attempted murder of America Polanco, and Count 8, which was the attempted felonious assault of America Polanco. (Tr. 4227-4230). The State moved for dismissal of these firearm specifications because it was relying on "the strangulation of America Polanco in the bedroom" as being the conduct underlying Counts 3 and 8, neither of which involved the use of a firearm. (*See* Tr. 4228-4230). The State also requested that the trial court prohibit the defense from commenting on the fact that the gun specifications were dismissed during its closing argument; the trial court denied that request. (Tr. 4227-4230; R.437, Nunc Pro Tunc Journal Entry).

On October 11, 2019, Mr. Nicholson was found guilty of all counts except for the attempted murder of America Polanco charged in Count 3. (Tr. 4353-4362; R.416, Journal Entry; R.438, Nunc Pro Tunc Journal Entry). He was found not guilty of Count 3. (Tr. 4353-4362; R.416, Journal Entry; R.438, Nunc Pro Tunc Journal Entry). The jury was polled, and all twelve members affirmed that the trial court had correctly stated each individual juror's verdict in the culpability phase of Mr. Nicholson's trial. (Tr. 4361-4362).

Mitigation Phase of Jury Trial

Outside the presence of the jury, defense counsel confirmed with the trial court that they would not be requesting a presentence investigation report or mental examination of Mr. Nicholson prior to the mitigation phase of his trial. (Tr. 4363-4364). Although Mr. Nicholson testified during the culpability phase of his trial, defense counsel informed Mr. Nicholson that he had a right to make a statement under oath (subject to cross-examination) or unsworn (not subject to cross-examination) in the mitigation phase. (Tr. 4364). Mr. Nicholson did not make either during the mitigation phase.

The mitigation phase of Mr. Nicholson's trial began on October 15, 2019 before the same jury that rendered a verdict on Mr. Nicholson's culpability. (R.420, Journal Entry; R.4374-4380). The trial court gave preliminary instructions to the jury (Tr. 4374-4380), and opening statements were delivered that morning by the State (Tr. 4380-4391) and defense counsel (Tr. 4391-4401).

The State relied on all of the testimony and, over defense counsel's objection, most of the exhibits presented during the culpability phase from trial, as their evidence of the aggravating circumstances and rested. (Tr. 4402. *See* Tr. 4367-4370).

In support of mitigation, the following witnesses testified on behalf of Mr. Nicholson: Robert Nicholson Jr., Donna Kain, Angel Nicholson, James Aiken, Dr. John Fabian, Dr. Travis Snyder, and Mary Cecil "Ceci" McDonnell, LISW. (*See* Tr. 4402-5046). The defense rested and moved to admit Defendant's Exhibits A, B, and C on October 17, 2019. (Tr. 5047). The trial court admitted those exhibits without objection from the State. (Tr. 5047).

In rebuttal, the State presented the expert opinions—over defense counsel's objections—of Dr. Thomas Masaryk and Dr. Richard Ryan Darby. (Tr. 4847-4995). The State also played jail calls between Mr. Nicholson and his mother, Angel Nicholson, on September 22, 2019 and October 11, 2019. (Tr. 5048-5053). The State rested and moved to admit State's Exhibit 702, 703,

705, 707, 708, 709, 710, 711, 712, 713 on October 17, 2019. (Tr. 5052). The trial court admitted all rebuttal exhibits over defendant's objection to all except for State's Exhibits 708 and 709. (Tr. 5052-5053).

On October 18, 2019, the jury returned a verdict of death as to Count 1 and Count 2. (R.425, Journal Entry).

The sentencing hearing was held on November 13, 2019 (R.439, Journal Entry), and the trial court entered its opinion sentencing Mr. Nicholson to death on November 19, 2019. (R.440, Sentencing Opinion). Mr. Nicholson filed a timely Notice of Appeal on December 27, 2019.

STATEMENT OF FACTS

Defendant-Appellant Matthew J. Nicholson began working as a security officer at Lincoln Electric in Cleveland, Ohio in 2012 when he was 23 years old. (*See* Tr. 4018-4019, 4015). That same year, Mr. Nicholson's then-girlfriend, Lauren Thomas, gave birth to Mr. Nicholson's daughter, Kamara Nicholson. (*See* Tr. 4019, 3871-3872).

Mr. Nicholson met America Polanco a few months after he began working at Lincoln Electric in 2012. (Tr. 4020). America worked at Lincoln Electric since May 8, 2006. (Tr. 3265). In 1993, America immigrated to the United States from Guatemala with her then-husband, M.L. Lopez Sr. (Tr. 3261-3262). After living in New York for several years, Manuel Lopez and America moved to Cleveland, Ohio, where they had three children together: Roberto Lopez (DOB: 12/28/1996), Giselle Lopez (DOB: 1/29/1999), and M.L. (DOB: 6/07/2001). (Tr. 3262). America testified that when she began working at Lincoln Electric in May 2006, she and Manuel Lopez were in the process of going through a divorce.[2] (Tr. 3265). America could not recall when she and Manuel Lopez divorced; however, she testified that the divorce was finalized, she and her three children moved out of their home with Manuel Lopez and into a home on Ridge Road. (Tr. 3264-3266).

I. America Polanco's relationship with Terricko "Rico" Marshall.

When Mr. Nicholson first met America in 2012, she was dating another Lincoln Electric employee, Terricko "Rico" Marshall. (Tr. 4020). Terricko testified that he and America dated between 2010 to 2012 for approximately 1.5 years. (Tr. 2982-2984). America could not recall exactly when she and Terricko began dating but indicated that "around 2012" sounded right. (*See*

[2] According to the online docket of the Cuyahoga County Court of Common Pleas, Domestic Division, America initiated divorce proceedings against M.L. Lopez on July 12, 2010 in Case Number DR-10-332421.

Tr. 3267-3268). America's oldest son Roberto—who graduated from high school in 2015—testified that America and Terricko began dating when he was in middle school (i.e., sometime before Fall 2011), and that America and Terricko dated for three-to-five years. (*See* Tr. 3634-3635).

At some point during their relationship, Terricko moved in with America and her three children. (*See* Tr. 2982, 3268-6270, 3634-3636). Roberto recalled Terricko living with his family "about a year or two." (Tr. 3635). Mr. Nicholson testified that America's relationship with Terricko "had a reputation of being up and down" in that, "[o]ne minute they were together; the next minute, there were rumors they were breaking up. No one [at Lincoln Electric] really knew. It was hard to follow." (Tr. 4021). According to both America and Terricko, their breakup was mutual. (Tr. 2983, 3271-3272). However, Mr. Nicholson testified that at some point, America told Mr. Nicholson that Terricko kept coming over to her home even though America was "done with the guy." (*See* Tr. 4023). America asked him how she could "separate herself" from Terricko, and Mr. Nicholson advised America that she could contact the police or get a civil protection order against Terricko. (Tr. 4023). At America's request, Mr. Nicholson changed the locks on America's home to prevent Terricko from continuing to come over. (*See* Tr. 4022-4023).

II. America Polanco and her three children moved to Garfield Heights in 2011.

America's realtor, Nanci Crystal, testified that she met America in the later summer or early fall of 2011. (Tr. 3432-3233. *See* Tr. 3270-3271). During that timeframe, Nanci helped America locate and purchase the home located at 4838 East 86th Street in Garfield Heights, Ohio (Tr. 2982-83). America and her three children moved into their Garfield Heights home sometime in late 2011. (*See* Tr. 3397, 2647). This home is where the September 5, 2018 incident underlying this case occurred.

At trial, America asserted that when she moved into her Garfield Heights home, she and Terricko Marshall were no longer dating. (*See* Tr. 3271-3272). That claim, however, was belied by the testimony of Terricko; Mr. Nicholson; and America's Garfield Heights neighbor, Constance "Connie" Allshouse. Terricko testified that he lived with America and her children at their Garfield Heights home before he and America broke up in 2012. (*See* Tr. 2982-2984). Mr. Nicholson recounted that when he first met America at Lincoln Electric in 2012, America and Terricko were dating. (Tr. 4020). Connie Allshouse—who has lived at 4841 East 86th Street in Garfield Heights with her husband, Vic Sanuk, for nineteen years—testified that when America and her children moved into their Garfield Heights home, America was dating Terricko. (Tr. 3397).

III. Mr. Nicholson began dating America in 2014 and moved into America's Garfield Heights home a few months later.

After Mr. Nicholson changed the locks on America's Garfield Heights home to prevent Terricko from coming over, Mr. Nicholson had dinner with America and her three children. (Tr. 4024). From there, Mr. Nicholson and America began to develop a friendship and get to know each other better. (*See* Tr. 4021. *See also* Tr. 3276-3277).

Mr. Nicholson testified that his relationship with America officially began around February or March of 2014, and that he moved in with America in September 2014. (Tr. 4022). Although America could not give precise dates, her testimony was consistent with this account. (Tr. 3276-3277. *See also* Tr. 2649). When Mr. Nicholson moved in with America in September 2014, he would have been 25 years old (*see* Tr. 4015); America, 41 years old (*See* Tr. 3780, 4028); Roberto, 17 years old; Giselle, 15 years old; and M.L., 13 years old (*See* Tr. 4015, 4022, 3262).

When Mr. Nicholson first moved in with America and her three children, he respected that it would take some time for her children to get used to him because America "had just broken up with Terricko." (Tr. 4030-4031). Mr. Nicholson did not try to pry too much into "who they were"

and would "take conversation when it was given to [him]." (Tr. 4031). America recounted that when Mr. Nicholson moved into her home, she told him that her kids already had a father and that she expected him to be respectful of her children. (Tr. 3277-3278).

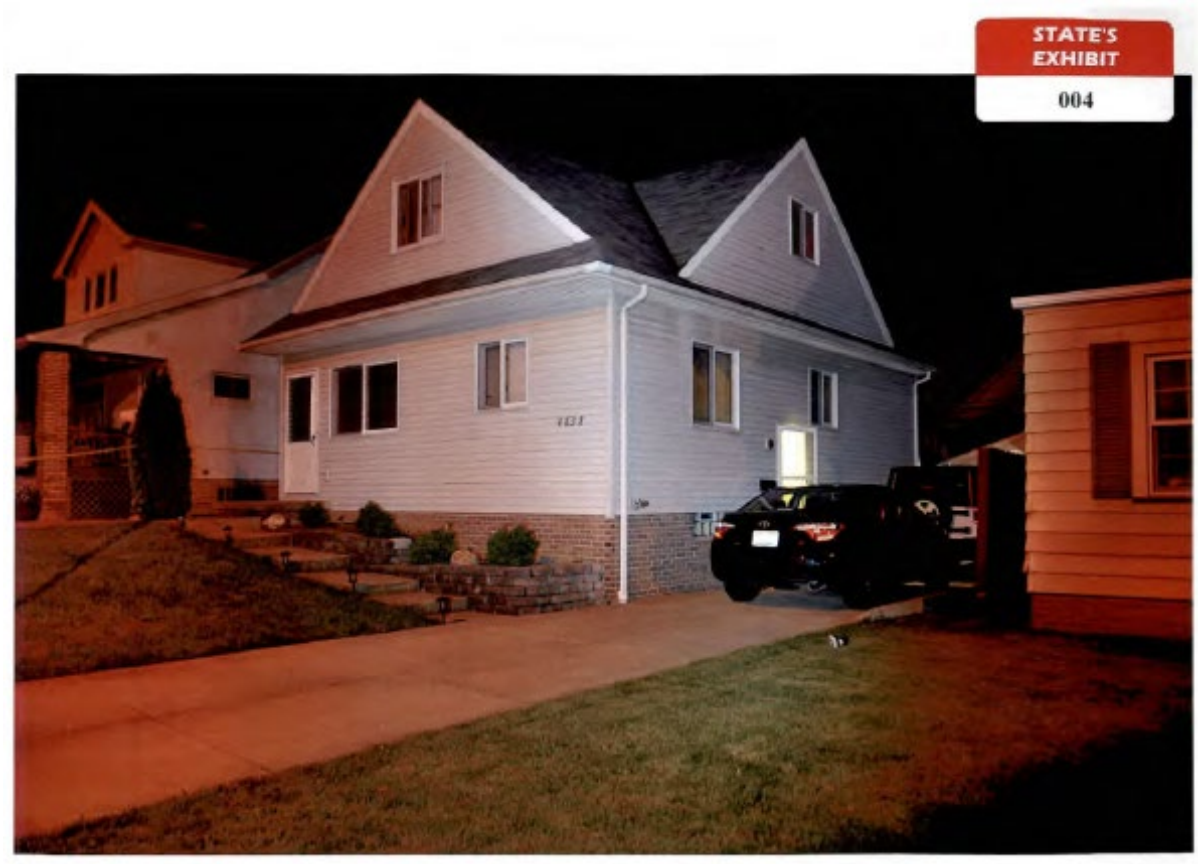
As their relationship progressed, America got to know Mr. Nicholson's family and Mr. Nicholson got to know America's friends and family. (*See* Tr. 4025-4027). Mr. Nicholson vacationed with America and her three children, and, he believed, developed positive relationships with all three of America's children. (*See* Tr. 4029-4031). Mr. Nicholson recognized that he "wasn't old enough to be a father figure to [America's three children]," but tried to be whatever he could—a friend—to them. (*See* Tr. 4031).

Mr. Nicholson testified that his relationship with America had "become a roller coaster" in that it "was up and down" towards the end of 2016, which continued up to the September 5, 2018 incident. (*See* Tr. 4046). Mr. Nicholson explained that one week, he and America would be happy together, but three weeks later they "were possibly breaking it off," only to be "back good" the following week. (*See* Tr. 4046).

A. The parking situation at the Garfield Heights Home in 2016 to 2018.

At trial, the State presented an abundance of evidence and testimony related to the parking situation at America's Garfield Heights home. (*See, e.g.*, Tr. 3307-3311). Roberto, America, and Mr. Nicholson each had their own vehicle when Mr. Nicholson initially moved into America's Garfield Heights home. (*See* Tr. 3307-3308). As reflected by State's Exhibit 337 and State's Exhibit 4 (shown below), the driveway of the home was wide enough for one vehicle; thus, a vehicle parked near the home's detached garage could not back out onto the street if another vehicle was parked behind it in the home's driveway:


337
FILED
4838 East 86th Street
Google


STATE'S
EXHIBIT
004

In 2016, there were at least three vehicles that needed to be parked in the home's driveway: America's, Mr. Nicholson's, and Giselle's. America leased a new car for Giselle in early 2016 shortly after Roberto left home for the military and America sold his car. (*See* Tr. 3308, 3633, 3638). Although Mr. Nicholson questioned America's decision to get her 16-year-old daughter a brand-new vehicle, the presence of the third vehicle in the driveway did not seemingly become an issue until Giselle began working. (*See* Tr. 3308-3309). When Giselle worked, she would often arrive home last. (*See* Tr. 3308-3309). Most mornings, both Mr. Nicholson and America would leave for work before Giselle left for school; thus, unless it was moved, Giselle's vehicle would prevent America and Mr. Nicholson from backing out of the driveway. (*See* Tr. 3308-3311). Because Garfield Heights did not allow street parking in their neighborhood (*see* Tr. 3309-3310), America made arrangements for Giselle to park her car in the driveway of America's neighbors, Connie Allshouse and Vic Sanuk, on the nights that Giselle arrived home from work after Mr. Nicholson and America. (*See* Tr. 3310-3312).

The parking situation at the Garfield Heights home became even more difficult to navigate in 2017 when M.L. turned 16 and America bought him a car—which meant that at least four vehicles were now being parked in the driveway. (*See* Tr. 3320). Because M.L., Giselle, America, and Mr. Nicholson departed from and arrived at the home at different hours of the day, the order in which the vehicles were parked was something that had to be coordinated amongst the household almost every day. (*See, e.g.*, Tr. 3307-3311, 3320-3332). To prevent vehicles from being blocked in, coordination efforts between America, Mr. Nicholson, Giselle, and M.L. were made almost nightly in 2017 and 2018 to ensure that the vehicles were parked in the order in which their driver would be departing the next morning. (*See* Tr. 4057-4058).

At trial, the State presented numerous text message conversations America had with Mr.

Nicholson and her children in 2017 and 2018 regarding parking at the Garfield Heights home. (*See, e.g.*, Tr. 3319-3333, 3354-3358; State's Exhibits 341B through 341Z). Mr. Nicholson acknowledged that the coordination regarding parking sometimes resulted in in stress, tension, and/or frustration amongst the members of the household. (*See* Tr. 4057-4058). However, none of the text messages presented by the State regarding the parking situation at the Garfield Heights home contained threats from Mr. Nicholson to America and/or her children. (*See* Tr. 3319-3333). Indeed, many of the text messages presented as exhibits by the State showed the family simply coordinating parking logistics with each other. (*See* Tr. 3319-3333).

While America claimed that Mr. Nicholson's relationship with her and/or her children was strained, in large part, because she America purchased M.L. a car after he turned sixteen (Tr. 3320-3321), text messages between Mr. Nicholson and M.L. show that Mr. Nicholson was actually helping M.L. with the car purchasing process in early November 2017. (*See* State's Exhibit 578: Exhibit K, Item 7 SMS Messages, Lines 3769-3770, 3784, 3819-3821, 3816-3817, 3864-3868).

B. Mr. Nicholson's relationship with Giselle and M.L. changed after they found out that Mr. Nicholson was sixteen years younger than their mother.

Before Mr. Nicholson moved in with America and her three children, America asked Mr. Nicholson not to bring up his age to her children. (Tr. 4028). According to Mr. Nicholson, America told him that she did not know how her children would react to Mr. Nicholson's age and that she did not want that to become a situation in their relationship. (Tr. 4028). Thus, after Mr. Nicholson moved in with America, he would make a conscious effort to hide belongings of his that would contain information about his age. (*See* Tr. 4028).

Mr. Nicholson believed that at some point, America's children discovered Mr. Nicholson's age after he inadvertently left his wallet on the kitchen counter while he took a shower one day. (Tr. 4029). America's oldest son, Roberto, testified that he started "hearing about" Mr. Nicholson's

age sometime in 2017, but did not indicate from whom he heard this information. (*See* Tr. 3665-3666). Mr. Nicholson testified that he believed his relationship with M.L. and Giselle changed after they found out how old Mr. Nicholson was, which caused them to become increasingly disrespectful to him. (*See* Tr. 4031-4033. *See also* Tr. 3757).

C. In September 2018, Mr. Nicholson and America Polanco were still in a relationship and living together with Giselle and M.L. at the Garfield Heights home.

Although America allegedly told Mr. Nicholson in June 2018 that she wanted him to move out of his home (*see* Tr. 3747-3755; State's Exhibits 410A, 410B, 410C), Mr. Nicholson described their relationship as "rollercoaster" in that some weeks, they would be doing fine, but then a few weeks later, they would be on the verge of breaking up. (*See* Tr. 4046-4047, 4164). With the State leading, America testified that in June 2018, she gave Mr. Nicholson two weeks to move out of the Garfield Heights home. (Tr. 3372). The next month, however, America was apparently discussing the feasibility of her working a different shift at work, which Mr. Nicholson indicated might not be a good idea because, at that point, America's children and Mr. Nicholson were not getting along. (*See* Tr. 3378-3380; State's Exhibit 341OO).

In September 2018, Mr. Nicholson was still living with America, Giselle, and M.L. at the Garfield Heights home. By that time, there were typically five vehicles parked in the home's narrow driveway every evening. (Tr. 4057). America was driving a white Jeep Wrangler; Mr. Nicholson a white Volkswagen Jetta; Giselle a dark-colored Toyota Corolla; and M.L. a silver Toyota Corolla. (*See* Tr. 3708, 3425-3426; State's Exhibits 4, 5, 56, 58, 64, and 65). The fifth vehicle typically parked near the home's detached garage was Mr. Nicholson's Jeep Grand Cherokee. (*See* Tr. 3425-3426; State's Exhibits 58, 64, and 65).

During that month, America was still working at Lincoln Electric and Mr. Nicholson was working as an armed security guard for Paragon Systems, a subcontractor for the Department of

Homeland Security, where he had been working for almost the last three years. (*See* Tr. 3378-3379, 3382-3384, 4051). At the time of the September 5, 2018 incident, Mr. Nicholson had been working for Paragon Systems for approximately three years. (Tr. 4051). As part of his everyday duties as an armed security guard, Mr. Nicholson was required to carry a Glock .40 firearm, which had been issued to him by his employer. (*See* Tr. 4051-4052). Paragon Systems also issued Mr. Nicholson a baton, handcuffs, pepper spray, a bulletproof vest, and a gun belt to use in the course and scope of his everyday duties. (*See* Tr. 4052). Mr. Nicholson testified that he typically stored these items—including his work-issued Glock .40 firearm—in the trunk of his vehicle when he was not working. (Tr. 4053-4054). Mr. Nicholson testified that America, Giselle, and M.L. were aware that he stored his work-issued items, including the firearm, in the trunk of his vehicle. (*See* Tr. 4053-4054).

IV. September 5, 2018 Incident

The catalyst for the instant matter was a text message America received from her ex-boyfriend, Terricko Marshall, that evening. (*See* Tr. 3704, 3893-3894). Up until that point, nothing remarkable had happened in the Garfield Heights home or between its household members.

On September 5, 2018, Mr. Nicholson worked as an armed security guard from 6:00 AM to 6:00 PM. (*See* Tr. 4054-4055). Around 4:30 PM to 5:00 PM, Mr. Nicholson texted America to let her know that he would be working late because his supervisor had asked him to help with a federal building assignment after his shift ended at 6:00 PM. (Tr. 4055-4056). However, because Mr. Nicholson was unable to make contact with his supervisor after his shift ended, Mr. Nicholson decided to go home. (Tr. 4055-4056).

When Mr. Nicholson arrived home around 7:00 PM, America and M.L. were already at home. (Tr. 4056). Knowing that America would likely be leaving before the other household

members the following morning, Mr. Nicholson texted America to let her know he was outside so she could back her white Jeep out of the driveway and park behind Mr. Nicholson's white Volkswagen. (*See* Tr. 4057, 4059; State's Exhibits 59 and 64). In the driveway, Mr. Nicholson and America had an "every day" conversation while Mr. Nicholson, with America's assistance, took off his work uniform and equipment and placed several of those items—including his duty belt with his work-issued Glock .40 firearm—in the trunk of his vehicle. (*See* Tr. 4058-4059). Mr. Nicholson testified that America would often—and did on September 5, 2018—hold some of his things—such as his keys and lunchbox—while he took off his uniform and equipment in the driveway and placed those items in his vehicle's trunk. (*See* Tr. 4058-4060, 4076).

When Mr. Nicholson and America came inside, Mr. Nicholson's vehicle was unlocked. (*See* Tr. 4059-4060). Mr. Nicholson testified that he had given America his keys to hold while he took the snaps off his duty belt and put it into his vehicle's trunk that evening. (Tr. 4076). Mr. Nicholson was not concerned about locating his keys immediately after coming inside, as he was in the habit of locking his vehicle every night before he went to bed. (*See* Tr. 4059-4060).

Inside the home, America asked Mr. Nicholson if he really had to work late or if he was going to see someone else. (Tr. 4060-4061). Although Mr. Nicholson offered to show America the text messages with his supervisor, America ignored him. (Tr. 4061). M.L. was upstairs in his bedroom almost the entire time Mr. Nicholson was home that evening. (*See* Tr. 4061). Mr. Nicholson had leftovers for dinner that evening and then took a shower. (*See* Tr. 4061-4062).

A. Mr. Nicholson and America began arguing after America received a text message from her ex-boyfriend, Terricko Marshall, at 8:50 PM on September 5, 2018.

Later in the evening, Mr. Nicholson and America were watching television in their bedroom when America received a text message from phone number (216) 324-0896 at 8:50 PM. (Tr. 4062-4063, 3703-3707, 3387-3389; State's Exhibit 341A). Mr. Nicholson testified that he

believed America's actions and words after receiving the text message were "peculiar because she never acted that way before" and that it "was obvious that she was concealing the text message." (Tr. 4063). Mr. Nicholson repeatedly asked America who the text message was from and what the text message said, and America suggested to Mr. Nicholson several times that the message was probably from a wrong number. (*See* Tr. 4063-4064).

After going back and forth about the text message, America agreed to show it to Mr. Nicholson. (Tr. 4064). America did not have a contact saved in her phone that was associated with the phone number that sent her the text message, and Mr. Nicholson did not recognize it. (*See* Tr. 4064-4065; State's Exhibit 341A). There was no conversation history on America's phone with that phone number, and the text message America received simply stated: "That's good." (*See* Tr. 4064-4065, 3704-3705, 3893-3894). America again proffered that she had received a text message from the wrong phone number; however, Mr. Nicholson testified that the way she acted did not feel right. (Tr. 4065). Therefore, at 9:07 PM, Mr. Nicholson responded from America's phone by texting back: "What's good?" (*See* Tr. 4065; State's Exhibit 341A). At 9:08 PM, phone number (216) 324-0896 responded: "That you only worked 7hrs." (Tr. 4065; State's Exhibit 341A).

Based on that message, Mr. Nicholson believed America knew who the text message was from and again asked her who she had been texting. (Tr. 4065-4066). America did not say anything, so Mr. Nicholson called that phone number from America's phone one minute later. (*See* Tr. 4066, 2996-2997; State's Exhibit 341A). While the phone was ringing, America told Mr. Nicholson that the person texting her was her ex-boyfriend, Terricko Marshall. (*See* Tr. 4066). Terricko did not answer the call because he was getting ready for work. (Tr. 2996-2997. *See also* Tr. 4066). However, at 9:09 PM Terricko—believing it was America who had just called him—texted "Hold on" to America's phone number. (*See* Tr. 4066, 2996-2997; State's Exhibit 341A).

Upon learning that America had been texting her ex-boyfriend, Mr. Nicholson and America began arguing. (*See* Tr. 4066-4067, 3387-3391). Although Mr. Nicholson knew that America and Terricko used to date, Mr. Nicholson was not aware that America was still in contact with Terricko. (*See* Tr. 3703-3704). However, both America and Terricko testified that after they broke up, they would communicate with each other every so often—usually via text message—about America's children, their mutual friends at Lincoln Electric, and what was going on in their lives. (*See* Tr. 2987-2991, 3276). Mr. Nicholson was also unaware that Terricko remained in contact with America's children while America and Mr. Nicholson were living together. (*See* Tr. 3703-3704, 2983-2985, 3271-3272, 3636). Terricko acknowledged that while Mr. Nicholson and America were dating in 2014 to 2018, he was texting with America's children and would go to the gym with M.L. once or twice a month. (*See* Tr. 2983-2985). Terricko also attended Roberto's high school graduation. (Tr. 3634-3636).

America admitted she actively concealed from Mr. Nicholson that she and her children still had occasional contact with Terricko because she did not want to upset Mr. Nicholson. (*See* Tr. 3703-3704). She concealed this information from Mr. Nicholson by not having Terricko's phone number saved as a contact in her phone and by deleting her text message conversations with Terricko. (*See* 3717-3718). Mr. Nicholson was completely unaware that America was still in contact with Terricko, so he never had reason to be upset with her prior to September 5, 2018 about it. (*See* Tr. 3703-3704).

According to Terricko, he and America had been texting each other throughout the day on September 5, 2018 about America's work schedule. (Tr. 2990-2995; *See also* Tr. 3717-3718). Because Terricko was working third shift at that time (11 PM to 7 AM), he recalled waking up sometime before 8:50 PM, seeing America's text message about only working only seven hours

that day, and responding to America's message by saying "That's good" at 8:50 PM. (Tr. 2992-2995. *See* State's Exhibit 341A). Although the September 5, 2018 conversation between America and Terricko was, as recounted by Terricko, seemingly harmless, America nonetheless deleted her entire text message conversation with Terricko sometime before he sent America that 8:50 PM text message. (*See* Tr. 3717-3718, 3893-3894; *See* State's Exhibit 341A**)**. Thus, when Mr. Nicholson saw the "That's good" text message, there was no way for Mr. Nicholson to ascertain the nature of America's conversation with Terricko. (*See* 4064-4065, 3717-3718, 3893-3894; *See* State's Exhibit 341A**)**. At trial, the State did not offer as evidence the full text message conversation between Terricko and America on September 5, 2018.

B. Mr. Nicholson and America had a phone conversation with Terricko Marshall sometime after 9:09 PM on September 5, 2018.

After Terricko finished getting ready for work, Terricko called America back sometime after 9:09 PM and America answered his call. (*See* Tr. 2996-2997, 4066-4067, 3387-3391). America told Terricko she had a boyfriend and that Terricko had a girlfriend, which Terricko acknowledged. (Tr. 4067. *See* Tr. 2996-2997, 3887-3889). Mr. Nicholson—who was listening to their conversation over speakerphone—believed that America "wasn't [acting like] herself." (Tr. 4067). A few moments later, Mr. Nicholson requested that America let him speak with Terricko, so she handed him the phone. (Tr. 4067. *See* Tr. 2996-2997, 3887-3889).

Mr. Nicholson asked Terricko what was going on between Terricko and America. (Tr. 4067, 2996-2997. *Compare with* Tr. 3387-3389). Terricko laughed and assured Mr. Nicholson that nothing was going on between him and America. (Tr. 4068. *See* Tr. 2996-2997. *Compare with* Tr. 3387-3389). Mr. Nicholson again asked Terricko if anything was going on between him and America, and Terricko again reassured Mr. Nicholson that there was nothing inappropriate going on between them. (Tr. 4068, 2996-2997. *Compare with* Tr. 3387-3389).

Although Mr. Nicholson did not believe Terricko, it was apparent to him that Terricko was not going to be honest with him if America was cheating on Mr. Nicholson with Terricko. (*See* Tr. 4068). Therefore, Mr. Nicholson calmly and politely ended the phone call with Terricko. (*See* Tr. 4068). Indeed, Terricko corroborated Mr. Nicholson's depiction of their phone conversation that evening. (Tr. 2996-2997, 3008-3009).

America, however, testified that Mr. Nicholson told Terricko during their phone conversation that Mr. Nicholson was "a big guy" and that "something bad is going to happen." (Tr. 3387-3389). Mr. Nicholson denied saying that (Tr. 4068) and Terricko testified that Mr. Nicholson did not say that to him at any point during their phone conversation. (Tr. 3008-3009. *See also* Tr. 2996-2997). To the contrary, Terricko explicitly testified that Mr. Nicholson did not make any threats to him, America, America's children, or—for that matter—anyone during their September 5, 2018 phone call. (Tr. 3008-3009). America also described Mr. Nicholson's demeanor while he spoke with Terricko as "angry" and alleged that Mr. Nicholson was cursing and yelling during that call. (Tr. 3705). Terricko, however, testified that there was "no argument, no cursing, no threats, nothing like that" during his conversation with Mr. Nicholson and acknowledged that Mr. Nicholson was not disrespectful to him in any way that night. (Tr. 2997, 3008).

After he ended the call with Terricko, Mr. Nicholson was upset with and angry at America. (Tr. 4069). Mr. Nicholson threw America's phone towards the bed where America was sitting, called America a "lying bitch," and told her: "I'm gone. The last bit of trust we had, you just destroyed." (Tr. 4069). Mr. Nicholson recalled America coming towards him and asking him where he was going. (Tr. 4069). Mr. Nicholson asked or told America to move her vehicle—which was parked behind his car in the driveway—so he could leave the home; however, America refused to do so. (*See* Tr. 4079-4080. *See also* Tr. 3713-3714, 3898, 3902-3907).

America alleged that Mr. Nicholson strangled her to the point where she could not breathe at some point while they were arguing in the bedroom that night. (Tr. 3387-3388). The State asserted during trial that this allegation was the factual basis for the attempted murder offense charged in Count 3 and the attempted felonious assault offense charged in Count 8. (*See* Tr. 4228-4230). Although two firearm specifications were included with both of those counts (R.2, Indictment), America never claimed during her trial testimony that Mr. Nicholson brandished, had in his possession, or threatened her with a firearm at any point in their bedroom that night. (*See* Tr. 3387-3391, 3671-3674).

Mr. Nicholson asserted that he did not grab, choke, punch, or otherwise physically assault America while they were arguing in their bedroom on September 5, 2018. (Tr. 4070).

C. America's son, M.L. overheard the argument between Mr. Nicholson and America from his upstairs bedroom and came downstairs to intervene.

While Mr. Nicholson and America were loudly arguing in their bedroom, America's 17-year-old son, M.L., was upstairs in his bedroom. (*See* Tr. 3386, 4072). At some point after the phone call with Terricko, M.L. came downstairs, began pounding on the bedroom door, and yelled at them to "Open the f-ing door." (Tr. 4069, 4071. *See also* Tr. 3389-3391). Mr. Nicholson testified that M.L. was trying to force the bedroom door open at the same time Mr. Nicholson was trying to open it. (Tr. 4073). M.L. entered the room, walked past Mr. Nicholson, looked at America, and asked America if she was okay. (Tr. 4069-4070, 4073. *But see* Tr. 3389). America—who was still sitting in the bed—told M.L. that she was fine. (Tr. 4070, 4073). M.L. then asked Mr. Nicholson: "Did you just call my mom a bitch?" (Tr. 4070, 4073).

Mr. Nicholson ignored M.L. and attempted to walk past him and exit the bedroom. (Tr. 4073). Mr. Nicholson testified that when he did that, M.L. "backed up out of the doorway, went into the hallway, [] [p]ut his hands up on both sides of the hallway, and [] blocked" Mr. Nicholson,

asking him again if Mr. Nicholson called M.L.'s mom a bitch. (Tr. 4073). According to Mr. Nicholson, he told M.L. he did not understand why M.L. was "coming down here challenging [him]." (Tr. 4073). Mr. Nicholson testified that after M.L. asked for the third time if Mr. Nicholson had called M.L.'s mom a bitch, Mr. Nicholson—believing that M.L. was not going to let Mr. Nicholson walk past him—asked M.L. what he was going to do about it. (Tr. 4073-4074). Mr. Nicholson testified that M.L. "started swinging on [him], [and] America came up behind [Mr. Nicholson] and wrapped her arms around [him]." (Tr. 4074. *See also* Tr. 3672).

Mr. Nicholson's testimony about M.L.'s behavior when he intervened in the argument between America and Mr. Nicholson that night was supported by the evidence presented and witnesses called by the State at trial. Approximately one hour after the incident, Mr. Nicholson told law enforcement that M.L. was "fucking trying to break in the bedroom door" and when Mr. Nicholson opened the door for him, M.L. put his fists up, started "bobbing back and forth," and was "fucking in attack mode." (Tr. 2775-2776; State's Exhibit 324B at 0:50:00-0:52:00). Additionally, in an enhanced 911 call from that evening, Mr. Nicholson stated: "You don't need to come banging on the fucking door, talking about 'You call my mother a bitch?'" (State's Exhibit 318).

America acknowledged that Mr. Nicholson opened the door for M.L. that night but denied that her son attacked Mr. Nicholson when he opened the door. (Tr. 3389-3390, 3671-3672). America testified about the events of September 5, 2018 twice during the culpability phase of Mr. Nicholson's trial: first on October 4, 2019 (*see* Tr. 3387-3391), then again on October 7, 2019 (*see* Tr. 3671-3674). The first time she testified, America claimed that while Mr. Nicholson was opening (or just after opening) the bedroom door for M.L. that night, Mr. Nicholson simultaneously said to her: "'I told you, if these kids come down, I'm going to kill him and I'll kill

your daughter and I'll kill you too.'" (Tr. 3389-3390). The second time America testified about this same series of events, America claimed that while M.L. was "crying and screaming" outside of her bedroom door, Mr. Nicholson told her: "[I]f he coming downstairs, he's dead. I'm going to kill him and your daughter." (Tr. 3671). In this version of events, America was apparently not included in Mr. Nicholson's alleged threat.

Yet, despite America's testimony that Mr. Nicholson allegedly had two firearms in the bedroom—one under the mattress and one in the closet (Tr. 3702)—Mr. Nicholson did not grab either of the two guns readily accessible to him and perform the threat America claimed Mr. Nicholson had just made. Instead, America testified, Mr. Nicholson opened their bedroom door for M.L. and engaged him in a physical fight. (*See* Tr. 3390, Tr. 3671-3672). America was not asked and did not testify about M.L. banging on the bedroom door or M.L. repeatedly asking Mr. Nicholson if he had called his mother a bitch. (*See* Tr. 3671-3672).

D. While M.L. and Mr. Nicholson were engaged in a physical altercation, America also began attacking Mr. Nicholson.

Mr. Nicholson told law enforcement that M.L.'s aggressiveness towards him was "what started" the physical altercation between them, which ultimately led to the shooting incident. (Tr. 4070. *See* Tr. 2775-2776; State's Exhibit 324B at 0:50:00-0:52:00). Mr. Nicholson—who was already upset at America for lying to him about texting her ex-boyfriend—became even angrier when M.L. attacked him and America, Mr. Nicholson believed, joined in. (*See* Tr. 4073-74).

In recounting the altercation that took place that evening, Mr. Nicholson testified:

> * * * [W]e started in the hallway. M.L., he hit me maybe two or three times. I know he punched me in the chin. And that hurt. That pissed me off. And when he did that, I tried to shove him. And he went back maybe two or three steps, and then he came back at me.
>
> And at the same time, I'm trying to—I'm prying America's arms from around me to get her off me.

> [M.L.] came back and he swung some more. And I shoved him again.
>
> And we slowly went from the bedroom doorway into the kitchen. And I grabbed M.L., and I tried to tackle him and get him down. And tried to restrain him. Because I didn't want to sit there and go toe-to-toe.

(Tr. 4074-4075).

America testified that after Mr. Nicholson opened their bedroom door for M.L., Mr. Nicholson: "grabbed M.L., took him in the kitchen. Start beating M.L." (Tr. 3390). America admitted to "trying to take [Mr. Nicholson] off [M.L.]" while M.L. and Mr. Nicholson were fighting in the kitchen. (Tr. 3672). According to America, M.L. somehow managed to get up, but Mr. Nicholson thew a kitchen chair at M.L., which knocked M.L. down again. (Tr. 3390).

Mr. Nicholson admitted that during the altercation, he "tried to get on top of M.L., to hold him down and stop him. Because [Mr. Nicholson] did not want to sit there and trade blow-to-blow with [his] 17-year-old stepson." (Tr. 4076). Mr. Nicholson estimated that M.L. was probably four inches shorter than him and weighed approximately 25-to-30 pounds less than he did on September 5, 2018. (Tr. 4075). After Mr. Nicholson "got [M.L.] down" and was on top of him, M.L. told Mr. Nicholson that he was done fighting. (*See* Tr. 4077).

Although Mr. Nicholson got off of M.L., America was still on Mr. Nicholson's back. (Tr. 4077). Mr. Nicholson told America multiple times to get off of him, which she eventually did. (Tr. 4077). After America got off of him, Mr. Nicholson "got up * * * walked to the other side of the kitchen, by the front window," and recounted that, at that point, he, America, and M.L. "all kind of sat there and caught [their] breath." (Tr. 4077).

Mr. Nicholson denied throwing a chair at M.L. at any point during the altercation (Tr. 4076), and the photographs taken of the kitchen by law enforcement hours after the incident did not lend any support to America's claim that a chair had been thrown in the home's small kitchen that night. (*See* State's Exhibits 147-150).

Although Mr. Nicholson felt as though the altercation between him and M.L. went on forever, Mr. Nicholson estimated that it probably lasted about five minutes. (Tr. 4076). Mr. Nicholson testified that while he was scolding M.L. and telling him to go back upstairs to his room, America "came back up behind" Mr. Nicholson, grabbed him again by wrapping her arms around him, and began squeezing around Mr. Nicholson's chest area. (*See* Tr. 4078-4079). Mr. Nicholson testified that he repeatedly told America to get off of him, but when she did not, he "started prying her hands from around [his] chest and started grabbing her arms," but she continued to resist. (*See* Tr. 4079).

Ultimately, Mr. Nicholson testified that he had to push America in order to get her off of him. (Tr. 4080). America claimed that Mr. Nicholson grabbed her and threw her at the wall across the hallway." (Tr. 3390). When Mr. Nicholson did that, "[M.L.] became irate," which caused Mr. Nicholson and M.L. to start fighting again. (Tr. 4080). Mr. Nicholson testified that he "tried to grab [M.L.] and put him back down [on the ground] to get on top of him [and] restrain him. But, at that point, America had [gone over] to the kitchen counter and * * * grabbed a knife." (Tr. 4080. *See also* Tr. 3760-3763). Mr. Nicholson testified that he then "let M.L. go" in order to restrain America and get the knife away from her; eventually, America dropped the knife. (*See* Tr. 4081).

Throughout the altercation that evening, Mr. Nicholson asked America "more than five" times to move her Jeep—which was parked behind his Volkswagen Jetta—so he could leave the home. (*See* Tr. 4079-4080, 3717-3721, 3898, 3901-3907). However, she refused to do so. (*See* Tr. 3717-3721, 3898, 3901-3907).

E. Giselle Lopez arrived home from work at some point during the altercation.

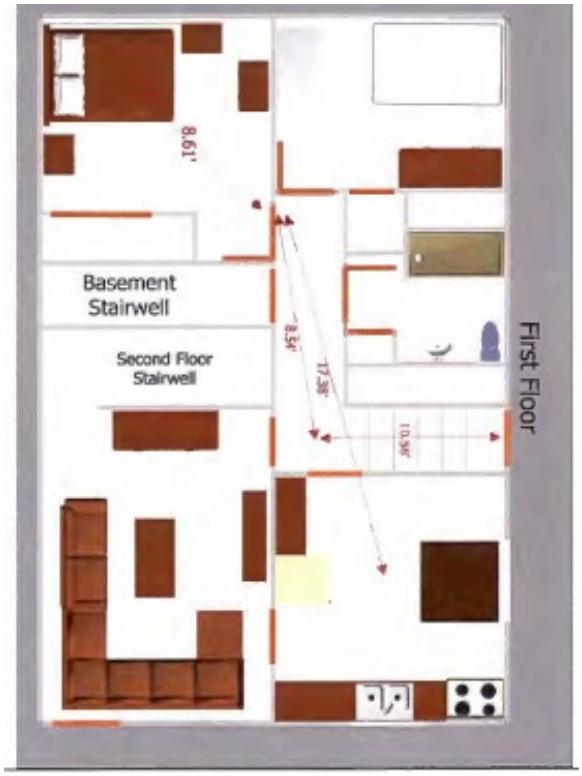
At some point during the altercation inside of the home, Giselle arrived home from work. (Tr. 4082; 3390, 3671-3674). Mr. Nicholson recounted the following series of events upon Giselle's arrival home.

After Giselle parked her vehicle behind America's white Jeep, Mr. Nicholson told both Giselle and America to back their vehicles out of the driveway so he could leave the home. (*See* Tr. 4082-4083). Giselle responded "Fuck you" to Mr. Nicholson and asked America what Mr. Nicholson had done. (Tr. 4083). America told Giselle that Mr. Nicholson had tried to kill M.L., and Giselle said that she was "sick of this motherfucker," referring to Mr. Nicholson. (Tr. 4083). M.L. went back upstairs to his room and Mr. Nicholson—after asking America again to move her vehicle—went to the bedroom to change out of his pajamas so he could leave. (Tr. 4083).

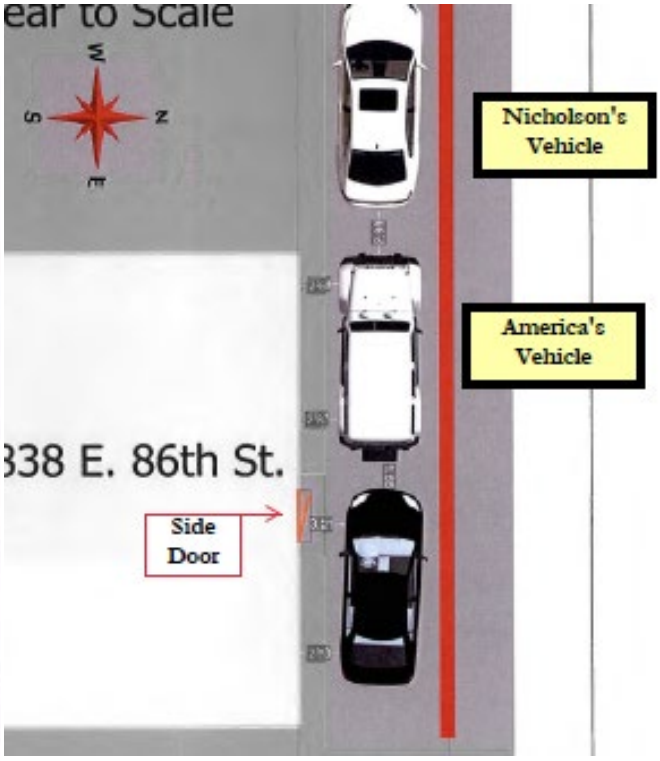
When Mr. Nicholson came out of the bedroom, America told M.L. and Giselle that Mr. Nicholson was about to kill them. (Tr. 4084). America—the last person to have possession of Mr. Nicholson's car keys—yelled out to M.L. that Mr. Nicholson's service weapon was in the back of his vehicle and to "[h]urry up before he gets another one." (*See* Tr. 4084). When Mr. Nicholson heard M.L. run down the stairs, Mr. Nicholson ran out of the bedroom to try to tackle him but was unsuccessful. (*See* Tr. 4084-4085). As M.L. ran out of the home, America held up the keys in her hand and pressed a button on the key fob. (Tr. 4084). It was at that point that Mr. Nicholson realized America was holding his vehicle's keys. (*See* Tr. 4084-4085).

Mr. Nicholson ran into the bathroom, looked out the window to the driveway, and saw M.L. rummaging through the trunk of Mr. Nicholson's vehicle, which was where Mr. Nicholson's duty belt holstering his service weapon was located. (Tr. 4085). Mr. Nicholson saw M.L. grab the duty belt from the trunk of Mr. Nicholson's vehicle and run back towards the side door of the home from which M.L. had exited. (*See* Tr. 4085). Before M.L. reached the door, Mr. Nicholson testified that, through the bathroom window, he saw M.L. stop near the driver's side of America's Jeep while still holding Mr. Nicholson's duty belt containing Mr. Nicholson's service weapon. (*See* Tr. 4085).

Diagrams prepared by BCI Agent Justin Soroka of home's main floor and driveway (State's Exhibits 308 and 310, respectively) are excerpted and reproduced below, with the main floor diagram being rotated to reflect the location of the home in proximity to the driveway:



State's Exhibit 308 (excerpted, rotated)



State's Exhibit 310 (excerpted)

It appeared to Mr. Nicholson that M.L. was trying to pull his service weapon out of the holster, so Mr. Nicholson exited the bathroom and ran towards the side door of the home. (*See* Tr. 4085). Mr. Nicholson testified that he intended to close and lock that door so M.L. could not come inside with Mr. Nicholson's service weapon. (*See* Tr. 4085). However, because Giselle was standing in the doorway holding the screen door open and America "looked at [him] with a crazy look," Mr. Nicholson ran back into the bedroom and attempted to close and lock the bedroom door. (Tr. 4085-4086). He was unable to do this because M.L. "had messed up the lock" when he tried

forcing the bedroom door open earlier that evening. (*See* Tr. 4085-4086).

In fear for his life and still emotional about the events that had taken place that night, Mr. Nicholson located his personal weapon in the bedroom and went back out into the hallway of the home. (Tr. 4086). M.L. was still outside at that point, and Mr. Nicholson repeatedly asked America to lock the door. (Tr. 4086). After America refused to do so, Mr. Nicholson realized that the "only chance to stop what potentially was about to happen was if [he] went and locked that door [him]self." (Tr. 4086-4087). Mr. Nicholson explained that he did not call 911 when M.L. ran outside because Mr. Nicholson's phone was in the basement and he was fearful that if he went to retrieve his phone, M.L. would have ample opportunity to come inside with Mr. Nicholson's service weapon and attack him. (*See* Tr. 4092-4093).

Mr. Nicholson approached the home's side door with his gun drawn. (Tr. 4088-4089). In explaining the layout of the Garfield Heights home, BCI Agent David Horn explained that upon entering the home from the driveway through this side door, there are a few steps that lead up into the main floor of the residence. (Tr. 3125-3126; *See* State's Exhibits 145-146). At the top of the steps, the kitchen can be accessed by turning left and the living room can be accessed by continuing straight. (*See* Tr. 3126-3127; *See* State's Exhibits 149, 155).

While he was in or near the side door stairs leading out to the driveway, Mr. Nicholson testified that America came up behind him and started attacking him with a can of Lysol. (*See* Tr. 4088-4089). Photographs taken of the scene as it was found by BCI Agent Horn in the early morning of September 6, 2018 show multiple cans of disinfect spray at or near the area wherein Mr. Nicholson testified that he and America were "wrassling" when America sprayed Mr. Nicholson's face and body with disinfectant spray. (Tr. 4089. *See* State's Exhibit 145, 149. *See* Tr. 3122-3124). Additionally, it appears that some type of aerosol spray can was photographed by BCI

Agent Horn on the floor under a table in the living room that was located near the side door stairway leading out to the driveway. (*See* State's Exhibits 154-156).

F. The shooting incident.

Mr. Nicholson testified that while America was attacking him in or near that stairway leading out to the driveway, he looked out of the door and could see M.L. and Giselle trying to get Mr. Nicholson's service weapon out of his gun belt's thumb break holster. (Tr. 4089-4090). Mr. Nicholson yelled at them to drop the weapon at least twice, but they refused to comply. (Tr. 4890). Mr. Nicholson saw that Giselle got his service weapon—which was "all plastic at the bottom"—out of the holster and "it looked like she had turned toward[s] [Mr. Nicholson]." (Tr. 4090). At that point, Mr. Nicholson discharged his personal firearm. (Tr. 4091).

America testified that M.L. called 911 at or around the exact time Giselle arrived home from work. (Tr. 3673-3674). According to America, while M.L. was calling 911, Mr. Nicholson ran to the bedroom, grabbed the gun, pushed America "like that on the side," and then "reach[ed] out of the door and shot [M.L.] and Giselle in the back." (Tr. 3674).

Although he did not recall how many times he discharged his firearm, he testified that he tried his best to shoot as low as he could; however, Mr. Nicholson had difficulty aiming because he and America were still "wrassling" with each other. (Tr. 4091). When asked by defense counsel why he shot so many times that night, Mr. Nicholson explained: "I shot because I couldn't see and it looked like Giselle had [Mr. Nicholson's service] weapon in her hand, they got it out of the holster. And as I shot, she fell into the Jeep and she dropped it. And then [M.L.] picked it up." (Tr. 4106).

G. After the shooting, America Polanco ran outside to the driveway and Mr. Nicholson went downstairs to the basement of the home.

While he and America were still wrestling, Mr. Nicholson saw M.L. and Giselle lying on the driveway. (Tr. 4091). At that point, he stopped shooting and let go of America. (Tr. 4091). America ran past Mr. Nicholson and to her children outside, and Mr. Nicholson closed the screen door and locked it. (Tr. 4091). Mr. Nicholson never shot at America at any point during the altercation or while America was outside in the driveway with her two children after they were shot. (Tr. 4091-4092. *See* Tr. 3714-3715).

Mr. Nicholson testified that, after the shooting, he went to the bathroom on the main floor of the Garfield Heights home to try to wash the Lysol off of his face and to look out of the bathroom window to see what was going on in the driveway. (Tr. 4093-4094). As he looked out the window, Mr. Nicholson saw that America had picked up Mr. Nicholson's duty belt and gun, thrown them into the trunk of his vehicle, closed the trunk, and ran down the driveway. (Tr. 4094-4097).

America and her neighbors, Connie Allshouse and Vic Sanuk, testified that America ran to their home and asked them to call 911. (Tr. 3675, 3404-3407, 2657-2662). Additional evidence regarding that 911 call was not presented by the State at trial. Mr. Nicholson testified that after America left the driveway, he went down to the basement to retrieve his cellphone, as he had inadvertently left it downstairs near the computer before coming up to the bedroom that night. (*See* Tr. 4097). Mr. Nicholson explained that he did not call 911 after the shooting because he anticipated that law enforcement had been contacted and were on their way. (Tr. 4094-4095).

America testified that she ran back over to her home to wait with Giselle and M.L. for the police and medics to arrive. (Tr. 3675. *See* State's Exhibit 321A at 0:00:00-0:02:00). While in the driveway, America testified that she saw Mr. Nicholson looking out at her from the side door while he was on the phone with his mother, Angel Nicholson. (Tr. 3675-3676, 4094). Mr. Nicholson

testified that he called his mother because he intended to kill himself, wanted his mother to know what happened, and wanted his mother to bring his daughter Kamara—who was living with his parents at that time—to the Garfield Heights home so he could see her "one more time." (*See* Tr. 4094, 4098-4101. *See generally* Tr. 3757-3763).

While Mr. Nicholson was on the phone with his mother, he began writing notes while sitting at the desk in the basement. (Tr. 4098-4102). BCI Agent David Horn found and photographed these notes on September 6, 2018, which were presented at trial as State's Exhibits 229 through 242. (Tr. 3140-3142).

In one of the notes, Mr. Nicholson wrote: "America I tried, you continually let your kids disrespect me…Why :(." (State's Exhibit 231). In explaining what he meant in this note, Mr. Nicholson testified that he "was really trying to put sense into everything that had just happened, and [he] couldn't believe that [M.L. and Giselle] had went and grabbed [Mr. Nicholson's] gun." (Tr. 4099). Although he "couldn't believe it," Mr. Nicholson acknowledged that he "knew the way that [M.L. and Giselle] felt about [him]," but that "the way [America] let [M.L. and Giselle] treat [Mr. Nicholson] definitely helped them and allowed them to do what they did." (Tr. 4099).

In another note, Mr. Nicholson wrote "I literally snapped." (Tr. 4100; State's Exhibit 234). Mr. Nicholson explained that in writing this note, he was "[j]ust giving a reason and not trying to get into justifying the situation." (Tr. 4100).

V. Law Enforcement's Actions at the Scene and Mr. Nicholson's Arrest

After Cuyahoga Emergency Communication Systems (CECOMS) received two 911 calls from 4838 East 86th Street at 9:35 PM and 9:37 PM on September 5, 2018 (*see* Tr. 2527-2536), officers from the Garfield Heights Police Department (GHPD) were dispatched to the scene at approximately 9:39 PM. (Tr. 2596, 2555). According to the Crime Scene Log created and maintained by Patrol Officer Spencer Sabelli (Tr. 2587-2588), Lt. Todd Vargo, Patrol Officer Spencer Sabelli, Patrol Officer Robert Jarzembak, Sgt. Bill Gall, and Patrol Officer Mike Malak responded to 4838 East 86th Street at 9:42 PM on September 5, 2018. (State's Exhibit 339). At approximately 9:45 PM, GHPD Patrol Officers Berri Cramer, Robert Pitts, and David Simia arrived at the scene. (State's Exhibit 339). Patrol Officer Robert Pitts was in his final stage of officer training and was being "shadowed" by Patrol Officer Simia that evening. (Tr. 2569-2570, 2886).

A. Two 911 calls were placed during the altercation inside of the home.

CECOMS dispatcher Danielle Diamond testified at trial that she received two 911 calls on the evening of September 5, 2018 related to this incident. (Tr. 2527-2536).

Dispatcher Diamond answered the first call at 9:35 PM from phone number "(216) 903-6245" (*See* Tr. 2530-2532; State's Exhibit 313; State's Exhibit 315), which America testified was her cell phone number. (Tr. 3306). That phone call was approximately 36 seconds long. (*See* Tr. 2530-32; State's Exhibit 313; State's Exhibit 315). Although the 911 caller did not say anything to the dispatcher, the voices of Mr. Nicholson and America can be heard in the background of the call. [*See* State's Exhibit 313. *Compare with* State's Exhibit 322A at 0:08:02-0:09:41 (America's voice), and State's Exhibit 324B at 1:24:30-1:27:49 (Mr. Nicholson's voice)]. The audio of that call was later digitally enhanced by removing Dispatcher Diamond's voice and amplifying the voices of Mr. Nicholson and America in the background. (*See* Tr. 2541-44; State's Exhibit 318).

Dispatcher Diamond answered the second 911 call at 9:37 PM on September 5, 2018 from phone number "(216) 903-1137" (Tr. 2532-2535; State's Exhibit 314; State's Exhibit 315), which appears to have been M.L's cell phone number. (*See* Tr. 3555-3556). In the second call, the male caller does not begin talking until approximately the 00:35 mark and hangs up around the 1:03 mark. (*See* Tr. 2532-2533; State's Exhibit 314). The audio of that call was likewise enhanced by removing Dispatcher Diamond's voice and attempting to amplify all other voices that could be heard in the background of the call. (*See* Tr. 2541-2544; State's Exhibit 319).

Mr. Nicholson testified that he believed the 911 call allegedly made by M.L. was made after the altercation in the kitchen. (*See* Tr. 4077-4078). During the second 911 call, Mr. Nicholson testified that he could be heard "yelling at M.L., telling him that he did not need to come downstairs, beating on the Fing door." (*See* Tr. 4077-4078; State's Exhibit 319). Mr. Nicholson can also be heard saying: "You asked your mom if she was okay, she said she was fine, go upstairs." (*See* Tr. 4078; State's Exhibit 319).

B. At the scene, several GHPD officers were wearing body cameras.

Evidence and testimony presented at the hearing indicated that the following persons were wearing body cameras issued by GHPD that day: Lt. Todd Vargo (Tr. 2761-2784; State's Exhibit 324A; State's Exhibit 324B; State's Exhibit 324C); Patrol Officer Sabelli (Tr. 2579, 2588-2593; State's Exhibit 323A; State's Exhibit 323D); Patrol Officer Jarzembak (Tr. 2555, 2562, 2567-2570; State's Exhibit 321A); Patrol Officer Cramer (Tr. 2603-2604, 2614-2622; State's Exhibit 322A); and Patrol Officer (In-Training) Pitts (Tr. 2880). Patrol Officer Simia was not wearing a body camera because he was shadowing Officer Pitts and thus, wearing plain clothes. (Tr. 2886).

Multiple GHPD officers testified that the timestamp from these body camera videos was recorded in UTC time on September 5, 2018 and September 6, 2018. (*See* Tr. 2594, 2800-2802, 2804-2805).

Therefore, the timestamp on the body camera was four hours ahead of the actual time the events depicted thereon occurred. (*See* Tr. 2594, 2800-2802, 2804-2805).

Body Camera Time (UTC)	When Recorded Event Actually Occurred
09/06/2018 at 1:00 AM	09/05/2018 at 9:00 PM
09/06/2018 at 2:00 AM	09/05/2018 at 10:00 PM
09/06/2018 at 3:00 AM	09/05/2018 at 11:00 PM
09/06/2018 at 4:00 AM	09/06/2018 at 12:00 AM
09/06/2018 at 5:00 AM	09/06/2018 at 1:00 AM
09/06/2018 at 6:00 AM	09/06/2018 at 2:00 AM
09/06/2018 at 7:00 AM	09/06/2018 at 3:00 AM
09/06/2018 at 8:00 AM	09/06/2018 at 4:00 AM
09/06/2018 at 9:00 AM	09/06/2018 at 5:00 AM
09/06/2018 at 10:00 AM	09/06/2018 at 6:00 AM

C. Initial actions of GHPD officers at the scene.

When GHPD Officers Robert Jarzembak and Berri Cramer arrived at 4838 East 86th Street, they observed America, M.L., and Giselle in the driveway between the side door of the home and the vehicles in the driveway. (Tr. 2605-2606).

Officers Jarzembak and Cramer made contact with America and she told them Mr. Nicholson was still inside of the home. (*See* Tr. 2605-2606). Accordingly, once the other GHPD officers who were dispatched to 4838 East 86th Street arrived at the scene and established a perimeter, Giselle and M.L. were extracted from the driveway to a safe location where first aid could be rendered by officers and they could be accessed by the responding EMS squads. (*See* Tr. 2605-2606, 2559-2561, 2573-2574). Although Officer Cramer was able to assist Officer Jarzembak with carrying Giselle (Tr. 2573-2574), Officer Jarzembak requested that Officer Sabelli help him move M.L. because Officer Sabelli was "physically stronger" than Officer Cramer. (*See* Tr. 2561-2562, 2574, 2581, 2608).

At the scene, Giselle was breathing, moaning, groaning, alert, and attempting to speak with officers and medics. (*See, e.g.*, Tr. 2561-2563, 2608, 2634-2635). M.L., however, was completely

saturated with blood and did not have any vital signs. (*See, e.g.*, Tr. 2561-2563, 2581, 2608). The responding Garfield Heights Fire Department EMS squads transported Giselle to MetroHealth Hospital and M.L. to Marymount Hospital just before 10:00 PM. (*See* State's Exhibit 324A at 0:11:30; Tr. 2743-2745, 2922-2928).

At 9:52 PM, Patrol Officer Berri Cramer obtained information about Mr. Nicholson and the incident from America. (Tr. 2607, 2609; State's Exhibit 322A at 0:08:10). Officer Cramer's body camera footage of her conversation with America was played for the jury over defense counsel's objection. (*See* Tr. 2614-2620). During that conversation, America told Officer Cramer that Mr. Nicholson started acting "crazy" after America's ex-boyfriend texted her. (*See* Tr. 2619-2620; State's Exhibit 322A at 0:08:10-0:09:00).

America provided additional information to Officer Cramer at the scene approximately ten minutes later and neighbors Connie Allshouse and Vic Sanuk were present during that conversation. (*See* State's Exhibit 322A at 0:11:30-0:23:14; Tr. 2610-2611). After Officer Cramer asked America what kind of firearm Mr. Nicholson had, America began to complain of numbness in her hands and shortness of breath. (*See* State's Exhibit 322A at 0:18:58-0:23:14). Paramedics were called to evaluate America at the scene. (*See* Tr. 2610-2611; State's Exhibit 322A at 0:18:58-0:23:14). EMTs began examining America around 10:07 PM and she was transported to Marymount Hospital by ambulance shortly thereafter. (*See* Tr. 2610-2611, 2930, 3088-3089; State's Exhibit 322A at 0:23:05).

D. Lt. Todd Vargo's phone conversation with Mr. Nicholson and Angel Nicholson.

At 9:56 PM, Lt. Todd Vargo called GHPD Police Chief Robert Byrne to apprise him of situation. (*See* Tr. 2746; State's Exhibit 324A at 0:11:00-0:13:28). In addition to supervising one of the GHPD patrol division night shifts (Tr. 2736), Lt. Vargo was part of the SouthEast Area Law Enforcement (SEALE) Crisis Intervention Team (CIT). (Tr. 2737-2739).

Angel remained on the phone with Mr. Nicholson while she Robert Nicholson Sr. traveled from their South Euclid home to 4838 East 86th Street in Garfield Heights. (*See* Tr. 3757-3759). During that phone conversation, Mr. Nicholson told his parents about M.L. coming into the bedroom and trying to fight him and stated that "[t]hey jumped him. (Tr. 3761. *See also* State's Exhibit 321A at 0:41:38-0:41:48; State's Exhibit 322A at 0:45:40-0:45:50). Mr. Nicholson told his parents that America "came at" him with a knife and "had the kids [] go get his service -- his gun." (Tr. 3760-61). Angel testified that Mr. Nicholson told her that he tried to leave the home multiple times, but America refused to move her vehicle. (Tr. 3782. *See also* Tr. 4079-4080, 3717-3721, 3898, 3901-3907). During his conversation with his parents, Mr. Nicholson repeatedly stated that he could not believe what America had done and stated that America had "tried to set him up." (*See* Tr. 3759-3762).

Angel's testimony about what Mr. Nicholson told his parents while they were on the way to the scene was corroborated by the body camera of Officer Cramer. Indeed, in Officer Cramer's body camera footage, Robert Sr. can be overheard telling Officer Berri Cramer and Officer Robert Jarzembak at 10:26 PM on September 5, 2018 that M.L., America, and/or Giselle had "jumped [Mr. Nicholson] and was beating on him." (State's Exhibit 321A at 0:41:38-0:41:48).

While Mr. Nicholson was on the phone with his parents, he received a phone call from a private phone number at 10:03 PM, which he assumed was law enforcement. (*See* Tr. 4102-4103, 2747; State's Exhibit 324B at 0:02:10-0:03:15). Mr. Nicholson answered the call and began talking with Lt. Vargo. (*See* Tr. 2746-2748; State's Exhibit 324B at 0:02:10-0:03:15).

At approximately 10:06 PM, Mr. Nicholson conferenced his mother in on the call with Lt. Vargo. (State's Exhibit 324B at 0:06:00). The phone conversation between Lt. Vargo, Mr. Nicholson, and his parents that night was between three-to-four hours long. (Tr. 4103, 2790, 3779).

Mr. Nicholson's parents arrived at the scene at approximately 10:20 PM. (*See* State's Exhibit 322A at 0:36:20-0:37:21; Tr. 2611-2612). Mr. Nicholson's parents remained on the phone with Mr. Nicholson and Lt. Vargo up until Mr. Nicholson surrendered sometime before 2:00 AM on September 6, 2018. (Tr. 3768-3770). Angel testified that Mr. Nicholson told Lt. Vargo the same things he had told his parents before Lt. Vargo joined the call. (*See* Tr. 3770, 3776-3777, 3779-3780, 3782-3783). This included, among other things, information about Mr. Nicholson being jumped by America, M.L., and/or Giselle that evening just before the shooting incident. (*See* Tr. 3770, 3776-3777, 3779-3780, 3782-3783). Although law enforcement was aware that Angel was on the phone call with Mr. Nicholson and Lt. Vargo, no one from GHPD ever requested to interview Angel Nicholson. (Tr. 3779-3780).

Lt. Vargo's body camera was activated when he was talking on the phone with Mr. Nicholson and his parents. (*See* Tr. 2748; State's Exhibit 324B). At times, the body camera was able to pick up statements made by Mr. Nicholson over the phone. (*See* Tr. 2748-2750, 2546-2550). However, Lt. Vargo acknowledged that significant portions of his phone call were not able to be clearly picked up by his body camera. (*See* Tr. 2748-50, 2768, 2796, 3795).

Although the phone call between Lt. Vargo, Mr. Nicholson, and Mr. Nicholson's parents lasted approximately three-to-four hours (Tr. 4103, 2790, 3779, 3895-3896, 2788), the State only presented evidence and testimony at trial from the first half of that call. (*See* State's Exhibit 324B; Tr. 4105). This was because Lt. Vargo claimed that his body camera suddenly stopped recording at or around 11:44 PM. (Tr. 2783; State's Exhibit 324B at 1:43:45). Lt. Vargo testified that a "a bunch of lights flashed and a bunch of things beeped and the camera just wouldn't function anymore." (Tr. 2783). Yet, State's Exhibit 324C clearly shows that Lt. Vargo's body camera was

later able to record both audio and video when Lt. Vargo was still at the scene at 1:55 AM on September 6, 2018 after Mr. Nicholson surrendered and was taken into custody. (*See* State's Exhibit 324C).

Det. Michael Klein of the Parma Police Department was later asked to enhance Lt. Vargo's body camera recording of his phone call with Mr. Nicholson. (Tr. 2546-2547). Specifically, Det. Klein attempted to enhance the audio of Mr. Nicholson's answers to Lt. Vargo's questions. (Tr. 2546-2547). Although Det. Klein was able to amplify Mr. Nicholson's voice at some points, he was nonetheless unable to do this for the whole track. (Tr. 2547-2548). The enhanced audio from Lt. Vargo's body camera was presented at trial as State's Exhibit 320. (Tr. 2549-2550).

At trial, Lt. Vargo was permitted to testify—over defense's objection—about the first half of his phone conversation with Mr. Nicholson and his parents while consulting a transcript-like report he created by reviewing his own body camera footage from that night. (*See* Tr. 2748-2752, 2759-2783). That report—which was prepared by Lt. Vargo in June 2019—was presented as State's Exhibit 342. (Tr. 2748-2752, 2761-2762). Beyond those conversations recounted in State's Exhibit 342, Lt. Vargo testified that he did not have any independent recollection of statements Mr. Nicholson made that night. (*See* Tr. 2793-2796). Lt. Vargo acknowledged that State's Exhibit 342 only reflected events and statements that were captured by his body camera and that he only included in State's Exhibit 342 audio from the body camera footage that he could clearly hear. (*See* Tr. 2796). However, again, Lt. Vargo's body camera was only activated during half of his phone conversation with Mr. Nicholson and his parents that night. (*See* Tr. 2693-96, 2783).

Put simply, then, Lt. Vargo's testimony did not include anything that was said after his body camera turned off, and also did not include anything that was said while his body camera was turned on but was not clearly audible. (*See* Tr. 2693-2696, 2783). Although Lt. Vargo was

allowed to use State's Exhibit 342 while testifying and even read parts of that report to the jury during his trial testimony, the trial court sustained defense counsel's objection to the admission of State's Exhibit 342 when it reviewed the State's Exhibits at the end of the State's case-in-chief. (*See* Tr. 3999-4000).

E. Mr. Nicholson peacefully surrendered sometime between 1 AM and 2 AM on September 6, 2018 and was taken into custody by GHPD officers.

At approximately 11:21 PM on September 5, 2018, members of SEALE/SWAT arrived at 4838 East 86th Street. (*See, e.g.*, Tr. 2812, 2687-2688; State's Exhibit 339).

Lt. Vargo was on the phone with Mr. Nicholson up until his surrender. (Tr. 2785). Before Mr. Nicholson surrendered, he indicated to Lt. Vargo he would be leaving the firearm in the basement of the home. (Tr. 2785, 2798-2799). Ultimately, that is where the firearm was later recovered by BCI Agent David Horn (Tr. 3145-3148). The SWAT commander testified that when Mr. Nicholson exited the home to surrender and was taken into custody, Mr. Nicholson was polite and respectful. (Tr. 2700). Mr. Nicholson was ultimately taken into custody without issue. (2790-2792).

At trial, the State went to great lengths to emphasize the fact that when Mr. Nicholson surrendered, he was wearing a bulletproof vest. (Tr. 2572, 2594, 2614, 2621, 2698, 2786, 2819, 2821, 3494; State's Exhibit 516). Notably, Mr. Nicholson owned multiple bulletproof vests—and other tactical gear—because he was employed as an armed security guard and would use these items during the course and scope of his employment. (Tr. 3372-3373, 3684, 3865-3870, 4051-4054, 4059, 4201-4202). Mr. Nicholson testified that the reason he wore the bulletproof vest when he surrendered was because Lt. Vargo had requested that Mr. Nicholson remain on the phone with him when he came outside to surrender, which Mr. Nicholson—a Black man (State's Exhibit 422)—thought was a terrible idea. (Tr. 4202-4203). At trial, the State repeatedly chastised Mr.

Nicholson's explanation of his belief that he needed to wear a bulletproof vest because he did not want his cellphone to be perceived as a weapon in his hand. (*See* Tr. 4203-4204). And while—as pointed out by the State—a "[c]ellphone isn't a weapon" (Tr. 4204), it goes without saying that Mr. Nicholson's fear was not unfounded.[3]

GHPD Officers Robert Pitts and David Simia transported Mr. Nicholson to the Garfield Heights jail—which is part of the Garfield Heights Police Department—where he was booked and taken into custody. (Tr. 2851-2852, 2892-2893).

While Officer Jarzembak recalled Mr. Nicholson surrendering sometime between 2:00 AM and 2:30 AM on September 6, 2018 (Tr. 2572), Lt. Vargo testified that he believed Mr. Nicholson surrendered at 1:00 AM on September 6, 2018. (Tr. 2788). According to the GHPD Booking Sheet, Mr. Nicholson was arrested at the scene on September 6, 2018 at 1:48 AM and booked by GHPD Booking Officer Christopher Matlin at 1:54 AM on September 6, 2018. (State's Exhibit 422).

After Mr. Nicholson was placed in a holding cell at GHPD, Officers Pitts and Simia returned to the scene in order to assist with the execution of the search warrant. (Tr. 2852).

VI. Law Enforcement's Investigation of the September 5, 2018 Incident

While GHPD officers were at the scene waiting for Mr. Nicholson to surrender and be taken into custody, GHPD detectives began their investigation of the incident.

A. Law enforcement went to Marymount Hospital where M.L. and America had been transported by EMTs.

After M.L. and America were transported from the scene to Marymount Hospital by ambulance, GHPD Officer Tim Baon and Auxiliary Officer Robert Kovach were directed stand

[3] *See* Hannah Knowles and Meryl Kornfield, *Fired Ohio Police Officer Charged with Murder in Shooting of Black Man Holding Cellphone*, THE WASHINGTON POST (Feb. 4, 2021), https://www.washingtonpost.com/nation/2021/02/03/andre-hill-ohio-officer-charged/.

guard at the hospital. (*See* Tr. 2923, 3090). America's medical records from Marymount Hospital indicate that she arrived at the ED at 10:45 PM (State's Exhibit 406 at p. 1) and that GHPD was present in the ED "continuously" that night. (State's Exhibit 406 at p. 20).

GHPD Lt. Robert Petrick testified that GHPD Police Chief Byrne directed him to go to Marymount Hospital because Chief Byrne "needed more patrol officers on the scene." (Tr. 2922-2923). When he arrived at Marymount Hospital, Lt. Petrick met with GHPD Officer Tim Baon and Auxiliary Officer Robert Kovach and learned M.L. was deceased. (Tr. 2923-2924). Lt. Petrick testified that he stood guard the body of M.L. for evidentiary purposes until his body could be transported to the morgue. (Tr. 2923). Lt. Petrick was at Marymount Hospital for "a little over an hour" before returning to the police station but did not collect any evidence or interview anyone while he was there. (Tr. 2924). Lt. Petrick testified that Sgt. Todd Cramer relieved him at Marymount Hospital. (Tr. 2928).

GHPD Sgt. Todd Cramer testified that when he arrived at Marymount Hospital, Officer Baon was talking with America in her hospital room. (Tr. 3090). Sgt. Cramer took photographs of America's purported injuries at Marymount Hospital just after 12:00 AM on September 6, 2018. (Tr. 3094-3095; State's Exhibits 253-258). Sgt. Cramer approximated that he left Marymount Hospital around 3:45 AM on September 6, 2018 and went back to 4838 East 86th Street to assist with the execution of the search warrant obtained by GHPD Det. Carl Biegacki. (Tr. 3095-3096). Officer Baon did not testify at trial in this case.

America was discharged from Marymount Hospital at 8:10 AM on September 6, 2018. (State's Exhibit 406).

B. Law enforcement went to MetroHealth Hospital where Giselle had been transported by EMTs.

While he was at Marymount Hospital, Lt. Petrick learned that Giselle—who had been

transported from the scene to MetroHealth Hospital—had passed away. (Tr. 2924-2925). After returning to the police station from Marymount Hospital, Lt. Petrick spoke with Det. Biegacki, Det. Stroe, and Chief Byrne at the police station and some of the other officers at the scene. (Tr.2924-2927). After speaking with them, Lt. Petrick responded to MetroHealth Hospital to collect a bullet fragment that had been removed from Giselle's body. (Tr. 2924-2927; State's Exhibit 500). Although Lt. Petrick could not remember when he arrived at MetroHealth Hospital, he knew he was there sometime after Mr. Nicholson had already been apprehended. (Tr. 2925). According to the booking sheet, Mr. Nicholson was taken into custody at 1:48 AM on September 6, 2018. (State's Exhibit 422). The evidence tag on the bullet fragment indicated that it was recovered by Lt. Petrick at 3:32 AM on September 6, 2018. (Tr. 2926-2928; State's Exhibit 500). After collecting this piece of evidence from MetroHealth Hospital, Lt. Petrick returned to the police station. (Tr. 2928).

C. The search warrant for the home was executed on September 6, 2018.

At the direction of Lt. Petrick, Det. Biegacki began drafting the search warrant for 4838 East 86th Street at the police station on September 5, 2018 while awaiting Mr. Nicholson's surrender. (Tr. 2922, 3850-3851).

Det. Biegacki testified that after he prepared and obtained the signed search warrant, he and Det. Stroe traveled back to scene with a copy of that signed search warrant. (Tr. 3851-3852). When Det. Biegacki and Det. Stroe arrived at the Garfield Heights home, Det. Biegacki testified that "BCI was starting to get ready to do the scene." (Tr. 3852). Although Det. Stroe testified that he and Det. Biegacki dropped off the search warrant sometime between 2 AM and 3 AM on September 6, 2018 (Tr. 3196-3197), the Crime Scene Log indicates that Det. Stroe and Det. Biegacki arrived at the scene at 4:30 AM. (State's Exhibit 339). Det. Biegacki and Det. Stroe walked quickly through the scene and did not search anything. (Tr. 3851-3852, 3196-3197).

Indeed, the Crime Scene Log indicates that Det. Stroe and Det. Biegacki left the scene at approximately 4:45 AM on September 6, 2018. (State's Exhibit 339). Thus, the search warrant was likely executed upon the home at or around 4:30 AM on September 6, 2018.

1. Two BCI agents assisted GHPD with processing the crime scene on September 6, 2018.

At the request of GHPD Police Chief Robert Byrne, BCI was contacted to assist with processing the crime scene. (Tr. 3581-3582). Accordingly, two BCI agents were sent to 4838 East 86th Street on September 6, 2018. (*See* Tr. 3581-3582).

i. Ohio BCI Agent Justin Soroka took photographs and collected evidence from outside of the home after arriving to the scene at approximately 3:15 AM on September 6, 2018.

BCI Agent Justin Soroka testified that he arrived at the scene around 3:15 AM on September 6, 2018 and took exterior photographs of the home. (*See* Tr. 3583-3585, 3588-3613; State's Exhibits 1-144). After the search warrant was obtained, BCI Agent Soroka walked through the home with one of the responding officers to assess what needed to be done. (*See* Tr. 3587-3588). He did not conduct an extensive search of or otherwise collect evidence from inside of the home. (*See* Tr. 3587-3588). BCI Agent Soroka acknowledged that because he arrived at the scene approximately six hours after the incident occurred, he was not in the position to say what evidence had been disturbed prior to his arrival. (Tr. 3626-3627). BCI Agent Soroka did not interview any civilians or conduct any interviews with law enforcement at the scene, as his sole role was to assist with processing and collecting evidence from the scene. (*See* Tr. 3626-3627). According to the crime scene log, BCI Agent Soroka left at approximately 6:09 AM. (State's Exhibit 339).

ii. Ohio BCI Agent David Horn took photographs and collected evidence from inside of the home between 4:15 AM and 6:30 AM on September 6, 2018.

BCI Agent David Horn arrived at the scene at approximately 4:15 AM on September 6, 2018. (Tr. 3582, 3122-3125). After speaking with BCI Agent Soroka, BCI Agent Horn went inside

of the home to take photographs and collect evidence. (Tr. 3122-3125). BCI Agent Horn testified that he first took photographs inside of the home to show the condition it was in before evidence was collected. (Tr. 3123; State's Exhibits 145-252). After taking photographs on the first floor, second floor, and then basement, BCI Agent Horn put down placards, took additional photographs, and collected evidence from inside of the home. (Tr. 3145-3148).

BCI Agent Horn left the scene at sometime between 6:15 to 6:30 AM. (Tr. 3150-3151. *See also* State's Exhibit 339). During the approximately two hours BCI Agent Horn was at the scene, he did not see anyone—including law enforcement—search any of the five vehicles parked in the driveway. (*See* Tr. 3150-3151). BCI Agent Horn testified that no one else—including law enforcement—was inside the home while he was taking photographs and collecting evidence. (*See* Tr. 3152-3153). BCI Agent Horn recalled: "I believe the handgun was found and I believe that's all they wanted." (Tr. 3152). During his search of the home, BCI Agent Horn did not search any closets because he was not asked to do so by GHPD. (Tr. 3151-3152).

2. After Mr. Nicholson was booked at the Garfield Heights jail, GHPD Officers Pitts and Simia returned to the scene sometime between 3:15 AM and 4:30 AM to assist with the execution of the search warrant.

After Mr. Nicholson was booked in the Garfield Heights jail at 1:54 AM on September 6, 2018 (State's Exhibit 422), GHPD Officers Pitts and Simia responded back to the scene. (Tr. 2852, 2893). Officer Pitts testified that BCI and GHPD detectives were at the scene when they returned. (Tr. 2852, 2894). Because BCI Agent Justin Soroka did not arrive at the Garfield Heights Home until approximately 3:15 AM, Officers Simia and Pitts must have arrived sometime thereafter. (*See* Tr. 2852-2853, 2894).

Although BCI Agent Horn recalled the handgun he found in the basement as being the only firearm GHPD was looking for (Tr. 3152), Lt. Petrick, Sgt. Cramer, Officer Pitts, and Officer Simia all testified that they returned to the scene in the early morning of September 6, 2018 after

they received information that Mr. Nicholson owned a "long gun" such as an AR-15 or AK-47. (*See* Tr. 2855-2856, 2870-2872, 2894, 2929, 2931-2932, 3096-3097). Indeed, America told Officer Cramer at the scene that Mr. Nicholson had a lot of guns, including a "big gun." (*See* State's Exhibit 322A at 0:14:54-0:15:05). Later that night, Officer Cramer radioed the information she received from America to other GHPD officers, stating that Mr. Nicholson was believed to have several different style firearms in the home, including a "long gun." (State's Exhibit 322A at 0:53:38-0:54:27).

Officer Pitts and BCI Agent David Horn both testified that GHPD officers searched the home after BCI Agent Horn was done processing the scene and collecting evidence (Tr. 2853, 3150-3151), but Officer Simia testified that he and Officer Pitts were searching the home contemporaneously with BCI. (Tr. 2895). Officer Pitts testified that he and Officer Simia searched the main floor of the home where the living room was located, then the second floor, and then the basement of the home (Tr. 2854-2856), but Officer Simia testified that he and Officer Pitts searched the basement first. (Tr. 2895). Although Officer Simia could not recall if he personally searched the bedroom shared by America and Mr. Nicholson, he testified that whatever he did search on September 6, 2018, he would have searched it thoroughly. (Tr. 2911-2913).

Both Officer Simia and Officer Pitts testified that they did not find anything in the home that was relevant to their investigation during their search and thus, did not collect any additional evidence or take any photographs on September 6, 2018. (*See* Tr. 2856, 2870-2872, 2895, 2911-2913). Indeed, besides the handgun that was obtained from the basement by BCI Agent Horn, no other firearms—including any long guns—were found at the scene by law enforcement during their September 6, 2018 search. (*See* Tr. 2856, 2870-2872, 2895, 2911-2913, 3152).

After BCI was done processing the evidence in the driveway, Officer Pitts testified that he

and Officer Simia searched "all three vehicles" in the driveway. (*See* Tr. 2856-2859, 2896-2898). Notably, though, there were five vehicles in the driveway at that time: a red/orange Jeep Grand Cherokee, M.L.'s silver Toyota, Mr. Nicholson's white Volkswagen Jetta, America's white Jeep Wrangler, and Giselle's black Toyota. (*See, e.g.*, State's Exhibits 58, 59, 44, 14, 15, 6).

Officer Pitts testified that these vehicles were locked, so they had to first locate the car keys inside of the home. (*See* Tr. 2856-2859, 2896-2898). Officer Pitts recalled that he and Officer Simia were able to locate the keys to the three vehicles in the "common area, the kitchen" (Tr. 2857-2858, 2869-2870). Officer Simia testified that he believed they had to obtain the car keys from inside the home in order to access the vehicles, but he could not recall for certain who found the car keys or, for that matter, where they were located. (*See* Tr. 2898, 2913-2914). There are no car keys visible in any of the photographs taken inside of the home by BCI Agent Horn (*see* State's Exhibits 145-252), and no one was asked or testified at trial about where members of the Garfield Heights home typically stored their car keys. A lanyard with keys was photographs and collected from the driveway by BCI Agent Soroka (*see* State's Exhibits 30, 33, 34, 36, 53, 54, 102, 103, 545; Tr. 3621-3625), but no evidence or testimony was offered about who this lanyard belonged to and whether a car key was included thereon. Officer Pitts testified that the black Toyota was the only vehicle that was unlocked. (Tr. 2870). Because it was the last vehicle parked in the driveway, it can be assumed that this was Giselle's car. (*See* State's Exhibit 67).

Officer Pitts testified that he could not specifically recall what was in Mr. Nicholson's white Volkswagen Jetta when he allegedly searched it on September 6, 2018 other than "normal things." (Tr. 2860). Officer Pitts testified that he allegedly observed inside of Mr. Nicholson's vehicle "shoeboxes, maybe clothing, like car care kits with, you know, like emergency roadside kind of things. Things of that nature." (Tr. 2860).

After searching the vehicles in the driveway, Officer Pitts and Officer Simia both testified that they did not find anything related to this investigation—including a long gun or any other firearms—and therefore, did not collect any evidence therefrom. (Tr. 2858-2860, 2868-2869, 2898-2899). Significantly, no photographs from any alleged searches of any of the vehicles parked in the driveway were apparently taken on September 6, 2018 by anyone in law enforcement. (Tr. 2876, 2915).

i. Patrol Officer Pitts's body camera allegedly stopped working sometime after Mr. Nicholson was arrested.

While the State presented duplicative body camera footage of the bodies of M.L. and Giselle being carried out of the driveway at the scene, noticeably absent from trial was body camera footage depicting GHPD's search of the home and vehicles on September 6, 2018.

GHPD Sgt. Todd Cramer and GHPD Police Chief Robert Byrne both testified that the body cameras used by GHPD in September 2018 had a battery life of twelve hours and 32 GB of memory. (Tr. 3084-3086, 3106-3107, 3483-3485). In 2018, the night shift for GHPD patrol officers was from 6:30 PM to 6:30 AM. (Tr. 2740). GHPD officers are and were required to turn their body cameras on whenever they are and were sent out on a call by dispatch. (Tr. 3483-3485). Thus, because the typical shift of a patrol officer was twelve hours, the battery life of a GHPD body camera battery life should last for an entire shift. (Tr. 3501-3503).

GHPD patrol officers would not keep their body cameras on throughout their entire shift. (*See* Tr. 3501-3503). They were to turn their body cameras on when they were having some type of interaction with the public or, in some instances, if they were doing "significant work" on a case, such as searching a home or a car. (*See* Tr. 3501-3503, 2906). It was also the general policy of the GHPD for officers to have their body cameras turned on the entire time they are at a crime scene. (*See* Tr. 2906). The twelve-hour body camera life was expected to be more than sufficient

to capture any and all events that took place during a patrol officer's shift, as it was unlikely that a GHPD patrol officer would ever have their body camera turned on for their entire twelve-hour shift. (*See* Tr. 3501-3503).

Police Chief Byrne testified that GHPD body cameras are assigned to individual officers. (Tr. 3483-3485). At the end of each shift, officers are required to place their assigned body camera on the docking station at the GHPD, which both charges the body cameras and downloads all video footage recorded on them that day to an external hard drive server located at the GHPD station. (Tr. 3483-3485). Because their body cameras would suffice for an incident report, GHPD officers would only generate a report if they were asked to do so by detectives or prosecutors. (Tr. 2880).

Yet, Officer Pitts testified that there was no body camera footage depicting his alleged search of the Garfield Heights home and the vehicles in the driveway on September 6, 2018 because his body camera ran out of battery life. (*See* Tr. 2876-2877, 2883).

Officer Pitts testified that he was dispatched to the scene at 9:39 PM on September 5, 2018 and transported Mr. Nicholson to the Garfield Heights jail approximately four-to-five hours later. (Tr. 2880). According to Officer Pitts, the battery of his body camera expired sometime before he returned back to the scene after transporting Mr. Nicholson to jail. (Tr. 2876-2877, 2883). Given that Officer Pitts's body camera was equipped with a 12-hour battery life (Tr. 3501-3503), it is unclear why his body camera's battery power purportedly expired less than five hours later. (*See* Tr. 2876-2877, 2880). Officer Simia testified that he was not wearing a body camera at any point on September 5, 2018 or September 6, 2018 because he was in plain clothes. (Tr. 2886).

Moreover, Officer Pitts and Officer Simia were at the GHPD police station at approximately 1:54 AM on September 6, 2018 for some period of time while they waited for Mr. Nicholson to be processed and booked by the jail. (*See* State's Exhibit 422). Thus, Officer Pitts

had ample opportunity to ensure that his body camera was charged when he was at the station before he returned to the scene for the purposes of assisting with the execution of the search warrant upon the home and/or vehicles. (*See* Tr. 2910-2911).

ii. Officer Pitts's September 6, 2018 report did not include any account of Officer Pitts and Officer Simia's purported search of the home and/or vehicles on September 6, 2018. A year later, the State directed Officer Pitts to prepare a second report and created a report on Officer Simia's behalf.

GHPD patrol officers testified that it was common for one officer to write a single report on behalf of all officers who were involved in that incident in September 2018. (Tr. 2889). Thus, the information included in a single incident report was typically a conglomeration of all information shared by all involved officers with the authoring officer. (*See, e.g.*, Tr. 2878-2880, 2889, 2899). This one report would therefore summarize all actions that were taken by all officers that evening at the scene. (*See, e.g.*, Tr. 2878-2880, 2889, 2899).

Officer Pitts was assigned the task of compiling information from all officers who responded to the scene and were involved in the investigation of this incident on September 5, 2018 and September 6, 2018. (*See* Tr. 2859-2861, 2899, 2906). Using that information, Officer Pitts prepared a report summarizing the knowledge and actions of all GHPD officers. (*See* Tr. 2859-2861, 2899, 2906). That report was completed on September 6, 2018. (Tr. 2864). Officer Simia did not write a report in September 2018 about his involvement in the investigation of this incident. (Tr. 2916-2917).

However, nearly one year later, Officer Pitts was asked by the Cuyahoga County Prosecutor's Office to complete another report. (Tr. 2862-2864). Officer Pitts's second report was completed on August 13, 2019. (Tr. 2864). Officer Pitts testified that his first report compiled generally what GHPD did, whereas the second report detailed Officer Pitts's involvement on September 5, 2018 and September 6, 2018 in this matter. (Tr. 2865). Notably, the fact that Officer

Pitts and Officer Simia allegedly conducted a search of the home after BCI on September 6, 2018 was not included in his first report but was added to the August 13, 2019 report Officer Pitts prepared at the request of the State. (Tr. 2866). Officer Pitts was unable to explain why this action was not described in his first report. (Tr. 2867-2868).

Moreover, neither one of Officer Pitts's two reports stated that he and Officer Simia conducted a search of any of the vehicles in the driveway on September 6, 2018. (Tr. 2867-2868, 2880, 2882). This was particularly significant, as Officer Pitts acknowledged that it had been brought to his attention that the issue of whether Mr. Nicholson's vehicle was searched on September 6, 2018 had become extremely relevant to this case. (Tr. 2867-2868, 2880, 2882). Thus, if true, it would have been incumbent upon Officer Pitts to include information about his alleged search of the vehicles in his second report.

On September 12, 2019, Officer Simia met with Cuyahoga County Assistant Prosecuting Attorneys Faraglia and Kilbane, and a law clerk from the prosecutor's office. (Tr. 2916-2917). Although Officer Simia testified that he did not notice anyone from the Cuyahoga County Prosecutor's Office taking notes during his interview, a Word document was apparently produced by someone in the prosecutor's office with information that Officer Simia allegedly provided to them on September 12, 2019. (*See* Tr. 2916-2917). Officer Simia testified that he was never given a copy of the document the prosecutor's office prepared based on information from him, so he did not review that report or otherwise verify the accuracy of the information contained therein. (*See* Tr. 2916-2917).

3. Sgt. Todd Cramer conducted a search of the detached garage when he was at the scene on September 6, 2018 between 4:00 AM and 7:00 AM.

Sgt. Cramer approximated that he left Marymount Hospital at 3:45 AM on September 6, 2018 and went back to 4838 East 86th Street to assist with the execution of the search warrant

obtained by Det. Biegacki. (Tr. 3095-3096). Indeed, the Crime Scene Log indicates that Sgt. Cramer was at the scene at 4:00 AM on September 6, 2018. (State's Exhibit 339). Sgt. Cramer testified that when he arrived, he was "pretty sure BCI had already started their search warrant, their evidence collection." (Tr. 3095). Although he participated in BCI's evaluation of the scene, Sgt. Cramer returned to Marymount Hospital shortly thereafter to ask America how law enforcement could access her detached garage, which was locked. (Tr. 3096-3097). Sgt. Cramer testified that he wanted search the detached garage to see if the long gun America claimed Mr. Nicholson owned was in there. (*See* Tr. 3096-3097).

Sgt. Cramer returned to Marymount Hospital and asked America Polanco where he could locate the garage door opener. (Tr. 3097). America advised Sgt. Cramer that the garage door opener was likely in a jacket that was hanging in Mr. Nicholson and America's bedroom closet. (Tr. 3097-3099). Sgt. Cramer returned to the home, located the described jacket in America's bedroom closet, and found the garage door opener. (Tr. 3097-3099, 3111-3114). While looking for Mr. Nicholson's coat in the bedroom closet, Sgt. Cramer did not observe any firearms or gun belts therein. (*See* Tr. 3097-3099, 3111-3114).

Sgt. Cramer searched the detached garage on September 6, 2018 but did not locate anything significant to this case therein. (Tr. 3097). Neither the long gun America claimed Mr. Nicholson owned nor any other firearms were found during Sgt. Cramer's search of the detached garage. (*See* Tr. 3097). Sgt. Cramer did not take any photographs during his search and was not wearing a body camera on September 6, 2018. (Tr. 3114-3115).

Other than his brief search of the bedroom closet and extensive search of the detached garage, Sgt. Cramer explicitly testified that he did not otherwise conduct a search of the home or any of the five vehicles that were parked in the driveway. (Tr. 3099-3100).

Sgt. Cramer approximated that he left the scene and returned to the police station sometime between 6:30 AM and 7:00 AM on September 6, 2018. (Tr. 3099-3100). At the police station, Sgt. Cramer completed a supplemental report. (Tr. 3102).

4. Lt. Petrick claimed that he returned to the scene at approximately 7:00 AM on September 6, 2018, but that assertion was belied by the evidence and testimony presented by the State at trial.

Lt. Petrick testified that he "got back together" with Sgt. Cramer sometime after he collected evidence at MetroHealth Hospital at 3:32 AM on September 6, 2018 and returned to the police station. (*See* Tr. 2928-2929). According to Lt. Petrick's testimony, he and Sgt. Todd Cramer went back to the scene at approximately 7:00 AM on September 6, 2018 to assess the scene again and to find out if the long gun America claimed Mr. Nicholson owned was ever located. (Tr. 2928-2929). However, Sgt. Cramer testified that he ***left*** the scene sometime between 6:30 AM and 7:00 AM on September 6, 2018. (Tr. 3099-3100).

Lt. Petrick testified that when he and Sgt. Cramer arrived at the scene, they talked to the agent from BCI and some of the patrol officers. (Tr. 2929). Again, that claim was not supported by the evidence and testimony presented at trial. The Crime Scene Log indicates that BCI Agents Justin Soroka and David Horn left the scene at 6:09 AM on September 6, 2018, and BCI Agent Horn testified that he left the scene sometime between 6:15 AM and 6:30 AM. (*See* State's Exhibit 339; Tr. 3150-3151). Moreover, all of the other patrol officers that responded to the scene were recorded on the Crime Scene Log as leaving at or before 6:09 AM. (State's Exhibit 339).

Lt. Petrick claimed that he was with Sgt. Cramer when he went back to the hospital and spoke with America about how to access the detached garage and that he assisted Sgt. Cramer with searching that garage on September 6, 2018 (Tr. 2930-2932). However, Sgt. Cramer never stated in his trial testimony that Lt. Petrick assisted him with the search of the garage or obtaining information about the garage door opener from America on September 6, 2018. (*See* Tr. 3097-

3099, 3111-3114).

Lt. Petrick testified that he and Sgt. Cramer searched Mr. Nicholson's white Jetta vehicle on September 6, 2018 while Officers Pitts and Simia searched the other vehicles in the driveway. (Tr. 2932-2935, 2964). However, Sgt. Cramer testified that he only searched the garage on September 6, 2018 and explicitly testified that he was not involved in the search of any vehicle. (*See* Tr. 3099-3100). Moreover, Sgt. Cramer testified that he never saw Lt. Petrick searching the vehicles in the driveway on September 6, 2018. (Tr. 3114). Indeed, although Sgt. Cramer wrote a report detailing his actions on September 5, 2018 and September 6, 2018, there was "absolutely no mention" of Lt. Petrick and Sgt. Cramer going through the vehicles on September 6, 2018 in Sgt. Cramer's report. (Tr. 2966). Furthermore, Officers Simia and Pitts both testified that they searched the white Volkswagen Jetta on September 6, 2018 and made no mention of Lt. Petrick assisting them in that search. (*See* Tr. 2856-2859, 2896-2898).

Lt. Petrick testified that the white Volkswagen Jetta was unlocked when he and Sgt. Cramer allegedly searched it on September 6, 2018 (Tr. 2933), but Officers Simia and Pitts testified that the white Jetta was locked when Officers Simia and Pitts—not Lt. Petrick and Sgt. Cramer—searched it on September 6, 2018. (*See* Tr. 2856-2859, 2896-2898). Officer Simia testified that he did not recall Lt. Petrick being at the scene with him and Officer Pitts when they conducted the search of the vehicles on September 6, 2018. (Tr. 2917, 2967-2968).

When Lt. Petrick allegedly searched Mr. Nicholson's white Volkswagen Jetta on September 6, 2018, he did not take any photographs of it. (Tr. 2965). Lt. Petrick did not take any measures to insulate the vehicle or to get any trace off of it at that time either. (Tr. 2965). Although Lt. Petrick usually writes reports, he did not write any report regarding his purported search of the vehicle on September 6, 2018 because the cars were not, according to Lt. Petrick, "part of the

crime scene at that time." (Tr. 2965). Yet, the shooting took place right beside the vehicles parked in the driveway, and the bodies of M.L. and Giselle were found lying next to these vehicles when GHPD arrived at the scene. (*See, e.g.*, State's Exhibits 321A, 322A, 323A). Moreover, Lt. Petrick's assertion that the vehicles were not "part of the crime scene at that time" was belied by the fact that multiple GHPD officers—including Lt. Petrick himself—claimed that they searched these vehicles on September 6, 2018. (*See* Tr. 2967).

Lt. Petrick acknowledged that his name was not on the crime scene log, which contained thirty-seven names. (Tr. 2965-2966. *See* State's Exhibit 339). The name of every other person who testified at trial about being at the scene was listed on the crime scene log. (*See* State's Exhibit 339). The State offered no explanation at trial as to why Lt. Petrick's name was not on the crime scene log and why no one from GHPD recalled seeing him at the scene on September 6, 2018.

D. On September 13, 2018, GHPD detectives executed a search warrant on Mr. Nicholson's vehicle and allegedly located his service weapon in the trunk at that time. Although photographs supporting that claim were allegedly taken on September 13, 2018, those photographs were lost and/or destroyed.

Mr. Nicholson testified at trial that he regularly kept—and, on September 5, 2018, had kept—his service weapon in the trunk of his white Volkswagen Jetta. (Tr. 4053-4054, 4059-4060, 4084-4085). America testified that she did not remember telling GHPD Det. Carl Biegacki during her September 5, 2019 interview that Mr. Nicholson kept his duty weapon in the trunk of his vehicle. (Tr. 3715). Instead—notwithstanding the fact that only one firearm was found by law enforcement on September 6, 2018—America maintained that Mr. Nicholson regularly kept his service weapon in their bedroom closet (Tr. 3714-3715); his personal firearm, which was recovered on September 6, 2018 in the basement (*see* State's Exhibit 204; Tr. 3135), under the bedroom mattress (Tr. 3674); and some other firearm never recovered and never otherwise described in the garage. (*See* Tr. 3289-3290, 3702, 3714-3715).

Other than the firearm Mr. Nicholson told Lt. Vargo he would be leaving in the basement when he surrendered on September 6, 2018 (Tr. 2785)—which he did (Tr. 3135; State's Exhibit 203)—law enforcement testified that they did not find any additional firearms during their September 6, 2018 search of the home or detached garage. (*See, e.g.*, Tr. 2853-2859, 2893-2898, 2911-2913, 2929-2934, 3098-3099, 3111-3114, 3151-3152, 3226-3227). Although dubious, GHPD also claimed they searched the vehicles in the driveway on September 6, 2018—including Mr. Nicholson's white Volkswagen Jetta—but did not find any firearms therein. (*See* Tr. 2858-2860, 2868-2869, 2898-2899). As BCI Agent Horn succinctly stated: "I believe the handgun was found and I believe that's all [GHPD] wanted." (Tr. 3152).

However, on September 11, 2018, September 12, 2018, and September 13, 2018, GHPD received calls from Mr. Nicholson's employer, Paragon Systems, regarding the location of Mr. Nicholson's service weapon. (Tr. 3861-3862; See Tr. 3199). On September 13, 2018, a search warrant was obtained and executed on Mr. Nicholson's white Volkswagen Jetta by, among others, Lt. Petrick and Det. Stroe on September 13, 2018. (Tr. 3201-3203, 3205-3217; State's Exhibits 334A through 334D). Mr. Nicholson's service weapon was among the items GHPD detectives testified they found in the trunk of Mr. Nicholson's vehicle during that search. (*See* State's Exhibit 334C).

Noticeably absent, though, were any photographs depicting the manner in which the firearm was found in the trunk of Mr. Nicholson's vehicle. Lt. Petrick claimed that he took photographs of "all four sides" of Mr. Nicholson's vehicle while executing the search warrant upon Mr. Nicholson's vehicle on September 13, 2018. (Tr. 2956-2958, 2968). Lt. Petrick and Det. Stroe also testified that every time a piece of evidence was found in Mr. Nicholson's vehicle, a

photograph was purportedly taken of where that item was found before it was removed from the vehicle. (*See* Tr. 2956-2958, 2968, 3199-3214).

Yet only sixteen photographs taken by GHPD detectives on September 13, 2018 during the search warrant execution upon Mr. Nicholson's vehicle were preserved by law enforcement, provided to defense counsel, and presented as evidence at trial. (Tr. 2948-2955, 2968. *See* State's Exhibits 284-299). This was because, GHPD detectives claimed, most of the photographs Lt. Petrick allegedly took on September 13, 2018 during the search warrant execution were lost, destroyed, and/or "overwritten." (*See* Tr. 2958-2962, 2971, 3101-3103, 3226-3227, 3879-3880).

1. Inconsistent testimony about the placement of the service weapon in the trunk of Mr. Nicholson's vehicle and GHPD's execution of the search warrant.

America's oldest son, Roberto Lopez, testified that on September 13, 2018, he met up with America, Estomarys Santos (America's friend), and Carlos Nieves (Roberto's friend) at America's home to move Mr. Nicholson's personal items out of the home and into Mr. Nicholson's white Volkswagen Jetta vehicle. (*See* Tr. 3656). Although Roberto and Carlos testified that they "all kind of consulted together" when they decided to do this (*see* Tr. 3666-3667, 3727-3728), Estomarys testified that she and America went to America's home on September 13, 2018 to find Roberto after the funeral and found Roberto and Carlos moving Mr. Nicholson's items at their own volition. (*See* Tr. 3439-3441, 3255-3256).

Carlos alone testified that, along with "America's friend," America arrived at 4838 East 86th Street on September 13, 2018 with "the father and the uncle" sometime after he and Roberto had started putting Mr. Nicholson's belongings into Mr. Nicholson's vehicle. (*Compare* Tr. 3732, *with* Tr. 3656, 3239-3242, 3682). Neither Roberto, America, nor Estomarys alleged anyone besides those four people were involved in moving Mr. Nicholson's things from the home into Mr. Nicholson's car on September 13, 2018.

Roberto testified that Mr. Nicholson's vehicle was unlocked on September 13, 2018 (Tr. 3667), but Carlos testified that he and Roberto went into America's bedroom and got the keys to Mr. Nicholson's vehicle in order to unlock it. (*See* Tr. 3729). Lt. Stroe testified that he believed GHPD had the keys to Mr. Nicholson's vehicle, and therefore used those keys to unlock Mr. Nicholson's vehicle when they executed the search warrant upon it on September 13, 2018. (Tr. 3202). Lt. Petrick could not recall whether Mr. Nicholson's vehicle was unlocked or locked when GHPD searched it on September 13, 2018. (Tr. 2969).

Roberto testified that while he was moving things from inside of the home to the vehicle, he came across a gun in a holster "on the bottom left side" of America's bedroom closet. (Tr. 3657-3658, 3667). Carlos recalled observing Roberto pull out "like a holster" that "had a pistol on it, with handcuffs" from the left side of the closet in America's bedroom. (Tr. 3729-3730). Roberto testified that the clothes in America's bedroom closet were hanging when he found the firearm and holster on September 13, 2018; he did not recall clothes being piled up on the closet's floor. (*See* Tr. 3657-3659). Indeed, in BCI Agent Horn's September 6, 2018 photographs of the closet in America and Mr. Nicholson's bedroom, the closet is neatly organized, and most clothes appear to either be hanging or folded on a shelf that is located above the hanging rod. (*See* State's Exhibits 177 and 178).

Roberto and Carlos both testified that Roberto put the gun holster containing the firearm in the trunk of Mr. Nicholson's vehicle. (*See* Tr. 3659-3661, 3667-3668, 3730). Estomarys recalled seeing the firearm in a gun belt on September 13, 2018. (Tr. 3242-3243). Lt. Petrick testified that he could not recall whether the firearm GHPD discovered in his trunk on September 13, 2018 was in a gun belt or not when it was allegedly recovered from the trunk of Mr. Nicholson's vehicle. (Tr. 2951-2952). And again, no photographs depicting the manner in which that gun was found by

GHPD on September 13, 2018 were produced because they had been "lost."

Both Estomarys and America testified that when they arrived at America's home on September 13, 2018, the gun belt containing the firearm was already in the trunk of Mr. Nicholson's vehicle. (Tr. 3256-3257, 3683). America identified the firearm that was found in the trunk of Mr. Nicholson's vehicle on September 13, 2018 by GHPD detectives as being Mr. Nicholson's service revolver. (*See* Tr. 3685).

Roberto expressly denied putting the gun holster with the firearm in any type of bag—including a garbage bag—before he placed it in the trunk of Mr. Nicholson's vehicle. (*See* Tr. 3659-3661, 3667-3668). Indeed, Roberto denied packaging Mr. Nicholson's belongings in any type of bags when he was moving Mr. Nicholson's personal items from inside of America's home into Mr. Nicholson's car. (*See* Tr. 3659-3661, 3667-3668). Carlos likewise did not suggest that he used any type of bags when he gathered Mr. Nicholson's belongings from inside of America's home and put them in Mr. Nicholson's vehicle. (*See* Tr. 3727-3733).

In stark contrast, both Estomarys and America testified that on September 13, 2018, Mr. Nicholson's belongings were packaged into garbage bags inside of the home, which were placed in Mr. Nicholson's car. (*See* Tr. 3682-3683, 3241, 3244-3245, 3248-3249, 3251-3253, 3256-3258). Most significantly, both Estomarys and America claimed that when they saw Mr. Nicholson's service weapon in its holster on September 13, 2018, it was inside of a garbage bag they observed in the trunk of Mr. Nicholson's vehicle. (*See* Tr. 3682-3683, Tr. 3241-3243, 3256-3258). Estomarys specifically testified that she saw the service weapon and holster in a black plastic garbage bag that was not transparent. (Tr. 3256-3257). However, in State's Exhibit 287—which was purportedly taken during GHPD's September 13, 2018 search warrant execution—the one garbage bag that is in view is white and transparent. (Tr. 2949; State's Exhibit 287). Notably,

unlike the other photographs taken on September 13, 2018, this photograph does not have a timestamp verifying that it was actually taken on that date. (*Compare* State's Exhibits 287 and 289, *with* State's Exhibits 284-286, 288, 290-299).

Estomarys testified that after she saw the gun belt holstering Mr. Nicholson's service weapon in the black, nontransparent garbage bag that had been placed in the trunk of Mr. Nicholson's vehicle, Estomarys put the gun belt with the gun down "in the trunk of the car." (Tr. 3241-3243). It was unclear from her testimony if Estomarys had removed the gun belt containing the firearm from the bag she claimed she saw it in before she put the gun belt with the firearm back in the trunk of Mr. Nicholson's vehicle. (*See* Tr. 3241-3243). America testified that she did not remember if she touched the firearm that she allegedly observed in a bag inside of the trunk of Mr. Nicholson's vehicle on September 13, 2018. (*See* Tr. 3683).

While Det. Stroe recalled observing clothing, uniforms, a gun belt, and "a gun in the trunk" of Mr. Nicholson's vehicle when the search warrant was executed by GHPD on September 13, 2018, Det. Stroe did not indicate whether any of these items were bagged—as friends America and Estomarys claimed—or unbagged—as friends Roberto and Carlos testified. (*See* Tr. 3205-3206).

Lt. Petrick testified that he observed "bags of clothing" in the back seat of Mr. Nicholson's vehicle on September 13, 2018 but could not recall whether there was a gun in the gun belt that he observed on that date. (Tr. 2947-2948, 2953-2954). Lt. Petrick also did not remember precisely where many of the items reflected in his sixteen photographs, State's Exhibits 284 through 299, were found by GHPD on September 13, 2018. (*See* Tr. 2948-55).

Roberto also testified that Carlos found a bucket of ammunition in the basement that was placed in Mr. Nicholson's vehicle. (Tr. 3658, 3660). Carlos recounted finding a tackle box with "a bunch of bullets" in the basement of the home, which he placed into the trunk of Mr. Nicholson's

vehicle. (Tr. 3731-3731). A large white bucket is visible in State's Exhibit 287, which Lt. Petrick claimed was taken on September 13, 2018 but does not have a timestamp confirming that claim. (Tr. 2949; State's Exhibit 287).

Roberto alleged at trial that Carlos pointed out to him that the ammunition in the bucket and/or tackle box were "hollow point rounds"—or "armor-piercing rounds"—for a rifle. (Tr. 3660). In contrast, Carlos testified that he observed "different rounds" inside of the tackle box. (Tr. 3731-3732). Although the trial court sustained defense counsel's objection to Roberto's description of "armor-piercing rounds" and indicated that such comment should be stricken, the effect of the damaging implication was nonetheless felt. (*See* Tr. 3660).

Lt. Stroe testified that when GHPD executed the search warrant upon Mr. Nicholson's vehicle on September 13, 2018, no one was present at 4838 East 86th Street. (Tr. 3201-3202). Roberto testified that they were all at America's home when GHPD executed the search warrant on Mr. Nicholson's vehicle that day. (Tr. 3656-3657). Carlos testified that he was not at the home when law enforcement executed the search warrant. (Tr. 3733). America testified that she remembered GHPD coming to her home and executing the search warrant on Mr. Nicholson's vehicle on September 13, 2018. (*See* Tr. 3715-3716). In her testimony, Estomarys did not seemingly recall GHPD detectives ever showing up at America's home to execute the search warrant on September 13, 2018, instead testifying that after the "garbage bags" containing Mr. Nicholson's personal items were placed in his vehicle, they "all left"—including America, Roberto, and Carlos—and went to the home of America's ex-husband and Roberto's dad, Manuel Lopez. (*See* Tr. 3248-3249).

2. Inconsistent testimony about the information America gave GHPD regarding Mr. Nicholson's service weapon.

At trial, America testified that she called law enforcement and told them she had located Mr. Nicholson's service revolver on September 13, 2018, and that law enforcement came to her home and executed a search warrant shortly thereafter. (Tr. 3685-3686). Det. Stroe testified that America contacted GHPD sometime around September 13, 2018 to tell them she had put Mr. Nicholson's service weapon in his vehicle. (Tr. 3199).

On cross-examination, however, America acknowledged that when she and Roberto went to the police station on September 13, 2018, America told Det. Biegacki that she found Mr. Nicholson's duty weapon, several portable radios, and a can of ammunition in the trunk of Mr. Nicholson's vehicle when she was putting Mr. Nicholson's personal belongings into his vehicle. (Tr. 3715-3716). This was memorialized in Det. Biegacki's report. *See* (Tr. 3224-3225). In other words, when America and Roberto spoke with Det. Biegacki at the police station on September 13, 2018, they were not alleging that Roberto found Mr. Nicholson's service weapon in America's bedroom closet and placed it into the trunk of Mr. Nicholson's vehicle that day, but rather, that they came across Mr. Nicholson's service weapon in the trunk of his vehicle while they were putting Mr. Nicholson's other belongings therein on September 13, 2018. (*See* Tr. 3715-3716).

America testified at trial that she did not recall talking to Det. Stroe about where the service weapon was back on September 13, 2018 or Det. Stroe telling her that he needed to swear out some type of affidavit for a search warrant of Mr. Nicholson's vehicle. (Tr. 3716).

America also admitted that, in her September 5, 2019 interview with Det. Biegacki, she told him that she did not put a gun or gun belt in Mr. Nicholson's vehicle at any time. (Tr. 3715. *See also* Tr. 3224-3225). That statement was memorialized in Det. Biegacki's report. (*See* Tr. 3219-3220, 3222-3223). Although Det. Biegacki's report also seemed to suggest that America told

him at some point that Mr. Nicholson kept his service weapon in the trunk of his vehicle, at trial, America testified she did not recall saying that to Det. Biegacki. (*See* Tr. 3715).

3. GHPD attempted to recover the lost and/or discarded photographs that were taken during the September 13, 2018 execution of the search warrant but were unsuccessful.

In anticipation of trial, counsel for both sides met with Garfield Heights Police Department detectives on September 5, 2019 to look at evidence in this case. (Tr. 85). During that meeting, it was discovered that there were some photographs taken of Mr. Nicholson's vehicle on September 13, 2018[4] by law enforcement executing a search warrant thereon that could not be located. (Tr. 85). Law enforcement speculated that "those photographs may have been overridden." (Tr. 85).

Counsel brought this issue to the attention of the trial court at the final pretrial hearing on September 10, 2019. (Tr. 85-87). At that time, defense counsel expressed its concern about the situation:

> MR. MACK: We shouldn't even be getting photographs at this last juncture. And while it might not be important for the State, they don't know the significance of those photos, and even if they wanted to have someone testify to what was in the trunk, it would not be the same.

(Tr. 87:11-17).

Sometime between September 5, 2019 and September 10, 2019, the Garfield Heights Police Department took their computer towers that "house[] all this information" to the Internet Crimes Against Children (ICAC) Task Force Program to see if it would be possible to forensically recover and download those photographs. (Tr. 85-88, 2101-2103).

On September 23, 2019, this issue was revisited by counsel and the trial court. (Tr. 2101-

[4] Based on counsel's September 23, 2019 discussion with the trial court and trial testimony, it is apparent that the prosecuting attorney was referring to photographs taken pursuant to the search warrant executed on September 13, 2018—not September 14, 2018. (*See* Tr. 2101-2103, 3199-3214).

2103). The State reported to the court that the ICAC was not able to retrieve "any photographs from the September 13, 2018 search warrant," though there was an "inventory list" and a "couple of photographs" that had already been turned over to defense counsel. (Tr. 2102). Defense counsel again took issue with the lost photographs, noting that "those photographs represent a critical aspect of our defense strategy. * * * [I]t's our position that we need that evidence. And that the State's wrong, in that regard." (Tr. 2102-2103). The court took the matter under consideration.

At trial, Lt. Petrick, Det. Stroe, Sgt. Cramer, and Det. Biegacki all testified that—beyond the sixteen photographs presented at trial—all other photographs GHPD claimed they took while executing the search warrant upon Mr. Nicholson's vehicle on September 13, 2018 were "overwritten" and could not be recovered. (*See* Tr. 2956-2962, 2968-2969, 2971, 3101-3103, 3226, 3880). Lt. Petrick testified that Det. Stroe was responsible for downloading those into law enforcement's CAD system shortly after they were taken. (*See* Tr. 2958-2962). Although it was common practice for GHPD detectives to also save these types of photographs to their own computer, copy these types of photographs onto a CD, and/or print search warrant photographs for the file, Det. Stroe apparently did not take any of these steps to ensure that the photographs GHPD took on September 13, 2018 while executing a search warrant upon Mr. Nicholson's car were preserved. (*See* Tr. 2968, 3102-3103).

V. Additional Factual Information Relevant to this Case.

Many of the Propositions of Law raised herein are fact-intensive and/or pertain to a limited procedural portion of this case. Thus, the Statement of Facts reflected in this section presents an overview of the evidence presented and the testimony elicited at trial that is relevant to multiple Propositions of Law set forth below. A more detailed account of the procedural and factual history of this case is contained within the individual Propositions of Law to which they pertain.

ARGUMENT

PROPOSITION OF LAW NO. 1

> **A trial court violates a defendant's right to due process and a fair trial under the United States and Ohio Constitutions when it enters a judgment of conviction based on insufficient evidence and/or against the manifest weight of the evidence.**

A conviction based on legally insufficient evidence constitutes a denial of due process. *Tibbs v. Florida*, 457 U.S. 31, 45 (1982), citing *Jackson v. Virginia*, 443 U.S. 307 (1979). Due process mandates that a criminal conviction be supported by evidence that leaves no reasonable doubt about the defendant's guilt. *Jackson*, 443 U.S. at 316-318. When a court reviews a record for sufficiency, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St. 3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. *See also State v. Thompkins*, 78 Ohio St. 3d 380, 1997-Ohio-52, 678 N.E.2d 541. Whether the evidence is legally sufficient to sustain a verdict is a question of law and subject to de novo review. *See, e.g., Thompkins*, 78 Ohio St. 3d at 386.

A challenge to the manifest weight of the evidence attacks the credibility of the evidence presented. *Thompkins*, 78 Ohio St. 3d at 386-387. In a manifest weight challenge, the reviewing court sits as a "thirteenth juror and makes an independent review of the record." *Id*. at 387. In performing this function:

> The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the 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.

Thompkins, 78 Ohio St. 3d at 387, quoting *State v. Martin*, 20 Ohio App. 3d 172, 175, 485 N.E.2d 717 (1st Dist. 1983). The court should consider whether the evidence is credible or incredible,

reliable or unreliable, certain or uncertain, conflicting, fragmentary; whether a witness was impeached; and whether a witness had an interest in testifying. *See, id. See also State v. Mattison*, 23 Ohio App. 3d 10, 11-12, 490 N.E.2d 926 (8th Dist. 1985).

A. The State failed to prove that Mr. Nicholson acted with "prior calculation and design" as charged in Counts One and Two.

Mr. Nicholson was convicted of two counts of aggravated murder as to M.L. and Giselle Lopez, Counts One and Two, respectively, in violation of R.C. 2903.01(A). (R.2, Indictment).

R.C. 2903.01(A) provides as follows: "No person shall purposely, and with prior calculation and design, cause the death of another." R.C. 2903.01(A).

Prior calculation and design involves "studied care in planning or analyzing the means of the crime as well as a scheme encompassing the death of the victim." *State v. Jones*, 91 Ohio St. 3d 335, 345, 2001-Ohio-57, 744 N.E.2d 1163, quoting *State v. Taylor*, 78 Ohio St. 3d 15, 19, 1997-Ohio-243, 676 N.E.2d 82. The phrase has been interpreted to require evidence of "a scheme designed to implement the calculated decision to kill" and "more than the few moments of deliberation permitted in common law interpretations of the former murder statute." *State v. Conway*, 108 Ohio St. 3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶ 38, quoting *State v. Cotton*, 56 Ohio St. 2d 8, 11, 381 N.E.2d 190 (1978). Thus, to prove prior calculation and design, the State must show a "scheme designed to implement the calculated decision to kill." *State v. Coley*, 93 Ohio St. 3d 253, 263, 2001-Ohio-1340, 754 N.E.2d 1129.

Evidence of purpose "does not automatically mean that the element of prior calculation and design also exists." *State v. Walker*, 150 Ohio St. 3d 409, 2016-Ohio-8295, 82 N.E.3d 1124, ¶ 17, citing *State v. Campbell*, 90 Ohio St. 3d 320, 341, 2000-Ohio-183, 738 N.E.2d 1178. "All prior calculation and design offenses will necessarily include purposeful homicides; not all purposeful homicides have an element of prior calculation and design." *Walker*, 2016-Ohio-8295

at ¶ 18. The phrase "prior calculation and design" suggests "advance reasoning to formulate the purpose to kill;" thus, "[e]vidence of an act committed on the spur of the moment or after momentary consideration is not evidence of a premeditated decision or a studied consideration of the method and the means to cause a death." *Id*.

This Court has repeatedly recognized that there is no bright-line test that "emphatically distinguishes between the presence or absence of 'prior calculation and design.'" *State v. Maxwell*, 139 Ohio St. 3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 148, quoting State *v. Taylor*, 78 Ohio St. 3d 15, 20, 1997-Ohio-243, 676 N.E.2d 82. "Instead, each case turns on the particular facts and evidence presented at trial." *See id.* Although there is no bright-line test, certain questions have been outlined as pertinent in ascertaining prior calculation and design: (1) Did the accused and the victim know each other, and if so, was that relationship strained?; (2) Did the accused give thought or preparation to choosing the murder weapon or murder site?; and (3) Was the act drawn out or "an almost instantaneous eruption of events?" *See, e.g.*, *State v. Hundley*, Slip Opinion No. 2020-Ohio-3775, ¶¶ 61-82; *Walker*, 2016-Ohio-8295 at ¶ 20; *State v. Franklin*, 97 Ohio St. 3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶¶ 56-60.

In this case, the evidence and testimony presented at trial did not support the finding that Mr. Nicholson acted with prior calculation and design. The evidence did not ""reveal[] the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation" and the circumstances surrounding the deaths of M.L. and Giselle did not show "a scheme designed to implement the calculated decision to kill." *Maxwell*, 2014-Ohio-1019 at ¶ 148, quoting *Cotton*, 56 Ohio St. 2d at paragraph three of the syllabus.

1. The State did not establish that Mr. Nicholson's relationship with Giselle and/or M.L. was sufficiently strained.

On September 5, 2018, Mr. Nicholson had been living with M.L. and Giselle at America's

Garfield Heights home for approximately four years. It was therefore undisputed that Mr. Nicholson knew Giselle and M.L. at the time of the incident.

i. Parking coordination efforts amongst the Garfield Heights household did not show a strained relationship between Mr. Nicholson and Giselle and/or M.L.

It was a reality of the Garfield Heights household that vehicles needed to be strategically parked in the driveway most nights in order to accommodate the differing schedules of the household members. Coordination amongst the household—be it the order of showers in the morning, use of a family computer, or otherwise—is something that is not uncommon to many families across the country. Here, the State argued that Mr. Nicholson's relationship was strained with M.L. and Giselle because the Garfield Heights household had to regularly coordinate parking. In support of that argument, the State presented a number of text messages from 2017 and 2018 that essentially showed America coordinating parking with either Mr. Nicholson, Giselle, and/or M.L. (*See* Tr. 3322-3333, 3345-3358).

The most recent "parking-related" text messages the State presented at trial were from March 13, 2018—around six months prior to the incident. (Tr. 3357-3358; State's Exhibit 341Z). On that date, Mr. Nicholson texted America: "Can you please tell the kids to move there [sic] cars. Thank you," and America texted Giselle and told her to move her car. (State's Exhibit 341Z). This clearly does not suggest a "strained relationship" between Mr. Nicholson and Giselle and/or M.L.

The State emphasized in its closing argument how it was "interesting" that—in the text messages the State selectively chose to present at trial regarding the car jockeying amongst the household—Mr. Nicholson never asked Giselle or M.L. to move their own cars but went through America instead. (Tr. 4280). However, America testified that when Mr. Nicholson first moved in, she told him that her children already had a father (Tr. 3278), and that when it came to America's

children, they were her responsibility, not Mr. Nicholson's. (*See* Tr. 3279). To avoid appearing like he was trying to be their father, then, Mr. Nicholson avoided telling America's children what to do. If anything, that showed Mr. Nicholson respecting America's children and following America's directive to him.

Put simply, while parking coordination efforts may have been, at times, frustrating to all members of the household, the evidence and testimony presented at trial simply does not support the finding that fleeting disagreements or annoyances about parking amounted to a strained relationship between Mr. Nicholson and America's children. The parking coordination efforts had been going on amongst the household since 2017, and no parking coordination issues between Mr. Nicholson and America's children had occurred in the weeks or months leading up to September 5, 2018.

ii. Disagreements amongst the household in the months prior to September 2018 did not show a strained relationship between Mr. Nicholson and Giselle and/or M.L. Even if Mr. Nicholson's relationship with America was strained, that does not equate to a strained relationship with M.L. and Giselle.

Mr. Nicholson acknowledged that his relationship with Giselle and M.L. changed quite a bit after, Mr. Nicholson believed, they found out Mr. Nicholson's age. (*See* Tr. 4031-4033. *See also* Tr. 3665-66). Mr. Nicholson's mother, Angel Nicholson, testified that Mr. Nicholson had shared with her that America's children were being disrespectful towards him, but described these issues as stemming from M.L. and Giselle—who were 17 years old and 19 years old, respectively, on September 5, 2018—just "being kids" and "doing things that kids do." (*See* Tr. 3757, 3786-3787).

America's oldest son, Roberto, described the circumstances in the home when he visited in June 2018 as being "uneasy." (*See* Tr. 3650-3652). When asked to explain what he meant by

"uneasy," Roberto testified that Giselle and M.L. "would get upset [at Mr. Nicholson] because [Mr. Nicholson] would like, leave the laundry in the basement around and play music loud, and [Mr. Nicholson] would also just be kind of disrespectful." (Tr. 3651-3652, 3668).

Over defense's objection, America recounted Mr. Nicholson getting upset at America because her children had broken his vacuum while using it. (*See* Tr. 3288-3289, 3290-3293). America did not indicate precisely when this alleged incident occurred, but based on her testimony, it was clearly at least one year prior to September 5, 2018. (*See* Tr. 3290-3293). Most notably, though, America testified that Mr. Nicholson did not direct his anger at the kids, but instead got "really upset" at her. (*See* Tr. 3288-3289).

The State also suggested that Mr. Nicholson's relationship with America and/or her children was strained, in large part, because America purchased M.L. a car after he turned sixteen (Tr. 3320-3321). But text messages between Mr. Nicholson and M.L. show that Mr. Nicholson was actually helping M.L. with the car purchasing process in early November 2017. (*See* State's Exhibit 578: Exhibit K, Item 7 SMS Messages, Lines 3769-3770, 3784, 3819-3821, 3816-3817, 3864-3868). Although the State also suggested Mr. Nicholson was upset about America getting Giselle a new car, this was a disagreement between Mr. Nicholson and America. (*See* Tr. 3307-3308). The State presented no evidence or testimony suggesting that this caused Mr. Nicholson and Giselle to have a strained relationship.

Through the State's leading questions, America testified about Mr. Nicholson getting upset at America and Giselle because Giselle left the home with her wet laundry in the dryer in March 2018. (Tr. 3358-3371). America claimed that Mr. Nicholson had taken Giselle's clothes out of the dryer while they were still wet (Tr. 3358-3363), but Mr. Nicholson testified that he was upset because Giselle accused him of wanting to touch her undergarments when he took them out. (Tr.

4034-4035). The State presented text messages between Mr. Nicholson and America from shortly after that incident. (Tr. 3368-3371). In those messages, Mr. Nicholson stated that he and America "were at odds for something disrespectful [America's] kids" had done, to which Mr. Nicholson responded because America did not "do anything about it." (Tr. 3369; State's Exhibit 341BB). Mr. Nicholson expressed his concern that Giselle was trying to come in between Mr. Nicholson and America's relationship, but clearly took issue with how America was handling the situation. (*See* Tr. 3389-3371; State's Exhibit 341BB). Indeed, Mr. Nicholson urged America to "just tell your daughter you love her and it's not a competition (as she said) between me and her, for you." (State's Exhibit 341BB).

Put simply, the State presented ample evidence and testimony regarding Mr. Nicholson's strained relationship with America. However, Mr. Nicholson did not kill America, and the jury explicitly found him "not guilty" of the attempted murder offense with which he was charged. Thus, even if the State proved that Mr. Nicholson had a strained relationship with America, that does not proof that he had a strained relationship with M.L. and Giselle.

iii. At most, the evidence and testimony presented at trial suggested that Mr. Nicholson had a distant relationship with Giselle and M.L. in the months leading up to September 5, 2018.

America's oldest son, Roberto, testified that in the two years he lived at 4838 East 86th Street with Mr. Nicholson, America, Giselle, and M.L. before he moved out in December 2015 (Tr. 3638), he did not witness any arguments or physical altercations Mr. Nicholson had with anyone in the household. (*See* Tr. 3661-3662). Indeed, when he left the home in December 2015, Roberto described Mr. Nicholson's interactions with him, America, Giselle, and M.L. as being cordial. (Tr. 3638). During any of his subsequent biannual visits, Roberto did not witness any arguments or physical altercations between Mr. Nicholson and Giselle or M.L. (*See* Tr. 3643-

3653). The State asked Roberto on direct examination: "And would you tell them to call you if there was [*sic*] any problems?" and Roberto indicated that he told Giselle this before he left in June 2018. (*See* Tr. 3653-3654). Roberto seemingly never received any calls from Giselle or M.L. alerting him to any problems, as Roberto did testify about any such calls at trial.

Giselle's best friend, Kristin Bailey, testified that when she saw Mr. Nicholson and Giselle interact, they just had "lightweight conversation" and did not interact much. (Tr. 3843-3845). Kristien did not indicate how often she witnessed these alleged interactions, and certainly did not attest to witnessing any physical altercations or otherwise threatening interactions between Mr. Nicholson and Giselle.

M.L.'s best friend, Henry Billingslea, testified that he was never at M.L.'s home when America or Mr. Nicholson were there. (Tr. 3568-3569). Henry never witnessed any verbal or physical altercations between Mr. Nicholson and M.L. (*See* Tr. 3577-3778). Although Henry testified that M.L. and Mr. Nicholson stopped saying "hello" and "goodbye" to each other whenever Henry picked M.L. up or dropped him off at home, Henry did not indicate how often he allegedly observed this lack of interaction between M.L. and Mr. Nicholson especially given that Henry testified he was never at M.L.'s home when Mr. Nicholson or America were home. (*See* Tr. 3568-3571).

Neighbor Victor "Vic" Sanuk testified that in the approximately three-to-four years Mr. Nicholson lived with America and her children at 4838 East 86th Street, he never witnessed any negative interactions between Mr. Nicholson and America or between Mr. Nicholson and America's children. (Tr. 2672, 2649-2653). Vic Sanuk's wife, Constance "Connie" Allshouse, likewise testified that she never observed any interactions between Mr. Nicholson and America's children. (Tr. 3400).

Accordingly, the State did not establish that Mr. Nicholson had a strained relationship with Giselle and/or M.L. on September 5, 2018. Instead, the State presented evidence and testimony that essentially amounted to several minor and not atypical disagreements or annoyances that members of the household had with each other over the span of approximately four years. Mr. Nicholson was not the parent of M.L. and Giselle, and he was only eleven years older than Giselle and thirteen years older than M.L. Although Mr. Nicholson admittedly began to distance himself from his girlfriend's two late-teens children, that does not equate to the "strained relationship" contemplated in cases discussing a court's evaluation of prior calculation and design.

2. The State did not establish that Mr. Nicholson gave thought or preparation to choosing the murder weapon or murder site. Moreover, the shooting incident was an almost instantaneous eruption of events on September 5, 2018.

Even if this Court finds that Mr. Nicholson did have a strained relationship with M.L. and Giselle on September 5, 2018, a strained relationship alone is not enough to support a conviction for aggravated murder. Rather, the existence of a strained relationship must be considered in light of the other *Taylor* factors.

The uncontroverted evidence showed that the catalyst for the events that took place on September 5, 2018 was a text message America received from her ex-boyfriend. America was not forthcoming about who she was texting, Mr. Nicholson got upset when he was told America had been texting her ex-boyfriend, and the two of them began to argue. M.L. heard them arguing, intervened, and a fight broke out in the home. As set forth extensively above, Mr. Nicholson testified that he obtained his personal firearm from the bedroom after seeing M.L. retrieve Mr. Nicholson's service weapon—which was holstered in his gun belt—from the trunk of Mr. Nicholson's vehicle. (*See* Tr. 4084-4092). Believing that Giselle and M.L. were going to shoot him, Mr. Nicholson testified that he discharged his firearm in self-defense. (*See* Tr. 4090-4091).

While the State presented sufficient evidence that Mr. Nicholson purposefully killed M.L.

and Giselle—notwithstanding any affirmative defenses and/or mitigating circumstances warranting a lesser-included-offense instruction—the State's theory of prior calculation and design was unsupported by the evidence. There was simply no evidence that Mr. Nicholson planned to kill M.L. or Giselle when he arrived home that evening, i.e., that he engaged in a studied consideration of the method, means, or location of the killing. The only plan that existed that night was to come inside, eat dinner, take a shower, and go to bed. America did not claim that Mr. Nicholson was acting odd or strange that night. Indeed, no evidence presented by the State indicated that the night of September 5, 2018 was unlike any other night at the Garfield Heights home.

Based on the evidence and testimony, it was clear that Mr. Nicholson did not choose the time or location of the shooting. Mr. Nicholson did not anticipate that America's ex-boyfriend was going to send her a text message that night, that America would lie about it, that M.L. would intervene in his argument with America, that M.L. would try to fight him, or that Giselle would be arriving home in the midst of everything. It defies logic to conclude that Mr. Nicholson's plan was to shoot M.L. and Giselle in the driveway of their home with witnesses around, including America. This is especially true given the uncontroverted testimony that Mr. Nicholson repeatedly asked America during the argument that night to move her Jeep—which was parked behind his Volkswagen Jetta—so because Mr. Nicholson was angry and wanted to leave the home. (*See* Tr. 4079-4080, 3717-3721, 3898, 3901-3907).

Moreover, the fact that Mr. Nicholson—an armed security guard—was a lawful firearm owner was not indicative of any prior calculation and design he allegedly had to kill M.L. and Giselle on September 5, 2018. Ohio courts have consistently held that "mere possession of a weapon is not, without more, evidence of prior calculation and design." *See, e.g.*, *State v. Hill*, 8th

Dist. Cuyahoga No. 98366, 2013-Ohio-578; *State v. Jones*, 1st Dist. Hamilton No. C-170647, 2020-Ohio-281, ¶ 23. This is especially true where America's own testimony demonstrated that Mr. Nicholson regularly kept at least one—if not two—firearms in his bedroom. (*See* Tr. 3289-3290). According to America, Mr. Nicholson owned guns the entire time he lived with her. (*See* Tr. 3289-3290). Thus, the fact that Mr. Nicholson—whether believing he was going to be attacked, in a fit of rage, or a combination of both—later walked down the hall and retrieved the firearm he always kept in the bedroom that night does not demonstrate, even when viewed in the light most favorable to the prosecution, anything more than instantaneous deliberation. Indeed, if Mr. Nicholson had actually planned or intended to kill anyone that night with a firearm, Mr. Nicholson could have just retrieved the firearm he had in the bedroom and used it long before M.L. came downstairs and intervened in Mr. Nicholson's argument with America. But Mr. Nicholson did not even go so far as to brandish his firearm while he was arguing with America or in response to M.L. banging on their bedroom door.

The State argued that the jury could infer that Mr. Nicholson's plan was to shoot M.L., Giselle, and/or America if they ever called the police to the home. (Tr. 3316, 3373-3374, 3389-3391, 3673-3674). However, even a planned contingency to kill is not evidence of a preconceived plan to kill. *See State v. Noggle*, 140 Ohio App. 3d 733, 749, 2000-Ohio-1927, 749 N.E.2d 309 (3d Dist.) (holding that "merely being prepared to kill if the situation calls for it does not amount to prior calculation and design"), citing *State v. Reed*, 65 Ohio St. 2d 117, 121-124, 418 N.E.2d 1359 (1981) ("The statements appellant made to a classmate that he would kill any police officer who got in his way of a crime he might commit do not show that appellant designed a scheme in order to implement a calculated decision to kill."). This is especially true here because America gave no indication as to when Mr. Nicholson allegedly made these threats, and no actual evidence

of these alleged prior threats were presented by the State. And, as set forth below, America's testimony regarding those alleged prior threats was not credible.

America claimed that after Giselle arrived home from work, Mr. Nicholson kept saying "if you call the police, you know what's going to happen." (Tr. 3389-3391, 4284). America also testified that sometime after M.L. called 911, Mr. Nicholson retrieved his personal firearm from the bedroom and shot Giselle and M.L. (Tr. 3674). Most critically, however, the State presented no evidence or testimony at trial showing that Mr. Nicholson even knew that the police had been called that night. (*See* Tr. 3389-3391). Indeed, Mr. Nicholson testified that he was not aware that M.L. or America had called 911 while they were arguing inside of the home that night. (*See* Tr. 4200-4201). Moreover, although Mr. Nicholson could be heard yelling in the background of the 911 calls, nothing he can be heard yelling was a threat. (*See* State's Exhibits 313-319).

Even when viewed in the light most favorable to the prosecution, the evidence does not demonstrate more than an almost instantaneous eruption of events on September 5, 2018. The State's own closing argument summarizing its theory of the case supports this conclusion:

> There's a fight that spills out into the kitchen.
>
> [M.L.] calls the police at 9:35 p.m. The defendant states, "you don't need to come banging on the fucking door asking if I'm calling your mother a bitch"
>
> [M.L.] does something at that point, which prompts the defendant to say: "There's the disrespect."
>
> You'll get the 9-1-1 calls. You can listen to them.
>
> At 9:37 [p.m.] [M.L.] calls back. He calls 9-1-1 again.
>
> And he calls back and he's able to have you, ladies and gentlemen, listen to the final minute of what led up to this. He allows you to listen to that. That action of calling 9-1-1 gives you the opportunity to go inside the home a minute leading up to the homicide.

> Because in this call, you hear the defendant begin to unload all 13 rounds of his gun.
>
> ~ ~ ~ ~ ~ ~
>
> (Thereupon, audio was played in the presence of the jury)
>
> ~ ~ ~ ~ ~ ~
>
> You hear at the very end, those were gunshots at the end. That's when he started to unload his 13 round-magazine into the backs of [M.L.] and Giselle Lopez.

(Tr. 4285-4286).

The State's synopsis of its own case and the evidence and testimony presented at trial demonstrated, at most, only Mr. Nicholson's anger in the moments leading up to the shooting. The uncontroverted evidence the State summarized in closing indicates that the time between Mr. Nicholson scolding M.L. during the first 911 call in the kitchen—which ended at 9:36:00 PM (State's Exhibit 315)—and Mr. Nicholson retrieving his handgun from the bedroom and shooting M.L. and Giselle—sometime at or around 9:37:21 PM—was a span of one to two minutes. Indeed, Officer Jarzembak testified that he was dispatched at 9:38 PM to respond to a "shots fired" report. (Tr. 2555).

Although a jury could reasonably infer that Mr. Nicholson purposely decided to shoot M.L. and/or Giselle in that span of time, the length of time is insufficient to infer prior calculation and design. *Jones*, 2020-Ohio-281 at ¶ 24. "Aggravated murder is a purposeful killing that also requires proof of prior calculation and design: forethought, planning, choice of weapon, choice of means, and the execution of the plan." *State v. Walker*, 150 Ohio St. 3d 409, 2016-Ohio-8295, 82 N.E.3d 1124, ¶ 28. "The element of prior calculation and design requires evidence that supports more than the inference of purpose. Inferring prior calculation and design from an inference of purpose is mere speculation." *Id*. at ¶ 26. Finding prior calculation and design on the facts of this case will

blur the line between planned killings and purposeful killings to the point where there will no longer be a difference between the two. This is not the type of case envisioned by the General Assembly when it adopted the more stringent requirement of "prior calculation and design."

Even when all the evidence is viewed in a light most favorable to the prosecution, the jury could not have reasonably found the required element of prior calculation and design. In this case, there was sufficient evidence that Mr. Nicholson had the purpose to kill, but not a plan to kill. Therefore, the evidence was insufficient to support Mr. Nicholson's conviction for two counts of aggravated murder.

3. The State's claim that Mr. Nicholson previously threatened to kill America, Giselle, and/or M.L. was not supported by the evidence and testimony presented at trial.

The State alleged that Mr. Nicholson acted with prior calculation and design on September 5, 2018 because he had allegedly told America on multiple occasions in the past that he would kill her and/or her children if the police were ever called to the house. (*See* Tr. 3293-3298, 2510-2511. *See also* Tr. 3313-3316). However, again, even if true, a planned contingency to kill is not evidence of a preconceived plan to kill. *See Noggle*, 140 Ohio App. 3d at 749; *Reed*, 65 Ohio St. 2d at 121-124; *Jones*, 2020-Ohio-281 at ¶ 22.

The only evidence presented at trial supporting that claim was testimony from America (Tr. 3289, 3316) and testimony, over defense counsel's objection, from other people—to wit, America's neighbor Connie Allshouse (Tr. 3401-3404, 3421-3423, 3427-3428) and America's male coworker, Shondell Smith (Tr. 3518-2523, 3529-3531). However, America's testimony about the alleged prior threats she claimed Mr. Nicholson made against her and/or her children was not credible.

Indeed, Shondell acknowledged that he had never observed any physical injuries on America and did not have firsthand knowledge about what was going on in her household. (Tr.

3530). Moreover, during the time that Shondell was working at Lincoln Electric with both Mr. Nicholson and America, Shondell admitted that he never saw anything at work that corroborated what America was telling him about the nature of her relationship with Mr. Nicholson. (Tr. 3530).

Connie likewise admitted that, notwithstanding the negative things America told Connie about Mr. Nicholson, she maintained a neighborly and friendly relationship with Mr. Nicholson up until September 5, 2018. (Tr. 3421-3422). Moreover, despite living in the neighborhood with Mr. Nicholson for approximately three-to-four years, Connie never personally witnessed any negative interactions between Mr. Nicholson and America or Mr. Nicholson and America's children. (*See* Tr. 3398-3400).

Mr. Nicholson expressly denied ever telling America that he would kill America and/or America's children if America, Giselle, and/or M.L. ever called the police. (Tr. 4041-4042).

America's conduct at the scene in the minutes after the shooting was equally telling. Moments after M.L. was loaded into the ambulance by responding EMTs, America repeatedly expressed to Connie her concern that her oldest son, Roberto, and "everybody" was going to kill her. (State's Exhibit 322A at 0:13:25-0:13:35, 0:14:52-0:14:56). When Connie suggested contacting America's ex-husband to let him know that his two children had been shot and were being transported to the hospital, America responded that she did not want to because he would "kill her" and bemoaned that "nobody will never [*sic*] forgive" her for what happened. (*See* State's Exhibit 322A at 0:16:43-0:16:57). Thus, in addition to seemingly having a proclivity to speak in hyperbolic terms, America undoubtedly was fearful about facing members of her family after this incident and understandably upset and angry at Mr. Nicholson. It stands to reason, then, that America had an interest in both portraying Mr. Nicholson in the worst way possible (retribution) and minimizing any blame or responsibility that members of her family might attribute to her for

what happened to M.L. and Giselle that night.

i. The evidence presented at trial did not support—and often refuted—America's claim that Mr. Nicholson made repeated threats to kill America, Giselle, and/or M.L. prior to September 5, 2018.

At trial, the State presented a copious amount of text messages between America and Mr. Nicholson showing that they discussed—among other things—the vehicles in the driveway, how Giselle and M.L.'s behavior towards Mr. Nicholson was impacting the relationship between America and Mr. Nicholson, and arguments or disagreements Mr. Nicholson and America had or were having. (*See* Tr. 3320-3333, 3345-3358, 3368-3371, 3375-3380; State's Exhibits 341B-Z, 341BB, 341GG, 341OO). Noticeably absent were any threatening text messages from Mr. Nicholson to America, Giselle, and/or M.L. Indeed, the State did not produce a single text message from Mr. Nicholson conveying any threat to kill or otherwise inflict harm upon America, Giselle, and/or M.L. at any point during the four years Mr. Nicholson lived at the Garfield Heights home.

With the State essentially testifying on America's behalf, America indicated that sometime before March 2018, America had "one recording" of an argument between her and Mr. Nicholson on America's cellphone, but Mr. Nicholson "took [America's] phone and he broke it." (*See* Tr. 3333-3334). The State did not elicit testimony from America about what the argument she allegedly recorded was about, whether any threats were actually made during that recorded argument, if Mr. Nicholson purportedly broke America's phone because he was upset about the recording, or any other specific information about that "one recording" America allegedly made of an argument she had with Mr. Nicholson sometime before March 2018. (*See* Tr. 3333-3334).

In her subsequent testimony, America—through the State's leading questions—alleged that, by January 2018, she was recording arguments between her and Mr. Nicholson "every day." (Tr. 3342). Although America claimed that Mr. Nicholson found out at some point that America

had been recording him, America did not allege that Mr. Nicholson did anything that resulted in the deletion or destruction of those alleged recordings. (*See* Tr. 3342). America likewise did not claim that Mr. Nicholson made any threats to America after finding out that she had allegedly been recording arguments between them "every day." (*See* Tr. 3342). Instead, America testified that when Mr. Nicholson found out that, he did not take her phone and reacted "[l]ike nothing happened. Like nothing. He told me: Just don't record me again." (Tr. 3342). America did not claim that Mr. Nicholson ever did anything to destroy the recordings she allegedly started making in January 2018 of her arguments with Mr. Nicholson. Yet, the State did not present a single one of those purported recordings at trial. Moreover, on cross-examination, GHPD Det. Biegacki testified:

MR. MACK:	There was some mention of a recording. Do you recall that?
DET. BIEGACKI:	Yes, I do.
MR. MACK:	And that was the allegation that America had recorded different communications between she and Mr. Nicholson; is that correct?
DET. BIEGACKI:	That's correct.
MR. MACK:	Threats and so forth; is that right?
DET. BIEGACKI:	Correct.
MR. MACK:	But the only recording, really, that you're able to listen to involved an argument over utilities and no threatening conversation by Mr. Nicholson; would that be fair?
DET. BIEGACKI:	It was just a loud argument over utilities, correct.
MR. MACK:	No threats, right?
DET. BIEGACKI:	Not that I recall, no.

(Tr. 3894-95).

Put simply, America claimed that in the months leading up to the incident, she made daily recordings of arguments she and Mr. Nicholson had. America claimed that Mr. Nicholson threatened to kill her, Giselle, and/or M.L. countless times in the months leading up to the incident. Those threats were not conveyed over text message because the State presented not a single text message with a threat to America, Giselle, and/or M.L. in it. Although those purported threats must have been conveyed verbally, the State presented not a single recording of any arguments between Mr. Nicholson and America period, much less any recordings containing threats Mr. Nicholson made to America about killing her, Giselle, and/or M.L. The absence of any such recording in the record is significant since America testified that she made recordings of her and Mr. Nicholson arguing daily in the seven months leading up to September 5, 2018.

ii. Despite having ample opportunity to do so, evidence and testimony presented at trial showed that America did not contact law enforcement at any point between 2015-2018 to report that Mr. Nicholson had physically assaulted her or had threatened to kill her, Giselle, and/or M.L.

America testified at trial that her relationship with Mr. Nicholson started changing in February 2015 in that Mr. Nicholson was allegedly getting aggressive towards her. (Tr. 3284). Although she did not exactly remember the first incident, America testified that "his mouth was bad towards [her], and at one point he grab[bed] her." (Tr. 3284-3285). At trial, America recounted one incident wherein Mr. Nicholson allegedly got upset because he believed America's children had damaged his vacuum cleaner. (Tr. 3288-3289). Although America did not indicate when this alleged incident occurred, she testified that she and Mr. Nicholson had a "big argument" during which Mr. Nicholson allegedly called her names and grabbed her arms. (Tr. 3288-3289). America acknowledged, however, that Mr. Nicholson did not direct any of his anger about his vacuum being damaged at America's children. (Tr. 3289).

Through the State's ongoing leading questions, America indicated that after the vacuum

cleaner incident, she wanted Mr. Nicholson to move out. (Tr. 3291). After, America claimed, her conversation with Mr. Nicholson about him moving out went "bad" and "[h]e got really angry," America sought advice from her neighbor Connie. (Tr. 3291-3292. *See* Tr. 3400-3404). Over defense counsel's repeated objections, America testified that, based on the advice she received from Connie, she went to the Garfield Heights Police Station and talked with Police Chief Robert Byrne. (*See* Tr. 3291-3299; Tr. 3402-3404). America did not testify as to when this occurred. America alleged that when she spoke with Chief Byrne, she told him "there was physical violence going on" and that she "wanted to get Mr. Nicholson out of the house." (Tr. 3708-3709. *See also* Tr. 3291-3299). Although Chief Byrne allegedly provided her information about the domestic violence hotline, America testified that GHPD did not file any police report or take any action because she did not have any physical markings on her "or he didn't do anything to [her]." (Tr. 3292-3293. *See* Tr. 3709). America testified that she called the domestic violence hotline but did not do anything else after she made that phone call. (Tr. 3293).

America's testimony about going to the GHPD to report being physically assault was directly contradicted by the testimony of Garfield Heights Police Chief Robert Byrne. At trial, Chief Byrne testified that he remembered America coming into the police station when he was working as a detective sometime between January 2013 and July 2015. (*See* Tr. 3488-3489). Although Chief Byrne did not recall the exact date America came into the police station and spoke with him, he testified: "I want to say it was earlier in my time in the bureau. It definitely wasn't in 2015. I – I would say 2013." (Tr. 3489). Yet, America testified that the altercations with and threats by Mr. Nicholson began in 2015. (Tr. 3285). Moreover, America, Mr. Nicholson, and America's neighbors, all testified that Mr. Nicholson did not move in with America and her children until the end of 2014 or early 2015. (*See* Tr. 4022, 3276-3277, 2649, 3398-3400).

Chief Byrne recalled that America came in alone and only spoke with him. (Tr. 3489-3490). He described her demeanor as being "pretty casual," "not nervous," and "normal." (Tr. 3490). Based on what America told him, Chief Byrne explained the eviction procedure to her, told her that a civil protection order was "one method of having somebody removed from a house," and gave her information for the domestic violence hotline. (Tr. 3490-3491). Significantly, Chief Byrne did not write a report at that time, as he described his conversation with America as being "more of somebody [who] came in looking for advice or some guidance"—not a report of a crime to law enforcement. (*See* Tr. 3491).

To be sure, Chief Byrne testified—in no uncertain terms—that if America had mentioned domestic violence or threats being made against her and/or her children to him during that meeting, then he would have had to prepare an incident report, which would have prompted a law enforcement investigation. (*See* Tr. 3499-3500). However, Chief Byrne did not recall America bringing up domestic violence and/or threats to him during his approximately twenty-minute conversation with her. (*See* Tr. 3500, 3492). His recollection was supported by the fact that no incident report was apparently generated following his conversation with America that day. (*See* Tr. 3499-3501). Chief Byrne testified that he prepared a report about this interaction with America in June 2019—six-to-four-years after the actual encounter—at the request of the State. (Tr. 3498).

It was therefore clear from Chief Byrne's testimony that America's actual reason for going to the Garfield Heights Police Department sometime between January 2013 and July 2015 was to obtain information as to how she could have ***someone*** removed from her home—not to report domestic violence or threats. (*See* Tr. 3488-3491, 3500-3501). Notably, though, Chief Byrne did not testify as to whom America was seeking to remove from her home when he spoke with her sometime "earlier in my time in the bureau. It definitely wasn't in 2015. I – I would say 2013."

(*See* Tr. 3489).

This is significant, as Mr. Nicholson testified that when America was dating Terricko Marshall sometime before Mr. Nicholson and America began dating in 2014, America told Mr. Nicholson that she was "done with" Terricko, but that Terricko "didn't really want to leave her." (*See* Tr. 4023). When America asked Mr. Nicholson if he knew how she could "separate herself" from Terricko, Mr. Nicholson recounted—in addition to helping America change the locks on her home—suggesting that she contact the police or try to obtain a civil protection order. (*See* Tr. 4023-4024). Terricko testified that he dated America from 2010 to 2012 (Tr. 2980-2982). Neighbors Vic Sanuk and Connie Allshouse recalled America and her children moving into their neighborhood in 2011 (Tr. 2647, 3397), and Connie testified that America was dating Terricko when she moved into 4838 East 86th Street. (Tr. 3397). As for America, she did not recall when they began dating, but testified that "around 2012" sounded right. (*See* Tr. 3268-3272). Put simply, the testimony and evidence presented at trial by the State casted doubt on America's testimony about going to GHPD sometime in 2015 to report that ***Mr. Nicholson*** had physically assaulted and/or threatened her such that she wanted him removed from her home.

This meeting with Chief Byrne was the only time America claimed she made any reports about Mr. Nicholson physically assaulting and/or threatening her, Giselle, and/or M.L. to law enforcement. (*See* Tr. 3709-3710). America's failure to make any reports to law enforcement during the three years she claimed Mr. Nicholson was physically assaulting her and/or threatening to kill America and her children was unexplainable given the ample opportunity she had to contact law enforcement without Mr. Nicholson's knowledge.

Connie testified that GHPD officers were frequently called out to the neighborhood by their neighbor, Amy Nemecek, who had ongoing issues with multiple people in the neighborhood

including Connie and America. (*See* Tr. 3421. *See also* Tr. 3504-3508, 3498-3499). Chief Byrne acknowledged that GHPD had been out to America's home "several times as a result of [Amy Nemecek's] complaints in 2013, '14, '15, '16, and so" (Tr. 3498-3499), and Connie Allshouse recalled seeing GHPD at America's home on multiple occasions prior to September 5, 2018. (Tr. 3428-3429). These complaints were almost exclusively nuisance-related complaints. (*See* Tr. 3504-3505). Prior to September 5, 2019, law enforcement had never been dispatched to America's home to investigate claims of threats or physical assault against America, Giselle, and/or M.L. (*See* Tr. 3428-3429).

Notwithstanding the repeated presence of GHPD officers at her home and in her neighborhood on account of Ms. Nemecek, America never seized upon the presence of law enforcement in her neighborhood to report that she was being physically assaulted and/or threatened by Mr. Nicholson. The reason, America testified, was because Mr. Nicholson had allegedly threatened to kill America and/or her children if they ever called the police. Of course, if America told law enforcement about what she later claimed was going on while they were already there, it is unclear what America thought Mr. Nicholson would have been able to do.

Moreover, Mr. Nicholson worked a full-time job almost the entire time he lived with America and her children. Indeed, 2016 up until the September 5, 2018 incident, Mr. Nicholson was working full-time at Paragon Systems as an armed security guard. (*See* Tr. 3316, 3693, 4054). Mr. Nicholson and America did not work the exact same hours, so America would typically leave the home first in the mornings and arrive home in the afternoon before Mr. Nicholson got off work. (*See, e.g.*, Tr. 3301-3302, 3307, 3693-3694, 3382-3387). Yet, America did not call law enforcement or go to the GHPD police station while Mr. Nicholson was at work and report that Mr. Nicholson had been physically assaulting her and/or threatening to kill her and her children

for the last three years.

America also acknowledged that, because of his car hobby, Mr. Nicholson would go to car shows out of town, including on one specific occasion, to Detroit with his father and brother. (*See* Tr. 3694-3695). At trial, Mr. Nicholson testified that he would take road trips to car shows with his father and brother "at least once a month." (Tr. 4043-4044). However, during any of the times Mr. Nicholson was out of town at a car show, America did not contact law enforcement to report any of the threats and/or domestic violence she testified at trial had been going on for years.

America's explanation for her failure to avail herself of the opportunity to speak with law enforcement while Mr. Nicholson was at work, out of town, or out of state was because Mr. Nicholson had purportedly threatened to kill her and/or her children if she did. But again, there were many ways America could have reported what she testified was going on in the home to law enforcement in the three years prior to September 5, 2018. However, she did not.

Although America allegedly told Connie about altercations she had with Mr. Nicholson, Connie acknowledged that she never called law enforcement on account of what America had told her. (Tr. 3421-3423). Instead, Connie suggested that America respond in a passive aggressive manner by being "totally shut off" from Mr. Nicholson and essentially ignore his presence in the household so Mr. Nicholson would "get the hint to move out." (Tr. 3402, 3421-3423). This advice is more consistent with merely a desire to have Mr. Nicholson move out of the home, not a way to respond to years of alleged physical assaults and/or threats to kill America and her children.

Through the State's leading questions, America testified that in August 2018, Connie offered to call the police if America's front porch light was turned on. (Tr. 3381). However, Connie did not testify about this arrangement, and America did not claim that she ever had to turn on the front porch light to signal to Connie that she needed assistance.

While America also allegedly confided in her male coworker, Shondell Smith, about altercations she had with Mr. Nicholson, Shondell testified that he did not tell anyone else about what America told him or contact law enforcement to report the "horrible things" he had allegedly been told by America. (Tr. 3519, 3521). America apparently told both Shondell and Connie that she went to GHPD and reported that Mr. Nicholson physically assaulted her but was told by GHPD that they "needed more evidence and more proof to make some type of movement on that situation." (Tr. 3521. *See* State's Exhibit 322A at 0:29:04-0:29:30). Of course, that account was, as described above, directly refuted by GHPD Police Chief Robert Byrne's testimony.

At trial, the State elicited testimony from various witnesses about America being a "private" person in order to justify why America did not report to law enforcement that Mr. Nicholson allegedly physically assaulted her and/or threatened to kill her and her children on multiple occasions over the course of approximately three years. (Tr. 3574-3576). Shondell testified that it was "awesome" America had confided in him because she was a "private person" and "it took a lot for her to trust someone." (Tr. 3516-3519). Yet, Shondell acknowledged that it was America who initiated the conversations with him about the issues in her relationship with Mr. Nicholson. (Tr. 3530-3531). Telling a coworker, without solicitation, intimate details about one's romantic relationship is not indicative of a person who is "private." This is especially true here, given that Shondell and America were not close enough to ever spend time together outside of work or for Shondell to be one of the people America contacted in the six weeks she was off of work after the incident. (*See* Tr. 3527-3531).

The State also elicited testimony that America was a "very private person" from Estomarys Santos (Tr. 3521, 3528) who, before this incident, had not interacted with America since approximately 2008. (*See* Tr. 3233-3234). Indeed, America acknowledged that she did not tell

Estomarys anything about her relationship with Mr. Nicholson until after the September 5, 2018 incident. (Tr. 3700).

Moreover, the State's portrayal of America as being too private of a person to report three years of alleged physical assaults and/or death threats to her and her children by Mr. Nicholson was belied by both the number and types of people America claimed she confided in about the issues in her relationship with Mr. Nicholson. In addition to Connie (neighbor) and Shondell (male coworker), America told Det. Biegacki that, prior to September 5, 2018, she had confided in the following people: her neighbor, Victor Sanuk; her realtor, Nanci Crystal; another male coworker at Lincoln Electric, Javier Umonzar; her neighbor that no one got along with and who called the police on America many times over the years, Amy Nemecek; and her ex-boyfriend, Terricko Marshall. (*See* Tr. 3698-3700, 3875-3876, 3864, 3856-3857).

At trial, Victor Sanuk did not indicate in his testimony that America had ever talked with him about her relationship with Mr. Nicholson. In fact, Victor Sanuk testified that he never saw any negative interaction between Mr. Nicholson and America or Mr. Nicholson and America's children at any point during the three-to-four years Mr. Nicholson lived with America and her children in Victor Sanuk's Garfield Heights neighborhood. (*See* Tr. 2671-2672).

Terricko expressly refuted America's claim that she told him about Mr. Nicholson physically assaulting and/or threatening to kill America and her children before the September 5, 2018 incident. Instead, Terricko testified that America never told him that Mr. Nicholson was being violent with her or that she wanted to sell her Garfield Heights home because of issues in her relationship with Mr. Nicholson. (*See* Tr. 3009-3010). To the contrary, Terricko testified that he would not have expected America to share with him that Mr. Nicholson was violent because America was a "very private person" (Tr. 3011). Indeed, Terricko described his relationship with

America after they broke up as being "just basically acquaintances," and that the extent of his post-break-up conversations with America were related to the children, mutual friends at Lincoln Electric, and their jobs. (*See* Tr. 2987, 3009-3010). Notwithstanding the fact that Mr. Nicholson recounted America telling him about the issues she was having in her relationship with Terricko (*see* Tr. 4021-4024), it is generally not expected that a person would share intimate details about their current relationship with their ex-boyfriend or ex-girlfriend. Thus, the fact that America did not tell Terricko about what was going on between her and Mr. Nicholson spoke neither to America's privacy nor supported America's claim to Det. Biegacki that she had shared such information with Terricko prior to September 5, 2018.

Nanci Crystal did not testify at trial about America sharing anything with her regarding America's relationship with Mr. Nicholson, and neither Ms. Nemecek nor Mr. Umonzar were called to testify as a witness at trial.

In sum, while the State may have arguably presented ample evidence regarding Mr. Nicholson's strained relationship with America, it failed to present sufficient, credible evidence supporting its claim that Mr. Nicholson acted with prior calculation and design on September 5, 2018 when he shot M.L. and Giselle, thereby causing their deaths. The State did not allege that Mr. Nicholson, with prior calculation and design, decided to shoot M.L. after M.L. started banging on the bedroom door while America and Mr. Nicholson were arguing inside. The State did not allege that Mr. Nicholson, with prior calculation and design, decided to shoot Giselle after Giselle arrived home from work and walked inside the side door. And the evidence would be insufficient to prove prior calculation and design under those circumstances. *See State v. Walker*, 150 Ohio St. 3d 409, 2016-Ohio-8295, 82 N.E.3d 1124, ¶ 18. ("Evidence of an act committed on the spur of the moment or after momentary consideration is not evidence of * * * a studied consideration of the

method and the means to cause a death.").

Rather, the State argued at trial that Mr. Nicholson killed Giselle and M.L. (but not America) on September 5, 2018 because M.L. called the police. The State contended that Mr. Nicholson held for three years a contingent intent to kill America, Giselle, and M.L. if the police were called to the home, which evidenced that he killed M.L. and Giselle with prior calculation and design. However, again, a planned contingency to kill is not evidence of a preconceived plan to kill. *See, e.g.*, *State v. Reed*, 65 Ohio St. 2d 117, 418 N.E.2d 1359 (1981). To that end, the State offered no evidence to show that Mr. Nicholson was even aware that the police had been called when Mr. Nicholson retrieved his firearm from the bedroom that night. Moreover, America's claim about Mr. Nicholson threatening to kill her and her children if police were ever called to the home was simply not credible. Indeed, testimony and evidence presented by State refuted America's claim on numerous fronts.

Even when all the evidence is viewed in a light most favorable to the prosecution, the jury could not have reasonably found that the State proved, beyond a reasonable doubt, the required element of prior calculation and design. Therefore, the evidence was insufficient to support Mr. Nicholson's two aggravated murder convictions. This Court should therefore reverse Mr. Nicholson's two aggravated-murder convictions under R.C. 2903.01(A), discharge Mr. Nicholson from further prosecution on those underlying counts, and remand this matter for further proceedings consistent with the Court's decision.

B. The State failed to prove, beyond a reasonable doubt, that Mr. Nicholson did not act in self-defense on September 5, 2018.

Describing extensively the events leading up to the incident, Mr. Nicholson testified at trial that he discharged his firearm on September 5, 2018 after it appeared that Giselle and/or M.L. was going to use the service weapon M.L. retrieved from the trunk of Mr. Nicholson's vehicle on Mr.

Nicholson. At defense counsel's request, the trial court instructed the jury on self-defense. (Tr. 4258-4261). The State did not object to the trial court instructing the jury on self-defense (Tr. 4268-4269), and acknowledged that, following House Bill 228's modifications to R.C. 2901.05, the State had the burden of proving, beyond a reasonable doubt, that Mr. Nicholson did not act in self-defense. (*See* Tr. 3511, 4268-4269).

1. Mr. Nicholson acted in self-defense on September 5, 2018.

The current version of R.C. 2901.05(B)(1) requires the State "to disprove self-defense by proving beyond a reasonable doubt that [the defendant] (1) was at fault in creating the situation giving rise to the affray, OR (2) did not have a bona fide belief that he was in imminent danger of death or great bodily harm for which the use of deadly force was his only means of escape, OR (3) did violate a duty to retreat or avoid the danger." *See, e.g., State v. Ferrell*, 10th Dist. Franklin No. 19AP-816, 2020-Ohio-6879, ¶ 26 (citations omitted). Notwithstanding the argument set forth in the Sixth Proposition of Law that the self-defense jury instructions given were by the trial court incomplete and thus, erroneous, the evidence and testimony quite clearly established that Mr. Nicholson was acting in self-defense, which the State failed to rebut. Indeed, the trial court found that Mr. Nicholson had presented a sufficient enough showing of self-defense to warrant the self-defense instruction, to which the State did not object. (*See* Tr. 4258-4261, 4268-4269).

M.L. intervened between Mr. Nicholson and America in the bedroom by banging on the door, yelling at Mr. Nicholson, and attempting to fight him. That account was supported by the first 911 call made at 9:35 PM that night, wherein—by the State's own account—Mr. Nicholson can be heard yelling at M.L. "You don't need to come banging on the fucking door asking if I'm calling your mother a bitch." (Tr. 4285. *See* State's Exhibits 313, 315, 318). Thus, M.L. was at fault in creating the situation giving rise to the affray.

Mr. Nicholson testified that he was then attacked by M.L. and America in the home that

night. Angel testified that Mr. Nicholson repeatedly told his parents—and law enforcement—that he had been jumped that night. (*See* Tr. 3759-3762). This account was supported by the body camera video of Officer Cramer showing Mr. Nicholson's parents telling law enforcement at the scene that Mr. Nicholson had been jumped and talking to Mr. Nicholson about this on the phone. (State's Exhibit 322A). Even though Lt. Vargo feigned ignorance about Mr. Nicholson's self-defense claim during the State's rebuttal case (*see* Tr. 4216-4223), evidence showed that Lt. Vargo was repeatedly told by Mr. Nicholson that he had been "jumped" by America, M.L., and/or Giselle on September 5, 2018. (*See* State's Exhibit 324B at 0:28:30-0:30:50, State's Exhibit 322A at 0:45:40-0:45:50).

Mr. Nicholson testified that America came at him with a knife, and Angel verified that claim. (Tr. 4080-4081, 4145-4146, 3761-3762). Notably, the State admitted that they had been listening to Mr. Nicholson's jail calls "since before the trial began." (Tr. 4371). Indeed, the State played for the jury at trial a jail call Mr. Nicholson had with his brother on May 14, 2019. (*See* Tr. 3804-3808; State's Exhibits 408, 423). Given that Mr. Nicholson was in jail since September 6, 2018, had he made any calls to his mother and discussed with her what she should testify to, the State most certainly would have heard that and presented that call as evidence at trial. However, it did not, so it must be presumed that no such call was ever made.

Mr. Nicholson testified that he retrieved his personal firearm from the bedroom after he saw M.L., at America's urging, retrieve the service weapon from the trunk of Mr. Nicholson's vehicle. (Tr. 4084-4087). Mr. Nicholson testified that he tried to close and lock his bedroom door, but it had been broken by M.L. earlier that night. (Tr. 4085-4086). He retrieved his firearm from the bedroom and attempted to lock M.L. out of the home, but America was attacking Mr. Nicholson. (Tr. 4087-4089. Mr. Nicholson testified that he shot M.L. and Giselle after they pulled

his service weapon out of its gun holster, turned towards him with it, and refused to drop it when Mr. Nicholson requested that they do so. (*See* Tr. 4088-4091). Notably, Mr. Nicholson did not violate any duty to retreat because he attempted to retreat but was unable to do so inside of his home. Moreover, he was inside of his home when this incident took place, and there was not any other place he could have safety retreated to.

The State maintained throughout the pendency of trial that Giselle and M.L. were running away from Mr. Nicholson when they were shot. (*See, e.g.*, Tr. 4287). The State repeatedly emphasized to the jury that M.L. was shot "in the back" eight times and Giselle was shot four times "in the back," with a fifth bullet being recovered from Giselle's bookbag. (*See* Tr. 2512, 4287, 2935-2945).

It goes without saying that it would take seconds for a person facing one way to turn 180 degrees and face the other. Indeed, the differing bullet paths reflected in the autopsy of M.L. suggest that M.L.'s body moved during the shooting. (*See* State's Exhibit 601 at pp.1-2). While the bullet direction for the first three gunshot wounds is from right (or slightly right) to left, the bullet direction for the other five gunshot wounds is described as being from left (or slightly left) to right. (*See* State's Exhibit 601 at pp.1-2). Moreover, the first three gunshot wounds are to M.L.'s right side (right upper arm, right lower back x2), while the other five are to his left side (left lower back x3, left hip/left flank). Given how narrow the driveway at the Garfield Heights home was (*see* State's Exhibit 321A at 0:00:00-0:02:00), the location of M.L.'s body in relation to America's Jeep (*see* State's Exhibit 321A at 0:00:00-0:02:00), and America's testimony that Mr. Nicholson reached out of—not exited—the home's side door when he discharged his firearm, the locations and bullet paths of the first three gunshot wounds noted in M.L.'s autopsy necessarily suggest that M.L.'s body was not facing the same direction the entire time during the shooting.

Notably, too, it was unclear from the evidence and testimony presented at trial why Giselle and M.L. turned left when they exited the home's side door instead of turning right if they were, in fact, running away from Mr. Nicholson when they were shot "in their backs." (*See* Tr. 4287). By turning left out of the side door, M.L. and Giselle were traveling towards the home's fenced-in backyard and detached garage. (*See, e.g.*, State's Exhibits 337, 73, 56-66). Notably, the trunk of Mr. Nicholson's white Volkswagen Jetta would have been accessible that night by turning left out of the home's side door. (*See, e.g.*, State's Exhibits 59, 44, 60, 63, 64). By turning right out of the side door, M.L. and Giselle would have been traveling towards the street and the homes of their neighbors—including Connie Allshouse and Vic Sanuk. (*See, e.g.*, State's Exhibits 337, 1-6). Moreover, Giselle's vehicle—which was the only car in the Garfield Home's driveway that was not blocked in—was parked to the right of the side door from which Giselle and M.L. exited that night. (*See, e.g.*, State's Exhibits 1-6).

The State also attempted to counter Mr. Nicholson's testimony about what happened that night by highlighting that there were no observable injuries on Mr. Nicholson's face in his booking photo or indicated on the booking sheet when he was taken to jail on September 6, 2018. (*See* Tr. 3883-3885, 4147-4150; State's Exhibit 422; State's Exhibit 306). Det. Biegacki testified that he did not observe any injuries on Mr. Nicholson when he saw him on September 6, 2018. (Tr. 3883-3885). The State repeatedly suggested that Mr. Nicholson was much bigger than M.L. (Tr. 3777-3778, 4140-4142), noting that the listed weight on Mr. Nicholson's booking sheet was 190 pounds. (Tr. 3884; State's Exhibit 422). According to M.L.'s autopsy report, however, he was 169 pounds and 5'9" tall. (State's Exhibit 601). The fact that Mr. Nicholson did not have any observable injuries on his face and weighed more than M.L., however, does not amount to evidence that disproves, beyond a reasonable doubt, that Mr. Nicholson acted in self-defense that night.

Although the State argued that Mr. Nicholson was attempting to harm America when M.L. intervened, as discussed below, America was not a credible witness because the State's own evidence directly contradicted her claims.

2. America was not a credible witness, as her testimony about what happened on September 5, 2018 was not supported—and often contradicted—by the evidence and testimony presented at trial.

America Polanco and Mr. Nicholson were the only two testifying witnesses with firsthand knowledge about the events that unfolded at 4838 East 86th Street on September 5, 2018. However, America's testimony about those events were contradicted by the evidence presented by the State at trial.

First, America testified that after she received the text message from Terricko around 8:50 PM, Mr. Nicholson grabbed her from her neck and strangulated her to the point that she felt like she stopped breathing. (Tr. 3387-3388, 3671, 3706). Somehow, America was able to get Mr. Nicholson off of her. (*See* Tr. 3388). Sgt. Cramer took photographs of America's purported injuries at Marymount Hospital just after 12:00 AM on September 6, 2018; those photographs were presented at trial as State's Exhibits 253 through 258). (Tr. 3094-3095). In Sgt. Cramer's photographs, there is no visual indication of petechiae—a common sign of strangulation—or redness around America's neck. (*See* State's Exhibits 253, 256, 257, 258; Tr. 3706-3007). Indeed, no testimony or evidence offered by the State at trial indicated that America presented to the emergency department on September 5, 2018 with petechiae or any other injuries that would have been expected had she, in fact, been strangled to the point that she stopped breathing as she claimed. Although America's medical records from Marymount Hospital reflect that America reported to the attending physician that she had reportedly been strangulated with hands, the medical examination and imaging did not reflect any neck injuries suggestive of strangulation. (*See* State's Exhibit 406). Moreover, there are no visible injuries or redness to America's neck in

Officer Cramer's body camera footage of America at the scene on September 5, 2018. (*See* State's Exhibit 322A at 0:08:19-0:09:40).

Second, Sgt. Cramer testified that America told him at Marymount Hospital that Mr. Nicholson had struck her in the face. (Tr. 3091). However, the photographs Sgt. Cramer took of America's face do not show injuries indicative of America being struck in the face (*see* State's Exhibits 253, 256, 257, 258), and there are no visible injuries on America's face in Officer Cramer's body camera footage of America at the scene on September 5, 2018. (*See* State's Exhibit 322A at 0:08:19-9:40). Indeed, at trial, America did not testify that Mr. Nicholson struck her in the face during the altercation in the bedroom on September 5, 2018.

Third, America acknowledged on cross-examination that she told law enforcement that Mr. Nicholson had repeatedly punched her in the arms while they were in the bedroom arguing on September 5, 2018. (Tr. 3706). However, America did not testify about Mr. Nicholson purportedly punching her in the arms during her initial direct examination on October 3, 2019 or her continued direct examination on October 7, 2019. Moreover, the September 6, 2018 photographs taken by Sgt. Cramer at Marymount Hospital do not show any injuries to America's arms indicative of being repeatedly punched. (*See* State's Exhibit 255, 254; Tr. 4071). Mr. Nicholson acknowledged that he grabbed America's wrist later that evening in the kitchen when he was trying to get America off of him and/or to restrain her. (*See* Tr. 4071). And, in the photographs taken of America at the hospital ER by Sgt. Cramer, there does appear to be a bruise on America's wrist. (*See* State's Exhibit 254; Tr. 4071).

Fourth, America also testified that at some point during their argument in the bedroom, Mr. Nicholson "punched the wall." (Tr. 3388). Indeed, America claimed that M.L. was prompted to come downstairs, in part, that night because he heard Mr. Nicholson "punching the wall and

screaming." (Tr. 3389). Yet, the photographs taken of the bedroom by BCI Agent David Horn in the early morning of September 6, 2018 do not support that testimony. (*See* State's Exhibits 175-180). Moreover, none of the law enforcement agents who searched the home testified at trial that they observed markings on or defects to the bedroom walls suggestive of a punch.

Fifth, America acknowledged that she had deleted her entire text message conversation with Terricko long before Mr. Nicholson saw the "That's good" text message come into America's phone from Terricko—whose phone number was not saved as a contact in America's phone—that night. (*See* Tr. 3717-3718; State's Exhibit 321A). However, America never apparently disclosed to anyone in law enforcement that she had deleted her prior conversation with Terricko before Mr. Nicholson saw the "That's good" text message from Terricko to America. (*See* Tr. 3893-3894). Det. Biegacki testified that the first time he learned that America had deleted her prior text messages with Terricko sometime well before Mr. Nicholson looked at her phone on September 5, 2018 was during America's cross-examination testimony at trial. (*See* Tr. 3893-3894).

Sixth, America testified that when Mr. Nicholson was talking to Terricko on the phone, Mr. Nicholson told Terricko: "If you and her have something going on, you know bad things are going to happen here because I am a big dude." (Tr. 3388; Tr. 3704-3708). Sgt. Cramer testified that America told him the same thing at Marymount Hospital. (Tr. 3111). Mr. Nicholson denied saying that (Tr. 4068), and Terricko testified that Mr. Nicholson never said to him during their phone call that "things were going to get bad for America." (Tr. 3008-3009). America also testified that when Mr. Nicholson was speaking with Terricko on the phone that evening, Mr. Nicholson was angry, yelling, and using swear words at Terricko. (Tr. 3705). However, Terricko testified that, during the September 5, 2018 phone call, Mr. Nicholson was not disrespectful or threatening at any point during the call. (Tr. 3008). Rather, Terricko testified that Mr. Nicholson asked him if

there was anything going on between Terricko and America, Terricko told Mr. Nicholson there was not, and the phone call ended without issue. (*See* Tr. 3008).

Seventh, America testified that after M.L. knocked on the bedroom door, Mr. Nicholson "grabbed [M.L.], took him in the kitchen. Start[ed] beating [M.L.]," and got M.L. on the floor. (*See* Tr. 3390, 3672). Specifically, America testified that Mr. Nicholson was grabbing M.L.'s hands and arms while he was hitting M.L. (Tr. 3672). According to America, when M.L. got up from the floor, Mr. Nicholson grabbed a chair and threw it at M.L., which knocked M.L. down on the ground. [*See* Tr. 3390]. BCI Agent David Horn entered the home sometime after 4:15 AM on September 6, 2018 to take photographs of the home in the condition that it was when he first entered. (*See* Tr. 3122-3124). BCI Agent Horn took photographs of the kitchen as he found it when he entered; in those photographs, all of the kitchen chairs are tucked under the table. (*See* State's Exhibits 147-150). Moreover, nothing in the appearance of the relatively small kitchen supports America's claim that a chair had just been thrown therein. (*See* State's Exhibits 147-150).

To be sure, the testimony from Dr. Todd Barr of the Cuyahoga County Medical Examiner's Office regarding the autopsy he performed of M.L. did not substantiate America's claim that Mr. Nicholson had beaten, hit, and/or thrown a chair at M.L. on September 5, 2018. Dr. Barr testified that, in preparing his autopsy report, he always gives a description of each and every injury observed on the body during the autopsy. (*See* Tr. 3926-3927). At trial, Dr. Barr testified about superficial abrasions (scratches) he observed on M.L.'s body which, Mr. Barr speculated, "may have occurred when [M.L.] fell." (Tr. 3949-3950, 3930-3931). Dr. Barr explained that an abrasion "sort of sloughs off that superficial layer of skin, just like a scratch," while a contusion "has a little bit more force" that, although not necessarily breaking the skin, results in a bruise. (Tr. 3949-3950). At trial, Dr. Barr did not testify that he saw any contusions on M.L.'s body or, for that

matter, any other injuries that would have likely been derived from M.L. being struck, grabbed, or beaten with force or having a chair thrown at him with such force that M.L. was knocked to the ground as America claimed.

Eighth, America testified that while Mr. Nicholson and M.L. were fighting in the kitchen, Mr. Nicholson grabbed her and threw her from the kitchen to the wall in the hallway. (Tr. 3390, 3673). However, none of the photographs BCI Agent Horn took of the kitchen, living, or main floor hallway on September 6, 2018 show signs of a person being thrown into a wall. (*See* State's Exhibits 147-182). Moreover, none of the law enforcement agents who searched the home testified at trial that they observed anything on the main floor that was suggestive of someone being thrown into a wall.

Nineth, America only testified about M.L. calling 911 from his phone on the evening of September 5, 2018. (Tr. 3390, 3673). America never testified that she called 911 that evening from her cellphone, or that she gave M.L. her phone to make any call. Indeed, based on her testimony, the State told the jury in its closing argument that M.L. called the police at 9:35 PM and then called the police again at 9:37 PM on September 5, 2018. (Tr. 4285). However, the 911 Call Detail Reports presented at trial by the State as State's Exhibit 315 reflects that a 911 call was placed at 9:35 PM on September 5, 2018 by phone number (216) 903-6245. (*See* Tr. 2530-2531). America testified that her phone number was (216) 903-6245. (Tr. 3306). State's Exhibit 316 shows that a 911 call was also placed at 9:37 PM on September 5, 2018 by phone number (216) 903-1137 (Tr. 2532-2533), which was suggested as being M.L.'s phone number. (*See* Tr. 3555-3556. *See also* State's Exhibit 578, Attachment K, "Item 7 Call History").

Tenth, America testified that, at her direction, M.L. called Giselle to warn her not to come into the home on September 5, 2018. (Tr. 3390, 3673). However, the call history extracted from

M.L.'s cellphone by BCI Computer Forensic Scientist Natasha Branham does not reflect a call was made from M.L.'s cellphone to Giselle at any point on September 5, 2018. (*See* Tr. 3555-3556. *See also* State's Exhibit 578, Attachment K, "Item 7 Call History").

Eleventh, when law enforcement responded to the scene on September 5, 2018, America immediately and repeatedly told GHPD Officer Cramer at the scene that Mr. Nicholson had "a lot of guns" inside of the home. (State's Exhibit 322A at 0:07:45-0:07:51, 0:08:45-0:08:50, 0:09:37-0:09:40, 0:14:54-0:15:05). However, after multiple law enforcement officers allegedly searched the home, garage, and/or vehicles in the early morning of September 6, 2018, only the one firearm—which Mr. Nicholson told Lt. Vargo he would be leaving in the basement—was found. (*See, e.g.*, Tr. 2853-2859, 2893-2898, 2911-2913, 2929-2934, 3098-3099, 3111-3114, 3151-3152).

Twelfth, at the scene, America told Officer Cramer that Mr. Nicholson had a "big" (i.e., long) gun (State's Exhibit 322A at 0:14:54-0:15:05), which suggested to law enforcement that Mr. Nicholson had an AK-47 or an AR-15 firearm inside of the home. (*See* Tr. 2855-2856, 2870-2872, 2894, 2929, 2931-2932, 3096-3097). However, law enforcement never located a "long gun" inside of the home, his vehicle, and/or the detached garage at any point after September 5, 2018, and the State presented no evidence or testimony actually supporting America's claim that Mr. Nicholson even owned a "long gun." This is significant, as America alleged that, of the two times prior to September 5, 2018 Mr. Nicholson allegedly had pointed a gun at America (Tr. 3316), "one time [was when Mr. Nicholson] put a gun, one of the big guns, in [America's] forehead." (Tr. 3302).

Thirteenth, America told multiple responders to the scene that on September 5, 2018 that Mr. Nicholson had threatened to kill any law enforcement officers who attempt entry into the home. (*See* State's Exhibit 322A at 0:21:30-0:21:55, 0:26:11-0:27:20). However, it was undisputed that Mr. Nicholson was respectful to the responding law enforcement officers during

the entire encounter; was cooperative and peaceful whenever he surrendered; and was taken into custody without issue on September 6, 2018. (*See, e.g.*, Tr. 2790-2792, 2700, 2707, 2822-2823, 2827). Moreover, Lt. Vargo testified that Mr. Nicholson immediately told him when they spoke on the phone on September 5, 2018 that he had no intention of harming any police officers. (Tr. 2792). BCI Agent Horn testified that two of the handwritten notes on the basement desk were addressed were non-threatening to law enforcement (State's Exhibits 237 and 238; Tr. 4102), including one note specifically apologizing to law enforcement for having "to see this shit." (State's Exhibit 238). When SEALE/SWAT Det. Ben Lang arrested Mr. Nicholson, Mr. Nicholson apologized "for having you guys out here" and Lang thanked him for being a gentleman during the surrender. (Tr. 2822-2823). No weapons were found on Mr. Nicholson's person when he was patted by after surrendering on September 6, 2018. (Tr. 2822-2823).

3. The State failed to prove, beyond a reasonable doubt, that Mr. Nicholson did not act in self-defense.

Besides Mr. Nicholson, America was the only other person who was present for the entire incident on September 5, 2018. Although the State knew, through Dr. Fabian's report, what Mr. Nicholson claimed happened on September 5, 2018, the State never asked America—or rather, utilized its substantively leading style of questioning to testify on America's behalf—about whether Mr. Nicholson's service weapon had been removed from his trunk by M.L. and/or Giselle on September 5, 2018. The State likewise did not ask America if she ever put Mr. Nicholson's service weapon and/or gun belt in Mr. Nicholson's trunk on September 5, 2018 during trial.

Moreover, as set forth above, America was not a credible witness. Given the tragic events that took place on September 5, 2018, it certainly would be understandable for America to not have entirely clear recollection of the events that took place that night. In light of America's unimaginable loss, it also stands to reason that she would have an interest in portraying, or even

misremembering, her four-year relationship with Mr. Nicholson as nothing but bad. Notwithstanding the loss America has suffered, it is clear from the record that America was not—for whatever reason—a credible witness.

Notwithstanding Giselle's National Honor Society membership and M.L.'s video-game-playing hobby (*see* Tr. 4327-4328), if America told her children that Mr. Nicholson was going to harm them or her that night—even if untrue—it stands to reason that they would have done whatever they believed was necessary in order to protect their mother. Indeed, it was undisputed that M.L. intervened in the argument between America and Mr. Nicholson that night out of concern for his mother's safety. (*See* Tr. 4069-4076). Moreover, in Officer Berri Cramer's body camera from the scene, a GHPD dispatcher radioed to all GHPD law enforcement to "Be advised, female who they have at Metro, Giselle Lopez, she was in surgery. However, she told staff at the hospital that her mother was also shot and was in the house possibly." (State's Exhibit 322A at 1:31:42-1:32:50). Thus, if Giselle believed when she arrived home that America had been shot or otherwise harmed by Mr. Nicholson, reason and common sense support the conclusion that Giselle and M.L. would have—as Mr. Nicholson testified that he believed they were going to—used Mr. Nicholson's service weapon on him that night. (*Compare to* Tr. 4289). The State cannot rebut Mr. Nicholson's self-defense claim by arguing generally that this was not something Giselle and/or M.L. would do.

The State primary means of challenging Mr. Nicholson's self-defense claim was by calling Lt. Vargo as a rebuttal witness at trial. To that end, his testimony is just as significant for what it says as it is for what it does not. Specifically, Lt. Vargo was asked:

> MS. FARAGLIA: Lieutenant Vargo, we're not going to go through the whole night again.
>
> LT. VARGO: Okay.

MS. FARAGLIA: But, suffice it to say that you had an opportunity to review your bodycam and, in fact, you memorialized your findings in a statement form of what you heard this defendant say that evening in the phone?

LT. VARGO: Correct.

MS. FARAGLIA: All right. And is it also fair to say that you transcribed or had transcribed what you yourself heard [on his body camera recording] at certain times?

LT. VARGO: Yes.

MS. FARAGLIA: All right. At any point in time during the time you were speaking to this defendant, **prior to your camera going off**, did he indicate to you any type of self-defense theory?

LT. VARGO: No.

(Emphasis added.) (Tr. 4215-4216). Lt. Vargo also testified on rebuttal that Mr. Nicholson never told him about America attacking him or that anyone took a gun or a holster out of the trunk of Mr. Nicholson's vehicle that night. (*See* Tr. 4216-4218).

However, Lt. Vargo's testimony that Mr. Nicholson never indicated that he was acting in self-defense that night during his phone call before Lt. Vargo's body camera inexplicably stopped working was directly contradicted by the evidence the State presented at trial. Indeed, as early as 10:30 PM, Mr. Nicholson's father, Robert Nicholson Sr. can be overheard on Officer Berri Cramer's body camera saying to Mr. Nicholson on the phone: "If somebody jumped you, they'll [law enforcement] figure all of that out." (State's Exhibit 322A at 0:45:40-0:45:50). At 10:30 PM, Lt. Vargo was on the three-way call with Mr. Nicholson and Robert Sr. when Robert Sr. said this to Mr. Nicholson and in fact, Lt. Vargo attempted to interrupt Robert Sr. while he was speaking a couple of times about this. (State's Exhibit 324B at 0:28:30-0:30:50).

It follows, then, that Lt. Vargo would have, in fact, heard whatever it was that Mr. Nicholson was saying on the call at 10:30 PM that prompted Robert Sr. to say to Mr. Nicholson in response: "If somebody jumped you, they'll [law enforcement] figure all of that out." (*See* State's Exhibit 324B at 0:28:30-0:30:50, State's Exhibit 322A at 0:45:40-0:45:50). Put simply, Lt. Vargo was not truthful when he testified on rebuttal that prior to his body camera going off, Mr. Nicholson did not indicate to him any type of self-defense theory (Tr. 4215-4216), as such theory was clearly articulated to Lt. Vargo by Mr. Nicholson by at least 10:30 PM on September 5, 2018. (*See* State's Exhibit 324B at 0:28:30-0:30:50).

Furthermore, at 10:50 PM, Mr. Nicholson can be heard telling Lt. Vargo about M.L. coming downstairs and trying to break down the bedroom door that evening, to which Lt. Vargo responds: "Tell me that again. You said he [M.L.] was in attack mode?" (*See* State's Exhibit 324B at 0:50:00-0:50:30). Lt. Vargo talked to Mr. Nicholson about what type of corporal punishment a non-parent is (or is not) legally entitled to use. (State's Exhibit 324B at 0:50:30-0:51:28). Clearly responding to what Mr. Nicholson just told him, Lt. Vargo said: "For a 17-year-old…For, first of all, you're already, things are already tense inside the house, and then he's going to square up on you? This is your house, right?" (State's Exhibit 324B at 0:51:28-0:52:45).

To be sure, Lt. Vargo's rebuttal testimony regarding what Mr. Nicholson did or did not say to him during their phone conversation was belied by Lt. Vargo's earlier testimony during the State's case-in-chief. When asked pointed questions about his conversation with Mr. Nicholson by defense counsel, Lt. Vargo responded: "No, I don't remember – there's nothing – without reviewing it again, I don't recall anything written here, **and I don't remember any conversation we had about what exactly happened during the shooting incident, or how it had occurred."** (Emphasis added.) (Tr. 2796). (*See also* Tr. 2749). Indeed, over defense counsel's objection, the

trial court allowed the State to present testimony from Lt. Vargo during its case-in-chief that was almost exclusively derived from his review of the transcript he made in June 2019 while watching his body camera recording (State's Exhibit 342), as Lt. Vargo could not independently recall his conversation with Mr. Nicholson. (*See* Tr. 2748-2752).

Put simply, the State failed to prove, beyond a reasonable doubt, that Mr. Nicholson did not act in self-defense on September 5, 2018. Thus, the jury's verdict was not supported by sufficient evidence and/or was against the manifest weight of the evidence.

4. The State must not be allowed to "disprove" Mr. Nicholson's self-defense claim by failing to obtain, destroying, and/or losing all evidence that has a bearing on Mr. Nicholson's self-defense claim.

Mr. Nicholson's description of the events of September 5, 2018 was extensively detailed in the expert report prepared by Dr. Fabian in anticipation of, if necessary, the mitigation phase of Mr. Nicholson's trial. (Defendant's Exhibit A). After Dr. Fabian's unredacted mitigation report was given to the State by defense counsel on or around August 24, 2019 (*see* Tr. 2712-2713), the State was apprised of Mr. Nicholson's anticipated trial testimony and defense. This included, most notably, Mr. Nicholson's claim that he shot M.L. and Giselle in self-defense after they retrieved the service weapon issued to him by his employer, Paragon Systems, from the trunk of his vehicle which, Mr. Nicholson believed, they were going to use to shoot him with.

The State was aware GHPD detectives found Mr. Nicholson's service weapon in the trunk of his vehicle on September 13, 2018. The State also knew that GHPD detectives returned that service weapon to Mr. Nicholson's employer a few days later without first collecting any DNA evidence from it. Thus, the State apparently realized that it needed to find some witnesses and put together some evidence in order to prove, beyond a reasonable doubt, that Mr. Nicholson did not act in self-defense on September 5, 2018. Notably, although Lt. Vargo was made aware of Mr. Nicholson's self-defense claims on the night of September 5, 2018, the State apparently did

nothing prior to August 24, 2019 to look into that claim. Indeed, the State acknowledged that, after receiving Dr. Fabian's mitigation report, it "investigated and found additional witnesses who would provide additional testimony disproving" Mr. Nicholson's version of events. (*See* Tr. 2713).

Det. Biegacki met with America on September 5, 2019 to discuss the service weapon GHPD found in the trunk of Mr. Nicholson's. (*See* Tr. 3715, 3222-3225). During that interview, America told Det. Biegacki that she found Mr. Nicholson's service weapon in the trunk of his vehicle while she was putting Mr. Nicholson's property from inside of the home in his vehicle back in September 2018. (Tr. 3715).

Presumably from speaking with America, the "additional witnesses" found by the State to "disprove" Mr. Nicholson's self-defense claim were Carlos Nieves, the friend of America's oldest son, Roberto, and Estomarys Santos, America's friend. (*See* Tr. 2710-2713). Both Carlos and Estomarys claimed at trial they were present on September 13, 2018 at America's Garfield Heights home when Mr. Nicholson's service weapon was found. Yet, as described above, their testimony was not consistent with each other or the testimony of Roberto and America. Taken together, the testimony of Roberto, America, Estomarys, and Carlos was not credible because they did not offer a consistent and cohesive depiction of the events that took place on September 13, 2018.

The State also apparently realized that it had no explanation as to why GHPD officers did not find Mr. Nicholson's service weapon on September 6, 2018 when it searched the scene. Indeed, the State has yet to provide an explanation as to where Mr. Nicholson's service weapon was if it was not inside of the home, inside of the detached garage, or inside of any of the vehicles that GHPD officers all claimed they searched on September 6, 2018.

Officer Pitts generated a second report on August 13, 2019 at the State's request. (Tr. 2864). Officer Pitts testified that the State asked him to prepare that second report a year later "to

further elaborate more specifically what [his] exact actions were" with regard to this case. (*See* Tr. 2863). Although Officer Pitts and Officer Simia were allegedly working together when they assisted with executing the search warrant on September 6, 2018, Officer Pitts's second report from August 13, 2019 only described their search of the home. (*See* Tr. 2865-2866). Put simply, when Officer Pitts detailed his exact actions at the State's request on August 13, 2019, he did not claim that he and Officer Simia searched any vehicles in the early morning of September 6, 2018. (Tr. 2865-2866, 2881-2882). Officer Pitts was also unable to provide a plausible explanation as to why his body camera with a 12-hour recording capacity—which should have been activated during any searches he conducted—was not activated during the search that took place less than eight hours after he responded to 4838 East 86th Street. (*See* Tr. 2876-2877, 2880-2883). At trial, Officer Pitts conceded that it had been brought to Officer Pitts's attention that "whether or not Mr. Nicholson's vehicle had been searched" on September 6, 2018 "had become an issue in this case." (Tr. 2867-2868). Thus, although Officer Pitts did not claim in either his first or his second report that he searched the vehicles on September 6, 2018, at trial, Officer Pitts testified that he searched the vehicles parked in the driveway—including Mr. Nicholson's vehicle—but did not find anything significant, such as Mr. Nicholson's service weapon. (*See* Tr. 2862-2877, 2853-2861).

Prosecutors met with GHPD Officer David Simia on September 12, 2019 to discuss his search of the scene. (Tr. 2916-2917). During that interview, someone in the Cuyahoga County Prosecutor's Office produced a Word document with information that was allegedly provided by Officer Simia to them on that day regarding his alleged search of Mr. Nicholson's vehicle on September 6, 2018. (Tr. 2916-2917). Notably, Officer Simia testified that he never reviewed that report. (Tr. 2916-2917). In fact, Officer Simia claimed that he did not know it had even been created. (*See* Tr. 2916-2917).

i. The evidence presented about GHPD's alleged search of Mr. Nicholson's vehicle on September 6, 2018 was inconsistent and thus, not credible, and the State "lost," failed to preserve, or failed to obtain all evidence related to the service weapon, which was relevant to Mr. Nicholson's self-defense claim.

In no uncertain terms, the State failed to obtain or failed to preserve all evidence that related to the service weapon being in the trunk of Mr. Nicholson's vehicle on September 6, 2018. Taken with the inconsistent testimony about the service weapon, the absence of the below-described evidence is significant.

First, notwithstanding GHPD's policy that patrol officers activate their body cameras when they are conducting searches of vehicles and the 12-hour life of GHPD's body cameras in September of 2018, there was no body camera footage from the alleged search of the trunk of Mr. Nicholson's vehicle on September 6, 2018 by GHPD Officers Pitts and/or Simia.

Second, there were no photographs apparently taken at any point during the alleged search of Mr. Nicholson's trunk on September 6, 2018 by GHPD Officer Pitts, Officer Simia, Lt. Petrick, and/or Sgt. Cramer.

Third, Officer Pitts did not include in his initial report any mention that he—or anyone else, for that matter, from the GHPD—searched the home and/or Mr. Nicholson's vehicle on September 6, 2018.

Fourth, when Officer Pitts was asked to write a second report by the State just before trial commenced in this case, he still did not write in his second report that he and/or anyone else from the GHPD searched Mr. Nicholson's vehicle on September 6, 2018. This is significant, as he did include in his second report the assertion that he and Officer Simia conducted a search of the home that day.

Fifth, BCI Agent Horn testified that he did not see anyone from GHPD searching the vehicles when he was there taking photographs of the home on September 6, 2018.

Sixth, although Lt. Petrick claimed he was at the scene and searched specifically Mr. Nicholson's vehicle on September 6, 2018, his name—for some remarkable reason—is the only name that was not recorded in the crime scene log. Moreover, Sgt. Cramer and Officer Simia both did not recall seeing Lt. Petrick search any of the vehicles on September 6, 2018, including Mr. Nicholson's vehicle. Although Lt. Petrick said he searched Mr. Nicholson's vehicle with Sgt. Cramer, Sgt. Cramer explicitly testified that he did not search any vehicles on September 6, 2018.

Seventh, it was undisputed by all accounts that no other firearm beyond the one that Mr. Nicholson said he was leaving in the basement, and that was found in the basement, was recovered by law enforcement on September 6, 2018 even though GHPD officers testified that they searched the home thoroughly that day, and that the closet in America's bedroom was among the locations that they thoroughly searched.

Eighth, half of Lt. Vargo's conversation with Mr. Nicholson and Angel on the night of the incident was somehow "lost" when Lt. Vargo's body camera allegedly malfunctioned. Mr. Nicholson and Angel both testified that Mr. Nicholson told Lt. Vargo about his self-defense claims, that M.L. attacked him, and that Mr. Nicholson witnessed M.L. retrieving his service weapon from the trunk of his vehicle and, just before discharging his firearm, believed that Giselle and M.L.—who had possession of his service weapon—were going to shoot Mr. Nicholson. Notably, Lt. Vargo's body camera was miraculously working again after Mr. Nicholson surrendered sometime before 2 AM on September 6, 2018. (*See* State's Exhibit 324C).

Ninth, it is still wildly unclear from the evidence and testimony presented at trial precisely what America told GHPD detectives about Mr. Nicholson's service weapon as it relates to the trunk of Mr. Nicholson's vehicle. The State elicited testimony suggesting that Roberto placed the service weapon and gun belt in the trunk of the vehicle on September 13, 2018 after finding it in

America's bedroom closet, and that America contacted law enforcement to let them know about this. But America also apparently told law enforcement on September 13, 2018 that she "found" the gun and gun belt in Mr. Nicholson's trunk when she was loading Mr. Nicholson's belongings in his vehicle. Moreover, as set forth in the Statement of Facts above, the testimony of Roberto Lopez, Carlos Nieves, Estomarys Santos, and America regarding the circumstances through which the four of them were loading Mr. Nicholson's belongings from inside of the home into Mr. Nicholson's white Volkswagen Jetta were substantively and significantly inconsistent with each other.

Moreover, tenth, when Mr. Nicholson's service weapon and gun belt were allegedly discovered by GHPD on September 13, 2018, the photographs depicting how the gun belt and service weapon were positioned in the trunk were somehow "overwritten" despite the fact that the CAD system to which these photographs were allegedly uploaded "is pretty reliable." (*See* Tr. 2968).

Eleventh, although GHPD detectives typically saved to their computer, copied to a CD< and/or printed out all photographs at the time they are uploaded into GHPD's CAD system (*see* Tr. 2968), this was apparently not done in this case for some unknown reason.

Twelfth, although Lt. Petrick testified that all sixteen photographs he allegedly took at 4838 East 86th Street during the September 13, 2018 search warrant execution were dated "September 13, 2018" in the bottom right corner (Tr. 2956-2958), that claim was not accurate. For reasons not explained or asked about at trial, State's Exhibits 287 and 289 do not have "September 13, 2018" in the bottom right corner. (*See* State's Exhibits 287, 289). As discussed more extensively in Proposition of Law No. 3, Mr. Nicholson was prejudiced by the lost photographs GHPD claimed they took on September 13, 2018 during the search warrant execution. These photographs would

have been relevant to Mr. Nicholson's self-defense claim and/or to impeaching the testimony of Officer Pitts, Officer Simia, Lt. Petrick, Roberto, Carlos, Estomarys, America, and/or Det. Stroe.

Thirteenth, there was no body camera footage obtained when GHPD executed the search warrant on Mr. Nicholson's car. Officer Simia testified that GHPD officers should have their body camera turned on when searching a vehicle. (Tr. 2906). Neither Lt. Petrick, Det. Stroe, Det. Menary, nor Patrol Officer Zoltan Kovesdi (Tr. 2946) were apparently wearing an activated body camera on September 13, 2018 when the search warrant was executed upon Mr. Nicholson's vehicle, as no such body camera footage was presented at trial. (*See* Tr. 2970). Although the GHPD detectives were not issued body cameras according to Sgt. Cramer (*see* Tr. 3114-3115, 3084-3086), no evidence or testimony was presented at trial indicating whether Patrol Officer Kovesdi—who was in uniform (State's Exhibit 287)—was wearing a body camera on September 13, 2018 when Mr. Nicholson's vehicle was searched that day. Patrol Officer Kovesdi was not called to testify at trial by either the State or defense counsel.

Furthermore, law enforcement did not obtain DNA swabs from the service weapon that GHPD found in the trunk of Mr. Nicholson's vehicle on September 13, 2018 before it was returned to Mr. Nicholson's employer, Paragon Systems, sometime shortly after it was recovered. (Tr. 3862-3864). Thus, Mr. Nicholson had no ability to obtain DNA swabbing from the firearm in order to bolster his self-defense claim while he was in jail awaiting trial.

Moreover, GHPD did not impound Mr. Nicholson's vehicle after he was taken into custody on September 6, 2018. (*See* Tr. 2946). Thus, any evidence that could have been reliability obtained therefrom was not adequately preserved and protected against tampering.

Although this point has been made multiple times herein, it bears repeating that the State never provided any explanation as to why only Mr. Nicholson's personal firearm was recovered

from law enforcement's allegedly thorough search of the home, vehicles, and detached garage sometime after 2:00 AM on September 6, 2018 but, somehow, Mr. Nicholson's service weapon was "discovered" seven days later in the trunk of Mr. Nicholson's vehicle. After Giselle and M.L. were shot, Mr. Nicholson remained inside of the home until he was taken into custody in the early morning of September 6, 2018—where he has been ever since. Given the notes found in the basement by BCI Agent Horn on September 6, 2018, it appears that Mr. Nicholson was almost certainly in the basement throughout the pendency of the standoff with law enforcement. Thus, Mr. Nicholson did not seemingly have the opportunity to hide the service weapon America claimed he kept in the bedroom closet before Mr. Nicholson was taken into custody. Indeed, neither Roberto nor Carlos testified that the service weapon was hidden or otherwise concealed when it was allegedly found in America's bedroom closet on September 13, 2018.

ii. The State—not Mr. Nicholson—must bear the burden of law enforcement's failure to obtain and/or failure to preserve evidence related to Mr. Nicholson's self-defense claim.

After Mr. Nicholson was taken into custody on September 6, 2018, he did not have access to any of the evidence that would have bolstered or otherwise lent credence to his self-defense claim and/or his account of the events that took place that evening. Indeed, because it was the State that sought to deprive Mr. Nicholson of his liberty and life, it was incumbent upon law enforcement to competently obtain, preserve, and provide all evidence relevant to this case. However, law enforcement failed to meet its obligation to do this, and the State should not be allowed to reap the benefit of law enforcement's negligent, reckless, and/or intentional malfeasance. This Court must not allow the State to "disprove" Mr. Nicholson's self-defense claim on account that all evidence that could have supported it was not obtained, lost, and/or destroyed by law enforcement.

When the search warrants were executed on September 6, 2018 and September 13, 2018,

law enforcement knew that Mr. Nicholson was being investigated for homicide offenses that, if charged, could result in him either spending the rest of his life in prison or, as was the case here, sentenced to death. It was therefore incumbent upon all persons acting as part of the law enforcement arm of the State of Ohio to ensure that all evidence—including material, exculpatory evidence and/or potentially useful evidence to Mr. Nicholson—was properly collected, documented, and preserved in the event that Mr. Nicholson was criminally charged.

Mr. Nicholson had neither an obligation nor an ability to ensure that law enforcement turned on their body cameras when they executed the search warrants on September 6, 2018 and September 13, 2018. Mr. Nicholson had neither an obligation nor an ability to direct law enforcement to take photographs of his vehicle when they allegedly searched it on September 6, 2018. Mr. Nicholson could not have advised law enforcement that they needed to make sure all photographs they took on September 13, 2018 of his vehicle were properly preserved, and likewise had no way of making sure these photographs were not, as GHPD detectives claimed, inexplicably "overwritten."

Moreover, after the service weapon was found in Mr. Nicholson's trunk on September 13, 2018, it was law enforcement—not Mr. Nicholson—who could have told Paragon Systems that the firearm needed to remain in the custody of GHPD up until any criminal prosecution of Mr. Nicholson was completed. It goes without saying that the way in which the gun belt and firearm were found in the trunk of Mr. Nicholson's vehicle after the September 5, 2018 incident was extremely relevant to his self-defense claim. When GHPD first looked in the trunk of Mr. Nicholson's vehicle, did the gun belt and/or service weapon appear to have been thrown in there or placed inside of bags deliberately? Did the service weapon or gun belt visibly appear to have DNA material on them that was transferred during the September 5, 2018 incident? An actual

depiction of the way in which these two items were found would have not only offered answers to these—and potentially other—questions about Mr. Nicholson's self-defense claim but would also have had a bearing on Mr. Nicholson's credibility regarding the events that he claimed took place that evening and the credibility—or lack thereof—of numerous persons, including America and the investigating GHPD officers and detectives who testified at trial.

Again, it bears repeating Lt. Vargo's body camera only recorded approximately one half of his three-to-four-hour phone conversation with Mr. Nicholson that evening. (*See* Tr. 2783, 2790). Thus, Lt. Vargo's June 2019 transcript of his conversation with Mr. Nicholson accounted for only 1.5 hours of their three-to-four-hour phone call. Moreover, of those 1.5 hours recorded on his body camera, only the "clearly" audible portions were transcribed by Lt. Vargo and included in his June 2019 transcript/report, State's Exhibit 342. (*See* Tr. 2796). For those reasons, the trial court ultimately sustained defense counsel's objection to admitting State's Exhibit 342. (*See* Tr. 2748-2751, 3987, 4000). Although Lt. Vargo supposedly created a report on September 15, 2018 that contained information from his phone conversation with Mr. Nicholson before he reviewed his own body camera footage that report—initially offered as State's Exhibit 343—was withdrawn by the State without explanation. (Tr. 2748-2751, 3987).

The State had the burden to disprove that Mr. Nicholson acted in self-defense. The trial court must have believed that Mr. Nicholson presented at least a sufficient enough showing of self-defense to warrant the self-defense instruction, as it was given by the trial court in this case. (Tr. 4258-4261). The State presented no physical evidence to rebut Mr. Nicholson's self-defense claim and did not elicit testimony from the only other person with actual knowledge of the events that evening—America Polanco—to refute Mr. Nicholson's claims about his service weapon being retrieved from the trunk of his car by M.L.; Giselle and/or M.L. attempting to use Mr. Nicholson's

service weapon on him; and/or America putting Mr. Nicholson's service weapon in the trunk of his vehicle after the incident on September 5, 2018. The only attempt the State made was calling Lt. Vargo as a rebuttal witness, but Lt. Vargo himself already acknowledged that his body camera did not record the entire conversation; that he could not hear, and therefore, did not transcribe, everything that was recorded by his body camera; and that he did not have any independent recollection of "**any conversation [he] had [with Mr. Nicholson] about what exactly happened during the shooting incident, or how it had occurred."** (Emphasis added.) (Tr. 2796). Thus, the State did not meet its burden in proving that Mr. Nicholson did not act in self-defense because it offered neither evidence nor testimony refuting Mr. Nicholson's account.

The prosecutor is more than legal counsel employed to properly and zealously represent the interests of the State or to prosecute a cause of action; it is incumbent upon the prosecutor to see that justice is done—even if to do so means that the prosecution's own case is weakened. *See, e.g.*, *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This requirement extends not only to the individual prosecutor or assistant prosecutor assigned to the case. The State is responsible for any information known to any other assistant prosecutor and any information known to any law enforcement official. Law enforcement officers are as much a part of the prosecution as the prosecutor, and as much agents of the State as any prosecutor or assistant prosecutor. *Giglio v. United States*, 405 U.S. 150, 154 (1972).

In sum, the trial court determined that the self-defense instruction was warranted in this case (Tr. 4258-4261) and the State did not object to that instruction being given (Tr. 4269). The State had the burden of disproving Mr. Nicholson's self-defense claim but did not present any credible evidence and/or testimony refuting his testimony about what took place on September 5, 2018, including Mr. Nicholson's claim that he acted in self-defense. Among others, a mere

photograph of the inside of Mr. Nicholson's trunk during GHPD's September 6, 2018 execution of the search warrant would have either bolstered or discredited Mr. Nicholson's self-defense claim. Law enforcement bore the responsibility of properly documenting, recording, obtaining, and preserving all evidence in this case. As set forth extensively herein, GHPD quite plainly failed to do so.

The State cannot be allowed to meet its burden of proving, beyond a reasonable doubt, that Mr. Nicholson did not act in self-defense by arguing that no other evidence or testimony—other than his own testimony and the testimony of his mother—supports Mr. Nicholson's self-defense claim. Indeed, all actual evidence that would have had any bearing on Mr. Nicholson's self-defense claim and his account of the events that took place on September 5, 2018 was not properly documented, obtained, and/or preserved by law enforcement. The State—not Mr. Nicholson—must bear the burden of law enforcement's numerous investigatory failures, and the State must not be permitted to rely upon the absence of evidence GHPD did not properly document, record, obtain, and/or preserve in order to meet its burden of disproving Mr. Nicholson's testimony about what happened on September 5, 2018 and, more narrowly, that he acted in self-defense.

PROPOSITION OF LAW NO. 2

> **The introduction and admission of prejudicial and improper character and other acts evidence and the failure of the trial court to limit the use of the other acts evidence and/or to give the appropriate cautionary instruction to the jury denied Mr. Nicholson his rights to a fair trial, due process, and a reliable determination of his guilt and sentence as guaranteed by U.S. Const. amends. V, VI, VIII and XIV; and/or Ohio Const. art. I, §§ 10, 16.**

A. Over defense counsel's repeated objections, the trial court allowed the State to present other-acts evidence and testimony related to Mr. Nicholson's alleged interactions with America and her children in the three years leading up to September 5, 2018.

As described herein, the trial court permitted the State—over defense counsel's objection—to offer evidence and testimony regarding incidents between Mr. Nicholson and America, M.L., and/or Giselle Lopez that allegedly occurred within the three years prior to September 5, 2018.

1. Defense counsel unsuccessfully attempted to exclude other-acts evidence related to America and her children before trial.

Defense counsel moved to exclude any evidence relating to other crimes, wrongs, or acts on May 3, 2019. (R.87, Motion to Exclude Any Evidence Relating to Other Crimes, Wrongs or Acts). On August 22, 2019, defense counsel file another Motion *in Limine* that sought to exclude the other acts evidence it anticipated—based on defense counsel's review of the State's discovery materials—the State was going to seek to introduce at trial. (R.179).

On September 3, 2019, the State filed a Combined Notice of Intent to Introduce "Other Acts" Evidence Pursuant to Evid.R. 404(B) and Brief in Opposition to Defendant's Motion to Exclude Such Evidence. (R.201). In that Motion, the State expressed its intention to introduce evidence of: (1) a March 21, 2018 incident involving Giselle Lopez and Mr. Nicholson; (2) two "domestic abuse" incidents that allegedly occurred between Mr. Nicholson and America Polanco in 2015; and (3) evidence of Mr. Nicholson's repeated threats of violence to America Polanco,

M.L., and/or Giselle Lopez over the span of years. (R.201). Defense counsel did not file any response to the State's September 3, 2019 Combined Notice and Brief in Opposition.

At the September 5, 2019 hearing on all pretrial motions, the trial court heard arguments from counsel regarding the other-acts evidence Mr. Nicholson sought to exclude and the State intended to introduce. (Tr. 64-73). In addition to being irrelevant and/or unduly prejudicial, defense counsel argued that the State could not offer substantial proof that Mr. Nicholson committed those other acts, and that the other-acts evidence did not fall under one of the Evid.R. 404(B) exceptions. (Tr. 64-67).

The State maintained that the other-acts evidence it sought to introduce was relevant and admissible "to show the Defendant's motive to commit the murders, his intent to commit the murders, and the lack of mistake or accident in doing do." (Tr. 67-72). The State specifically cited to *State v. Nields*, 93 Ohio St. 3d 6, 2001-Ohio-1291, 752 N.E.2d 859 and *State v. Thompson*, 8th Dist. Cuyahoga No. 81322, 2003-Ohio-3939, in support of its position.

In *Nields*, this Court held that admission of testimony from a police officer who had responded to a domestic violence call involving the defendant and victim "several weeks before the murder" was permissible because it tended to show motive, intent, absence of accident, and the tumultuous relationship between the defendant and the victim just weeks before the murder. *See* 93 Ohio St. 3d at 22. Similarly, in *Thompson*, the Eighth District Court of Appeals upheld the trial court's admission of testimony regarding a domestic violence incident between the defendant and victim that occurred less than two months before the victim was murdered. 2003-Ohio-3939 at ¶¶ 4-11, 21-27. Unlike in this case, the defendant in *Thompson* claimed that someone else in the apartment building where the victim's body was found killed the victim. *Id.* at ¶ 27. Thus, the earlier domestic violence incident between the victim and defendant was also found to be probative

of the perpetrator's identity. *See id.*

Relying upon these cases, the trial court denied Mr. Nicholson's motion to exclude the other-acts evidence, *in limine*, at the September 5, 2019 hearing. (Tr. 72; R.218, Journal Entry).

2. The trial court allowed the State to elicit testimony from America and present evidence about alleged other-acts Mr. Nicholson allegedly committed against her and her children.

When it became clear during the State's direct examination of America that the State was going to begin asking America about other-acts between America and Mr. Nicholson, defense counsel renewed its pretrial objection to such evidence and testimony. (Tr. 3293-3297, 3335-3337, 3365-3366). The following discussion on the State's presentation of other-acts evidence took place in sidebar:

> MR. MACK: Your Honor, I don't want to continue to object to Anna's direct examination because I don't want to be disruptive, but I just want to put our objection on the record as it relates to any 404(B), I want to renew that, as it relates to prior incidents with the kids, any prior incidents with America. I don't believe that it's probative. I believe that it's unfairly prejudicial. A lot of this is not relevant for the reason that we're here.
>
> We're going through the entire history from 2014 all the way up until the day of the incident, and there's got to be a cutoff point. I understand some foundation is necessary, but what we're getting into isn't probative. So thank you for hearing me.
>
> MR. SCHROEDER: We would renew the same arguments that we made in the briefs that we filed prior to trial. We're going to get into a series of statements that Mathew Nicholson made directly announcing his intention and his threats to kill the victims that he killed in this case. It's not just relevant evidence. It's the most relevant evidence that we're going to get into in the entire trial. I mean, you could not have 404(b) more directly relevant to that.
>
> MR. MACK: Yeah, but there have been incidents that are

discussed that are not even related to this. She said in her testimony that there was [*sic*] no threats or anything like that to the kids at this point. We're talking about things that aren't even germane. So get to what you're talking about. That's what I'm asking for.

THE COURT: I'm going to overrule your objection. It does show absence of mistake, it does show intent, and he certainly made threats not only to her but consequences to her children, if, in fact, she intended to have him leave the household. So I think it's very relevant.

MR. MACK: Thanks. I'm not going to object anymore.

THE COURT: I appreciate that.

(Tr. 3294-3297). Mr. Nicholson never claimed at any point that he was mistaken when he shot Giselle and M.L. on September 5, 2018.

America Polanco testified[5] that in February 2015, her relationship with Mr. Nicholson started changing because Mr. Nicholson had begun to get aggressive. (Tr. 3284). Although America could not "remember exactly the incident," she testified that "the first time I remember he – his mouth was bad towards me, and at one point he grab me. He threw me on my bed. I was scared." (Tr. 3284-3285). After the incident, America allegedly contacted Mr. Nicholson's mother, Angel Nicholson, to tell her what had happened because America was concerned. (Tr. 3285-3287). However, Angel testified that she and America met for lunch on one occasion at Mr. Nicholson's behest because Angel and America did not have a good relationship. (*See* Tr. 3738-3741, 3784-3786). America did not contact law enforcement after this incident and did not seek medical treatment. (*See* Tr. 3285-3287).

[5] As discussed, *infra*, throughout the pendency of the State's direct questioning of America, Cuyahoga County Assistant Prosecuting Attorney Anna Faraglia—over defense counsel's objection—improperly asked substantive leading questions. (*See* Tr. 3282-3284).

America testified about another incident wherein her children broke Mr. Nicholson's vacuum cleaner. (Tr. 3288). America recalled that Mr. Nicholson got really upset and angry, called America names, and "grab[ed] [America] from [America's] arms." (Tr. 3288). America did not indicate when this incident allegedly happened. She did not report it to law enforcement or seek medical treatment. Moreover, America acknowledged that Mr. Nicholson did not direct any of his anger about the incident to her children. (Tr. 3288-3289).

America also testified that when she and Mr. Nicholson were arguing in their bedroom, America's children would not generally come to her door. (Tr. 3313). However, America testified that "one time he was argue with me and he was grabbing me in the bed, and he was hurting me. And I ask him to stop. I didn't want to be loud. I didn't want the kids to hear that." (Tr. 3313). America testified that Giselle heard them arguing from her room—which was next to Mr. Nicholson and America's bedroom—and asked America if she was okay from outside of the door. (Tr. 3313-3314). The Court asked Ms. Faraglia if she had a timeframe as to when this happened, and Ms. Faraglia indicated that it was in March or May 2016. (Tr. 3314). The Court asked America if that was correct, but she testified that she did not remember, but acknowledged that it was sometime after Roberto's graduation from bootcamp (Tr. 3314-3315), which Roberto testified was in February 2016. (Tr. 3643). According to America, when Giselle came to the door, Mr. Nicholson "got really angry. He have his – he grab his gun, get it ready, and he says: 'Tell your daughter to shut up, to go in her room, or I going to kill her. And he point to the wall, through her bedroom." (Tr. 3315). America testified that she told Giselle she was okay and to go to her room, and nothing else seemingly happened during that encounter. (Tr. 3315).

America testified that Mr. Nicholson pointed a gun at her twice, but did not indicate when these alleged incidents occurred. (Tr. 3316). With the State's leading, America testified that Mr.

Nicholson put "one of the big guns in [her] forehead" during one of their arguments in their bedroom. (Tr. 3302). America did not recall what the argument was about, and did not indicate when this allegedly happened. (*See* Tr. 3302). Law enforcement never recovered a long gun from the home, and the State presented no evidence at trial showing that Mr. Nicholson ever owned a long gun.

America did not report any of these incidents to law enforcement, because she claimed that "he always already threatening [her] that if [she] ever call the police he will kill me, my kids, and ever police who comes in the house. Because he hate the police." (Tr. 3316). However, as set forth extensively above, no actual evidence—including text messages or recordings of Mr. Nicholson—showed Mr. Nicholson ever making threats to harm America or her children. Moreover, everyone from law enforcement who interacted with Mr. Nicholson indicated that he was polite and respectful to them and surrendered without issue on September 6, 2018. (*See, e.g.*, Tr. 2790-2792, 2700, 2707, 2822-2823, 2827).

Through leading questions, the State also elicited testimony regarding an argument America and Mr. Nicholson had about the cost of utility bills. (Tr. 3317-3318). America did not claim that Mr. Nicholson threatened to kill her and/or her children because of the expensive utility bills, or that he pointed a gun at her or her children during any alleged utility-bill related argument. (Tr. 3317-3318). In a *sua sponte* sidebar, the trial court told the State that they needed to "move this along." (Tr. 3318-3319).

3. The trial court allowed the State to present photographs it obtained from America's cell phone extraction, which it claimed depicted some of the other-acts America testified about.

During the State's direct examination of America Polanco, America indicated that she began taking photographs of parts of her body after Mr. Nicholson allegedly assaulted her in the years and/or months leading up to September 5, 2018. (Tr. 3333). The State asked America if she

had these photographs on her cell phone, and she stated twice that she did not. (Tr. 3333). Yet, the State proceeded to ask: "Okay. And so you indicated to us that there were some incidents that happened between you and Mr. Nicholson. So if we have photographs of you that are from your phone, would you recognize them?" (Tr. 3334). While defense counsel objected to these photographs under Evid.R. 404(B), it did not argue that the State was impeaching America by presenting these photographs or had failed to lay the proper foundation. (*See* Tr. 3334-3337). The trial court erroneously overruled defense counsel's objection. (*See* Tr. 3334-3337).

The State then presented photographs that were allegedly recovered from her phone by Gary Stein of the Cuyahoga County Prosecutor's Office. (Tr. 3333-3334). In sidebar, defense counsel objected to the introduction of those photographs for the 404(B) reasons previously stated. (Tr. 3335), and the following conversation ensued:

> MR. MACK: Again, Judge, I know that there's domestic violence issues that have been discussed, but we are getting to every domestic violence argument, fight that they ever had? Because at the end of the day, he's charged with the homicide of these kids, not domestic violence with respect to her.
>
> MS. FARAGLIA: Well, we're going to get to the kids. That's going to be the – I have to lead up to it. I want to get through my evidence.
>
> MR. MACK: My point in, there shouldn't be any leading up to it. This should not be –
>
> MR. SCHROEDER: He is also charged with attempted murder of her, so she's in the indictment.
>
> MR. MACK: That's a ridiculous argument. Number one, you'll have her testify that he targeted the kids, that she walked past –
>
> MR. SCHROEDER: That's a Rule 29/closing argument, not an evidentiary –

THE COURT: Okay. Let's go.

(Tr. 3336-3337).

With regard to State's Exhibit 341ZZ, America testified that she could not remember when that photograph was taken, but that it was part of her leg from "where [Mr. Nicholson] squeezed me with his legs – with his hands." (Tr. 3338-3339). America testified that she took State's Exhibit 341AAA, which was a photograph of her leg. (Tr. 3339). She did not recall when that picture was taken, but testified that Mr. Nicholson was responsible for inflicting the harm reflected in that photograph to her. (*See* Tr. 3339-3340). Over defense counsel's objection, Gary Stein, Supervising Investigator for the Cuyahoga County Prosecutor's Office, testified that the metadata from State's Exhibit 341ZZ indicated that the photograph was taken on April 22, 2015 at 7:00 PM (Tr. 3833-3334; State's Exhibits 341ZZ-1, 341ZZ-2), and the metadata from State's Exhibit 341AAA indicated that the photograph was taken on April 24, 2015 at 6:28 PM (Tr. 3833-3335; State's Exhibits 341AAA-1, 341AAA-2). Mr. Nicholson testified that he, in fact, took State's Exhibit 341AAA after America came home from work and complained of something falling off the rack and hitting her while she was working as a machine operator at Lincoln Electric. (*See* Tr. 4039-4041, 3267).

America testified that State's Exhibit 341BBB was a photograph of a hole in the kitchen that Mr. Nicholson caused during an argument with America. America did not indicate when this argument allegedly took place, who took this photograph, and whether Mr. Nicholson physically assaulted and/or threatened America or America's children at any point during this argument. (Tr. 3340). Mr. Nicholson denied punching any holes in the kitchen wall, but instead testified that he cut a hole in the kitchen wall at some point to find the wiring so he could install a chandelier in their kitchen. (Tr. 4036-4037). Notably, State's Exhibit 341BBB appears to be a carefully cut rectangle and not—as would be expected for a hole punched into a wall—a circle. (*See* State's

Exhibit 341BBB). To be sure, the photographs taken by BCI Agent David Horn of the kitchen show a chandelier in the kitchen of 4838 East 86th Street. (*See* State's Exhibits 147-149). Over defense counsel's objection, Gary Stein testified that the metadata from State's Exhibit 341BBB indicated that the photograph was taken on August 21, 2016 at 4:52 PM. (Tr. 3835).

America testified that State's Exhibit 341CCC was a photograph that she took that showed "[a] punch in the wall, again." (Tr. 3340). Again, she did not testify when she took this photograph and did not state that Mr. Nicholson physically assaulted and/or threatened America or America's children at any point during the argument that allegedly resulted in Mr. Nicholson punching the wall. (*See* Tr. 3340). Moreover, America did not indicate what wall this photograph allegedly depicted. (*See* Tr. 3340). Unlike State's Exhibit 341BBB—which was rectangular—this hole was circular. (*See* State's Exhibit 341CCC). When Mr. Nicholson was asked about this photograph, he indicated that "this is possibly the hole in the wall" that he admitted to punching in 2018. (Tr. 4037, 4034-4035). Over defense counsel's objection, Gary Stein testified that the metadata from State's Exhibit 341CCC indicated that the photograph was taken on August 21, 2016 at 4:42 PM. (Tr. 3835-3836).

America also testified that State's Exhibits 341DDD, 341EEE, and 341FFF were photographs of punches in the stairway wall leading down to the basement. (Tr. 3341). America did not indicate when these photographs were allegedly taken, and did not testify that it was Mr. Nicholson who caused the alleged punches reflected in State's Exhibits 341DDD, 341EEE, and 341FFF. (*See* Tr. 3341). Again, America did not testify that Mr. Nicholson physically assaulted and/or threatened America or America's children at the time these punches were allegedly made into the wall going down to the basement. (*See* Tr. 3341). Mr. Nicholson testified that he was replacing the drywall in the basement stairway, and that State's Exhibits 341DDD, 341EEE, and

341FFF reflected his progress in knocking the drywall out with a sledgehammer. (*See* Tr. 4034, 4037-38); State's Exhibit 341DDD). Over defense counsel's objection, Gary Stein testified that the metadata from State's Exhibits 341DDD, 341EEE, and 341FFF indicated that the photographs were taken on August 21, 2016 between 5:51 PM and 5:52 PM. (Tr. 3835-3837).

Finally, the State essentially testified on America's behalf when describing an incident that allegedly took place between Mr. Nicholson and Giselle in March 2018. (Tr. 3358-3360). America claimed that Mr. Nicholson was upset at Giselle because she left the home with her laundry not complete. (Tr. 3358-3360). Mr. Nicholson allegedly took Giselle's wet clothes out of the dryer When Giselle returned home, an argument between Giselle and Mr. Nicholson ensued. (Tr. 3360). America testified that Mr. Nicholson got mad at Giselle, said bad words to her, got in Giselle's face "really bad," grabbed Giselle's laptop "and threw it and threw the table against her, which hurt her feet. And then he throw something in the wall, in the living room." (Tr. 3360-3361). America testified that M.L. came downstairs at some point, and that Mr. Nicholson grabbed America and "he started arguing, stated yelling." (Tr. 3361). America claimed that Mr. Nicholson threw M.L. against the wall and punched the wall in the living room. (Tr. 3362). Giselle never sought medical treatment for that alleged foot injury, and America never seemingly encouraged her to obtain it. (Tr. 3362-3363).

America testified that State's Exhibits 341GGG and 341HHH were photographs of the "punch" Mr. Nicholson allegedly put in the living room wall. (Tr. 3367-3368). State's Exhibit 341III purportedly showed where they had begun fixing up the wall, and State's Exhibit 341JJJ was allegedly a photograph of a bruise on Giselle's foot. (Tr. 3368). Over defense counsel's objection, Gary Stein testified that the metadata from State's Exhibit 341GGG indicated that the photograph was taken on March 21, 2018 at 7:48 PM (Tr. 3837), and that the metadata from State's

Exhibits 341HHH through 341III indicated that the photographs were taken on March 23, 2018 at 4:08 AM, 4:09 AM, and 6:02 PM, respectively. (Tr. 3837-3838).

The State also presented text messages between Mr. Nicholson and America on March 22, 2018 wherein Mr. Nicholson and America were seemingly referencing the incident between Mr. Nicholson and Giselle. (Tr. 3368-3372; State's Exhibit 341BB).

Mr. Nicholson admitted that, sometime in early 2018, there was an incident between him and Giselle. (*See* Tr. 4034, 4037). Specifically, Mr. Nicholson recounted that Giselle and America left the home while Giselle's clothes were in the dyer. (Tr. 4034). Mr. Nicholson waited an hour or two for them to return so Giselle could come and take her laundry out, as he had washed his work uniforms but needed to dry them. (*See* Tr. 4034). When Giselle and America returned home, Giselle did not take her laundry out of the dryer but instead began to watch television in the living room. (Tr. 4034). So, Mr. Nicholson took her laundry, which "was totally dry," and set it on top of the dryer. (Tr. 4035). Mr. Nicholson testified that after he told Giselle, he had placed her clothes on top of the dryer, Giselle "went off" on him and accused him of wanting to touch her undergarments. (Tr. 4035). Mr. Nicholson was upset at being accused of wanting to touch the undergarments of his girlfriend's daughter and admitted at trial that he "hit a wall." (Tr. 4035). However, he denied calling Giselle names or otherwise physically assaulting her. (Tr. 4035, 4039).

Mr. Nicholson denied ever being involved in a physical altercation with America and/or her children at any point prior to September 5, 2018. (Tr. 4033-4034). However, he did admit to calling America names whenever he was upset but maintained that the name calling never led to physical altercations between him and America. (Tr. 4035-4036).

4. Law enforcement was never contacted about any of the other-acts America testified about.

It was undisputed at trial that, prior to September 5, 2018, Mr. Nicholson had no criminal history. (Tr. 3891, 4020). Mr. Nicholson denied ever physically assaulting America and/or her three children at any point prior to September 5, 2018. (*See, e.g.*, Tr. 4033-4041). Mr. Nicholson also denied ever threatening to kill—or otherwise do any harm to—America and/or America's children. (Tr. 4041-4042). As discussed extensively in the First Proposition of Law, America testified that she only contacted law enforcement about being physically assaulted and/or threatened by Mr. Nicholson once. The trial court allowed America—over defense counsel's objection—to testify about that at trial.

B. Over defense counsel's repeated objections, the trial court allowed the State to present "disclosure" testimony from Connie Allshouse and Shondell Smith about what America told them.

To substantiate America's claims about prior incidents between Mr. Nicholson and America, the trial court allowed the State to present—over defense counsel's objection—"disclosure" testimony from America's neighbor, Connie Allshouse, and America's male coworker, Shondell Smith, about what America told them about her relationship with Mr. Nicholson and the advice that they gave to America in response to what America told them. (*See* Tr. 3401-3404, 3421-3423, 3427-3428; Tr. 3518-3523, 3529-3531).

1. Shondell Smith

Prior to Shondell's trial testimony, defense counsel objected, citing in a sidebar its concerns about "the dangers of 404(B)." (*See* Tr. 3509-3510). Defense argued that Shondell's testimony about what America allegedly told him would be "unfairly prejudicial" which outweighed any purported probative value claimed by the State. (*See* Tr. 3508-3509). Moreover, defense counsel argued that Shondell's testimony did not "fall into one of the firmly rooted exceptions of 404(B)"

such that "allowance of this witness to testify would be a violation of" Mr. Nicholson's constitutional rights. (Tr. 3509-3510).

The State responded by alleging that America confided in Shondell "that defendant made specific threats to kill her and her children, which is highly probative of the defendant's motive, intent, purpose, and lack of mistake or accident, given that that is in issue in this case, his level of *mens rea* regarding the homicides." (Tr. 3510). Defense counsel took issue with the State "thow[ing] all of the [404(B)] exceptions out there" and noted that neither mistake nor accident were at issue in this case. (Tr. 3510-3511).

The trial court ruled that Shondell could testify about what America allegedly confided in him about specific threats Mr. Nicholson allegedly made because such testimony was relevant to the issue of self-defense, noting that the State had the burden to prove that this was not a case of self-defense. (Tr. 3511). Defense counsel argued that "self-defense is different than [the 404(B)] exceptions" cited by the State, to which the trial court concluded: "I think it's relevant to those issues. I'm going to deny your motion." (Tr. 3511).

In his testimony, Shondell Smith acknowledged that he had never observed any physical injuries on America and did not have firsthand knowledge about what was going on in her household. (Tr. 3530). Moreover, during the time that Shondell was working at Lincoln Electric with both Mr. Nicholson and America, Shondell admitted that he never saw anything at work that corroborated what America was telling him about her relationship with Mr. Nicholson. (Tr. 3530).

2. Connie Allshouse

Over defense counsel's objections, the trial court permitted the State to elicit testimony from America's neighbor, Connie Allshouse, that America had confided in Connie about "a lot of strife going on the house between America and Matt." (Tr. 3401). Connie testified that "it was more to the point of my home, not your home. I've got the right to do what I want and I have a

say-so and…" (Tr. 3401). Based upon what America told Connie about what was going on between America and Mr. Nicholson, Connie suggested that America "be totally shut off from him. Don't talk to him. Don't cook for him. Don't sleep with him. Don't do anything for this guy. And maybe he would get the hint and move out." (Tr. 3402).

Connie also testified—over defense's objection—that, based on what America told her, Connie told America to call the police. (Tr. 3404). Notably, on Officer Cramer's body camera, Connie can be overheard referencing the fact that America tried reporting Mr. Nicholson to the police chief prior to September 5, 2018. (State's Exhibit 322A at 0:29:04-0:29:30). Although defense counsel objected to Officer Cramer's body camera being played because of the multiple hearsay statements that can be heard thereon, the State overruled that objection. (*See* Tr. 2617-2618).

Like Shondell, Connie acknowledged that she had never observed any physical injuries on America and did not have firsthand knowledge about what America claimed was going on. Indeed, notwithstanding the negative things America told Connie about Mr. Nicholson, Connie maintained a neighborly and friendly relationship with Mr. Nicholson up until September 5, 2018. (Tr. 3421-3422). Moreover, despite living in the neighborhood with Mr. Nicholson for approximately three-to-four years, Connie never personally witnessed any negative interactions between Mr. Nicholson and America or Mr. Nicholson and America's children. (See Tr. 3398-3400).

C. Argument

Evid.R. 404(A)(1) is a general prohibition on using evidence of a person's character to prove that he acted "in conformity therewith on a particular occasion." Evid.R. 404(B) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

"The admissibility of other acts evidence is carefully limited because of the substantial danger that the jury will convict the defendant solely because it assumes that the defendant has a propensity to commit criminal acts, or deserves punishment regardless of whether he or she committed the crime charged in the indictment." *State v. Schaim*, 65 Ohio St. 3d 51, 59, 1992-Ohio-31, 600 N.E.2d 661, citing *State v. Curry*, 43 Ohio St. 2d 66, 68, 330 N.E.2d 720 (1975). "This danger is particularly high when the other acts are very similar to the charged offense, or of an inflammatory nature * * *." *Id.*

This Court has established a three-step analysis for evaluating the admissibility other-acts evidence: (1) whether the evidence is relevant under Evid.R. 401 (i.e., whether it makes "any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence,"); (2) whether the evidence is presented to prove the character of the accused in order to show conduct in conformity therewith or whether the other-acts evidence is presented for a permissible purpose, such as those stated in Evid.R. 404(B); and (3) whether the probative value of the other-acts evidence is substantially outweighed by the danger of unfair prejudice as set forth in Evid.R. 403. *State v. Williams*, 134 Ohio St. 3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 20, *reconsideration granted*, 133 Ohio St. 3d 1512, 2012-Ohio-6209, 979 N.E.2d. 1290 (court of appeals ordered to address remaining assignments of error).

Evidence of other acts is to be construed against admissibility. *State v. Lowe,* 69 Ohio St. 3d 527, 530, 1994-Ohio-345, 634 N.E.2d 616. This is because "[t]he average individual is prone to much more readily believe that a person is guilty of the crime charged if it is proved to his satisfaction that the defendant has committed a similar crime." *State v. Hector*, 19 Ohio St. 2d 167, 174-175, 249 N.E.2d 912 (1969). *See also Schaim*, 65 Ohio St. 3d at 59; *Curry*, 43 Ohio St. 2d at 68.

The proponent of the other-acts evidence must do more than simply point to a permissible purpose and assert that evidence is relevant to it. *State v. Hartman*, 161 Ohio St. 3d 214, 2020-Ohio-4440, 161 N.E.3d 651, ¶ 23. Indeed, Evid.R. 404(B) is concerned with the chain of reasoning that links the evidence to the purpose for which it is offered. *Id.* This Court has held that other-acts evidence must have a "temporal, modal and situational relationship" with the charged offenses so that it "discloses purposeful action in the commission of the offense in question." *State v. Burson*, 38 Ohio St. 2d 157, 159, 311 N.E.2d 526 (1974).

The State must be able to offer "substantial proof" that the defendant committed the alleged other acts in order to use "other acts evidence" against the defendant. *See Hartman*, 2020-Ohio-4440 at ¶ 28, citing *State v. Carter*, 26 Ohio St. 2d 79, 83, 269 N.E.2d 115 (1971). *See also State v. Broom*, 40 Ohio St. 3d 277, 282-283, 533 N.E.2d 682 (1988); *Lowe,* 69 Ohio St. 3d at 530.

In this case, a large portion of the "other acts" evidence and testimony the State presented would not even amount to criminal or "bad" conduct. And even assuming the veracity of America's testimony about Mr. Nicholson calling her names, squeezing her legs, and/or punching a hole in the wall in the years leading up to this incident, the State should not have been allowed to present evidence and testimony regarding every argument, disagreement, or even physical altercation Mr. Nicholson was alleged to have been involved in during the approximately four years he lived at 4838 East 86th Street with America and her children. This is even more true where, as is here, Mr. Nicholson was never charged or convicted as a result of these alleged prior acts, and not one police report was ever generated regarding any such purported incidents.

This Court recently "clear[ed] up some of the confusion that exists regarding the use of other-acts evidence" in the context of sex-related crimes. *Hartman*, 2020-Ohio-4440 at ¶ 19. *See also State v. Smith*, Slip Opinion No. 2020-Ohio-4441. Mr. Nicholson submits to this Honorable

Court that clarification is necessary where the defendant and victim are members of the same household and the State seeks to admit as other-acts evidence prior arguments, disagreements, disputes, name calling, verbal abuse, emotional abuse, and/or physical altercations between the household members.

1. The other acts evidence was irrelevant to the particular purpose for which it was offered, and, in some instances, the State failed to offer substantial proof that Mr. Nicholson was the perpetrator of the alleged other act.

In Evid.R. 404(B) cases, the inquiry is not whether the other-acts evidence is relevant to the ultimate determination of guilt. Rather, the court must evaluate whether the evidence is relevant to the particular purpose for which it is offered. *See Curry*, 43 Ohio St.2d at 73, 330 N.E.2d 720. That is to say, the other-acts evidence must be probative of a "purpose other than the person's character or propensity to behave in a certain way." *United States v. Gomez*, 763 F.3d 845, 860 (7th Cir.2014) (en banc). This Court recently reiterated that: "Trial courts must keep in mind that it is not enough to say that the evidence is relevant to a nonpropensity purpose. The nonpropensity purpose for which the evidence is offered must go to a 'material' issue that is actually in dispute between the parties. *Hartman*, 2020-Ohio-4440 at ¶ 27, citing *Huddleston v. United States*, 485 U.S. 681, 686 (1988). Moreover, "[t]he supposition that proposed other-acts evidence, if true, would be relevant is not a license for courts to allow the jury to consider every unsubstantiated accusation." *Hartman*, 2020-Ohio-4440 at ¶ 28. Rather, there must be some threshold showing that the act for which the evidence is offered occurred. *See id.*

Indeed most—if not all—of the other-acts evidence presented by the State in this case should have been excluded because it was not relevant. The evidence (mostly text messages) and testimony the State was permitted to present to the jury ranged from neutral text messages regarding the placement of cars in the driveway, to arguments that are not uncommon to many households or romantic relationships (bills, hurt feelings, disagreements about raising children,

etc.), to name-calling, to holes being punched into walls. However, none of this evidence tended to prove motive, opportunity, intent, preparation, plan, knowledge, identity, and/or absence of mistake or accident and thus, was completely irrelevant.

The testimony of both Shondell Smith and Connie Allshouse was likewise irrelevant because they had no personal knowledge or information about any of the prior acts America claimed had occurred. Indeed, the testimony of these two witnesses merely restated America's claims and therefore, was not probative since America herself was testifying. Moreover, their testimony only pertained to Mr. Nicholson's strained relationship with America. They did not claim to have ever been told about Mr. Nicholson's alleged strained relationship with M.L. and/or Giselle. Thus, such testimony was not relevant to the particular purpose for which it was offered and did not go to any material issue.

To that end, the trial court's ruling that Shondell could testify about what America told him because such testimony was relevant to the State's burden of proving Mr. Nicholson did not act in of self-defense was erroneous. (Tr. 3511). Rebutting a self-defense claim is not a permissible purpose for which other acts evidence can be offered, especially where, as was the case here, Shondell did not testify being told anything specifically about Mr. Nicholson's relationship with and/or conduct towards M.L. and/or Giselle. Moreover, Shondell's testimony about America's disclosure of other alleged acts committed by Mr. Nicholson against America had nothing to do with Mr. Nicholson's self-defense claim. Thus, the trial court erred when it permitted the State to elicit testimony from Shondell about what America told him regarding prior incidents between America and Mr. Nicholson because his testimony was irrelevant to the particular purpose for which it was offered.

The trial court allowed the State to present and admit State's Exhibits 341ZZ-341FFF,

which the State represented was photographic evidence of Mr. Nicholson's prior bad acts. (*See* Tr. 3338-3342). America could not attribute any timeframe to any of those photographs. (*See* Tr. 3338-3342). Moreover, before the State asked America about State's Exhibits 341ZZ-341FFF, America explicitly testified twice that she did not have photographs on her phone depicting any of the alleged injuries she sustained from Mr. Nicholson's alleged physical assaults of her (Tr. 3333-3334). Although America affirmed that she would recognize photographs of her (Tr. 3334), it was nonetheless erroneous for the trial court to allow the State to essentially impeach its own witness by showing her the photographs that someone in the prosecutor's office had extracted from her phone. Admission of those photographs was further erroneous because State did not elicit from America the proper foundation to present these photographs as evidence to the jury in Mr. Nicholson's trial.

Moreover, with regard to State's Exhibits 341DDD, 341EEE, and 341FFF, America did not even testify that Mr. Nicholson was the person who created these holes or otherwise provide any information surrounding the circumstances those photographs were supposed to represent. (*See* Tr. 3341). Thus, the State did not offer over substantial proof that Mr. Nicholson was even responsible for these holes. Furthermore, the fact that Mr. Nicholson allegedly punched holes in the walls of the home was not relevant to prove his motive and/or intent in committing the offenses alleged in this case.

The trial court erred when it allowed the State to present evidence and testimony regarding unsubstantiated prior incidents that almost exclusively occurred between Mr. Nicholson and America. These incidents ranged from normal household disputes to claims about physical assault and threats. However, as set forth extensively above, the State needed to prove the existence of a strained relationship between Mr. Nicholson and Giselle and/or M.L.—not Mr. Nicholson and

America—in order to prove that Mr. Nicholson acted with prior calculation and design. Most of the other-acts evidence presented by the State was not relevant to prove that Mr. Nicholson purposely attempted to kill and/or assaulted America, which is what he was charged in Count 3 and 8. In addition to being unsubstantiated, America herself could not offer specifics about a number of the incidents she testified about, including when they happened and what happened. It was therefore erroneous for the trial court to allow America, Shondell, and Connie to testify about prior incidents between America and Mr. Nicholson that were unsubstantiated, propensity evidence, did not go to a material issue in dispute between the parties, and was not relevant to the particular purpose for which it was offered.

Mr. Nicholson's alleged conduct towards mostly America was not linked to any overarching plan to kill M.L. and Giselle. The incidents America testified about were wholly distinct and unlike the common-scheme evidence demonstrated in *Williams*, *supra*, the other-acts evidence in this case contains few—and most frequently, no—similarities to the crimes charged. Thus, the evidence was not relevant to show a common scheme or plan.

Moreover, the prior acts evidence in this case was plainly not admissible for purposes of establishing motive. Mr. Nicholson's prior alleged domestic disputes with almost exclusively America did not reveal a specific reason for shooting and killing M.L. and Giselle and thus, did not provide evidence of any motive to commit murder beyond that which can be inferred from the commission of any homicide offense.

Even more fatal to the State's case is the fact that it offered no evidence or testimony showing that Mr. Nicholson even knew law enforcement had been called on the night of September 5, 2018. It cannot be argued, then, that these prior alleged threats were relevant to establish any motive or plan by Mr. Nicholson when the evidence did not support the finding that Mr. Nicholson

was even aware that the predicate event to the contingent killing had occurred.

Accordingly, the trial court erred when it permitted the State to present other acts evidence from America and the other acts evidence from "disclosure" witnesses, Shondell Smith and Connie Allshouse, because the evidence of Mr. Nicholson's alleged other acts was unsubstantiated, irrelevant, and/or constituted improper propensity evidence.

2. The probative value of any relevant other acts evidence was substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

In every instance, the trial court must determine whether the proffered evidence—though admissible under Evid.R. 404(B)—is nevertheless more prejudicial than probative. *Williams*, 2012-Ohio-5695 at ¶ 20. Other acts evidence must be excluded when its probative value "is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(A).

As set forth above, evidence of Mr. Nicholson's other acts constituted improper propensity evidence and the trial court erred in admitting.

However, to the extent that this Court concludes that some of the other acts evidence was properly admitted under Evid.R. 404(B), the trial court nonetheless erred in admitting such evidence under Evid.R. 403 because the State quite plainly offered the other acts evidence to confuse the issues or mislead the jury. Again, Mr. Nicholson was not charged with killing America with "prior calculation and design," so evidence of a strained relationship between America and Mr. Nicholson was not relevant to the jury's evaluation of the aggravated murder counts charged in Counts 1 and 2 relating to M.L. and Giselle. As set forth extensively in the First Proposition of Law, America's testimony about Mr. Nicholson's prior alleged threats to kill America and her children if police were ever called out to the house was not credible. Moreover, even if credible, a

contingent threat is not evidence of prior calculation and design. These alleged threats were unsubstantiated and were never made, even by America's own testimony, to either M.L. or Giselle.

Moreover, with regard to the two "disclosure" witnesses, their testimony was not probative and, to the extent that it was, any slight probative value was substantially outweighed by the prejudicial effect of their testimony. By allowing Shondell Smith and Connie Allshouse to testify about what America disclosed to them, the trial court allowed the State to improperly bolster America's credibility. Neither Shondell nor Connie had firsthand knowledge about anything America told them. They did not seemingly take any steps to verify the veracity of what America was saying. America testified at trial and there was therefore no need for Shondell or Connie to testify about what America told them. The probative value of such testimony was substantially outweighed by the prejudicial effect thereof, and the trial court erred by allowing the State to elicit testimony from Shondell and Connie about what America told them. Put simply, if America lied to them, then they merely repeated and reinforced that lie.

3. The trial court's limiting instructions were not sufficiently narrow.

To the extent that the trial court's admission of some or all of the other-acts evidence was proper, the risk of unfair prejudice was not mitigated by the cautionary instructions provided by the trial court. In *Hartman*, this Court held that, "[i]n determining whether to admit other-acts evidence, a court should consider the extent to which a limiting instruction to the jury might reduce the risk of unfair prejudice." 2020-Ohio-4440 at ¶ 66. Because an instruction does not automatically cure all prejudice concerns, the trial court must decide whether the prejudicial effect of the other-acts testimony is such that it can be sufficiently mitigated by a well-tailored limiting instruction or, as was the case here, whether the effect of the testimony is so prejudicial that no

instruction can temper its sway. *See id.* "If the latter is the case, the evidence must be excluded." *Id*, citing Evid.R. 403(A).

Before the State continued its direct examination of America about prior other acts between Mr. Nicholson and America, the Court read the following instruction to the jury:

> THE COURT: Ladies and gentlemen, you've heard some evidence – some testimony, excuse me, before we recessed, and I just want to emphasize that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Please keep that in mind. You may proceed.

(Tr. 3298-3299).

Before the State presented State's Exhibits 341GGG through 341JJJ over defense counsel's objection, the trial court gave the following limiting instruction:

> THE COURT: Commission of crimes other than the offenses with which the defendant is charged in this trial is received only for a limited purpose. It is not received and my not be considered to prove the character of the defendant in order to show that he acted in conformity or in accordance with that character.
>
> If you find that the evidence of other incidents is true and that the defendant committed them, you may consider that evident for the purpose of deciding whether it proves the defendant's motive, opportunity, intent, or purpose, preparation, or plain to commit the offense charged in this trial.
>
> That evidence cannot be considered for any other purpose. Please keep that in mind.

(Tr. 3366-3667).

Unfortunately, an instruction of this type was "of only limited value to the jury." *Hartman*, 2020-Ohio-4440 at ¶ 69. As this case illustrates, "the analytical distinctions between the different

types of evidence that may be admitted under Evid.R. 404(B) can be difficult." *Id.* Thus, "[i]t is not realistic to simply list all the permissible uses and expect jurors to go through each one and determine the use for which the evidence is properly considered." *Id.* "To tell a jury that a certain piece of evidence may be considered as evidence of 'proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident,' Evid.R. 404(B), imparts nothing meaningful and is akin to telling the jurors that the evidence may be considered for any purpose." *Id.*

In *Hartman*, this Court held that "when a court issues a limiting instruction with respect to other-acts evidence, the instruction should be tailored to the facts of the case." 2020-Ohio-4440 at ¶ 70. Defense counsel did not object to the court's limiting instruction in this case and, as reflected in *Hartman*, this Court's guidance regarding the appropriate limiting jury instructions for other acts evidence was prospective. *See id.* at ¶ 70. Nonetheless, the generic nature of the instruction that was given in this case severely reduced its import in mitigating the prejudicial effect of the other acts evidence the State presented in this case. Indeed, the limiting instruction in this case should have not only stated the precise purpose for which this other-acts evidence was being offered, but also should have instructed the jury that they could only consider this evidence as it related to the aggravated murder offenses set forth in Count 1 and 2 that related to Giselle and M.L.

PROPOSITION OF LAW NO. 3

> **The loss and/or destruction of material evidence by law enforcement not available to the defense, in violation of *Brady*, denies a capital defendant his rights under Article I, Sections 5, 9, 10, and 16 of the Ohio Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution.**

A. Background

On January 18, 2019, defense counsel filed a Motion for Disclosure of Exculpatory Evidence (R.32) and Motion for Disclosure of Impeaching Information (R.33). At the September 5, 2019 oral hearing on all pretrial motions, both of those motions were granted by the trial court. (*See* R.258, Journal Entry; R.256, Journal Entry).

Defense counsel filed on January 26, 2019 a Motion to Compel Law Enforcement Officials to Turn [Over] and Advise the Prosecuting Attorney of All Information Acquired During the Course of Investigation (R.44) and Motion to Properly Preserve and Catalog All Physical Evidence (R.46). Both of those motions were granted at the September 5, 2019 hearing. (R. 252, Journal entry; R.253, Journal Entry). Although defense counsel also filed on January 26, 2019 a Motion for an Order Directing that a Complete Copy of the Prosecutor's File be Made and Turned Over to the Court for Review and to be Sealed for Appellate Review, If Necessary (R.45), the trial court denied that motion (R.240, Journal Entry).

B. Argument

The suppression of materially exculpatory evidence by the State violates a defendant's due process rights, regardless of whether the State acted in good or bad faith. *State v. Johnston*, 39 Ohio St. 3d 48, 60, 529 N.E.2d 898 (1988); *Brady v. Maryland*, 373 U.S. 83 (1963). The State's failure to preserve materially exculpatory evidence likewise violates a defendant's due process rights under the Fourteenth Amendment of the U.S. Constitution. *See, e.g.*, *Arizona v. Youngblood*, 488 U.S. 51 (1988); *California v. Trombetta*, 467 U.S. 479 (1984). The United States Supreme

Court has made clear that the prosecuting attorney's obligation to disclose *Brady* material includes all evidence in the prosecutor's file—as well as that obtained by law enforcement *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 437-438 (1995).

Evidence is deemed to be "materially exculpatory" if "there is a 'reasonable probability' that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Johnston*, 39 Ohio St. 3d at 61, citing *United States v. Bagley*, 473 U.S. 667 (1984). "A 'reasonable probability' is sufficient to undermine confidence in the outcome." *State v. Jackson*, 57 Ohio St. 3d 29, 33, 565 N.E.2d 549 (1991).

In contrast, evidence is not materially exculpatory if it is merely potentially useful. *See, e.g.*, *State v. Geeslin,* 116 Ohio St. 3d 252, 2007-Ohio-5239, 878 N.E.2d 1, ¶¶ 10-15; *State v. Lewis*, 70 Ohio App. 3d 624, 591 N.E.2d 854 (4th Dist. 1990). Potentially useful evidence indicates that the evidence may or may not have incriminated the defendant. *See Geeslin*, 2007-Ohio-5239 at ¶ 11. The failure to preserve evidence that by its nature or subject is merely potentially useful violates a defendant's due process rights only if the police or prosecution acted in bad faith. *See id.* at ¶ 10.

In this case, photographs of Mr. Nicholson's trunk when it was opened by law enforcement on September 13, 2018 were materially exculpatory because the presence of the service weapon in the trunk of Mr. Nicholson's vehicle was consistent with Mr. Nicholson's self-defense claim. If the jury found that Mr. Nicholson was acting in self-defense on September 5, 2018 as he claimed, then he would have been found not guilty of at least the counts relating to M.L. and Giselle with which he was charged.

Moreover, even if not materially exculpatory, the photographs of Mr. Nicholson's trunk when it was opened by law enforcement on September 13, 2018 were at least potentially useful.

As set forth extensively above, Mr. Nicholson testified that he retrieved his personal firearm from the bedroom because he saw and/or believed that M.L.—at America's behest—had retrieved Mr. Nicholson's service weapon from the trunk of his vehicle. Mr. Nicholson further testified at trial that he discharged his personal firearm on September 5, 2018 because he believed Giselle and/or M.L. were going to use the service weapon that M.L. retrieved from the trunk of Mr. Nicholson's vehicle on Mr. Nicholson. Mr. Nicholson also testified that after the shooting, America picked up his service weapon from the driveway, put it in the open trunk of his vehicle, and closed his vehicle's trunk before running to the home of neighbors Connie Allshouse and Vic Sanuk to ask for assistance.

In her cross-examination of Mr. Nicholson, Assistant Prosecuting Attorney Anna Faraglia feigned disbelief at the notion that America would have "stepped over her kids that were shot to death and walked over and shut the trunk" of Mr. Nicholson's vehicle on September 5, 2018. (Tr. 4179). Mr. Nicholson clarified that what he testified happened that evening was that America picked up his duty belt and service weapon from the driveway, put them in his vehicle's open trunk, and shut the trunk of his vehicle. (Tr. 4179). Notwithstanding the State's purported bewilderment, such actions would not have been time consuming given the proximity of Mr. Nicholson's vehicle to where M.L. and Giselle were laying. Moreover, given what had just happened, it was not unreasonable to suggest that America wanted—at the very least—to put Mr. Nicholson's service weapon in a secure place that he could not readily access. After all, America had the keys to Mr. Nicholson's vehicle, thus giving her access to the trunk and preventing Mr. Nicholson from having access to it.

And, as described extensively in the Statement of Facts and the First Proposition of Law, the cumulative instances of "missing" or "lost" evidence related specifically—and only—to Mr.

Nicholson's service weapon and the trunk of Mr. Nicholson's vehicle, which was—if not materially exculpatory—potentially useful evidence that proved and/or bolstered Mr. Nicholson's self-defense claim, necessarily implies that bad faith must be at play here.

Indeed, a continuing cavalier attitude towards to preservation of evidence with an abundantly apparent evidentiary value can amount to "bad faith." *See, e.g.*, *State v. Durnwald*, 163 Ohio App. 3d 361, 2005-Ohio-4867, 837 N.E.2d 1234, ¶¶ 31–35 (6th Dist.); *In re J.B.*, 2017-Ohio-406, 84 N.E.3d 238 (6th Dist.); *State v. Combs*, 5th Dist. Delaware No. 03CA-C-12-073, 2004-Ohio-6574, ¶¶ 28–32.

In *Durnwald*, the defendant was arrested on several traffic violations, including driving under the influence. 2005-Ohio-4867 at ¶ 2. There had been a recording that captured appellant's driving before being stopped and his performance of field sobriety tests. *Id.* at ¶ 3. That recording was unavailable because cadets who were left alone in the trooper's vehicle during a training session allegedly erased and taped over it. *Id.* Defendant argued that because this was the only evidence that could have refuted the officer's testimony as to his condition at the time of the stop, due process required dismissal of the charges. *Id.* The Sixth District Court of Appeals concluded that the evidence was potentially useful, as opposed to materially exculpatory, and proceeded to consider whether the destruction of the recording constituted bad faith. *Id.* at ¶ 3.

Evidence was presented that the Ohio State Highway Patrol policies required that all traffic stops, pursuits, and crash scenes be recorded on videotape and preserved until all criminal and civil actions have been completed. *Dunwald*, 2005-Ohio-4867 at ¶ 32. The appellant requested the tape of his stop within a few days after it was made. *Id.* The trooper, who had viewed the video, testified that for a DUI arrest, the practice was to leave a tape in the machine until the tape was fully used. *Id.* at ¶¶ 32-33. The tape could easily be removed from the recorder in the trunk of the cruiser, and

the only action he took to preserve the tape was to not turn the recording system on. *Id.* at ¶ 33. Nevertheless, the videotape was partially erased. *Id.* at ¶ 34. Notably, the tape would have had to have been rewound in order to record over appellant's stop. *Id.*

The Sixth District Court of Appeals observed in *Durnwald* that the videotape had obvious evidentiary value, was likely to be requested, and should have been preserved just as with any other evidence of an alleged crime. We found it "incredible that such 'accidental' erasures continue to occur." 2005-Ohio-4867 at ¶ 35. While the court recognized that the trooper's actions may not have been intentional, it also recognized that the erasure was not caused by machine malfunction. "Rather, the erasure occurred due to the trooper's complete and utter failure to safeguard evidence relevant to a crime and arrest." *Id*. at ¶ 36. Because of the ease of preserving the tape, the Highway Patrol's own policy requiring its preservation, and the failure to protect and preserve the videotape under these circumstances, the Sixth District Court of Appeals determined that the trooper's conduct constituted "more than mere negligence or an error in judgment." *Id*. To the contrary, the appellate court found that the continuing cavalier attitude towards the preservation of DUI videotape evidence rose to the level of bad faith. *Id.* at ¶ 36. Thus, the appellate court held that any testimony by the trooper regarding evidence which may have been recorded by the videotape should have been suppressed. *Id.*

Likewise, here, the cavalier attitude of the GHPD to the preservation, documentation, and/or collection of evidence described above rose to the level of bad faith. Thus, Mr. Nicholson's rights under Article I, Sections 5, 9, 10, and 16 of the Ohio Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution were violated by GHPD's loss, destruction, and/or failure to preserve the photographs that were taken of the trunk of Mr. Nicholson's vehicle when the service weapon and gun belt were found. These photographs were

not otherwise available to Mr. Nicholson—who was incarcerated—and Mr. Nicholson had no other way of obtaining evidence regarding the observations that could have been made from looking at the contents of his vehicle's trunk when it was first opened, and the firearm and gun belt were discovered.

Moreover, because GHPD gave the service weapon back to Paragon before collecting any DNA evidence therefrom, Mr. Nicholson—like the defendant in *Durnwald*—was wholly and completely deprived of any ability to conduct and, if appropriate, present DNA evidence at trial as part of his defense. If not materially exculpatory, these lost and/or destroyed photographs—as well as the service weapon itself—were certainly potentially useful to supporting Mr. Nicholson's self-defense claim, bolstering his credibility about what happened on September 5, 2018, and/or impeaching the testimony of America Polanco, GHPD detectives, and other witnesses presented by the State at trial. The continuing cavalier attitude towards the preservation of evidence by GHPD in this case rose to bad faith, as even after finding the service weapon in the trunk of the vehicle that was parked merely a few feet from where Giselle and M.L. fell, GHPD failed to preserve the evidentiary value of this piece of evidence. The loss, destruction, and/or failure to preserve the materially exculpatory and/or potentially useful evidence by law enforcement described above deprived Mr. Nicholson of the ability to present a meaningful defense, in violation of *Brady*, thereby depriving Mr. Nicholson of his rights under Article I, Sections 5, 9, 10, and 16 of the Ohio Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution. Accordingly, all evidence relating to the service weapon should have been suppressed and/or the counts relating to Mr. Nicholson's self-defense claim dismissed. In the alternative, defense counsel was ineffective, to the prejudice of Mr. Nicholson, because it failed to

move the trial court to suppress this evidence and/or dismiss all counts related to Mr. Nicholson's self-defense claim. Reversal and a new trial are therefore warranted.

PROPOSITION OF LAW NO. 4

> **A trial court abuses its discretion and denies a defendant a fair trial and due process contrary to 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, by allowing the introduction of repetitive and gruesome photographs and body camera video of the scene and deceased.**

A. Background

On May 7, 2019, defense counsel filed a Motion *in Limine* to Prohibit the Prejudicial Display of Tangible Things and/or Photographs During Trial **(**R.91) and a Motion *in Limine* to Exclude Photographs of the Deceased (R.92). In latter motion, defense counsel specifically requested that the trial court issue an order limiting—if not preventing—the State from admitting any gruesome photographs into evidence. (R.92). Both of those pretrial motions were denied by the trial court. (R.220, Journal Entry; R.221, Journal Entry).

At trial, the State introduced 252 photos taken of the scene at 4838 East 86th Street by law enforcement on September 5, 2018 and/or September 6, 2018. (Tr. 3588-3613, 3125-3145; State's Exhibits 1 through 252). Of those photographs, 144 photographs were taken outside of the home, where the shooting took place (Tr. 3588-3618; State's Exhibits 1 through 144), and 108 photographs were taken inside of the home, where the firearm, Mr. Nicholson's handwritten notes, and other items were found. (Tr. 3125-3145; State's Exhibits 145 through 252). Most of the 144 photographs taken of the scene outside of the home showed blood splatter/pooling, spent shell casings, and the personal items of M.L. and/or Giselle that were found in the driveway.

The State also introduced and played for the jury the body camera footage from GHPD Officer Spencer Sabelli (Tr. 2588-2591; State's Exhibit 323A), Officer Robert Jarzembak (Tr.

2567-2572; State's Exhibit 321A), and Officer Berri Cramer (Tr. 2614-2621; State's Exhibit 322A) at the scene on September 5, 2018.

Officer Sabelli's body camera shows the bodies of Giselle Lopez and M.L. laying in the driveway outside of the home; GHPD officers moving the body of M.L. out of the driveway; Officer Sabelli performing life-saving measures on M.L.; and the body Giselle laying on the ground while receiving medical treatment. (State's Exhibit 323A at 0:02:00-0:10:54). On Officer Jarzembak's body camera, Giselle can be heard moaning and/or crying while she is in the driveway. (State's Exhibit 323A at 0:02:45). At trial, defense counsel objected to Officer Sabelli's body camera footage being played because it showed life-saving measures and was unfairly prejudicial. (Tr. 2588-89). However, the trial court overruled that objection. (Tr. 2588-2589).

Officer Jarzembak's body camera shows the bodies of Giselle Lopez and M.L. laying in the driveway outside of the home; GHPD officers moving the bodies of Giselle and M.L. out of the driveway; Giselle Lopez moaning while being moved by Officer Jarzembak; Officer Sabelli performing life-saving measures on M.L.; and Giselle receiving medical treatment at the scene. (State's Exhibit 321A at 0:01:00-0:05:15, 0:06:27-0:06:53, 0:08:30-0:10:45). On Officer Jarzembak's body camera, Giselle can be heard moaning and/or crying when she was being moved and while she is being treated by the EMT at the scene. (*See* State's Exhibit 321A at 0:03:30-0:10:45). Defense counsel did not object to the body camera video of Officer Jarzembak being played at trial.

Officer Cramer's body camera shows the bodies of Giselle Lopez and M.L. laying in the driveway outside of the home; GHPD officers moving the bodies of Giselle and M.L. out of the driveway; Officer Sabelli performing life-saving measures on M.L.; and the bodies of M.L. and Giselle being lifted and placed onto stretchers (State's Exhibit 322A at 0:01:30-0:08:02, 0:09:53-

0:10:26, 0:11:08-0:11:41). After the State had already started playing Officer Cramer's body camera footage, defense counsel objected, which was overruled by the trial court. (Tr. 2616). Defense counsel later clarified the basis for his objection, which was not based on the prejudice brought about by the gruesome and repetitive visual image of life-saving measures Officer Sabelli was performing on M.L. (*See* Tr. 2616-2618).

The State also introduced twenty-nine autopsy photos of Giselle Lopez (Tr. 3960-3972; State's Exhibits 654 through 683), and forty-nine autopsy photos—including two enlarged autopsy photos—of M.L. (Tr. 3929-3944; State's Exhibits 603 through 653, 613A, 617A). Among the forty-nine autopsy photographs of M.L. were four photographs of M.L.'s internal organs that had been struck by the bullets. (Tr. 3951-3952; State's Exhibits 633 through 636). Defense counsel did not object to any of these photographs being presented to the jury at trial.

B. Argument

Trial courts have discretion to determine whether photographs and body camera video footage is admissible for some valid evidentiary purpose. *State v. Maurer*, 15 Ohio St. 3d 239, 265, 473 N.E.2d 768 (1984). "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St. 3d 217, 219, 450 N.E.2d 1140 (1983).

Unlike in non-capital cases, the standard for admission of photograph and/or video evidence in capital cases is much stricter than the standard set forth in Evid. R. 403. Specifically, this Court has held that:

> To be admissible in a capital case, the probative value of each photograph must outweigh the danger of prejudice to the defendant and, additionally, not be repetitive or cumulative in nature. Contrary to the Evid.R. 403 standard, where the probative value must be minimal and the prejudice great before the evidence may be excluded, pursuant to *Maurer*, * * * if the probative value does not, in a simple balancing of the relative values, outweigh the danger of prejudice to the defendant, the evidence must be

excluded.

State v. Morales, 32 Ohio St. 3d 252, 258, 513 N.E.2d 267 (1987).

This same logic applies to body camera video that is repetitive and redundant of the photographic and/or other video evidence that has also been presented to the jury.

In *Morales*, this Court strongly cautioned judicious use of excessive photographic evidence that is inflammatory in nature in order "so that any question of probative value, as compared to cumulative, repetitious and prejudicial effects will be avoided." 32 Ohio St. 3d at 259. Moreover, this Court recently cautioned "trial courts to closely scrutinize the crime-scene and autopsy photos that are offered as exhibits in murder trials." *State v. Ford*, 158 Ohio St. 3d 139, 2019-Ohio-4539, 140 N.E.3d 616, ¶ 257. "When those photographs go to an element of the offense that is clearly proven by other evidence, they serve no useful purpose whatsoever." *Id*. Although this Court ultimately found that it was harmless error when the trial court erred admitted two photos of injuries that had already been depicted in other photos, this Court nonetheless called attention to the prejudicial effective unnecessary and excessive gruesome photos can have upon a capital defendant's right to a fair trial under the Ohio and Federal Constitutions. *See id.* at ¶ 255.

In this case, the cause and manner of death were not contested. Mr. Nicholson admitted that he shot Giselle and M.L. on September 5, 2018. (*See* Tr. 4091, 4106, 4176-4178). The State acknowledged in its closing argument that "[c]ausation is not an issue here" (Tr. 4273), and in its final closing argument that there was "[n]o question" that Mr. Nicholson's gun, which was found in the basement, was the gun used on September 5, 2018. (Tr. 4333). Moreover, through defense counsel's questioning (or lack thereof) of the State's witnesses—including medical examiner, Dr. Todd Barr, who performed the autopsies of Giselle and M.L.—it was apparent that Mr. Nicholson was not disputing that he caused the wounds that led to the two deaths. (*See, e.g.*, Tr. 3979-3980).

If a picture is worth a thousand words, a video of a gruesome scene is worth much more.

The body camera footage from Officers Cramer, Sabelli, and Jarzembak was repetitive and extremely prejudicial to Mr. Nicholson, as it showed America crying out for her children, Giselle Lopez moaning out and crying as she was being moved away from the driveway during the final moments of her life; life-saving measures; and overall a gruesome scene upon the officers' arrival. This prejudicial impact was further exacerbated by the repetitive photographs of the scene taken by BCI Agent Soroka on September 6, 2018 that showed blood splatter, pools of blood, many spent shell casings, and the personal belongings of Giselle and M.L. strown around in the driveway. There was no independent importance to any of the duplicative photographs and body camera footage other than to emphasize to the jury how gory the scene was and to improperly present victim impact evidence during the culpability phase of trial.

Moreover, the repetitive photographs from the autopsies of Giselle and M.L. were unnecessary given that the cause of their deaths was not being contested by the defense. In fact, defense counsel did not ask the deputy medical examiner a single question on cross-examination. (Tr. 3789-3790). Yet, the deputy medical examiner, Dr. Todd Barr, went on for approximately sixty pages of transcript describing the wounds and pointing the jury to numerous, duplicative photographs of M.L. and Giselle's bodies. (Tr. 3919-3979). The photographs of M.L.'s internal organs were particularly disturbing and wholly unnecessary given that the defense was not contesting the cause of death of M.L. or, for that matter, Giselle. (*See* Tr. 3951-3952; State's Exhibits 633-636).

Put simply, there was no reason why far fewer photos could have been introduced. *See Ford*, 2019-Ohio-4539 at ¶ 257 ("A few crime-scene photos showing the body along with the coroner's testimony will often suffice."). Once exposed to these horrific photographs and video footage, it was unlikely that jurors could forget them. These photographs had no relevance to the

aggravating circumstances, but they no doubt left an impression that lasted through the mitigation phase. Exposure to these photographs and body camera video footage "only served to inflame the passions of jurors," which is the precise impact this Court has cautioned against. *See id.*.

The display and admission of inflammatory, gruesome photographs and body camera footage in this case violated Mr. Nicholson's right to a fair trial under the Ohio and United States Constitutions. The numerous photos and videos of the deceased bodies were grotesque. The scene photographs were cumulative. The State should be required to obtain a conviction and sentence on the basis of evidence—not gratuitous gore. The repeated introduction and reference to photographs of the two bodies was done to evoke an emotional response and to prejudice the jury against Mr. Nicholson. Critically, the probative value was limited as the manner and cause of death was not at issue here.

Although defense counsel objected to the life-saving measures on Officer Sabelli's body camera (State's Exhibit 323A), it failed to object, on the grounds of repetitive, gruesome video and/or photographic depictions, to: the body camera video from Officer Berri Cramer's body camera (State's Exhibit 322A); the body camera video from Officer Jarzembak (State's Exhibit 231A); the photographs BCI Agent Soroka took of the scene (State's Exhibits 1-144), and the photographs from the autopsies (State's Exhibits 603-650, 654-683). Therefore, this issue must be reviewed for plain error or for ineffective assistance of counsel as discussed, *infra*. Mr. Nicholson submits the plain error standard has been satisfied because (1) there was an error, i.e., a deviation for a legal rule; (2) the error was plain or obvious; and (3) the error affected substantial rights. *State v. Barnes*, 94 Ohio St. 3d 21, 27, 759 N.E.2d 1240 (2002).

"When an evidentiary ruling is so egregious that it results in a denial of fundamental fairness, it may violate due process." *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir.2003). An

evidentiary ruling can rise to the level of a due process violation if it offends some fundamental principle of justice. *Id*. Because Ohio has established rules to effectuate Mr. Nicholson's fundamental rights to a fair trial and to freedom from arbitrary and capricious convictions and punishments, the State has opted "to act in a field where its action has significant discretionary elements," and therefore must "act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387, 401 (1985).

For all the foregoing reasons, the trial court abused its discretion and denied Mr. Nicholson a fair trial and due process by admitting repetitive, gruesome photographs and video footage of the scene, Giselle Lopez, and M.L. A new trial is therefore warranted.

PROPOSITION OF LAW NO. 5

A trial court errs and deprives a defendant of his rights to due process and a fair trial under the United States and Ohio Constitutions when it overrules defendant's request to instruct the jury on the lesser included offense.

Defense counsel requested that the trial court instruct the jury on voluntary manslaughter under R.C. 2903.03(A). (Tr. 4267-4270). "Requested jury instructions should ordinarily be given if they are correct statements of law, if they are applicable to the facts in the case, and if reasonable minds might reach the conclusion sought by the requested instruction." *State v. Adams*, 144 Ohio St. 3d 429, 2015-Ohio-3954, 45 N.E.3d 127, ¶ 240 (citation omitted). In general "[a]n appellate court reviews a trial court's refusal to give a requested jury instruction for abuse of discretion." *Id.*, citing *State v. Wolons*, 44 Ohio St. 3d 64, 68, 541 N.E.2d 443 (1989).

Thus, this Court must use the abuse of discretion standard to decide whether the trial court erred in determining that there was insufficient evidence presented to reasonably support both an acquittal on the charged crime of murder and a conviction for voluntary manslaughter. *State v. Shane*, 63 Ohio St. 3d 630, 632, 590 N.E.2d 272 (1994) ("Even though voluntary manslaughter is not a lesser included offense of murder, the test for whether a judge should give a jury an instruction on voluntary manslaughter [an inferior-degree offense] when a defendant is charged with murder is the same test to be applied as when an instruction on a lesser included offense is sought."). An abuse of discretion implies that the court's attitude is arbitrary, unreasonable, or unconscionable. *Adams*, 62 Ohio St. 2d at 157.

The offense of voluntary manslaughter is governed by R.C. 2903.03(A), which provides that "[n]o person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another * * *."

To mitigate the accused's conduct, there must be evidence of reasonably sufficient provocation occasioned by the victim so as to warrant such an instruction. *See Shane*, 63 Ohio St. 3d at paragraph one of the syllabus. The inquiry into the mitigating circumstances consists of both objective and subjective components. *Id.* at 634. The objective component determines whether the provocation in a given case "is reasonably sufficient to bring on sudden passion or a sudden fit of rage[.]" *Id*. Reasonably sufficient provocation is provocation "sufficient to arouse the passions of an ordinary person beyond the power of his or her control." *Id.* at 635. The subjective component involves the "emotional and mental state of the defendant and the conditions and circumstances that surrounded him at the time' to determine if he was in fact provoked." *Id.* at 634.

In this case, the trial court did not find that Mr. Nicholson failed, as a matter of law, to present sufficient evidence or provocation, which caused him to act under the influence of sudden passion or in a sudden fit of rage on September 5, 2018. (*See* Tr. 4267-4270). Indeed, there was ample evidence presented at trial that Mr. Nicholson was acting under the influence of sudden passion or a fit of rage.

Lt. Vargo testified that when he first spoke with Mr. Nicholson, Lt. Vargo detected a "panic or misunderstanding" in Mr. Nicholson's voice, "as if he were trying to make sense of what had just happened." (Tr. 2763, 2798). During Lt. Vargo's three-to-four-hour phone call with Mr. Nicholson and Angel Nicholson, Mr. Nicholson repeatedly said that he had "snapped," "blacked out," and lost control. (*See, e.g.*, Tr. 2764-2767, 2769, 2780, 2792. *See also* Tr. 4108-4112). Throughout the phone call, Lt. Vargo testified that Mr. Nicholson expressed how he was "shocked and apologetic about what he had done" (Tr. 2757, 2798. *See, e.g.*, Tr. 2764, 2768-2769, 2776-2777, 2792-2793. *See also* Tr. 4111-4112). After speaking with America, Det. Biegacki opined that Mr. Nicholson was in a "rampage" on September 5, 2018 (Tr. 3893, 4297), and America

testified that Mr. Nicholson was "extremely angry" when he was arguing with America in the bedroom that night. (Tr. 3710-3711).

The State likewise acknowledged that Mr. Nicholson was acting under sudden passion or in a sudden fit of rage on September 5, 2018 by asserting in its closing argument that "[t]his all started because [Mr. Nicholson] got upset about a text from Terricko Marshall" and America was not forthcoming and/or dishonest about who she was texting when Mr. Nicholson confronted her about it. (*See* Tr. 4289). Moreover, in its closing argument, the State tried to portray the fact that Mr. Nicholson made thirteen "conscious pulls" of his firearm's trigger on September 5, 2018 was indicative of Mr. Nicholson's prior calculation and design and/or purpose in this case. (*See* Tr. 4287). Yet, if anything, the fact that Mr. Nicholson shot thirteen times was supportive of the notion that Mr. Nicholson was acting under the influence of extreme provocation—or, as Det. Biegacki summarized America's recollection of the events that evening, in a "rampage"—on September 5, 2018. (*See* Tr. 4297).

Rather, the trial court refused to give the voluntary manslaughter instruction requested by defense counsel because it concluded—in relying upon caselaw from the Eighth District Court of Appeals—that a jury instruction on voluntary manslaughter and self-defense was improper because the two legal theories are incompatible. (Tr. 4269-4270). According to the Eighth District Court of Appeals, these two legal theories are "incompatible" because "[v]oluntary manslaughter requires that the defendant be under the influence of sudden passion or a fit of rage, while self-defense requires the defendant to be in fear for his own personal safety." *State v. Jefferson*, 8th District Cuyahoga No. 97331, 2012-Ohio-2387, ¶ 26 (citations omitted).

However, Ohio's appellate courts are split as to whether self-defense and voluntary manslaughter instructions can be simultaneously given to the jury. Indeed, the Seventh District

Court of Appeals "refused to accept a steadfast rule" like the Eighth District Court of Appeals. *State v. Tubbs*, 7th Dist. Mahoning No. 18 MA 0094, 2020-Ohio-730, ¶ 47. Instead, the Seventh District Court has stated that while "an instruction on voluntary manslaughter is generally incompatible with and contradictory to self-defense, there is no blanket rule holding the two theories inconsistent or contradictory." *State v. Stanley*, 7th Dist. Mahoning No. 14 MA 0106, 2016-Ohio-7284, ¶ 22.

The steadfast rule of the Eighth District Court of Appeals relied upon by the trial court is improper because it erroneously presumes a person cannot be acting under the influence of sudden passion or a fit of rage while also in fear for his own personal safety within the same encounter. Such a stringent rule fails to appreciate the way in which series of events and multiple actors can impact the jury's retrospective review of what unfolded. Thus, this Court should denounce the steadfast rule of the Eighth District Court of Appeals, on which the trial court in this case relies, and instead encourage a review of the facts and circumstances of each case in order to determine whether the two theories are inconsistent or contradictory, or if, as was the case here, the evidence presented supports both theories.

Here, the jury's evaluation of the events that took place between approximately 8:50 PM and 9:41 PM on September 5, 2018 were relevant to their determination of whether Mr. Nicholson should be found (1) guilty of the charged offenses; (2) guilty of the lesser-included voluntary manslaughter offenses (had the jury been instructed thereon); or (3) not guilty of the charged offenses and lesser-included offenses. While Mr. Nicholson and America were arguing in their bedroom, M.L. intervened and a physical altercation between M.L. and Mr. Nicholson began. Mr. Nicholson testified that he was angry and upset that M.L. had intervened in the argument between America and Mr. Nicholson, and that emotion was heard in the 911 calls that were played for by

the jury. Mr. Nicholson was still also upset and angry with America, and both he and America testified that Mr. Nicholson asked America multiple times that evening to move her vehicle—which was blocking his car in the driveway—so he could leave the home because of how upset Mr. Nicholson was. America, however, never moved her vehicle. At some point during the altercation inside of the home, Giselle arrived home.

Mr. Nicholson testified that he shot M.L. and Giselle after his service weapon had been retrieved from the trunk of his vehicle which, Mr. Nicholson believed, M.L. and Giselle intended to use to shoot him with it. In that moment, Mr. Nicholson was experiencing "fear for his own personal safety" and was also acting "under the influence of sudden passion or a fit of rage." As argued by defense counsel, these two sentiments are not mutually exclusive. (Tr. 4269). To be sure, the legal ramifications of a jury's finding that a defendant acted in "self-defense" are not the same as the legal impact of a jury finding that a defendant acted "under the influence of sudden passion or in a sudden fit of rage." While the former results in a "not guilty" verdict, the later results in the defendant being found guilty of a lesser-included offense.

Moreover, as was the case here, if more than just two people are involved, the situation itself is exponentially more complex than just the Eighth's District's elementary interpretation that either the defendant be under the influence of sudden passion or a fit of rage (warranting voluntary manslaughter instruction) or the defendant to be in fear for his own personal safety (warranting self-defense instruction).

The emotions Mr. Nicholson was experiencing on September 5, 2018 compounded on each other throughout the course of the evening even though they were brought about by different people. When Mr. Nicholson fatally shot Giselle and M.L., he was acting out of fear for his own personal safety while under the influence of sudden passion or a fit of rage that was provoked by

America's dishonesty and/or his discovery that America may be cheating on him and by M.L.'s decision to intervene and physically attack Mr. Nicholson when America and Mr. Nicholson were arguing.

Indeed, the jury's assessment of Mr. Nicholson's self-defense claim relies, in large part, on its evaluation on whether Mr. Nicholson was "at fault in creating the situation giving rise to the deaths of [M.L.] and Giselle Lopez." (Tr. 4258-4259). However, as described extensively in the Statement of Facts, the fatal shootings of Giselle and M.L. did not take place in a vacuum. They were part of a course of events that took place over the span of less than one hour that began with an argument between America and Mr. Nicholson, in which M.L. subsequently intervened, during which Giselle arrived home. In light of the evidence and testimony presented at trial, an instruction on voluntary manslaughter was not incompatible with or contradictory to self-defense, as Mr. Nicholson was charged with offenses that related to America, M.L., and Giselle.

The State's own closing argument remarks in this case highlight the absurdity in the steadfast rule that the mitigation circumstances relevant to voluntary manslaughter cannot simultaneously exist with the circumstances creating a legal claim of self-defense. Indeed, the State its closing argument "[t]his all started because [Mr. Nicholson] got upset about a text message from Terricko Marshall * * *" (Tr. 4289), and Mr. Nicholson himself testified that he was upset about America being deceitful towards him about the fact that she was texting her ex-boyfriend. Because of that, the State claimed, Mr. Nicholson "create[d] this situation," which, of course, is also relevant to Mr. Nicholson's self-defense claim, as discussed in the First Proposition of Law.

The trial court therefore abused its discretion in rejecting a jury instruction on voluntary manslaughter because Mr. Nicholson presented, as a matter of law, sufficient evidence of provocation and that Mr. Nicholson was acting under the influence of sudden parison or in a

sudden fit of rage, which—given the escalating nature of the circumstances described above—was, if not an act of self-defense, reasonably sufficient to incite him to use deadly force.

Alternatively, even if this Court concludes that the two legal theories underlying voluntary manslaughter and self-defense are incompatible, the law is well-settled that jurors may reasonably draw different inferences from the same facts. *See, e.g.*, *State v. Bridgeman*, 55 Ohio St. 2d 261, 263, 381 N.E.2d 184 (1978); *State v. Ford*, 10th Dist. Franklin No. 07AP-803, 2008-Ohio-4373, ¶¶ 65-68; *State v. Agee,* 7th Dist. Mahoning No. 12 MA 100, 2013-Ohio-5382, ¶¶ 79-80; *State v. Kalman*, 8th Dist. Cuyahoga No. 90752, 2009-Ohio-222, ¶ 23.

In this case, reasonable jurors could find that Mr. Nicholson acted in self-defense, that Mr. Nicholson under the influence of sudden passion or in a sudden fit of rage—thereby making the charge of voluntary manslaughter appropriate—or both. Therefore, the trial court erred when it refused to instruct the jury on the lesser offense of voluntary manslaughter—as well as self-defense—as there was clearly sufficient evidence that Mr. Nicholson under the influence of sudden passion or in a sudden fit of rage when he shot M.L. and Giselle. The trial court's failure to give the lesser-included offense instruction thus deprived Mr. Nicholson defendant of his rights to due process and a fair trial under the United States and Ohio Constitutions and was erroneous. Accordingly, reversal and remand for a new trial is warranted.

PROPOSITION OF LAW NO. 6

A trial court errs and deprives a defendant of his rights to due process and a fair trial under the United States and Ohio Constitutions when it fails to give the jury an accurate and complete instruction on Ohio's self-defense law.

The purpose of jury instructions is to properly guide the jury in deciding questions of fact based on the applicable substantive law. Although a trial court "has broad discretion to decide how to fashion jury instructions," such instructions must "present a correct, pertinent statement of the law that is appropriate to the facts" of the case. *State v. White*, 142 Ohio St. 3d 277, 2015-Ohio-492, 29 N.E.3d 939, ¶ 46, citing *State v. Griffin*, 141 Ohio St. 3d 392, 2014-Ohio-4764, 24 N.E.3d 1147, ¶ 5; *State v. Lessin*, 67 Ohio St. 3d 487, 493, 1993-Ohio 52, 620 N.E.2d 72.

A defendant is entitled to have the trial court give complete and accurate jury instructions on all the issues raised by the evidence. *State v. Sneed*, 63 Ohio St. 3d 3, 9, 584 N.E.2d 1160 (1992); *State v. Comen*, 50 Ohio St. 3d 206, 553 N.E.2d 640 (1990), paragraph two of the syllabus. However, the failure to object to jury instructions waives all but plain error on appeal. *See, e.g.*, Crim.R. 52(B); *State v. Long*, 53 Ohio St. 2d 91, 372 N.E.2d 804 (1978). Further, an error in a jury instruction does not constitute a plain error unless, but for the error, the outcome of the trial clearly would have been otherwise. *Long*, 53 Ohio St. 2d at paragraph two of the syllabus.

At defense counsel's request, the trial court instructed the jury in this case on self-defense. (*See* Tr. 4258-4261). The State did not object to the self-defense instruction being given, including the instruction that the State had the burden of proving, beyond a reasonable doubt, that Mr. Nicholson did not act in self-defense on September 5, 2018. (*See* Tr. 4269). Thus, the propriety of the trial court's finding that there was sufficient evidence presented at trial to give the self-defense instruction is not before this Court.

Prior to March 28, 2019, Ohio law deemed self-defense an affirmative defense, requiring

a defendant to prove the elements of self-defense by a preponderance of the evidence. *See, e.g., State v. Ferrell*, 10th Dist. Franklin No. 19AP-816, 2020-Ohio-6879, ¶ 25 (citations omitted). Effective March 28, 2019, however, following revisions to R.C. 2901.05, a defendant no longer bears the burden of establishing the elements of self-defense by a preponderance of the evidence. *See id.* at ¶ 26 (citations omitted) (discussing R.C. 2901.05(B)(1)).

In promulgating these changes to R.C. 2901.05, the Ohio legislature did not statutorily define "self-defense" or otherwise indicate precisely what the State must prove in order to satisfy their burden. Thus, given the lack of any clarification from the Ohio General Assembly or binding precedent from this Court on this novel issue presented by House Bill 228's burden-shifting modification to R.C. 2901.05, Ohio's trial and appellate courts have interpreted the self-defense statute, R.C. 2901.05(B)(1), as placing the burden on the prosecution to disprove at least one of the common law elements of self-defense beyond a reasonable doubt. *See Ferrell*, 2020-Ohio-6879 at ¶ 26, quoting *State v. Carney*, 10th Dist. Franklin No. 19AP-402, 2020-Ohio-2691, ¶ 31. Under that interpretation, the State is required "to disprove self-defense by proving beyond a reasonable doubt that [the defendant] (1) was at fault in creating the situation giving rise to the affray, OR (2) did not have a bona fide belief that he was in imminent danger of death or great bodily harm for which the use of deadly force was his only means of escape, OR (3) did violate a duty to retreat or avoid the danger." *Ferrell*, 2020-Ohio-6879 at ¶ 26, citing *Carney*, 2020-Ohio-2691 at ¶ 31. *See also State v. Daley*, 10th Dist. Franklin No. 19AP-561, 2020-Ohio-4390, ¶ 39.

Here, the trial court instructed the jury that the State had to prove beyond a reasonable doubt that the defendant did not use deadly force in self-defense; enumerated the common law elements of self-defense; and defined the terminology relevant to these common law elements. (*See* Tr. 4258-4260).

The trial court then just generally instructed the jury that:

> If you find that the State proved beyond a reasonable doubt all the essential elements of aggravated murder or any of the lesser included offenses and that the State proved beyond a reasonable doubt that the self-defense does not apply, you must find the defendant guilty according to your findings.
>
> If you find that the State failed to prove beyond a reasonable doubt any one of the elements of aggravated murder or any of the lesser included offenses, that being murder and felonious assault, or if you find that the State failed to prove beyond a reasonable doubt that self-defense does not apply, you must find the defendant not guilty according to your findings.

(Tr. 4260-4261).

This instruction did not clearly inform the jury on precisely what findings they needed to make in order to conclude that the State proved, beyond a reasonable doubt, that Mr. Nicholson acted in self-defense. (*See* Tr. 4258-4261). However, by defining what self-defense is, the instructions impliedly suggested that self-defense is cumulative, meaning that the State could satisfy its burden of proof by merely disproving one of the four common law self-defense elements enumerated by the trial court. (*See* Tr. 4258-4261).

Moreover, the self-defense instructions given in this case did not accurately reflect Ohio's self-defense common law regarding the revival of the right to use self-defense to an "initial aggressor." On this point, the jury was instructed that "[s]elf-defense means that A, the defendant was not at fault in creating the situation giving rise to the deaths of [M.L.] and Giselle Lopez." (Tr. 4258-4259). However, the notion that someone "created the situation" is extremely vague and broad, especially where, as is here, there are multiple persons coming into the situation at different times during the evening. Indeed, the State argued that Mr. Nicholson "create[d] the situation" giving rise to the deaths of M.L. and Giselle by suggesting that "[t]his all stated because [Mr. Nicholson] got upset about a text from Terricko Marshall and then begins to strangle America." (Tr. 4289).

Significantly, though, a person who wrongfully starts a physical conflict is forever foreclosed from claiming self-defense in the affray. The right to use self-defense is restored to the initial aggressor when the initial aggressor withdraws from the conflict in good faith and/or communicates (expressly or impliedly) to the other person his or her intention to withdraw, yet the other person nonetheless continues to use (or threatens the use of) unlawful physical force. Indeed, in *State v. Melchior*, 56 Ohio St. 2d 15, 381 N.E.2d (1978), this Court recognized that:

> Even though the accused may in the first instance have intentionally brought on the difficulty and provoked the occasion, yet his right of self-defense will revive and his actions will be held justifiable upon the ground of self-defense in all cases where he has withdrawn from the affray or difficulty in good faith as far as he possibly can, and clearly and fairly announced his desire for peace.

Id. at 21. *See also Melchior v. Jago*, 723 F.2d 486, 493 (6th Cir.1982). Like Ohio, most—if not all—states have expressly recognized the restoration of the right to use self-defense upon withdrawal in its state statutes and/or case law. [6]

[6] *See,* for instance: Ala. Code § 13A-3-23(c)(2); Alaska Stat. § 11.81.330(b); Ariz. Rev. Stat. Ann. § 13-404(B)(3); Ark. Code Ann. § 5-2-606(2)(B); CALCRIM No. 3471; Colo. Rev. Stat. § 18-1-704(3)(b); Conn. Gen. Stat. Ann. § 53a-19(c); *State v. Smith*, 913 A.2d 1197, 1212 (Del. 2006); *Bedney v. United States*, 471 A.2d 1022, 1024 n.2 (D.C. 1984); Fla. Stat. Ann. §776.041(2)(b); Ga. Code Ann. § 16-3-21(b)(3); *State v. Turner*, 38 P.3d 1285, 1290 (Idaho Ct. App. 2001); 720 Ill. Comp. Stat. Ann. 5/7-4(c); Ind. Code Ann. 35-41-2(g)(3); Iowa Code Ann. § 704.6(3)(b); Kan. Stat. Ann. § 21-5226(c)(2); Ky. Rev. Stat. Ann. § 503.060(3); La. Stat. Ann. § 14:21; Me. Rev. Stat. Ann. tit. 17A, § 108(1)(B); *Commonwealth v. Pring-Wilson*, 863 N.E.2d 936, 947 (Mass. 2007); *People v. Rajput*, 2020 Mich. LEXIS 127, *7-12 (Mich. 2020); *Bellcourt v. State*, 390 N.W.2d 269, 272 (Minn. 1986); *Patrick v. State*, 285 So.2d 165, 169 (Miss. 1973); Mo. Ann. Stat. § 563.031(1)(a); Mont. Code Ann. § 45-3-105(2)(b); *Hans v. State*, 100 N.W. 419, 422 (Neb. 1904); *State v. Hall*, 13 P.2d 624, 633 (Nev. 1932); N.H. Rev. Stat. Ann. § 627:4(I)(b); *State v. Rivers*, 599 A.2d 558, 562 (N.J. Super. Ct. App. Div. 1991); *State v. Pruett*, 172 P. 1044, 1046 (N.M. 1918); N.Y. Penal Law § 35.15(1)(b); *State v. Marsh*, 237 S.E.2d 745, 747 (N.C. 1977); N.D. Cent. Code § 12.1-05-03(2)(b); OUJI CR 2d, 8-51 (Oklahoma); Or. Rev. Stat. § 161.215(2); *State v. Bryant*, 520 S.E.2d 319, 322 (S.C. 1999); Tenn. Code Ann. § 39-11-611(e)(2); Tex. Penal Code Ann. § 9.31(b)(4); Utah Code Ann. § 76-2-402(2)(a)(iii); *Smith v. Commonwealth*, 435 S.E.2d 414, 416 (Va. App. 1993); *State v. Craig*, 514 P.2d 151, 156 (Wash. 1973); *State v. Brooks*, 591 S.E.2d 120, 125 (W. Va. 2003); Wis. Stat. Ann. § 939.48(2)(b); *Farmer v. State*, 124 P.3d 699, 708 n.3 (Wyo. 2005).

Under the formulation of the self-defense instruction given, if the jury found that Mr. Nicholson was at fault in creating the situation in that, as the State suggested, he got upset about a text from Terricko, the jury was required to conclude that the State—in disproving this one element—had proven beyond a reasonable doubt that Mr. Nicholson did not act in self-defense. The self-defense instructions given by the trial court did not direct the jury to consider whether, if they found that Mr. Nicholson creating the situation giving rise to the deaths of M.L. and Giselle, the right to use self-defense had been restored to him because: (1) Mr. Nicholson withdrew (or attempted to withdraw) from the conflict in good faith; (2) communicated, either explicitly or impliedly, his withdrawal or intention to withdraw; and (3) M.L., Giselle, and/or America nevertheless continued to use or threatened the use of unlawful physical force.

Because defense counsel failed to object to self-defense instructions given, this issue must be reviewed for plain error or for ineffective assistance of counsel as discussed, in Proposition of Law No. 16, *infra*. Mr. Nicholson submits that the plain error standard has been satisfied because (1) there was an error, i.e., a deviation for a legal rule; (2) the error was plain or obvious; and (3) the error affected substantial rights. *State v. Barnes*, 94 Ohio St. 3d 21, 27, 759 N.E.2d 1240 (2002). The trial court's inaccurate and incomplete self-defense instruction deprived Mr. Nicholson of his Federal and/or Ohio Due Process right to have the prosecution prove his guilt beyond a reasonable doubt by establishing all elements of the charged offenses beyond a reasonable doubt and also proving, beyond a reasonable doubt, that Mr. Nicholson did not act in self-defense. Put simply, the jury instructions given were not a correct statement of Ohio's common law because they failed to account for the restoration of the right to use self-defense to an initial aggressor, which was extremely pertinent given the facts of this case.

Accordingly, reversal and remand for a new trial is warranted. In the alternative, if this Court does not find plain error as to the errors addressed in this Proposition of Law, defense counsel was clearly ineffective—as discussed in Proposition of Law No. 16, *infra*—for failing to request a self-defense instruction that accurately and completely reflects Ohio's self-defense law.

PROPOSITION OF LAW NO. 7

A trial court errors when it admits victim-impact testimony during the culpability phase of the death penalty trial that is overly emotional and/or is not relevant to the facts attendant to the offenses, and which results in prejudice to a capital defendant in the mitigation phase.

A. Background

Defense counsel filed a Motion *in Limine* to Prohibit Victim-Impact Evidence During Trial and, if Necessary, the Mitigation Phase on May 7, 2019. (R.90). That motion was granted by the trial court following the September 5, 2019 hearing on all pretrial motions. (R.244, Journal Entry).

1. Victim-Impact Testimony from M.L.'s friend, Henry Billingslea.

During the guilt-phase proceedings, over the defense's objection, Henry Billingslea testified about the life of his friend, M.L. (Tr. 3565-3578). At a sidebar discussion during trial, the State noted that Henry was going to testify "generally about [M.L.]," and "also that he saw a hole in the wall [of] the house at some point." (Tr. 3563). The State argued that his testimony was "all relevant to the defendant's prior history of domestic violence against America and against her children, which goes to the defendant's motive, intent, and purpose in committing the homicide." (Tr. 3563-3564). Henry testified that M.L. was "his best friend" and that they "did everything together," including working out, going to school, leaving school, going out to eat, and playing video games (Tr. 3567). When asked to do so by the State, Henry described M.L. as "nice to everybody," "[r]espectful to his teachers, mom, dad, everybody," never having a problem with anybody, and "the nicest kid [Henry Billingslea had] ever met." (Tr. 3567).

Henry was not present at 4838 East 86th Street when the September 5, 2018 incident occurred. Henry testified that he never hung out at M.L.'s home when Mr. Nicholson was there. (Tr. 3569-3570, 3578). Henry testified that he had "brief" interactions with Mr. Nicholson when Henry came to 4838 East 86th Street to pick-up and drop-off M.L. (Tr. 3570). With regard to those

brief interactions, Henry essentially testified that he observed Mr. Nicholson and M.L. "say hi and bye to each other" "at first," "after a couple of years" Henry allegedly noticed that M.L. and Mr. Nicholson stopped doing this. (Tr. 3570-3571). However, Henry Billingslea did not testify as to how often he allegedly observed Mr. Nicholson briefly interact with M.L. when Henry picked M.L. up or dropped M.L. off.

At trial, Henry testified about how he came to learned what happened to M.L. on September 5, 2018. Over defense counsel's objection, Henry testified that he had been talking to M.L. on the phone while playing video games around 7:30 PM or 8:00 PM on September 5, 2018. (Tr. 3572).

Henry testified—over the objection of defense counsel—that he went to 4838 East 86th Street a couple of days after M.L. died. (Tr. 3572-3573). When he was there, Henry noticed that "furniture and stuff" had been moved around and observed a hole in the family room's wall. (Tr. 3573). Over defense counsel's objection, Henry testified that he—along with "[l]ike the whole school almost, or like our whole class"—attended M.L.'s funeral. (Tr. 3574).

After the State asked Henry if he "learn[ed] of anything new about M.L. at the funeral"—to which defense counsel objected—the State explained in a sidebar that it was trying to elicit from Henry the fact that "[M.L.] had a girlfriend that he didn't tell anyone about." (Tr. 3574-3575). The State argue that defense counsel had "made an issue of the fact that no one ha[d] disclosed anything to the outside world," and that Henry's testimony regarding his discovery of M.L.'s girlfriend showed that M.L. was private and did not disclose a lot of stuff. (Tr. 3575).

During that sidebar, defense counsel indicated that it was "going to continue to object to this witness testifying" because he was "not a fact witness" and that his testimony felt "more like victim impact testimony, bringing in a friend that the jury can sympathize and empathize with." (Tr. 3575-3576). The trial court nonetheless allowed Henry to testify that he did not know, prior

to September 5, 2018, that M.L. had a girlfriend, but later learned after M.L. passed away that he did. (Tr. 3576-3577).

2. Victim-Impact Testimony from Giselle's friend, Kristin Bailey.

During the guilt-phase proceedings, over the defense's objection, Kristin Bailey testified about the life of her best friend, Giselle Lopez. Kristin testified that she "thought of [Giselle] more like a sister," and when asked by the State, described Giselle as "very sweet, caring, loving, always laughing. She's just so kind – so kindhearted. Everybody loved her. And she was so loyal and trustworthy as well." (Tr. 3842). Kristien testified that Giselle was part of the show choir at school and a member of National Honor Society. (Tr. 3842-3843).

Kristin Bailey was not present at 4838 East 86th Street when the September 5, 2018 incident occurred. Kristin Bailey testified that when she was at Giselle's home and saw Giselle interact with Mr. Nicholson, she observed them engage in "lightweight conversation." (*See* Tr. 3844). Kristin stated that Mr. Nicholson would "not often" come up in conversation between Giselle and Kristin. (Tr. 3845).

Although Kristin testified that she observed "what seemed like holes that were patched, re-plastered," on a wall in the kitchen and on a wall in the living room by the stairwell, Kristin could not recall when she saw those holes. (Tr. 3845). Kristin likewise did not testify as to whether she had any actual information as to the origin of these holes. Moreover, the presence of these purported holes in the walls was relevant to America's prior acts testimony, not the actual events of September 5, 2018. Photographs of the purported holes in the walls from such alleged prior acts were presented at trial (State's Exhibits 341BBB to 341GGG) and testified about by America. The State did not show Kristin those photographs to confirm that they were the holes she saw or did not otherwise ask Kristin to describe the holes she testified about seeing in the wall.

3. Other victim-impact evidence elicited by the State during the culpability phase of trial.

Throughout the culpability phase of trial, the State elicited testimony from multiple witnesses relating to the personal characteristics of Giselle and M.L. Both Giselle and M.L. were described as being "good kids" by America's ex-boyfriend Terricko Marshall (Tr. 2982) and America's realtor Nanci Crystal (Tr. 3433). Neighbor Connie Allhouse described Giselle and M.L. as being "[v]ery, very polite. Respectful. Good. They listened. They weren't loud. They didn't act out. I mean, super super nice kids." (Tr. 3398). Neighbor Vic Sanuk testified about how he helped take Giselle and M.L. to school when America and her children first moved into the neighborhood. (Tr. 2648). At the State's prompting, Vic Sanuk described the children as follows:

> Very polite, very friendly * * * very well-disciplined. Okay? When they came from home school – they were in school – I guess they – I guess they knew the stay home. Hardly ever would see them go out and party or anything like that. It was a situation where they go home, do their school work. When they got old enough to work, they would go to their employment, come home. I believe that they had a like a curfew, they had to be home a certain time, because you never see them come home later. And they all – they seem like they all had part-time jobs when they were going through school, maybe to help out with the finances or maybe pay for their insurance, whatnot. I don't know for sure.

(Tr. 2649-2650).

With regard to Giselle, Terricko Marshall described her as being an "intelligent young lady" who had "made the dean's list, [and was at the] top of her class" when she graduated and had started taking college classes. (Tr. 2985). America testified that Giselle did a lot when she was in school, including the choir and National Honor Society. (Tr. 3275). Roberto testified that Giselle was in the choir in high school (*see* Tr. 3632) and had aspirations of going to college after she graduated (Tr. 3642). When prompted by the State, Roberto's best friend, Carlos Nieves, described Giselle as "very smart" and recounted that Giselle "was always by her mom's side, whenever [Carlos] came over." (Tr. 3726).

With regard to M.L., Terricko Marshall testified that he and M.L. would work out together a couple of times a month. (Tr. 2985-2986). America testified that M.L. "loved to play baseball." (Tr. 3275). M.L.'s older brother, Roberto Lopez, testified that his brother played baseball (Tr. 3632, 3648) and also enjoyed playing video games (Tr. 3635-3636). After Roberto graduated from high school and moved away from home, Roberto testified that he and M.L. continued to play video games online together "a couple days a week." (Tr. 3641-3642). Roberto's best friend, Carlos Nieves, testified that he looked at M.L. "as if he was [Carlos's] younger brother." (Tr. 3726). When prompted by the State, Carlos described M.L. as "really funny, energetic. He loved sports and he – he occasionally joked a lot, so he was a really nice kid." (Tr. 3726).

The State elicited testimony from Roberto as to how he found out about the death of his brother and sister. (Tr. 3654-3655). Roberto testified that, on September 13, 2019, Roberto was "throwing" Mr. Nicholson's clothing that was still inside of America's home into Mr. Nicholson's car. (Tr. 3659-3660). The State asked Roberto how he felt when he was doing that, to which Roberto responded: "I was angry." (Tr. 3660). The trial court sustained defense counsel's objection to that testimony. (Tr. 3660).

On the fourth day of the culpability phase of Mr. Nicholson's trial (Thursday, October 3, 2019), America Polanco became so upset while testifying about the events of September 5, 2018 that the trial court excused her during the middle of her direct testimony that day. (Tr. 3391-3393). Although eight additional witnesses were called to testify after America was excused, America Polanco's direct testimony did not resume until Monday, October 7, 2019. (Tr. 3670).

It is undisputed that when America was testifying on October 3, 2019, she was in an overly emotional state. To be sure, in its State's Final Closing Argument, the State described America as being in a "catatonic state" on the witness stand during the culpability phase of Mr. Nicholson's

trial. (Tr. 4331).

From a review of the transcript, it appears that America became upset on October 3, 2019 while reading—at the request of the State—text messages between her and Giselle from 2017 because the prosecutor instructed America to "just look up at" her at one point. (*See* Tr. 3331). It is unclear from the transcript whether America remained in an emotional state when she gave the testimony set forth on the next sixty pages of the trial transcript. However, while testifying about the events of September 5, 2018, America became extremely upset:

> AMERICA: * * * And he put me to the side with his gun in his hand. He shot my babies. He killed my [M.L.] in the driveway, not even 3 feet of distance. He killed my baby. My baby was dead instantly. He shot my Giselle. * * * When I go to talk to [M.L.] and Giselle, [M.L.] was already dead. And Giselle's last words were, she throw her arms on [M.L.'s] back and she told him: "I love you, [M.L.]." And she asked me: "Mama, what happened? Why so loud?" * * * My babies dying. That's what happened that day. My babies are not here anymore.
>
> MS. FARAGLIA: Mrs. Polanco –
>
> THE COURT: Let's take five minutes.

(Tr. 3391-3392).

In depicting the events that had just taken place in the courtroom, the following discussion was held between the trial court and counsel, outside the presence of the jury:

> THE COURT: The record should reflect that at 1:58 [PM] as America Polanco was testifying, describing the events of September 5, 2018, she broke down. I granted a recess for her to collect herself.
>
> She could not collect herself. She had difficulty breathing. The court paramedic was brought up. He recommended calling EMS. EMS recommended that she be transported to the hospital. So she is – she just left here. It's now 2:50 [PM].

So we're going to excuse her from testifying today. I'll explain to the jury that she was unable to continue her testimony, and that she will conclude it at another time.

Now, any objection, counsel?

MS. FARAGLIA: None, Your Honor.

MR. MACK: No, Your Honor.

THE COURT: Very good. I'll explain to the jury. Let's bring the jury out.

(Tr. 3392-3393).

The trial court told the jury that a recess had been taken "in order for America Polanco to compose herself," but that "[s]he was unable to do so." (Tr. 3393). In its closing, the State referenced America's emotional state on the stand in an attempt to cast doubt on Mr. Nicholson's testimony that America put Mr. Nicholson's service weapon back in the trunk of his vehicle after the shooting. (Tr. 4331).

The trial court also allowed the State to the body camera footage from three GHPD patrol officers—Officer Robert Jarzembak, Officer Spencer Sabelli, and Officer Berri Cramer—which shows America crying and in a "catatonic" state. (Tr. 4331; State's Exhibit 322A at 0:00:00-0:23:15; State's Exhibit 321A at 0:00:00-0:19:25; State's Exhibit 323A at 0:00:00-0:12:00). In its closing argument, the State pointed out that:

> [W]hen officers get to the scene, you heard the bodycam. America Polanco is an emotional wreck. She just watched her two children get murdered in cold blood right in front of her. * * * She could barely compose herself at the scene. She had to be treated by EMS. She went to the hospital. She could barely compose herself here on the stand over a year later.

(Tr. 4287-4288). And, in its final closing argument, the State implored the jury to take a look at the body camera footage from Officers Sabelli, Cramer, and Jarzembak, which showed America

in a "catatonic state, like she was on that witness stand." (Tr. 4331).

The State also improperly referenced victim impact evidence in its opening statement and closing arguments during the culpability phase of trial. During its opening statement and final closing argument, the State displayed for the jury's view a photograph of M.L. and Giselle sitting down. (Tr. 4320-4321). Defense counsel objected to this victim impact photograph being displayed during the State's final closing argument, which was overruled by the trial court. (Tr. 4321). In the State's opening statement and closing arguments, the State referenced the fact that Giselle Lopez was part of the Honor Society, graduated at the top of her class, was in nursing school at Tri-C when she was killed and was gainfully employed. (Tr. 2506. *See* Tr. 4327). With regard to M.L., the State pointed out that he was a high school student who enjoyed playing video games and "had a curfew." (Tr. 2506. *See* Tr. 4327-4328). In final closing argument, the State attempted to justify America's inconsistent testimony by pointing out that she was "a distraught mother that has lost two kids and she saw them being gunned down." (Tr. 4330. *See also* Tr. 4331-4332). The State also stated in final closing argument—over defense counsel's objection—that "The Polanco and Lopez family have been on a journey too." (Tr. 4339).

Additionally, GHPD Lt. Robert Petrick became overly emotional when he was testifying on the second day of the culpability phase, October 1, 2019, about his search of Giselle's bookbag. One of the bullets struck a book that was in bookbag Giselle was wearing. (Tr. 2935-2937). At the State's request, Lt. Petrick pulled out various items from Giselle's bookbag and described them to the jury. (Tr. 2935-2938). During his testimony, Lt. Petrick became overly emotional on the witness stand and—without solicitation—brought up the subject matter of his own daughter being in nursing school in relation to the State asking Lt. Petrick what pockets of Giselle's bookbag he was opening. (Tr. 2938).

This statement and emotion by Lt. Petrick during trial were significant, as testimony and evidence presented throughout trial indicated that, at the time of the incident, Giselle was in nursing school at Tri-C. (*See* Tr. 3343). Defense objected to Lt. Petrick's testimony. (Tr. 2938). In sidebar, defense counsel argued that Lt. Petrick's reference to his daughter being in nursing school was "completely irrelevant" to the question the State had asked him and "was done in order to get the jurors to sympathize with what's going on, in terms of the questioning here." (Tr. 2939). The trial court noted that it did not believe Lt. Petrick got emotional intentionally (Tr. 2940) but agreed that it was inappropriate for Lt. Petrick to reference his own daughter being in nursing school—like Giselle was on September 5, 2018—when he was testifying. (*See* Tr. 2940).

B. Argument

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. McKelton*, 148 Ohio St. 3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 259; *Payne v. Tennessee*, 501 U.S. 808, 817 (1991). The admission of such evidence is limited to the sentencing phase of the death-penalty proceedings. *See State v. Graham*, Slip Opinion No. 2020-Ohio-6700, ¶¶ 113, 136; R.C. 2930.13, 2930.14(A), and 2947.051; Article I, Section 10, Ohio Constitution.

1. The victim-impact testimony offered by the State during the culpability phase of trial was irrelevant.

"Victim-impact testimony is admissible during the culpability phase of the proceedings only when it is *relevant* to the commission of the offense *and* it is not overly emotional." *See Graham*, 2020-Ohio-6700 at ¶ 136. When such evidence is improperly admitted in the culpability phase of the proceedings, it increases the likelihood that arbitrary factors will influence the jury's decisions, which increases the possibility that a reversal will be required. *See id.* at ¶ 136 (citations omitted).

To be admissible at trial, evidence must be relevant. Evid.R. 402. Evid.R. 403(A) prohibits the admission of relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Exclusion of such evidence is mandatory. In *State v. Goss*, 97 Ohio St. 3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, this Court held that victim-impact testimony is relevant and admissible during the culpability phase of a death-penalty trial when the testimony concerns the circumstances surrounding the commission of the murder. *Id.* at ¶ 62. And, in *State v. Maxwell*, 139 Ohio St. 3d 12, 2014-Ohio-1019, 9 N.E.3d 930, this Court upheld the admission of testimony about the victim's family and her divorce during the culpability phase of trial because such testimony provided background information about the victim's relationship with the defendant and the witnesses who testified. *Id*. at ¶¶ 134-137.

Unlike in *Maxwell*, Henry's testimony did not provide any substantive background information about M.L. relationship with Mr. Nicholson that was relevant to the offenses charged in the indictment. Although Henry testified that he saw a hole in the living room wall sometime after September 7, 2018, the presence of this purported hole in the wall was relevant to America's prior acts testimony, not the actual events of September 5, 2018. Henry likewise did not testify as to whether he had any actual information as to the origin of these holes. Moreover, photographs of the purported holes in the walls from such alleged prior acts were presented at trial (State's Exhibits 341BBB to 341GGG) and testified about by America. The State did not show Henry those photographs to determine whether the hole Henry saw after September 5, 2018 was one of the holes America testified about and did not otherwise ask Henry to describe the hole he testified about seeing in the living room wall after the incident. Put simply, Henry Billingslea's victim-impact testimony provided the jury with no relevant facts attendant to the charged offenses.

Because his testimony was irrelevant, it should not have been admitted during the culpability phase of Mr. Nicholson's death penalty trial. (*See* Tr. 3840-3846, 4168, 4327-4328).

Kristin similarly did not provide any substantive background information about Giselle's relationship with Mr. Nicholson that was relevant to the offenses charged in the indictment. Thus, Kristin Bailey's victim-impact testimony also provided the jury with no relevant facts attendant to the charged offenses. Because her testimony was irrelevant, it should not have been admitted during the culpability phase of Mr. Nicholson's death penalty trial. (*See* Tr. 3840-3846, 4168, 4327-4328).

In this case, the victim-impact testimony from Henry Billingslea, Kristin Bailey, and the other witnesses as described above was irrelevant, as such testimony did not provide relevant background regarding the circumstances of the deaths of M.L. and/or Giselle and did not otherwise offer an insight on Mr. Nicholson's actual relationship with M.L. and Giselle leading up to the September 5, 2018 incident. Accordingly, the trial court erred when it failed to exclude the testimony of Henry Billingslea and Kristin Bailey altogether. Moreover, the trial court should have granted defense counsel's objections to the victim-impact testimony and evidence the State elicited from other witnesses during the culpability phase of Mr. Nicholson's trial.

2. The irrelevant victim-impact testimony admitted during the culpability phase prejudiced Mr. Nicholson because it was overly emotional.

Where defense counsel objected to the admission of victim-impact evidence during the culpability phase of Mr. Nicholson's trial, this Court must determine whether the testimony resulted in reversible error. To determine whether an error affected the substantial rights of the defendant and requires a new trial, we must ascertain "(1) whether the defendant was prejudiced by the error, i.e., whether the error had an impact on the verdict, (2) whether the error was not harmless beyond a reasonable doubt, and (3) whether, after the prejudicial evidence is excised, the

remaining evidence establishes the defendant's guilt beyond a reasonable doubt." *State v. Arnold*, 147 Ohio St. 3d 138, 2016-Ohio-1595, 62 N.E.3d 153, ¶ 50 (lead opinion), citing *State v. Harris*, 142 Ohio St. 3d 211, 2015-Ohio-166, 28 N.E.3d 1256, ¶ 37 (setting forth the three-part analysis for determining whether the error affected the substantial rights of the defendant and thus requires a new trial).

For purposes of analyzing whether the admission of the victim-impact testimony constituted reversible error in this case, it must be determined whether the testimony was overly emotional. *Graham*, 2020-Ohio-6700 at ¶ 121. In *Graham*, this Court set forth a nonexhaustive list of facts that can be considered when evaluating whether victim-impact testimony was overly emotional. *See id.* at ¶¶ 123-125. Those factors are: (1) the length of the victim impact testimony; (2) whether witnesses, jurors, and/or 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; and (6) this Court's precedent in similar cases involving allegedly overly emotional victim-impact testimony. *See id.* at ¶ 126.

Although defense counsel filed a pretrial motion in limine to exclude victim-impact testimony during the culpability phase that was granted by the trial court, defense counsel did not—except when otherwise noted above—renew its objection at trial. Thus, where victim-impact testimony objections were not renewed, all but plain error has been forfeited. *See State v. Powell*, 132 Ohio St. 3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 130.

In this case, the testimony of Henry takes up approximately fourteen (14) pages of the guilt-phase transcript (Tr. 3565-3578), and the testimony of Kristin Bailey takes up approximately six (6) pages of the guilt-phase transcript (Tr. 3840-3846). Starting from the first witness to testify

during the guilt-phase of trial, Danielle Diamond, (Tr. 2527) and ending with the State's rebuttal witness, Todd Vargo, (Tr. 4223), the guilt-phase transcript of witness testimony is less than 1,696 pages long. (*See* Tr. 2527-4223).

The record does not indicate that there were any physical manifestations of emotion by Henry, Kristin, the jury, or members of the audience during the testimony of Henry Billingslea and Kristin Bailey. However, the victim-impact testimony of Henry and Kristin was nonetheless prejudicial when considered with the physical manifestations of emotion that did take place during the culpability phase of Mr. Nicholson's trial.

In *Graham*, this Court noted that the victim impact evidence was admittedly a "close call," and only the victim's father provided victim impact testimony in that case. *See* 2020-Ohio-6700 at ¶ 127. Here, there were at least six witness who offered the above-described victim-impact testimony at trial, as well as one law enforcement officer who got emotional on the stand. If *Graham* was a "close call," then this case is quite plainly over that line.

The irrelevant victim-impact testimony of Henry and Kristin—along with the overly emotional state of America Polanco and Lt. Petrick and other victim-impact testimony elicited from multiple witnesses by the State during the culpability phase of Mr. Nicholson's trial—cumulatively inflamed the passions of the jurors. In its final closing argument, the State sought to capitalize on the emotions of the jurors by reminding them that America was in a "catatonic state" on the witness stand (Tr. 4331)—i.e., the impact the incident has had on the family—and encouraging the jurors to remember what they were told about the personal characteristics of Giselle and M.L. by, among others, Henry Billingslea, Kristin Bailey, Connie Allshouse, and Vic Sanuk. (*See* Tr. 4327-4328). In so doing, the State sought to—and did, in fact—elicit a purely emotional response that inhibited the jurors from making objective and rational decisions

regarding Mr. Nicholson's guilt, thereby resulting in prejudice to Mr. Nicholson.

3. The irrelevant and overly emotional victim-impact testimony admitted during the culpability phase prejudiced Mr. Nicholson in the mitigation phase of trial.

The guilt-phase victim impact testimony prejudiced Mr. Nicholson in the mitigation phase of trial because the cumulative effect of the victim impact testimony of multiple witnesses—including, most notably, America—was extremely impactful. Unlike the victim's father in *Graham*, America's victim impact testimony was overly emotional, as she became so upset during her testimony that she was taken away from the courthouse in an ambulance. The cumulative impact of the improper culpability phase victim impact testimony permeated into the mitigation phase of trial. Mr. Nicholson was therefore deprived of his substantive right to a fair trial and resulted in a violation of Mr. Nicholson's rights as guaranteed under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution as well as Article I, Sections 9 and 16 of the Ohio Constitution. Thus, Mr. Nicholson is entitled to a new trial.

PROPOSITION OF LAW NO. 8

> **A trial court commits prejudicial error in a capital case when it fails to ensure the defendant receives the adequate voir dire necessary to empanel a fair and impartial jury, free from bias and preconceived opinions about the death penalty, and comprised of jurors capable of imposing a life sentence upon conviction in accordance with the facts and the law, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution, and/or Article I, Sections 5, 9, 10, and 16 of the Ohio Constitution.**

A. General Legal Principles

Jury selection is critically important in a capital case to ensure that the defendant's constitutional rights are protected. Not just his rights to due process and a fair trial before an impartial jury, but his equally important rights—if he is convicted—to individualized sentencing by a jury willing and able to fairly consider the life sentencing options and any mitigating factors the defendant identifies in support of a sentence less than death. *See, e.g.*, *Penry v. Johnson*, 532 U.S. 782 (2001); *Eddings v. Oklahoma*, 455 U.S. 104 (1982). If, because of a bias in favor of death or which impairs fair consideration of mitigation evidence, even one juror is unable to perform in that required manner, any resulting death sentence violates the defendant's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution, and Article I, Sections 5, 9, 10, and 16 of the Ohio Constitution, and must be set aside.

"Much like cross-examination is the engine of truth in our justice system, voir dire is the engine of selecting a jury that will be fair and impartial." *Ellington v. State*, 292 Ga. 109, 124 (2012). Thus, while recognizing that trial judges must have substantial discretion to oversee jury selection, due process mandates that voir dire be sufficient to allow the parties and the trial court to elicit juror bias. *See generally Morgan v. Illinois*, 504 U.S. 719, 727-739 (1992).

Although the trial court has some discretion to determine the scope of permitted inquiry during voir dire, that discretion is "subject to the essential demands of fairness." *Morgan*, 504 U.S.

at 730, quoting *Aldridge v. United States*, 283 U.S. 308, 310 (1931). A capital case like this one will inevitably elicit strong emotions, especially given the youth of Giselle Lopez and M.L. Thus, if done properly, jury selection in a case such as this one should take a substantial amount of time and require hundreds of prospective jurors. It must not be rushed, as it was here. *See, e.g.*, *In re Tsarnaev*, 780 F.3d 14, 25-26 (1st Cir.2015) (quotations omitted); *Miller-El v. Cockrell*, 537 U.S. 322, 328 (2003) (noting that jury selection in capital murder case took five weeks). "Moreover, the fact that defendant bears the burden of establishing juror partiality * * * makes it all the more imperative that a defendant be entitled to meaningful examination at voir dire in order to elicit potential biases held by prospective jurors." *State v. Jackson*, 107 Ohio St. 3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 57 (citations omitted).

The Supreme Court of the United States has set forth the rule for juror disqualification in capital cases in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), *Wainwright v. Witt*, 469 U.S. 412 (1985), and their progeny. *Witherspoon* recognized that the Sixth Amendment's guarantee of an impartial jury confers on capital defendants the right to a jury not "uncommonly willing to condemn a man to die." 391 U.S. at 521. But the Supreme Court of the United States has also acknowledged the State's "strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes." *Uttecht v. Brown*, 551 U.S. 1, 9 (2007). To ensure the proper balance between these two interests, only "a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause." *Id.* As the Court explained in *Witt*, a juror may be excused for cause "where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." 469 U.S. at 424-426. *See also Adams v. Texas*, 448 U.S. 38, 40 (1980).

Morgan applied these principles to hold that a capital defendant is entitled to an inquiry that will "life qualify" his prospective jurors—and thus enable him to remove for cause—any prospective juror who would automatically vote to impose the death penalty regardless of the facts or instructions from the judge. *See* 504 U.S. at 729. The *Morgan* Court went on to hold that general fairness and "follow the law" questions—of the like employed by the trial court here—were not enough to detect those in the venire who automatically would vote for the death penalty. *Id*. at 734-735

B. The trial court failed to afford Mr. Nicholson a constitutionally adequate voir dire.

Mr. Nicholson did not receive a jury selection process that allowed for the identification and selection of jurors who were willing and able to, if necessary, reasonably consider: (1) all mitigation evidence presented by Mr. Nicholson in the sentencing phase; and/or (2) sentences other than death. Because Ohio's law mandates that capital defendants have the same jury in both phases of a capital case, it was imperative that Mr. Nicholson be availed at the outset of jurors who were fair, impartial, free from bias and preconceived opinions about the death penalty, and capable of imposing a life sentence upon conviction.

Ultimately, there were less than 150 prospective jurors questioned over the seven days of jury selection, a relatively short period of time—and small number of jurors—for such a high-profile capital case where there was no question that Mr. Nicholson shot and killed two teenagers. Of the 150 prospective jurors summonsed, less than half (or 58) were determined to be "death qualified" by qualified (and were not otherwise excused).

The twelve jurors and four alternate jurors selected for service as a result of the inadequate voir dire were:

Assigned Prospective	Assigned	Final Juror No.	Juror's	Gender, Race,

Juror No. for Death Qualification Individual Voir Dire	Prospective Juror No. for General Voir Dire	Assigned	Initials	Age
5 (Tr. 161-180)	**3** (Tr. 2273-2274)	**3**	_.V.	Female, Black, 61
9 (Tr. 191-211)	**4** (Tr. 2274-2275)	**4**	L.M.	Female, White, 43
16 (Tr. 265-283, 305)	**5** (Tr. 2275-2276)	**5**	R.C.	Male, White, 72
26 (Tr. 385-400)	**9** (Tr. 2283-2285)	**9**	J.F.	Female, White, 26
35 (Tr. 551-573)	**16** (Tr. 2387-2400)	**12**	B.C.	Female, White, 55
40 (Tr. 618-635)	**17** (Tr. 2400-2410)	**6**	S.M.	Female, White, 60
43 (Tr. 648-668)	**18** (Tr. 2411-2417)	**11**	K.L.	Female, White, 59
46 (Tr. 693-710)	**19** (Tr. 2418-2424)	**1**	M.K.	Female, White, 49
48 (Tr. 714-735)	**20** (Tr. 2425-2434)	**10**	N.B.	Male, White, 75
49 (Tr. 736-759)	**21** (Tr. 2434-2436)	**8**	D.T.	Female, White, 51
53 (Tr. 829-851)	**24** (Tr. 2442-2449)	**7**	M.A.	Female, Black, 61
61 (Tr. 913-938)	**27** (Tr. 2456-2466)	**2**	L.H.	Female, White, 64
Alternate Jurors				
68 (Tr. 1073-1094)	**31** (Tr. 2478-2484)	**A1**	A.B.	Female, White, 40
72 (Tr. 1102-1120)	**32** (Tr. 2484-2486)	**A2**	M.B.	Female, Black, 45
78 (1244-1264)	**35** (Tr. 2489-2491)	**A3**	C.G.	Female, Black, 58
87 (1285-1316)	**36** (Tr. 2491-2492)	**A4**	M.M.	Male, Black, 58

1. The trial court erroneously denied defense counsel's request for alternating questioning.

On May 3, 2019, defense counsel moved the trial court for an order requiring the State and defense counsel to examine the potential venirepersons in an alternating manner during the death qualification individual voir dire. (R.81, Defendant's Motion for Alternating Individual Voir Dire). Defense counsel requested in that motion that it be permitted to question half of the venire first during the individual death qualification voir dire (as opposed to the State questioning all venirepersons first). (*See* R.81, Defendant's Motion for Alternating Individual Voir Dire). On September 5, 2019, the trial court denied that motion. (R.214, Journal Entry).

Before death qualification individual voir dire commenced, the 150 prospective jurors completed a 22-page questionnaire that was available to counsel for review. (Tr. 90-97). Among other things, this questionnaire solicited information from prospective jurors about their views on the death penalty and whether they would be willing and able to consider "mitigating factors" and

"aggravating circumstances" in the mitigation phase of trial. These completed juror questionnaires are included in the record and are hereinafter referred to as "JQ." From these questionnaires, then, it was apparent before death qualification individual voir dire commenced which jurors strongly supported the death penalty, as well as which jurors were strongly opposed to the death penalty.

During death qualification individual voir dire, the State was generally able to question prospective jurors first. (*See generally* Tr. 108-2241). Sometimes, the court would question prospective jurors before the State. (*See generally* Tr. 108-2241). On all occasions, defense counsel questioned all prospective jurors last. (*See generally* Tr. 108-2241). In making its motion to exclude Juror No. 33 for cause, defense counsel again argued that failing to require the State and defense counsel to alternate their questioning of venirepersons during the "Witherspooning process" violated Mr. Nicholson's constitutional rights to a fair trial. (Tr. 520-524). "Each time the prosecutor has the opportunity to first get up there and cleanup this questionnaire, in terms of people who are strongly in favor of the death penalty and would only impose death under certain circumstances. And it's just unfair." (Tr. 521). After the court denied Nicholson's motion to exclude Juror No. 33 for cause, defense counsel explained that he did not "believe the outcome would be the same had I gotten up there first and asked leading questions about what she had placed on [the juror questionnaire]. And again, it puts us at a disadvantage." (Tr. 524).

Many prospective jurors expressed bias in favor of the death penalty on their questionnaires. However, because the State and/or court questioned these prospective jurors first, they were able to be "rehabilitated"—in most cases, superficially—through "follow the law" questioning and/or their general desire to respond agreeably to the State and/or the court's questioning. *See, e.g.*, Juror No. 3 (Tr. 112-136; JQ 3); Juror No. 4 (137-160; JQ 4); **Juror No. 16**,

who served as Juror No. 5 in this case[7] (court denied defense counsel's motion to excuse for cause during death qualification voir dire) (Tr. 265-283, 305; JQ 16); **Juror No. 20** (Tr. 308-327; JQ 20) [defense used peremptory challenge on during general voir dire (Tr. 2278-2280, 2436)]; **Juror No. 31** (Tr. 461-479; JQ 31); **Juror No. 32** (Tr. 479-493; JQ 32) [defense used peremptory challenge on during general voir dire (Tr. 2271-2273, 2317-2318, 2450]; Juror No. 33 (Tr. 493-525; JQ 33) (court denied defense counsel's motion to excuse for cause during death qualification voir dire); **Juror No. 34** (Tr. 525-551; JQ 34) [defense used peremptory challenge on during general voir dire (Tr. 2375-2386, 2424)]; **Juror No 43,** served as Juror No. 11 in this case (Tr. 643-668; JQ 43); **Juror No. 46,** served as Juror No. 1 in this case (Tr. 693-710; JQ 46); **Juror No. 49,** served as Juror No. 8 in this case (Tr. 742-759; JQ 49); **Juror No. 59** (Tr. 882-911; JQ 59) [defense used peremptory challenge on during general voir dire (Tr. 2458-2456)]; **Juror No. 61**, served as Juror No. 2 in this case (Tr. 913-938; JQ 61); **Juror No. 62** (Tr. 939-961; JQ 62) [defense used alternate peremptory challenge on during general voir dire (Tr. 2265, 2466-2471, 2484)]; and **Juror No. 78**, served at Alternate Juror No. 3 in this case (Tr. 1244-1264; JQ 78; Tr. 2489-2491).

Having been just explained the law by the State and/or the court—and agreeing to follow that law—most of these prospective jurors were unwilling to contradict themselves during defense counsel's questioning and admit their death penalty bias—even if that bias was readily apparent on the questionnaires the prospective jurors completed only a few days earlier.

There were also some prospective jurors who expressed bias against the death penalty in their juror questionnaires. Defense counsel did not have the opportunity to rehabilitate these

[7] Mr. Nicholson also asserts in Proposition of Law No. 16 that defense counsel was ineffective because it failed to exercise a peremptory on Juror No. 16 (R.C.)—who ultimately became Juror No. 5 in this case (Tr. 2275-2276)—during general voir dire despite attempting to have this juror excused for cause during death qualification individual voir dire.

prospective jurors through the same type of "follow the law" questioning used by the court and/or the State on those prospective jurors who expressed "pro-death penalty" views. Instead, the State and/or court asked questions that further solidified these prospective jurors' bias against the death penalty, thereby precluding defense counsel's ability to meaningfully rehabilitate these prospective jurors. This tactic was utilized on at least the following members of the venire: Juror No. 8 (Tr. 188-190); Juror No. 22 (Tr. 331-333); Juror No. 30 (Tr. 442-460) (court granted State's motion to excuse Juror No. 30 for cause over defense counsel's objection); Juror No. 67 (Tr. 1055-1073) (court granted State's motion to excuse Juror No. 67 for cause over defense counsel's objection); Juror No. 100 (Tr. 1478-1491) (court granted State's motion to excuse Juror No. 100 for cause over defense counsel's objection); Juror No. 117 (Tr. 1798-1807); and Juror No. 123 (Tr. 1859-1882) (court granted State's motion to excuse Juror No. 123 for cause over defense counsel's objection).

In sum, the trial court's refusal to allow alternating questioning during death qualification individual voir dire prevented Mr. Nicholson from receiving an adequate voir dire necessary to empanel a fair and impartial jury, free from bias and preconceived opinions about the death penalty, and comprised of jurors capable of imposing a life sentence upon conviction in accordance with the facts and the law, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution, and/or Article I, Sections 5, 9, 10, and 16 of the Ohio Constitution.

2. The trial court placed undue and unconstitutional reliance on general "follow the law" questions, including to retain prospective jurors who had already revealed disqualifying biases in favor of death.

The court repeatedly used, or permitted the prosecutor to use, superficial "follow the law" questions with **dozens** of prospective jurors. This included using such "follow the law" questions to permit the retention of jurors whose bias was strong enough to demonstrate that—or to at least suggest grave doubt about whether—the juror's views prevented or substantially impaired that

prospective juror from doing his/her duties in accordance with the court's instructions and the juror's oath.

Generally, the rehabilitation of prospective jurors who had already revealed disqualifying information in favor of death in the juror questionnaire would proceed as follows:

First, the State and/or court would point out that the prospective juror had expressed some view in their juror questionnaire suggesting their bias in favor of death and/or unwillingness to consider mitigating factors. *See, e.g.*, Juror No. 3 (Tr. 112-114); Juror No. 4 (Tr. 138-140); **Juror No. 16** (Tr. 265-269).

Then, the State and/or court would explain the relevant provisions of Ohio's capital law to that prospective juror—i.e., the two-phase capital trial process; the weighing process in the mitigation phase; and/or what "mitigating factors" and "aggravating circumstances" are. *See, e.g.*, Juror No. 3 (Tr. 114-125); Juror No. 4 (Tr. 140-141, 143-146); **Juror No. 16** (Tr. 269-275). While explaining the process, the State and/or court would intermittently end their explanation by asking the prospective juror if they understood and/or could accept what had just been explained; on most occasions, the prospective juror would answer affirmatively. *See, e.g.*, *id.*

Next, the State and/or court would ask the prospective juror if they would be willing and/or able to do what the State and/or court just told that prospective juror the law requires them to do. *See, e.g.*, Juror No. 3 (Tr. 117-120); Juror No. 4 (Tr. 146-148); **Juror No. 16** (Tr. 269-275). On almost all occasions, the prospective juror who was biased in favor of the death penalty would against answer affirmatively. *See id.* Thus, the court would conclude that these prospective jurors who were clearly possessed disqualifying biases in favor of death were "death qualified." *See id.*

This method of "rehabilitation" is problematic because it is merely superficial. Most venirepersons would be unwilling to tell the court and/or State that they are unwilling to follow

the law. Moreover, such rehabilitation is not meaningful or effective, as it merely asks that those prospective jurors with disqualifying biases in favor of death be willing to *consider* mitigating factors and that they *understand* what the law requires. This is simply not enough to overcome the extreme bias many prospective jurors had in favor of death.

The trial court relied upon and/or permitted improper "follow the law" type of questions as a means of rehabilitating jurors who were biased in favor of the death penalty with at least the following members of the venire: Juror No. 3 (Tr. 112-136; JQ 3); Juror No. 4 (137-160; JQ 4); **Juror No. 16**, who served as Juror No. 5 in this case[8] (court denied defense counsel's motion to excuse for cause during death qualification voir dire) (Tr. 265-283, 305; JQ 16); **Juror No. 20** (Tr. 308-327; JQ 20) [defense used peremptory challenge on during general voir dire (Tr. 2278-2280, 2436)]; **Juror No. 31** (Tr. 461-479; JQ 31); **Juror No. 32** (Tr. 479-493; JQ 32) [defense used peremptory challenge on during general voir dire (Tr. 2271-2273, 2317-2318, 2450]; Juror No. 33 (Tr. 493-525; JQ 33) (court denied defense counsel's motion to excuse for cause during death qualification voir dire); **Juror No. 34** (Tr. 525-551; JQ 34) [defense used peremptory challenge on during general voir dire (Tr. 2375-2386, 2424)]; **Juror No 43,** served as Juror No. 11 in this case (Tr. 643-668; JQ 43); **Juror No. 46,** served as Juror No. 1 in this case (Tr. 693-710; JQ 46); **Juror No. 49,** served as Juror No. 8 in this case (Tr. 742-759; JQ 49); **Juror No. 59** (Tr. 882-911; JQ 59) [defense used peremptory challenge on during general voir dire (Tr. 2458-2456)]; **Juror No. 61**, served as Juror No. 2 in this case (Tr. 913-938; JQ 61); **Juror No. 62** (Tr. 939-961; JQ 62) [defense used alternate peremptory challenge on during general voir dire (Tr. 2265, 2466-2471,

[8] Mr. Nicholson also asserts in Proposition of Law No. 16 that defemse counsel was ineffective because it failed to exercise a peremptory on Juror No. 16 (R.C.)—who ultimately became Juror No. 5 in this case (Tr. 2275-2276)—during general voir dire despite attempting to have this juror excused for cause during death qualification individual voir dire.

2484)]; and **Juror No. 78**, served at Alternate Juror No. 3 in this case (Tr. 1244-1264; JQ 78; Tr. 2489-2491).

3. The trial court should have granted Nicholson's motion for mistrial because prospective jurors did not understand the two-phase capital trial process and/or essential terms related to that process.

Further compounding its error in jury selection, it was clear at the outset of the individual death qualification voir dire that many prospective jurors did not understand the two-phase capital trial process or essential terms related to the mitigating phase such as "aggravating circumstances" and "mitigating factors." Thus, during death qualification individual voir dire, these prospective jurors were not able to give informed and honest responses to inquiries about their fitness to serve in this case. Many questions asked by counsel and/or the court during death qualification individual voir dire presumed and/or were dependent upon at least a basic understanding of those core terms, the two-phase capital trial process, and the weighing that takes place in the mitigation phase. However, as voir dire proceeded in this case, it became clear that—even after answering several questions about their fitness to serve as a juror in this case—many prospective jurors did not have the requisite understanding of the essential terms and/or two-phase capital trial process.

Critically, then, the effectiveness of the State's purported "rehabilitation" of prospective jurors who expressed extreme bias in favor of the death penalty and/or an unwillingness to hear and weigh evidence about mitigating factors before deciding what sentence to impose was dubious. This is because many prospective jurors, after being "rehabilitated" by the State, would subsequently respond to questions in a way that made it clear that the prospective juror did not actually understand the subject matter on which they had just purportedly been rehabilitated.

For example, Juror No. 3 was asked by the State about her questionnaire response indicating that she would not want to hear evidence about mitigating factors before deciding what sentence to impose. (Tr. 114-18). After the State's "rehabilitative questioning," Juror No. 3 stated

that she would want to hear evidence about mitigating factors before deciding a sentence to impose. (Tr. 117-118). However, upon subsequent questioning, it became clear that Juror No. 3 did not understand the concepts necessary for Juror No. 3 to actually have been meaningfully rehabilitated by the State. (*See* Tr. 119-136). After Juror No. 3 was purportedly "rehabilitated," she told the prosecutor upon subsequent questioning she would not be able to sign a verdict for the death penalty "[b]ecause * * * if it's really not no [*sic*] proof that this person actually did it, why would I sign my name to that?" (Tr. 120). Even after the prosecuting attorney and the court explained to Juror No. 3 the two-phase trial process, the weighing process in the second phase, and the meaning "aggravating circumstances" and "mitigating factors," it was nonetheless clear that Juror No. 3 still did not fully understand these concepts (Tr. 119-125), such that the State's earlier attempt at rehabilitating Juror No. 3 was superficial (*see* Tr. 114-118).

Although assistant prosecuting attorney Chris Schroeder noted for the record that he thought Juror No. 3 was "somewhat confused with the process," he nonetheless did not think there was a basis to challenge her for cause. (Tr. 135). Defense counsel expressed his concern that prospective jurors like Juror No. 3 would not understand the process and essential terms to a degree sufficient for a meaningful death qualification voir dire. (Tr. 135). Yet still, the court found Juror No. 3 to be qualified to sit as a juror on this case. (Tr. 136). The court then suggested that "it might be easier for [prospective jurors] to understand [the process and essential terms] if they have something to visualize it." (Tr. 136-137). Upon the court's suggestion, the State retrieved a board it had "created once before" that had a visualization of the two-phase capital trial process to use with its death qualification voir dire. (Tr. 137). However, a copy of that board was not included in the record.

After the individual voir dire questioning of Juror No. 53 during the September 18, 2019

morning session, defense counsel moved for a mistrial on the grounds that the way the individual voir dire was being conducted was depriving—and would continue to deprive—Mr. Nicholson of his constitutional right to a fair trial. (Tr. 851-855). However, the trial court denied that motion.

The superficial rehabilitation of prospective jurors who clearly did not understand the meaning of essential terms and/or the two-phase capital trial process was prevalent throughout the death qualification individual voir dire of Mr. Nicholson's prospective jurors. *See, e.g.*, Juror No. 3 (Tr. 118-135); Juror No. 20 (Tr. 308-327); Juror No. 30 (Tr. 442-460); Juror No. 31 (Tr. 474-478); **Juror No. 43** (served as Juror No. 11 in this case) (Tr. 648-650); Juror No. 45 (685-693); **Juror No. 46** (served as Juror No. 1 in this case) (Tr. 698-710); **Juror No. 48** (served as Juror No. 10 in this case) (Tr. 730-735); **Juror No. 49** (served as Juror No. 8 in this case) (Tr. 742-759); Juror No. 50 (Tr. 807-816); Juror No. 94 (Tr. 1454-1464); Juror No. 106 (Tr. 1565-1579); Juror No. 128 (Tr. 1953-1954); and Juror No. 143 (Tr. 2200-2201, 2217).

4. Prospective jurors were erroneously told by the State and court that Mr. Nicholson was charged with "four counts" of aggravated murder during death qualification voir dire.

In reading preliminary instructions to the panel of venirepersons being individually questioned that day, the trial court stated, in relevant part, that: "For the purposes of this proceeding today, however, we are only focusing on **four counts involving aggravated murder**." (Tr. 102, 257, 379, 597, 774, 1008, 1197, 1347, 1506, 1751).

The trial court made this erroneous representation in its preliminary instructions to approximately 125 out of the 150 venirepersons. (*See* Tr. 102, 257, 379, 597, 774, 1008, 1197, 1347, 1506, 1751-1906). This erroneous representation was made by the trial court to jurors who appeared for questioning in the following death qualification voir dire panels:

1. September 16, 2019, AM Session (Tr. 102)
2. September 16, 2019, PM Session (Tr. 257)

3. September 17, 2019, AM Session (Tr. 379)
4. September 17, 2019, PM Session (Tr. 597)
5. September 18, 2019, AM Session (Tr. 774
6. September 18, 2019, PM Session (Tr. 1008)
7. September 19, 2019, AM Session (Tr. 1197)
8. September 19, 2019, PM Session (Tr. 1347)
9. September 20, 2019, AM Session (Tr. 1506)
10. September 20, 2019, PM Session (Tr. 1751)

Only the two panels—AM and PM—individually questioned on September 23, 2019 for death qualification were correctly instructed by the trial court that Mr. Nicholson was charged with two counts of aggravated murder. (*See* Tr. 1921, 2103). This change was prompted when, just before the individual questioning of Juror No. 123 began towards the end of the September 20, 2019 PM session, defense counsel voiced its concern to the court about assistant prosecuting attorney Anna Faraglia stating that there were "four aggravated murders in this case." (Tr. 1856-1859).

Indeed, during her individual questioning of jurors between September 16, 2019 and September 20, 2019, Ms. Faraglia represented that Mr. Nicholson had been charged with "four counts" of aggravated murder to the following venirepersons:

1. Juror No. 3 (Tr. 115)
2. Juror No. 3 (Tr. 117) (second reference)
3. Juror No. 9 (Tr. 194)
4. Juror No. 17 (Tr. 289)
5. Juror No. 26 (Tr. 389)

6. Juror No. 29 (Tr. 429)
7. Juror No. 32 (Tr. 481, lines 9-10)
8. Juror No. 32 (Tr. 481, lines 10-11) (second reference)
9. Juror No. 32 (Tr. 481, lines 18-21) (third reference)
10. Juror No. 43 (Tr. 645, line 16)
11. Juror No. 43 (Tr. 645, line 17) (second reference)
12. Juror No. 50 (Tr. 785) (excused before general voir dire)
13. Juror No. 50 (Tr. 786) (second reference) (excused before general voir dire)
14. Juror No. 51 (Tr. 806, line 8)
15. Juror No. 51 (Tr. 806, line 19) (second reference)
16. Juror No. 64 (Tr. 1019, lines 13-14) (excused before general voir dire)
17. Juror No. 64 (Tr. 1019, lines 16-17) (second reference) (excused before general voir dire)
18. Juror No. 64 (Tr. 1020) (third reference) (excused before general voir dire)
19. Juror No. 68 (Tr. 1079)
20. Juror No. 52 (Tr. 1210)
21. Juror No. 93 (Tr. 1431) (excused before general voir dire)
22. Juror No. 110 (Tr. 1705) (excused before general voir dire)
23. Juror No. 111 (Tr. 1731)
24. Juror No. 114 (Tr. 1785, lines 2-3)
25. Juror No. 114 (Tr. 1785, lines 17-18) (second reference)

All twelve jurors and four alternates who were selected for Mr. Nicholson's jury were on one of the death qualification individual voir dire panels wherein the court erroneously told the

venire that Mr. Nicholson had been charged with "four counts" of aggravated murder. (Tr. 102, 257, 379, 597, 774, 1008, 1197, 1347, 1506, 1751). Additionally, Juror Nos. 4(9), 9(26), 11(43), and Alt. Juror No. 1(68), were individually told by prosecuting attorney Anna Faraglia during their death qualification questioning that Mr. Nicholson had been charged with "four counts" of aggravated murder. (Tr. 194, 389, 645, 1079).

C. Conclusion

As a result of the errors identified in this Proposition of Law, Mr. Nicholson was denied the meaningful and searching voir dire the constitution requires in a capital case. The resulting jury was not fair or impartial, nor could it have been, given the trial court's numerous errors. Mr. Nicholson was therefore deprived of his substantive right to a fair trial and resulted in a violation of Mr. Nicholson's rights as guaranteed under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution as well as Article I, Sections 9 and 16 of the Ohio Constitution. Thus, Mr. Nicholson is entitled to a new trial.

PROPOSITION OF LAW NO. 9

> **A trial court abuses its discretion and denies a defendant a fair trial and due process contrary to 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, when the trial court admits undisclosed discoverable evidence at trial.**

A. Background

On September 5, 2019, the State filed its Witness List. (R.249). Although Estomarys Santos and Carlos Nieves were both called to testify as witnesses by the State during the culpability phase of trial (*see* Tr. 3232-59, 3723-3), these two witnesses were not included on the State's September 5, 2019 Witness List. (*See* R.249).

The State filed a Supplemental Witness List on September 13, 2019, but neither of these two names were included as part of that list. (R.357).

On September 24, 2019, the State filed a Second Supplemental Witness List. (R.372). Although Estomarys Santos's name was included on that list, her address was not provided. (*See* R.372). However, Carlos Nieves was not included on that list. (*See* R.372). Notably, death qualification voir dire in this case began on September 16, 2019 and ended on September 23, 2019. (*See* Tr. 98-2242).

On September 26, 2019, the State filed a Third Supplemental Witness List, wherein the name and address of Carlos Nieves was provided. (R.372). Significantly, general voir dire took place on September 25, 2019 (Tr. 2243-2495); the jury view of 4838 East 86th Street took place on September 26, 2019 (Tr. 2496-2499); and the guilt phase of Mr. Nicholson's trial commenced on September 30, 2019. (*See* Tr. 2500).

After opening statements on September 30, 2019, defense counsel informed the trial court that it had received "some discovery as recent as September 27th, September 25th, of additional witnesses that the State anticipates calling in their case-in-chief." (Tr. 2526, 2710-2718). This

discovery was the statements from Estomarys Santos and Carlos Nieves, whose testimony was relevant to the location of Mr. Nicholson's service weapon. (Tr. 2710-2718, 2526). Before the State called its first witness, defense counsel expressed their concern about the State's belated disclosure and indicated to the trial court that they were going to object to those two witnesses being called at the appropriate time. (Tr. 2526).

As set forth above, Mr. Nicholson testified that M.L. retrieved his service weapon from the trunk of his vehicle on September 5, 2018 and that he discharged his firearm because he believed M.L. and/or Giselle were going to shoot him with the service weapon that had been retrieved from his vehicle. Mr. Nicholson also testified that before law enforcement arrived at the scene, America picked up that service weapon, put it in the open trunk of his vehicle, and shut the trunk. Thus, as described in the Statement of Facts and First and Third Propositions of Law, that service weapon was critical to Mr. Nicholson's self-defense claim and overall credibility.

Significantly, Mr. Nicholson's service weapon was not recovered on September 6, 2018 when law enforcement searched the home. Indeed, on September 13, 2018, Mr. Nicholson's service weapon was recovered from the trunk of his vehicle by GHPD detectives. That location was consistent with his self-defense claim. However, GHPD promptly returned the firearm to Mr. Nicholson's employer without collecting any DNA swabs therefrom and no photographs of the trunk of Mr. Nicholson's vehicle showing the manner in which the firearm was allegedly found on September 13, 2018 were provided to defense counsel by the State.

When it became apparent that the service weapon was paramount to Mr. Nicholson's self-defense claim, the State made efforts to generate information that would preempt that claim. As extensively detailed above, inconsistent testimony was elicited from multiple GHPD officers who claimed they searched the trunk of Mr. Nicholson's vehicle on September 6, 2018 and found

nothing. Such allegation was not made in any GHPD reports, no body camera video footage of the alleged September 6, 2018 search of Mr. Nicholson's vehicle was produced, and there were no photographs apparently taken of Mr. Nicholson's trunk at that time either.

Thus, in order to explain why, according to GHPD, Mr. Nicholson's service weapon was not allegedly found in the trunk of his vehicle on September 6, 2018, but was ultimately found there on September 13, 2018, law enforcement spoke with America's friend, Estomarys Santos, and Roberto Lopez's friend, Carlos Nieves, who both claimed to be at America's home on or around September 13, 2018 with America and Roberto. America, Roberto, Carlos, and Estomarys all testified—albeit inconsistently—that when they were at America's home together on or around September 13, 2018, they were moving Mr. Nicholson's belonging out of America's home and into Mr. Nicholson's car.

The testimony of Carlos and Estomarys was significant because it conflicted with Mr. Nicholson's version of critical events related to his self-defense claim. Specifically, Carlos and Roberto both testified that Mr. Nicholson's service weapon was found in America's bedroom closet—notwithstanding the fact that the closet was allegedly searched by law enforcement on September 6, 2018—on September 13, 2018. Carlos and Roberto both testified that Roberto put Mr. Nicholson's service weapon in the trunk of Mr. Nicholson's vehicle before GHPD arrived with a search warrant, and Estomarys testified that she saw that firearm in a black garbage bag in the trunk of Mr. Nicholson's vehicle when she was at the home on September 13, 2018.

Outside of the presence of the jury, counsel and the trial court discussed this issue more extensively at the end of the day on September 30, 2019. (Tr. 2710-2718). Defense counsel expressed its concern that they have received "discovery within the past few days of new witnesses who [the State] intends to call" and that defense counsel has not "even had an opportunity to have

[its] investigator go speak to" Estomarys or Carlos. (*See* Tr. 2710-2711). The State responded by claiming that GHPD interviewed Estomarys on September 23, 2019, and that her statement was provided in discovery on that same day. (Tr. 2711-2712). Significantly, death qualification in this case began on September 16, 2019 (s*ee* Tr. 98), and general voir dire took place on September 25, 2019. (*See* Tr. 2257).

The State claimed that it did not obtain information from Estomarys and Carlos regarding their September 13, 2018 presence at America's home until after it received Dr. Fabian's mitigation report on August 24, 2019 and investigated Mr. Nicholson's version of events and self-defense claim. (*See* Tr. 2712-2713). The State claimed this was not new information because America allegedly told Det. Stroe that she put Mr. Nicholson's service weapon in Mr. Nicholson's vehicle after the shooting. (Tr. 2713-2714). America, however, testified at trial that she did not remember talking to Det. Stroe, and in fact, America recalled telling Det. Biegacki that when she was putting other items from the home inside of Mr. Nicholson's vehicle, she found Mr. Nicholson's service weapon in the trunk. (Tr. 3716. *See also* Tr. 3222-3226). That information was reflected in Det. Biegacki's report from September 13, 2018. (Tr. 3222-3226). Additionally, on September 5, 2019—which was, notably, after the State received Dr. Fabian's mitigation report on August 24, 2019 with information regarding Mr. Nicholson's self-defense claim—America again told Det. Biegacki that she did not put any guns or gun belts in Mr. Nicholson's vehicle, which was documented in Det. Biegacki's report regarding his interview of America on that date. (*See* Tr. 3222-3223).

The record reflects that arrangements were made for defense counsel's investigator to talk with Estomarys before she testified at trial (Tr. 2715-2716). The day before Estomarys testified, defense counsel's investigator was able to meet with her. (Tr. 3228-3229). The investigator's

conversation with Estomarys was recorded by the defendant's investigator, and was seemingly provided to counsel sometime on the evening of October 2, 2019. (*See* Tr. 3228-3229). Estomarys was the first witness to testify the following morning. (*See* Tr. 3231). However, the same process was not requested by defense counsel or offered by the State as to Carlos.

At trial, defense counsel mistakenly objected to the testimony of Carlos as being improper propensity evidence under Evid.R. 404. (*See* Tr. 3721-3722). After defense counsel was advised that his testimony was actually related to the discovery of the service weapon in the trunk of Mr. Nicholson's vehicle, defense counsel failed to renew its objection to his testimony on the grounds that the State failed to timely provide his statement to defense counsel and/or to disclose him as a witness. (*See* Tr. 3721-3722). The record contains no explanation from the State as to why he was not included on the State's witness list until September 26, 2019. (*See* R.372, State's Supplemental Witness List).

B. Argument

Crim.R. 16 governs discovery matters in a criminal proceeding. The purpose of this rule is "to provide the parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system, the rights of defendants, and the well-being of witnesses, victims, and society at large." Crim.R. 16(A). Crim.R. 16(I), which governs the disclosure of witnesses, provides, "[e]ach party shall provide to opposing counsel a written witness list, including names and addresses of any witness it intends to call in its case-in-chief, or reasonably anticipates calling in rebuttal or surrebuttal." The State's failure to timely disclose a witness usually presents the defense with a shorter time to prepare and therefore may often put the defense at a substantial tactical disadvantage.

Under Crim.R. 16(L), the trial court is vested with discretion in determining the sanction to be imposed for a party's nondisclosure of discoverable material. Specifically, the rule provides

that where it is brought to the court's attention that a party has failed to properly disclose evidence, the court may order the party to permit the discovery or inspection, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or make any other order it deems just under the circumstances.

Thus, this Court's review is limited to whether the trial court's action in this case constituted an abuse of discretion. *State v. Parson*, 6 Ohio St. 3d 442, 445, 6 Ohio B. 485, 453 N.E.2d 689 (1983). In situations where the prosecution fails to disclose a witness prior to trial, this Court has held "the testimony of the undisclosed witness can be admitted if it can be shown that the failure to provide discovery was not willful, foreknowledge of the statement would not have benefitted the defendant in the preparation of the defense, and the defendant was not prejudiced by the admission of the evidence." *State v. Heinish*, 50 Ohio St. 3d 231, 236, 553 N.E.2d 1026 (1990), citing *Parson*, 6 Ohio St. 3d at 445-446.

Given America's inconsistent statements regarding the location of the service weapon and the apparent bias of America and Roberto, the testimony of Estomarys and Carlos was critical to the State's intended purpose of directly countering Mr. Nicholson's self-defense claim and generally discrediting his description of the events. There were no photographs or body camera footage of the trunk of Mr. Nicholson's vehicle on September 6, 2018 or September 13, 2018, and no DNA testing was attempted on Mr. Nicholson's service weapon. Thus, their testimony was crucial because it discredited Mr. Nicholson's version of the critical events related to his self-defense claim.

The circumstances did not justify the timing of the prosecution's disclosure of the identity of and/or statements from Estomarys and Carlos on September 23, 2019 and/or September 26, 2019. Det. Biegacki spoke with America and Roberto on September 13, 2018 about the discovery

of the service weapon in the trunk of Mr. Nicholson's vehicle. (Tr. 3715-3716). Presumably, then, America and Roberto would have conveyed to Det. Biegacki at that time who was at the home with them at the time the service weapon was observed. Moreover, even assuming the State was truly oblivious to the issue surrounding the service weapon in the trunk until it received Dr. Fabian's report on August 24, 2019, the State was clearly aware of this issue by September 5, 2019, as Det. Biegacki spoke with America about the service weapon on that date. (Tr. 3715). It follows, then, that it must have been America who told Det. Biegacki on September 5, 2019, that Estomarys and Carlos were present on September 13, 2018 when the service weapon was seen in Mr. Nicholson's trunk (assuming, of course, the veracity of that claim).

Notwithstanding the State's claim that it gave defense counsel the statement of Estomarys the same day on which she was interviewed—September 23, 2019—Det. Biegacki clearly spoke with America about the service weapon on September 5, 2019. Neither Carlos nor Estomarys were random eyewitnesses who had no connection to the Polanco-Lopez families. Given that they were good friends of America and Roberto, Det. Biegacki should have been able to easily make contact with them after speaking with America on September 5, 2019.

Given the impending trial date, the State should have immediately given defense counsel a witness list with the names and addresses of Estomarys and Carlos and informed defense counsel that which the State expected these two witnesses to testify about based on Det. Biegacki's September 5, 2019 conversation with America. To the extent that the State was waiting on supplemental reports from Det. Biegacki, those reports could have been provided at a later date to defense counsel. This immediate disclosure would have given defense counsel the opportunity to meaningfully speak with Mr. Nicholson, who was incarcerated, about these two witnesses and what they were expected to testify about before trial began. Moreover, had the State informed

defense counsel of their intention to call Estomarys and Carlos at trial, defendant's investigator would have had the opportunity obtain information about them and, if possible, interview Estomarys and/or Carlos before trial commenced.

The fact that Defendant's investigator was able to speak to Estomarys the day before she testified—while defense counsel was in the midst of trial—does not alleviate the belated discovery disclosure issue here. Effective representation generally requires more than an interview in a courthouse hallway; it may require a lengthier and more substantive investigation to determine not only what evidence the witness would offer, but also facts relevant to the witness's credibility. *See, e.g.*, *State v. Parks*, 69 Ohio App. 3d 150, 590 N.E.2d 300 (2d Dist. 1990); *State v. Smith*, 34 Ohio App. 3d 180, 517 N.E.2d 933 (5th Dist. 1986). Because of the State's belated discovery disclosure and identification of Estomarys and Carlos as being witnesses it intended to call in this case, defense counsel was deprived of the opportunity to conduct a substantive investigation into these two witnesses as to both what evidence they will offer, but also, their credibility. Moreover, defendant's investigator was never given the opportunity to speak with Carlos.

Accordingly, the record supports a reasonable inference that the State willfully violated Crim.R. 16. Foreknowledge of the anticipated testimony of Estomarys and Carlos would have benefited the accused in the preparation of his defense, as defense counsel would have had a meaningful opportunity to investigate and evaluate the credibility of both witnesses. Moreover, Mr. Nicholson was prejudiced the admission of the testimony of Estomarys and Carlos, as his trial counsel did not have a meaningful opportunity to investigate the claims of Estomarys and Carlos, or to otherwise obtain information that would call into question the credibility of either witness.

To that end, defense counsel's failure to request a continuance upon learning of these two new witnesses cannot be interpreted as an indication that Mr. Nicholson would not be prejudiced

by the inclusion of the testimony of Estomarys and Carlos. *See State v. Edwards*, 49 Ohio St. 2d 31, 43, 3 O.O.3d 18, 358 N.E.2d 1051 (1976) (trial court may properly conclude that failure to request a continuance means that the defense counsel is prepared to go forward.). Indeed, defense counsel learned of these two witnesses on the last day of death qualification voir dire, one week before the first witnesses in Mr. Nicholson's capital trial commenced. Certainly, it is expected that defense counsel's efforts in the week before the culpability phase of a capital trial begins will be spent diligently reviewing the voluminous discovery production and preparing to cross examine the State's many witnesses. Moreover, on September 23, 2019 and September 25, 2019, defense counsel was engaged in voir dire for this case.

"The trial court's discretion in fashioning sanctions under Crim.R. 16 is broad, but not unlimited." *State v. Wilson*, 91 Ohio App. 3d 611, 616, 632 N.E.2d 1384 (2d Dist. 1993). The purpose of the sanctions authorized by Crim.R. 16 is "to relieve the objecting party of the prejudice created by his adversary's discovery failure." *Id.* An objecting party is not required to propose "the least onerous form of sanction," and the court's adoption of it constitutes an abuse of discretion where, as is here, it is clear from the record that the sanction adopted by the trial court was insufficient to relieve the prejudice the discovery failure has created. *See id.* The trial court therefore abused its discretion in allowing Estomarys and Carlos to testify over defense counsel's objection without, at a minimum, inquiring into the defense's need for a continuance to prepare both an effective cross-examination of these two crucial surprises witnesses and any available independent impeaching their credibility. Accordingly, Mr. Nicholson's convictions must be reversed, and this matter remanded for a new trial. In the alternative, defense counsel was clearly ineffective—as discussed *infra*—for failing to properly maintains is objections to these two witnesses.

PROPOSITION OF LAW NO. 10

A trial court errs and deprives a defendant of his rights to due process and a fair trial under the United States and Ohio Constitutions when it fails to limit the evidence presented in the mitigation phase of a capital trial to the evidence that is relevant to the aggravating circumstances the defendant was found guilty of committing.

A. Background

Defense counsel moved the trial court to determine and limit the State's mitigation phase evidence outside the presence of the jury in a pretrial motion. (R.194, Defendant's Motion to Determine and Limit Plaintiff's Sentencing Phase Evidence Outside the Presence of the Jury). The trial court reserved its ruling of that motion until the completion of the culpability phase. (R.264, Journal Entry). Thus, prior to the commencement of the mitigation phase, defense counsel renewed that motion. (See R.418, Defendant's Motion to Determine and Limit Plaintiff's Sentencing Phase Evidence Outside the Presence of the Jury; Tr. 4370-4371).

On October 15, 2019, the trial court held a hearing outside of the presence of the jury "on the issue of the scope of what can be submitted by the State for their aggravating circumstances" in the mitigation phase of trial. (Tr. 4364, 4366-4374). The State moved to admit everything that was admitted at the guilt phase except for the following exhibits: State's Exhibits 253-258 (photographs of America taken at the hospital on September 6, 2018); State's Exhibit 330 (analysis report of electronic devices prepared by Natasha Branham, a computer forensic scientist at BCI); State's Exhibit 406 (America's medical records from the hospital); and State Exhibits 536, 539, 542-545, 549, 550, 553-560, and 586 (miscellaneous items collected from 4838 East 86th Street by GHPD). (Tr. 4366-4367).

Defense counsel objected to "any and all exhibits that goes to the nature and circumstances of how these two individuals died." (Tr. 4367-4368). Defense counsel also objected to "any of the photographs that depict the injury of these individuals, particularly the gunshot wounds, so all the

coroner and medical examiner's photographs, anything that pertains to the weapon, crime scene photos, any bodycam that pertains to the actual scene." (Tr. 4368). Succinctly stated, defense counsel objected to anything that described the nature and circumstances of the offenses being admitted during the mitigation phase on the grounds that readmission of such exhibits violated Mr. Nicholson's federal and Ohio constitutional rights and diminished the fairness of the mitigation process. (Tr. 4368, 4374). However, that objection was overruled. (Tr. 4370).

The State also indicated that they intended to call a representative from the Cuyahoga County Jail to authenticate and play a jail call Mr. Nicholson made to his mother, Angel Nicholson, on October 11, 2019—just a few hours after the guilty verdict had been rendered. (Tr. 4371-4373). In that phone call, Mr. Nicholson speculated to his mother that in order to adjust to "prison like," he anticipated he would "probably [have] to join [a] gang" because he anticipated that he would "probably" "have to go to a level 5 prison for about a year or so." (*See* Tr. 4372). Mr. Nicholson surmised that, as part of prison life, "you either join a gang or you try to steady yourself, and then the gangs try to come in your cell, steal your shit. They're always fighting and you're an open target in the showers." (Tr. 4373). Mr. Nicholson went on to speculate that, in order to gain entry into such prison gang, he would be made to "stab somebody." (*See* Tr. 4373-4372). However, Mr. Nicholson did not tell his mother this was definitely something he was going or willing to do, describe how he would stab someone, or otherwise indicate that he was doing anything other than speculating on the grim reality he was facing hours after the verdict.

Defense counsel objected to the admission of that call during the mitigation phase because it was not relevant. (Tr. 4372). Instead, defense counsel pointed out that Mr. Nicholson was merely speculating on what he anticipated were the realities of long-term prison life during a time when Mr. Nicholson was extremely emotional given the gravity of the situation he was in following the

guilty verdict and was anticipating in the mitigation phase of trial. (*See* Tr. 4373).

Again, it bears repeating that, prior to September 6, 2018, Mr. Nicholson has never been incarcerated in prison or jail and, for that matter, had never been criminally charged. Given Mr. Nicholson's non-existent criminal history, there was no evidence or testimony provided during the mitigation phase as to how Mr. Nicholson was made aware that he was required to kill someone in order to join a gang or if this was something he merely speculated upon. Since Mr. Nicholson was still in county jail at the time of this call with his mother, he did not likely have any communication with any prison gang members about what requirements were expected of him in order to gain entry into any such gang. Indeed, had any such communication taken place, the State would have surely presented evidence thereof during the mitigation phase of trial. Put simply, there was no reason to believe that Mr. Nicholson's comments regarding what he expected prison life to be were based on anything other than what Mr. Nicholson had seen on television or in a movie.

The trial court reserved its ruling on the admissibility of Mr. Nicholson's jail calls. (*See* Tr. 4373-4374). On October 17, 2019, defense counsel agreed to stipulate to the authenticity but not admissibility of redacted jail calls between Mr. Nicholson and Angel on September 22, 2019 (Tr. 5048-5051; State's Exhibit 702; State's Exhibit 710) and on October 11, 2019 (Tr. 5048-5051; State's Exhibit 703; State's Exhibit 711). Those two calls were played for the jury and admitted as evidence over defense counsel's objection. (Tr. 5051-5053).

B. Argument

R.C. 2929.03(D)(1) provides that at the mitigation phase of a capital proceeding, the jury shall consider, among other things, "'any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing * * * [and] hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing.'" *See State v. Maxwell*, 139 Ohio St. 3d 12, 2014-Ohio-

1019, 9 N.E.3d 930, ¶ 240, quoting *State v. DePew*, 38 Ohio St. 3d 275, 282-283, 528 N.E.2d 542 (1988). Accordingly, here, the State could reintroduce only the minimal evidence proving the aggravated circumstances that moved this case into the mitigation phase: for Counts One and Two, the course of conduct specification under R.C. 2929.04(A)(5).

Evidence relating to the aggravating circumstances is but a small subset of the category of all evidence relating to the nature and circumstances of the aggravated murder offense. *See State v. Ford*, 158 Ohio St. 3d 139, 2019-Ohio-4539, 140 N.E.3d 616, ¶¶ 355-356 (finding no error where the trial court limited the readmission of evidence to only "evidence that it deemed relevant to the aggravating circumstances" and the evidence that was unnecessarily cumulative was not prejudicial). Moreover, the "nature and circumstances" evidence is only admissible to the extent the defense offers the evidence as mitigating. *State v. Belton*, 149 Ohio St. 3d 165, 2016-Ohio-1581, 74 N.E.3d 319, ¶ 92; *DePew*, 38 Ohio St. 3d at 289.

The overbroad readmission of evidence in this case improperly appealed to the juror's sympathies and passions and unfairly prejudiced Mr. Nicholson. Evidence relevant to the counts in the indictment, as opposed to the aggravating-circumstance specifications, should be irrelevant at the sentencing phase and should not have been admitted. For example, gruesome videos and photographs of M.L. and Giselle Lopez were not relevant to the aggravating circumstances. Likewise, photographs and body camera video of the bloody scene; America's text messages with Mr. Nicholson and Giselle (State's Exhibits 341B-BB, 341GG, 341OO); the prior acts photographs and metadata (State's Exhibits 341ZZ-JJJ); the text messages between Mr. Nicholson and Angel Nicholson (State's Exhibits 410A, B, C); Mr. Nicholson's May 14, 2019 jail call (State's Exhibits 408, 423); cellphone extraction reports (State's Exhibits 424, 425); utility bills (State's Exhibits 426 and 427); the data extracted from the electronic devices (State's Exhibits 578, 579, and 552),

and the majority of the testimonial evidence—among others—had nothing to do with the aggravating circumstances.

The trial court abused its discretion in readmitting nearly all culpability phase evidence during the mitigation phase of Mr. Nicholson's trial, as some of this evidence was not relevant to the nature and circumstances surrounding the R.C. 2929.04(A)(5) specifications. Of the readmitted evidence that was arguably relevant to the nature and circumstances surrounding the R.C. 2929.04(A)(5) circumstances, admission of such evidence improperly tipped the scales towards the aggravating circumstances.

"When an evidentiary ruling is so egregious that it results in a denial of fundamental fairness, it may violate due process." *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir.2003). An evidentiary ruling can rise to the level of a due process violation if it offends some fundamental principle of justice. *Id*. Because Ohio has established rules to effectuate Mr. Nicholson's fundamental rights to a fair trial and to be free from arbitrary and capricious convictions and punishments, the State has opted "to act in a field where its action has significant discretionary elements," and therefore must "act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387, 401 (1985).

By seeking to readmit practically all evidence from the culpability phase, the State impermissibly introduced evidence as to the nature and circumstances of the offense as aggravation. Presenting, arguing, and relying upon improper matters in support of aggravating circumstances weighing in favor of a death penalty violated Mr. Nicholson's constitutional rights to due process of law, equal protection of the law, confrontation of the State's evidence against him, and freedom from cruel and unusual punishment. U.S. Const. amends. V, VI, VIII, and XIV; Ohio Const. Art. I, §§ 1, 2, 5, 9, 10, 16 and 20. The trial court therefore erred in readmitting nearly

all evidence from the culpability phase instead of limiting the evidence relevant to the aggravating circumstances Mr. Nicholson was found guilty of committing.

Accordingly, reversal and remand for a new trial is warranted. In the alternative, this matter should be reversed and remanded for a new mitigation phase of trial.

PROPOSITION OF LAW NO. 11

> **It is a violation of the Eighth and Fourteenth Amendments to the United States Constitution and/or Article I, Sections 1, 2, 9, and 16 of the Ohio Constitution to uphold a sentence of death when an independent weighing of the aggravating circumstances versus the mitigating factors, pursuant to R.C. 2929.05, demonstrate that the aggravating circumstances do not outweigh the mitigating factors beyond any reasonable doubt, such that the death sentence is not appropriate.**

After reviewing Mr. Nicholson's propositions of law, if necessary, this Court must independently review Mr. Nicholson's death sentence for appropriateness under R.C. 2929.05(A). In conducting this review, this Court must determine whether the evidence supports the jury's finding of aggravating circumstances, whether the aggravating circumstances outweigh the mitigating factors, and whether death is the appropriate sentence. R.C. 2929.05(A). *See State v. Johnson*, 144 Ohio St. 3d 518, 2015-Ohio-4903, 45 N.E.3d 208, ¶ 99.

As serious as the aggravating circumstances are in this case, they do not outweigh the mitigating factors by a reasonable doubt. Mr. Nicholson's traumatic childhood, multiple mental health diagnoses, absence of a prior criminal record, and positive relationships with family and friends all mitigate against a death sentence. An independent reweighing would show that the death penalty is not the appropriate sentence in this case.

A. Mitigation Phase Evidence and Testimony

The State requested that the exhibits discussed in the sidebar with the trial court earlier that morning be readmitted—over defense's objection—as the State's evidence of the aggravating circumstances and rested. (Tr. 4402. *See* Tr. 4367-4370).

In its presentation of "mitigating factors" evidence and testimony, the defense called Mr. Nicholson's brother, Robert Nicholson Jr.; his maternal aunt, Donna Kain; and his mother, Angel Nicholson, to testify about the circumstances of Mr. Nicholson's childhood and Mr. Nicholson's

history of head injuries. (*See, e.g.*, Tr. 4402-4458, 4459-4506, 4507-50).

Defense counsel also called experts to offer mitigation evidence and testimony on Mr. Nicholson's behalf during the mitigation phase of trial.

James Aiken, a prison management and adjustment expert, testified that, in his expert capacity, he believed that Mr. Nicholson could be safely confined and properly confined within a secure facility for a life sentence. (Tr. 4551-4592).

Dr. John Fabian, a forensic and clinical psychologist and forensic neuropsychologist, testified that, upon his examination of Mr. Nicholson over the course of five sessions, it was his expert opinion that Mr. Nicholson suffered from a number of mental health conditions, including PTSD, ADHD, borderline personality disorder with paranoid traits, and major depression disorder, recurrent and moderate without psychotic factors. It was also Dr. Fabian's opinion that Mr. Nicholson showed signs of a traumatic brain injury based on neuropsychological testing. (Tr. 4594-4772). Dr. Fabian further opined that Mr. Nicholson's traumatic brain injury impaired Mr. Nicholson's executive functioning abilities. Dr. Fabian's August 23, 2019 expert report was admitted as Defendant's Exhibit A.

Based on Dr. Fabian's evaluation and Mr. Nicholson's extensive history of head injuries prior to September 5, 2018, an MRI of Mr. Nicholson's brain was at the Cleveland Clinic on July 24, 2019. (State's Exhibit 708). by Dr. Travis Snyder, a neuroradiologist, reviewed Mr. Nicholson's brain MRI and testified on his behalf during the mitigation phase of trial. Specifically, Dr. Snyder opined that Mr. Nicholson's brain MRI was consistent with brain trauma based on his findings of at least six bilateral subcortical foci of increased signal (diffuse axonal injury) and associated bilateral frontal cortical volume loss. (Tr. 4773-4844). Dr. Snyder's August 17, 2019 expert report was offered as Defendant's Exhibit B. His slides with imaging comparisons of Mr.

Nicholson's MRI to MRIs obtained in studies of persons with brain injuries was presented as Defendant's Exhibit C.

Due to scheduling conflicts, the State called two of its rebuttal witnesses before the defense called its final witness and rested. (Tr. 4844-4846, 4902).

The State's first rebuttal witness was Dr. Thomas Masaryk, a neuroradiologist whose expert testimony was offered to rebut the defense's mitigation phase evidence and testimony regarding Mr. Nicholson's traumatic brain injury diagnosis by Dr. Snyder's review of the MRI of Mr. Nicholson's brain. (Tr. 4847-4898) Defense counsel objected to Dr. Masaryk being recognized as an expert in neuroradiology because Mr. Nicholson's capital case was the first criminal case in which Dr. Masaryk testified as an expert. (Tr. 4851-4852). The trial court overruled defense's objection. (Tr. 4852). Dr. Masaryk did not generally dispute Dr. Snyder's findings based upon Dr. Snyder's review of the MRI of Mr. Nicholson's brain. Rather, Dr. Masaryk testified that he did not believe the MRI imaging of Mr. Nicholson's brain showed ***significant*** brain trauma. (*See* Tr. 4860-4862, 4866-4970). His October 10, 2019 expert report was offered as State's Exhibit 705.

The State next called as its rebuttal witness Dr. Richard Ryan Darby, a neurologist whose expert testimony was offered to rebut the defendant's mitigation phase evidence and testimony regarding Mr. Nicholson's traumatic brain injury diagnosis by Dr. Fabian and Dr. Snyder. (Tr. 4903-4994). Before Dr. Darby began testifying, defense counsel objected to Dr. Darby being qualified as an expert because Mr. Nicholson's capital case was the first case in which Dr. Darby testified as an expert. (Tr. 4903-4904). After hearing Dr. Darby's credentials, the trial court—over the defense's objection—recognized Dr. Darby as an expert witness. (Tr. 4914-4915).

Defense counsel then called its last mitigation witness, Mary Cecil "Ceci" McDonnell, a licensed independent social worker and mitigation specialist who assisted the defense with its

mitigation investigation in Mr. Nicholson's case. (Tr. 4995-5046). The September 1, 2019 Social History Report prepared by Ms. McDonnell and Kelly O'Connor, LISW, was offered as State's Exhibit 714.

The defense rested and moved to admit Defendant's Exhibits A, B, and C on October 17, 2019. (Tr. 5047). The trial court admitted those exhibits without objection from the State. (Tr. 5047).

For the remainder of the State's rebuttal case, defense counsel stipulated to the authenticity but not admissibility of two recorded jail calls Mr. Nicholson made to his mother, Angel Nicholson. (*See* Tr. 5048-5049).

The first call offered by the State was a redacted version of Mr. Nicholson's September 22, 2019 jail call with Angel Nicholson. (Tr. 5048-5049). During that call, Mr. Nicholson expressed his frustration with defense counsel and Dr. Fabian after learning that Dr. Fabian's 62-page mitigation report—which included Mr. Nicholson's 13-page description to Dr. Fabian about the September 5, 2018 incident, including critically, the basis for Mr. Nicholson's self-defense claim—had been given to the State one month before trial began. (*See* Tr. 5142; State's Exhibit 702). Indeed, as set forth in Proposition of Law No. 16, *infra*, defense counsel was ineffective for allowing Dr. Fabian—defense counsel's neuropsychologist mitigation expert—to ask Mr. Nicholson about the incident once it became apparent that insanity was not a viable culpability-phase defense. Defense counsel knew or should have known of Dr. Fabian's propensity to record and seemingly transcribe information from the police report and statements the defendant makes about the incident, even when such information was not relied upon in Dr. Fabian's diagnosis of Mr. Nicholson and thus, did not need to be incorporated into his mitigation report. Thus, when Mr. Nicholson became privy to Dr. Fabian's method, and knowing that defense counsel was required

to give the State Dr. Fabian's reports, Mr. Nicholson surmised that he needed to hold back information from Dr. Fabian to make up for the relevancy filter that his own mitigation neuropsychologist lack. In its mitigation closing argument, the State casted doubt upon Dr. Fabian's diagnosis of Mr. Nicholson because it was based largely on information obtained from Mr. Nicholson. (*See* Tr. 5097-5100). The State argued that Mr. Nicholson was not honest with Dr. Fabian, which the State proffered, was evidenced by Mr. Nicholson's September 22, 2019 phone call with his mother. (*See* Tr. 4097-5100). Notably, Dr. Fabian's report was prepared on August 23, 2019—over a month prior to that phone call—and Dr. Fabian's testimony was based relied largely, if not completely, on his 62-page report. (*See* State's Exhibit A). The audio of Mr. Nicholson's September 22, 2019 jail call was offered as State's Exhibit 702, played for the jury, and admitted into evidence over defense counsel's objection. (Tr. 5049). The State also offered as State's Exhibit 710 the "Call Detail Report" related to that same jail call. (Tr. 5050-5051).

The second call offered by the State was a redacted version of Mr. Nicholson's jail call with his mother hours after the jury rendered its culpability phase verdict on October 11, 2019. (Tr. 5050). During that call, Mr. Nicholson speculated on the realities of prison life, including what actions he thought he may have to take—such as killing another inmate—in order to gain entry into a prison gang for safety. (*See* Tr. 4371-4374). Although it was undisputed that, prior to September 5, 2018, Mr. Nicholson had never been charged with any crime, the State offered this jail call to rebut the testimony of James Aiken regarding Mr. Aiken's opinion that Mr. Nicholson posed a "low-risk" to other inmates and prison staff. The audio of that jail call was submitted as State's Exhibit 703, played for the jury, and admitted into evidence over defense counsel's objection by the trial court. (Tr. 5049). The State also offered as State's Exhibit 711 the "Call Detail Report" related to that same jail call. (Tr. 5050-5051).

On October 17, 2019, the State rested and moved to admit State's Exhibit 702 (redacted audio of Mr. Nicholson's September 22, 2019 jail call with Angel Nicholson); 703 (redacted audio of Mr. Nicholson's October 11, 2019 jail call with Angel Nicholson); 705 (Dr. Masaryk's expert report); 707 (Dr. Darby's expert report); 708 (MRI of Mr. Nicholson's brain); 709 (Mr. Nicholson's medical records); 710 (call detail report from Mr. Nicholson's September 22, 2019 jail call with Angel Nicholson); 711 (call detail report from Mr. Nicholson's October 11, 2019 jail call with Angel Nicholson); 712 (paper written by Gerard Reidy); and 713 (Dr. Fabian's mitigation report, already admitted as Defendant's Exhibit A). (Tr. 5052). The trial court admitted all rebuttal exhibits over defendant's objection to all except for State's Exhibits 708 and 709. (Tr. 5052-5053).

B. Aggravating Circumstances

As discussed in Mr. Nicholson's First Proposition of Law, *supra*, the evidence at trial did not support the jury's finding of guilt as to the one aggravating circumstance, as the evidence at trial was not sufficient to support Mr. Nicholson's conviction of the two aggravated murder counts charged in Counts 1 and 2. Alternatively, the evidence at trial did not support the jury's finding of guilt as to the one aggravating circumstance because the State failed to prove, beyond a reasonable doubt, that Mr. Nicholson was not acting in self-defense on September 5, 2018.

C. Mitigating Factors

Although Mr. Nicholson maintains that the evidence at trial did not support the jury's findings of guilt as to the aggravating circumstances, if this Court concludes otherwise, this Court must then weigh any of the relevant mitigating factors provided in R.C. 2929.04(B) against the aggravating circumstances in this case. These factors include:

1. The nature and circumstances of the offense, R.C. 2929.04(B);
2. The history, character, and background of the offender, R.C. 2929.04(B);

3. Whether the victim of the offense induced or facilitated it, R.C. 2929.04(B)(1);

4. Whether it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation, R.C. 2929.04(B)(2);

5. Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law, R.C. 2929.04(B)(3);

6. The youth of the offender, R.C. 2929.04(B)(4);

7. The offender's lack of a significant history of prior criminal convictions and delinquency adjudications, R.C. 2929.04(B)(5);

8. If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim, R.C. 2929.04(B)(6); and

9. Any other factors that are relevant to the issue whether the offender should be sentenced to death, R.C. 2929.04(B)(7).

1. Mr. Nicholson's traumatic childhood had lifelong consequences, and thus should be given significant or strong mitigating weight.

Historically, this Court has seldom given strong weight to a defendant's unstable or troubled childhood. *See, e.g., State v. Madison* 160 Ohio St. 3d 232, 2020-Ohio-3735, 155 N.E.3d 867, ¶ 241 (citations omitted). This Court has recognized that evidence of a defendant's "troubled upbringing" can be, under some circumstances, entitled to "some weight." *See State v. Graham*, Slip Opinion No. 2020-Ohio-6700, ¶ 208; *State v. Hale*, 119 Ohio St. 3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 265; *State v. Bey*, 85 Ohio St. 3d 487, 508, 1999-Ohio-283, 709 N.E.2d 484; *State v. Jackson*, 149 Ohio St. 3d 55, 2016-Ohio-5488, 73 N.E.3d 414, ¶ 164. Moreover, this Court has given, in appropriate cases, "significant weight" to the defendant's troubled upbringing. *See*, *e.g.*, *State v. Clinton*, 153 Ohio St. 3d 422, 2017-Ohio-9423, 108 N.E.3d 1, ¶ 294.

Evidence of a "troubled upbringing" can include a showing of: a dysfunctional family; an unstable or chaotic home environment; combative and violent behavior by his immediate family members; domestic violence or corporal punishment inflicted upon the defendant; irresponsible parents; and substance abuse issues in the home. *See, e.g.*, *Graham*, 2020-Ohio-6700 at ¶ 208; *State v. Grate*, Slip Opinion No. 2020-Ohio-5584, ¶ 246.

In this case, defense called Mr. Nicholson's brother, Robert Nicholson Jr.; mother, Angel Nicholson; and maternal aunt, Donna Kain to testify about Mr. Nicholson's history, character, and background which included, most notably, an account of Mr. Nicholson's troubled upbringing. Defense also presented the testimony of its mitigation specialist, Mary "Ceci" McDonnell, LISW, regarding the social history she and Kelly O'Connor prepared in Mr. Nicholson's case. A copy of their social history report was presented as State's Exhibit 714. For the reasons described below, this Court should give "significant weight" to Mr. Nicholson's troubled upbringing.

i. Mr. Nicholson and Robert Jr. witnessed verbal and physical abuse between their parents, Angel and Robert Sr., on a daily basis growing up as children.

Robert Jr. and Mr. Nicholson share the same parents—Robert Nicholson Sr. and Angel Nicholson—and Robert is approximately ten years older than Mr. Nicholson. (Tr. 4407). Robert Jr. testified that fights and arguments between his parents had gone on as long as he could remember and was "almost a daily or every other day occurrence." (Tr. 4408-4410; State's Exhibit 714 at pp.1-2). Robert Jr. recalled Robert Sr. physically and verbally abusing his mother throughout his childhood. (Defendant's Exhibit A at p.6). Robert Jr. recounted being four-or-five years (before Mr. Nicholson was born) when Angel took him from his bedroom in the middle of the night so they could leave the home and move to California because the domestic violence in the household had gotten so bad. (See Tr. 4408-10, 4523). Robert Jr. and Angel both testified about one occasion when Angel jumped out of a window while Robert Sr. fired shots at her. (Tr. 4410-

4411, 4441-4442, 4621-4622, 5010-5011). Mr. Nicholson shared that he knew his father had a gun by age 8 and estimated that he saw his father chase his mother with the gun about four or five times in his life. (State's Exhibit 714 at p.2; Tr. 5010-5011).

The domestic violence between Robert Sr. and Angel was still rampant in the home after Mr. Nicholson was born in 1989, when Robert Jr. was 10 years old, which both boys often bore witness to. (*See* Tr. 4413-4414, 4523-4524, 5003, 5005, 5011; State's Exhibit 714 at pp.1-2). Robert Jr. recalled once incident when Mr. Nicholson, 4 or 5 years old at the time, was screaming in the doorway of their bedroom while watching their father hold their mother "over the edge of a couch and choke[] her until she went almost – I think she went unconscious." (Tr. 4414-4415, 5011; State's Exhibit 714 at p.2). Robert Jr. and Mr. Nicholson "yelled and asked for help" but none of their neighbors got involved. (Tr. 4415). Angel recalled that incident as well. (Tr. 4524-4525). Mr. Nicholson's "first memory" was of him "punching a hole through a glass door when he was about four or five years old" because he was "so frustrated and so frightened by his parents fighting that he would do anything to make it stop.". (Tr. 5008-5009; State's Exhibit 714 at p.1).

Angel testified about other altercations that Mr. Nicholson witnessed between Angel and Robert Sr. and indicated that, on at least one occasion, law enforcement was called to their home and took Robert Sr. to jail. (Tr. 4526-4527). Robert Sr. acknowledged law enforcement being called to their home in response to a domestic violence incident for which he was taken to jail. (Defendant's Exhibit A at p.10; Tr. 5004-5005).

Mr. Nicholson recounted witnessing verbal and physical domestic abuse between his parents as a child, but Dr. Fabian noted that Mr. Nicholson "had a tendency to veneer any abuse within the family and protect his parents." (Defendant's Exhibit A, at p.3). Mr. Nicholson shared with Dr. Fabian that he could no go to sleep some nights because of his parents' arguing.

(Defendant's Exhibit A at p.17). Mr. Nicholson indicated that he thought about suicide when he was a little boy because he got tired of dealing with, hearing, and being in the middle of his parents, as both his mom and dad would often share their side with what happened with him. (Defendant's Exhibit A at p.17).

Although Angel and Robert Sr. both maintained gainful employment and instilled in both of their children the importance of education, Angel and Robert Sr. both drank heavily in the home when Robert Jr. and Mr. Nicholson were growing up. (*See* Tr. 4425, 4525, 5003-5004; State's Exhibit 714 at pp.1-2). Alcohol was a large contributor to the physical and verbal altercations that took place between them in the home. (*See* Tr. 4425, 4525, 5003-5004).

Donna testified that she and her sister, Angel Nicholson, used to be very close, but that their relationship became "very estranged" when she discovered the abuse that was going on in the home. (Tr. 4463). Donna recalled often seeing her sister with injuries and begin told by Angel that she had incurred those injuries accidentally. (Tr. 4466-4468). This rang untrue to Donna, as she did not recall her sister being a particularly clumsy person. (See Tr. 4466-4468).

ii. Mr. Nicholson and Robert Jr. were both verbally, emotionally, and physically abused by their parents throughout their childhood.

Robert Sr. was verbally, psychologically, and emotionally abusive towards Mr. Nicholson and Robert Jr. in the home as children which would, at times, escalate to physical abuse. (Tr. 4421-4422, 4543, 4622, 4625, 4641, 5008-5011. *See also* Tr. 4542-4543; State's Exhibit 714 at pp.1-3). Mr. Nicholson reported Robert Sr. "beat him in the head." (Defendant's Exhibit A at p.3; State's Exhibit 714 at p.2). Dr. Fabian described Robert Sr. as being "very controlling in the family." (Tr. 4617). As for Robert Sr., he denied physically assaulting Angel and said he never hit his sons. (Tr. 4630-4631, 4635, 5005; Defendant's Exhibit A at p.10).

Angel recounted Robert Sr. mentally abusing Mr. Nicholson by regularly calling him

names (Tr. 4528-4529), and Mr. Nicholson described his father "calling him a fairy" and "questioning his masculinity." (Defendant's Exhibit A at p.4). Ms. McDonnell indicated that, through her social history investigation, it became clear that Robert Sr. focused a lot of the name-calling on Mr. Nicholson. (Tr. 5017). Robert Sr. would call Mr. Nicholson a pussy, bitch, stupid, and a waste of space. (Tr. 5017).

Although Mr. Nicholson represented to Ms. McDonnell that he met most developmental milestones normally, Ms. McDonnell testified that it became clear through her investigation that Mr. Nicholson had enuresis when he was 6-to-8 years old. (Tr. 5005). Mr. Nicholson also reported experiencing night terrors which, Ms. McDonnell testified, are "often a neurologically-induced issue" during childhood. (Tr. 5006). Mr. Nicholson experienced anxiety about leaving the home to go to daycare, school, or other people's homes, and indicated that it was "hard and scary" for him to separate from his mother. (Tr. 5006).

Angel also admitted that, while intoxicated, she physically assaulted Mr. Nicholson when he was a child but could not recall precisely how many times that occurred, in part, because of her own alcohol-related memory issues. (*See* Tr. 4541-4542, 4641). Angel testified that she verbally abused and/or called Mr. Nicholson out of his name "all the time" when Mr. Nicholson was a child. (Tr. 4542-4543).

Neither Mr. Nicholson nor Robert Jr. felt safe as children in the home growing up, as they never knew exactly how the fights between their parents would start or end. (Tr. 5009). The two boys were also fearful about being targeted. (Tr. 5009). Thus, Mr. Nicholson began to develop a kind of "chronic stress response" as a child because he was living with that "not knowing" and helplessness about the unstable and dysfunctional home environment he was in. (Tr. 5009). Notably, Matthew experienced this "much longer" than Robert Jr., as Robert Jr. left the home

when Mr. Nicholson was 8 years old. (*See* Tr. 5009; State's Exhibit 714 at pp.2-3).

Donna described the manner in which Robert Jr. and Mr. Nicholson grew up as being: "Horrific. Horrific. Abuse. Watching their mother being strangled, watching their mother being beaten, watching their mother being dragged. And they had so much fear of [Robert Sr.] and they feared him." (Tr. 4482; State's Exhibit 714 at pp.1-2). Donna recalled noticing both Robert Jr. and Mr. Nicholson being nervous, unable to focus, and becoming quiet over time. (Tr. 4464-4465, 4477).

iii. Threats and fear prevented members of the Nicholson family from reporting or otherwise taking action to stop the domestic violence in the household.

Both Robert Jr. and Mr. Nicholson were "taught not to ever say anything about what was going on in that house" and often isolated from their friends and family. (*See* Tr. 4426, 4471-4473, 5012; State's Exhibit 714 at p.2). Donna recalled one occasion when she went to check on Angel and the boys because Angel had not been answering or returning her phone calls. (Tr. 4471-4475). Although the vehicles were in the driveway, no one answered the door. (Tr. 4471-4475). Donna waited in the driveway and saw, at one point, someone move the blind from inside the home, which she took to be a sign from Robert Jr. to let her know they were in there but had been prohibited from opening the door for her. (Tr. 4471-4475).

Mr. Nicholson reported that he did not tell anyone what was going on inside the home to anyone because his parents had "drilled into his brain" that if he did, he would be taken away from the family. (Defendant's Exhibit A at p.3; State's Exhibit 714 at p.2). Robert Jr. described his homelife as "like being in a cult—you stayed isolated because you didn't want anyone else to know what was going on." (State's Exhibit 714 at p.2). At trial, Ms. McDonnell indicated that Mr. Nicholson and Robert Jr. "were threatened that their mother would be killed if they told" anyone about the domestic violence going on in their home. (Tr. 5012). Robert Sr. was described as

"exceptionally controlling," as he did not allow anyone to have friends over and would not allow Angel to speak on the phone with anyone—even her own family members—unless he could hear what was being said. (Tr. 5012).

Donna testified that she tried to help Angel get out of that situation on multiple occasions to no avail. (Tr. 4472-4474, 5013). According to Donna, Robert Sr. threatened to "kill them all" if Angel ever tried to leave him. (Tr. 4472-4475, 5012-5013). Robert Sr. did not, according to Donna, allow Angel to leave the home with both boys, and Mr. Nicholson was almost always the one that had to stay with Robert Sr. (Tr. 4475). Robert Jr. testified that he began spending summers with his maternal aunt, Donna Kain, from approximately age 5 up until he was able to drive. (*See* Tr. 4412-4413, 4417. *See also* Tr. 4465). However, Robert Sr. did not allow Mr. Nicholson to spend time at Donna's home over the summer because he "kept Mr. Nicholson very close to him." (Tr. 4465, 4477-4478).

Robert Sr. consistently indicated to Robert Jr. that he preferred Mr. Nicholson over him, and often did or said things to Mr. Nicholson about Robert Jr. in order to create a wedge in the relationship between the two brothers. (Tr. 4422-4424, 4443-4444, 5017-5018; State's Exhibit 714 at p.3). Donna testified that Robert Sr. would tell Mr. Nicholson lies about his brother for the purpose of creating tension between Mr. Nicholson and Robert Jr. (Tr. 4478-4479). This ultimately resulted in a disconnect between Mr. Nicholson and Robert Jr. and was a way to keep Mr. Nicholson and Robert Jr. isolated from each other. (*See* Tr. 4478-4479; State's Exhibit 714 at p.3).

iv. After Robert Jr. joined the military, Mr. Nicholson continued witnessing and experiencing domestic violence in the home, was isolated, and did not have anyone else in his life that he could talk to or look to as a positive role model.

Mr. Nicholson was 8 years old when Robert Jr. joined the military and left Ohio. (Tr. 4419, 5014; State's Exhibit 714 at p.2). Robert Jr. was eager to join the military in order to get away

from his dysfunctional, unstable, chaotic, and abusive home life. (*See* Tr. 4622, 5014-5015). However, Robert Jr. "presented with a lot of guilt and unresolved issues about being older and leaving" Mr. Nicholson "in that environment." (*See* Tr. 4622-4623, 5015). Mr. Nicholson was the only child living in the home with his parents from age 8 up until Mr. Nicholson—30 years at the time of trial—"moved out a couple years ago." (State's Exhibit 714 at pp.2-3).

Robert Jr. testified that while he was away, Angel would call him and put the phone on speaker phone so he could hear what was going on in the home. (Tr. 4417). Because of what he heard, Robert Jr. repeatedly begged Angel to give him custody of Mr. Nicholson—notwithstanding the fact that he was in the military—and also told Angel that she and Mr. Nicholson both could come live with him. (Tr. 4417-4418, 4529, 5015).

Mr. Nicholson indicated that Robert Sr. drank more than Angel earlier in his life—drinking around six-to-twelve beers a night—the roles between his parents reversed with Mr. Nicholson was in high school. (State's Exhibit 714 at p.3). Mr. Nicholson reported that he became a caretaker for his mother in high school, which included driving her car before he even had a license—so she did not drive drunk—and making sure that Angel did not choke on her own vomit. (Tr. 5016; State's Exhibit 714 at p.3). The domestic violence from Robert Sr. was still going on in the home at that time, and Mr. Nicholson began to feel as though he needed to be his mother's protector. (Tr. 5016-5017; State's Exhibit 714 at p.3). Growing up, Mr. Nicholson felt "continuously frustrated" with and disappointed when his mother would return to Robert Sr. after "violent episodes" between them had happened. (State's Exhibit 714 at p.3).

Although Mr. Nicholson visited Robert Jr. some summers, their parents did not allow Mr. Nicholson to stay with Robert Jr. very long. (Tr. 4419-4420, 4477-4478), 5015 Robert Jr. recounted that, when their parents allowed Mr. Nicholson to visit with Robert Jr. and his wife in

Wisconsin, Mr. Nicholson "loved coming to visit and seeing us because he was able to get away from the craziness. He hated to go back home." (Defendant's Exhibit A at p.7). Notably, unlike Robert Jr., Mr. Nicholson was not given a reprieve "[f]rom [the] craziness" of his home environment because Mr. Nicholson was not allowed to spend summers with his aunt, Donna Kain, as Robert Jr. had done for years growing up. (See Tr. 4416-4417).

v. Because Mr. Nicholson was more isolated than Robert Jr., his traumatic childhood had a significant and lasting impact upon him.

Robert Jr. testified, over time, both he and his wife noticed a dramatic change in Mr. Nicholson's personality. (*See* Tr. 4420, 5019-5020; Defendant's Exhibit A at p.7; State's Exhibit 714 at p.3). Mr. Nicholson became "very withdrawn" and kept to himself. (Tr. 4420). It was Robert Jr.'s opinion that Mr. Nicholson had been "brainwashed by his parents" and was being kept in a controlling bubble by them. (*See* Tr. 4623). When he looked at his wedding photos, Robert Jr. recounted recognizing on Mr. Nicholson's teenage face a look of pain that, through his years of experience in law enforcement, was something he had seen many times on the faces on children who are victims of crimes. (See Tr. 4428-4429). As Mr. Nicholson got older, Robert Jr. described him as being "flat angry, full of hate and depression." (Tr. 2624; State's Exhibit 714 at p.3).

When Donna saw Mr. Nicholson over the holidays, he would usually be "by himself" and never looked really happy. (Tr. 4477). Eventually, Donna testified, Mr. Nicholson basically "went into a deep deep shell" and essentially stopped talking to other members of his family because he had been controlled, "locked and isolated" by Robert Sr. his entire life. (Tr. 4482-4483). Indeed, Angel testified that Mr. Nicholson did not have a lot of friends because Robert Sr. "wasn't in approval of a lot of kids coming over." (Tr. 4530). Mr. Nicholson indicated that he felt "very isolated" growing up. (Tr. 5016-5017; State's Exhibit 714 at p.3).

Robert Jr. surmised he was able to overcome the traumatic events of the childhood he and

Mr. Nicholson shared because—unlike Mr. Nicholson—Robert Jr. had the opportunity to spend extended periods of time away from the home with his aunt, left the home at age 19, and was able to develop relationships and gain role models outside of his family's home. (See Tr. 4416). Robert Jr. also cited his military experience as being responsible, in part, for his success in life. (See Tr. 4418-4419). From the military, Robert Jr. testified that he gained great discipline, was in a structured environment, and experienced a familial type of relationship with other servicemen that he did not have as a child in the Nicholson home. (See Tr. 4418-4419).

Mr. Nicholson told Dr. Fabian that he got "nervous, shaky, and panicky" if he heard people arguing and that he had difficulty trusting people because of what he witnesses between his parents as a child. (Defendant's Exhibit A at p. 21). Mr. Nicholson acknowledged that he never had an example of what a normal relationship was and thus, did not know what to do in situations where he or his romantic partner were upset. (*See* Defendant's Exhibit A at p.21). Even before the incident, Mr. Nicholson had a negative outlook on the world. (Defendant's Exhibit A at p.21). Mr. Nicholson told Dr. Fabian had recurrent dreams throughout his life that he was fighting and would actively "punch" in his sleep." (Defendant's Exhibit A at pp. 21-22).

Angel expressed her belief that the domestic violence Mr. Nicholson witnessed between Angel and Robert Sr.—which Mr. Nicholson sometimes experienced as well—had a negative impact on Mr. Nicholson. (Tr. 4529). Angel testified that she believed this entire situation would have never occurred if she would have had the courage to leave Robert Sr. when Robert Jr. and Mr. Nicholson were children. (See Tr. 4529). Thus, Angel explained that she was willing and able to provide more information on the stand during the mitigation phase trial than she initially was amenable to sharing with Dr. Fabian because she only recently appreciated the impact Mr. Nicholson's home had on him. (See Tr. 4537). For that, Angel Nicholson blamed herself for not

doing enough. (Tr. 4537).

vi. The multigenerational domestic violence, alcoholism, and mental health issues permeated the families of both Angel and Robert Sr., which bore upon the way in which Mr. Nicholson was raised.

Cumulatively, Dr. Fabian recognized that the physical and verbal abuse that had been endured by generations of Mr. Nicholson's family impacted Mr. Nicholson. (*See* Tr. 4612, 4630, 4639-4640, 4675-4676). Put simply, the history of dysfunction, domestic violence, and alcoholism in the families of Angel and Robert Sr. was therefore reflected in the household in which Mr. Nicholson grew up.

Robert Jr. testified that his father was a "severe alcoholic" up until Robert Jr. left for the military at age 19. (See Tr. 4424, 4502). Angel testified that although Robert Sr. was "always a drinker," he got really carried away after his adopted mother passed away, when Mr. Nicholson was around 3 years old. (Tr. 4544). Donna described Robert Sr. as being "an angry person" who "would drink a lot" and take his anger out on Angel, Robert Jr., and Mr. Nicholson. (Tr. 4469). Robert Sr. himself acknowledged drinking too much while he was raising Mr. Nicholson and Robert Jr. as children. (*See* Tr. 4630, 4634-4635; Defendant's Exhibit A at p.10). Robert Sr. recounted to Dr. Fabian that he had been sober for approximately 20 years. (Defendant's Exhibit A at p.10. *See also* Tr. 4547).

While Robert Jr. would not expressly state what mental health conditions his father had been diagnosed, he nonetheless testified that Robert Sr. had some issues that he is supposed to take medication for. (Tr. 4430). Angel told Dr. Fabian that Robert Sr. "had a chemical imbalance" and was on some type of anxiety pills, but that was not verified. (Defendant's Exhibit A at p.13).

Donna recalled Angel telling her that Robert Sr.'s "biological mother rejected him" when he was a child and, later on in life, when Robert Sr. was an adult. (Tr. 4468-4469). Dr. Fabian

indicated that when he talked with Robert Sr., he became emotional while talking about his estrangement from his biological parents. (Tr. 4629; *See* Defendant's Exhibit A at p.9). Robert Sr. reported growing up with his adopted parents who were verbally abusive to each other and who both had drinking problems. (Tr. 4630; Defendant's Exhibit A at p.9). Robert Sr.'s adopted father was a World War II veteran who Robert Sr. described as being "messed up from the war." (Tr. 4630).

Although Robert Jr. believed that Angel did not initially have alcohol issues, she began to develop alcohol dependence over the years. (Tr. 4424-4425, 4470, 4502). Indeed, Angel testified that she began getting drunk because she "wanted the numb the pain" she experienced from the verbal and physical abuse in her home. (Tr. 4525. *See also* Defendant's Exhibit A at p.13).

Angel Nicholson detailed for the jury the domestic abuse she witnessed in her home between her mother and stepfather as a child including, most tragically, an incident wherein Angel's mother—who was physically assaulted on numerous occasions by Angel's stepmother—attempted to shoot Angel's stepfather but mistakenly ended up shooting Angel's two-year-old sister instead. (Tr. 4518-4519, 5028). Angel's mother and stepfather would argue frequently in the home, and alcohol would exacerbate the domestic violence between them. (Tr. 4639). Angel told Dr. Fabian that she never lived with her parents together and lived with her aunt for a significant portion of her childhood. (*See* Tr. 4638-4639; Defendant's Exhibit A at pp.12-13). Dr. Fabian described Angel's childhood as being "dysfunctional." (Tr. 4638-4639).

Angel testified that she and Robert Sr. began dating when they were 16 years old. (Tr. 4509). After witnessing her stepfather pull a gun out on her mother when she was 17 or 18 years old, Angel moved in with Robert Sr. while she was pregnant with Robert Jr. (Tr. 4514-4515, 4520). When she left, Angel believed she was "running away" and "leaving a situation" of domestic

violence behind for a much better one. (See Tr. 4514-4515, 4520). However, Angel testified that Robert first abused her just one month after Robert Sr. was born. (Tr. 4521).

Donna testified that Angel was still isolated from her family (Tr. 4476), and Robert Jr. opined that Robert Sr. and Angel were "still in denial of this issue concerning domestic violence" and the impact that it had on Mr. Nicholson growing up. (See Tr. 4425-4426). Angel acknowledged that because of the pain and shame associated with the domestic violence she has experienced her entire life she was reticent to share with defense counsel and the defense's mitigation experts about what she has been through in her life. (Tr. 4516). Indeed, when Dr. Fabian interviewed Angel, she was unwilling to discuss with him the domestic violence she experienced in the home. (Tr. 4536-4537).

Angel explained that because she is still married to and living with Robert Sr., she was fearful about what information would be published by the media, admitting on the witness stand that there was still violence in the household. (Tr. 4536, 5026). Indeed, Dr. Fabian told the jury that he later found out after one his of telephone interviews with Angel that Robert Sr. had been "hovering over the phone when Angel was talking about Mr. Nicholson and domestic violence in the family" with him. (Tr. 4620-4621, 4640-4641). Ms. McDonnell testified that it was clear to her that Robert Sr. was listening in on her phone calls with Angel during her social history investigation. (Tr. 5025). Ms. McDonnell also indicated that she "knew that [Robert Sr.] would not feel comfortable with" Angel coming to her office for interviews without Robert Sr. being there. (Tr. 5026). In Ms. McDonnell's opinion, [i]t was very clear he was in charge of what was going to come out of her mouth." (Tr. 5026). It was Dr. Fabian's opinion that Angel was still "in fear and threatened in that relationship." (Tr. 4621).

Mr. Nicholson told Dr. Fabian that his mother had talked about extra-terrestrial encounters

with him, which caused him to believe she may have undiagnosed mental health issues. (*See* Tr. 4619-4620; Defendant's Exhibit A at p.4. *See also* Defendant's Exhibit A at p.13). Dr. Fabian indicated that he "continued to hear there were mental health issues on the mother's side of the family," but was not able to confirm any specifics. (*See* Tr. 4629). Although Dr. Fabian noted that he was not evaluating Angel and believed the information he received from her about Mr. Nicholson was generally accurate, he explained that he was concerned about how long she may have been experiencing "delusional thinking," as it would have undoubtedly interfered with her parental fitness when she was raising Mr. Nicholson and his brother. (*See* Tr. 4620-4621).

Ms. McDonnell testified about the concept of "repetition compulsion," which is where someone grows up with a particular set of events that are horrible and that they have no control over—the definition of trauma—and they tend to keep repeating those patterns despite actually trying to make it different. (Tr. 5028-5029). Ms. McDonnell explained that "unless there's real intervention, in terms of mental health," then the cycle of horrible events will not change. (Tr. 5029). It was Ms. McDonnell's opinion that the repetition compulsion cycle was at work in Mr. Nicholson's life and ultimately, the events that took place on September 5, 2018. (Tr. 5029).

vii. Mr. Nicholson's traumatic childhood impacted his relationship with America and her children.

After Mr. Nicholson and America began dating, Robert Jr. indicated that Mr. Nicholson became even more isolated from his family because America was "very controlling." (See Defendant's Exhibit A at pp.7-8; Tr. 5019-5020). Angel testified about America being controlling of Mr. Nicholson during the guilt phase of trial, specifically detailing how America required him to frequently check-in with her when Mr. Nicholson was with his family. (Tr. 3780-3782). Robert Sr. echoed Angel's account when he spoke to Dr. Fabian. (Defendant's Exhibit A at p.12).

Angel described Mr. Nicholson's relationship with America as being "an obsessive type of

relationship" that was unhealthy and toxic. (Defendant's Exhibit A at pp. 14-15). Angel explained that Mr. Nicholson frequently had to prove to America that he was where he said he was and that he was with who he said he was with. (Defendant's Exhibit A at pp. 14-15). For example, when Mr. Nicholson told America that he was at an Indians baseball game with his parents, he would prove this to America by taking a photograph with one of his parents in front of the baseball statute and sending that photograph to her. (Defendant's Exhibit A at pp. 14-15).

Robert Jr. and Robert Sr. told Dr. Fabian that they were not aware of any prior domestic altercations between America and Mr. Nicholson. (Defendant's Exhibit A at pp. 8, 12). However, Robert Jr. told Dr. Fabian about Mr. Nicholson sharing with him that one of America's children jumped up and punched Mr. Nicholson in his back while America and Mr. Nicholson were arguing. (Defendant's Exhibit A at p.8). Robert Sr. told Dr. Fabian that he was aware that "one of America's children would be mouthy with" Mr. Nicholson. (Defendant's Exhibit A at p.12).

Tellingly, Robert Jr. surmised that Mr. Nicholson was dating America—who was 16 years older than him—because he was "looking for a mother figure and wanted to be comforted and taken care of. He had so much bad stuff growing up that I think he saw what America had and that's the family that he wanted." (Defendant's Exhibit A at p.8). In Robert Jr.'s opinion, Mr. Nicholson "saw a chance to make the family that he wanted, that he never had [as] a kid." (Defendant's Exhibit A at p.8).

Mr. Nicholson told Dr. Fabian that although his relationship with America and her children was good, things started to change after America's son, Roberto Lopez, left home for the military. (Defendant's Exhibit A at p.31). During the guilt phase of trial, Roberto admitted that he had talked with Mr. Nicholson and his brother, Robert Jr., about his interest in joining the military, and that Mr. Nicholson had given him a recommendation as to what branch of the military he should go

into. (Tr. 3662-3664). Mr. Nicholson explained to Dr. Fabian that after Roberto left for the Army, America became extremely depressed and ultimately blamed Mr. Nicholson for Roberto deciding to go into military service. (Defendant's Exhibit A at p.31).

According to Mr. Nicholson, his relationship with America's other two children, M.L. and Giselle, changed approximately six months after Roberto left home. (Defendant's Exhibit A at p.31). Mr. Nicholson surmised that they had discovered that Mr. Nicholson was 16 years younger than their mother which, Mr. Nicholson believed, they did not appreciate. (Defendant's Exhibit A at pp. 31-32). M.L. and Giselle were disrespectful to Mr. Nicholson and America about the age difference between them, with Giselle retorting on one occasion that Mr. Nicholson was only a little bit older than she was, and M.L. chastising America by expressing his interest in dating a "cougar" when he was older. (Defendant's Exhibit A at p.32).

Mr. Nicholson also told Dr. Fabian that America was diagnosed with an untreatable kidney disease, which made America even more depressed and for which she also blamed Mr. Nicholson for. (Tr. 4680-4681; Defendant's Exhibit A at p.33). Mr. Nicholson recounted America telling him, in front of M.L. and Giselle, that he had stressed her out to a point where she had obtained this illness. (Defendant's Exhibit A at p.33).

However, Mr. Nicholson told Dr. Fabian that his relationship with the children was nonetheless improving gradually, which Mr. Nicholson believed America did not like. (Defendant's Exhibit A at pp.32-33). It was Mr. Nicholson's opinion that America wanted her children to approve of their relationship, but not be a part of it. (Defendant's Exhibit A at p.32). Thus, America started excluding Mr. Nicholson from doing things that he used to do with America and her children, such as going to the mall, getting ice cream, or going out to eat. (Defendant's Exhibit A at p.32).

Mr. Nicholson noticed a wedge forming again between him and America's two children and started to isolate himself from everyone in the household "just to avoid things." (Defendant's Exhibit A at p.32-33). In the seven-to-nine months leading up to the September 5, 2018 incident, Mr. Nicholson began spending time alone in the basement, going to car shows alone, and generally making a point to not invade their space. (Defendant's Exhibit A at pp.32-33). During those months, America was either doing things with Mr. Nicholson or doing things with her children. (Defendant's Exhibit A at p.33). When Mr. Nicholson tried talking to America about why they were no longer doing things they had done for years together, America accused Mr. Nicholson of being jealous of and disliking her children. (Defendant's Exhibit A at p.33). Mr. Nicholson claimed that America had even told Giselle and M.L. on a few occasions that he did not like them and did not want to be around them, which he said was not true. (Defendant's Exhibit A at p.33).

During the mitigation phase, Dr. Fabian noted that it was "striking" to him that Mr. Nicholson's relationship with America and her children in the months leading up to the incident had devolved into a dysfunctional relationship much like what he witnessed between his parents growing up. (*See* Tr. 4618). Indeed, as set forth above, Mr. Nicholson was negatively impacted in his life by his traumatic upbringing as a result of experiencing and witnessing daily domestic violence between his parents; physical, verbal, and psychological abuse by both of his parents; his parents' excessive drinking; head injuries; natural traumatic events; being bitten by a dog; sexual abuse; and isolation. Ms. McDonnell opined that what Mr. Nicholson's formative experiences as being developmental trauma, which impacted him throughout the entire course of his development as a child. (Tr. 5026-5027). Mr. Nicholson was not taught how to solve problems, resolve conflict, feel love, to feel attuned, or to generally exist in a non-dysfunctional and stable home environment. (*See* Tr. 5027).

viii. Mr. Nicholson's traumatic upbringing should be afforded strong and/or significant weight.

As described extensively above, Mr. Nicholson was raised in a dysfunctional and unstable home environment. His parents both abused alcohol. Mr. Nicholson witnessed verbal, psychological, and/or physical abuse between his parents in the home his entire life, and Mr. Nicholson was regularly a recipient of verbal, psychological, and/or physical abuse from both of his parents. His parents discouraged him from telling anyone by instilling in him fear that if he did, he would be taken away from his family. Mr. Nicholson was isolated his entire life. He did not have many friends growing up, rarely left the home, and seldomly had friends come over. Robert Sr. isolated Mr. Nicholson, Angel, and Robert Jr. from the outside world, including from members of their own family. Robert Sr. also encouraged Mr. Nicholson and Robert Jr. to have a disconnected relationship by making comments that were intended to drive a wedge between the two brothers. Mr. Nicholson was further isolated at age 8, when Robert Jr. left the home after enlisting in the military. When Mr. Nicholson was in high school, he began feeling as though he needed to protect his mom from both the domestic violence inflicted upon her by Robert Sr. and from the intoxicated state Angel often drank herself into. Mr. Nicholson remained in the home after turning 18, living there, Robert Sr. surmised, up until only a couple of years before he began dating America in 2014.

Both of Mr. Nicholson's parents grew up with domestic violence in the home and in situations where alcohol abuse was rampant. Thus, the multigenerational domestic violence not only played a role in and, in part, dictated the circumstances in which Mr. Nicholson grew up, but made it such that he had no concept of the appropriate way to respond to conflict amongst members of his family. Because of his isolation, Mr. Nicholson had no friends or family members—included

his own brother—that he could look to for example or confide in about what was going on in the home. Indeed, Mr. Nicholson continued living with his parents even into his adulthood. Mr. Nicholson was 29 years old when this incident happened, but given his attachment to his parents, isolation, and limited time spent living out of the home, Mr. Nicholson—unlike his older brother, Robert Jr.—did not have considerable time to distance himself from his childhood and allow other factors to assert themselves in his personality and his behavior prior to September 5, 2018. *Compare with Madison*, 2020-Ohio-3735 at ¶ 241. To the contrary, evidence showed that Mr. Nicholson began to adopt the personality and behavior of Robert Sr.

Mr. Nicholson was 25 years old when he began dating America, who was 16 years older than him. Although Mr. Nicholson sought a healthy familial relationship with America and her children, Mr. Nicholson's family and Mr. Nicholson testified that America sought to isolate Mr. Nicholson from his family and friends. Over time, he began to be isolated from M.L. and Giselle as well, which mimicked the isolation Mr. Nicholson experienced his entire childhood. Thus, although not an excuse or justification for what happened on September 5, 2018, Mr. Nicholson's traumatic upbringing most uncertainly influenced his perceptions, reactions, actions, and mindset that night. Accordingly, for the reasons described above, this Court should give Mr. Nicholson's traumatic upbringing significant or strong mitigating weight.

2. Mr. Nicholson's mental health diagnoses should be given significant mitigating weight.

The defense called Dr. John Fabian, a forensic and clinical psychologist and neuropsychologist, regarding Mr. Nicholson's mental health diagnoses. This Court has recognized that mental-health diagnoses are "entitled to significant weight in mitigation." *See, e.g.*, *State v. Grate,* Slip Opinion No. 2020-Ohio-5584, ¶ 255; *State v. Johnson*, 144 Ohio St.3d 518, 2015-Ohio-4903, 45 N.E.3d 208, ¶ 132.

i. Mild Neurocognitive Disorder Due to Traumatic Brain Injury

Dr. Fabian diagnosed Mr. Nicholson with mild neurocognitive disorder due to traumatic brain injury ("TBI"). (*See* Tr. 4643-4648, 4670, 4676-4677, 4725-4729); Defendant's Exhibit A at p.52). Dr. Fabian opined that Mr. Nicholson was unable to conform his conduct to the law—a mitigating factor under R.C. 2929.04(B)(3)—due to his trauma-induced brain abnormalities. Indeed, as discussed herein, evidence presented during the mitigation phase supported the conclusion that Mr. Nicholson's brain condition caused him to lack the substantial capacity to appreciate the criminality of his conduct. Thus, this Court should give Mr. Nicholson's brain injury significant mitigating weight under R.C. 2929.04(B)(3). *See, e.g.*, *Frazier v. Huffman*, 343 F.3d 780, 793-800 (6th Cir.2003). In the alternative, if this Court concludes that Mr. Nicholson's mild neurocognitive disorder due to traumatic brain injury does not qualify as an R.C. 2929.04(B)(3) factor, this Court should nevertheless give some mitigating weight to this under the catchall provision of R.C. 2929.04(B)(7). *See, e.g., State v. Elmore*, 111 Ohio St. 3d 515, 2006-Ohio-6207, 857 N.E.2d 547, ¶¶ 164-165.

It was reported that Mr. Nicholson had two head injuries under the age of 18 months. (Tr. 4648-4649, 5007-5008; Defendant's Exhibit A at p.55; State's Exhibit 714 at p.1). When Mr. Nicholson was six months old, he hit his head on a cocktail table. (Defendant's Exhibit A at p.55; State's Exhibit 714 at Around approximately seven months old, Mr. Nicholson was improperly strapped in his car seat when his mother slammed on the brakes of her vehicle to avoid an accident and was ejected from his car seat, causing him to hit his head. (Defendant's Exhibit A at p.55; State's Exhibit 714 at p.1). Although Mr. Nicholson may have lost consciousness, he did not receive medical treatment. (Defendant's Exhibit A at p.55; State's Exhibit 714 at p.1). Angel also indicated that Mr. Nicholson hit his head "hard" on the stove when he was a young child. (State's

Exhibit 714 at p.1). For all of those incidents, Mr. Nicholson did not receive medical treatment. (State's Exhibit 714 at p.1).

At trial, Dr. Fabian explained that pediatric brain injuries are "not good because they're occurring during one's brain development." (Tr. 4649). Pediatric brain injuries therefore "place youth at risk for different psychological, psychiatric, and other types of risk factors in adulthood," especially where—as was the case here—these head injuries occur before age 13. (Tr. 4649-4650).

Mr. Nicholson recalled getting hit in the head as a child on a number of occasions. (*See* Tr. 4650-4651, 4767; Defendant's Exhibit A at p.22; State's Exhibit 714 at p.1; State's Exhibit 714 at p.5). Between ages six and eight, Mr. Nicholson he fell down the basement steps and hit his head "real hard" on the concrete floor. (Tr. 4648; Defendant's Exhibit A at pp. 22, 24, 55; State's Exhibit 714 at p.1). According to Mr. Nicholson, he could not see and was taken to the hospital, where he was diagnosed with a concussion. (Defendant's Exhibit A at p.22). When Robert Jr. spoke with Dr. Fabian, he indicated that he "had some concerns about Mr. Nicholson's eyesight/vision" precluding him for being a fire pilot, as Mr. Nicholson had once expressed his interest in doing. (Defendant's Exhibit A at p.7).

Mr. Nicholson also told Dr. Fabian about getting his in the head while playing softball so hard that he had to go to the emergency room, where he was diagnosed with a concussion. (Defendant's Exhibit A at pp. 22, 55; State's Exhibit 714 at p.1). Mr. Nicholson indicated that he had lost consciousness in gym class on one occasion as well after he hit a steel wall plate. (Tr. 4649; Defendant's Exhibit A at pp. 24, 55). However, Dr. Fabian testified that he did not have data that Mr. Nicholson ever lost consciousness during a head injury. (Tr. 4729).

Prior to this incident, Mr. Nicholson and his family reported that Mr. Nicholson had been involved in many motor vehicle accidents and a number of serious accidents while working on

hotrods. (Tr. 4648, 4650-4652, 4656-4658, 5018-5019; Defendant's Exhibit A at pp. 19-20, 22-24; State's Exhibit 714 at pp.3-4). Robert Nicholson Jr., Angel Nicholson, and Robert Nicholson Sr. all confirmed that, prior to September 5, 2018, Mr. Nicholson had been involved in many car accidents. (*See* Tr. 4432-4434, 4444-4445, 4530-4534, 4549-4550, 4656-4658; Defendant's Exhibit A at pp. 4, 11, 14). Mr. Nicholson described being in a car crash that was so bad "he should have died from" it. (Defendant's Exhibit A at p.23). Mr. Nicholson indicated that he still had a scar or indention on his head from it, and that the car crash messed up his vision, caused him to black out, and that he remembered waking up and "not knowing who he was." (Defendant's Exhibit A at p.22). On another occasion, Mr. Nicholson was involved in a head-on collision that caused his vehicle to roll multiple times. (Defendant's Exhibit A at p.22, 24-25. *See also* Tr. 4532-4533, 4651). Mr. Nicholson recounted striking his head on his vehicle's steering wheel, roof, and pillar when it was rolling. (Defendant's Exhibit A at p.22). Angel recounted that when she saw Mr. Nicholson after that accident, his pupils were dilated, and Mr. Nicholson looked as though he did not know where he was. (Tr. 4533-4534). Mr. Nicholson indicated that he lost control of his bladder and bowels in the week following that car accident. (Defendant's Exhibit A at p.22. *See also* Tr. 4533-4534).

After some of these car crashes, Angel and Robert Sr. noticed Mr. Nicholson getting upset about things that would not have previously bothered him. (Tr. 4535; Defendant's Exhibit A at pp. 11, 14). Mr. Nicholson complained of frequent headaches and severe migraines in the years prior to September 5, 2018 but took over-the-counter headache relief medication rather than seeking medical evaluation. (Tr. 4535-4536). In total, Dr. Fabian estimated that he was given information leading him to believe that Mr. Nicholson had sustained approximately eight concussions. (Tr. 4649).

Mr. Nicholson reported that he had a "history of migraines" that began when he was seventeen years old. (State's Exhibit 714 at p.5). Mr. Nicholson also reported phantosmia (smelling something burning that is not there) and experiencing a metallic taste in his mouth ever since around age 17. (State's Exhibit 714 at p.5). Mr. Nicholson also reported in 2019 "having a slow reaction time, difficulty walking through doorways without bumping into them, struggles with putting socks and shoes on, and impaired depth perceptions." (State's Exhibit 714 at p.5). Although most of this information was not incorporated into Dr. Fabian's report (Defendant's Exhibit A), Ms. McDonnell testified that although she was not a neurologist and could not make a TBI diagnosis, the history Mr. Nicholson described to her are "consistent with" clinical symptoms of TBI. (Tr. 5030).

Based on Dr. Fabian's evaluation of Mr. Nicholson, MRIs of Mr. Nicholson's brain were obtained and subsequently evaluated by the defense's expert neuroradiologist, Dr. Travis Snyder. (*See* Tr. 4687-4690). Defendant's Exhibit A at p.25). Dr. Fabian's TBI diagnosis was ultimately supported by Dr. Snyder's review of Mr. Nicholson's brain MRIs.

Upon his evaluation of Mr. Nicholson's July 24, 2019 MRI, Dr. Snyder found that there was white matter change consistent with shearing and diffuse axonal injury. (Defendant's Exhibit B at p.2; Tr. 4790-4798, 4802-4803; Defendant's Exhibit C at pp.1-5; *see also* Defendant's Exhibit A at p.25). Dr. Snyder also noted that there were at least "seven bilateral anterior frontal foci of increased T2/Flair weighted signal." (Defendant's Exhibit B at p.2; *see also* Defendant's Exhibit A at p.25). Dr. Snyder identified "grey-white matter interface measuring 2 mm in length, and the largest was in the anterior-inferior left frontal lobe measuring 4 mm in maximum dimension." (Defendant's Exhibit B at pp.2-3; *see also* Defendant's Exhibit A at p.25). Dr. Snyder's findings "were consistent with shearing diffuse axonal injury and prior head injury." (Defendant's Exhibit

B at p.3; *see also* Defendant's Exhibit A at p.25). Dr. Snyder explained that a diffuse axonal injury is a type of traumatic brain injury that occurs when the person suffers some kind of blunt force trauma to the head, which causes the brain to shift around rapidly inside of the skull. (Tr. 4819-4821). Axons are long, connected fibers in the brain that get sheared as the brain moves around, which is referred to as a "diffuse axonal injury." (Tr. 4820).

Dr. Snyder also indicated that there was "evidence of bilateral frontal cortical thinning relevant to brain volume loss." (Tr. 4803-4809; Defendant's Exhibit A at p.25; Defendant's Exhibit C at p.6; *see* Defendant's Exhibit B at p. 5). Dr. Snyder "noted that the frontal lobes of the brain are the most commonly reported location for traumatic brain injury," and indicated that, in Mr. Nicholson's case, there was evidence of at least six bilateral subcortical foci of increased signal (diffuse axonal injury) associated by lateral frontal cortical volume loss." (Defendant's Exhibit A at p.25; Tr. 4801; *see* Defendant's Exhibit B at pp. 5-6). Ultimately, Dr. Snyder testified that Dr. Fabian's neuropsychological tests, particularly the "executive functioning results," were consistent with the frontal lobe deficits seen on the MRI of Mr. Nicholson's brain. (*See* Tr. 4815-4818). Dr. Snyder indicated to Dr. Fabian that the "most significant finding was the frontal lobe volume loss." (Defendant's Exhibit A at p.25). Dr. Snyder also noted that "there may be some issues related to low volume in the anterior cingulate area of the prefrontal cortex and the temporal pole," and that the "orbitofrontal area is also deficient regarding volume." (Defendant's Exhibit A at p.25).

In sum, Dr. Snyder opined that these findings "would be consistent with traumatic brain injuries," but that he could not ascertain the precise date of these injuries from his review of Mr. Nicholson's MRI. (Tr. 4799-4801; Defendant's Exhibit A at p.25; *see* Defendant's Exhibit B at p.6). Dr. Snyder also indicated to Dr. Fabian that this imaging "could not discriminate or definitively assess for ADHD." (Defendant's Exhibit A at p.25).

In rebuttal, the State presented the testimony, over defense's objections, of Dr. Richard Ryan Darby and Dr. Masaryk.

a. Dr. Masaryk's opinion that the MRI of Mr. Nicholson's brain demonstrated "no definitive imagine evidence of significant brain trauma" was not persuasive.

Dr. Thomas Masaryk, a neuroradiologist at the Cleveland Clinic, was called to testify on behalf of the State during the mitigation phase regarding his expert report, presented as State's Exhibit 705. (*See* Tr. 4848-4849).

Dr. Masaryk's report contained the following three conclusions: (1) the white matter hyperintensities observed in Mr. Nicholson's MRI was "nonspecific related to a diagnosis of TBI" (State's Exhibit 705 at p.3); (2) the quantitative brain measurements on Mr. Nicholson's 7/24/2019 are "within normal limits" particularly in light of the purported absence of other signs of **significant** TBI (State's Exhibit 705 at p.3); and (3) that a negative scan for micro-hemorrhage, contusion, encephalomalacia, gliosis, Cavum Septum/Cavum Vergae, or volumetric changes in the pituitary, thalamus, caudate, or hippocampus collectively suggest an absence of **significant** TBI" (State's Exhibit 705 at p.4).

Notably, the second and third conclusions were narrowly tailored to pertain to a "significant TBI," notwithstanding the fact that Dr. Masaryk himself recognized the blunt trauma to the brain encompasses a "spectrum of injury." (State's Exhibit 705 at p.1. *See also* Tr. 4861-4862). Dr. Masaryk likewise testified at trial that Dr. Snyder's findings were not findings "that you would typically see in a significant brain injury." (Tr. 4861-4862; 4883, 4885). This choice of words was—in no uncertain terms—significant.

Dr. Masaryk opined in his report that, "given the absence of any other imaging findings which would indicate significant brain trauma (e.g., contusion, micro-hemorrhage, or gliosis

(scarring))." (*See* State's Exhibit 705 at p.3). However, Dr. Masaryk himself recognized that a person could have a TBI even without evidence of contusion, micro-hemorrhage, or gliosis in their MRI. (*See* State's Exhibit 705 at p.1). Again, there is no set number or benchmark of findings that must be made in order to assess whether a person has sustained a TBI. (*See* Tr. 4813). Moreover, the MRI of Mr. Nicholson's brain was obtained because of this legal matter; not immediately following an incident where TBI was suspected. Thus, as Dr. Snyder explained, there could have been hemorrhaging in his brain after any one of Mr. Nicholson's numerous head injuries that has since resolved. (Tr. 4810-4811).

The fact that Mr. Nicholson's TBI did not fall on the spectrum of "contusion"—"involving significant direct impact to the brain parenchyma due to severe physical trauma, potentially coma"—does not discount Dr. Snyder's TBI findings. (*See* State's Exhibit 705 at p.1). Indeed, Dr. Snyder never claimed that Mr. Nicholson's MRI showed evidence of a "significant TBI" and Dr. Fabian's summary of Mr. Nicholson's head injury history likewise did not give any indication of any "severe physical trauma" to the head, including coma, such that any of the findings associated with a "significant TBI" would have been expected to show up on the July 24, 2019 MRI of Mr. Nicholson's brain. Put simply, then, Dr. Masaryk merely concluded that Mr. Nicholson's MRI imaging did not contain anything specific that would lead him to believe that "there was significant brain injury." (Tr. 4861-4862).

Dr. Masaryk did not dispute that white matter hyperintensities (WMHI) could be observed in the MRI of Mr. Nicholson's brain. (*See* State's Exhibit 705 at p.2). Rather, Dr. Masaryk discounted Dr. Snyder's conclusion that Mr. Nicholson had a TBI because, he noted, that white matter hyperintensities can be common on MRI in patients with and without head trauma, as white matter hyperintensities is a common MR finding in association with small vessel ischemic disease,

inflammatory conditions, or simple tension headaches. (State's Exhibit 705 at p.2).

As discussed extensively above, Dr. Snyder opined that Mr. Nicholson's relatively young age (30) and the location of the white matter hyperintensities (subcortical junction of his brain) was indicative of a TBI. (*See* Tr. 4830-4832, 4839-4841; Defendant's Exhibit B). There was no indication in any medical records reviewed by the State's or defense's experts that Mr. Nicholson had small vessel ischemic disease (a frequent finding on CT and MRI scans of elderly people) or any inflammatory conditions. Moreover, while Mr. Nicholson indicated to Dr. Fabian that he did have a history of headaches—also a symptom of TBI—neither the location of the white matter hyperintensities nor Mr. Nicholson's medical history suggested to Dr. Snyder that the white matter hyperintensities observed on Mr. Nicholson's MRI were related to headaches. (*See* Tr. 4828).

More specifically, Dr. Masaryk opined that—in addition to the white matter hyperintensities being nonspecific for TBI—the white matter hyperintensities observed on the MRI of Mr. Nicholson were "minor in prevalence and limited in distribution." (State's Exhibit 705 at p.2). Put simply, Dr. Masaryk testified that although he could see the WMHI in the MRI of Mr. Nicholson's brain, he could not "conclude with any degree of certainty that those are shearing injuries." (Tr. 4870-4871).

Dr. Masaryk referenced in his report and testimony a study wherein the MRIs of 499 boxers and 62 "normal controls" were compared, which the State asked Dr. Snyder about during cross-examination. (State's Exhibit 705 at p.2; Tr. 4884-4885; Tr. 4832-4833). Dr. Snyder testified that, in that study, it was found that the boxers had more white matter lesions than the non-boxers; however, the difference between the boxers and non-boxers was not "statistically significant." (State's Exhibit 705 at p.2; Tr. 4832). Dr. Snyder explained that the "statistically significant" standard for peer-reviewed literature is "very high" in that it has to be "very, very clear before they

can call it statistically significant." (Tr. 4832-4833).

Dr. Masaryk did not dispute Dr. Snyder's finding that the parenchymal volumes of the frontal lobes of Mr. Nicholson's brain were in the 29th percentile—which is lower than the mean (50th%)—he, like Dr. Darby, essentially asserted that this volume loss or atrophy was not sufficiently low so as to link it to TBI. (*See* Tr. 4875-4876; Tr. 4886-48879State's Exhibit 705 at p.3). Indeed, at trial, Dr. Masaryk acknowledged that there were some "small areas" of Mr. Nicholson's frontal lobes that were "subtly more different and are questionable." (Tr. 4875).

In reviewing Dr. Snyder's opinion that there was evidence of TBI based upon his review of Mr. Nicholson's MRI, Dr. Masaryk made a point to note in his report that "[n]o clinical correlation was provided." (State's Exhibit 705 at p.2). Dr. Snyder testified, however, that he intentionally did not review Mr. Nicholson's medical records prior to reviewing and developing his opinion about Mr. Nicholson's brain MRI because he did not want to be subconsciously biased or otherwise influenced by what he was expecting to see based on such history. (*See* Tr. 4811-4812). Indeed, after he prepared his report, Dr. Snyder reviewed Dr. Fabian's synopsis of Mr. Nicholson's related history, which, Dr. Snyder opined, was concordant with his imaging review. (Tr. 4812-4813). Thus, the fact that Dr. Snyder did not review Mr. Nicholson's history "related to [the] number of prior incidents of head trauma, loss of consciousness, or presenting GCS [Glasgow Coma Scale]" before he reviewed Mr. Nicholson's brain MRI (*see* State's Exhibit 705 at p.2) is not dispositive of Dr. Snyder's TBI findings. If anything, Dr. Snyder's TBI findings are more persuasive for the precise reason that he was not influenced by his knowledge of Mr. Nicholson's multiple childhood head traumas and head injuries from multiple motor vehicle collisions.

b. Dr. Darby's first opinion—that there was "insufficient evidence to support a clinical diagnosis of TBI"—was not persuasive.

Dr. Darby's first opinion was that there was "insufficient evidence to support a clinical

diagnosis of TBI." (State's Exhibit 707 at pp. 1-2; Tr. 4921; 4969-4972).

Notably, Dr. Darby apparently only considered the head injuries Mr. Nicholson sustained in motor vehicle accidents when Mr. Nicholson was at least sixteen years old. (*See* Tr. 4291; State's Exhibit 707 at pp. 1-2). Indeed, although Dr. Fabian's report details many childhood head injuries Mr. Nicholson sustained, Dr. Darby did not reference a single one of those childhood head injuries in his expert report. (*See* State's Exhibit 707 at pp. 1-2). Dr. Darby's opinion was therefore erroneous because he only looked at one subset of head injuries Mr. Nicholson had sustained—car related head injuries from ages 16-30—and ignored the multiple head injuries Mr. Nicholson sustained as a child, including two under the age of ten months old. (*Compare* Defendant's Exhibit A at p.22, *with* State's Exhibit 707 at pp.1-2; Tr. 4921). During cross examination, Dr. Darby acknowledged that "significant early childhood trauma" could affect early brain development, and that pediatric brain trauma could affect someone later in life. (Tr. 4977-4978).

Dr. Darby further claimed that there was "no documentation in the police reports or medical records that Mr. Nicholson ever had clinical symptoms to support a diagnosis of traumatic brain injury." (Tr. 4921-4930; State's Exhibit 707 at p.1). Yet, in the next paragraph of his report, Dr. Darby noted that a CAT scan of Mr. Nicholson's brain was ordered in the ER after a motor vehicle accident in 2014. (State's Exhibit 707 at p.1). As Dr Snyder pointed out, the fact that a physician ordered a CT scan in the first place indicates that Mr. Nicholson exhibited sufficient enough TBI symptoms to make the physician concerned that Mr. Nicholson had sustained a traumatic brain injury. (Tr. 4814. *But see* Tr. 4925-4926).

Dr. Darby noted that the 2014 CAT scan of Mr. Nicholson's brain was "normal, indicating that there was no brain injury." (State's Exhibit 707 at p.1; Tr. 4293-4926). But comparing the results of a CT scan to those obtained from an MRI is like comparing apples to oranges. Dr. Snyder

explained that because a CT is based on x-ray technology—which looks for broken bones—the prior CAT scan of Mr. Nicholson's brain would not have shown the detailed imaging reflected in the MRI reviewed by Dr. Snyder. (Tr. 4814, 4842-4843; Defendant's Exhibit C). Specifically, volumetric analysis cannot be evaluated from a CT scan, and the white matter shearing foci shown in Defendant's Exhibit C could not be seen in a CT scan. (Tr. 4814). Thus, the prior CAT scan Mr. Nicholson received of his brain was merely a "very crude x-ray test to look for any evidence of large bleeds or fractures." (Tr. 4814. *See also* Tr. 4833-36). Dr. Snyder never claimed to observe evidence of large bleeds or fractures in Mr. Nicholson's subsequent MRI, so that fact that Mr. Nicholson's October 2014 CAT scan was normal is not dispositive of Dr. Snyder's TBI findings.

Dr. Darby also noted in his report that there were three other police reports documenting car crashes in which Mr. Nicholson was involved. (State's Exhibit 707 at p.2. *See generally* Tr. 4921-4930). Dr. Darby admitted that because Mr. Nicholson did not seek medical attention after a number of the car crashes he was in, no one would have been in the position to ascertain whether Mr. Nicholson had suffered at TBI from any of those car accidents. (*See* Tr. 4970-4973). In asserting that there was insufficient evidence to support a clinical diagnosis of TBI, Dr. Darby erroneously concluded the lack of reference to any head injuries in those police reports and Mr. Nicholson's failure to seek medical treatment after those car crashes is proof-positive that Mr. Nicholson did not suffer any traumatic brain injuries therefrom. Patrol officers are not, however, skilled medical professionals, and are neither qualified nor required to document each and every injury an individual involved in a car crash sustains or complaints of. Indeed, a review of the Ohio Department of Public Safety's standard Traffic Crash Report form quite plainly indicates that the officer's focus when preparing an accident report is on detailing factually what happened and obtaining information about the crash, vehicles parties, and witnesses. It is not on obtaining

detailed medical complaints or making baseless medical diagnoses of persons involved in those motor vehicles collisions.

Moreover, the fact that Mr. Nicholson did not obtain medical treatment after the car crashes in 2017, 2014, and 2009 is not dispositive of TBI, as TBIs undoubtedly can interfere with a person's decision-making abilities. To that end, while a broken bone can be readily apparent to both the injured and observers, a person suffering from mild TBI symptoms—such as headaches, light sensitivity, vertigo, nausea, and vomiting (*see* State's Exhibit 707 at p.2)—may not realize they have suffered a TBI such that medical treatment is necessary.

Although Dr. Darby referenced in his report his review of Mr. Nicholson's primary care medical records from 2014-2016, Dr. Darby did not indicate whether he attempted to obtain and/or reviewed Mr. Nicholson's pediatric medical records. Nothing in Dr. Darby's report indicates he even considered Mr. Nicholson's childhood head injuries in his analysis, so it must be assumed that Dr. Darby did not attempt to locate and review medical records from Mr. Nicholson's childhood (i.e., 1989-2007). (*See generally* State's Exhibit 707). Thus, it was improper for Dr. Darby to ignore Dr. Fabian's multiple references to Mr. Nicholson's childhood head injuries (*see, e.g.*, Defendant's Exhibit A at p.22) and make no attempt to locate any of Mr. Nicholson's pediatric medical records, but then assert that there was insufficient evidence to support a clinical diagnosis of TBI. (State's Exhibit 707 at pp. 1-2). To that end, the absence of medical records related to treatment for Mr. Nicholson's childhood head injuries would not be dispositive of TBI given the domestic violence and alcohol use going on in the Nicholson household while Mr. Nicholson was growing up. Certainly, if domestic violence were rampant in the Nicholson home, it follows that Robert Sr. and/or Angel would have been reluctant to take their children to the doctor, as abuse screenings are often performed by pediatricians.

Put simply, Dr. Darby's opinion that there was "insufficient evidence to support a clinical diagnosis of TBI" was not persuasive because it was based on Dr. Darby's erroneously narrow and quite clearly biased review of Mr. Nicholson's medical history.

c. Dr. Darby's second opinion—that there was "insufficient evidence to support findings of TBI on Mr. Nicholson's brain MRI"—was not persuasive.

Dr. Darby next opined that there was insufficient evidence to support findings of TBI on Mr. Nicholson's brain MRI because Dr. Snyder's reported findings were not "clearly due" to a TBI. (*See* State's Exhibit 707 at pp.2-4; Tr. 4930).

Dr. Darby rejected Dr. Snyder's "claims that T2 hyperintensities represent evidence of diffuse axonal injury (DAI), or 'shearing' injury." (State's Exhibit 707 at pp. 2-3; Tr. 4940-4952).

First, Dr. Darby took issue with the fact that some of the images from the literature Dr. Snyder relied upon in Defendant's Exhibit C "were cropped and do not accurately represent the full images from the study." (State's Exhibit 707 at pp. 2-3; Tr. 4951-4952). While Dr. Snyder acknowledged that he cropped the images taken from Dr. Reidy's study, the reason he cropped those photographs was to show the white matter lesions that were relevant to the images of Mr. Nicholson's brain. (Tr. 4798-4800). Dr. Snyder did not crop any of the peer-reviewed trauma literature images to take something out that he did not want to show the jury or to otherwise misrepresent anything to the jury. (Tr. 4798-4800). Indeed, Dr. Darby's comment was merely a red herring, as he did not allege that the copping had any effect with regard to a comparison of the white matter lesions relevant in this case. (*See* State's Exhibit 707 at p.3).

Second, Dr. Darby took issue with the absence of evidence of microbleeds on Mr. Nicholson's MRI, which would support a diffuse axonal injury (DAI) or shearing injury. (State's Exhibit 707 at pp. 2-3; Tr. 4949-4951; 4981-4982). In response to that assertion, Dr. Snyder made clear to the jury that "contusions and hemorrhages in the brain are indicative of someone that has

a severe trauma. They're not common, I don't see them very often." (Tr. 4810. *See also* Tr. 4836-4837). Thus, Dr. Snyder explained, the fact that Mr. Nicholson's MRI did not show hemorrhages or contusions did not exclude the fact that Mr. Nicholson had a mild traumatic brain injury, especially in light of his other findings. (Tr. 4810, 4837-4838). That assessment was support by the State's other expert on this matter, Dr. Thomas Masaryk, who noted in his expert report that blunt trauma to the brain "encompasses a spectrum of injury which may be: a) subconcussive (asymptomatic), (b) concussive or mild traumatic brain injury (mTBI) which is symptomatic and may be associated with loss of consciousness, or c) contusion involving significant direct impact to the brain parenchyma due to sever physical trauma, potentially coma." (State's Exhibit 705 at p.1). Moreover, Dr. Snyder further noted that it was possible that Mr. Nicholson did, in fact, have a hemorrhage at the time of his injures, but that the hemorrhages had since resolved—which was not uncommon. (Tr. 4810-4811).

Third, Dr. Darby opined that the white matter hyperintensities on Mr. Nicholson's MRI "are a common finding that is not specific to TBI or any other neurological disease, as they can happen in persons without neurological diseases." (State's Exhibit 707 at p.3; Tr. 4940-4943). Dr. Snyder conceded that white matter hyperintensities ("white dots") are common in older people (ages 60+) but are not typical for persons of Mr. Nicholson's age who have not had any TBI or other conditions for which white matter hyperintensities are expected. (*See* Tr. 4827. *See also* Tr. 4975). Moreover, even though the majority of people will have these white matter hyperintensities by the time that they are 70 years old, they will not have them at the subcortical junction, as was apparent in Mr. Nicholson's MRI, but rather, will have them in the periventricular and generally "all over the brain." (Tr. 4827). Thus, while Dr. Snyder conceded that these white matter hyperintensities are fairly common from aging, "in a young patient in that location, they're more

consistent with trauma." (Tr. 4827). The State asked Dr. Snyder if they could be caused by "small vessel ischemic disease," to which Dr. Snyder responded: "That's aging. Yes. Small vessel ischemic disease means the aging process. Or some people call them microvascular changes of aging." (Tr. 4828). Dr. Snyder again emphasized that there was "no reason for a 30-year-old to be aging in the brain." (Tr. 4828).

Dr. Snyder also acknowledged that white matter hyperintensities could be caused by inflammatory conditions, but again noted that they would involve "more of the deep and periventricular" areas of the brain. (Tr. 4827-4828). Although white matter hyperintensities could result from migraine headaches with "aura," which is when the patient sees colors while having a migraine. (Tr. 4828). Even still, Dr. Snyder noted that these white matter foci are typically "in the deep white matter," meaning that they would not be seen in the subcortical junction—which is where the white matter foci were observed in Mr. Nicholson's MRI. (*See* Tr. 4828). While the State pointed out to Dr. Snyder that Dr. Fabian testified that Mr. Nicholson had a history of migraine headaches (Tr. 4828-4829), Dr. Fabian neither testified nor included in his report any indication from Mr. Nicholson that these migraine headaches were with aura. Notably, too, "headache" is one of the TBI symptoms that Dr. Darby claimed in his report there was no documentation of "following Mr. Nicholson's car accidents of other events." (*See* State's Exhibit 707 at p.2).

Put simply, Dr. Snyder explained that the presence of white matter hyperintensities in a person's MRI alone does not necessarily mean that they have suffered a TBI. (Tr. 4830). However, in Mr. Nicholson's case, both his relatively young age (30) and the location of the white matter hyperintensities (subcortical junction of his brain) was indicative of a TBI in Dr. Snyder's opinion. (*See* Tr. 4830-4832, 4839-4841; Defendant's Exhibit B). Dr. Snyder conceded that he could not

determine the age of the white matter hypersensitivities observed on Mr. Nicholson's MRI. (Tr. 4836). Dr. Darby acknowledged on cross-examination that "diffuse axonal injury often occur at the area where the gray matter and white matter meet," and that TBI typically affects the frontal and temporal lobes of the brain. (Tr. 4982).

Dr. Darby also rejected Dr. Snyder's finding that Mr. Nicholson's MRI showed that his bilateral frontal lobes had a volume in the 29th percentile, meaning that his frontal lobes were smaller than two-thirds of the population. (*See* Tr. 4808-4809; State's Exhibit 707 at p.3; Tr. 4934-4935; 4980). Dr. Darby opined, in short, that Mr. Nicholson's brain volume did not fall in a low enough percentile for it to be significant. (*See* Tr. 4808-09; State's Exhibit 707 at p.3). Dr. Snyder maintained that the size of Mr. Nicholson's frontal lobes in comparison to the other lobes of his brain were notable, especially when taken with the white matter findings and Mr. Nicholson's extensive head injury history, which included two head injuries before he was one year old. (*See* Tr. 4809; Defendant's Exhibit A at p.22).

Dr. Darby further opined that there was "no evidence that [Mr. Nicholson's] brain size is a change that occurred because of a TBI," such that it "could be concluded, with a reasonable degree of medical certainty, that Mr. Nicholson does not have significant bilateral frontal lobe brain volume loss as a result of a traumatic brain injury." (State's Exhibit 707 at pp.3-4; Tr. 4935-4939). Dr. Snyder explained that his lost volume determination of Mr. Nicholson's frontal lobes was determined by comparing the frontal lobes of Mr. Nicholson's brain to the other lobes, as there had been no other MRI of Mr. Nicholson's brain previously performed. (Tr. 4837). It was therefore Dr. Snyder's testimony that Mr. Nicholson's frontal lobes had lost volume over time. (Tr. 4837-4838).

d. Dr. Darby's third opinion—that Mr. Nicholson's neuropsychological testing results were not "clearly attributable" to a TBI—was not persuasive.

Dr. Darby rejected Dr. Fabian's opinion that "Mr. Nicholson's neuropsychological deficits related to attention, working memory, processing speed, memory, and executive function * * * are related to an obvious mild neurocognitive disorder due to the traumatic brain injury." (State's Exhibit 707 at p.4; Tr. 4952-4955; 4982-4985).

Dr. Darby first pointed to the absence of "convincing evidence" supporting clinical TBI diagnosis. However, as discussed above, Dr. Darby's review of Mr. Nicholson's head injury history was incomplete, as he most notably failed to look into the multiple childhood head injuries Dr. Fabian referenced in his report. (*See, e.g.*, Defendant's Exhibit A at p.22).

Dr. Darby also opined that there was not convincing evidence that Mr. Nicholson had "neuroimaging findings that would meet radiographic criteria for DAI/brain shearing or brain atrophy due to a traumatic brain injury." (State's Exhibit 707 at p.4). Dr. Snyder noted during his mitigation phase testimony that there "are many findings that are seen in head trauma" and "every patient can't have every head trauma finding." (Tr. 4813). However, here, Mr. Nicholson had two significant head trauma findings, which matched the history reflected in Dr. Fabian's report, and therefore supported the traumatic brain injury finding. (*See* Tr. 4813). Although the impression of the Cleveland Clinic radiologist who reviewed the MRI of Mr. Nicholson's brain was that it was "unremarkable" and "without intravenous contrast" (State's Exhibit 708; Tr. 4823-4824), neither of the State's experts disagreed with Dr. Snyder's findings regarding the presence of white matter foci—which would not be "unremarkable"; rather, they just disagreed with the cause of them. (*See* Tr. 4826).

Dr. Darby also argued that "Mr. Nicholson's neuropsychological testing performance could be influenced by a number of factors that are unrelated to a traumatic brain injury." (State's

Exhibit 707 at p.4). However, Dr. Snyder pointed out that Dr. Fabian's report regarding Mr. Nicholson's executive functioning was concordant with what he had found in his review of Mr. Nicholson's brain MRI. (Tr. 4837-4838). Notably, Dr. Snyder only reviewed Dr. Fabian's report after he reviewed Mr. Nicholson's brain MRI and made his own findings. (Tr. 4837-4838). Dr. Fabian testified that it would be "basically impossible" to ascertain whether a person's neuropsychological testing results were affected by a TBI, any one of the psychiatric disorders with which Mr. Nicholson had been diagnosed, or a combination of both. (*See* Tr. 4694). While Dr. Fabian acknowledged that PTSD, depression, ADHD, and borderline personality disorder characters can also cause impairments in a person's neuropsychological functioning, it was nonetheless his expert opinion that Mr. Nicholson was impaired at the time of the offense, and that the neuropsychological testing results were consistent with damage to the frontal lobes of Mr. Nicholson's brain, especially given Mr. Nicholson's extensive history of head injuries throughout his entire life. (*See* Tr. 4691-4692. *See also* Tr. 4967). Indeed, Dr. Fabian opined that an MRI of Mr. Nicholson's brain should be obtained to evaluate for TBI not solely because of Mr. Nicholson's neuropsychological testing results, but notably, because of Mr. Nicholson's history of head injuries as both a child and an adult. (*See* Defendant's Exhibit A at p.22).

Finally, Dr. Darby opined that "Mr. Nicholson's test results may not reflect a change or decline from his expected prior level of performance." (State's Exhibit 707 at p.4). This assertion based on Dr. Darby's review of Mr. Nicholson's high school and college records, from which Dr. Darby expressed that "it was not clear that cognitive testing with Dr. Fabian represents a decline from what would be expected based on estimates of Mr. Nicholson's **prior** general level of intelligence." (Emphasis added.) (State's Exhibit 707 at p.4). This assertion, however, assumes that Mr. Nicholson's TBI did not occur before Mr. Nicholson was in high school and or college,

which was erroneous. Again, Dr. Fabian's report reflected multiple childhood head traumas Mr. Nicholson sustained, including two before the age of 10 months. (*See* Defendant's Exhibit A at p.22). Thus, if Mr. Nicholson's high school and college grades were earned after he was already experiencing the effects of any childhood TBIs, Dr. Darby's estimation of Mr. Nicholson's "prior general level of intelligence" would not have been, in actuality, a pre-TBI intelligence level approximation. Dr. Darby ignored Mr. Nicholson's multiple childhood head traumas and cannot therefore offer an opinion that fails to take into account Mr. Nicholson's childhood head traumas when Dr. Darby failed to make any effort to obtain any information about them.

e. Dr. Darby's fourth opinion—that there was no evidence to support the conclusion that Mr. Nicholson had a TBI that resulted in an acquired frontal behavioral syndrome—was not persuasive.

Dr. Darby rejected Dr. Fabian's opinion that Mr. Nicholson's TBI "resulted in an acquired frontal lobe behavioral syndrome that limited Mr. Nicholson's ability to conform his behavior to the law." (State's Exhibit 707 at p.5; Tr. 4956-4962). More narrowly, Dr. Darby noted that there was "no evidence to support that Mr. Nicholson demonstrated changes to his behavior at any point as a result of an acquired traumatic brain injury," because Mr. Nicholson told Dr. Fabian he was "always a risk-taker." (State's Exhibit 707 at p.5). Dr. Darby concludes that there was no evidence to support an acquired frontal behavioral syndrome because "Mr. Nicholson had no clear changes to risky behavior or irritability/anger following any accident." (State's Exhibit 707 at p.5). Yet, on cross-examination, Dr. Darby testified that the executive function of the brain can be affected by ADHD and TBI. (Tr. 4978-4980).

Again, Dr. Darby's opinion fails to take into consideration the multiple childhood head injuries that were outlined in Dr. Fabian's report. (Defendant's Exhibit A at p.22). Instead, Dr. Darby points to an arbitrary point in time—essentially, when Mr. Nicholson began driving at or

around age 16—to suggest that "his risky behavior led to the car accidents, and not the other way around." (State's Exhibit 707 at p.5). However, Dr. Darby's opinion did not take into consideration the impact of childhood head injuries that took place while Mr. Nicholson's brain was still developing, including at least two when Mr. Nicholson was not even 1-year-old. (*See, e.g.*, Defendant's Exhibit A at p.22). Put simply, by the time Mr. Nicholson was driving, he could already have been suffering from acquired frontal behavioral syndrome stemming from the multiple childhood TBIs that were included in Dr. Fabian's report, but that Dr. Darby chose to ignore.

Moreover, Dr. Darby's assertion that Mr. Nicholson had "no clear" irritability or anger following any accident was belied by the information contained in Dr. Fabian's report. Mr. Nicholson's brother reported Mr. Nicholson's face in their wedding pictures as being "flat, angry, and full of hate and depression." (Defendant's Exhibit A at p.7). Robert Sr. reported Mr. Nicholson having some potential problems "with anger or becoming upset moreso [sic] than he did in the past, which could possibly be [due] to the head injuries." (Defendant's Exhibit A at p.11. *See also* Defendant's Exhibit A at p.12). In general, Mr. Nicholson's family "described him as having sudden impulse problems and difficulties with anger and irritability at times." (Defendant's Exhibit A at p.59).

During the mitigation phase of trial, Dr. Fabian responded to this assertion by noting that human behavior is multifaceted relative to causation. (Tr. 4692-4694). Dr. Fabian went on to point out that Dr. Darby did not see Mr. Nicholson or evaluate him in person, whereas Dr. Fabian met with Mr. Nicholson five times during the course of his evaluation of Mr. Nicholson. (*See* Tr. 4693-4694; 4967, 4969, 4993-4994). Indeed, Dr. Darby himself acknowledged that he does not teach his fellows to diagnose brain injury without actually examining the patient. (Tr. 4984-4985). Dr.

Fabian opined that there was "enough meat there to say that some of this executive functioning of dysfunction[ing] is due to TBI, or multiple TBIs or concussions." (Tr. 4693-4694). However, he acknowledged that there are other psychiatric disorders that could affect his cognitive testing. (Tr. 4694). Ultimately, it was abundantly clear to Dr. Fabian that Mr. Nicholson was "impaired" and that "at the end of the day [Mr. Nicholson is] abnormal in his brain and psychological makeup." (Tr. 4694). Accordingly, Mr. Nicholson's brain impaired should be given significant—or at least some—mitigating weight by this Court.

ii. Post-Traumatic Stress Disorder

Dr. Fabian diagnosed Mr. Nicholson with post-traumatic stress disorder (PTSD). (Tr. 4669-4671, 4676-4678; R.440, Sentencing Opinion at p.12). Dr. Fabian noted that there was evidence of complex trauma and polytrauma in Mr. Nicholson's life. (Defendant's Exhibit A at pp.58, 60-61). Mr. Nicholson's PTSD was derived, in large part, from his traumatic upbringing. Indeed, evidence presented at trial supported the conclusion that Mr. Nicholson's PTSD caused him to lack the substantial capacity to appreciate the criminality of his conduct, especially given the opinion of Dr. Fabian that Mr. Nicholson may have been experiencing a PTSD-induced disassociation episode on September 5, 2018. (Defendant's Exhibit A at p.61). Thus, this Court should give Mr. Nicholson's PTSD diagnosis significant mitigating weight under R.C. 2929.04(B)(3). In the alternative, if this Court concludes that Mr. Nicholson's PTSD does not qualify as an R.C. 2929.04(B)(3) factor, this Court should nevertheless give modest mitigating weight to this under the catchall provision of R.C. 2929.04(B)(7). *See, e.g.*, *State v. Stojetz*, 84 Ohio St.3d 452, 472, 1999-Ohio-464, 705 N.E.2d 329.

As detailed above, Mr. Nicholson witnessed verbal and physical abuse between his parents in the home, and also experienced physical, verbal, and emotional abuse from both of his parents

throughout his life during his developmental period as a child. (*See* Defendant's Exhibit A at pp. 56-58). Both of Mr. Nicholson's parents abused alcohol. (Defendant's Exhibit A at p.60). Dr. Fabian noted that Mr. Nicholson was unfortunately "subject to learning that domestic violence was a way to solve disputes within the home and to process negative emotions." (Defendant's Exhibit A at p.60). Dr. Fabian testified at trial that Mr. Nicholson "lacked insight into the dysfunction within the family," which Dr. Fabian believed contributed to the events that took place on September 5, 2018, in part. (Tr. 4615-4616). Mr. Nicholson's desire to protect his parents and avoid bringing to light his childhood traumas affected Dr. Fabian's investigation of Mr. Nicholson's mental health issues. (Tr. 4615-4616).

Mr. Nicholson experienced a fire and at least two traumatic natural disasters as a child. (*See* Defendant's Exhibit A at p.56; State's Exhibit 714 at p.2). When Mr. Nicholson was three or four-years old, the family had a house fire, which caused them to move from Cleveland, to Beachwood, and then later to South Euclid. (Tr. 4407-4408, 4436, 4474-4475, 4546-4447; Defendant's Exhibit A at pp. 7, 19; State's Exhibit 714 at p.2). Mr. Nicholson also indicated that he experienced one tornado in 1991 and 1992 so severe that he believed he and his family were going to die. (Tr. 5009; Defendant's Exhibit A at p. 18. *See also* State's Exhibit 714 at p.2). Mr. Nicholson also recounted experiencing a tornado or "crazy windstorm" while on the way home from school, which he vividly described to Dr. Fabian. (Tr. 5009; Defendant's Exhibit A at pp. 18-19).

Mr. Nicholson was also bitten by his family dog in the face when he was 6 or 7 years old. (Tr. 5012; State' Exhibit 714 at p.2). Mr. Nicholson recounted that he was in shock after the attack because he "held his nose in his hands." (State's Exhibit 714 at p.2). He reported being one of the first patients the Cleveland Clinic used skin glue on, which repaired his nose. (State's Exhibit 714

at p.2).

Mr. Nicholson also reported being sexually abused at age 5 by a cousin and raped by a male friend around the age of 22. (Tr. 4671-4674, 5010; Defendant's Exhibit A at pp.4, 56; State's Exhibit 714 at p.2). Significantly, Mr. Nicholson was guarded with information about these two incidents and declined to discuss them in great detail with Dr. Fabian. (Tr. 4673-4674; Defendant's Exhibit A at p.58).

Most of the traumas Mr. Nicholson experienced in his life were when Mr. Nicholson was a child. Thus, Dr. Fabian explained that these early traumatic events could have led to a compromise in neurodevelopment during Mr. Nicholson's developmental years. (Defendant's Exhibit A at p.58). Thus, Dr. Fabian expressed a concern about insecure and damaged attachments between Mr. Nicholson and his parents. (Defendant's Exhibit A at pp.60-61; Tr. 4625-4627). Although it was undisputed that Mr. Nicholson and his brother grow up generally being provided the basic physical necessities, Dr. Fabian explained that the traumatic connection Mr. Nicholson developed with his parents filtered his view of his other relationships throughout his life. (Tr. 4625-4626). Dr. Fabian emphasized that the fact that Mr. Nicholson's parents were, for the most, hard-working and emphasized education did not eliminate the impact of the verbal and physical abuse he witnessed and was subject to as a child. (Tr. 4627-4628).

Dr. Fabian opined that Mr. Nicholson's PTSD symptoms included at risk for hyperarousal, irritability, low frustration tolerance, and aggression. (Defendant's Exhibit A at p.61). These symptoms were, according to Dr. Fabian, "further aggravated by the nature of his brain dysfunction, especially related to his frontal lobe integrity and executing functioning." (Defendant's Exhibit A at pp.61-62). Accordingly, significant mitigating weight under R.C. 2929.04(B)(3) or, in the alternative, modest mitigating weight under R.C. 2929.04(B)(7), should

be given to Mr. Nicholson's PTSD diagnosis.

iii. Attention Deficient Hyperactivity Disorder

Dr. Fabian diagnosed Mr. Nicholson with attention deficient hyperactivity disorder ("ADHD"). (Tr. 4631-4632, 4641-4643, 4659-4660, 4666-4667, 4676); R.440, Sentencing Opinion at p.12). Dr. Fabian testified that Mr. Nicholson's father and mother described symptoms characteristic of ADHD. (Tr. 4632). Moreover, Dr. Fabian noted that facts about Mr. Nicholson's many car accidents were indicative of someone with undiagnosed and untreated ADHD. (*See* Tr. 4633-4634). Some mitigating weight should be given on account of Mr. Nicholson's ADHD diagnosis. *See, e.g.*, *State v. Jackson*, 149 Ohio St. 3d 55, 2016-Ohio-5488, ¶ 164.

Angel recounted concerns expressed by Mr. Nicholson's elementary teachers about his ability "to sit and focus and things of that nature," but conceded that she never told any of Mr. Nicholson's teachers about what was going on in the household. (Tr. 4527-4528; Defendant's Exhibit A at p. 14). Although Angel testified that, testing indicated that Mr. Nicholson had ADHD, she never followed up on any treatment because Robert Sr. did not believe anything was wrong with Mr. Nicholson and thought that treatment was unnecessary. (Tr. 4528). In Dr. Fabian's report, Robert Sr. described Mr. Nicholson as "always being impulsive and acting before thinking and being hyper, restless, and overactive." (Defendant's Exhibit A at pp.10-11).

iv. Borderline Personality Disorder with Paranoid Traits

Mr. Nicholson was also diagnosed with borderline personality disorder with paranoid traits by Dr. Fabian. (Tr. 4668, 4671; R.440, Sentencing Opinion at p.13). This Court has traditionally given little mitigating weight to this diagnosis because it is widely recognized that personality disorders are commonplace in murder cases. *See, e.g.*, *State v. Taylor*, 78 Ohio St. 3d 15, 33, 1997-Ohio-243, 676 N.E.2d 82,

Specifically, Dr. Fabian noted that Mr. Nicholson presented with evidence of hypervigilance, paranoid thinking, distrust of other people, and antisocial personality traits regarding mostly stimulation-seeking behaviors. (Defendant's Exhibit A at p.59). Mr. Nicholson also admitted to a history of physical aggression, affective and emotional instability, impulsivity, and recklessness. (Defendant's Exhibit A at p.59). Mr. Nicholson also presented with symptoms of a fear of abandonment and volatility in relationships. (Defendant's Exhibit A at p.60). Dr. Fabian noted that individuals with borderline personality disorder "are at risk for periods of stress-related paranoia and potential loss of contact with reality. They often experience rapid changes in self-identity and unstable self-image in addition to unstable relationships." (Defendant's Exhibit A at p.60).

v. Major Depression Disorder

Mr. Nicholson was diagnosed with major depression disorder, recurrent and moderate without psychotic factors by Dr. Fabian. (R.440, Sentencing Opinion at p.13; Tr. 4653-4655). Angel told Dr. Fabian that after Mr. Nicholson's most recent car accident, he began exhibiting what appeared to her to be signs of depression. (Defendant's Exhibit A at p.14). Mr. Nicholson told Dr. Fabian that, at various points in his life, he has experienced depression. (Defendant's Exhibit A at pp. 16-18). This Court has previously found that even a severe depression diagnosis is, on its own, "a weak mitigating factor." *See, e.g.*, *State v. Cunningham*, 105 Ohio St. 3d 197, 2004-Ohio-7007, 824 N.E.2d 504, ¶ 138

vi. Other relevant mental health diagnoses and opinions by Dr. Fabian.

Dr. Fabian further noted that Mr. Nicholson presented in testing, interview, within his relationship with America, and at the time of the September 5, 2018 offense with obsessive and perseverative thinking. (Defendant's Exhibit A at p.61). "Perseverative thinking" is an effect of

traumatic brain injury to the frontal lobes that includes cognition and behaviors which arise from a failure of the brain to inhibit proponent responses or to allow its usual progress to a different behavior. (Defendant's Exhibit A at p.61). It was Dr. Fabian's opinion that "[t]he instant offenses include a potential misperception on Mr. Nicholson's part, not only to the infidelity by America, but also his perception that he was defending himself from her children." (Defendant's Exhibit A at p.61). Given his borderline personality and PTSD symptomology, Dr. Fabian opined that Mr. Nicholson would be at risk for a dissociative-type experience. (Defendant's Exhibit A at p.61).

Overall, Dr. Fabian described Mr. Nicholson's mental health diagnoses as being complex in that his psychology, neuropsychology, brain, behavior, background he grew up in, and the multigenerational history of his parents, was "complicated," "really abnormal," and "rare," especially given that Mr. Nicholson had no prior criminal history. (*See* Tr. 4691). Dr. Fabian opined that Mr. Nicholson was "impaired" in that he "has psychological and problem psychiatric diagnoses and brain disfunction." (Tr. 4692). Dr. Fabian emphasized in his report that because a TBI can affect a person's emotional, behavioral, and cognitive functioning, the symptoms of the psychiatric disorders with which Mr. Nicholson was diagnosed could overlap with the effects of a traumatic brain injury. (*See* Defendant's Exhibit A at p.60).

Although Mr. Nicholson indicated to Dr. Fabian that he rated his self-esteem as being "10/10," Dr. Fabian testified that, from his observations of Mr. Nicholson and in his opinion, that Mr. Nicholson "talk[ed] a lot" and "want[ed] to appear * * * hip and with it," but that there was a "fragile sense of self" in that Mr. Nicholson was "kind of weak and affected and then traumatized and, unfortunately, he's never processed any of this." (Tr. 4768-69).

Cumulatively, Mr. Nicholson's mental health diagnoses should be given significant mitigating weight by this Court.

3. Mr. Nicholson's complete lack of any prior criminal convictions or delinquency adjudications should be given some mitigating weight.

It was undisputed at trial that Mr. Nicholson had no criminal convictions or delinquency adjudications prior to September 5, 2018. (Tr. 4429, 5023. *See also* Defendant's Exhibit A at p.26; (State's Exhibit 714 at p.5). Although testimony was presented regarding Mr. Nicholson's purported domestic violence altercations with America Polanco, America was not a credible witness. Moreover, the other acts evidence the State presented during the culpability phase of trial were not prior criminal ***convictions*** or delinquency ***adjudications***, which is what is contemplated under the plain language of R.C. 2929.04(B)(5). Thus, this Court should give some mitigating weight to this factor. *See, e.g.*, *State v. Simko*, 71 Ohio St. 3d 483, 496, 644 N.E.2d 345 (1994).

4. Other mitigating factors under R.C. 2929.04(B)(7) raised in this case should be given some weight.

a. Mr. Nicholson's low risk to prison staff and inmates should be given slight mitigating weight.

The defense also called James Aiken, who was declared an expert in correctional management security operations and inmate classification without any objection from the State. (*See* Tr. 4561-4562). In sum, it was Mr. Aiken's expert opinion that Mr. Nicholson could be "adequately housed, managed, and secured in a high security facility for the remainder of his life without causing an undue risk of harm to staff, inmates, or the general public." (Tr. 4575). This Court has held that such assessment should be given slight mitigating weight. *See, e.g.*, *State v. Madison*, 160 Ohio St. 3d 232, 2020-Ohio-3735, 155 N.E.3d 867, ¶¶ 239, 242.

Mr. Aiken noted that in addition to Mr. Nicholson's absence of any prior criminal record predating September 5, 2018, it was equally significant that Mr. Nicholson had "no disciplinary violations" during the more than one year Mr. Nicholson had been in custody at Cuyahoga County Jail awaiting trial. (*See* Tr. 4569-4570). Mr. Aiken explained that most people entering a

"confinement setting" exhibit their most disruptive behavior patterns when they are first confined. (Tr. 4570). Even though Mr. Nicholson had never been incarcerated prior to September 6, 2018, his confinement history nonetheless reflected Mr. Nicholson's willingness to be compliant while confined. (*See* Tr. 4569-4570).

Mr. Aiken also explained that the fact that Mr. Nicholson was 30 years old indicated to him that Mr. Nicholson was "beginning to transition into an even more compliant behavior pattern." (Tr. 4571-4572). This is because, in his abundant experience, disciplinary violations and involvement in illegal prison activity tended to be less frequent for persons who enter prison in their early-to-mid 30s. (Tr. 4572).

Mr. Aiken opined that Me. Nicholson was "very well adjusted" to institutional incarceration. (Tr. 4572-74). And while Mr. Nicholson's endangerment to other inmates was very low, Mr. Aiken testified that his vulnerability level while in confinement was very high for Mr. Nicholson. (Tr. 4574, 4585-4586). Mr. Aiken indicated during cross-examination that he would not put Mr. Nicholson in the general population because Mr. Nicholson's "vulnerability is much higher than his potential for causing harm to other people." (Tr. 4586). The State indicated to Mr. Aiken that "every death row inmate has his own cell" and that death row inmates are "kept away from the other inmates in general population" in Ohio, such that death row would be a "safer environment" for someone than being in general population. (*See* Tr. 4587). However, the fact that Mr. Nicholson would be in a "safer environment" on death row does not support the decision to impose a death sentence upon here where, as is here, the primary reason Mr. Nicholson was classified as having high vulnerability level in prison was because of his lack of prior criminal record and law-enforcement-adjuster occupation as an armed security guard.

b. The love and support of Mr. Nicholson's family should be given some mitigating weight.

This Court has recognized that the love and support of a capital defendant's family also qualify as "other factors" under R.C. 2929.04(B)(7) and are entitled to some mitigating weight. *See, e.g.*, *State v. Cunningham*, 105 Ohio St. 3d 197, 2004-Ohio-7007, 824 N.E.2d 504, ¶ 137, citing *State v. Fox*, 69 Ohio St. 3d 183, 194-195, 631 N.E.2d 124 (1994). Notwithstanding Mr. Nicholson's dysfunctional and traumatic childhood, ample evidence regarding the love and support of Mr. Nicholson's family was presented during the mitigation phase of trial, which should be given some mitigating weight by this Court.

D. The cumulative weight of the mitigating factors weighs against a death sentence.

There is significant evidence in Mr. Nicholson's character, history, and background that diminished his moral culpability and weighed in favor of a sentence less than death. He was exposed to domestic violence throughout his entire childhood and was encouraged by his own father to be distrusting of his own brother. He suffers from severe mental illness, at least partly due to the abuse and neglect he was subjected to throughout his childhood, which was only made worse by the multiple head injuries he sustained throughout the course of his life.

On September 5, 2018, Mr. Nicholson had been feeling isolated and separated from the "family unit" at 4838 East 86th Street. When America received a text message from her ex-boyfriend, Mr. Nicholson and America began arguing. America was not forthcoming with Mr. Nicholson about the fact that she had been texting with her ex-boyfriend and admitted during the guilt phase that she had deleted her prior conversations with Terricko before she received a text message from him at 8:50 that night. Mr. Nicholson believed trust between him and America had been "destroyed" and could never be rebuilt, which caused Mr. Nicholson to feel angry, upset, and hurt. (Defendant's Exhibit A at p.37).

Although Mr. Nicholson worked hard to suppress his traumatic childhood experiences, his background left him without the internal, emotional, mental, and psychological capabilities to handle conflict within the home or to appropriately react to being hurt or betrayed by someone he loved. Over time, his estrangement from America and her children contributed to his psychological deterioration, as it encouraged his isolation and paranoia, while at the same time triggered in him the deeply rooted pain he undoubtedly experienced as a child growing up. By September 5, 2019, Mr. Nicholson was in a seriously compromised emotional and psychological state, which he could neither recognize nor successfully bring himself out of that evening.

Notwithstanding the tragic events that unfolded on September 5, 2018, the mitigating factors in Mr. Nicholson's life provide the context needed to assess his moral culpability. Cumulatively, this Court should accord great cumulative weight to the mitigating factors present in this case, discussed extensively above. *See, e.g.*, *State v. Johnson*, 144 Ohio St. 3d 518, 2015-Ohio-4903, 45 N.E.3d 208, ¶¶ 137-140; *State v. Tenace*, 109 Ohio St. 3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶¶ 86-96, 105. Indeed, in this Court's independent weighing of the mitigating and aggravating factors in prior cases, this Court has given "great cumulative weight not only to direct evidence of a background of alcohol use, violence, and abuse like [Mr. Nicholson's] but also to the testimony of an expert capable of explaining to a jury the psychological and social effect that this sort of experience can have on a human being." *State v. McKelton*, 148 Ohio St. 3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 358 (O'Neill, J., concurring in part and dissenting in part).

This Court's independent review of the evidence will show that the aggravating circumstances Mr. Nicholson was found guilty of committing are outweighed, beyond a reasonable doubt, by the great cumulative weight of the mitigating factors present in this case. Accordingly, sentence of death imposed by the trial court is not appropriate in this case.